

SOUTH AFRICA / JUDGMENT

Nzima v S (Appeal) (A132/2023)

[2025] ZAGPPHC 483 (19 May 2025)

[2025] ZAGPPHC 483**COURT**

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, M M D Lenyai, G N Moshwana

CASE / FILE NUMBER

A132/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: A132/2023****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED.****DATE:**

19 May 2025

SIGNATURE

In

the matter between:**SUPRISE****SIBUSISO NZIMA****APPELLANT****and****THE****STATE****RESPONDENT****This**

judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 19 May 2025.

JUDGMENT

N V KHUMALO J (with LENYAI J and MOSHOANA J concurring)

Introduction

[1] The Appellant was arraigned and convicted on 18 September 2013 with two other co-Accused, cited as Accused 3 by the then Circuit

Local Division of the Eastern Circuit District of the High Court of South Africa, Gauteng Division, Pretoria, functioning as the

Mpumalanga Division, Nelspruit on counts of murder (count 1), robbery with aggravating circumstances (count 2), possession of firearms

(count 3), and possession of ammunition (count 4). The provisions of s 51 (1) and 51 (2) of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentence Act”) (the CLAA) were applicable on counts 1 and 2 respectively. On 20 September 2013, the court accordingly imposed the following sentences:

1. Murder - Life imprisonment,
2. Robbery with aggravating circumstances – 15 years imprisonment ,
3. Possession of Firearms – 5 years imprisonment,
4. Possession of ammunition 1 year imprisonment .

[2] The Appellant is, with leave of this court granted on 23 March 2023, appealing against his conviction. His appeal against sentence was refused on 20 February 2019.

[3] The salient facts are that on 22 July 2011, the home of Richard Phillip Manikela (the deceased) and his wife, Julia Mashabane (“the deceased’s wife”) in Mbonisweni near Kabokweni, was in the early hours of the morning invaded by 4 intruders demanding money. The intruders tortured the deceased with an iron, shot and killed him with his own shotgun after they had access to the gun that was locked in his safe. They ran away with the deceased’s Ford

Sapphire motor vehicle, shotgun and ammunition. The deceased’s cellular phone, wallet and bank cards were also found missing. The police arrested one Percy Nhlanhla Dube (“Percy”) who then admitted his involvement in the robbery and murder of the deceased, implicating the Appellant and the 2 co-Accused. Accused 1, Belina Maluka, is the deceased’s sister and Accused 2, Louise Given Msibi, and Appellant are young men from Engodini. Percy confessed to the offence, turned state witness and implicated the Appellant as the one who shot the deceased during the robbery. The court a quo found the Appellant and his co Accused’s guilt to have been proven beyond reasonable doubt reliant mainly on the evidence of Percy. The Appellant and his co- Accused’s evidence was rejected as being not reasonably possibly true.

- [4] During the trial the Appellant and each of his co- Accused were legally represented. They pleaded not guilty to all the charges denying that they were present at the scene of crime. Each raised an alibi. The Appellant alleged to have been at home sleeping. The court a quo convicted the Appellant and his 2 co- Accused, reliant on the whole evidence that was led, amongst others, chiefly that of Percy, a single eye witness, following the admission into evidence of the s 220 of the Criminal Procedure Act 51 of 1977 (the Act) concessions on the facts and conclusions made in relation to the cause of the deceased's death, and confirmation of such admissions by all the Accused.

The Evidence led in brief

By the state

- [5] Percy was the state's chief witness and already convicted and sentenced to 20 years imprisonment for the murder of the deceased when he testified. He had pleaded guilty at his trial. His testimony in this trial was that he was familiar with Accused 1, the sister of the deceased. He also knew Accused 1 as a person who sold dagga. Sometimes in June 2011 Accused 1 summoned him to come to her place. Once there Accused 1 wanted to know if he was a brave person and wanted money, which he confirmed. She told him that his brother had about R3 Million which he is just playing around with. He asked her

if he wanted him to go and take it and she agreed but pointed out that he needed to find assistance. As he attended school during the week and could only do that during the weekend, he asked her to give him a week. By the end of the week he had finished thinking about it and during the weekend went to Engodini to meet with Accused 2. He was introduced to Accused 2 by a certain friend of his, a former school mate of Accused 2 and meeting for the first time. He recruited Accused 2 asking him the same questions he was asked by the 1st Accused. Accused 2 agreed, he was keen. He invited Accused 2 to meet Accused 1 so that he could hear the story for himself.

- [6] Accused 2 came to Accused 1's home with five other people who were all unknown to him. Accused 3 was one of them. They found him already there. Accused 1 repeated the story to the men about her brother and the money. She produced an amount of R2 000 which she alleged was given to her by the deceased to hold for payment of his employees. The money was used to convince the men that the deceased had money. She asked them to only take the money from the deceased but not kill him. The men left. Percy had agreed with Accused 2 that they will come back on 20 July 2011 which they failed to do. They

only came back the next day on 21 July 2011. Only Surprise Nzima the Appellant in casu, Accused 2 and another person called Steve came back the next day at about 9 o clock in the evening. They found Percy at Accused 1's house. Accused 2 brought a small firearm. They also had cables and a masking tape which was going to be used to scare the deceased.

- [7] Accused 1 repeated the instructions that they were to only get the money which was

going to be shared amongst themselves. She gave them information about the deceased, specifically that the deceased gets up early in the morning at about 4:00 am and drive away to an unknown destination. They would therefore have to enter the deceased's

place at about 5:00 am when he leaves the premises. Accused 1 also told them that the deceased owned a shotgun for shooting birds. He left with the men, that is Accused 2, the Appellant and Steven to his place.

[8] At his place he realised that not all of them were going to fit on his bed. He decided to call one Mduduzi Madonsela ("Mduduzi"), a friend of his to come to his house. He introduced Mduduzi to the men and asked him to accommodate Accused 2 and the Appellant at his place. He stayed with Steve at his place. On 22 July 2011 at dawn Accused 2 and the Appellant arrived at his bedroom window and woke him up. They all left for the deceased's house in Patwa. The Appellant had the firearm and Steven the cables and the masking tape. Accused 2 told them that the deceased knew him, so he was not going

to enter first. Whilst waiting outside the deceased's gate, they heard the deceased's car. Steven and the Appellant entered the gate as soon as the deceased opened it. They closed the deceased's mouth with a masking tape, made him lie down in the garage, next to his motor vehicle with his hands tied to his back. His legs were also tied.

[9] Percy and Accused 2 then entered the house. Percy ran straight to the bedroom where he found the wife of the deceased whilst Accused 2 went to look in the other rooms. Percy ordered the deceased's wife to stay lying in bed and not make a noise. He told her not to be scared nothing was going to happen to her. He asked her if she knew

anything about the money and she didn't. The Appellant and Steven brought the deceased into the kitchen. At the time Accused 2 was back with him in the couple's bedroom. There were two safes in the bedroom, one under the wardrobe and the other one next to the bed. They managed to open the one safe next to the bed using keys shown to them by the wife. A pump gun and ammunition was inside the safe but there was no money. Accused 2 was not impressed. He went to the kitchen which was facing the bedroom.

[10] The Appellant came into the bedroom, took the pump gun and the ammunition. He started playing with it. Steven and Accused 2 were then torturing the deceased in the kitchen, burning him with an iron, asking him where the money was. During the whole time Accused 2 was speaking to the deceased, asking the deceased about the money. The deceased told them about the amount of R3 000 he gave to his sister to keep for him. He denied having any knowledge about a R3 Million. Appellant left the bedroom holding the pump gun and went to the kitchen. The Appellant shot the deceased. They were all surprised why Appellant did it. Accused 2 asked the Appellant why he shot the deceased. Appellant said it was a mistake. According to Percy he was witnessing for the first time a person dying from a shooting so he got a fright. It was also not part of the plan that the deceased was going to be killed.

[11] He said whilst surrounding the deceased, paralysed by shock from what has just happened, the deceased's wife came and closed the deceased's eyes. She told them that he was dead and whilst they were still paralysed by shock, she left the house and ran away. Percy wanted also to run away, alone, but Accused 2 said they must use the deceased's car. Accused 2 got into the car and they all followed suit and drove away. The Appellant still had the pump gun. They left the cellphone and the wallet inside the safe after they opened it. He does not remember seeing any of them with any of the items. They escaped in the deceased's motor vehicle. He was dropped off near a dumping site after he told the others that he needed to go to school. He went back home, and did not go school. He does not know what happened to the deceased's motor vehicle

after that. He told Mduduzi what had happened who kept on asking him where he went with the people as he was aware that they went

somewhere in the early hours of the morning. Mduduzi then got scared when he saw police vehicles passing going to the direction of Patwa.

[12] On the second day he phoned Accused 1 to inform her of what had happened. She told him she was busy she couldn't speak to him over the phone. He made an appointment to see her that afternoon. He however only went to see her the next day. Accused 1 was enraged and wanted him to explain why they killed the deceased. He told her that the Appellant shot the deceased by mistake. She told him that since there was no money found they must keep quiet about it. Accused 1 looked very scared due to the turn of events. He left but then came back to see her sometime later to ask for muti to remove the image of the deceased in his life. She gave her muti and instructions how to use it. He was then in contact with Accused 2, also known as Sixteen. Accused 2 kept on phoning him asking him how things were on his side. Accused 2 also asked him the same question. He told him to be silent about the whole thing. He never saw the Appellant again.

[13] He indicated that when they entered the premises of the deceased everybody's face was covered with a stocking except him. Further that Accused 2 was aware of where the deceased was staying and knew the area very well, although not where Accused 1's house was situated. He had to direct Accused 2 and the 4 other men to Accused 1's place as he kept on phoning for directions. He did not tell Mduduzi the reason why he asked him to accommodate Accused 2 and 3. Percy confirmed that the injuries on the deceased's body were caused by the hot iron.

[14] Accused 1's legal representative put to Percy that Accused 1 denies that she ever had a discussion about the deceased having money. It is the deceased who twice borrowed money from Accused 1 in the amounts of R300 and R400, which indicates that the deceased never had money in the first place. Accused 1 instead helped the deceased with her pension money. She never met any of the people Percy was talking about or knew him, except knowing him as a friend to one Frans Sithole ("Sithole") who used to reside at her house. She once heard him trying to recruit Frans to go and commit criminal activities with him and

chased him away. It was the only encounter she had with Percy. He never spoke to her nor come to her house after the deceased was shot. She denied dealing in dagga or that any firearm or ammunition was found at her place.

- [15] On cross examination by the Appellant's legal representative Percy confirmed that he did not report the matter to the police because he was scared of being shot by Accused 2. He was also not sure if he went to report to the police station, he was going to be arrested. He was told that the Appellant was going to deny knowing or meeting him. He confirmed that the use of the iron on the deceased was to try and get the information about the R3 Million. He denied that the shooting was part of the plan.
- [16] The deceased's wife confirmed that out of the Accused persons she only knew Accused 1 whom she referred to as sister-in-law. The deceased's mother shared the same surname with Accused 1's mother. On the day the deceased was murdered he woke up in the morning to go and buy feeds for the pigs. She heard him start the car, but it kept on idling for a long time. She went out of the bedroom to check and find out why he has not left. She opened the kitchen door to check in the garage and was confronted by two young men who ordered her to go back to the bedroom. They tied her hands with a masking tape and ordered her to lie on her stomach on the bed. They demanded a key to the safe that was near the door. Her husband had earlier in the morning removed the key and threw it on the table. One of the young man saw the key and asked if it was the key for the safe. The young man took the key, opened the safe and took the firearm out. They started demanding money, asking her to show them where the deceased put the money. They told her they did not come to hurt anybody they only wanted the money.
- [17] Whilst she was in the bedroom with the two, the other two had come into the kitchen with the deceased. He heard them saying to the deceased he must give them the money and also demanded firearms. She told them that her husband had only 1 firearm. It was at that stage that they took an iron and burnt the deceased with it, demanding the money. Even though the deceased's mouth was closed she could hear him cry. The deceased told her to give the men the proceeds from the sale of tomatoes which she did. It was not a lot of money. She offered them the deceased's vehicle. She then heard a gunshot from the kitchen. They took her out of the bedroom to the kitchen and told her that if she does not give them the money, they will make her lie next to her husband where he was lying dead. Prior to deceased being shot he told the young men that she can take them to Bellina to the deceased's sister who is keeping his R3 000.
- [18] They went with her outside the house where the deceased does his inyanga business. She did not know where the deceased kept his money from that business as she normally is not allowed to enter there. They brought her back to the house and told her to go into the bedroom. They took the deceased's cellphone, wallet, firearm, and drove away in his vehicle. The vehicle was later found by the police.

- [19] Under cross examination she explained that two of the young men were with her in the bedroom and the other two with her husband. She could not say how many of them were there. Prior to the incident she took Accused 1 as her sister, a sister-in-law. They used to be on good terms. She would confide on her if she had problems with her husband. She confirmed that on 15 July 2011 she had a problem with her husband and went to Accused 1. She did not sleep there but asked Accused 1 to accompany her back home so that Accused 1 can speak to her brother but she refused. She went back home alone. She denied ever not sleeping at home. It was put to her that the next day Accused 1, her brothers and the deceased held a family meeting. The deceased was fined R400 and he had only R200. She heard about the R3000 for the first time when the deceased told the intruders about the money that he gave to Accused 1 for safe keeping.
- [20] She further confirmed that the faces of the Accused were covered. However, one of the men removed his cover. It was put to her that Accused 1 was going to dispute that she was given an amount of R3000 by the deceased.
- [21] Mduduzi in his evidence confirmed that he was friends with Percy. They grew up together at Embonisweni. He knew Accused 1 as a person who sells dagga and the deceased as an Inyanga. Sometime on 21 July 2011, he got a call from Percy to come to his place urgently. He found Percy with three unknown young men. At Percy's request he agreed to accommodate two of the men at his place. He later fetched the two men when they now wanted to go to sleep. The two young men called each other Sixteen and Surprise. Those two men are Accused 2 and one other person who was not present in court. He only knew Accused 2. At 3:00 he opened the door for them and they left and he went back to sleep.
- [22] In the morning around 8:00, Percy came to his place, he was shaking and his pants wet. He asked for a cigarette and left saying he was going home to lie down a bit. Later he came back and told him that he and the young men he was with the previous day went to the deceased's place to rob the deceased of his money. Due to bad luck things did not go according to their plan. They entered the house and demanded the money from the deceased. The deceased told them that he did not have the money. They searched the house for the money and found a firearm instead in a safe. They took the firearm and threatened the deceased with it, as if they were shooting at him. They were not aware that the firearm had ammunition. A rear shot went off and shot the deceased. It was the Appellant that pulled the trigger. They thereafter went out took the deceased's motor vehicle and escaped.
- [23] At the time Percy related the story to him, he had already heard from kids at his school about the deceased having been murdered. He never again saw the two young men he accommodated at his place. The other person who was at his place besides Accused 2 was not in court. He could not remember the name of that person but recalled that they referred to each other as Sixteen and Surprise. Accused 2 was referred to as Sixteen and the other as Suprise. He however could not differentiate who was Suprise between the person who slept at Percy's place and the other one who slept at his place. The name Sixteen fascinated him and he wanted to know why Accused 2 had that name. The two were in possession of a black

refuse bag and tyre clamps for fastening wheel caps. Although they said they were going to saw gum trees, they had nothing in their possession showing that they were going to do so. He also confirmed that Accused 1 sold dagga. It was put to him that Accused 2 was going to deny that he knew him or that he was at his place.

[24] Mr Piet Nkosi from Ermelo Trust next to Ngodini, a self-employed mechanic and panel beater, was found in possession of the deceased's firearm and ammunition that was used to kill the deceased. He was prior to his testimony warned in terms of s 204 of the CPA against incriminating evidence and possible charges on count 3 and 4 if in his evidence he falsely replies questions posed to him. According to Nkosi the firearm was left at his place by Accused 2 who arrived with someone he knew. They asked him to look after the item which they left in a bag on the floor whilst they went to buy cigarettes. They never came back. He found out that what they left behind in the bag was a firearm. It was a pump gun with only 1 ammunition. He took the gun and went to hide it at a mountain nearby as he is very scared of firearms. Accused 2 came back one evening after 3 or 4 days accompanied this time by someone he did not know and demanded the firearm. He told Accused 2 that it was in the bush and he was not going to retrieve it because it was at night and dark. They left without it. The next day he went and retrieved it from the mountain as he promised Accused 2 that when they come back they will find it at his house. They never came back.

[25] The firearm was at his house for two weeks whereafter the police came looking for it. They handcuffed him and demanded the firearm. They also told him that there is a person in the police vehicle who needed to talk to him. He opened the police car and saw Accused 2 sitting inside. Accused 2 told him to give the police the firearm. He told the police that it was at the mountain. The police went with him to the mountains to look for it. Once there he told them that he actually took it home. They went back to his home where he took out the firearm and gave it to the police. The upper part of the firearm was cut in half, and the short part was still intact. He was arrested and locked up with Accused 2 who then promised to tell the police

that he was not involved. Accused 2 never did. The piece that was cut was still there. He never took the shotgun to the police because he thought that he might be in trouble with Accused 2 who might come back to look for it and might not like it if he hears that he took the firearm to the police.

[26] It was put to Nkosi that Accused 2 was going to deny coming with the police at his house and telling him to give the police the firearm. Further that Accused 2 doesn't deny that the police brought him to his place but denies telling him to give the police the shotgun or promising him to tell the police that he was not involved. Responding to questions posed on behalf of Accused 3 he said he knew who Surprise Ngwenya is, it is the person who accompanied the Accused 2 to his place, when he came for the first time. He confirmed that, that person was not in the dock.

- [27] Detective Sergeant Van Vuuren confirmed that Captain Magagula (Magagula) asked him and Lieutenant Joseph (Joseph) to accompany him to assist with a suspect, meaning Accused 2, who was to point out a firearm that was apparently used to commit murder. Accused 2 directed Joseph who was driving to Kabokweni until they reached a mountainous place turning into dirt roads. They stopped at a place next to a mountain. A black old man (that is Nkosi) was seated 10 meters from the vehicle. Magagula spoke to Accused 2 and told them that Accused 2 gave the firearm to Nkosi. Thereafter instructed him and Joseph to get out of the car. He and Joseph approached Nkosi and introduced themselves to him. Nkosi told them his name. He denied that he knew Accused 2. Magagula also alighted from the vehicle. More conversation took place between Magagula and Nkosi which he could not understand whereafter Magagula instructed him and Joseph to accompany Nkosi who had agreed that he knew about the firearm and was going to show it to them. They followed Nkosi to the back of the house. Nkosi searched underneath some scrap metal and took out a piece of a pipe and gave it to them. They examined the pipe and realised that it is the front part of the barrel of a gun. Nkosi told them that it was the only part in his possession.
- [28] They went back to the vehicle where Magagula was waiting. They showed him the pipe. There was further conversation between Nkosi and Magagula. Nkosi indicated that the rest of the firearm was up the mountain. They called for a backup that joined him and Joseph to take Nkosi up the mountain to look for the rest of the firearm. Nkosi directed them halfway the mountain, leading them through narrow tracks between the trees. He said that he hid the firearm there but could not find the exact spot. He started searching under the rocks acting as if he did not know where the firearm was. After searching the area with the backup uniform members the firearm was still not found. He told Nkosi that they were not going to leave until they
- have found the firearm and were going to call the dog unit to assist. Nkosi then confessed that it was not there but at the house.
- [29] They went back to Nkosi's house. They found the gun, a 12 gauge shotgun under the mattress, with the front part cut off. They took it to Magagula and arrested Nkosi for being in possession of an unlicensed firearm. It had no ammunition. Nkosi was handed over to the Kabokweni uniform police for them to open a docket and to book in the firearm together with the piece of barrel. He indicated that Accused 2 is known to him as Sixteen. It was put to Van Vuuren that Accused 2 was going to deny that they left the police station to go to Piet Nkosi's house. He was going to point out Steve's place and instead ended up at Nkosi's house. No questions were posed on behalf of the Appellant.
- [30] According to Captain Magagula, the investigating officer, he was involved in the arrest of Accused 2 and the Appellant after Percy implicated them after his arrest. He got information that Accused 2 was at Lehau. Accused 2 was known to him. He with Lieutenant Joseph and Constable Khumbai arrested Accused 2 at Lehau and read him his rights. Accused 2 told them that the deceased's firearm was with Nkosi in Ermelo. As it was already late Accused 2 was kept at the police station in Nelspruit. The next day he, with Sergeant Van Vuuren and

Lieutenant Joseph were taken to Nkosi's home at Engodini by Accused

2. Accused 2 pointed Nkosi's house to them. They called for a backup from Kabokweni Police Station. Nkosi was questioned about the firearm. Although Accused 2 told him that it was given to Nkosi, Nkosi tried to deny that. He instructed Van Vuuren and Joseph to go with Nkosi into his house to search for the firearm. They came back with a barrel that was cut off from the firearm. Nkosi tried to deny knowing where the rest of the firearm was, although Accused 2 confirmed that the barrel came with the firearm. Nkosi ultimately told them that the firearm was at the mountain. Joseph and Van Vuuren together with a backup went with Nkosi to the mountains and came back with nothing. They went back to the house and came out with the pump gun. Accused 2 confirmed that it was the pump gun he was referring to. He admitted that the firearm retrieved at Mr Nkosi's house is the firearm that was used to kill the deceased, which he left at Nkosi's house.

- [31] They arrested Nkosi for possession of a firearm without a licence. He instructed Phangane from Kabokweni to book Nkosi for the offence. The firearm was registered in the SAP13 book by Malinga from Kabokweni. He disputed what was put to Van Vuuren that when they left the police station with Accused 2 they were going to Steven's house but ended up at Mr Nkosi's house. He reiterated that Accused 2 gave them directions to Nkosi's house. Under cross examination he

denied that he asked Accused 2 for Steven and Surprise's cell phone numbers, and phoned the numbers or asked him to go and point out Steven's homestead.

- [32] Magagula confirmed that he is the one who arrested the Appellant on the night of 12 June 2012 at a certain house after receiving information that Appellant was at Burgersfort at a village called Cross River. He went there with Constable Van Vuuren and Mkhonza, after receiving information from Percy that Appellant was involved in the murder and robbery of the deceased. The same day at night Appellant was found and arrested in the area. He denied that Appellant was erroneously implicated by Percy, pointing out that Percy told him that he knew the Appellant and he believed him.

- [33] The conversation between him and Percy also led to the arrest of Accused 1. He confirmed that he was together with Mkhonza stationed at Kabokweni and that the deceased was unknown to him prior the incident but he knew Accused

1. Accused 1 was arrested after Percy confirmed that she was involved after they have received records of Percy's cellphone from Vodacom. The records indicated that Percy was talking to Accused 1 after the incident. The deceased's vehicle was recovered and identified by the deceased's wife at Kabokweni. The firearm and the barrel were sent for ballistic in a forensic bag. The ballistic report was confirmed that it refers to a plastic that was recovered from the body of the deceased during the postmortem. Under cross examination he confirmed that nothing was found on Accused 1. Accused 2 also confirmed to him that the firearm they got from Nkosi was the one used to kill the deceased.

The defence's version

[34] Accused 1 denied knowing anything about the deceased's murder or calling Percy to her house and telling him about a R3 Million that the deceased supposedly had and was playing around with or asking him to organise people to assist him to get the money from the deceased. She denied showing Percy an amount of R3 000 allegedly given to her by the deceased to keep. According to her the deceased did not have money. She actually paid an amount of R200 on behalf of the deceased to assist him to partly settle the amount of R400 his wife's family fined him. The deceased passed away before settling the shortfall. She denied having any knowledge about the meetings Percy alleged were held at her house with the other Accused to discuss the robbery of the deceased and that she gave muti to cleanse Percy after the deceased's murder. She denied knowing any of the Accused.

[35] She alleged that there was bad blood between her and Percy because she once chased him away from her home some days before, after she overheard him trying to hire one Francis Sithole ("Sithole") who stayed in her property, to go and steal. It was in 2010. Percy and Sithole were sitting outside and she was sitting nearby in the vicinity. She told Sithole that she does not want Percy at her house and when Percy came to her property she chased him away. From thereon Percy was no longer entering her place during the day. She would only hear Percy's voice talking at night and in the morning tell

Sithole that she has already told him that she did not want that person at her place. She then said Percy came only on that day when she chased him away, it was the very first time she heard him talking to Frans. That is the reason Percy hated her and implicated her in this incident.

[36] Under cross examination, she said she saw Percy for the first time when she chased him away for talking to Sithole about the job. She did not know his name. She only came to know that his name is Percy on the 1st day when Percy testified in court. She said she chased Percy away a year before the deceased passed away and it was possible Percy knew her very well. She denied that Percy was at her house numerous times. She pointed out that they stay very far from each other that is why they never see each other.

[37] Accused 1 called Sithole as her witness. According to Sithole he has been staying at Accused 1's property for 12 years. Prior to that he stayed with Accused 1's brother. He moved to Accused 1's place when the brother's place got sold. He was not paying rent. He knew Percy from seeing him at Accused 1's house since around

2002. Percy arrived one day at Accused 1's house and sat on a bench he had brought for him to sit. Percy told him that he was looking for someone to do work taking computers from schools. He said there is a special motor vehicle they will be driving which will be taking the computers to a place called Matsulu. He did not agree as he was still sick. Accused 1 overheard the conversation and chased Percy away. Percy did not take it kindly and never came back. He does not remember what year it was. He never saw Percy again. It could have been the previous year which was 2012 and when he said 2002 he really meant 2012. He could not say when exactly was Percy there. He denied Accused 1's version put to Percy

that there was another time that Percy visited Sithole at night and was told by Accused 1 that Percy was not welcomed there. He was not able to say what year or day it was when he appeared in court. He also did not know any of the Accused except for Percy. His evidence was not much of any assistance as he contradicted Accused 1 in relation to her evidence regarding Percy.

- [38] Accused 2's evidence in chief was practically a bare denial. He denied everything that was said by Percy and his friend Mduduzi, regarding the events prior and during the commission of the crime. He denied that he was referred to as Sixteen, accommodated at Mduduzi's house the night before the crime was committed or going to the deceased's house with Percy and the other Accused when the crimes were committed against the deceased and his wife. He denied that he left a firearm with Piet Nkosi and came back later to look for it. He however agreed that he was there at Nkosi's place with the police when Nkosi gave the firearm to the police. He denied that he directed Captain Magagula and Lieutenant Joseph to Nkosi's

place or had intended to go there and told Nkosi to give the police the shotgun. He further denied the evidence by Detective Constable

Van Vuuren who alleged to have been introduced to him as Sixteen. Also, that he pointed Nkosi to the constables or confirmed that the firearm handed in by Nkosi was ever in his possession.

- [39] He confirmed that after the firearm was retrieved from Nkosi they went back to the police station. He disputed Captain Magagula's evidence, mainly that he agreed to go and point out where the firearm was after which they went to Nkosi's house. According to him when they left the police station they were going to Steven's parental home. Magagula instead asked for Steven and Surprise's numbers which he then gave to Magagula. As to how they ended up going to Nkosi's home he does not know. He alleged to have never handled a firearm all his life. He explained how he was arrested and

hit by Moloisane, demanding a firearm from him, afterward put in the cell until the next day. Magagula and a white policeman took him up the lift, put him in a place where there was a chair, and tortured him sitting on a chair. A plastic bag was put over his face. He couldn't breathe and he urinated on himself. Magagula told him to produce the firearm. He denied having handled a firearm ever. He was then taken to Nelspruit. He did not know Accused 1 but the Appellant was known to him. He and the Appellant stay at Clau-Clau and Mashonamini. He also knew Percy Dube because his father stays in the vicinity of his home. He did not know Mduduzi. He denied being involved in the murder and robbery of the deceased on 22 July 2011 but to have been at home at Mashonisani on that day.

- [40] He under cross examination stated that he only knew Percy by sight. He did not know either Magagula, Nkosi or Van Vuuren prior the arrest. All of them Percy, Mduduzi and Nkosi and Van Vuuren were lying about him. He repeated his denial that when he left the police station with Magagula and Van Vuuren, he was going to show them Nkosi's place but to point to them Steve's parental home. He said he was surprised by Percy's allegation that he was with

him, and met him for the first time, referred by Bonga. Regarding Mduduzi, he refuted that it could be possible for Mduduzi to recognise him after seeing him once 2 years ago as he alleges, and at night. He said his name was Louise and his nickname is Mashabane and not Sixteen and denied that anybody knows him by that name. He confirmed that him and the Appellant were acquaintances, that he knows Steve as a Muslim and they attend church together. He had phone numbers of both Steven and Surprise who is the Appellant.

Magagula

told him that they were also sought for the same case he was arrested for, that is why he wanted their phone numbers. He confirmed taking them to Steve's parental home. He said after he had pointed out the house the police spoke amongst themselves and left. He was then surprised when they arrived at Nkosi's home. The two policemen alighted and came back with Nkosi holding the firearm. He denied seeing them allegedly coming twice to the vehicle with Nkosi prior to the recovery of the firearm.

- [41] He could not remember what he did on the date of the incident he assumed he would have been at home as he does not like going around except to church or playing soccer. He cannot however confirm as a matter of fact that he was at home where he stays with his parents. He does not remember who was with him or what he did on that day. He denied being involved or bringing the Appellant and Steven for the robbery of the deceased, driving the deceased's vehicle when they left the deceased's home or leaving the firearm at Nkosi's home.
- [42] Appellant's evidence was that all the allegations against him were new to him. He had no knowledge of them. He from the Accused persons only knew Accused 2 who stays about 500 meters from his home. Percy was not known to him. He first saw Percy for the first time at court. He denied being involved in the murder or robbery of the deceased and alleged to have heard all that for the first time in court. He denied meeting Mduduzi or being accommodated at Mduduzi's place but to have met him for the first time at court. He denied that he brought a firearm or that he owned one. According to him he did not know the deceased's place of resident. He did not together with Steve accost the deceased as Steve and him were not in good terms. There was therefore nothing that they could have done together. Steve once stabbed him when they were still scholars, so he is an old enemy of his. He did not shoot the deceased and has never handled a pump gun in his life. On the date of the incident he was supposed to be at home. That date was a Thursday he was therefore for sure at home and did not leave the homestead. From the beginning of 2011 he was working at UTI. In April 2011, he found himself another job at Melkas until June 2011. Around July he was desperate for a job and used to stay at home.
- [43] Regarding the name of Surprise whom his legal representative indicated was mentioned as Surprise Ngwenya, he alleged that he knows Surprise Ngwenya to be Steve's friend. Percy confuses the name of Surprise, confusing him with the other Surprise as Accused 2 never introduced him to Percy. He confirmed that during Percy's testimony he was aware of Surprise Ngwenya, Accused 2's friend, but that information was not mentioned or put to Percy. Also, it was never put to Percy that he might be confusing him with someone else. He

pointed out that Percy mentioned that he did not know him and only came to know him through Accused 2 and questioned that if he is the one that Percy alleges to have accommodated at Mduduzi's place

why couldn't Mduduzi identify him in court. He confirmed that Percy only mentioned the name Surprise not Ngwenya referring to him and that the name Surprise Ngwenya was brought up only during Nkosi's testimony. He also could not say if Percy knows Surprise Ngwenya.

[44] He confirmed that during July 2011 he was not working and desperate for a job. He had no income. He was asked to confirm that he is saying that because 22 July 2011 was a Thursday it means that he must have been home and not saying as a matter of fact he was at home. His response was that it was the time when his contract at Melkas came to an end. He then most of the time stayed at home. He could not as a matter of fact say that on that day he was at home. He however normally would be at home. It was not normal that during the week he would not be at home at the time it is alleged that he was at Etwatwa, it was already late.

[45] The Appellant is appealing his conviction on the following grounds: that

[45.1] Percy Dube, the witness implicating him was a single witness and an accomplice, who did not muster the threshold of the cautionary rule against the acceptance of the evidence of a single witness regarding his identity and being also an accomplice. Percy's evidence on his identity was not corroborated by Mduduzi Madonsela or the deceased's wife, the only witness who could have done so.

[45.2] The trial court incorrectly rejected his defence of an alibi, that he was not at the deceased's place on the date the deceased was murdered. He denied being one of the intruders at the deceased's place and that he is the one that shot the deceased.

[46] The Appellant also contrariwise contends now on appeal, as an alternative ground, lest his alibi does not pass muster, whether the trial court correctly found that the shooter (whom the state contends is the Appellant) had the intention to kill the deceased. It is argued that another reasonable inference to be drawn from the evidence was that the shooter accidentally shot the deceased. In that regard the state failed to disprove that Plaintiff's killing of the deceased was not intentional but a mistake. A defence that was not raised by the Appellant or any of the Accused during the trial except for the alibi. The Appellant further pleads that in the event that this Honourable Court finds his conviction by the trial court on

that standpoint to have been correct, that the court make the following order:

46.1 That the conviction and sentence on count 1 for murder is set aside and replaced with a conviction of culpable homicide.

46.2 That the Appellant is sentenced to 8 years imprisonment on count 1.

46.3 That any sentence the Appellant receives on count 1, run concurrently with the sentence on count 2.

Legal framework

[47] It is trite that on appeal, the court considers the trial court's finding of fact inclusive of credibility findings from the point of view that unless any material misdirection can be identified it is accepted that the trial court's conclusions are correct.[1] In *S v Manyane and Others* [2], the court held that:

"This court's powers to interference on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong." (my emphasis)

[48] Consequently, even where the trial court has erred in relation to the onus of proof, its credibility findings are still important in so far as they are not affected by the misdirection. [3] If the appeal court is in doubt on the finding of fact by the court a quo, the latter's decision remains.

[49] In relation to the onus of proof and the weighing of the evidence led before the court a quo, in *S v Van Der Myden*, [4] the following was held in the Headnote:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he or she is entitled to be acquitted if it is reasonably possible that he or she might be innocent. These are not separate and independent tests, but the expression of the same test ('the proper test') when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. The process of reasoning which is appropriate to the application of the proper test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored." (my emphasis)

[50] It is therefore commonplace that prior the return of a conviction, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put

forward might be true. The point that the two are inseparable means that only if it can be said that there is no reasonable possibility that the alleged innocent explanation might be true, can the court reach a conclusion that the guilt of the accused has been established beyond reasonable doubt. As declared, each being the logical corollary of the other, and in whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. The trial court is therefore enjoined to satisfy itself upon an appraisal of all the evidence – not just the evidence of the single witness and or accomplice – that the State proved its case beyond a reasonable doubt.

- [51] Whether or not this has been achieved by the court a quo is contested firstly on the basis that the evidence of Percy implicating the Appellant, being a single witness and an accomplice, failed to muster the threshold of the cautionary rule against the acceptance of such evidence as it was uncorroborated, specifically by Mduduzi Madonsela or deceased's wife, the only witnesses who could have corroborated the witness.
- [52] In terms of s 208 of the Act an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.”[5]
- [53] The trial court was therefore confronted by the fact that Percy was not only a single witness but also an accomplice. The developments on the cautionary rule in relation to a single witness is better elucidated in *S v Sauls*[6] where the court, faced with the same challenges as in casu in that it had to, consider amongst others, if the trial court erred (a) in accepting as truthful evidence of a single eye-witness (b) in rejecting the stories told by each of the appellants as being false beyond a reasonable doubt and c) even if the evidence of a single witness was properly accepted as true was the inference of guilt drawn by the trial court against the appellant justified? primarily cautioned that it had been held that “such a rule does not replace common sense,”
- [54] Diemont JA in *Sauls supra*, also referred to what is regarded to be a well-known passage by De Villiers JP in *Rex v Mokoena* (1932 O.P.D. 79 at 80) that reads:
- “the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by sec. 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect”*
- [55] By corroboration it is meant other evidence which supports the evidence of the accomplice and renders the evidence of the accused less probable on the question in issue. Absence of corroboration per se does not render unreliable the evidence of a single witness and or an accomplice that is clear and satisfactory. The trial judge has to weigh the whole evidence, consider its merits and demerits and, having done so, decide whether it is trustworthy and whether, even though there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.[7]

[56] It is however also pointed out by Diemont J that “the cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA, in *Nhlapo v Rex* (A.D. 10 November 1952) quoted in *R. v Bellingham* 1955 (2) SA 566 (AD) at 569.

[57] In *S v Leve* supra, the court went on to state that in para 8:

‘If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.’

[58] The application of the cautionary rule to the evidence of an accomplice was in *S v Hlapezula and Others* 1965 (4) SA 439 (A) at 440 D-H, explained as follows:

‘It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following

factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly. . . there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him; see in particular *R v Ncanana*, 1948

(4) SA 399 (AD) at 405-6; *R v Gumede*, 1949 (3) SA 749 (AD) at 758; *R v Nqamtweni and Another*, 1959 (1) SA 849 (A) at 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned.’

Analysis

[59] The court a quo was conscious of the challenges inherent on such evidence, as it sought direction from the same authority in considering the matter. The dictum in *Hlapezula* generally provides a simpler exponential perspective and a clearer guidance on the application of the rule when weighing the single witness's evidence who is as well tainted, as an accomplice. The expected result however remains the same, that is proof beyond reasonable doubt and not satisfaction of the cautionary rule per se.

- [60] After weighing of the whole evidence, exercising the necessary caution as mooted or advocated by the relevant authorities, that is, subjecting the whole evidence to the relevant scrutiny, the court a quo found that the guilt of all the Accused including that of the Appellant was proved beyond reasonable doubt, notwithstanding that Percy a single witness and an accomplice. It found his evidence to be satisfactory and clear in all material respect, hence reliable.
- [61] As an accomplice, the court highlighted the fact that Percy was already tried, convicted and sentenced. He had pleaded guilty. In that instance the usual dangers burdening an accomplice not pertinent, which was precisely correct. I must also add the fact that prior the incident, all the implicated persons, except for Accused 1, were unknown to him, including those that were mentioned by the Accused like Surprise Ngwenya and Nkosi. This was also confirmed by the Accused. He therefore had no sinister motives to implicate any of the Accused. In Accused 1's instance, whom Percy knew, the allegations she made to contest Percy's implication of her in the matter make no sense, that Percy incriminated her, working in cohorts with these young men, who robbed and murdered the deceased because she once chased him away from her property. Frans Sithole's evidence who was supposed to corroborate her evidence was more ridiculous, incomprehensive and a total disaster.
- [62] The court a quo found Percy's evidence to be also reliable, therefore, the fact that he was an accomplice not to have tainted his evidence, notwithstanding being also a single witness. He satisfactorily and clearly relayed with certainty how the whole plan was hatched with Accused 1 giving information on the deceased and instructions on how it was to be implemented. How he recruited Accused 2 who in turn recruited the Appellant and Steven who were both also unknown to him. They were all introduced to Accused 1 were they twice met at her house. The three came back and the plan was executed by the four of them that ended with the fatality and the robbery of the deceased.
- [63] The testimony of the deceased's wife, who is on the other side of the spectrum, even though she could not identify the perpetrators per se, that 4 young men entered their home in the early hours of the morning and perpetrated these offences, with two of them who were busy with her husband in the kitchen whilst the other two were with her in the bedroom, corroborated Percy's evidence. She stated that the two that were with her in the bedroom got the safe key, opened it and discovered the deceased's shotgun. Percy identified the two to have been him and Accused 2. According to the deceased's wife, the shotgun was however taken by a 3rd intruder who whilst brandishing it went to the kitchen where her husband was being tortured, after which a shot was fired killing her husband. Same narration as Percy's testimony. Percy identifies the 3rd intruder who could not have been Accused 2 or himself to have been the Appellant as Steven remained in the kitchen with the deceased.
- [64] Furthermore, according to Percy and the deceased's wife the perpetrators escaped with the shotgun and the deceased's vehicle. It was proven that the deceased's shotgun was then found in Nkosi's possession whose home was pointed out by Accused 2 who had then asked Nkosi to give the police the firearm. Magagula confirmed that Accused 2 told them that the

shotgun was with Nkosi. Nkosi confirmed that the pump/shotgun was left at his place by Accused 2 and another young man he knew. Accused 2 came back 3 days later to collect the firearm. He was now with another person he did not know and he did not give it to them as it was late for him to go and retrieve it from the mountain, which he did the next day but they never came back. The firearm was as per admissions made and forensic reports the deceased's shotgun stolen from the deceased's

home and from which the fatal shot was discharged. This together with the evidence of the deceased's wife that the intruders ran away with the deceased's shotgun and bakkie corroborated Percy's evidence that the Appellant was holding the deceased's shotgun when they fled the crime scene and Accuse 2 driving his bakkie. The involvement of the Appellant cannot be disputed.

[65] Nkosi also alleged that the name of the person who was with Accused 2 on the day the firearm was left at his place is Surprise and was not in court. He was told or asked if it was Surprise Ngwenya and he was not sure in that regard and his response incoherent. However mainly certain that, that the Surprise he knew was not in court. It was then argued by Appellant's counsel that indeed the Surprise Ngwenya referred to was not in court and was being confused with the Appellant. However, the Surprise who was in court that was alleged to be involved is the Appellant, whose name is Surprise Nzima. Nobody suggested or mentioned the name of Surprise Ngwenya but the Appellant's legal representative. The allegation of a confusion has no merit. Nkosi knew this person and referred to the fact that he did say the person's name is Surprise to which the person agreed. The insistence on the surname of Ngwenya was that of the Appellant's legal representative. I am satisfied that as remote these facts and Nkosi are to what Percy had testified about, they are but very significant facts in that Nkosi does clearly

identify Accused 2 to be the person who left the shotgun at his place which most significantly was proven to have been stolen from the deceased's home and to have been used in the deceased's murder. All these facts corroborate Percy's evidence of Accused 2 and Appellant being involved in the murder and robbery committed against the deceased.

[66] Percy had further mentioned how he got Accused 2 who is known as Sixteen involved who in turn brought with him the Appellant and a person called Steven. In their evidence both Accused 2 and Appellant indicated that they know and stay close to each other including Steven who Accused 2 admitted was his friend. It cannot be just by chance that they were together mentioned to be involved. Moreover, the person pointed out thereafter by Accused 2 is found in possession of the deceased's shotgun and confirms that it is Accused 2 who left the firearm at his place. The discovery of the shotgun corroborates Percy's allegation that Accused 2 and 3 were involved in the robbery and murder of the deceased.

[67] In further corroboration of Percy's evidence the deceased's wife testified of the intruders being four young men, two of whom were busy with her whilst the others were busy with her husband. They demanded money, tortured and murdered her husband. They had their faces covered. It was also her evidence that one of them did not have his face covered, a fact that Percy attested to, that he was not wearing a mask, although the other 3 did. She nevertheless

did not alter her evidence but confirmed that she still could not identify any of the intruders.

All this evidence of the other witnesses supports Percy's evidence, rendering the evidence of the Appellant on his non-committal alibi less probable.

[68] According to Percy he saw the Appellant for the first time when Accused 2 brought them to Accused 1's house so that they can hear for themselves what was the plan and the mission in relation thereto. Only the three of them came back a day before the incident. One of them stayed with him that is Steven whilst he asked Mduduzi his friend, to accommodate the other two that is Accused 2 and the Appellant, whom he confirmed to be nicknamed Sixteen and Surprise. According to Mduduzi who did not know these people, he was interacting with them for the first time that night. He heard the two referring to each other as Sixteen and Surprise. He was more fascinated by the name Sixteen whilst aware that it was in reference to Accused 2. He was however unsure about Surprise who it seemed to him was not in court, although the name was mentioned. Both men left at 3:00 am, tying in with the plan as alleged by Percy. It must be taken into consideration that it is Percy who sent the two to Mduduzi. As Mduduzi was more fascinated by Sixteen, he probably might not have paid much attention to the Appellant. Appellant is the only one who could have been the Surprise referred to. Importantly, none of these witnesses referred to Surprise Ngwenya, nor was the name put to them to indicate that they might have confused Surprise Ngwenya for the Appellant whose real name is Surprise Nzima.

[69] It is nevertheless of material importance that Percy, all throughout was involved and working with Accused 1 and 2 including the Appellant in fulfilling the plan. There is no possibility that he would be mistaken in identifying any of them, specifically the Appellant. He had seen the Appellant twice including when they executed the plan. He did not even require his evidence on the involvement of the Appellant to be corroborated as it was clear and satisfactorily on all material aspects. Mduduzi played a very limited role in the whole matter. His uncertainty and unclear evidence in identifying the Appellant whose name is indeed Surprise is therefore not of any material effect to Percy's evidence.

[70] This court as an appeal court is mindful that when an appeal is centred on the issue of corroboration, the appeal court would not lightly interfere with the factual findings of the trial court unless they are manifestly wrong or are based on the wrong premise. It has to be borne in mind that it is the trial court which was steeped in the atmosphere of a trial. The trial court saw the witnesses and observed their demeanour. The trial court was in the advantage position to believe or disbelieve the witnesses[8].

- [71] The argument therefore that Percy's evidence should not have been found to be reliable as he was a single witness and an accomplice whose evidence was not corroborated has no merit and not supported by the whole evidence that was led. There were no factors that genuinely militated against his credibility. On the other hand the contestation of Percy's evidence by each of the Accused lacked any substance and the alibi allegations correctly found to be devoid of materiality and genuineness. In meeting the state's proven case the Appellant could not say with any conviction what his alibi was, whether or not he was indeed at home, leaving no reasonable possibility that the alleged innocent explanation he put forward might be true. He was non-committal about what he was doing on that day and night in question, his explanation lacking transparency and clarity. The totality of the evidence considered in conjunction with his non-committal alibi excludes any reasonable doubt about his guilt.
- [72] If the conviction is sustained the Appellant has submitted to be amenable to a finding of guilt on culpable homicide arguing that the state failed to disprove that his killing of the deceased was not intentional.
- [73] The court a quo was correct in its pondering on the matter to jettison the narration that the killing of the deceased was discussed and resolved not to be part of the plan. However, that, since it was agreed that the weapon brought by Accused 2 and carried by the Appellant was to be used to scare the deceased to make him surrender the money whilst being also aware that the deceased had a firearm and a possibility of resistance very high, they should have contemplated the likelihood of the use of the mentioned firearms with a shootout ensuing which may result in fatality. As a result, their failure to do so is no excuse to liability to what ensued. The court a quo was also not convinced of their conviction to the alleged decision looking at their brutal conduct of burning the deceased with an iron, the gruesome wounds that were inflicted and their association with the act, to achieve their plan. The extent of brutality applied contradicts the assertion of an intention not to hurt or kill the deceased. Such was foreseeable and they associated themselves with the possible outcome.[9] The court a quo was correct to find the shooting of the deceased by the Appellant to have been intentional and all to have associated themselves with the deed and the outcome.
- [74] Consequently, in the absence of any misdirection on the court a quo's finding of facts or reasoning on its decision not to place any probative value on the Appellant's version, the conviction stands.

[75] The following order is as a result made:

1. The appeal is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree,

M M D LENYAI

I agree

G N MOSHOANA

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[1] see S v Dlumayo 1948

(2) SACR 677 A 696-699; Mhlumbi and Others v S 1991

(1) SACR 235 (A) 247 (g)

[2] 2008 (1) SACR 543 (SCA)

[3] S v Tshoko 1988

(1) SA 139 (A) 142F-143A

[4] 1999 (1) SACR 447 (W)

[5] S v Stevens 2005(1) All SA 1 (SCA) at par [15].

[6] 1981

(3) SA 172 (A) at 180e

[7] Supra at 180d

[8] S v Francis 1991(SACR 198(A) at 2014D.

[9]S v Ngubane 1985

(3) SA 677 (A) at 685 F

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