THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 22/95
REPORTABLE

In the matter between

DANIEL MUSINGADI	**FIRST APPELLANT**
SARAH LAMBANI	**SECOND APPELLANT**
SAMUEL MALENGA	**THIRD APPELLANT**
DAVID MUTHIDZA	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Coram: Farlam, Mthiyane JJA et Comrie AJA

Heard: 31 August 2004

Delivered: 23 September 2004

Summary: Criminal law – common purpose – expansion of – whether effective disassociation from.
Criminal law – circumstantial evidence – weight of – failure to controvert by defence testimony – inferences drawable.
Criminal law – extra-curial declarations by accused – weight of.
Criminal law – death sentence abolished – other sentences substituted.

JUDGMENT

COMRIE AJA

[1] In December 1994 the four appellants were convicted by a circuit court, comprising Marais J and assessors, sitting at Louis Trichardt, of:

(1) murder; and

(2) robbery with aggravating circumstances.

A fifth accused, Ms Martha Mahtshemule, was acquitted. The first and second appellants were sentenced to death for the murder and to 12 years' imprisonment each for the robbery. In terms of s 316A of the Criminal Procedure Act 51 of 1977, as it then stood, they enjoyed an automatic right of appeal to this court, which they exercised. The third and fourth appellants were sentenced to effective terms of imprisonment of 18 and 20 years each. The trial court granted them leave to appeal against their convictions only. Now, almost ten years later, the appeal is before this court.

[2] Upon our enquiry counsel were unable to furnish a full or complete explanation for this highly regrettable delay. Mr van Heerden for the state undertook to bring the matter to the attention of the Director of Public Prosecutions, Pretoria, and to institute inquiries, all with a view to avoiding a repetition. It is often said that justice delayed is justice denied. While this may be an overstatement in some contexts, it does underline the need for reasonable expedition. The present is not a case where leave to

appeal was granted late or the appeal itself noted late. In the ordinary course it should have come before this court eight or more years ago. The unexplained delay is to be deprecated.

[3] The events giving rise to the convictions occurred in early July 1993. By the end of October practically all the evidence upon which the state eventually sought to rely had been assembled. That was before the Interim Constitution (Act 200 of 1993) came into force. The trial itself, however, was heard during the last quarter of 1994, and thus under that Constitution. In *S v Makwanyane and another* 1995 (2) SACR 1 (CC) the Constitutional Court declared the death sentence unconstitutional. By a subsequent amendment to the Criminal Procedure Act the death sentence was removed from the statute book (see the Criminal Law Amendment Act 105 of 1997, s 34). Counsel were correctly agreed that in the event of the murder convictions of first and second appellants being sustained, their death sentences must be set aside and replaced by other proper sentences. (See s 1(10) of Act 105 of 1997.)

[4] Appellants 3 and 4 were both arrested in Randburg on 30 August 1993. They were conveyed to Louis Trichardt where, later that same day, they made statements to magistrates Gericke and Boshoff respectively. The admissibility of these statements was

contested on the ground that they had not been made freely and voluntarily. After a trial within a trial the court below received the statements in evidence, although at the same time it rejected statements made to magistrates by appellants 1 and 2. All four statements complied with the requirements of s 217(1)(b) of the Criminal Procedure Act, with the consequence that the onus rested upon the appellants to prove on a balance of probabilities that their statements were not freely and voluntarily made (the so-called reverse onus). The trial court held that appellants 3 and 4 had not discharged that onus. The reverse onus was subsequently held to be unconstitutional: *S v Zuma and others* 1995 (2) SA 642 (CC). The declaration of invalidity does not apply to the present matter: see para [44] of the judgment of Kentridge AJ. It should be noted, moreover, that the trial court also said:

'Dit is onnodig om op die bewyslas te steun. Ons bevind dat die bekentenisse bo redelike twyfel vrywilliglik deur beskuldigdes 3 en 4 gemaak is.'

[5] The deceased, Mrs Dercksen, was a middle-aged woman who, with her husband, lived on the farm Doornspruit in the Louis Trichardt district. Her parents, Mr and Mrs du Toit, lived in another house on the same farm. Security around the Du Toits' house was tight: it included barbed-wire fencing and Pitbull terriers. Within the same house, in a room called the office, substantial sums of cash

were accumulated from the farm's business transactions and stored in a safe. The Du Toits' domestic worker was the second appellant, Ms Sarah Lambani. In the absence of the Du Toits – they were away at the relevant time – she had the keys to the compound and she was under strict instructions as to who might and might not be admitted. The key to the safe was held by the deceased.

[6] On 5 July 1999, in her parents' house, the deceased was assaulted and strangled to death. There was also an attempt to poison her by the administration of a noxious mixture containing acid. The safe was opened and cash was taken. As there were no signs of forced entry, suspicion fell on the second appellant. Within days she, her alleged aunt (accused no 5) and the first appellant were arrested. On the day of his arrest the first appellant pointed out certain places to Capt van Staden. After a second trial within a trial, the trial court admitted the contested evidence of such pointings out and accompanying declarations. On this occasion the trial court held that the state had proved voluntariness beyond reasonable doubt. In the same judgment the trial court declined to accept evidence of admissions made by accused no 5 to another police officer, and of a pointing out by her to him, on the ground that the state had not discharged the last mentioned onus of proof.

[7] The police trail led to appellants 3 and 4 who were eventually located in Randburg, where they were arrested on 30 August 1993. As I have said they made their statements to magistrates in Louis Trichardt on the same day.

[8] The appellants applied for bail in the magistrate's court. In terms of s 235 of the Criminal Procedure Act the trial court received the evidence given by the first appellant at the bail enquiry, but not the evidence given by the other applicants for bail.

[9] At the trial all the appellants, and accused no 5, pleaded not guilty. Appellants 1, 3 and 4 (and accused 5) raised alibi defences. The second appellant's defence, announced by her counsel at the plea explanation stage, was that she had been a victim of the robbery, which had been carried out by men wearing balaclavas over their faces. The state adduced no direct evidence implicating any of the appellants in the commission of the robbery or the murder. At the close of the state case the evidence implicating them indirectly consisted in the main of the material to which I have already referred, plus the testimony of Ms Janet Majiye who was living with the third appellant as his wife. She gave evidence against appellants 1 and 3 and against accused no 5.

[10] The first and second appellants closed their cases without giving evidence or calling witnesses. Appellants 3 and 4 testified and persisted in their alibis. Appellant 4 called his mother in support of his alibi. Accused no 5 testified in her own defence; among other things, her evidence affected appellants 1 and 2.

Admissibility of Evidence

[11] It is convenient to deal first with the attacks on the admissibility of evidence advanced by counsel for the appellants, Mr Barnard. He submitted that the evidence given by the first appellant at his application for bail should not have been received by the trial court, because it did not appear from the record that the appellant had been 'properly warned' before testifying in support of bail. The evidence in question was to the effect that on the morning of 5 July 1993 he visited the second appellant, with whom he claimed to have had a relationship, at the farm from about 9.00 am to 10.00 am. This prima facie destroyed his alibi, which was also undermined by the evidence of Ms Majiye, but did not link him directly with the crimes which were probably committed later in the day. At the bail hearing first appellant was represented by an attorney, Mr Hamman, who elicited this piece of evidence from his

client during examination in chief. As to this, the prosecutor also put a few questions.

[12] The bail evidence was tendered, and received, by the trial court in terms of s 235 of the Criminal Procedure Act. It was not received in terms of s 60(11B)(c); that subsec – which provides for a warning by the judicial officer presiding – was not yet in existence. At the trial counsel for no 1 raised a single objection, namely that the record of the bail proceedings was not properly certificated in terms of s 235. The objection was not upheld. Counsel for other accused successfully objected to their bail evidence on other grounds, but counsel for no 1 raised no question of unfairness. In the absence of such an objection, there was no enquiry by the trial court into fairness. See *S v Nomzaza* 1996 (2) SACR 14 (A); *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC). It can safely be inferred from attorney Hamman's conduct of the bail application, and from his evidence at the trial on other issues, that he was an experienced and competent attorney. We have to assume that he advised his client of his rights and about the implications thereof. Prima facie fairness was served. Absent an objection on this score, and a consequent enquiry by the trial court into the issue thus raised, there is no basis upon which we can conclude by way of conjecture that there was any unfairness when

the appellant testified as he did. That such evidence was later to prove adverse to his alibi does not amount to unfairness. As Kriegler J trenchantly observed in *Dlamini's* case at [95]:

'That [constitutional] shield against compulsion does not mean, however, that an applicant for bail can choose to speak but not to be quoted. As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.'

[13] As I have said earlier, the bail evidence did not implicate the first appellant in the commission of the crimes. What implicated him to some extent were his pointings out to Capt van Staden and the accompanying explanations. The fairness of the procedure whereby Van Staden, who was independent of the investigation, conducted and recorded the pointings out and accompanying explanations, was not questioned at first instance or on appeal. The appellant was arrested on the morning of 9 July 1993 and later that same day accompanied Van Staden to the scene. The defence objected to this evidence on the ground that after his arrest the appellant was assaulted by other police officers, one such assault in the bush being particularly severe. This was the subject of the second trial

within a trial. The appellant also testified that in small measure he was told by those policemen what to say, but that for the most part he invented the information which he conveyed to Van Staden. The police witnesses denied the assaults and attributed the wounds on the appellant's forearms to a struggle that occurred when, wearing handcuffs, he refused to climb onto the back of the police bakkie and had to be forced to do so. Dr Botha, who examined the appellant a few days later, expressed the opinion during the first trial within a trial that the forearm injuries could not have been caused by the handcuffs. She changed her opinion during the second trial within a trial when she was shown similar handcuffs and the circumstances were explained.

[14] Of greater significance was that the appellant did not manifest the injuries which were to be expected from the assaults, and especially from the severe assault in the bush. The appellant claimed that among other things he had been repeatedly hit with the handle of a pick-axe on his body and on his head. To Dr Botha he claimed multiple blows to the head; in evidence he claimed one blow. An injury to his chest, which the appellant claimed to Dr Botha was the result of a kick, turned out to be an old, healed rib-fracture sustained, it would seem, in a bus accident. But recent injuries, other than to his forearms, were not present.

[15] Much was made during the second trial within a trial of an alleged swelling of the appellant's face. Dr Botha did not observe it, nor did magistrate Roos. The photographs (exhs S and S1) taken of the appellant immediately prior to his departure on the pointing out expedition and immediately after his return, do not support the existence of such a swelling, especially bearing in mind that the appellant has a naturally full face. I accordingly do not think it necessary to go into the evidence of attorney Hamman and magistrate Boshoff on this point save to mention that the pointings out occurred before the appellant was advised by attorney Hamman not to make any statements.

[16] By the end of the lengthy trial within a trial the appellant was thoroughly discredited, and the trial court so found. On appeal Mr Barnard was unable to challenge that finding. He sought, however, to paint a picture of persistent police violence towards all five accused, including first appellant. Among other matters we were referred to the statements by appellants 1 and 2 which were excluded (no 1's statement was made almost three months later, on 5 October 1993); to the exclusion of admissions allegedly made by accused no 5 on the day of arrest; and to the episode on 14 July 1993 when first appellant was taken to magistrate Roos, claimed to have been threatened and assaulted, and then decided not to make

a statement. While all these matters may raise a suspicion in the mind of a court, the trial court after careful enquiry found it proven beyond reasonable doubt that the pointings out to Van Staden were made by the appellant freely and voluntarily. I see no ground for interfering with the conclusion of the court *a quo*.

[17] With regard to the statements made on the day of their arrest by third and fourth appellants to magistrates Gericke and Boshoff respectively, Mr Barnard submitted: (a) that the trial court applied the wrong (ie reverse) onus of proof; and (b) that applying the correct onus (ie beyond reasonable doubt) the trial court should have concluded that the statements were not made freely and voluntarily. The first submission is unsound in law. Para [44] of the judgment in *S v Zuma*, supra, reads:

'[44] The application of s 217(1)(b)(ii) since 27 April 1994 may well have caused injustice to accused persons, but we cannot repair all past injustice by a simple stroke of the pen. Weighing all the relevant considerations it seems to me that the proper balance can be struck by invalidating the admission of any confession in reliance on s 217(1)(b)(ii) before the date of our declaration, but in respect only of trials begun on or after 27 April 1994, and not completed at the date of delivery of this judgment. The effect might be in those trials to require reconsideration of the admissibility of confessions already admitted, including the hearing of further evidence.'

[18] The present appeal falls precisely within the class of transient cases excluded from the declaration of invalidity. When this was pointed out to Mr Barnard during argument, he correctly conceded the point. He was then asked whether he could submit that appellants 3 and 4 had discharged the reverse onus. He conceded that he could not. That too was a correct concession on the evidence. Mindful, however, of the remarks of Kentridge AJ, I will briefly re-examine the position. It will be recalled that the trial court said:

'Dit is onnodig om op die bewyslas te steun. Ons bevind dat die bekentenisse bo redelike twyfel vrywilliglik deur beskuldigdes 3 en 4 gemaak is.'

In truth by the end of the first trial within a trial the credibility of appellants 3 and 4 was in tatters. The high watermark of counsel's argument was the portrait of persistent police violence to which I have adverted earlier. That is insufficient to disturb the trial court's finding quoted above. On the contrary, the strong probability in my view is that once apprehended in Randburg, these appellants realised that the game was up, at least in part. They accordingly decided of their own volition that it was in their interests to admit the less serious charge of robbery, but to distance themselves from the more serious charge of murder. That is how their statements read. In my opinion, therefore, submission (b) above must also fail.

[19] It follows from the aforegoing that all the contentious evidence admitted against the several accused was in my judgment correctly admitted. I should mention that in the judgment on conviction Marais J was at pains to point out that the extra-curial declarations by appellants 1, 3 and 4 were admissible against their authors only, and not against their co-accused.

The Convictions

[20] It is convenient to begin with the second appellant. The evidence against her, which I shall call the general evidence, was entirely circumstantial. It was admissible against the second appellant and provided that an adequate link was established, against the other appellants as well. We should perhaps remind ourselves at this stage that there is nothing wrong in principle with circumstantial evidence. On the contrary it can sometimes be compelling. In the prelude to their discussion of *R v Blom* 1939 AD 188 and the rules of inferential reasoning, Zeffertt, Paizes and Skeen: *The South African Law of Evidence* rightly say at 94:

'Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. In some cases, as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of

a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as this is possible, to evaluate and guard against the dangers they raise.'

This passage was quoted by Mthiyane JA in the judgment of this court in *S v Mcasa* and another (delivered 15 September 2003, unreported, Case No 638/2002) at para [8]. The substance of the passage can be traced back to Hoffmann: *SA Law of Evidence* (1ed, 1963) at 31.

[21] The evidence against the second appellant may be summarised as follows. She was employed at the farm as a domestic worker in the house of the Du Toits. They were away at the time. The house was heavily secured by barbed-wire fencing, said to be eight foot tall, and two dogs of savage mien. When visitors called, the dogs had to be locked away. The windows had burglar bars. The appellant had the key to the compound. The gates had to be kept locked at all times. She was under strict instructions as to who might and might not be admitted. She knew that cash was kept in the safe in the office. She knew that the deceased (the Du Toits' daughter) had the key to the safe. She knew that there

was caustic soda in the pantry. She was a short, thin woman whereas the deceased was a thickset middle-aged woman. The deceased was overpowered, tied up, and severely assaulted. There was an attempt to poison her with a noxious acidic mixture. She was eventually strangled to death by the use of what seems to have been a tie around her neck. The safe was opened and cash taken. There were no signs of forced entry on the day in question.

[22] The appellant's defence, stated on her behalf at the beginning of the trial, was that she was a victim, not one of the perpetrators: that three men wearing balaclavas had gained access to the house while she was working, detained her and apparently committed the crimes. The appellant gave no evidence to this effect. Two matters were raised in cross-examination of Mrs du Toit by counsel for no 2. The first had to do with the sale of meat. This can be disregarded because Mrs du Toit said that such sales were rare and occurred well away from the house. There was no evidence to the contrary. The second aspect related to a possibly different arrangement with regard to the key between the appellant and the deceased in the absence of the Du Toits. Naturally, Mrs du Toit could not testify with certainty on this point. The appellant did not give evidence of such a different arrangement.

[23] None of appellants 1, 3 and 4 implicated the second appellant in oral evidence. No 1 did not testify; no's 3 and 4 were steadfast in their alibis. The case appeared to take a turn right at the end, when accused no 5 testified. In answer to questions by the court, and then by the prosecutor, she spoke of inconsistent explanations of the robbery furnished to her by the second appellant. Her counsel was afforded the opportunity of additional cross-examination. In the judgment on conviction, weight was attached to the evidence of no 5 and to the propositions which were put and not put to her by counsel for the second appellant. Without holding that the trial court erred in his connection, I am of opinion that this was an unnecessary *excursus*, given the weight of the prosecution case.

[24] The uncontroverted evidence all points in one direction. The absence of the Du Toits presented a good opportunity to steal money from the safe, to which the deceased held the key. To obtain that key the deceased had to be overpowered, a feat which no 2 was physically unlikely to achieve on her own. So the three men, to whom she refers in her plea explanation, were called in to assist. They could not have got through the barbed wire, and past the dogs, unless the appellant admitted them. This is confirmed by the absence of signs of forced entry. The inference is inescapable that the second appellant was party to a conspiracy to rob the deceased

and its implementation. Since grievous bodily harm was inflicted on the deceased before, during or after the robbery by one or more of the robbers, the appellant's guilt on the charge of robbery with aggravating circumstances was in my view proven beyond reasonable doubt.

[25] However, there was also an attempt to kill the deceased by poisoning her, followed by her actual death as a result of strangulation. The explanation for these events must surely lie in the fact that no 2 was well-known to the deceased. Had the deceased survived the robbery, she would have identified no 2 as the household traitor. The deceased therefore had to be killed in order to avoid no 2's detection. Again, the inference appears to be inescapable that the appellant was party to the murder. First, she had the prime motive to avoid detection. Second, she knew about the caustic soda in the pantry, whereas the others probably did not. It is possible that the appellant did not participate in or foresee the strangulation. If so, it matters not: the deceased's death by whatever means was in the air, it was part of the appellant's plan. I accordingly have no doubt that the second appellant was correctly convicted of murder with direct intent to kill.

[26] I turn to appellants 3 and 4. The evidence which specifically implicated no 3 was his statement to magistrate Gericke, made on the day of arrest. This implicated no 3 in at least the robbery. In addition Ms Majiye testified that on what seems to have been the morning of 5 July he was fetched by a woman who may have been accused no 5. The appellant had previously told his wife that there was money on the farm. Later that day, according to Ms Majiye, the appellant left for the city. The third appellant's defence was that he had been working in Randburg since the beginning of the year as a welder. It was common cause that he was arrested in Randburg at the end of August. He attributed his wife's adverse testimony to the improper influence of the investigating officer. The trial court found Ms Majiye to be a good witness. On a perusal of the transcript of her evidence, I can see no reason to disagree with that finding. She undermined the alibi and furnished some tentative links between the appellant and the commission of the crimes.

[27] Faced with the statement, which once admitted could not be explained away, and supported by the evidence of Ms Majiye, the trial court rightly rejected the alibi defence. In doing so, however, the court erred in one respect. It held against no 3 that he had failed to call as a witness his employer, whose identity was known, to corroborate his alibi. At the commencement of the trial counsel for

no 3 informed the court that his client's defence was an alibi: 'Hy was in Randburg gewees op daardie stadium, op die perseel van J & J Service'. (In his evidence no 3 stated the same thing.) The state was thus aware from the beginning of the trial of the appellant's alleged alibi and of the identity of the employer. It was not suggested by prosecution or defence that there was any difficulty in locating the employer and ascertaining whether the employment records supported the alibi for 5 July or supported no 3's prolonged absence from home. Nor was it suggested by the prosecution that a representative from the employer would for some reason be unduly well disposed towards the appellant. In these circumstances it seems to me that it was equally open to either side to call the employer and that an inference against no 3 was not warranted. Since the onus of disproving the alibi was on the state, there is even something to be said for the view that an inference should have been drawn against the prosecution. *R v Bezuidenhout* 1954 (3) SA 188 (A) at 196H-197E; 226. While the error by the court below constituted a misdirection, I do not consider it to have been material in the circumstances. On the evidence the alibi was bound in any event to have been rejected.

[28] The evidence which specifically implicated appellant 4 was his statement to magistrate Boshoff, made on the day of his arrest. This

implicated him in at least the robbery. His defence was an alibi, namely that he had left for Randburg on 1 June 1993 where he remained until his arrest there at the end of August. The appellant's mother testified in support of the alibi, but she proved to be hopelessly unreliable and her evidence was rightly rejected by the trial court. The statement, once admitted, could not be explained away. No 4's alibi was correctly rejected.

[29] In broad terms the statements of appellants 3 and 4 were similar, although inevitably some of the details varied. They admitted going to the farm in the morning (in no 3's case, to fetch money), where the domestic worker, after locking up the dogs, allowed them in. It was only in the afternoon, however, that the deceased returned to the house unaccompanied. It was then that the appellants and third man (Daniel – accused no 1?) grabbed the deceased, tied her up and blindfolded her. Money was procured from the safe or office. It was at this juncture, the robbery completed, that the domestic worker (according to no 3, 'Sarah' – accused no 2?) proposed poisoning the deceased. According to no 3, the men refused and Sarah appeared to go ahead with the poisoning on her sole account. According to no 4, the men refused and Samuel (no 3?) threw the poison away; but the domestic and 'Daniel' (no 1?) made a second attempt using other poison.

According to both appellants all three men thereupon left the premises taking with them the money which was later shared. In both statements there was mention of a 'Martha'. If that was intended to mean accused no 5, it suffices to say that her guilt was not proved beyond reasonable doubt, which is not the same thing as saying that she was innocent.

[30] Neither appellant 3 nor appellant 4 mentioned, in their statements, the deceased's death by strangulation. No 3 could not say whether the deceased was still alive when the men left, only that they had tied her up. No 4 could not say whether the second poisoning attempt succeeded because he did not see it – he heard about it from Daniel. On a fair interpretation he too left the deceased while she was bound. According to his statement the domestic worker said that if the deceased was not poisoned, she (the domestic) would be arrested.

[31] The trial court accepted the two statements at face value. It accordingly accepted the reasonable possibility that the deceased was still alive when the men left the house, taking the money with them, and that the deceased may have been strangled to death by no 2 after their departure. In convicting appellants 3 and 4 of murder

on the basis of *dolus eventualis* the court pointed to a number of facts:

- that the appellants were responsible for the deceased's captive state as part of the joint enterprise to rob;
- that when they departed, they left the deceased trussed up and helpless;
- that the appellants knew, when they departed, that no 2 was intent on killing the deceased; and
- that the appellants must have known, and therefore knew, that the deceased was powerless to resist or withstand no 2's murderous intent.

[32] Applying *R v Chimbamba and another* 1977 (4) SA 803 (R AD) the trial court said that in the above circumstances appellants 3 and 4 'cannot in law just be allowed to wash their hands of what they now knew to be the consequence of leaving the deceased a bound, helpless captive at the mercy of a vicious would-be murderer'. The trial court said further:

'By failing to release the deceased when they knew her death was probably imminent if she was not released, accused 3 and 4 persisted in the unlawful activity of holding deceased captive at the time when they as a fact foresaw that the continuance of that unlawful act would enable accused 2 to kill the deceased. They therefore unlawfully continued to hold deceased a captive,

reckless of whether or not deceased was killed as a direct result of being held captive.'

and

'What we are dealing with in this case is not common purpose. It is continuation in an unlawful act, to wit, the holding of the deceased as captive, when they as a fact foresaw that that was likely to result in murder.'

[33] The latter proposition assumes that an intent to kill was not part of the common purpose in the first place. It is implicit in the judgment that the trier of fact so assumed or found otherwise the reasoning to which I have referred would have been unnecessary. Perhaps the court below took that unstated view of the facts because there was no evidence to indicate that the men went armed to the farm, or that arms were used. It seems to me, however, that the facts raised two closely related issues. The first is whether the common purpose to rob was expanded, as events progressed, so as to include a common purpose to murder. If so, the second issue is whether appellants 3 and 4 effectively disassociated themselves from the expanded common purpose.

[34] The appellants purported to disassociate themselves from the murder (they refused to be part of the poisoning) but not from the robbery (they went off with the money and shared it). What had become clear to them, however, was that the robbery was

developing into a murder which would be facilitated by their own prior conduct. It appears to me that by departing the scene, and leaving the helpless deceased to her probable (and actual) fate, the appellants must be taken to have acquiesced in the expansion of the common purpose unless they took steps effectively to disassociate themselves from that development. That our law recognises a defence of disassociation (in some other jurisdictions called withdrawal) is clear. *S v Singo* 1993 (1) SACR 226 (A); *S v Nduli and others* 1993 (2) SACR 501 (A); *S v Lungile and another* 1999 (2) SACR 597 (SCA). See too *S v Nzo and another* 1990 (3) SA 1 (A) at 11D-I. In the case of a conspiracy or common purpose, Gubbay CJ ventured the following *dictum* in *S v Beahan* 1992 (1) SACR 307 (ZS) at 324b-c:

'I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his

contribution is required. To the extent, therefore, that the principle enunciated in *R v Chinyerere* (supra at 579B and 578E) is at variance, I would with all deference, depart from it.'

[35] This court has twice expressly left open the correctness of this *dictum* and whether it is rule of law or a rule of thumb. See *Nduli's* case, supra, at 5076; *Lungile's* case, supra, at 603 para [20]. What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation. Compare Snyman: *Strafreg* (4ed) at 267-9. It appears that much will depend on the circumstances: on the manner and degree of an accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise. In an article entitled 'Accomplices and Withdrawal' (1981) 97 *LQR* 575 Professor David Lanham reviewed the case law in the Commonwealth and USA. He concluded at 591:

'While it is not possible to produce a detailed definition of withdrawal as a defence to accomplice liability, a number of principles can be extracted from the weight of authorities examined above. These principles are as follows:

1. Any withdrawal, voluntary or otherwise, which negates the *actus reus* of accomplice liability exculpates the accused.
2. A withdrawal which does not negate the *actus reus* of accomplice liability may nonetheless be defence if certain conditions are satisfied –

   (a) Such a withdrawal must be a voluntary withdrawal.

   (b) Whatever form the participation takes, reasonable steps to prevent the crime may exculpate the accused even if there is no countermand.

   (c) Where the act of participation goes beyond encouragement, mere countermand may not be sufficient to exculpate the accused.

   (d) Where the participation takes the form of encouragement (eg counsel, command or agreement) a potentially effective countermand will afford a defence even if no other steps are taken to prevent the crime. Such countermand may be expressed in words or implied by conduct.

   (e) Withdrawal must be capable of being effective: a withdrawal which is untimely, uncommunicated, or misunderstood or a countermand which is not received by all principals will be no defence.'

See too *SA Criminal Law and Procedure* Vol 1 (3ed, Burchell) at 318-320.

[36] The particular aspect which confronts us here is whether having said no to the poisoning it was sufficient for appellants 3 and 4 to leave the scene or whether in the circumstances they were required to undo some of the prior conduct. In *White v Ridley* (1978)

140 CLR 342, a decision of the High Court of Australia, Gibbs J said at 350:

'The further question raised by *Archbold* is whether the person countermanding or withdrawing is required, in order to escape liability, to take reasonable steps to prevent the commission of the crime. Professor Glanville Williams [(*Criminal Law: The General Part*] p 385) and Professors Smith and Hogan: *Criminal Law*, 3rd ed. (1973), p 110, consider that an accused remains liable notwithstanding his communicated withdrawal unless he takes steps to avert the danger which he has helped to create. Professor Howard expresses a similar view: *Criminal Law*, 3rd ed. (1973), pp 282-283. Professor Glanville Williams cites from the judgment in *Eldredge v United States*, [(1932) 62 F (2d) 449, at p 451]: "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse." It seems entirely reasonable to insist that a person who has counselled or procured another to commit a crime, or has conspired with others to commit a crime, should accompany his countermand or withdrawal with such action as he can reasonably take to undo the effect of his previous encouragement or participation.'

[37] In *Beahan's* case, supra, Gubbay CJ held: 'A reasonable effect to nullify or frustrate the effect of his contribution is required'. In *Lungile's* case, supra, which was an armed robbery resulting in death, Olivier JA said at 603g-h:

'… it is clear that, on whatever view one takes of the matter, there was no effective disassociation. The first appellant's mere departure from the scene is a

neutral factor. It is more likely that he fled because he was afraid of being arrested, or of being injured, or to make good his escape with the stolen money and goods.'

In R v *Becerra and Cooper* (1976) 62 Cr App R 212 (CA), B gave C a knife to use against anyone who might interrupt their burglary. When someone approached, B said: 'come on, let's go' and went out through the window. C remained and stabbed the approaching man to death. A defence of withdrawal failed. Roskill LJ said at 219:

'On the facts of this case, in the circumstances then prevailing, the knife having already been used and being contemplated for further use when it was handed over by Becerra to Cooper for the purpose of avoiding (if necessary) by violent means the hazards of identification, if Becerra wanted to withdraw at that stage, he would have to "countermand", to use the word that is used in some of the cases or "repent" to use another word so used, in some manner vastly different and vastly more effective than merely to say "Come on, let's go" and go out through the window.'

It was not specified precisely how much further B would have had to go, but (as Gubbay CJ observed) physical intervention to prevent the use of the knife might have been required.

[38] In the subsequent English case of *R v Grundy* [1977] *Criminal Law Review* 543 (CA). G had over a period of weeks furnished prospective burglars with useful information about the premises to be burgled. G did not participate and he testified that for the last two

weeks he had tried to stop H from breaking in. The Court of Appeal held that the defence of withdrawal should have been left to the jury. In a comment on this case in the *Criminal Law Review*, and contrasting *Becerra*, Professor J C Smith wrote:

'The present case does not go so far as to require physical intervention to prevent the commission of the crime. The defence was however that G had been trying to *prevent* H from breaking in. It may be that an operative withdrawal can be more easily effected when it is made at a preparatory stage, as in this case, than where the crime is in the course of commission, as in *Becerra*. When the knife is about to descend, it would seem likely that the only effective withdrawal would be physical intervention to prevent it reaching its target.'

See too Smith & Hogan: *Criminal Law* (8 ed) at pp 158-160.

[39] The aforegoing authorities indicate in my view that on a practical level the courts of several countries, including South Africa, proceed from this premise: that the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.

[40] In the present appeal I am satisfied that appellants 3 and 4 did not do enough. They could not simply walk away, leaving the deceased tied up and at the mercy of no 2 who, they knew, was intent on killing her. To effectively disassociate themselves appellants 3 and 4 had at least to have untied the deceased; and perhaps more was required of them. I would accordingly confirm their convictions for murder on the basis of *dolus eventualis*, which was relevant to sentence.

[41] It is possible, I think, to arrive at the same result by applying what was said by Botha JA in *S v A en 'n ander* 1993 (1) SACR 600 (A) at 605-6. In relation to a *commissio* followed by an *omissio*, it was held that the 'Ewels' principle (*Minister van Polisie v Ewels* 1975 (3) SA 590 (A)) was part of the civil law regarding wrongfulness. The same considerations did not necessarily apply to the criminal law. Botha JA said at 606g-h:

'In die strafreg moet die ondersoek na die wederregtelikheid van die late op sy eie bene staan. Dit kan wees dat die beleidsoorwegings wat by hierdie ondersoek in die strafreg te pas kom, tot 'n ander resultaat sal lei as wat die geval is in die privaatreg. Dit kan ook wees dat die strafregtelike aanspreeklikheid van iemand wat ter verbreking van 'n regsplig nalaat om 'n ander persoon te verhoed om 'n misdaad te pleeg, van 'n ander graad of vorm kan wees as dié van die dader self. 'n Moontlikheid wat homself hier voordoen, is aanspreeklikheid as 'n medepligtige, op die grondslag dat die versuim om die

regsplig na te kom die element van bevordering van die misdaad kan uitmaak wat vir medepligtigheid nodig is.'

[42] On the particular facts of the present appeal I would be inclined to hold that appellants 3 and 4 acted wrongfully, in the criminal sense, in departing the scene of the robbery without taking steps towards preventing the imminent murder of the deceased and that they did so, reckless as to whether the deceased was murdered. However, it is unnecessary to reach a final conclusion on this alternative reasoning.

[43] I come to the first appellant. In addition to the general evidence, he pointed out certain places at the homestead to Capt van Staden. His relevant accompanying explanations (in the order given rather than in chronological sequence) were:

'(a) "By hierdie huis het Sarah 'n wit vrou met gif vermoor. Ek, Dawid en Samuel was hier om geld by Sarah te kom haal wat sy uit die kluis uit die kantoor uigehaal het."

(b) "Die twee honde was hier toegesluit. Ons het hier by die huis ingegaan."

(c) "Ek en Samuel en Dawid het hier gesit en die bediende het daar gesit en tee gedrink. Die wit vrou was nie hier nie. Die bediende het, toe sy die voertuig hoor, ons by die agterdeur uitgelaat sodat ons kan gaan wegkruip."

(d) "Ons is by hierdie hek uit en het by daardie varkhok weggekruip. Sarah het vir ons die geld in 'n plastieksak hier by die hek kom gee. Ons is toe

weg na die teerpad. Ons is na Martha, Sarah se suster se stad by Mpeni gebied Elim. Ek weet nie wat het van die wit vrou geword nie. Dit is al."'

[44] As can be seen, the appellant admitted theft but exculpated himself with respect to robbery and murder. On the strength of *R v Valachia and another 1945* AD 826 and *S v Cloete* 1994 (1) SACR 420 (A) the court accepted that the appellant was entitled to have the whole of his explanation taken into account, both the favourable parts and the unfavourable parts. Marais J quoted from the judgment of Greenberg JA in *Valachia* at 837:

'Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[45] If the second appellant had already stolen the money from the safe, there was no reason for three men to collect it. One man, probably the first appellant if he did have a relationship with the second appellant, would have sufficed. It would have been against their interests for the men to remain at the farm drinking tea and risk discovery by the deceased. Their presence would have been contrary to the second appellant's strict instructions about visitors

and would also have implicated the men in the theft of the money once the loss was discovered. Besides that, the deceased possessed the key to the safe. As I have observed earlier, she was a thick-set middle-aged woman, whereas second appellant is short and thin. She would have required assistance to overpower the deceased, assault her severely and attempt to force the poison down her throat. The inference is plain that the appellant and the other men went to the farm to overcome the deceased, obtain possession of the key to the safe and steal the money therefrom.

[46] When the appellant was arrested, along with accused no 5, it appears to me that he (like appellants 3 and 4) realised the game was up. He accordingly decided immediately to advance his own interests by admitting relatively minor guilt but at the same time exculpating himself in respect of the more serious side of things. In the absence of evidence from the appellant, the trial court was in my view justified in rejecting the exculpatory parts of his explanation. One of course accepts and recognises the appellant's constitutional right to silence (s 35(1)(a) and (b)), but the trial court could do no more than approach the matter on the basis of the evidence before it. That was sufficient to sustain the conviction for robbery with aggravation.

[47] Applying *S v Nkomo and another* 1966 (1) SA 831 (A) the trial court reasoned further as follows:

'In hierdie geval het beskuldigde 1 saam met beskuldigde 2 en andere die huis wat oorledene sou binnekom, binnegegaan. Nie alleen moes hulle verwag het, soos in Nkomo se saak, dat iemand in die huis sal wees nie, hulle het inderdaad gewag sodat iemand in die huis inkom. Die persoon wat ingekom het was toe doodgemaak. 'n Mens kan alleenlik aflei dat dit gedoen was óf om die roof te bevorder óf om die identiteit van iemand te beskerm.

In hierdie geval is dit 'n baie sterk waarskynlikheid dat aangesien beskuldigde 2 aan die oorledene bekend is dat die oorledene doodgemaak is omdat sy beskuldigde 2 kon uitken. Daar is geen redelike of enige verduideliking van beskuldigde 1 van wat in daardie huis gebeur het nie.

Na afloop van die roof, volgens sy eie verklaring, het beskuldigde 1 weggegaan saam met die geld en daarna aan die verdeling deelgeneem.

Van al hierdie feite kan alleenlik afgelei word dat daar 'n gesamentlike bedoeling was waarvan beskuldigde 1 deel was om die oorledene te dood óf om die roof te bevorder óf om die identiteit van iemand te beskerm. Weer eens verwys ek na Mlambo se saak [R v Mlambo 1957 (4) SA 727 (A)] en die feit dat beskuldigde 1 nie getuig het nie. As hy verwag dat ons 'n mindere afleiding moet maak dan moet hy self getuig.

Ons is dus van mening dat beskuldigde 1 skuldig is aan moord met *dolus directus*.'

[48] It will be noted that appellant 1 admitted less than appellants 3 and 4, in particular no 1 did not refer to the tying up of the deceased. The trial court held it against the appellant that he did not testify,

whereas appellants 3 and 4 did give evidence. That was in my view a distinction without a difference inasmuch as no's 3 and 4 persisted in their alibis and did not testify with regard to the commission of the crimes. Like no's 3 and 4, in his extra-curial explanations no 1 did not admit participation in the murder. The correct approach in my view was to analyse the appellant's admissions in the light of the general evidence in order to see what inferences could properly be drawn. In other words the approach should have been the same as was adopted in respect of appellants 3 and 4.

[49] The first appellant did not admit being present when the deceased was strangled to death. He said: "ek weet nie wat het van die wit vrou geword nie'. As I have said, there is no evidence that the men went to the farm armed, or that arms were used. A distinctive feature of this case is the attempted poisoning. I think it unlikely that the men knew about that possibility in advance. It accordingly seems to me not unlikely that no 2 was responsible for the poisoning, on her own initiative as it were. The first appellant did not claim to have protested at the poisoning, but the explanations were less formal than a statement to a magistrate. We know objectively that the strangulation followed the poisoning. It accordingly seems reasonably possible that the men, including no 1, left the scene after the poisoning but before the strangulation. The

appellant was aware of (and overstated) the poisoning. He said: 'By hierdie huis het Sarah 'n wit vrou met gif vermoor.' He did not claim to have learned this later. His explanations are open to the interpretation that he was not present when the deceased was poisoned but absent evidence from him to that effect, I think the trial court was justified in inferring, on all the evidence, that he was present.

[50] Was the deceased trussed up when the poison was administered and when the men left the farm? In my view she must have been: first, because restraining the deceased was an inherent part of the unarmed robbery; second, because it is highly unlikely that no 2 would have attempted to poison the deceased unless she was restrained, and third, because the deceased was found after the event still tied up and it is unlikely that no 2 could have achieved that on her own. That being the position, it appears to me that the first appellant's case does not differ materially from the cases of no's 3 and 4, and that he too should have been convicted of murder on the basis of *dolus eventualis*.

[51] <u>The Sentences</u>

The third and fourth appellants were not granted leave to appeal against their sentences. It is common cause that the death

sentences on appellants 1 and 2 must be set aside. In the case of the second appellant, I can see no appropriate alternative to life imprisonment. She either strangled the deceased to death or was party to doing so. She either administrated poison to the deceased or was party to doing so. She abused her significant position of trust as a member of the household. The poisoning and the murder were carried out in all probability in an endeavour to avoid her detection as one of the robbers. At the time of sentence, no 2 was 35 years old. She had a husband and a child of 9 years. She reached standard VII at school. She was employed as a domestic worker, earning a relatively small wage. She was a first offender. I do not consider that these personal circumstances offer much balance against the callous and brutal murder of her employer. In my opinion life imprisonment meets the justice of the case.

[52] The first appellant, at the time of sentence, was 31 years old and a first offender. He had a wife and a child of 9 years whom he supported through his work as a builder. He reached standard V at school. His conviction for murder is now based on *dolus eventualis*. I should record that appellants 3 and 4 had relevant previous convictions and that it was held in their favour that they were not the leaders of the robbery. The first appellant had no previous convictions and the evidence does not establish that he was more or

less of a leader than the other two men. In sentencing him I must bear in mind, for the purposes of balance, the sentences imposed on no's 3 and 4, which were effectively 18 and 20 years respectively.

[53] The first appellant was sentenced to 12 years' imprisonment for the robbery. I purpose to leave that sentence intact. For the murder I would impose 16 years' imprisonment (being the same as was imposed on both no's 3 and 4). I would order the whole of the robbery sentence to be served concurrently with the murder sentence thus producing an effective sentence of 16 years. In this way the first appellant's status as a first offender is reflected to his benefit.

[54] <u>The Order</u>

(A) The appeals of all four appellants against their convictions for murder and robbery with aggravating circumstances are dismissed, and those convictions are confirmed.

(B) The appeal of the first appellant (Daniel Musingadi) against his sentence on count 1 (the murder) succeeds. The sentence of death is set aside and replaced by a sentence of 16 years' imprisonment to be served concurrently with the sentence (hereby confirmed) of

12 years' imprisonment on count 2 (the robbery). The effective sentence is accordingly 16 years' imprisonment.

(C) The appeal of the second appellant (Sarah Lambani) against her sentence on count 1 (the murder) succeeds. The sentence of death is set aside and replaced by life imprisonment. In law that sentence is to be served concurrently with the sentence of 12 years' imprisonment on count 2 (the robbery) which is hereby confirmed.

R G COMRIE
ACTING JUDGE OF APPEAL

CONCUR

FARLAM JA
MTHIYANE JA