REPORTABLE

CASE NO.: SA

12/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIFAS GURIRAB	**FIRST APPELLANT**
JOHNY FRANS MOSES	**SECOND APPELLANT**
DENNIS KAUTWIMA	**THIRD APPELLANT**

And

THE STATE	**RESPONDENT**

CORAM: Shivute CJ, Maritz JA *et* Strydom AJA.

HEARD ON: 2007/10/15

DELIVERED ON: 2008/02/07

APPEAL JUDGMENT

STRYDOM AJA: [1] The three appellants appeared in the

High Court of Namibia on two counts, namely Murder and Robbery with aggravating circumstances as defined in sec 1 of the Criminal Procedure Act, Act 51 of 1977 (the Act). On the first charge it was alleged that they, on the 18th January 1996, and at the farm Verreweg, unlawfully and intentionally killed one Joseph F Oosthuizen. On the second charge it was alleged that they threatened to kill one Hester Oosthuizen and then robbed her of N$900,00 and N$300,00.

[2] The appellants pleaded not guilty to all the charges and after a somewhat lengthy trial first appellant was convicted of attempted murder and robbery with aggravated circumstances and second and third appellants were convicted on both counts as charged. Fairly lengthy sentences of imprisonment were imposed by the learned Judge *a quo.* The appellants were throughout the trial represented by legal practitioners.

[3] Subsequently all the appellants applied for leave to appeal to the Supreme Court of Namibia. Leave was granted to the first appellant to appeal against his conviction of attempted murder. The applications of second and third appellants were refused. They in turn petitioned the Chief Justice for leave to appeal in terms of sec. 316 (6) of the Act. Both petitions were successful and appellants were granted leave to appeal against their convictions and sentences.

[4] Before the appeal was argued first appellant was invited, on instructions by the Chief Justice, to address argument on the question whether his conviction of attempted murder, on count 1, should not be set aside and substituted with a conviction of murder, and if the conviction is altered to one of murder, to present argument on why the sentence should not also be increased.

[5] Because leave to appeal was granted, also to second and third appellants, the appeals were heard together. The appellants were again represented by counsel, namely Mr Mostert, who appeared for first appellant, and Mr Grobler, who appeared on behalf of second and third appellants. Ms Miller appeared on behalf of the State.

[6] After argument was heard we handed down the following order and indicated that our reasons would follow later. The order handed down provided as follows:

"IT IS ORDERED:

1. That the conviction of the first appellant of the crime of attempted murder and the sentence imposed in respect of that conviction in the High Court of Namibia are set aside and the following orders are substituted:

   (a) 'That the first accused is convicted of the crime of murder.'

   (b) 'That the first accused is sentenced to 18 years imprisonment.'

2. That the sentence of 18 years imprisonment is antedated to 1 November 1999.

3. That the first appellant's appeal against his conviction of crime of robbery with aggravating circumstances is dismissed.

4. That the order of the High Court of Namibia that 6 years imprisonment imposed in respect of the first appellant's conviction of the crime of Robbery with aggravating circumstances is to be served concurrently with the sentence imposed in respect of the crime of murder is confirmed.

5. That the appeal of the second appellant against his convictions is dismissed.

6. That the appeal of the third appellant against his convictions and sentences succeeds. The convictions and sentences are set aside and the following order is substituted:

(a) 'That the third accused is found not guilty and discharged.'

[7] Hereafter follow the reasons in support of the above order.

[8] In the early evening of the 18th January 1996 first appellant, accompanied by two other persons, left Grootfontein in the motorcar of the first appellant. They travelled for about 67 kilometres on a gravel road until they

came to the farm of the deceased, Verreweg. The car was left next to the road but hidden among some bushes. First appellant and the two other persons then walked for about a kilometre until they came to the farm homestead.

[9] At the homestead they hid among some bushes near to where the engine room was and where electricity was generated for the homestead. They sat down and waited for a considerable period of time until the deceased approached from the house, ostensibly to switch off the engine.

[10] When the deceased was approaching the three people donned balaclavas and two pistols were removed from a sack which was carried by one of the persons. When the deceased reached the engine room he was set upon and after, what seemed to have been a heavy fight, he was overpowered. His hands were bound behind his back and a piece of cloth was bound, very tightly, around his mouth and

nose to stop him from screaming. According to the doctor, who held the post mortem on the body of the deceased, the main cause of death was asphyxiation.

[11] The deceased was left where he was trussed up and the three persons then ran to the house where they accosted Mrs Oosthuizen just as she was coming out of the house in search of her husband, the deceased. Mrs Oosthuizen was threatened with a pistol by one of the persons and they gained entrance into the house where they searched and took her wallet, containing some money. They also gained entrance to the safe in the house where they removed an unknown amount of money. Some of the money was in plastic bank bags of Standard Bank and consisted of coins.

[12] The three persons left the house together and Mrs Oosthuizen, assisted by some of the farm labourers, went to a neighbouring farm from where she summoned the police

because she could not find the telephone at its usual place.

[13] Mrs Oosthuizen was not able to identify any of the assailants but she testified that two of them wore balaclavas whereas the third person did not wear any disguise.

[14] During investigation the police found a balaclava at the engine room which must have come off during the scuffle with the deceased. The police was also able to follow three sets of footprints from the homestead to a place next to the road where it was clear that a motorcar had been parked and where some blue paint, which had been scratched off by bushes, was also found. According to the police trackers the footprints were made by Hang Ten sandals, "veldskoene" and a pair of smooth heeled shoes. From the tyre marks left by the motorcar the trackers were able to establish that the car, when it left, drove in the direction of Grootfontein.

[15] It had rained the previous afternoon or early evening and in order to protect the footprints the police covered parts of them for later comparison if suspects would be found.

[16] The discovery, by the police, of the balaclava at the scene of the attack on the deceased, led them to the branch of Pep Stores in Grootfontein and from there the trail led to the first appellant. It seems that the buying of balaclavas in Grootfontein in mid summer did not go unnoticed and the manager of Pep Stores was not only able to give a description of the person who had bought the balaclavas but also of the car in which the person had left the shop.

[17] First appellant was arrested the day after the robbery and killing of the deceased occurred. He initially denied any complicity in the crimes. He was taken to the scene where the crimes were committed and it was found that his shoes matched one of the sets of footprints found by the police.

[18] After further questioning first appellant decided to make a statement. First Appellant was questioned by a police officer, one Saunderson, who introduced himself as a lawyer. However, first appellant testified that he was not taken in by this ruse and he stated that he willingly told his story to the police.

[19] According to first appellant the two persons who accompanied him to the farm Verreweg were second and third appellants. He stated that he was approached by second appellant some few days before the incident took place and requested to buy two balaclavas. He went to Pep Stores and bought the balaclavas. Thereafter, and on the late afternoon of the 18th January, second appellant asked him to take him to a farm where he wanted to obtain work. Before leaving town second appellant told him to go to the police barracks and there they picked up the third appellant.

[20] First appellant said that he did not know where the farm was and he was directed, mainly by the second appellant. On the way second and third appellants spoke in Oshiwambo and he could not understand what they were saying as he is Damara speaking. At a certain point he was told to stop the car because it was forbidden for cars to come onto the property at night. He wanted to stay with the car but second appellant told him to accompany him and the third appellant. They then left on foot for the homestead.

[21] When they arrived at the homestead they went to sit near the engine room. There they stayed for a considerable time until some person approached the engine room. He, first appellant, then saw second appellant remove two pistols from the bag he was carrying as well as the balaclavas, which they then put on. According to first appellant he then realised, for the first time, what the purpose of their visit to the

farm was. When the person, coming from the house, went into the engine room he was set upon by second and third appellants. After this person, who later proved to be the deceased, was trussed up they all ran to the house where they met Mrs Oosthuizen and where the two appellants robbed her after searching the house and gaining access to the safe. From there they ran back to the car and drove to Grootfontein.

[22] According to the first appellant he was unaware of what was going to happen when the three of them set out for the farm and it was only when second appellant removed the pistols and balaclavas from the bag he was carrying, that he realised what was going to happen. During all the time that the deceased was attacked and that the robbery took place he, first appellant, was merely an innocent bystander, who feared for his life if he were to attempt to flee from the scene.

[23] Back in Grootfontein, third appellant was dropped at the police barracks. The three of them also went into a certain room where the bag, which previously contained the pistols and balaclavas, was left inside a cupboard. Thereafter he and second appellant departed, first to the house of first appellant, where they both entered and stayed for a while, and thereafter, he took second appellant to his house and returned to his own room where he was living with his girlfriend, a Miss Blaadt.

[24] As a result of the statement of the first appellant, second and third appellants were arrested. They however, denied that they were with the first appellant on the evening and night of the 18th January and both of them later alleged to have alibis for the relevant time when the crimes were committed.

[25] At this stage it would be convenient to deal with a finding

by the learned Judge *a quo* concerning, what is known in our criminal law, as the doctrine of common purpose. It was mainly the finding by the Learned Judge *a quo* that causality was a necessary ingredient of the doctrine which led to the conviction of the first appellant of attempted murder on the first count. In summing up the evidence in regard to the appellant the Court concluded that he had not been privy to the agreement by the second and third appellants to rob but that he at a later stage spontaneously joined in the attack and robbery. The Court found, *inter alia,* that in such an instance it would be unjust to apply the principles, regarding the doctrine of common purpose, as laid down by the Appeal Court of South Africa in the case of *S v Safatsa and Others,* 1988 (1) SA 868 (A). The Court was of the opinion that in circumstances as the present it was necessary to revive the principles, regarding the element of causality, set out previously in the case of *S v Thomo and Others,* 1969 (1) SA 385(A).

[26] In an exhaustive discussion of decisions of the South African Appeal Court, and dividing such cases into those delivered before and those delivered after the *Thomo*–case, Botha, JA, in the *Safatsa*-case, pointed out the uncertainty created by some decisions of that Court in regard to whether, in applying the doctrine of common purpose, it was necessary to prove causality between the actions of a perpetrator and the resultant effect, e.g. death of the victim. It must be pointed out that the *Safatsa*-case did not deal with the so-called 'joining in' cases where the principles of common purpose are so often applied. In the *Safatsa*-case the State could prove that each one of the accused had the requisite intention to kill the deceased and that they actively associated themselves with the conduct of the mob, which was directed at the killing of the deceased.

[27] Dealing specifically with the *Thomo*-case the learned

Judge pointed out that Wessels, JA, who wrote the judgment in the said case, concurred in the judgment of the case of *S v Madlala,* 1969 (2) SA 637 (A), which judgment was delivered just prior to the *Thomo* judgment, and in which Holmes, JA, stated the following at 640F – H, namely:

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof-
>
> (a) that he individually killed the deceased, with the required *dolus*, eg by shooting him; or
>
> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence and it occurred; see *S v Malinga and Others,* 1963 (1) SA 692 (A) at 694F-H and 695; or
>
> (d) that the accused must fall within (a) or (b) or (c) – it does not matter which, for in each event he would be guilty of murder."

[28] Referring to the above excerpt and the fact that the two judgments were given so close in time Botha, JA, said the following at 897:

> "In this formulation of the legal position relating to common purpose it is quite clear, in my opinion, that there is no room for requiring proof of causation on the part of the participant in the common purpose who did not 'do the deed' (ie the killing). This fortifies my view that it was not intended in *Thomo's* case to lay down that a causal connection had to be established between the acts of every party to a common purpose and the death of the deceased before a conviction of murder could ensue in respect of each of the participants."

[29] The *Safatsa*–case was further explained in the case of *S v Mgedezi and Others,* 1989 (1) SA 687 (A). It was there laid down that in cases where the State does not prove a prior agreement and where it was also not shown that the accused contributed causally to the wounding or death of the deceased, an accused can still be held liable on the basis of the

decision in *Safatsa* if the following prerequisites are proved, namely:

(a) The accused must have been present at the scene where the violence was being committed;

(b) he must have been aware of the assault being perpetrated;

(c) he must have intended to make common cause with those who were actually perpetrating the assault;

(d) he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;

(e) he must have had the requisite *mens rea*; so in respect of the killing of the deceased, he must have

> intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (p 705 to 706).

[30] Therefore also in regard to the so-called “joining in“ cases causality is not required provided that there is proof of the prerequisites set out in the *Megedezi*-case.

[31] Returning to the findings, in this regard, by the Court *a quo*, it is clear that it brought about a fundamental change in the law, as laid down and explained in the above cases, and the question is whether that was justified. The reasons why the learned Judge *a quo* found it necessary to revive the reasoning in the *Thomo* case, and thereby depart from the general position of the law, are threefold. Firstly that it would be unjust to hold an accused, who was not part and parcel of the original agreement to commit the crime, equally

responsible with those who were part of the original agreement. (Record page 1336 to 1337). Secondly that for reasons of policy and in the interest of justice and in order to encourage accused persons, in the position of the first appellant, to come forward and assist the police in solving cases, such accused persons' liability should be limited to their particular unlawful act which they belatedly executed after they had joined in on the spur of the moment. (Record p 1337). Thirdly that the situation has changed from the day that the principles, set out in the *Safatsa*–case, have been formulated. At the time there were multiple cases where hundreds of people were involved in and to that extent the doctrine of common purpose, as set out in the *Safatse*-case, has fulfilled its role. (Record page 1337 to 1338).

[32] I agree with Ms Miller, as well as counsel for the defence, that these are not compelling, nor even convincing, reasons why the law as set out in the *Safatsa* case should not

be followed, also by Courts in Namibia. It seems to me that the reliance placed by the Court *a quo* on the *Thomo*-case, which was either decided on wrong principles or, if Botha, JA, is correct, could never have meant to require causality where the doctrine applies, is in my opinion not a good starting point to change the law. To require causality in such an instance will limit the applicability of the doctrine and deprive it of its usefulness in situations where it would otherwise be difficult to prove liability.

[33] There is further in my opinion no reason to accept that application of the doctrine, as found by the Court *a quo,* would encourage criminals to come forward and assist the police in their investigation of cases. It is also not correct to say that the *Safatsa*-case created new law in order to meet a particular situation where crimes committed by groups of people were rife, and in order to cope with such a situation, it was necessary to devise new principles which would be able

to take care of the situation.

[34] On p. 895 Botha, JA, stated that his object was "to attempt to clarify the law as it is applied in practice…". The learned Judge further pointed out that he was not dealing with the so called ‘joining in’ type of cases. To that extent and on the facts found by the Court *a quo*, namely that the first appellant only joined in on the spur of the moment after the attack on the deceased had already started, it would have been more correct to apply the principles set out in the *Mgedezi*-case, supra.

[35] That the learned Judge in the *Safatsa*–case was merely clarifying and restating the law of common purpose in regard to the question of causation is clear from the Court’s analysis of the relevant case law. Thus it was stated that even before 1969 (that was when the *Thomo* judgment was delivered) the Court found clear instances where convictions of persons,

based on common purpose, were upheld where no causal connection had been proven between the conduct of the accused and the death of the deceased. (p. 895).

[36] As was pointed out earlier, also in regard to the *Thomo*-case, the Court was of the opinion that it could never have been intended that in convictions on the basis of common purpose a causal connection was required between the conduct of the accused person and the death of the deceased.

[37] After analysing various Appeal Court cases, also cases where a causal connection was either required or where doubt existed as to whether such connection was required or not, the learned Judge on p. 900 concluded as follows:

> "That being the existing state of the law relating to common purpose, it would constitute a drastic departure from a firmly established practice to hold now that a party to a common purpose cannot be convicted of murder

> unless a causal connection is proved between his conduct and the death of the deceased. I can see no good reason for warranting such a departure."

[38] I respectfully agree with the reasoning and findings by the learned Judge in the *Safatsa*-case, *supra.* The various Namibian cases referred to by Ms Miller show in my opinion that the doctrine of common purpose is also firmly embedded into the criminal law and procedure of this country and, although the issue of causality was not always pertinently addressed, there can be no doubt that the clarification of the principles of the doctrine, as set out in the *Safatsa*-case, has found application in our criminal law. (See in general *S v Haikele and Others,* 1992 NR 54 (HC); *S v Alexander and Another,* 1992 NR 88 (HC); *S v Ipinge Andreas Leonard Amalovu and Another,* CC72/2000, unreported judgment by Mtambanengwe, J, delivered on 7 June 2001; *S v Christiaan Nicolaas Jones and Three Others,* CC04/2004, unreported judgment by Mainga, J, delivered on 2 November 2005; *S v*

Elia Avelino and Five Others, CC 06/2003, unreported judgment by Gibson, J, delivered on 22 November 2005 and *S v Joseph Garisweb and Another,* CC 05/2003, unreported judgment by van Niekerk, J, delivered on 16 October 2006).

[39] From this it follows that on the facts found by the learned Judge *a quo* she could not find the first appellant guilty of attempted murder. A conviction of attempted murder presupposes that the first appellant acted with the necessary *mens rea*, namely *dolus directus* or *dolus eventualis* and he should therefore have been found guilty of murder. On the findings by the Court *a quo* the conviction should have been one of murder as those findings fit the requisites set out in the *Megedezi*-case, *supra.*

[40] This was in principle conceded by Mr Mostert, who appeared for the first appellant, instructed by Legal Aid on a certificate issued by this Court. Counsel also accepted that

the doctrine of common purpose as set out in the above cases of the Appeal Court of South Africa, is part of our law.

[41] Before dealing with the merits of the appeal there is the question whether this Court is empowered to substitute a conviction of murder, which is a more serious crime, for the conviction of attempted murder. Also in this regard counsel for the State and counsel for first Appellant agreed that this Court is competent to do so.

[42] I have no doubt that that is so. Sec. 322 of the Criminal Procedure Act, Act 51 of 1977, as amended by Act 26 of 1993 (The Criminal Procedure Amendment Act) circumscribes the powers of the Court of Appeal and subsec 1(b) provides that his Court “[can] give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or”.

[43] On the basis of this provision the South African Appeal Court found that the Court has the power to alter the conviction, on appeal, to a conviction of a more serious crime. (See *R v Mkwanazi,* 1948 (4) SA 686(A), *S v E,* 1979 (3) SA 973(A) and the commentary on the said section in *Hiemstra, Suid-Afrikaanse Strafproses, 5th Ed by Kriegler*, p861.)

[44] I therefore find that this Court is competent to substitute a conviction of a more serious crime, namely murder, for a conviction of a less serious crime, namely attempted murder.

[45] In an able argument Mr Mostert conceded that the first appellant was correctly convicted on the second count, namely robbery where aggravating circumstances were present. In regard to count 1 counsel however submitted firstly that the State neither proved *dolus directus* nor *dolus eventualis*. Secondly counsel submitted that the State also

did not prove negligence on the part of the first appellant in causing the death of the deceased and that consequently he should have been acquitted on the first count of murder.

[46] I do not agree with these submissions by counsel, nor do I agree with the finding of the Court *a quo* that the first appellant was unaware of the purpose of going to the farm Verreweg and that he only joined the attack on the deceased on the spur of the moment.

[47] A reading of the evidence by the first appellant showed that he went to great lengths to distance himself from the attack on the deceased as well as the robbery, to such an extent that some of his explanations border on the ludicrous and are so improbable that they can be rejected out of hand.

[48] According to the first appellant he bought two balaclavas in mid summer in Grootfontein, on the request of second

appellant, but he paid for them. He did not find this request strange or improper. However just prior to the attack on the deceased three balaclavas were produced and later the police found a balaclava in the house of the first appellant. (p. 130). Only two balaclavas were bought but all three persons present at the scene wore balaclavas.

[49] He, first appellant, financed the petrol which was put into his car for the trip and stated that he would have been recompensed by second appellant at some later stage. This did not happen. First appellant also testified that he did not know where the farm was or how far it was from Grootfontein. I find this highly unlikely for if he did not know how far the farm was and as a result did not take enough petrol they could have been in the awkward situation where they, after commission of the crime, and on their way back to Grootfontein, could have run out of petrol.

[50] When they arrived at the farm first appellant said that he wanted to stay at his vehicle but he was invited to come along with the second and third appellants. The car was then hidden amongst the bushes next to the road. This was indeed strange behaviour of the second appellant to invite a man to accompany himself and his co-perpetrator simply to witness the commission of a serious crime or crimes. The improbability of this action is so startling that it is unbelievable. Up to that stage, according to the first appellant, he was still labouring under the impression that second appellant was hoping to obtain work at the farm. That was what second appellant allegedly told him was the purpose of the trip. This is so improbable that it can safely be rejected as false and in my opinion first appellant knew all along what was going to happen and he made common cause with the other perpetrators.

[51] The reason given by the first appellant why they did not

drive up to the homestead with the car is also difficult to understand. According to him second appellant stated that cars were not allowed to enter the farm after it turned dark. Why there was a prohibition on cars entering the farm but people were allowed to enter is difficult to understand. Any person would have realized that the prohibition concerned people only. However, second appellant, according to first appellant, was there for a legitimate reason, namely to ask for work, so why would they not be able to drive up to the farmstead rather than to walk there which would immediately have caused suspicion? This was another unsuccessful attempt by the first appellant to explain away every suspicious circumstances pointing towards guilt.

[52] Once they arrived at the homestead second appellant did not go up to the house to ask for work, instead they went and sat down in the dark amongst some bushes and waited there for a considerable period of time. It seems that first

appellant accepted this as quite normal behaviour because he never tried to find out what was going on. No reasonable person would have accepted this behaviour as normal and the first appellant, yet again, set himself the almost impossible task of attempting to put an innocent gloss over facts which clearly point to complicity in the commission of the crimes and guilt.

[53] When the attack on the deceased was launched first appellant, after putting on the balaclava handed to him by second appellant, did not use the opportunity to escape but instead went closer to see what was happening. I find the injury to the first appellant's thumb significant and this is at least corroborative evidence that the first appellant took part in the attack on the deceased. According to Dr Damaseb, who saw the first appellant the next day after the crimes were committed, the injury was so fresh that he was under the impression that it was caused that very day. It is correct, as

was submitted by Mr Mostert, that the doctor conceded various possible causes for the injury, but he did not change his opinion as to the freshness of the injury. When first appellant was cross-examined he stated that the injury was caused a week before the incident. This, according to the medical evidence, was not possible. Bearing in mind the circumstances of the case, the false explanation given by the first appellant as to when he suffered the injury and the fact that his girlfriend Ms. Blaadt was also unaware of the injury which the first appellant, according to his evidence, had suffered a week before the incident, the inference that he suffered the injury during the attack on the deceased, is inescapable.

[54] Lastly there is the evidence of Mrs Oosthuizen that when the robbery took place all the persons involved acted together and that there was not one person who did not play an active part and was merely a bystander. During cross-examination

she stated that when they came to the safe all three persons pulled out packets, presumably containing money, from the safe. All three persons again left together.

[55] I am mindful of the fact that a trial Judge is in a better position to make findings of credibility having had the benefit of seeing the witnesses and observing their reactions during examination-in-chief and under cross-examination and being steeped in the atmosphere of the case, whereas the Court of Appeal only has the record to go by. However bearing in mind the false and improbable explanations given by the first appellant for his presence together with the other two perpetrators and the evidence and concession that he took part in the robbery, I am satisfied that the Court *a quo* was correct in having rejected his evidence that he was merely an innocent bystander who at no stage took part in either the attack on the deceased or in the robbery which followed on the attack.

[56] However, in my opinion the Court *a quo* should also have found that the first appellant did not act on the spur of the moment but that he, together with the two other perpetrators, agreed and acted with a common purpose to rob the Oosthuizens.

[57] Because of the death of Mr Oosthuizen the question remains whether the first appellant is guilty of murder or whether he should have been convicted of culpable homicide.

[58] The first appellant knew that force would be used to overcome any resistance from Mr Oosthuizen. To this extent he knew that fire-arms were present. They waited at the engine room because they knew that the deceased would, at some stage, come to switch off the engine or generator providing electricity. They waited until the engine was switched off before they launched their attack.

[59] The attack was a serious one. This is evidenced by the many injuries found by Dr Damaseb on the body of the deceased. Dr Damaseb was invited by the police to visit the scene of the crime. He saw the body of the deceased. The hands of the deceased were tied behind his back and his legs were also tied. His mouth and his nose were gagged with a piece of cloth which was then bound up tightly and the deceased had been bleeding from both nostrils. This, together with the fact that the deceased was an elderly man, and, according to the doctor, frail and vulnerable, led to respiratory problems which caused asphyxiation.

[60] Even the most inexperienced person would realise that to tie up a person in such a way that his intake of air is obstructed could lead only to one result and that is death. I accept, as it was accepted by the Court *a quo,* that the main purpose of the assailants was to rob and not to kill. However they came prepared to overcome any resistance and they

must have realised that force would be necessary to achieve their purpose. They came prepared and armed with guns and materials to gag and bind up the deceased. They ambushed him and were able, after a fight, to overpower him. It was most certainly foreseeable that in a situation such as this, where the deceased was resisting and screaming, that in the process of gagging the deceased, something could go wrong, also bearing in mind the nearness of mouth and nose to each other. It would have been an easy exercise for any one of the assailants to make sure that the deceased was not so tied up that he could not breathe. However they reconciled themselves with the possibility that the deceased may have been tied up in such a way that he could not breathe and left the deceased helpless and tied up in such a way that he succumbed and died. This was done in the execution of a common purpose to rob the deceased where each one foresaw that, in the words of Dr Damaseb, significant force would have to be applied and measures be

taken to prevent the deceased from raising the alarm and so prevent them from achieving their criminal object.

[61] I am therefore of the opinion that the first appellant is guilty of murder on the first count and that his conviction of attempted murder must be set aside and a conviction of murder substituted therefor.

[62] The learned Judge *a quo* regarded the first appellant as a naïve or stupid bumbler who, sort of innocently, stumbled onto the crime scene and then, overtaken by circumstances, on the spur of the moment decided to join in. A reading of the evidence does in my opinion not support such finding. One reason for such finding was the buying of the balaclavas by first appellant in mid summer. However the Court's finding that he bought it from someone who knew him, namely the manager of the shop, is not supported by evidence. On the evidence it is much more likely that the

manager only by chance saw the first appellant doing the purchase. It is also not the purchase by itself that put the police on the trail of the culprits but the fact that the second appellant lost his balaclava and left it on the scene of the crime where it was found by the police and then set in motion the investigation which culminated in the arrest of the first appellant. The appellant, on his own version, quickly saw through the ruse concocted by Saunderson which showed that he was neither stupid nor naïve and was also astute enough to realise that the evidence collected by the police was so strong against him that it would be more to his advantage to come clean and use the opportunity to put all the blame on the others. This plan almost succeeded.

[63] This brings me to the appeals of the second and third appellants. Both appellants were incriminated by first appellant as being the two persons who accompanied him to

the farm Verreweg on the evening of the 18th January and who committed the crimes charged. Where evidence incriminating a co-accused came from an accomplice, the Courts have come to particularly scrutinise such evidence and treat it with caution before accepting it as trustworthy. This is so because an accomplice has intimate knowledge of the commission of the crime and therefore is able to testify in a way which is convincing and where the only falsehood is the substitution of the accused for the real culprit. One way of reducing the risk involved in such evidence is to look for corroboration in other creditable evidence. (See in this regard *S v Hlaphezula and Others,* 1965 (4) SA 439 at 440 D-H). Although the evidence of an accused, implicating a co-accused, is not strictly evidence of an accomplice the cautionary rule is just as much applicable to that evidence. (See *S v Dladla,* 1980 (1) SA 526 (A) at 529A-B).

[64] I agree respectfully with the learned Judge *a quo* that in the case of the second appellant other trustworthy evidence existed which corroborated that of the first appellant and excluded the possibility of a wrong conviction based on the evidence of an accomplice in the crimes. Although Mr Grobler, on behalf of second and third appellants, was correct when he submitted that the first appellant was an unsatisfactory witness who endeavoured to extricate himself from the commission of the crimes and who put all the blame on the second and third appellants, the fact of the matter is that in regard to the presence of the second appellant, together with the first appellant on the relevant evening, there is the important evidence of Ms Mina Blaadt, the girlfriend of the first appellant. Her evidence was that she knew the second appellant from various visits to the first appellant and that on a specific evening the second appellant, who introduced himself to her as Johnny, visited the house where she and first appellant resided. On this occasion the first

appellant was not present when second appellant enquired about him. He again returned the next day and later that evening first and second appellants left the house together in the car of the first appellant.

[65] At about 2 o'clock that night she awoke as a result of a knock on the door of the house and when she opened the door first and second appellants entered the house. She, Ms Blaadt, recognised the second appellant in the light of a candle which was lit inside the house. Second appellant had a white bag made of cloth in his hand and later she heard the sound made by coins. The two appellants left together and when first appellant later returned he said that he had a problem but he did not elaborate on that.

[66] Although the evidence of Ms Blaadt was not without blemish the Court *a quo*, after carefully analysing the evidence, concluded that there was no reason to reject her

evidence. In my opinion the Court's finding cannot be criticised.

[67] Second appellant tried to convince the Court that he only came to Grootfontein late on the afternoon of the 18th January and that he could therefore not have been the person who accompanied first appellant to Verreweg. This claim by the second appellant was in my opinion refuted by Constable David Lugambo who testified that he knew the appellant and saw him on a much earlier occasion, namely about 17h30, at a shop in the Omulunga Township, a township adjacent to the Damara section where the first appellant resided. This witness also testified that the second appellant was wearing Hang Ten sandals, one of the shoeprints found by the trackers leaving the scene of the crime.

[68] In order to support his case second appellant called one

Philemon Augustus, a young person whom the appellant said he accompanied from Owambo as he, Philemon, was to appear in the Magistrate Court, Grootfontein, on the 19th of January, seemingly on a charge of assault. The Court *a quo* pointed out various instances where the evidence of the second appellant and his witness did not agree. Philemon, under cross-examination, later also denied that he was to appear in Court on the 19th of January and said that instead it was the 26th of February. By that the whole reason for coming to Grootfontein on the 18th of January, as stated by the appellant, fell away.

[69] Both Philemon and second appellant testified that they, on this occasion, stayed at the house of one Louwna Hendjala where they spent the evening of the 18th watching television. This evidence was only given by second

appellant when he testified in Court. The State thereupon applied for and was granted leave by the Court to call Louwna Hendjala to testify as she was not called by the appellant.

[70] Mrs Hendjala denied that second appellant and Philemon stayed at her house and she denied that she knew them. She also testified that at the time she did not have a television set and, as was testified by appellant and Philemon, that there was an adjacent structure to her house where they stayed at the time. She testified that no such structure existed and that the house was a four roomed house as originally built.

[71] The second appellant denied that his name was Johny Frans Moses and he testified that he was known as Joseph Moses. Appellant also denied that he knew first appellant although he stated that he met third appellant in Oshakati.

He testified that he was arrested by two police officers who saw him and said "he would fit too". This seems to me to be a most improbable reason for being arrested on such serious charges and it can safely be rejected.

[72] Mr Grobler referred the Court to various cases in which it was laid down what measure of proof is required in order to convict an accused, where the onus of proof lies and what the approach of a Court should be to the evidence of an accused person (See, *inter alia, S v Glaco,* 1993 NR 141 on 147 C-E; *S v D and Another,* 1992 (1) SA 513 (Nm); *S v Molautsi,* 1980 (3) SA 1041 (BSC); *R v Biya,* 1952 (4) SA 514 (A) at 521 C-E and *S v Hlapezula, supra,* at 442 E-F).

[73] In my opinion the Judge *a quo* fully analysed and considered all the evidence. If the only evidence involving the second appellant was that of the first appellant the outcome of the case may well have been different. The

Court however, was alert to the cautionary rule and applied it in regard to the evidence of the first appellant. Likewise the learned Judge *a quo* set out the merits and demerits of the other witnesses and gave reasons for accepting or rejecting the evidence of such witnesses.

[74] The Court *a quo* found the appellant and Philemon Augustus to be poor witnesses. The evidence to which I have referred herein before clearly substantiate such finding and the Court *a quo*, correctly in my opinion, rejected their evidence as false.

[75] Once the appeal on the first count of murder was unsuccessful it follows, on the evidence before the Court, that the appeal against the second count of robbery with aggravating circumstances should also be dismissed. I did not understand Mr Grobler to submit otherwise and counsel, in my opinion correctly, conceded that no grounds existed to

interfere with the sentences imposed.

[76] In the result the second appellant's appeal against his convictions and sentences is dismissed.

[77] The conviction of the third appellant rests exclusively on the evidence of the first appellant. In an eloquent and well written judgment the learned Judge *a quo* came to the conclusion that there were mainly three reasons why it would be safe to accept the unsatisfactory evidence of a co-perpetrator and convict the appellant.

[78] In regard to such evidence the learned Judge warned herself against accepting the evidence of a co-perpetrator where it incriminated a co-accused without there being any corroboration for such evidence but then went on to state that the Court would be entitled to accept the evidence of an accomplice where it is "so startlingly out of the ordinary that

the only conclusion that one can reach for what accused 1 said is that he can only have said it because that event which is so unique it was true". (Record p 1310)

[79] This principle was applied when the learned Judge found “The reference to a friend (third appellant) residing at the police barracks in Grootfontein is peculiar and extraordinary. It stands out for its uniqueness.”

[80] The second reason for believing the first appellant was because the first appellant knew that the third appellant had shortly returned from Windhoek on that day and it was stated that that “is really remarkable, because it happened to be the case ….. could accused have conjured up such a fact, sucked it out of the sky. In my view it is utterly preposterous.” (Record p 1321),

[81] The third reason stated by the learned Judge was the

evidence of first appellant that third appellant was introduced to him, or was referred to, as Dennis, a name which third appellant testified was his name but a name that he was not generally known by. Amongst his colleagues he was known as Koos.

[82] Whether one looks at these safeguards collectively or singularly they do not seem to me to carry such a degree of conviction that it would be safe to accept the unsatisfactory evidence of first appellant which was the only evidence incriminating the third appellant. In my opinion it cannot be said that the State proved the guilt of the third appellant beyond reasonable doubt, This is even more so when one looks further at other undisputed facts which came out during the trial, and which concern the third appellant.

[83] Looking at the reasons given by the learned Judge which prompted acceptance of the evidence of the first

appellant, it is so that the third appellant resided at the time at the police barracks together with his girlfriend and children. But according to the evidence so did other police officers. It seems that no name was at that stage mentioned by the second appellant when he directed the first appellant to the barracks and he merely referred to his friend.

[84] According to the third appellant and Const. van Niekerk they only arrived from Windhoek late that afternoon of the 18th. Van Niekerk further corroborated the third appellant that the third appellant requested him to stay over in Windhoek till the next day before returning to Grootfontein. A request which was declined by van Niekerk. All this seems to me to introduce a factor of chance into the robbery which was clearly planned and destined to take place the night of the 18th. There was no certainty that the third appellant would be back in Grootfontein, either that evening, or in time,

to accompany the first and second appellants on their journey to Verreweg. This, in my opinion, was improbable again bearing in mind that a certain amount of planning went into the commission of the crimes. It seems to me unlikely that the commission of the crimes depended on the uncertain event that the third appellant would return in time from Windhoek.

[85] The words, ascribed to third appellant, that he had just returned from Windhoek was, according to the record, first mentioned by first appellant in the Magistrate's Court on the 28th of March 1996. The impact of this evidence would have been much greater had the first appellant mentioned it at some earlier opportunity. The lapse of time made it possible that first appellant heard about this from some other source at a later stage. Putting it differently, the possibility cannot be excluded that the first appellant heard about this at a later

stage and he used it to bolster his claim to implicate the third appellant.

[86] It must be pointed out that both van Niekerk and van Zyl, the investigating officer, were quite skeptical about the implication of the third appellant in the commission of the crimes and they, or even the third appellant, may have mentioned this fact to first appellant, or in his presence, to illustrate the improbability of third appellant's complicity in the crimes. All this shows in my view that the reliance placed by the Court *a quo* on the uniqueness and veracity of this statement is not correct and knowledge thereof by the first appellant could have been gained by him in a number of ways, other than from third appellant on the 18th of January.

[87] One may also ask why the name Dennis was now all of a sudden introduced. By the use of that name the third

appellant was now clearly identified as there was nobody else with that name residing at the barracks.

[88] The Court stated that no issue was made by the defence of the third appellant to suggest that anybody else was masquerading as him. However, once it is placed in issue that the accused was not the person who committed the crimes it follows that only one of three possibilities come to the fore, namely:

(a) that he was falsely implicated in the commission of the crime, or

(b) that it was a case of *bona fide* but mistaken identity, or
(c) the accused is lying.

[89] In order to establish whether the accused is lying a Court would look at all the evidence as well as the evidence of the particular accused. There were certain undisputed facts present in this case which strongly pointed away from

the third appellant as being one of the perpetrators of these serious crimes. The first was that although shoes of the third appellant were compared by the police with the footprints found by them it was concluded that the shoes were smaller than the spoor made by the person running away from the scene. Not satisfied, the police scraped off soil, which they found on the shoe of third appellant, and sent that for forensic testing together with soil found at the scene. The result of the test was that the soil samples differed.

[90] The incrimination of the third appellant, and hence his conviction, was, in the words of the learned Judge *a quo,* "solely due to the evidence of accused 1." Except for criticism expressed by the learned Judge in regard to an answer given by the appellant in connection with a possible alibi witness, Linus Shikupe, and the fact that he stated under cross-examination that he himself referred at the Magistrate's Court to his recent return from Windhoek, which was not

correct, no other criticism was expressed concerning his evidence and the rejection of his evidence was based solely on the evidence of the first appellant and the safeguards the Court found in regard to that evidence as set out herein before. To the absence of serious criticism of the evidence of the third appellant must be added the alibi evidence put before the Court *a quo* by the third appellant.

[91] The third appellant called his girlfriend, Prisca Ilonga, to substantiate his alibi. The Court was not convinced by her evidence and found it too good to be true. The main criticism expressed in regard to the evidence of Ms Ilonga concerns the time when third appellant came back from Windhoek. The Court stated that whilst she was going about her ordinary domestic chores she was able to note the time to the precise minute.

[92] It seems to me that once the third appellant was

arrested, shortly after the 18th, the time when third appellant arrived home became important and her mind was certainly directed, shortly after the event, to that occasion. It was not as if nothing had happened and she was now, 6 months or a year later, required to state the time when an ordinary event had happened, namely the return of her husband to their home. A reading of her evidence left me in doubt as to whether the times of 18:44 and 18:43 stated by her, were ever intended to convey fixed times when according to her, the third appellant was supposed to have returned from Windhoek. In evidence-in-chief and under cross-examination she indicated that her husband came home before the clock struck 8:00. In fact under cross-examination by Mr Damaseb she explained that her evidence was not meant to convey an exact time but that she said that third appellant was home before the clock struck 8:00. What this evidence conveys to me is that there was a clock which

struck the hour, 8 bells for 8:00 and 3 bells for 3:00 etc. Her husband was home according to her shortly before the clock struck 8 bells. The times of 19:44 and 19:43 are no more than estimates, being before 8:00, that her husband could be at home. Unfortunately this discrepancy was not properly cleared up, and the criticism levelled at this evidence is, in my opinion, not altogether justified. In my opinion therefore the alibi evidence cannot be rejected out of hand.

[93] Another strange facet of the case was the finding of the bag, which contained the weapons and other implements to commit the crimes, in the room of police officer Philemon at the barracks. In my opinion no acceptable explanation was given for this and one would have expected that at least an affidavit would have been taken from Philemon. The explanation accepted by the Court that officers at the barracks frequently visited each other and had access to each others rooms begs the question. Although van Zyl said

that he investigated the matter and was satisfied that Philemon had an alibi for the crime, it does not seem to me to be a final answer. Why the bag was put in Philemon's room whereas third appellant also resided at the barracks and could just as well have taken the bag to his rooms, that is if he was involved, is in my opinion another issue which raised more questions than providing answers.

[94] For the above reasons I have come to the conclusion that the State did not prove beyond reasonable doubt that the third appellant was guilty of the crimes charged and he was therefore entitled to be found not guilty and to be discharged.

[95] The above are the reasons for the order issued by this Court on 15 October 2007.

[96] The Court is indebted to all counsel for the clear and well prepared arguments presented by them.

STRYDOM, AJA

I agree

SHIVUTE, CJ

I agree

MARITZ, JA

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