



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, MOSSEL BAY)**

CASE NO: CC11/2017

In the matter between:

[*REPORTABLE*]

THE STATE

AND

THAMSANQA SISHUBA

Accused

JUDGMENT: 7 SEPTEMBER 2017

HENNEY, J

INTRODUCTION

[1] The deceased in this matter, Matthaeus Human (“first deceased”) and his wife Eurika Human (“second deceased”), were an elderly couple who lived with their 2 dogs,

a Staffordshire bull terrier (“staffie”) and a Yorkshire terrier (“yorkie”), in Great Brak River, near the town of Mossel Bay. The first deceased with the assistance of the second deceased, were involved in a business which delivered a service which entailed the pumping of raw sewerage. They had one worker by the name of Steven who assisted the first deceased in the business.

[2] On the morning of 14 June 2016, the first deceased, as per his usual routine, would have woken up and make coffee for him and the second deceased who would still have been in their bedroom. He would also have fed their 2 dogs. He would then have waited for his worker Steven whereafter they would start with the business for the day. He had an appointment at 7 AM that particular morning to remove sewerage from a client, Mr Wilhelm Nel.

[3] According to the evidence of Mr Nel, the first deceased never arrived at his house on that particular day. It is common cause that Mr Nicholas Cloete, a neighbour of the deceased, prior to 18 June 2016, observed that no one was in or around the premises of the deceased. He did not even observe the dogs and found this very strange.

[4] On 18 June 2016, after being alerted by someone else, he went to the deceased house and according to him, something was not in order at the house. He observed that the staffie was inside the house, which he found uncommon. He also noticed someone lying in one of the rooms and immediately called the police.

[5] It is common cause that the second deceased was found dead in their bedroom and later on the first deceased was found lying dead on the floor of the garage. It is also not in dispute that both the deceased's property as set out in counts 1 and 2, respectively were stolen from them. As well as an amount of R14 000,00 that was stolen by electronic means from the second deceased after she was threatened with violence. The cause of death of the first deceased was a result of chop wounds to the head and the cause of death of the second deceased were stab wounds to the neck and chest.

[6] The accused before court was arrested by the police on 7 July 2016 after a palm print of his was found at the scene of the crime. Although the accused made a statement to the police a few weeks before his arrest, it is common cause that Steven was involved in the murder and robbery of the deceased and that he later fled to Lesotho. After the arrest of the accused, he was charged with the following offences which the State alleges was committed during the period 13 June 2016 to 18 June 2016 at Sandhoogte Road in Great Brak River:

- a) Count 1: ROBBERY WITH AGGRAVATING CIRCUMSTANCES in respect of the first deceased, Matthaesus Human.
- b) Count 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES in respect of the second deceased, Eurika Human.
- c) Count 3: MURDER of the first deceased, Matthaesus Human, by hitting him with a panga which caused chop wounds to his head.

d) Count 4: MURDER of the second deceased, Eurika Human, by stabbing her with a sharp object in the neck and chest.

[7] The state alleges that in respect of all 4 charges the provisions of section 51 of Act 105 of 1997 is applicable. It is clearly set out in the indictment which specific provisions of the Act are applicable.

[8] Adv. C van der Vijver from the Office of the Director of Public Prosecutions, Western Cape appeared for the State and Ms Luterek, a local attorney appeared for the accused.

PLEA

[9] The accused pleaded not guilty to all the charges against him.

[10] He gave a detailed plea explanation in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977. His explanation of plea is set out in exhibit A and can be briefly summarised as follows.

[11] He says that on Monday, 13 June 2016 Steven called him to ask if he will accompany Steven to his employer (the first deceased), on the next day which was Tuesday, 14 June 2016. After they arrived there on the morning of 14 June 2016, Steven went to open the garage and asked him to wait inside. At that stage, it was still dark. After a while the first deceased woke up and came outside and spoke to Steven.

[12] The two of them then came into the garage, whereafter Steven grabbed a panga and started to hit the first deceased. After Steven hit the first deceased about 3 to 4 times; Steven requested that he also hit the first deceased with the panga. The accused says that at that stage he was afraid, and Steven said that he will also hit him (the accused) if he does not want to hit the first deceased. Then the first deceased fell to the ground and the accused says he hit the first deceased once on his neck or lower head. The first deceased tried to stand up and called out to Steven.

[13] The accused says he was scared and ran away towards the N2, and later went to his house in Zone 14, Great Brak River. After that, Steven phoned him a few times during the day and said that he wanted to see him. Steven also told him that he had "finished the old man and woman". Later that evening, Steven requested him to go back to the house of the deceased to fetch his (Steven's) keys, but he was too afraid to go back.

[14] On 15 June 2016, he accompanied Steven to Mossel Bay where Steven bought a bus ticket to go to Bloemfontein and told him that he will return on the Sunday. Steven also gave him the keys to his house. The accused was later arrested by the police after members of the community told the police that he was friends with Steven. He told the police that he had the keys to Steven's house and he accompanied the police to the house.

FACTS IN DISPUTE

[15] The accused denies that he, himself, murdered or robbed the deceased or was involved with Steven in the murder and robbery of the deceased. Or that he voluntarily took part in the attack on the first deceased. He further denies that he attacked or was present or assisted in the murder of the second deceased.

FACTS THAT ARE NOT IN DISPUTE

[16] The following facts are not in dispute:

- 1) that both deceased were attacked on 14 June 2016 and were subsequently found murdered;
- 2) that the cause of death of the first deceased was chop wounds to the head and that of the second deceased was stab wounds to the head and neck;
- 3) that the accused and Steven were at the property of the deceased at the time of the attack;
- 4) that the accused was present when the first deceased was attacked by Steven with the panga;
- 5) that the items as mentioned in the charge sheet were stolen from the deceased during or after the attack;
- 6) that an amount of R14 000,00 was paid from the ABSA account of the deceased into an FNB account in Lesotho, by electronic means; and

- 7) that Steven, a day after the incident on 15 June 2016, went to Bloemfontein and later fled to Lesotho.

THE EVIDENCE

[17] The state called the following witnesses: Dr Christa Hattingh; Gerhardus Petersen; Wilhelm Nel; Nicholas Cloete; Piet Phaledi; Lt Col Mautshiyane; Warrant Officer Schutte and Warrant Officer Rabie. Apart from the viva voce evidence a range of documents and photographs were handed in as documentary evidence.

[18] During the plea proceedings, the accused gave a full explanation of plea which was recorded in exhibit A as referred to earlier. And he also made admissions which were recorded in exhibit B. The exhibits the State further handed in was a photo album (exhibit C) which depicts photos of the crime scene, as well as the respective post mortem reports (exhibit D1, D2 and an additional report D3) of the deceased compiled by Dr Hattingh.

[19] A further photo of a handmade knife that was found in the clothes of the first deceased during the post mortem examination was handed in as exhibit D4. Exhibit G was a statement in the form of an affidavit the accused made to Warrant Officer Rabie, exhibit E was a report of a pointing out made by the accused before Lieutenant-Colonel Mautshiyane and exhibit F which is a so-called warning statement made by the accused

to Warrant Officer Rabie. The court will referred to these exhibits where necessary during the course of the judgment.

[20] The accused testified in his own defence and did not call any witnesses.

[21] Most of the evidence is not in dispute. The court will only where necessary for the purposes of resolving the factual disputes refer to some of the evidence of these witnesses.

[22] The evidence in chronological order is as follows. Wilhelm Nel, to whose evidence I had already referred to in the introduction, does not need to be repeated because it is common cause. The next witness was Nicholas Cloete, I also referred to his evidence in the introduction and will not repeat it, as it is common cause and not in dispute. Warrant Officer Schutte's evidence is also not in dispute and he basically states that he was the first policeman to arrive on the scene on 18 June 2016 where they found the deceased. This was after the police were called by Mr Cloete.

[23] He testified that the place was locked and they had to gain access to the house by having to pry open one of the doors and in one of the rooms they found the body of the second deceased. He further testified that they found the 2 dogs in the house. And he also observed some blood spatters on the floor tiles in the living room.

[24] He testified that they found the first deceased in the garage, which was also locked, and that they had to cut the padlock off the garage door with a bolt cutter. The scene was later handed over to Warrant Officer Rabie, who took over the investigation of the case. Also present at the scene, at a later stage, were members of the forensic crime unit of the South African Police Services, which included fingerprint experts.

[25] Warrant Officer Rabie, the investigating officer, testified that after he had attended the scene of the crime on 18 June 2016, he enquired from the neighbours if the deceased had any workers and they gave him Steven's name. He later on the same evening, through his informers, found out who Steven was.

[26] These informers also pointed out the residence of Steven, which was situated in the Wolwedans area of Great Brak River. He found no one at home and returned to the scene of the crime. On 21 June 2016, he received information that there was someone at Steven's house. He went to the house and found the accused, who was unknown to him. He had a discussion with the accused and asked him whose house it was, to which he replied that it was Steven's.

[27] The accused told him that Steven was not at home but that he was somewhere further down the road. After further questioning, the accused told him that Steven is not there, but that he went to his family in Bloemfontein. He further stated that Steven had given him the keys to his house and that he had to look after the house.

[28] The accused told him that he was instructed not to let anyone enter the house. He explained to the accused why he was looking for Steven and that he wanted to have access to the house. Whereupon the accused gave him permission to search the house.

[29] While searching the house, he came across a dirt bin wherein he found a plastic bag which contained a lady's purse with some cards. He saw that it was the property of Mrs Human, the second deceased. He also found a wallet that belonged to Mr Human, wherein he found some cards and his driver's licence. On the same day, he took a statement from the accused. At that stage he did not consider him as a suspect and the accused also gave him the impression that he did not know anything about the incident.

[30] He also, due to the fact that the accused was in Steven's house and to eliminate his fingerprints and because he was not a suspect at that stage, took the fingerprints of the accused. As a result of this information given to him by the accused, he went to Botshabelo in the Free State, to try and find Steven. According to him, Steven later fled to Lesotho and is currently still in that country.

[31] After a while he received the results of the fingerprints that were lifted at the scene of the crime, and it found that the palm print of the accused was lifted at the

scene. The palm print was found on the handle of a boat that was standing somewhere on the premises where the crime was committed.

[32] After he received this palm print, he again approached the accused on 7 July 2016 and told him that they found his palm print on the scene of the crime. He also informed the accused about the charges against him and explained his constitutional rights to him.

[33] He wanted to take a warning statement from the accused, but the accused refused and instead volunteered to answer questions posed to him. When he conducted this interview with the accused, he was assisted by a Sotho speaking interpreter. In his statement, he made mention of a person by the name of Jack that Steven mentioned was also on the scene.

[34] The accused further said that Steven brought the first deceased into the garage and when he saw this, he ran away towards the direction of the N2 and at that time he saw two unknown men entering the premises of the deceased. There were rumours about two persons who had sent some package to Bloemfontein, which he followed up but could not connect this occurrence to this case.

[35] He further tried to follow up leads based on the rumours about the two unknown persons which proved to be fruitless. He tried to trace the cell phones of the

deceased and it emerged that Steven had used one of the cell phones of the first deceased.

[36] Upon further investigation, it also came to his attention that an amount of money was transferred from an ABSA account of the deceased to an FNB account in Lesotho, on 14 June 2016. He also made arrangements for the accused do a pointing out to Lieutenant-Colonel Mautshiyane.

[37] In cross-examination he testified that the accused gave his co-operation to him and had regular contact with him but it later emerged that the accused tried to mislead him. He further insisted that the accused had told him about the two unknown persons that entered the premises on the day of the incident.

[38] The version that was put to him by the legal representative of the accused that corresponds with the accused's plea explanation was never conveyed to him by the accused. In fact, he asked the accused, why he never went to the police station and he said the accused told him that he was afraid. He further testified that he was present during the post mortem examination and they found a handmade knife in the clothes of the first deceased.

[39] Dr Christa Hattingh was the state pathologist that performed the post-mortem examination on the respective deceased. This occurred on 20 June 2016. As mentioned

earlier in respect of the first deceased, she found that there were seven chop wounds that were inflicted: 3 on each side of his head; one wound to the shoulder; one to the lower forearm; and a further wound to the chest. The chop wounds to the head had caused 3 incised injuries to the brain and were compatible with the type of instrument or weapon as shown on photo 90, the panga.

[40] In her opinion if regard is to be had to the manner in which the wounds were inflicted there was a clear intention to kill him. She further testified that the first deceased may have been alive for some time after the attack.

[41] In respect of the second deceased, she found the cause of death to be stab wounds to the chest and neck. These wounds, in her view, is compatible with the home-made knife or sharp object as shown in exhibit D, because of the irregular edges it had.

[42] Lieutenant-Colonel Mautshiyane was the police officer who accompanied the accused when he went to do a pointing out of the scene of the crime. He recorded everything that the accused said to him in exhibit E. He further insists that the accused told him everything that was written down in this document.

[43] Piet Phaledi resides in Great Brak River, and conducts a passenger transport business which transports people between Great Brak River and Mossel Bay. Both Steven and the accused are known to him. On 15 June 2016 he was called by Steven

who requested him to transport him to Mossel Bay. Before he went to pick up Steven, the accused came to his house at about 8 AM.

[44] The accused wanted to go with him to fetch Steven and later accompanied him when he picked Steven up at about 9 AM. The accused and Steven sat at the back of his bakkie. Steven had a pilot case and he dropped him off at the InterCape bus station near Shell garage in Mossel Bay, whereafter he and the accused returned to Great Brak River.

[45] Gerhardus Petersen is the son-in-law of the deceased. He testified about the business they were involved in, the manner in which their house was set up and the daily routine of the deceased. He knew that Steven was one of the workers of the first deceased. He further testified that it would have been unusual for the first deceased to have employed another person to work for him during June, because he would not have been very busy during that time.

[46] The second deceased used to do the Internet banking of the business and she was also involved in the administration of the business. He said that although they had a garage, they never used it to park their vehicles in. They also had 2 dogs and he further testified about the feeding routine of these dogs. It also came to his attention at a later stage that an amount of R14,000.00 was electronically withdrawn from the banking

account of the deceased and transferred to an FNB account in Lesotho, on 14 June 2016.

[47] He further testified about the items that were discovered to be missing and presumably stolen. The family of the deceased had been severely traumatised by this incident. It also affected his wife, her sister and their children who had difficulty in trying to cope with this incident.

[48] That was the evidence that was presented by the state.

[49] I will now proceed with a summary of the evidence given by the accused.

[50] The accused, in his evidence, stated that the first deceased was known to him and he used to work for him during December 2015. In the evening of Monday, 13 June 2016, Steven called and told him that the first deceased wanted someone to come and assist him with the pumping of sewerage on 14 June 2016.

[51] He and Steven arranged to meet each other at 6 AM the next morning whereby Steven would come to his house. After Steven came to him the next day, they went to the house of the deceased. Steven had a school bag with him. He himself did not carry any weapon and he was not aware if Steven had any weapon with him. When they arrived at the premises of the deceased, it was still dark and they went to the

garage. Steven opened the garage door and told him to go inside. He entered through the side door. Steven told him to wait until the first deceased has woken up. Steven in the meantime, was outside busy with the lorry.

[52] The first deceased came out of his house and into the garage on his own. Steven then suddenly started to attack the first deceased. He then proceeded to hit the first deceased with an object; the accused says he cannot remember what it was. The first deceased then fell to the ground. At that time the accused says he ran away towards nearby trees and stood there for a moment. He heard the first deceased screaming and then ran away to Zone 14, where he stays.

[53] Later, Steven came to him and asked why he ran away. He told him that he ran away "from what he (Steven) was doing" (sic). He did not go to the police because he was scared and confused. Steven requested him to go back to the deceased' house to fetch a key which he left on the car seat. The accused says he refused to go because he was scared to go back to that house. On Wednesday, 15 June 2016, which was the next day, he saw Steven again. Steven had hired Piet Phaledi, to take him to the bus station in Mossel Bay. He was requested by Piet, to accompany him and Steven to Mossel Bay. Steven was dropped at the bus station and took a bus to Bloemfontein.

[54] The accused says Steven promised him that he would come back and that he only took some clothing to Bloemfontein. They were in regular contact and he also called Steven to find out if he arrived safely in Bloemfontein.

[55] The people in the community told Warrant Officer Rabie, that Steven had left his house key with him. He was later questioned by the investigating officer, who told him what Steven had done. The police searched Steven's house, and during the search they found a plastic bag and took it with them. They arrived again the next day and took him to the police station.

[56] He told them that he has no knowledge of what Steven had done, and that Steven told him that he would be coming back. He never entered the main house of the deceased and cannot remember if he touched anything in the garage. He was just standing there.

[57] The court will deal with the further evidence of the accused during the evaluation of all the evidence.

EVALUATION

[58] It is common cause that at round about 6 o'clock on the morning of 14 June 2016, the accused and Steven went to the house of the deceased. It was during this

time that the deceased were attacked, killed and robbed of their possessions. It must have also been during that same time that an amount of R14,000.00 was transferred by means of electronic or Internet banking from the ABSA account of the deceased to an FNB account in Lesotho. It is not in dispute that the second deceased was the only person that could have performed or executed such a transaction.

[59] The evidence shows that the first deceased did not possess the necessary knowledge and skills to have performed such a transaction. There were no eyewitnesses to this incident. And the only person that could give the court an explanation as to what happened was the accused.

[60] The accused admitted that he was on the scene and in the garage where the first deceased was attacked, but that is the only portion of his evidence that can be accepted.

[61] His version as to what really and truly happened on the scene is dishonest and untruthful. In his initial statement to the police, he created the impression that he did not have any knowledge about this incident. And only told the police about how he accompanied Steven to the bus station in Mossel Bay and how Steven left the keys of his house in his possession.

[62] This, whilst he knew what had happened to both deceased's and that Steven was responsible for what happened there. It was only at a later stage, when it emerged

that a palm print of his was found at the scene and when he was required to give an explanation as to how his palm print could have been found on the scene, that he told the police that he himself was present at the scene when the first deceased was attacked. He gave different versions as to what really happened at the scene with regards to his involvement. And he tried to mislead not only the investigating officer, but also this court.

[63] In his attempt to mislead the court, he tried to disavow the various versions he gave to the police as well as the version that was given to the court in his explanation of plea. In his so-called warning statement made to the investigating officer after his arrest, he stated that when they were at the house of the deceased, Steven also known as Lebohang, gave him a panga, and told him “you *will see what you going to do with this panga.*” (translated)

[64] He further said in his statement, that at that stage he and Lebohang went through a side door into the garage. Lebohang told him that he must sit in the dark. Thereafter Lebohang and the first deceased came into the garage. Then Lebohang attacked the first deceased with some object. The accused says at that stage he got a fright and ran out of the garage. He left the panga in the garage.

[65] In his explanation of plea (Exh “A”), he says the following about the attack on the first deceased. That when they arrived at the place of the deceased, Steven opened

the garage door and told him to wait inside, after a while the first deceased woke up and the lights of the house went on.

[66] After Steven and the first deceased spoke to each other, they came into the garage and Steven grabbed the panga and started to hit the first deceased. After Steven hit the first deceased about 3 or 4 times, he told him to also hit the first deceased. He says that he was afraid of Steven who told him that if he does not want to hit the first deceased he would also hit him.

[67] At that stage the deceased started to fall down to the ground and then he hit the first deceased once with the panga, on his neck or lower head. The first deceased started to scream and the accused said that it was at that stage that he ran away. He was later contacted by Steven who told him that he wanted to see him. And he said that he had "finished the old man and woman".

[68] In his evidence in court, he later says the following about the incident. That when they arrived at the premises of the deceased it was still dark. Both he and Steven went into the garage. Steven said he must remain behind in the garage. After the first deceased woke up, he went to Steven who was busy with the lorry. The first deceased came into the garage on his own and Steven followed him.

[69] He was standing one side, and then he saw Steven fighting with the first deceased. Steven was busy hitting the first deceased, but he cannot remember what Steven used to hit the first deceased. When the first deceased fell onto his knees, he says that it was at that stage that he managed to run away.

[70] It is clear that the accused's evidence about what happened at the scene is not credible and he tried to mislead the court as to what really happened there. He was a poor witness who failed to take the court into his confidence. He was extremely evasive and argumentative during cross-examination when confronted with these different versions. This fact was conceded by his legal representative Ms Luterek during argument.

[71] Ms Luterek in argument further submitted that the mere fact that the accused was a dishonest and untruthful witness does not mean he is guilty because he may have lied because of the position he found himself in. That may be correct but the accused gave several versions to this court as to what really happened. If he wanted this court to believe him he could have right from the onset said to the police that he was involved but did not do anything to the deceased.

[72] He chose not to do so when he first spoke to Warrant Officer Rabie, but rather led him to believe that he did not know anything about the incident. Then when it was shown that one of his palm prints was found on the scene he gave a further 3

different versions. That is, when in a statement to the investigating officer, he placed himself on the scene but denied that he was involved in the assault of the deceased.

[73] He similarly in a statement made to Lieutenant-Colonel Mautshiyane also denied that he was involved in the assault of the first deceased. Then in court during his explanation of plea, he admitted that he had assaulted the first deceased, albeit under duress from Steven. Only to disavow that admission later during evidence in court, where he once again stated that he did not do anything to the first deceased. In **S v T 2000 (2) SACR 658 (Ck)** at paragraph 19, *Ebrahim J* said the following in this regard: “... *It is apparent that the magistrate failed to apply his mind properly in assessing the appellant’s story. He clearly did not believe the appellant and for this reason rejected his version. This approach was manifestly incorrect. Even if he subjectively disbelieved the appellant he was still required to consider whether there was a reasonable possibility of the version being true. Before his explanation may be rejected it must not merely be improbable but it must be false beyond reasonable doubt.*” In my view, this is clearly a case where the accused version is false beyond reasonable doubt.

[74] There are further aspects of his evidence which the court finds improbable and which can safely be rejected. These are: why would Steven have wanted him to go back to the scene to go fetch a key? He tried to create the impression that he was afraid of Steven because of what he had done, but he never went to the police to report the incident.

[75] Even after Steven had left for Bloemfontein and would not have been in a position to harm him, he still did not go to the police. Before this, he rather further associated himself with Steven, by meeting him again at a later stage after he had committed this horrible crime, which made him so afraid that it caused him to run away.

[76] Why then would he go with Steven to the bus station? Why would Steven leave the keys of his house in his possession? Why did the accused not tell the police when he was confronted by Warrant Officer Rabie, what he knows about the incident? He further tried to create the impression that there may have been other unknown persons involved with Steven, which he later says he never told the police.

[77] The question that needs to be asked is why would he do that? Was it because he knew that it would have been impossible for one person only to have committed these two murders. In my view that could be the only plausible explanation, which he used as a deflection to exculpate himself from any further involvement in the offence. It became apparent that on the objective evidence, there was no need for the accused to have accompanied Steven to the house of the deceased, for the purpose of him going there for work.

[78] That fact is borne out by the evidence and the version of the accused as well as the objective facts surrounding this case. The accused therefore accompanied Steven to the place of the deceased for a different purpose. And as correctly pointed out

by the prosecutor, that it would be highly unlikely that Steven would have involved the accused, who would have been a witness to the incident, in the commission of the crime, if the accused was not aware of it before the incident.

[79] The conduct of the accused, afterwards, more especially his further association with Steven; the fact that Steven trusted him to look after his house when he left for Bloemfontein; the accused's silence after the police came looking for Steven; his attempts to mislead the police and this court; is not consistent with that of an innocent bystander who was merely at the wrong place and at the wrong time. These are all objective facts from which inferences can be safely drawn. In evaluating circumstantial evidence, it is trite that a court has to follow the guidelines as set out in **R v Blom 1939 AD 188 at 202-203** which is that:

- “(1) *The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
- (2) *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*”

[80] The only reasonable inference that the court can draw from the surrounding facts and circumstances as referred to above, is that the accused had prior knowledge of the incident and that he formed an association with Steven to commit these offences. I say this for the following reasons: it is clear that Steven would have needed some

assistance in order to have killed two people because if there was an attack on the one person, the other one would have made alarm and could have easily called the police for assistance, so there had to be a simultaneous attack on both the deceased.

[81] If one has regard to the place where the first deceased was attacked and the place where the second deceased was attacked, such a conclusion would not be illogical or inconsistent with the probabilities. The first deceased was attacked outside of the house in the garage away from the second deceased who was still in their bedroom. So, the one deceased had to be eliminated outside of the house while simultaneously the other one had to be attacked inside the house.

[82] A further indication on the objective evidence that shows that there were two people involved, was the fact that the deceased were killed by different means and different weapons were used when they were killed. It is clear that the person that attacked the first deceased used the panga and the person that attacked the second deceased used a knife or sharp object. The medical evidence shows that the injuries that the first deceased sustained was consistent with that of a panga and that the injuries the second deceased sustained was consistent with that of a knife or sharp object.

[83] The evidence clearly shows that the panga was at a later stage found in the garage and it seems that it was not removed from the garage after the first deceased was attacked with it. It is highly unlikely that if there was only one person that attacked

both the deceased that, that person would have gone through all the trouble to make use of two different weapons. I agree with the prosecutor that in all likelihood, it was Steven who would have attacked and killed the second deceased and the accused would have attacked and killed the first deceased, given the fact that when he arrived at the scene he immediately went to the garage, where he was hiding himself in order for the first deceased not to see him.

[84] I say this because if on the version of the accused, it was genuinely the case that he went to the premises of the first deceased to go and work for him, one would have expected him to be outside at the time when the first deceased came out in order for him to show the first deceased that he is there, because he was called or requested to come and work for him. One would have expected Steven to have told the first deceased that he had brought the accused with to come work for him. But rather bizarrely the accused goes into the garage and out of sight of the first deceased.

[85] The only inference that can be drawn from this fact as said earlier is that the accused went to hide himself in the garage because he was not there to work for the first deceased, but for a different reason, which was so that the first deceased can be lured into the garage by Steven in order for him to attack him and keep the first deceased busy, while Steven would go inside to the second deceased. Whereafter Steven would have proceeded firstly to force her to transfer the amount of R14 000,00 over to an FNB account in Lesotho.

[86] This explains the rather uncommon and nonsensical behaviour of his continued associated with Steven afterwards. And why he accompanied Steven to the bus station in Mossel Bay, when Steven travelled to Bloemfontein. The reason for this was because the accused had an interest in Steven going to Bloemfontein, which is very near to Lesotho after Steven had forced the second deceased to pay an amount of R14 000,00 in an FNB account registered in Lesotho. This was the reason why the accused was in continuous contact with Steven and believed that he would still be coming back. And as said earlier, this behaviour of his is not consistent with that of an innocent person, who wanted to disassociate himself from Steven because of what he had done.

[87] This also explains why no other items except cell phones and small items, like a laptop computer and tablet, were stolen from the deceased. It was because they had managed to steal a big amount of cash. It would also have been too difficult for the accused and Steven to have stolen other bigger items from the premises of the deceased.

[88] I therefore find the accused version as to his involvement in the crime as not reasonably possibly true.

[89] In my view, this is the only reasonable inference based on the facts and surrounding circumstances of this case which the court can come to. I therefore find that the accused formed a common purpose with Steven to murder both the deceased and rob them of their possessions.

[90] The further question to consider was when the R14 000,00 was transferred from the bank account of the deceased and the second deceased was forced to do so, whether robbery was committed. I have not been able to find in the limited time at my disposal and with limited resources at circuit court, any case law in this country and I believe that there may not be any that deals with robbery committed under these circumstances.

[91] The only comparison to money having been stolen in this manner is to be found in situations where theft had been committed of credit or of money in an incorporeal form. It is clear that the amount of R14 000,00 was not available in a corporeal form when the second deceased was forced to make an electronic payment in an incorporeal form. **Burchell: Principles of Criminal Law (4th ed)** at 690 under his discussion of **Theft of Credit** states:

“If it is possible to steal money in an incorporeal form, then clearly it is possible to steal money in its credit form. This means that it can be theft to deposit dishonestly a cheque drawn on another person’s bank account, or dishonestly to instruct a computer to transfer money from one account to another. Although there is no actual physical handling of the money, the conduct amounts to theft.”

Snyman: Criminal Law (6th ed) at 478 under the sub-heading of **(d) Theft of credit, including the unlawful appropriation of trust funds**, albeit in a different context says the following about theft of an incorporeal thing:

“X commits this form of theft if he steals money in the form of credit. In most cases the credit has been entrusted to X with the understanding that it is to be used in a certain way, whereupon X then violates the terms under which he is to use it by employing it for some other purpose – usually for his own advantage. What makes this form of theft so different from other forms of the crime is that X commits theft despite the fact that what he steals is neither a corporeal thing nor does it belong to somebody else. It differs from the ordinary principles governing theft to such an extent that it cannot be accommodated under the definition of the crime given above without radically amplifying the ordinary meaning of the words.”

[92] And further at page 493 under the sub-heading, **Theft of credit, including the unauthorised appropriation of trust funds:**

“(a) General The fourth form of theft, namely theft of credit, will now be considered. This form of the crime constitutes a particular way in which money can be stolen.

No one will deny that money can be stolen, and where X unlawfully takes cash (notes, coins) from Y’s possession and appropriates it to himself there is usually no difficulty in regarding such conduct as theft: X here commits theft by virtue of the general principles applicable to the crime. Notes and coins are, after all, corporeal property, and in this set of facts X is not the owner of the notes or coins.

The most obvious meaning of ‘money’ is corporeal notes or coins. However, ‘money’ may also have a less obvious and more abstract meaning, namely ‘credit’. By ‘credit’ is usually meant a right to claim money from a bank, because the bank is the owner of the money which is in the bank, whereas the bank’s client only has a right to claim from the

bank. In modern business usage cash is seldom used. Money generally changes 'hands' by means of cheques, negotiable instruments, credit or debit entries in books, or registration in the electronic 'memory' of a computer. In cases one can hardly describe the money in issue as tangible, corporeal articles. It would be more correct to describe it as 'economic assets', 'an abstract sum of money', 'a unit representing buying power', or (the word which will be used in the discussion which follows) 'credit'. (Emphasis added)

[93] Therefore if the crime of theft, which is an essential element of the crime of robbery can be committed in this manner, then as a general proposition where money in an incorporeal form is stolen (in the broad sense) through the use of violence or threat of violence, the crime of robbery can be similarly be committed. With the further proviso that such “*money*” is stolen by means of violence or the threat of violence to constitute the crime of robbery.

[94] On this basis, I am of the view that the crime of robbery can be committed by the theft of an incorporeal thing through violence or force. It is therefore useful once again to have regard to the legal definition of the crime of robbery. **Burchell (supra)** at page 706 defines **Robbery** as “*Robbery consists in the theft of property by intentionally using violence or threat of violence to induce a person to submit to the taking of the property.*”

[95] On the basis of this analogy and in coming back to the facts in this case, in my view, what Steven and the accused did was to commit robbery by means of the theft

of money from the deceased by forcing the second deceased to instruct the computer to transfer money from the deceased account to the Lesotho FNB account.

[96] Even though there was no physical handling of the money, this, they did by violent means. And even though the accused was not present, he formed a common purpose, to commit this robbery with aggravating circumstances. The case against the accused has therefore been proved beyond reasonable doubt.

[97] I therefore find the accused guilty on all four of the charges as set out in the indictment, which includes the robbery with aggravating circumstances of the amount of R14 000,00 when the second deceased had been forced by means of electronic banking to pay over to an FNB account.

R.C.A HENNEY
Judge of the High Court

Coram : **HENNEY, J**

Judgment by : **HENNEY, J**

For the State : **Adv P. Van Der Vijver**

Instructed by : **The Office of the Public Prosecution**
Western Cape

For the Accused : **Mrs L Luterek**

Instructed by : **Legal Aid South Africa**
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Date(s) of Hearing : **29 AUGUST 2017**

Judgment delivered on : **7 SEPTEMBER 2017**