

SOUTH AFRICA / JUDGMENT

S v Nquphe and Another (CC26/2020) [2020] ZAECGHC 116 (1 October 2020)

[2020] ZAECGHC 116

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Mtshabe

CASE / FILE NUMBER

CC26/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)
CASE
NO: CC26/2020
DATES
HEARD: 11, 12, and 13/8/2020
DATE
DELIVERED: 1 October 2020
In

the matter between:

THE
STATE
and
SIWESIHLE
NQUPHE
ACCUSED 1
SIMTHANDILE
VUMENDLINI
ACCUSED 2

JUDGMENT

MTSHABE AJ:

[1] The accused were each charged with the commission of (3) three criminal offences. They are:

[1.1] House breaking with intent to commit robbery;

[1.2] Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977; and

[1.3] Murder.

[2] It is alleged that on 4 October 2019 and at or near number 15 McGowen Street, Grahamstown in the district of Albany, the accused did unlawfully and intentionally break/open and entered the house of David Hughes with intention to commit robbery. That is in respect of Count 1 (house breaking with intent to commit robbery). It is further alleged that on 4 October 2019 and at or near number 15 McGowen Street, Grahamstown, in the district of Albany the accused unlawfully and with the intention to rob assaulted David Hughes and did there and then with force and violence, take from him the items listed in the annexure “A”. The items listed in annexure “A” of the INDICTMENT are:

ITEM

VALUE

(a) Lenovo laptop (small)

R 5 000-00

(b) Lenovo Laptop (big)

R7 000-00

(c) Mobcell i cellphone

R400-00

(d) Cash R5 000-00

(e) Onyx black stone wedding ring

R1 000-00

(f) 2x Vietnam bank notes

unknown

(g) Labrador pin

unknown

The total

R18 400-00

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- [3] It is alleged that the aggravating circumstances were present in that the accused inflicted dangerous bodily harm to the said David Hughes (deceased) and or wielded dangerous weapons being a harmer and a sword before/after/ during the commission of the offence. It Is alleged further that on 4th October 2019 and at or near number 15 McGowen Street, Grahamstown, in the Magistrate district of Albany, the accused did unlawfully and intentionally assaulted the deceased, resulting in his death on the 17th October 2019.
- [4] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 OF 1977, as emended states the following:
- [4.1] Accused number 1 used to work for the deceased. He conspired with accused No. 2 and a companion to rob the deceased.
- [4.2] On the date of the incident, the accused armed themselves with a harmer and proceeded to the house of the deceased. Accused number 1 knocked at the front door and the deceased opened him while accused number 2 entered through the back sliding door.
- [4.3] Upon entering the house, the deceased recognized accused number 1. They attacked him using a harmer and another sharp instrument that they found inside the house. He sustained serious injuries.
- [4.4] They overpowered him and took the items listed in annexure "A" (I have referred to items in the preceding paragraphs). They then left him for dead but before taking all of his wedding ring from his finger.
- [4.5] The deceased was found with serious injuries but still alive. He was sent to Settlers Hospital and later transferred to Livingstone Hospital, Port Elizabeth, where he succumbed to his injuries on 17 October 2019.
- [4.6] The post-mortem examination was conducted on the body of the deceased and the doctor concluded that the cause of death was complications following blunt force trauma to the head and body.
- [4.7] At all material times the accused in concert and in the further reference of a common purpose to commit the crimes mentioned in Count 1-3.
- [5] Accused Number 1 pleaded guilty to counts 1, 2 and 3. Accused number 2 pleaded guilty to count 1 and 2 and he pleaded not guilty to count 3 (murder).

- [6] Advocate McConnachie who appeared on behalf of accused number 1 informed me that the Plea of accused number 1 are not in accordance with his instructions in so far as pleading to counts 1 and 3. He then requested to approach the accused for further instructions.
- [7] The charges were put afresh to Accused No. 1. In count 1 accused number 1 pleaded not guilty and stated that he pleads as follows: "House breaking with intent to steal" no to commit robbery as indicated in the indictment. In respect of count 3 (murder) he pleaded not guilty. As indicated above Accused No.1 1 pleaded guilty to count 2 which is robbery with aggravating circumstances as defined in section 1 of Criminal Procedure Act 51 of 1977."
- [8] Accused number 2 was legally represented by Mr Charles.
- [9] Accused number 1 submitted a Plea explanation in terms of section 112 and 115 of Criminal Procedure Act 51 of 1977 which reads as follows:

Plea to sections 112 and 115 of Criminal Procedure Act 51 of 1977

"[9.1] I hereby admit to my involvement in the events at the date and place as referred to in the indictment.

[9.2] I was at the time employed by Dayne Hughes, the stepson of the deceased, who lived in an adjacent property to the deceased's

home.

[9.3] On 2nd October 2019 I was asked by Dayne Hughes to arrange for someone to assault the deceased on the pretext of robbing him.

[9.4] His instructions were that the deceased should be rendered unconscious and should require hospitalization but should not be killed.

[9.5] I am uncertain why employer wanted the deceased to be attacked but I was aware that there was tension between him and the deceased relating in inter alia to his mother and his brother who was also a stepson of the deceased.

[9.6] I made the arrangements as requested by my employer with Accused No. 2 who is my stepbrother and a third party who was not ultimately involved, emphasizing that the deceased should not be killed.

[9.7] The attack was to be timed for when the deceased was alone in the house and was initially planned for the following day but eventually only happened on Friday 4 October 2019.

[9.8] It was carried out by Accused number 2 after my employer, Dayne Hughes, had discussed the modus operandi with us. He was armed with a harmer supplied to him by my employer, Dayne Hughes, on the day of the attack.

[9.9] A role was to be a decoy for Accused number 2 on the pretext of borrowing a guardian implement for the deceased whilst Accused number 2 entered the deceased's house through another entrance. I was not going to play any further part in the attack or robbery.

[9.10] The deceased refused to lend me the implement as requested saying that my employer should requested the implement himself.

[9.11] After leaving and returning to my employer's property I heard Accused number 2 calling me from the deceased house and I entered the deceased house by climbing through a broken window.

[9.12] After entering the deceased's house I found that Accused number 2 and the deceased were grappling on the floor and that the deceased was bleeding profusely from a head injury.

[9.13] Accused number 2 asked me for assistance in subduing the deceased and I did so by striking the deceased twice on his one arm with a sword, the blade section of which was contained in a scabbard.

[9.14] The deceased became unconscious and Accused number 2 and I then gathered items from different parts of the house before leaving with the stolen property.

[9.15] I do not dispute the amended list of stolen property as appended to the indictment except for the mobicell cellphone which was my property and had been placed in the possession of the deceased before the incident. I was subsequently informed that the cell phone had been recovered from the home of my employer Dayne Hughes.

[9.16] I personally only stole R420,00 in cash which I removed from the deceased's wallet and two Lenovo laptops one of which was taken from me by Accused No. 2.

[9.17] Before leaving the deceased's property I also picked up the broken handle of the harmer that was used by Accused No. 2 in the attack on the deceased which I disposed of while No. 2 and I were en route back to our homes after the attack.

[9.18] I was arrested in connection with the incident on 6 October 2019 when I admitted to my involvement to the events in question.

[9.19] In making the arrangements for the attack on the deceased and in participating to the extent that I did, it was never my intention that the deceased should be killed nor did I foresee that he might die as a result of the attack or reconcile myself with such possibility and I did not personally inflict any fatal injuries on the deceased.

[9.20] I admit that I at all material times acted intentionally and with knowledge of wrongfulness.

[9.21]

I, therefore plead as follows:

Count 1: guilty of housebreaking with intent to steal;

Count 2: guilty of robbery with aggravating circumstances;

count 3: not guilty of murder.”

[10] The second Accused’s statement in terms of section 112 of Act 51 of 1977 reads as follows:

“I, Simthandile Vumendlini, do hereby state as follows;

[10.1]

I am charged with the following offences:

Count 1: House breaking with intent to commit robbery in that on or about 4th October 2019 and at or near No. 15 McGowen Street, Grahamstown, in the district of Albany, I unlawfully and intentionally broke and entered the house of David Hughes with intent to commit robbery.

Count 2: Robbery with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act 51 of 1977, in that on or about the date mentioned in count 1, I unlawfully and intentionally assaulted David Hughes and did there and then with force and violence, take from him the items listed as per annexure “A”.

Count 3: Murder in that on the date and place mentioned in count 1, I unlawfully and intentionally assaulted David Hughes, an adult person, resulting in his death on 17th October 2019.”

[10.2] I fully understand the content of the charges against me, as well as the provisions of section 51(1) of Act 105 of 1977 regarding the applicable prescribed minimum sentences in this case.

[10.3] I make this plea explanation with my own free will and without being unduly influenced thereto.

[10.4] I plead guilty to counts 1 and 2 against me.

[10.5] The facts upon which I plead guilty are set out hereunder:

[10.5.1] The co-accused in this matter is my brother. My brother was working for the deceased and the deceased’s son Dayne. My brother informed me on Thursday the 3rd October 2019, that he has a job for me and that I should accompany him to his work place the following day which was the Friday 4 October 2019. My brother didn’t explain to me the nature of the job and I also didn’t ask him. The following day I went with my brother to his employment. We met the deceased’s son Dayne. Dayne told us that he wants us to commit a robbery at his father’s house, the deceased. Dayne told us where the items in the house were and that he wanted us to rob. Dayne further told my brother to use the front door and that I should use the back door to enter the house. Dayne told my brother to knock on the front door and ask for a tool that would make his father go to look for it at the back yard. Dayne also gave me a harmer that I should use to assault his father.

[10.5.2] My brother and I then went to deceased house as we were told to do by Dayne. I jumped over the fence at the back of the yard, I left my brother at the front door. I saw the deceased came out of the back door that is when I assaulted him with the harmer about three times next to the neck and shoulder. The deceased ran to the house. I followed the deceased into the house. The deceased and I inside the house. At that stage my brother was not inside the house. I managed to tackle the deceased. I then again assaulted the deceased with the harmer on his forehead. I assaulted the deceased once with the harmer on his forehead. I lost the front part of the harmer as I was assaulting the deceased on his forehead. I started looking for the front part of the harmer but could not find it. It was at that stage that my brother entered the house. My brother also assaulted the deceased. I think the deceased passed out after my brother assaulted him. We both ransacked the house. I took two laptops, a cellphone and some cash. May brother was busy taking items from the other room. I left after I took possession of the items. The deceased regained consciousness when I left the house and it was then when my brother again assaulted the deceased with a wooden object that is in the form of a plank. I left my brother inside the house whilst he was still busy assaulting the deceased. I left and waited for my brother at the corner of the street. My brother joined me after a while. I left one laptop in the bush but returned later to fetch it. I sold both laptops. One laptop was recovered by the Police. I was arrested on Sunday the same weekend of the incident. The deceased's son Dayne is living opposite the deceased's house. My brother took

cigarettes for Dayne during the robbery. I decided to cooperate with the Police. I told the police everything. I even made a confession to assist the Police with their investigations.

[10.6] I admit that the intention was to go and break into the deceased house and thereafter to rob him.

[10.7] I admit that I acted in concert with my brother to break in and rob the deceased. I admit that it was never my inventions to kill the deceased. I further admit that killing deceased was never part of the plan.

[10.8] I admit that the deceased was David Hughes, a 72 years old male person.

[10.9] I admit that the main cause of death of the deceased was complications following blunt force trauma to the head and body.

[10.10] I admit that the injuries reflected in the medico-legal post mortem report, death register No. GEDR 510/2019, were sustained by the deceased David Hughes during the incident, that the contents of the postmortem report is correct and that it is hereby admitted as exhibit "E".

[10.11] I admit that the deceased die on the 17 day of October 2019 at Livingstone Hospital in Port Elizabeth.

[10.12] I admit the deceased sustained no further injuries from the time of

the assault until medical practitioner, Dr Gregory Hanslo, performed the postmortem examination on the body of the deceased on the 23rd day of October 2019.

[10.13] I admit that the photo album and key thereto, are correct and is admitted as Exhibit “F”. The item in photo 10, described in the key as sword with a carved wooden handle and wooden pouch, is

the object within which my brother beat the deceased.

[10.14] I regret my actions and wish for the court to have mercy on me.

[10.15] I know and understand the consequences of a plea of guilty and that

is my instructions to my Counsel. The statement was signed by Accused No. 2 on 5 August 2020.

[11] The State did not accept the pleas of guilty with the result that the pleas of not guilty were entered, but the admission made in the respective plea explanations of both accused stand.

[12] Certain admissions were also made in terms of section 220 of the Criminal Procedure Act, in the main relating to the identity of the deceased as David Hughes, a 72 year old male person, that the main cause of death of the deceased was “complications following blunt force trauma to the head and body”. The injuries reflected in the medico-legal postmortem report, death register No. GEDR 510/2019, were sustained by the deceased David Hughes during the robbery, that the contents of the postmortem report is correct and is thereby admitted as exhibit “E”, that the deceased died on the 17th day of October 2019 at Livingstone Hospital in Port Elizabeth, that the deceased sustained no further injuries from the time of the robbery and assault on him, until medical practitioner Dr Gregory Hanslo, performed the postmortem examination on the body of the deceased on 23rd day of October 2019. That the photo album and the key thereto, are correct and are admitted as exhibit “F”. The item in photo 10 described in the key as a sword with a carved wooden handle and wooden pouch was admitted, as the object which Accused No. 1 used to beat the deceased.

[13] In order to prove its case, the State called five witnesses.

[14] The first Sates witness was Mrs. Jennifer Hughes who is the wife of the deceased. She testified that on 4th October 2019 she left for work at about 07H45 in the morning. She left her husband alone at home with the dogs. She testified that she locked the security gate at the front door. She informed the court that she knows Accused No. 1 as he used to work for her husband and her son Dayne. She stated that she did not know Accused No. 2. Whilst at work she noticed that her son Dayne try to get hold of her. She returned Dyane’s call and was informed by his son that her husband has been attacked.

- [15] On arriving at her home she noticed that the street was full of Police, Hitech security and medics. She eventually managed to get into the house. She noticed that her husband was badly beaten. He had head injuries, black spots in the neck, his eyes were bleeding on the sides, and his head was swollen almost double the size of them. According to her the paramedics tried to put bandage on the eyes of the deceased.
- [16] He had several injuries on his head and body. She stated that she accompanied her husband to the local hospital in Grahamstown. Because of the nature of the injuries on her husband, he had to be transferred to Port Elizabeth. Mrs. Hughes was refused to accompany her husband to Port Elizabeth Hospital and was informed that she would be kept updated about the developments.
- [17] On that day she went back to the house to take her clothes and she stayed with a friend. On Sunday she went back to the house. Her friends assisted her on cleaning the house. She was requested by the Police to look for any items that were stolen from the house.
- [18] She also told the court that she saw blood in the house particularly in the passage of the house. Mrs. Hughes testified that the rear sliding door was locked when she left for work. She also testified to the fact that the deceased would not have been able to walk to the sliding door without his cane (walking stick). According to her the only possible window and entry that Accused No.2 could have used to get inside the house was the window which was stuck and was left open enough for the cats. According to her the window was not opened wide enough for any person to get through and if anyone wanted to enter he would have had to open it wider, which would constitute house robbing.
- [19] Mrs. Hughes also testified that when she opened her husband's cardboard where she knew that the deceased would keep the money, she discovered that an amount of R4 000-00 was stolen from the house. She also discovered that the cash in the wallet was also missing. She also informed the court that in the wallet there was an amount of about R1 000-00. She testified that when she opened the drawer, she found a strange harmer which according to her did not belong to her husband and this was the very old harmer which has been used to assault the deceased. She also testified to the effect that both her husbands' laptops and cellphone were missing. The smaller laptop was always kept in his husbands' office and the other one was used by his husband when she came from work on days. She also informed the court that the cellphone of her husband was always kept in his pocket because he had a problem of hearing and so the phone was kept in vibration.
- [20] She testified that later, Sunday the 6th October 2029 the Police came to see her at her house. The Police came with her husbands' laptop and cellphone she identified the cell phone and the laptop as the items that belonged to her husband. She was later called by Sergeant Daniels who showed her money from Vietnam, a wedding ring and a Labrador pin. She identified these items as belonging to her husband. The Vietnamese notes were Exhibit "3". The wedding ring was exhibit "4" and the Labrador pin was exhibit "5". She testified that the wedding ring has always been on his husband's finger and when he tried to take it off he

could not even when he has tried to use olive oil, soap or anything to make his finger loose, and on the day in question when Mrs. Hughes left for work. She left her husband with the ring on his finger. She also observed that the sliding door was opened when she arrives from work and she stated that the other window was high opened and there was blood on the window. According to her she found that someone used force to open the window and she testified that when she left for work the door was not damaged as she found it on her return.

- [21] She also testified to the effect that the phone which was shown to her by the Police was bought by her husband for her and she couldn't use it. She also testified that her husband could not reach the back sliding door without using his walking stick. Her husband, who was the second husband assisted her in raising her children from the previous marriage. There were 4 children from the previous marriage and her youngest is Dayne. Dayne lives across the street and he lives in the house of her husband.
- [22] She testified to the effect that the death of her husband and her sight of him is very emotional. According to her the accused took her life partner away. She testified that she lives with panic attacks and she does not open the door at all. She was very shocked to hear that the person who attacked her husband was known to them as she was referring to Accused No.
1. Now she does not trust people anymore. Before the incident she would go to the bowling club with her husband, sit with friends and have some drinks. Now that her husband is no more that pleasure has been taken away from her by the Accused.
- [23] Under cross examination Mrs. Hughes was not shaken at all. She remained an honest witness. Her version was not contradictory at all. She was not lying in her evidence in court, I find. I found her to be a credible and a reliable witness. Under cross examination Counsel for the Accused No.1 put to the witness (Mrs. Hughes) that the cellphone that was found at Dayne's house belonged to him. I must mention, lest I forget that, it transpired during the evidence of the Accused No.1 that the cellphone which was found at Dayne's home was his and was different from the cellphone which was found by the Police as that one is the one that was taken from the deceased's home. She admitted that her husband was a person who wanted things to go his way and as a result of that there were times when he would clash with Dayne. Under cross examination she stated that every time she saw Accused No. 1 he was always smiling. That is why she was shocked when she heard that Accused No.1 was involved in the attack of her husband. She also testified that at one stage Accused No.1 went to Port Alfred with her husband and they slept there. She was consistent even in under cross examination that there was no broken window in the house. The window was stuck in an open position and they decided to live it like that for the cats to come in and out. She had no knowledge of the allegation that Accused No. 2 was given a harmer by Dayne to assault his father (the deceased).

- [24] Counsel for the Accused No. 1 stated the following: “I put to you that Accused No. 1 had pleaded guilty to the first to the two counts but denies that he has killed your husband”. Mrs. Hughes answered as follows: “whoever did that he wanted him dead”.
- [25] The second State witness called by the State was, a specialist, Dr Hanslo. He is the one who completed exhibit “E”, which is death register and No GEDR 510/2019. Doctor Hanslo is a Forensic Pathologist employed by the Eastern Cape Department of Health. He performed the postmortem examination of the deceased on 23rd October 2019. His observations of the external appearance of the body of the deceased were recorded in his affidavit and confirmed by him in oral evidence as including multiple sutured lacerations on right forehead, from 5mm to 50mm in size;
- (a) 2 x 20mm purple confusion of right cheek;
 - (b) a 30mm sutured laceration of the right cheek;
 - (c) a 60 x 35mm abrasion of occipital area of head;
 - (d) a 30mm sutured laceration of left forehead;
 - (e) a 25mm sutured laceration of left temporal area of head;
 - (f) Profuse purple and blue contusions of right upper arm, with underlying closed right humeral fracture;
 - (g) minor pink contusions of anterior aspect of right thigh; and
 - (h) minor abrasions and lacerations of anterior aspect of right lower leg.
- [26] Doctor Hanslo described the death of the deceased as the flowing directly from: “complications following blunt force trauma to the head and body”.
- [27] Dr Hanslo testified that due to the age of the deceased the type of injuries sustained led to his death. He testified that a person hitting the deceased could have foreseen that a person with those injuries could have died. According to him there substantial and serious injuries to the face and sustaining those injuries could lead to the demise of the person especially when considering his age.
- [28] Doctor Hanslo was a reliable witness. under cross examination by both legal representatives for Accused he was not shaken, and he remain consistent with his evidence in chief.
- [29] The third State witness to be called was Anele Kepe who testified that he knows Accused No. 2 very well. He testified that he was shocked to find out that Accused No. 2 was implicated in the death of deceased as he (Accused No. 2) is a person whom he (Anele Kepe) trusted very well. He testified that on 4th October 2019 Accused No. 2 arrived at his home at about 4pm. He was wearing a golden ring with a black stone. He confirmed that the Labrador pin, spectacle parts and the ring were brought to him by Accused No. 2. These are some of the items that appear in annexure “A” to which I have referred to above and which were taken

from the house of the deceased on 4th October 2019. The box which contained the items I have mentioned above was taken from Anele Kepe by the Police on Sunday, the 6th October 2019. Anele Kepe was not cross examined by both accused.

[30]. The 4th state witness to be called was Constable Johnson. He testified that he was the arresting officer. He stated that he recovered a cellphone and a laptop from Accused No. 2. He testified that Accused No. 2 gave him a black cellphone. This cellphone was exhibit "2". The phone was shown to accused number 1 and number 2. Accused number 2 confirmed that it is the one he gave to Constable Johnson. He testified that Accused No. 2 informed them (Police) that the laptop was at his neighbor. The Police walked together with the accused to the neighbor and collected the laptop. The laptop was exhibit 1 he testified that they found a blue pair of trousers at Accused No. 1's home. This blue pair of trousers had stains which according to Constable Johnson looked as if they were blood stain and that there was blood in the water. He also noticed that the top which is blue in colour had blood spots on it. According to him the top was taken for DNA test, but there have been no results produced or revealed in court. The evidence of Constable Johnson was not disputed I found him to be a credible and reliable witness. He was not shaken under cross examination.

[31] Last State witness called was Sergeant Ray Daniels, who is the investigating officer in this matter. He testified that he recovered certain clothes from Accused No. 2. Accused No. 2 did not dispute the evidence of Sergeant Daniels in so far as the recovery of the clothes. He disputed that his clothes were in a bucket of water. He stated that they were in a washing basket. Under cross examination Accused No. 2 disputed that his grey top had blood looking like spots on it. Sergeant Daniels did not record in his pocket book that he actually showed the possible blood spots to accused number 2. Be that as it may his evidence was not challenged and he testified to the effect that both accused co-operated with him during their arrest.

[32] Both accused testified. Accused number 1 in the main testified to the effect that he was instructed by Dayne (the son of the deceased) to look for someone who could assault and rob the deceased. He testified that the deceased had been assaulted to such an extent that he is hospitalized for few months. He testified that on the day in question (4 October 2019) he met accused number 2 at the corner of McGowen Street and they both entered the house Dayne. His evidence was that he overheard Dayne instructing accused number 2 as to how to enter the house of the deceased. His (accused number 1) assignment was to go to deceased's home and borrow a spade and that would attract the deceased and at that time accused number 2 would have to enter the house and attack the deceased. Accused number 1 testified that when he got into the house, accused number 2 was holding the arm of the deceased and the deceased was lying on the floor. He testified that as he was walking past the deceased and the accused he accidentally touched the sword which was hanging on the wall. He took the sword and assaulted the deceased on the arm. Accused number 1 and accused

number 2 ransacked the house and made off with the items and cash listed in annexure "A".

- [33] According to accused number 1, of importance in his evidence is that when he entered the house and saw accused number 2 and the deceased, the deceased was only bleeding from the nose. He conceded that the amount of blood seen in photo 4, 5, 6 and 10 and exhibit "F" could not have been caused by the bleeding of the deceased from the nose.
- [33] Under cross examination accused number 1 was evasive in answering the questions. There were times when he was not able to answer some of the questions that were put to him by the State Advocate. The version of accused number 1 does not explain the extensive injuries the deceased had on the head, including the open wounds. He does not explain the amount blood present in the house where the deceased was assaulted. His version also does not explain the stain on the sword, which appears to be blood stain.
- [34] Accused number 1 admitted that the deceased would have linked him to the attack, if he survived as he was the one who distracted him at the front door. According to the accused number 1 he is the one who knocked at the front door to facilitate accused number 2's entry to the house from the back. I find the evidence of accused number 1 not to be reasonable possible true.
- [35] Accused number 2 also testified. He stated that Dayne came with the plan that the deceased should be hospitalized and items to be taken from the deceased's home. He also testified that Dayne informed them that they could take the items for themselves. According to accused number 2 the killing or beating of the deceased to death was never part of the plan. According to accused number 2 he attacked the deceased at the back of the house after the deceased came out of the house. He testified that the deceased came through the sliding door that he opened himself. He also testified that he assaulted the deceased twice with the harmer next to his neck and shoulder. When the deceased ran back to the house accused number 2 followed him he again assaulted the deceased inside the house. At this stage according to accused number 2 he hit him once on the forehead with the harmer he got from Dayne.
- [36] I must also mention that accused number 1 testified that the deceased at one stage called his name and the name of Dayne. This happened when the deceased was being assaulted by the accused. On the contrary accused number 2 stated that the deceased only called the name of accused number 1 and he did not mention that the deceased called the name of Dayne.
- [37] It is common cause that both accused assaulted the deceased. It is also common cause that they used blunt objects with force to assault the deceased. It is also common cause that the deceased did not suffer any injuries other than those he received from the assault by the accused. It is also common cause that the accused robbed the deceased with aggravating circumstances.

- [38] At the end of evidence I requested Counsel for the State as well as for the accused to prepare for me Heads of Argument. I am very grateful to the Counsel for the assistance they have given me in this matter. I also appreciate the collegiality displaced by the counsel when they were dealing with this matter.
- [39] As I have indicated above it is not in dispute that the deceased was robbed inside his house but the accused with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977.
- [40] In the Heads of Argument by the accused they both concede that they entered the house of the deceased in order to rob him. This concession particularly in respect of accused number 1 removes his submission that he entered the house with the intention to steal not to rob. The concessions I must state that are properly reasoned by Counsel for the accused.
- [41] It is clear from the evidence of Mrs Hughes and Dr Hanslo that the attack on the deceased was extremely violent and a great deal of force was used. It is common cause that more than one weapon was used, that is a harmer and a sword. Furthermore, the deceased blood was found on the floor as well as on the walls of the house as depicted in the photograph which was exhibited "F". This is contrary to the evidence of Accused No. 1 who stated that the deceased had blood in the nose.
- [42] Counsel for both accused conceded that the death of the deceased was for foreseeable based on *dolus eventualis* particularly in view of the fact that accused number 1 knew of the deceased's age and frailty. *Dolus eventualis* exists where the accused foresees the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur or the prohibited consequence might exist and he or she accepts this possibility into the bargain. The requirements of *dolus ventualis* in consequence crimes are, therefore:
- (a) A foresight;
 - (b) Possibility;
 - (c) Correlation between foreseen and actual manner of consequence occurrence;
 - (d) Recklessness.[1]
- [43] The injuries that were inflicted on the deceased during the attack by both accused, of which both became active participants were so severe that the in escapable influence which arise there from is that the form of intention at the time of the attack was converted to *dolus directus* which can be attributed to both accused, irrespective of which of the accused was responsible for inflicting the fatal injuries upon the deceased.
- [44] It is not necessary for me to decide which of the accused inflicted which wounds. The attack on the deceased was

planned by both of them and performed with a common purpose not only to break in and robbed the deceased, but also to assault him with dangerous weapons so that he is admitted in the hospital.

[45] The evidence presented in court establishes and inference, I am of the view that the only reasonable inference to draw, that both accused participated actively in a vicious, sustained and severe assault on the deceased with a harmer and another object that is a sword. It is clear from the evidence that after the deceased had been rendered unconscious through a vicious and sustained attack by the accused on their version, they robbed him of the items listed in annexure "A".

[46] I am satisfied, given the admissions by the accused, that they had a common purpose to assault the deceased. It can be accepted that none of them disassociated with the activities of another from the attack, assault and robbery of the deceased.

[47]

The requirements of common purpose are:

- (1) The accused must have been present at the scene of the crime.
- (2) The accused must have been aware of the unlawful assault.
- (3) The accused must have intended to make common cause with those who actually perpetrate the assault.
- (4) He must have manifested his sharing a common purpose with the perpetrator of the assault by himself performing some act of associate with the conduct of the others.
- (5) Requisite of mens rea so irrespective of the killing of the deceased he must have intended them to be killed or he must have foreseen[2] the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

[48] Both accused in their evidence were at pains to explain the blood depicted in exhibit "F". Both accused were extremely poor witnesses. They were evasive and their mendacity was patent as they attempted to shift the blame to each other. The evidence of the State and the inferences that I have drawn from that evidence is to be preferred over the accused inadequate, obviously flawed and manufactured evidence. It is also strange to me how accused number 2 in particular never mention in his plea explanation as well as to his Counsel that he used drugs on the day in question.

[49] Accused number 2 further testified that the deceased called the name of the accused number 1. When asked under cross examination whether the deceased did call both the name of Dayne and accused number. He categorically stated that the deceased never called the name of Dayne. This contrary to what accused number 1 has stated in his evidence in chief, when he stated that the deceased called his name and the name of Dayne. It is clear

from the evidence of the accused number 2 that accused number 1 was left in the house by accused number 2 assaulting the deceased. I must also mention that Mrs. Hughes stated that in order to enter the house through the window one would have to force it up as it was slightly opened for cats only. Furthermore Mrs. Hughes stated that in order to enter the sliding door one would have to break in. As I have indicated above the evidence of Mrs. Hughes has been consistent all the way. Even under cross examination she was not shaken at all. I have no reason not to believe Mrs. Hughes.

[50] During argument Counsel for accused number 1 stated that the evidence of Doctor Hanslo was that injuries inflicted upon the deceased caused the injury which led to his death. I am satisfied that accused number 1 was aware that a harmer had to be used to assault the deceased. He associated with the actions of accused number 2. In any event even if he did not associate himself, he directly participated in the assault of the deceased and the robbery. What makes things worse is that accused number 1 has worked for the deceased and he knew that the deceased was a frail person. Despite that knowledge he assaulted the old man who has not done anything wrong to both of the accused.

[51] Counsel for accused number 2 correctly conceded that accused number 2 ought to have foreseen that out of the injuries he has inflicted upon the deceased, the deceased could die.

[52] That leads me to the crux of the case, namely, whether the State has proved beyond reasonable doubt that the accused had committed the offence of house breaking with intent to commit robbery, robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 and they had the intention to kill the deceased.

[53] House breaking with intent to commit a crime consists in unlawfully and intentionally breaking and entering a building with the intention of committing some crime in it. The crime of house breaking is defined as follows:

“(1)

The Common Law Crime of housebreaking with intent to commit an offence consist in the removal or displacement of some part (1) of the structure of a house, or of premises in the nature of a house, with the object of gaining admission thereto and committing some crime therein, and

(2) In the entry of the offender into the house or premises broken, or the insertion by him into their house or premises of any part of his body or any instrument with which he proposes to exercise control over anything within the house or premises.[3]

The essential elements housebreaking with intent to commit a crime are:

Unlawful co-breaking, entering, premises, intent.

[54] The evidence of Mrs. Hughes states categorically that the window which accused number 1 said he used to enter the premises was slightly closed for the purposes of allowing the cats to come in and out. She testified that no person could enter there unless he has opened the window wide. I Have no reason not to accept the evidence of Mrs. Hughes as she is the

person who was staying in that house for a long time. I am satisfied that accused number 1 committed the offence of housebreaking with intent to commit a crime of robbery, as he could not enter through the premises without opening the window.

- [55] Mrs. Hughes also testified that the sliding door was closed when she left it. I am also satisfied that accused number 2 in order to enter the house had to break or open the door without the permission of the deceased in order to enter into the house. Both accused after they have entered the premises their intention was to commit an offence. There is no way that both accused could take the property or items listed in annexure “A” without force. They could not take them without robbing the deceased and assault him. Consequently I am satisfied that the State has proved the offence of housebreaking with intent to commit robbery.
- [56] The offence of robbery with aggravating circumstances is clear in these circumstances. Both accused testified that they used a harmer and a sword to assault the deceased.
- [57] Criminal Procedure Act 51 of 1977 defines aggravating circumstances in relation to robbery or attempted robbery, to mean:
- (i) The wielding of a firearm or any other dangerous weapon;
 - (ii) The infliction of grievous bodily harm; or
 - (iii) A threat to inflict dangerous bodily harm, by the offender and or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence. Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of the property. Gardiner and Lansdown in Criminal Law and Procedure defines robbery as: “Robbery is theft, from the person of another, or in his presence if the property stolen is under his immediate care and protection, accompanied by actual violence or threats of violence to such person or his property or reputation, intentionally used to obtain the property stolen or to prevent or to overcome resistance to it being stolen.” [4].
- [58] Both accused testified that before they could take the property of the deceased assaulted him with harmer and a sword. On their own version the accused conceded that a harmer is a dangerous weapon including the sword. I am satisfied that the property of the deceased was taken by the accused after they have used violence and assaulted him with the items mentioned above. Furthermore Counsel for the accused number 1 and number 2 correctly and intelligently conceded that the accused should be found guilty of count 2.
- [59] The last count, count 3 is the count of murder. The question to be asked at this stage is whether the State has proved beyond the reasonable doubt that the accused has the intention to kill the deceased.
- [64] In *S v Sigwahlwa* 1967(4) 566(A) at 570 (B-E), Holmes JA stated the following:

“That, however, does not conclude the enquiry because the following positions are well circled in this county:

[64.1] The expression “intention to kill” does not, in law necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *Dolus eventualis*, as distinct from *dolus directus*.

[64.2] The fact that objectively the accused ought to reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of the *bonus paterfamilias* in the position of the accused. In other words the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus not culpa*. These two different concepts never coincide.

[64.3] Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so and even if he probable did do so.”

[65] Did the accused foresee that the assault on the deceased could possibly have led to his death? It is certainly clear from the facts that they could have. In my opinion, inference that they did and did foresee both as a possible consequence of their actions is the only reasonable inference to draw from the fact that a harmer and sword was used to assault the deceased repeatedly on the forehead and body, and that extreme force was used with these weapons. Given the nature of the weapons used, the sustained nature of the assault and the force applied, there exists no reasonable possibility that the accused did not foresee that their actions might lead to the death of the deceased. That being so, the State has in relation to count 3 established beyond doubt reasonable that the accused had the necessary intention, in the form of *dolus eventualis*, to kill the deceased. They are therefore both found guilty of his murder.

[66] In conclusion, I found that the State has proved its case beyond reasonable doubt against both accused in relation to all 3 charges. My verdict is that both accused are guilty of the following:

- (a) Count 1, housebreaking with intent to rob;
- (b) Count 2, Robbery with aggravating circumstances;
- (c) Count 3, Murder

N.R.MTSHABE

ACTING JUDGE OF THE HIGH COURT,

GRAHAMSTOWN

[1] See: Principles of Criminal Law, 4th Edition Jonathan Burchell, page 352 See also: S v Van Saardt 2009 (1) SACR 618(SCA) para 39

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[2] See: S.v Mgedezi 1989(1)SA 687(A) See also: SvMzwempi 2011(2) SACR 237(ECM) See also: S v Safatsa 1988(1) SA 868(A) See also: S v Memani 1990(2)SACR(4) (TK)

[2] See: S.v Mgedezi 1989(1)SA 687(A)

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See also: S v Memani 1990(2)SACR(4) (TK)

[3] See: R v Tusi 1957(4) SA 553 (N) See also: Rv Badenhorst 1960(3) SA 564 (A)

[3] See: R v Tusi 1957(4) SA 553 (N)

See also: Rv Badenhorst 1960(3) SA 564 (A)

[4] See: R v John 1956(3) SA 20(SR) See also: R v Ngoyo 1959(2)SA 461(T)

[4] See: R v John 1956(3) SA 20(SR)

See also: R v Ngoyo 1959(2)SA 461(T)

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Prepared on 12 October 2026 · Esheria