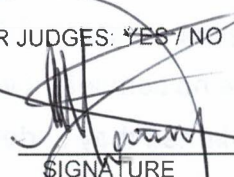


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED
11 July 2022 DATE
 SIGNATURE

CASE NO: SS16/2020

In the matter between:

THE STATE

And

JABULANI MICHAEL MBANJWA

ACCUSED 1

NHLANHLA FORTUNE KUBHEKA

ACCUSED 2

JUDGMENT

MATJELE AJ:

INTRODUCTION

1. In this matter Mr. Jabulani Michael Mbanjwa (Accused 1) and Nhlanhla Fortune Kubheka (Accused 2) are facing five charges, namely: counts 1 and 3 of

kidnapping Siphokuhle Duda and Mpho Given Mfako; counts 2 and 4 of murder of the two same people read with section 51(1) of Act 105 of 1997; and lastly count 5 of obstructing the course of justice by hiding the bodies of the deceased with intent to distort truth as to the circumstances surrounding the death of the deceased. All these offences are alleged to have taken place on or about the 27th July 2019 at King's Hotel situated at 30 President Street, Germiston in the district of Ekurhuleni. The state alleged that all five counts were committed in furtherance of common purpose it not being known who the other parties are.

2. Competent verdicts in terms of section 258 of the Criminal Procedure Act 51 of 1977 (CPA) in respect of murder counts 2 and 4 were read to the accused, and both confirmed they understand. In respect of counts 1,3 and 5 the provisions of section 270 CPA relating to counts where no competent verdicts are specified, was read for the accused, and they both confirmed they understand.
3. Both the accused pleaded not guilty to all counts preferred against them. Adv. Seoka for accused 1 confirmed the pleas to be in accordance to his instructions. No plea explanation was tendered as the accused exercised his right to remain silent.
4. Adv. Mthembu for accused 2 also confirmed the pleas of his client to be in accordance with his instructions. His client's section 115 statement is that in respect of counts 1,3 and 5 his client did not participate and knows nothing about them. In respect of counts 2 and 4 he acted under duress as he was forced by accused 1 to stab both the deceased. He admits to participating in the stabbing.
5. Admissions were made in terms of Section 220 of the Criminal Procedure Act, 51 of 1977, signed by both legal representatives and both accused persons, and these were as follows:
 - 5.1 The deceased person is Siphokuhle Duda, a male person who died on the 28th July 2019 as a result of multiple deep incised wounds on the neck and chest (thoracic), sustained at 30 President Street Germiston, Kings Hotel.
 - 5.2 Another deceased person is Mpho Given Mfako, a male person who died on the 28th July 2019 as a result of multiple deep incised wounds on the neck

and chest (thoracic), sustained at 30 President Street Germiston, Kings Hotel.

5.3 On the 28th July 2019 they were both declared dead by GD Gibson, an emergency service practitioner, with declaration of death forms, marked exhibits B1 and B2.

5.4 Dr. Molefe Isaach Kolodi conducted post mortem examinations on both bodies of the deceased marked DR 1907/19 and DR1908/19 respectively on the 31st July 2019, and recorded findings on the medico-legal reports marked exhibits C1 and C2, each supported by an affidavit in terms of section 212(4) & (8) CPA sworn to by Dr. Molefe Isaach Kolodi in respect of the post-mortem examinations. The cause of death in respect of each of the deceased was determined to be: "MULTIPLE DEEP INCISED WOUNDS TO THEIR NECKS AND CHESTS (THORACIC)".

5.5 From the time the deceased were stabbed at Kings Hotel until such time that Dr. Kolodi conducted post mortem examinations thereon on the 31st July 2019 the bodies on the deceased sustained no further injuries.

5.6 The facts and findings of the post mortem reports marked exhibits C1 and C2 are true and correct.

5.7 The contents, correctness and chain in respect of photo album containing photos 1-31 compiled by Sgt Matsobane H. Maphakela marked as Exhibit D, depicting the crime scene and where the bodies of the deceased were found at 30 President Street, Germiston. Also photo album containing photos 1-133 compiled by Cst. Thabo David Masemola stationed at the local criminal record centre in Germiston marked exhibit E, depicting deceased's bodies during post mortem examination conducted at Long Street, Germiston Government mortuary.

5.8 Warrant officer Motjile Chriswell Makapan, a forensic analyst at Forensic Science Laboratory matched the blood stains sample from Accused 2's trouser with the sample from deceased DR 1908/19, Mpho Given Mfako, and it matched according to biology report Exhibit F.

5.9 SAPS arrested accused 2 on the 29th July 2019, and accused 1 on the 30th September 2019.

6. State submitted an address in terms of section 150 CPA.

7. Oral evidence was heard by the court from the following witnesses for the state: Zoliswa Luvuyo Hlwempu, Dr Molefe Isaac Kolodi, Boitumelo Mickey Kolberg, W/O Oduetse Chriswell Makapan, Sgt Samuel Mashinini, Sgt Hector Mavundza, Sgt Matsobane Maphakela and W/O Merinah Ntunguvhadzeni Netshidzati. Both accused testified and only accused 2 called a witness, Sibongasonke Zondo.
8. Over and above the above mentioned exhibits submitted with s 220 admissions, the court received the following documentary evidence: Accused 2's warning statement and police statement marked exhibit G; Zolisa Hlwempu's police statement marked exhibit H; and Boitumelo Mecky Kolberg's police statement marked exhibit I.
9. After all evidence was heard, counsels for the state and defence submitted heads of argument, which they elaborated briefly on in court, through which the state is arguing that it has discharged the onus on it to prove its case beyond reasonable doubt and both accused must be convicted of all five counts each as charged. On the other hand, each of the defence counsels argued on behalf of each of their clients that they be acquitted in the matter as the state has not proven its case beyond any reasonable doubt. Adv. Mthembu argued accused must be convicted of assault with intent to do grievous bodily harm only in terms of his admissions.

Evidence:

10. In summary, the state first called **Zoliswa Hlwempu**, who testified that he knows both accused persons. At the time of the commission of these offences he was staying with accused 1 in his flat or room at Kings Hotel for six months at that time. He knows accused 2 from when they were at school using the same transport mode. They later became friends as they belonged to the same group of 'Izikhothane', which group specialising in wearing expensive clothes and dancing.
11. On the evening of Friday the 26th July 2019 he and accused 1 were at his place, called "umhlaba wamaqiniso", meaning "the land of truths". The two deceased in this matter, whom he called Virus (Given Mfako) and Teaspoon, arrived with two

cell phones that they were selling. On accused 1's instructions he left with one of the deceased, Given Mfako, to go sell the two phones. They managed to sell one phone for R450, and they used R50 to buy a drug called crystal meth. On their return at accused 1's place they smoked these drugs and they gave accused 1 R100. While they were all four smoking around 7 or 8pm he then went out to 'hustle' or 'spin', which means to go out to steal. He returned with a stolen bicycle which he brought to accused 1's room between 10pm and 12am. He left again to go spin.

12. Upon his return he found a lady called Boitumelo with the three men he earlier left in the house, and this was around dawn in the morning. He came back with two designer jackets. By then virus and Teaspoon were quiet. He again went out after he had been given a R40 from Boitumelo to buy crystal meth drugs.

13. He returned from buying crystal meth and while they were smoking it the owners of the phones the deceased had brought the previous night arrived knocking at accused 1's place. Accused 1 and the two deceased spoke with them outside. Upon their return accused 1 was very angry asking the 2 deceased where the starter packs or memory cards of those phones were.

14. Accused 1 then sent Zoliswa to call accused 2 and Bongi. He only found accused 2 about an hour later and did not find Bongi. When he returned with accused 2 they met Accused 1, Teaspoon and Virus at a corner-shop belonging to some Pakistani people. They then returned to the flat with him in the front as told by accused 1 to make sure Teaspoon does not runaway, while they come from behind them on the way to accused 1's place, which is upstairs. This sequence of walking is however different from the one observed by the defence witness, Sibongasonke Zondo though he also confirmed all five went past him while he was washing his vehicle 'enroute' to accused 1's place.

15. He then took the bicycle and left passing all the four at the gate while going to BP garage to pump it. From the garage he went to sell the bicycle at Elsburg for R500. Bought two bags of crystal meth drugs costing R300, which he went to smoke it elsewhere. He returned to the flat around 1pm where he found both the deceased already tied both arms from behind with wire and lying on their stomachs, and Kyle

seating down with his hands tied too at the back towards the right side, looking distressed. There was also Gift and another male unknown to him. Accused 1 was holding a table knife about 45cm long, the type used in butcheries, visible in photos 27 and 28 of exhibit D. And there were other knives on the floor. Gift was packing some bricks to sit on, after he had used one to assault Kyle on the left eye. The deceased's clothes were torn and they also looked like they had been assaulted as they were in pains, Teaspoon having a swollen face.

16. At around 3.30 to 4 pm he left one R150 bag of drugs and left under the pretext that he was going to buy a straight of alcohol, just to be out of the situation in accused 1's house. Accused 1 told him to make it quick so they may assault the deceased well while drunk. He later met accused 2 around 7 pm who told him he was going to buy mandrax, and also told to call the witness, Zoliswa back accused 1's room. He told him not to inform accused 1 that he saw him, and he even advised accused 2 not to return there. This is corroborated by Accused 2 in his evidence.
17. He did not witness any assault nor stabbing, and he left the deceased at accused 1's house tied but still alive at the time. He was then arrested with accused 2 on a Monday, the 29th July 2019.
18. The second state witness was Boitumelo Kolberg. She knew both accused 1 and 2 in the matter. She also knew Zoliswa Hlwempu who testified before her in this case. She had previously been in a 'friends with benefits' relationship with accused 1, before she was in a relationship with one Thabo who is also a friend of accused 1.
19. During her evidence she admitted that she could be mixing dates, but the sequence of events is accurate. She stated that on Friday morning she went to accused 1's place and she offered him R40 and he was going to add some money to buy drugs. Accused 1 gave the money to Zoliswa who then left to buy crystal meth drugs. In accused 1's room he found him with two boys who would later be assaulted and stabbed in her presence. She corroborates Zoliswa except that she says it was Friday morning, whereas Zoliswa said it was Saturday morning. The latter makes

sense, as the deceased Teaspoon and Virus only arrived in accused 1's flat on Friday evening, and not morning.

20. They all smoked these drugs, likewise these two deceased were already busy smoking when she entered. When she was done she left the room and went to a betting place and later to a club. She returned to accused 1's room around 3 am in the following morning. This would obviously be Sunday morning, and not Saturday morning a Boitumelo originally stated. Boitumelo went on to say, when she returned Accused 1, who opened the door, had the knife depicted in photo 27 and 28 of exhibit D in his possession. She referred to it as a sword.
21. Boitumelo states that during this time she noticed the two deceased who on the ground, tied. Accused 2 was present, and at one time stabbed both of them at random even though she does not see where exactly, as she was busy with her phone, deliberately distracting herself from the situation she found in that room. At some stage accused 1 instructed accused 2 to take the phone, she voluntarily handed the phone to accused 2 even before he could ask for it. This is different from her police statement: she resisted and accused 2 took it by force. She did not hear if there was any conversation between accused 2 and 1 as to what was to happen with the deceased. According to her it was only accused 1 and 2 who were assaulting the deceased and there was also Kyle among them.
22. It became however apparent that she was arrested because she was saying nothing about the assault to the deceased. Except for admitting that Zoliswa was in and out of the house, however she denies having seen him come with the bicycle and also denied having seen Zoliswa coming with two designer jackets. This obviously took place the previous day.
23. She left in the morning having been handed over by accused 1 to his neighbour for her to wait there. She left that person under the guise that she was going to buy cigarette, and she fled to her friend's place where she spent the whole of Sunday. On Monday she was told about the arrest of accused 2 and Zoliswa, and she thought accused 1 was arrested too, and she decided to go to the police.

24. She admitted that she had been warned before about her relationship with accused 1, as the latter dangerous. She believed when it happened to her and saw the stabbing of the two deceased. She also confirmed seeing accused 2 at the time he was injured, and he informed her he was injured by accused 1.
25. **Dr Isaac Molefe Kolodi** testified that bodies DR 1907& 1908/ 2019 died as a result of multiple deep penetrating incised wounds to the necks and chests (thoracic). The total number of wounds observed on both bodies was 94 caused by a sharp object. The one shown on the photos 27 & 28 of exhibit D, his reply was that it is conceivable that object was the one used to inflict those wounds. It is possible he said.
26. **Warrant Officer Oduetse Chriswell Makapan**, from forensic laboratory specialising in DNA analysis. He analysed the exhibits that were submitted to the laboratory. Briefly, the results revealed that one of the strings that tied the deceased that had DNA of body DR1907/19 reference 15D2AA1731" (PA4002578881) matched the DNA of accused 1, reference sample "MJ Mbanjwa:17DBBE2194". Also the swabs taken on the sharp object on photos 27 and 28 reference 14DCAS2568 (PA 5001503733), match with the DNA sample coming from accused 1 reference sample "MJ Mbanjwa:17DBBE2194". Accused 1's DNA was also found in a mixture of results on a wire string referenced FPD-00257, used for restraining upper and lower limbs of body the 20 years old DR1907/2019. This is where W/O Makapan stated that the said string could have been handled by more than one person hence several stri-loci numbers in the results, but they include accused 1's DNA in that mix, but exclude accused 2. The other donor is someone else not before court.
27. The DNA from the pants of accused 2, reference PW4001401546 matched the body sample of deceased DR1908/19. This formed part of accused 2's formal section 220 CPA admissions. However, in respect of the ropes tying the upper and lower limbs of body DR1908/19 reference PA 6002922217 no DNA was obtained.
28. **Sergeant Samuel Mashinini**, testified that on the 28/07/2019 whilst was on duty received the call from a person who wanted to remain anonymous reporting about

the crime that had happened at Kings Hotel. He and Sgt Maluleke went to the Kings Hotel and found residents who also refused to reveal their names. They reported that, they have heard unusual cry of a person for help, which came from the first floor. The police were taken to first floor and showed a certain room from which the cries were coming from the previous night. The police entered the room as the door was not locked. Their attention was caught by the prints of blood on the wall and remaining blood on the floor corner. The owner of the room was not there. The floor was made of wooden floor and had a trap door leading underneath, which was on the roof of a shack that is on the ground floor. Sergeant Maluleka followed the blood traces through this hole and he saw the two feet of a person between a wall and a shack. They found a way of accessing where the bodies were from the ground floor with the help of one of the residents who had a key for one of the rooms on the ground floor. They had to break the wall of the shack on the ground floor with the permission of the owner, in order to access the section where they saw the feet. They then discovered two dead bodies which were tied on their hands and feet.

29. The sharp object on photos 27 and 28 of exhibit D, which he referred to as a spear, was found in the roof of the shack on the ground floor. It was removed from there and placed where it could be easily accessible, which was on the floor of the room upstairs (the crime scene). The sharp object had blood on the blade as well on the handle.
30. The police called the people from the pathology department, who arrived and declared the two persons as dead. The photographer was also summoned from the Local Criminal Record Centre and arrived and took the photos on exhibit D.
31. Nothing much came from cross examination by accused 1 counsel except that the two witnesses had said it was a knife that is on photos whereas he is saying it's a spear. The witness maintained that it's a **spear**. Accused 2's legal representative did not cross examine.
32. **Sergeant Hector Mavhundza** came to testify. He said, he was called by Sgt Maluleke. He arrived at the scene of the crime at Kings Hotel, he found two dead

males tied with ropes on the ground floor. He referred the sharp object found as the **dagger**. Under cross examination by accused 1's legal representative it was put to him that it's possible that the crime scene was tempered, he said not in his presence. Whilst accused 2's legal representative asked him why he does not remember where exactly was the dagger found. He said the time has lapsed, the incident happened long time and it should be born in mind that he might have attended 3-4 crime scenes at that point in time.

33. Witness **Sgt. Matsobane Maphakela** attended the crime scene at Kings Hotel coming from the local criminal record centre in Germiston, and took all photos in exhibit D at 12:10 am. He found other police officers in the scene already. He found two dead bodies with their hands and feet tied, with the strings or ropes. On the floor he found the knife or sword with a handle with insulation tape. He estimated the length that sharp object to a meter. He said the knife was on the room on the first floor, and not where he found the bodies. In the morning he took the swabs from the knife and the exhibits were sent to the forensic laboratory. He booked the knife or sword into SAP13, 1351/2019. Under cross examination by accused 1 legal representative he said the deceased were tied with ropes or strings and one was tied with the wires. Put to him that he was assisted by the prosecutor to say the wire was used too to tie the bodies, he responded that the photos he took show that bodies were tied with wires. Put to him that no evidence proved that the knife was on the other room, he replied by saying it was pointed to him there and he does not know who put it there. It was said that Sgt Mashinini said the knife was on top of the roof. He replied by saying that Sgt Maluleke explained to him that the knife was removed from the original position since he would be unable to take its picture in that position. Put to him that the crime scene was tempered or tainted, he stated that the person removing the knife had worn the gloves. The witness was told that he kept on trying to fix the version. There was no cross examination by accused 2 counsel. The court clarified from him whether the sharp object he said it was about a meter is the one which is depicted on photo 27-28 of Exhibit D, he confirmed same.

34. **Warrant officer (W/O) Merinah Netshidzati** testified she made follow-up with Boitumelo's rape allegation but she did not meet with person whom Boitumelo

alleges she first reported this allegation to. Boitumelo informed her that the said witness was in homelands. When the warrant officer persisted on this she got a response from Boitumelo that the said witness said she was scared of accused 1 therefore she doesn't want to be involved. When she insisted for Boitumelo take her to the person she told her the person has relocated. She ended up no longer finding Boitumelo herself. The warrant officer eventual got promoted to work in Dobsonville SAPS and a new investigating officer took over the case. The next time she re-surfaced was when she was scared because there were people who had threatened her not to testify against accused 1.

35. She could not find Kyle because when she looked for him Kyle's mother informed her that he had since moved to KwaZulu-Natal because he is scared of accused 1. She is the one who took exhibits that include ropes, strings and wires from the bodies of DR 1907 & 1908, and buccal samples of the accused to the forensic laboratory for analysis, except for accused 2's pants which were taken by her colleague officer Netshiavha. It took time for her to arrest accused 1 as he was on the run but was helped by the fact that accused 1 was arrested by Primrose SAPS for another different crime, where he was using other names, calling himself DeLong Jili. Through the fingers prints he was eventually located and charged in court when he was appearing on those other matters. The witness knew the accused because he is the type of person who is always in and out of Germiston police station for different offences. Asked if she had promised Boitumelo and Zoliswa anything for them to testify for the state, she said no.

36. Under cross examination accused 1's counsel verified who told her that accused was staying at Kings Hotel, that being Sibongakonke Zondo. She said she verified that he was staying there even immediately after the incident as she would receive a call he is there, and when they arrive he has fled. Also the accused when arrested for other crimes, he would normally provide his Kings Hotel address. under cross examination by counsel for accused2 it transpired that accused 1 was once arrested for cases of business breakings and theft of out of motor vehicles. Did she believe accused 2 when he implicated himself, Zoliswa and accused 1 in a commission of crime, her reply was yes. Did she believe that Zoliswa was implicated, she said yes. But Zoliswa was withdrawn from this matter as an

accused and testified as an ordinary witness against both the accused, it was asked if he was promised something? Why did he not testify as a Section 204 witness? She replied that she does not know why Zoliswa was no longer an accused person. That decision was taken by prosecution. Accused 2's version put to her that he stabbed the deceased under the instructions of accused 1 because he was scared of him. Does the witness believe that version, she said yes, because even other people said they are scared of accused 1. She got the information that the accused would come to Kings Hotel at night, which corroborates what Sibongasonke Zondo testified, which led to him fleeing to KZN.

DEFENCE CASE:

37. Accused 1, **Jabulani Michael Mbanjwa**, disputed that he was at Kings Hotel on the weekend of July 2019. He says he was no longer staying at Kings Hotel at that time as he moved out on the beginning of February 2019. He was assisted by a certain person called Grey to transport all his goods including the door of room from Kings Hotel to Knights squatter camp, where he was now living in July 2019, the time of this incident. His reason for moving out then was because of a certain Mr. Mkhize who was busy cooking false criminal cases against him, which caused his previous arrests. Even with the present matter, it is one of the cases Mkhize crafted against him. The witnesses in this matter: Zoliswa, Boitumelo including accused 2 are working together with Mr. Mkhize to falsely implicate him in these crimes. He does not know Zoliswa had never met him. He only met him in police custody after he was arrested. He denies ever assaulting him previously. He denies ever staying with Zoliswa. He only knows accused 2 from a distance as he was a friend of his nephew, Thando. He says it is accused 2 who in fact reminded him of such, when they met at the police station after his arrest. He denied ever assaulting accused 2 before. He confirmed knowing Boitumelo who he alleged was his girlfriend but he last saw her in 2018. He denied that Boitumelo saw him stabbing the two deceased and/or being possession of a big knife. He denied of knowing the sharp object which is depicted on photos 27 & 28 exhibit D.

38. He stated that he did not instruct accused 2 to rape Boitumelo as he was not there when such was happening. Furthermore, he would not instruct someone to rape a

person he was once involved with. He does not know the deceased persons as he was given the photo albums to peruse. Mr. Mkhize was not a caretaker but an outsider who came to open a panel beating business at Kings Hotel. He then also asked for a place to stay for his employees at Kings Hotel. Accused 1 denied that Mkhize was the caretaker of the building, but rather accused 1 used to be a co-caretaker with his uncle Zulo.

39. He was cross examined by Adv. Mthembu for accused 2, who asked him why his room was called 'umhlaba wabaqiniso' (land of truths), he said that was not true but rather the whole hotel building was called by that name. Put to him that indeed the name of his room fits the description of the events of this matter, as the issue of enquiry was about the sim cards or starter packs. He alleged that he found the place called by that name after he came from KZN where he was arrested. Asked if Mkhize is the one who caused him to be arrested there in KZN as well, he replied negatively. Asked whether he had seen Mkhize's presence in this matter, he said no. Put to him that the record will reflect that he didn't dispute that he once assaulted Zoliswa and Nhlanhla during the testimony of Zoliswa. Asked whether it was a co incidence that Zoliswa and Nhlanhla are scared of him and that it was emphasized by w/o Netshidzati, the former I/O that people told her that they are scared of him.

40. Under cross examination by Adv. Xaba of the State, asked whether besides his allegations that Zoliswa, Boitumelo and Nhlanhla schemed against him, was science the DNA results colluded against him too? He replied by saying that Mkhize has escalated he does not know what magic is he using now. He said, he does not use drugs and he is the member of the gangster group called the 26 which only operate in prison. Asked about beads on his arm, he said he is not a traditional healer. He denied being a sangoma.

41. **Sbongasonke Zondo** was called by accused 2 as a witness. He testified that on a Saturday morning in July 2019, he was woken by the noise at the passage where he was staying at Kings Hotel. He was occupying one of the rooms there next to accused 1's room. From the album Exhibit D he identified the door to accused 1's room. He placed the accused 1 in the scene of the crime during the weekend of

the 26th to 29th July 2019. He also knew Zoliswa whom he called Zolile. He also knew accused 2, who he said he knew for some time as he lived in a block where Zondo's father also lived Kwa-Mbatha there in Germiston. He had occasions where they would talk with him.

42. He was also the one responsible for the arrest of Zoliswa and accused 2 on Monday the 29th July 2019. In the process of interrogating accused 2 when he found him at the scrapyard, while denying knowledge of anything to do with killed people in Accused 1's room, after examining the rolled sleeve of his trouser that had blood on it, and which blood on the trouser was ultimately matched with one of the deceased's sample by W/O Makapan, he attempted to flee but the witness grabbed him. On the way to King's Hotel he confessed to him that they ended up killing the deceased, explaining to him how they killed them.
43. When the police had arrived at King's Hotel busy with their investigations he also attempted to arrest accused 1 without success, whom he saw and chased at the back of the building. Accused 1 fled into the dark and they had to stop chasing him out of fear. Even in subsequent days he would be seen at night at Kings Hotel, and this caused the witness to leave Germiston and go back home in Nquthu for the fear of his life from accused 1, as there was no electricity in the building. He was located in Nquthu for him to testify in the matter. It is apparently due to his relocation to Nquthu that the state could not find him as he was originally a state witness.
44. On Saturday the 27th July 2019 he was woken up in the morning by noise of people on the passage next to his room. When he went out he saw four unknown males with accused 1 who had come out of his room to address him, carrying a walking stick. That walking stick, according to the evidence of accused 2, has a pipe inside in which the knife appearing in photo 27 and 28 fitted and would not be visible as accused 1 uses it as a walking stick. He described the handle of this walking stick to resemble the handle of a gun. Accused 1 asked these people as to what they want and why they are attacking them so early in the morning. One of the four males responded by stating that they were looking for stolen cell phones by the

person who stayed at accused 1's room. This evidence corroborates Boitumelo's evidence.

45. Accused 1 denied there being a boy staying there, but if they were talking about the one he knew, he was going to look for him. They promised to return in the afternoon. After these people left the witness took the bucket of water to go wash his vehicle, since he had a trip to take. While busy washing the car, accused 1 came in the company of two male persons whom he later saw dead, taking them to his room. Accused 1 informed him that these were the boys that had caused the community members to come to his room, and he was going to teach them a lesson because they brought community members to his house. This evidence tallies with that of Zoliswa and accused 2 that when Zoliswa had gone to call accused 2 on accused 1's instructions they found accused 1 with the two deceased at a Pakistan's shop.

46. After accused 1 went pass he tried to warn one of the deceased not to go to accused 1's room but that boy did not listen to him. After they had walked passed him, Zoliswa and accused 2 followed. He did speak with Zoliswa but accused 2 walked passed him without talking to him. In his conversation with Zoliswa he told him he had been sent by 'Gabhadiya', referring to accused 1, to call accused 2.

47. He confirmed knowing accused 1's room called 'Umhlaba wamaqiniso' (land of truths), where people from outside the Kings Hotel would come there to have their issues resolved. Based on past experience of what happens in that room is the reason he was discouraging one of the deceased boys from going there, as the bad things happen in that room, and he knew this was not going to end well. He had seen old people being assaulted in that room. There was always noise in that room caused by people who came to that room by way they knocked by stamping their feet on the floor as there was no door so as to get attention. During the night time there was always a noise like someone was banging something with a hammer from 8pm till 4am every day, and not one in the building could ask accused 1 because he was feared by everyone.

48. He says within 5 minutes Zoliswa left the room in possession of a bicycle, for which he borrowed a tyre pump from him but he denied having it though he did have, and advised him to go to the garage. When he went upstairs to his room he saw the younger deceased boy standing outside at the door of accused 1. He asked why he was not leaving and he said he was waiting for his brother as he is still inside and they are talking. Even when he went to throw dirty water in the toilet which is passing accused 1's room he asked the boy again and even before he locked his room leaving, and the boy kept giving the same answer.
49. The following day while returning to his room he found residents of Kings Hotel outside the building. And they prevented him from going to his room telling him accused 1 killed people and threw them in a hole in his flat. The police had not yet arrived but someone had called them. Realising their delay in arriving, he drove with some of the community members in his car to fetch the police, who later followed them back to Kings Hotel. He did enter accused 1's room in the presence of the police and saw blood from the door. He also heard Boitumelo in the crowd as well saying she saw the deceased tied and lying on the floor in accused 1's room, but they were still alive when she last saw them.
50. He was also aware that accused 2 was assaulted by accused 1, ending up in hospital on one of the two occasions. and at one time he did ask accused 2 why he was in the company of accused 1. He also stated that accused 1 was the leader of young boys who were in drugs. They would steal things and bring them to his house. He confirmed that accused 1 was the most feared person in that area of Kings Hotel. He had seen him stabbing one person in front of him who washed cars outside Kings Hotel, who used to bring money to him, the day he refused to give him money.
51. **Nhlanhla Kubheka**, accused 2, was the last witness to testify. He confirmed that he knew Zoliswa and the circumstances leading to their friendship, he also knew accused 1 through Thando, accused 1's nephew who lived on the ground floor at Kings Hotel, whilst accused 1 was on the 1st floor. This is contrary to accused 1's evidence that this Thando lived a kilometre away from Kings Hotel. He also knew Boitumelo though Thando as well and had been with her and accused 1 together.

He testified that he was fetched by Zoliswa on instructions of accused 1. He confirmed the evidence of both Zoliswa and Sibongasonke that they went to accused 1's room together with the two deceased people on a Saturday.

52. He stated that accused 1 gave them two okapi knives that was himself and Zoliswa to stab the deceased. He admitted that he did stab one of these two people and Zoliswa stabbed the other one. This took place still during the day way before the sunset. As they did not stab the deceased to the satisfaction of accused 1, he stopped them saying they did not know what they were doing. Meaning they were not doing it as he expected. They gave him back the knives and accused 1 left the room. Accused 2 could not go out since he did not know the whereabouts of accused 1. He was afraid of him and before he could do anything against accused 1, he had to think about his own safety first.

53. Accused 2 was left in the house with Zoliswa and the two deceased, accused 1 came back in the company of Kyle and Gift. When Kyle and Gift entered they started to assault the deceased. Zoliswa did take a bicycle and went out. When he returned at 7-8pm accused 2 got an opportunity to go and check on his Aunty/sister was not looking for him. He returned around 12 and 1am, as he allegedly did not want accused 1 to think he ran away, and also he was curious to know if the situation was still as he left it. Before he left accused 1 had already started stabbing the deceased persons on their bodies. They were able to ward off the blows and they were still breathing. He left out of shock. And being scared. He returned, then Boitumelo came in and Zoliswa was absent. He was then sent by accused 1 to go look for Zoliswa to return with the straight he had gone to buy. He found him at JJ and gave him the message, but he said he was not returning there, and advised accused 2 also not to return there. He left him there and went home to sleep. He slept the whole Sunday and only woke up on Monday, the day he was arrested. Zoliswa went out to buy straight as he reported, he was long gone and he was in the evening sent to call him. He confirmed the conversation they had with Zoliswa and the advice that Zoliswa gave him. He also did not go back to the Kings Hotel. When he left Kings Hotel the two deceased were still alive, there is no evidence to indicate that the fatal wounds were inflicted in his presence nor in Boitumelo's presence. He was not also present when their bodies were dumped to the ground

floor. Accused 1 had on two occasions assaulted him, at first with a stone, and on another occasion with a bottle. And had visible scars on his head. He could not tell his parents about what accused 1 had done to him but he did tell his Aunt. He said he did not anticipate that the deceased would end up being killed.

Totality of evidential material

54. Facts not in dispute are as follows:

- a) It is common cause that the deceased were stabbed several times and died as a result, at Kings Hotel in Germiston.
- b) It is not in dispute that accused number 2 was one of the people who were present at the crime scene during the commission or partial commission of the crimes in counts 2 & 4.
- c) Accused 2, Zoliswa, Boitumelo and Zondo know each other.
- d) Accused 1 and Boitumelo know each other.

55. Facts in dispute are as follows:

- a) I respect of accused 1, whether he was at Kings Hotel on the weekend of the commission of these 5 crimes and was therefore involved as alleged, or he was at Knights squatter camp?
- b) In respect of accused 2, If accused 1 is proved to have been the culprit, whether accused 2 acted in common purpose with accused 1 on any or all of the five counts?
- c) Whether both accused were responsible for the kidnapping of both the deceased.
- d) Whether both accused were together when the deceased died.
- e) Whether the accused acted together in the concealment of the dead bodies.

Onus:

56. In the SCA case of **State v Combrink**¹ by Shongwe AJ stated that "...it is trite law that the state must prove its case beyond reasonable doubt and that no onus rests on the accused to prove his innocence. It is sufficient for present purposes to state that it is well settled that the evidence must be looked at holistically"

¹ 2012 (1) SACR 93 (SCA)

57. "It is part of dictum that there is no duty on the accused to prove his innocence and that in case the version of the Defence is reasonably possibly true, he would be entitled to an acquittal. These are not separate and independent tests. In order to convict, the evidence [of the State] must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon consideration of all evidence".²

Evaluation of facts in dispute:

58. In *S v Chabalala*³ Heher AJA stated:

"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

59. As to whether accused 1, Jabulani Michael Mbanjwa was at Kings Hotel or not on the weekend of the commission of these 5 crimes and still occupying the room which according to him he used to occupy before 1 February 2019, the following are important to determine. Firstly, he is incriminated by the person whom he says was his girlfriend, someone who is near and dear to him. A person who admits to the accused having been nothing but good to her in many respects for the period she knew him, until the date of the incident. This is Boitumelo, whom accused 1

² State vs Meyden 1999(1) SACR 447 (W).

³ 2003 (1) SACR 134 (SCA) @140a-b

alleges he was last with her in 2018, and she says the opposite. She was with him twice during that weekend he being with the two deceased.

60. Even though Boitumelo seemed to mix the days, which she later admitted, and accused 2 in his evidence confirmed she was there but only confused the dates, her evidence is corroborated by that of both Zoliswa and Accused 2. Even all their police statements place accused 1 in the scene. Sibongasonke Zondo, who was the accused neighbour also placed him in the scene, as he testified that on two occasions on that Saturday the 27th July 2019 he conversed with accused 1. That was corroborated by Zoliswa who asked for a bicycle pump from him after they went past him while he washed his vehicle.
61. Lastly he is implicated and placed on the scene by DNA evidence from the ropes and steel wires used to tie one of the deceased and on the sharp object on photos 27 and 28 of exhibit D, as testified by W/O Makapan from LCRC.
62. I am therefore satisfied that the accused was indeed still resident at King's Hotel when these offences took place, and he in fact participated in the commission of the kidnapping, tying of the deceased and their murder. It follows that as the owner of the room he knew the environment better than any other person who might have acted in common purpose with him. It has been alleged that at times he would enter through the trap door and sleep there. He knew the situation underneath the floor of his house. It follows therefore that he was best placed to know where to conceal the two bodies, and he indeed did conceal them by pushing them down where they were found by SAPS. He could not have done this alone, but must have been assisted in carrying those bodies and concealing them as such.
63. As to whether both accused were responsible for the kidnapping of the deceased, in respect of accused 1 is conclusive he was the main person behind their kidnapping. When he returned to the building walking followed by the two deceased accused 1 informed Zondo that those were the boys that brought members of the community to his house. These are people who were making noise that woke Zondo up in the morning of that Saturday, looking for stolen cell phones. Accused

1 even participated in their tying up to restrict their movement and ensuring they don't run away.

64. Since accused 1 is proved to have been the perpetrator, the question is whether accused 2 acted in common purpose with him on any or all of the five counts?

65. Accused 2 admitted to stabbing at least one of the deceased twice with okapi knife from the deceased, in his evidence. According to his admission statement exhibit G he stabbed both the deceased, which corroborates what Boitumelo stated that she did not see Zoliswa stab the deceased but accused 2 doing it randomly on both the deceased. According to his admission statement, exhibit G, this happened after Kayle and Gift were present, yet before Court he testifies that his participation in stabbing the deceased only happened during the day, before accused 1 left to fetch Kayle and Gift. This is also before Boitumelo arrived, clearly Boitumelo was testifying about a different occasion of stabbing by accused 2. Also this clashes with Zoliswa's and Zondo's evidence, as according to them Zoliswa did not spend even 5 minutes after all 5 people went into the house. He left with the bicycle going to pump and sell it, and not later after kyle and Gift were present. It was never disputed by accused 2 when they both testified.

66. Also another contradiction is that in terms of his statement exhibit G he was left alone with the deceased told not to speak a word with them but only guard them, when Accused 1 returned with Kayle, Zolile and Gift. This then excludes Zoliswa from participating in the stabbings during the day as alleged by accused 2.

67. He also stated that Zoliswa did take a bicycle and went out after Gift and Kyle arrived. When Zoliswa returned at between 7 and 8pm he, accused 2, got an opportunity to go and check if his Aunty or sister was not looking for him. It has been submitted by his legal representative that he returned quickly to avoid giving accused 1 an impression that he ran away, yet his own evidence says otherwise, because he returned between 12 and 1am, which is 4 to 5 hours later.

68. Under cross examination he admits that he saw accused 1 stabbing the deceased, yet throughout he always maintained that it was himself and Zoliswa who stabbed the deceased, and knives were taken by accused 1 who left and returned with Kyle

and Gift. He thereafter left when he was sent to call Zoliswa with a straight and never returned but went home to sleep. He contradicts himself further by stating that at the time he was sent to go and call Zoliswa, the deceased had been injured by accused 1 and their clothing was full of blood in his presence. This confirms why the folded side of his trouser had a lot of blood.

69. It becomes even more interesting when he says this stabbing of the deceased by accused 1 with the spear or sharp object in photos 27 and 28 was when Kyle and Gift were no longer present. The people present were Boitumelo, himself, accused 1 and Zoliswa. He concedes that at some stage Kyle and Gift had left when accused 1 only. This indeed corroborates Boitumelo's evidence perfectly, except that Zoliswa was not there according to Boitumelo and Zoliswa's evidence. This is proof that accused 2 did not go home to sleep as he testified in examination in chief, after meeting Zoliswa who advised him not to return there. He returned and participated further and actively associating himself with what accused 1 was doing. I therefore believe the things Boitumelo testified that they both even raped her, and accused 2 raped her the second time in the absence of accused 1. That was not the behaviour of a person who was scared and affected by people who here bleeding and stabbed in the room.

70. I can safely conclude that after accused 1 handed Boitumelo to his neighbour it was only himself and accused 2 in that room with the deceased. Since his alibi has failed, accused 2 is the only person who could have assisted accused 1 to conceal the bodies after the fatal wounds per Dr Kolodi were administered on both deceased. Accused 2 had numerous opportunities to flee like Zoliswa did, but did not take that opportunity to disassociate himself from accused 1's activities on the day in question. Asked under cross examination why he did not flee after accused 1 left, he said he does not know.

71. It was argued for accused 2 that he did not know what is happening as he had just been called by Zoliswa when they met accused 1 and the two deceased at a shop belonging to the Pakistanis, and following them into accused 1's house. From the

evidence above it is clear that even if he did not know at the beginning, when he got to know he did not distance himself from accused 1's actions.

72. It follows also as to whether both accused were together when the deceased died, that indeed they were as concluded above. Also, whether both the accused acted together in the concealment of the dead bodies, they were the only two left in that room after Boitumelo was removed by accused 1. Whatever that happened to the 2 deceased and their remains was done by the last two in that room, which is both accused 1 and 2.

LAW

COUNTS 1 AND 3: KIDNAPPING

73. '**Kidnapping**' consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is under the age of 18 years, the custodians of their control over the child. The elements of the crime are the following: (a) the *deprivation* of (b) a person's *freedom of movement* (or *the parental control* in the case of a child) which takes place (c) *unlawfully* and (d) *intentionally*.

COUNTS 2 AND 4: MURDER

74. Murder is the unlawful and intentional causing of the death of another human being. The elements of the crime are the following: (a) *causing the death* (b) of *another person* (c) *unlawfully* and (d) *intentionally*.

COUNTS 5: OBSTRUCTING THE COURSE OF JUSTICE

75. The crime of defeating or obstructing the course of justice consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice. The elements of the crime are the following: (a) *conduct* (b) which amounts to *defeating or obstructing* (c) *the course or administration of justice* and which takes place (d) *unlawfully* and (e) *intentionally*.

Evaluation of Admissions:

76. Starting with Section 220 admissions and their exhibits, **S v GROENEWALD**⁴ it was stated that an admission is an acknowledgment of a fact. When proved or made formally during judicial proceedings, it dispenses with the need for proof in regard to that fact. Section 220 of the Act, accordingly, makes it possible for a contested fact to be put beyond issue since, once made, the admission constitutes 'sufficient proof' of it.
77. In so far as accused 2 is concerned he did not dispute the contents of his police statement which was accepted as Exhibit G. In respect of both accused chain evidence was not in dispute when one considers the admissions in terms of section 220 CPA, even though it would appear as if counsel for accused 1 was challenging every witness by the state. It is therefore important that I deal with formal evidence of the state first before I deal with disputed factual issues.
78. In addition to admissions I am satisfied with all formal evidence presented before this court by Dr Molefe Isaac Kolodi, W/O Oduetse Chriswell Makapan, Sgt Samuel Mashinini, Sgt Hector Mavundza, Sgt Matsobane Maphakela and W/O Merinah Ntunguvhadzeni Netshidzati. They were all honest and reliable witnesses whose evidence remained unshaken despite extensive cross examination from defence counsels.

Evaluation of Alibi

79. In **R v Hlongwane**⁵ "The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya*, 1952 (4) SA 514 (AD). But is it important to point out that in applying this test, the alibi does not have to be considered in isolation. ...The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the *Biya's* case *supra*,

⁴ 2005 (2) SACR 597 (SCA) at para 33

⁵ 1959 (3) SA 337 (A) 340H

Greenberg, J.A., said at p. 521 "... if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime".

80. The alibi defence of the accused 1 could not be sustained in light of the strong evidence against him by 5 witnesses before court and DNA results. Accused 2 contradicted his own alibi in his own evidence as discussed earlier, proving that he was not at his home as he said but at accused 1's house as probabilities and circumstances dictate.

Premeditated Murder

81. On charges of murder, culpable homicide or assault the evidence often reveals that X's aggressive conduct was immediately preceded by insulting or provocative behaviour on the part of Y, which angered X and led to his aggressive conduct. Had the insulting or provocative conduct of Y or somebody else not taken place, X would not have killed or assaulted Y. There is therefore a material difference between provoked homicide and non-provoked homicide, which is, generally speaking, synonymous with premeditated murder. The question to be discussed here is whether or to what extent X may rely on the provocation as a defence. This question arises almost exclusively in cases in which X is charged with murder. There is a **substantial difference between premeditated murder**, which is always committed with some evil motive, and the **intentional but unpremeditated killing** of another person who has provoked X before X acted with aggression. Any reasonable person feels almost instinctively that if X had not been provoked by Y, X would not have killed Y. It would, of course, be wrong to allege that Y then only "got what he deserved", because the law expects every person to exercise self-control. Nevertheless, from a broad moral point of view, every reasonable person would be inclined to extend some recognition for human weakness and therefore

to treat X's aggressive act towards Y in a way which differs from the way it would treat the premeditated killing of Y.⁶

82. Firstly, from the beginning of the matter, when charges were put to the accused and as reflected in the indictment the murder charges were read with section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997. That suggests the imposition of life sentence if the accused are convicted unless substantial and compelling circumstances exist that justify the imposition of a lesser sentence. This is among others, where the murder is proven to have been premeditated.

83. The sale of a stolen phone was the gist of the matter. The state has since requested the court to consider the murder as premeditated in respect of accused 1, despite the State neither on the indictment nor when charges were put to both accused did not mention "planned" or "premeditated murder". Based on the case relied upon by the state, **Rasimate Samuel Baloyi v The State**⁷ it is my view that in this matter a case for premeditation or planning prior to the murders taking place is well established from the facts of the case.

Common Purpose

84. A lot has been submitted in relation to common purpose in this matter and an argument presented by counsel for accused 2, quoting among others **S v Lungile and Another**⁸ to argue that accused 2 disassociated himself from the actions of accused 1. From the factual findings, it is clear that he never disassociated himself and he did other wrongs voluntarily in the absence of accused 1. He was a willing participant as a member of accused 1's 26 gang. He was loyal.

85. Defence of Necessity and compulsion in respect of accused 2 does not hold any water based on the evidence before court. I don't see the need to even discuss this any further.

⁶ CR Snyman, Criminal Law, 6th Edition, pg. 231

⁷ In **Rasimate Samuel Baloyi v The State** (739/2021) [2022] ZASCA 35 (01 April 2022)

⁸ 1999(2) SACR 597 (SCA).

Application of Facts to Law:

86. I am satisfied with all the state's witnesses. They were clear and straight forward as stated above, in respect of all the five counts, and their evidence is accepted by the Court as truthful and reliable.

87. When it comes to the evidence of the state there were so many contradictions, inconsistencies and improbabilities.

RULING:

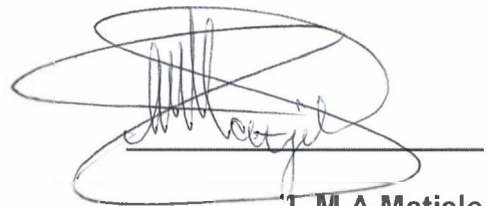
88. In respect of Count 1 and 3, I am satisfied that from the time both the accused and Zoliswa took the deceased to accused 1's place, the deceased had lost their freedom of movement. It is clear from Zoliswa's evidence that they realized the deceased Given Mfako wanted to run away and accused 1 signalled to him to guard him as they walk there. In the room they did not have any freedom. Accused 2 was left with them before they were tied, while accused 1 went to fetch Gift and Kyle, who when they arrived according to his evidence, they together with accused 1 further restricted their freedom to move by tying them with ropes and wire. Accused 2 participated in the whole process by guarding the two deceased not to escape.

89. In respect of Counts 2 and 4, I am satisfied that accused 1 was leading in the killing of these people, and accused 2 participated too and willingly associated himself with the resultant consequences. From Zondo's reliable evidence when he apprehended accused 2 while trying to escape, accused 2 confessed to him that they killed the deceased. This he knew that they were dead already by then. And such this murder was premeditated based on all I have already stated above.

90. In respect of count 5 of obstructing the course of justice I am satisfied as discussed above as well that indeed both accused 1 and 2 worked together in unlawfully and intentionally hiding the bodies of the deceased in order to distort the truth of what truly happened in accused 1's room and the circumstances of the killing of the deceased.

ORDER:

- a) Accordingly, both accused 1 and 2 are found guilty of counts 1,2,3,4 and 5 as charged.



L M A Matjele

Acting Judge of the High Court, Johannesburg

Appearances:

On behalf of the Accused 1: Adv. Seoka

Instructed by: Legal Aid Board

On behalf of the Accused 2: Adv. Mthembu

Instructed by: Legal Aid Board

On behalf of the respondent: Adv. Xaba

Instructed by: DPP

Date of hearing: 8th July 2022

Date of judgment: 11th July 2022