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REPUBLIC OF SOUTH AFRICA



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

Case Number: **SS8/2022**

- (1) REPORTABLE:NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

DATE

SIGNATURE

THE STATE

versus

MELLO, LEBOHANG BEJAMIN

ACCUSED 1

LESHABANE, STEPHEN MATHOPI

ACCUSED 2

RAMAGOSHI, KOENA GIVEN

ACCUSED 3

MOATSHE, DONALD KAGISO

ACCUSED 4

RAPELO, DONALD POTLELI

ACCUSED 5

EX TEMPORE JUDGMENT- Section 174 Application

(Criminal Procedure Act 51 of 1977)

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an application in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 (CPA).

Background

- [2] The accused have been charged with two counts: count 1 kidnapping and count 2, murder read with section 51 (1) of the Criminal Law Amendment Act, 105 of 1997 (“Minimum Sentence Act”).
- [3] In respect of count 1, the State contends that on 21 May 2021 at or near house 463, Sedibeng Section, Tembisa, the accused unlawfully and intentionally deprive Hlabirwa Mphahlele (“the deceased”) of his freedom of movement in tying him up with a rope against a street pole.
- [4] In respect of count 2, the State alleges that on the same date and place as mentioned in count 1, the accused unlawfully and intentionally killed Hlabirwa Mphahlele, an adult male, by assaulting him with open hands, fists, belts and kicking him.
- [5] In its endeavour to secure a conviction against the accused, in respect of count 2, the State places its reliance on the doctrine of common purpose, in that the accused acted with a common criminal intent when committing the murder.
- [6] Prior to the accused pleading, the court apprised the accused of the provisions of the minimum prescribed sentence of life imprisonment in respect to count 2.
- [7] Accused 1 is represented by Mr Pillay, accused 2 by Mr. Leshabane, accused 3 by Advocate Thumbu and accused 4 and 5 by Advocate Lekgothoane. The State is represented by Advocate Mbaqa.
- [8] On 10 October 2022 the charges were put to the accused, and they all pleaded not guilty to count 1 and 2. All of the accused denied that they were involved in the killing of the deceased.

[9] At the inception of the trial, the following exhibits were handed in by agreement between the parties, namely;

- (1) Exhibit “A” – Formal admissions by the accused.
- (2) Exhibit “B” – Post Mortem Report compiled by Dr E A Apatu following an examination on the body of the deceased on 27 May 2021.
- (3) Exhibit “C” – A photo- album and sketch plan compiled by Warrant Officer Godfrey Moshabane depicting the crime scene at 463 Sedibeng Section, Tembisa. The scene was photographed by Warrant Officer Moshabane on 21 May 2021 at 08:35am.

[10] The accused admitted that:

- (1) The deceased was Mr Hlabirwa Mphahlele.
- (2) On 27 May 2021 Dr Emefa Abra Apatu conducted a medico-legal post mortem examination on the body of the deceased.
- (3) The cause of death was determined to have been “Blunt force soft tissue injuries”, as per paragraph (v) of exhibit “B”.
- (4) Sergeant Vusi Shilaluke pointed out the crime scene to W/O Moshabane to photograph on 21 May 2021 as reflected in exhibit “C”.
- (5) Warrant Officer Moshabane compiled a key, sketch and photo plan as reflected in exhibit “C” which were accepted as correct.
- (6) Warrant Officer Moshabane collected exhibits from the crime scene.

[11] During the trial the following exhibits were handed in;

(1) Exhibit “D”- Sworn statement by the state witness, Ms Magata Mmadilemo.

(2) Exhibit “E”- Copy of an unabridged birth certificate of the deceased, Mr Hlabirwa Mathlatse Mphahlele.

(3) Exhibit “F” – Sworn statement by the state witness, Me Lerato Confidence Dlangamandla.

The Evidence in the State’s Case

[12] The following witnesses were called, namely, Ms Keneilwe Alice Phalafala, Ms. Magata Mmadilemo, Lerato Confidence Dlangamandla, Constable Choene Francis Hopane, Sergeant Vusi Shilaluke, Ms Ntsheba Gladys Mphahlele, Mr Thakgatso Mphahlele, Ms Mphaphuli Ngikiwe Bennedictor, and Dr Emeta Abra Apatu.

Ms Keneilwe Alice Phalafala (“Keneilwe”)

[13] Keneilwe testified that she resided at 463 Sedibeng Section, Tembisa, with her mother, Glodia Magata Mmadilemo, since 2019. They rented a shack on the premisses from accused 1 and accused 2, 3, 4 and 5 also occupied other shacks on the property, renting from accused 1.

[14] Keneilwe stated that on 21 May 2021 at around 02:00am, she was awakened by a person shouting for help. She and her mother went outside and found the accused present on the premisses. Accused 2, Steve, informed them that an unknown person had attempted to break into his shack.

[15] Accused 4, Donald Moatshe, was at the gate of the yard at that stage, calling someone, later identified as the deceased, to enter the yard. The accused questioned the deceased about his presence in the area at that late hour of the night. The deceased explained that he was on his way from his girlfriend residence in Mqantsa, identifying himself as Mathlatse.

- [16] Keneilwe testified that all the accused simultaneously interrogated the deceased, asking about the tools he used to try opening accused 2's shack window. The deceased denied attempting to break in.
- [17] Accused 2 discovered a backpack behind his shack, containing pampers, glue sticks and cigarettes. The deceased denied that the bag belonged to him, whereafter the accused assaulted the deceased until he admitted ownership of the backpack.
- [18] The witness testified that the deceased was punched, beaten with belts and kicked. He was forced to sit down, and at one point, accused 1 poured water on him.
- [19] Keneilwe recounted that her mother instructed the accused to phone the police, which accused 1 did.
- [20] After the phone call two police officers arrived and inquired about the nature of the complaint. The deceased explained that he was from Ivory Park, Extension 2, to visit his girlfriend at Mqantsa. Unable to gain entry, he decided to return to his parental home in Ivory Park.
- [21] The police thereafter left with the deceased and according to Keneilwe's observations the deceased showed no visible injuries. They all returned to their respective shacks.
- [22] Around 04:00am accused 1 called them again. Keneilwe went outside and discovered the deceased lying on the ground outside the premises.

Ms Magata Mmadilemo ("Magata")

- [23] The witness confirmed that Keneilwe was her daughter and that they were residing at 463 Sedibeng Section, Tembisa at the time of the incident. She stated that, upon hearing screams at around 02:00am, both she and Keneilwe exited their house to find the accused inside the yard.
- [24] Accused 2 informed them of an attempted break-in at his shack. The group proceeded to the window of accused 2's shack, where they observed footprints on the ground below the window. According to the witness, all present unanimously agreed that the footprints were made by a person wearing All Star tekkies.

- [25] Magata testified that accused 4 and a person, later identified, as Mathlatse, the deceased, approached them. The deceased was instructed to place his foot near the footprints found on the ground at the back of accused 2's shack for comparison with the shoes he was wearing. Despite being told not to move his foot, the deceased shifted it, hindering the comparison. After assessing the footprints and the deceased's shoes, the accused concluded that the footprints matched and that the deceased was the one who attempted to break into accused 2's shack.
- [26] The accused then assaulted the deceased using fists, belts, and kicks. Accused 2, during the assault, retrieved a rope from his shack, whereafter he tied the deceased's hands behind his back and his feet together. Magata pleaded with the accused to call the police as they would end up injuring deceased. The accused initially ignored her requests. Eventually, accused 1 phoned the police.
- [27] When the police arrived, the deceased on his knees on the ground. Following inquiries by the police, they instructed the accused to untie the deceased. Subsequently, the police officers, followed by the witnesses, the accused and the deceased, left the yard. The police officer advised the deceased to go to his girlfriend's place in Mqantsa before departing.
- [28] After the police left, the accused resumed assaulting deceased with the belts, they also kicked him. The second assault occurred outside the yard near the gate. The witness testified that she reprimanded the accused not to assault the deceased. She testified that at that point she went inside her shack. She stated that the accused also left, stating that they were going to prepare for work. When she left, the deceased was lying outside the yard near the gate on the grass.
- [29] Magata further testified that later that morning, after the deceased was found lying outside the yard, the police and ambulance services were contacted.

Lerato Confidence Dlangamandla ("Lerato")

- [30] The witness testified that at the time of the incident she was residing at 464 Sedibeng Section Tembisa and she knew her neighbours the accused residing at 463. On 21 May 2021 in the early hours of the morning, she was awakened by noises emanating from the

neighbour's premises. She got up and went to 463 to investigate what was going on. On her arrival she found accused assaulting a male, later identified as the deceased.

[31] The deceased was assaulted with a belt and he was kicked while his hands and feet were bound with a belt. Lerato stated that she was informed that the assault on the deceased was due to his alleged involvement in attempting to break in at accused 2's shack.

[32] Upon her arrival at the premises, she found Keneilwe, Mama Keneilwe, sis Gloria, Knowledge (who owns a tuckshop in the yard) and his wife and his two cousins. Lerato testified that she approached accused 1 and instructed him to call the street committee member. Accused 1, accompanied by Keneilwe went to the street committee member, Bigman. On their return, they informed them that Bigman was sleeping and that he would address their complaint in the morning.

[33] She stated that accused 2 made phone calls to determine where the deceased came from, with the phone on loud speaker, she heard a male person answering with an attitude, leading to the call being terminated. Accused 2 again called and warned the person that they would find the deceased dead in the street as he was being assaulted. The call was again terminated by the recipient.

[34] The police were called. On arrival the police officers informed them that they were not working in their sector and they left. Subsequently, two police officers arrived and inquired about the situation, everybody was talking. The police officers instructed the accused to untie the deceased. As the police officers exited the yard, the deceased followed and attempted to enter the police van, but the officers refused and departed, leaving the deceased behind.

[35] Lerato testified that the accused 1, 2 and 4 approached the deceased, who attempted to flee but was caught by accused 4. The deceased was again assaulted with belts and accused 4 tied the deceased to a pole outside the yard. During the second assault on the deceased accused 3 and 5 were not present.

Constable Choene Francis Hopane (“Hopane”)

[36] The witness, a police officer stationed at Tembisa SAPS, testified that at 03:00 am on 21 May 2021, while on duty, he received a complaint of mop justice in Sedibeng Section. Upon his arrival at the reported location, there was no indication of mop justice. Hopane reverted back to radio control after which he was redirected to 463, Sedibeng Section.

[37] On his arrival at the given address, he found a group of individuals inside the yard. A person was seated on the ground, his hands and feet tied with a rope and he was soaked. After introducing himself, Hopane inquired about the situation. A resident informed him that they suspected the person of attempting to break into one of the shacks on the premises.

[38] At this point, Hopane and the man engaged in a dialogue. The man identified himself as Mathlatse and explained that he entered the yard after being called by one of the residents. He further explained that he was on his way home from his girlfriend’s place in Mqantsa, the neighbouring section, when the man called him.

[39] Hopane instructed one of the men to untie the deceased, whereafter he inquired if any of them wished to file criminal charges against the deceased. They declined to do so.

[40] Hopane and the deceased then left the yard. He instructed the deceased to return to his girlfriend’s place in Mqantsa before leaving the scene to attend to his duties.

[41] The witness testified that he was unable to state whether the deceased was injured when he left the yard.

Sergeant Vusi Shilaluke (“Shilaluke”)

[42] The witness, employed by the South African Police Services and stationed at Tembisa, testified that on 21 May 2021, at around 06:20am, he responded to a complaint at 463 Sedibeng Section, Tembisa. The radio control report mentioned an individual, the deceased, lying next to the street.

[43] On his arrival at 463 Sedibeng Section, the witness encountered accused 1, who pointed out the deceased, lying outside yard 463, near the gate. Upon investigation, the witness found the deceased unresponsive whereafter he summonsed the ambulance services.

[44] While waiting for the ambulance to arrive, accused 1 informed Shilaluke that the deceased entered the yard the previous night, attempting to break a window in one of the shacks. He further informed the witness that the tenants residing at the premises accosted the deceased and assaulted him. Accused 1 also told the witness that the police were summoned and upon their arrival, the officers instructed them to release the deceased, which they did. Accused 1 also informed the witness that after the deceased left the yard, they all returned to their respective houses.

[45] Shilaluke stated that during the conversation with accused 1, the accused appeared agitated, moving around the crime scene. He testified that the accused was “all over”, and every time he wanted to talk to accused 1, he had to call him.

[46] On arrival of the ambulance services, it was confirmed that the deceased passed away. The witness also observed that one of the deceased’s legs was tied to a pole.

[47] Tembisa investigators were summonsed to attend to the crime scene. Upon their arrival the crime scene was photographed. Shilaluke confirmed the correctness of the crime scene photographs as depicted in exhibit “C”.

Ms Ntshaba Gladys Mphahlele (“Gladys”)

[48] The witness testified that at the time of the incident she was residing at Ivory Park [...], Midrand. The deceased was her son, Mathlatse Hlabirwa Mphahlele, and he was born on 10 October 1990, see exhibit “E”.

[49] She stated that prior to the passing of the deceased, on 21 May 2021, he lived with her in Ivory Park and he would frequently visit his girlfriend, Cordelia Mpungose in Mqantsa Section, Tembisa. She testified the deceased and Cordelia had three minor children. Tragically, on 16 October 2022 Cordelia passed away due to injuries sustained in a motor vehicle accident, leading to the children being placed in the care of Cordelia’s aunt.

[50] Ms Mphahlele testified that she last saw the deceased, her son, on Thursday, 20 May 2021. The following morning Thakgatso, the deceased’s brother, informed her that he had received a phone call from an unknown person claiming that they were assaulting Mathlatse. Thakgatso further informed her that he pleaded with the caller not to harm Mathlatse, but to call the police, whereafter the call was terminated.

- [51] The witness stated that Thakgatso reported the incident by calling 10111, specifying that the incident occurred in Sedibeng Section. As they had no transport, they waited until sunrise, after which Thakgatso went to work with the intention of going to where the incident occurred.
- [52] The witness testified that Thakgatso returned later that morning and conveyed the news of the deceased's death. He accompanied her to the crime scene, 463 Sedibeng Section, Tembisa.
- [53] On her arrival at the crime scene, she found her son, Mathlatse laying outside the yard, near the gate of 463 Sedibeng Section. She also noticed that his feet were tied with a rope and he was lying approximately 2 (two) metre from a pole on grass. Ms Mphahlele identified the crime scene as depicted in exhibit "C".
- [54] The police were on the scene, after arrival of the forensic team, the body of the deceased was transported to Germiston Mortuary. Ms Mphahlele stated that at a later stage, she identified the body as that of her son, Hlabirwa Mathlatse Mphahlele, at the mortuary.

Thakgatso Mphahlele ("Thakgatso")

- [55] Thakgatso testified that he resided with his mother, Ms Mphahlele and his siblings in Ivory Park. The deceased was his brother.
- [56] On 21 May 2021 at around 05:00pm, the deceased left their parental home to visit a friend and his girlfriend in Mqantsa. That was the last time he saw his brother alive.
- [57] During the early hours of the morning the witness received a phone call from an unknown male person. The caller informed him that he found the deceased knocking at his shack and he, the unknown male person was killing his brother, the deceased. The witness pleaded with the person to contact the police if the deceased had stolen anything. The call was abruptly disconnected. Thakgatso called the person again, informing him that he was going to call 10111.
- [58] Following the conversation, the witness called 10111, whereafter he went to the main house to inform his mother of what had transpired. As taxi driver, the witness started work at 04:30am, and after arriving at his place of employment, he proceeded with his

taxi to Sedibeng to search for the deceased. While driving in the area, a boy directed him to the yard where the incident occurred. Upon arrival at the yard, he found the deceased outside, tied to a pole and discovered that the deceased had passed away.

Section 174 Application

[59] Following the closure of the state's case the defence applied for the discharge of the accused in terms of section 174 of the CPA.

[60] The State and defence in addition to their oral submissions, favoured this court with comprehensive heads of argument. I am indebted to them and do not see any need to repeat such for purposes of this judgment.

Common Cause

[61] The following facts are not in dispute;

1. Accused 1 resides at 463 Sedibeng Section, Tembisa. Furthermore, that accused 2, 3, 4, 5, Magata, Keneilwe and Knowledge are tenants of accused 1.
2. In the early morning hours, at around 02:00am on 21 May 2021 an unknown person entered 463 Sedibeng Section, Tembisa and attempted to break into the shack of accused 2.
3. Accused 2 made alarm, after which the occupants searched for the "suspect".
4. A person named, Mathlatse, the deceased, who was in the vicinity of the yard was questioned.
5. The police were summoned to the yard, because no charges were opened, the police and Mathlatse left.
6. At around 04:00am the deceased, Hlabirwa Mphahlele was found tied to a pole outside the yard.

7. On arrival of the ambulance services, it was confirmed that the person has passed on. The body was transported from the crime scene to the mortuary.
8. On 27 May 2021 a post-mortem examination was conducted on the body of the deceased by Dr Emefa Abra Apatu.
9. She indicated that there was a white rope around the left wrist, an electrical wire tied around the right ankle and lastly a free-lying rope next to the left forearm of the deceased.
10. She concluded that the cause of death was “Blunt force soft tissue injuries”.
11. On 24 May 2021 Ms Tsheba Gladys Mphahlele, residing at [...] Ivory Park, Midrand, identified the body of the deceased as that of her son, Hlabirwa Mathlatse Mphahlele.

Application in terms of section 35(5) of the Constitution- Accused 1

[62] Considering my findings outlined below, I deem it unnecessary to delve into the application made by Mr Pillay on behalf of accused 1 in terms of section 35 of the Constitution.

Case Law, Discussion and Evaluation

[63] Section 174 of the CPA provides:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”

[64] On a proper reading and interpretation of the above section, it is apparent that the court hearing an application of this nature is enjoined to exercise a discretion, to either grant or refuse the application for discharge, where the court is of the opinion that there is no evidence that the accused committed the offence, he is charged with, the application must succeed.

[65] It is a discretion which must, self- evidently, be exercised judicially.

[66] Furthermore, it is well established that “*no evidence*” does not mean no evidence at all, but rather a lack evidence on which a reasonable court, acting carefully, might convict.¹

[67] In *S v Shuping and Others*,² Hiemstra, CJ reviewed the case law history of discharge applications and formulated the test as follows:³

“At the close of the State case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.”

[68] The second part of the latter test did not always find favour. In *S v Phuravhatha and Others*,⁴ Du Toit, AJ stated the following:

“The presumption in favour of innocence, the fact that the onus rests on the State, as well as the dictates of justice in my view will normally require an exercise of the discretion under s 174 in favour of an accused person where the State case is virtually and basically non-existent. Strengthening or supplementation of a non-existent State case is a physical impossibility.”

[69] Since the inception of our Constitutional order, conflicting views arose as to whether or not the Constitution has impacted on the test to be applied by a court in an application in terms of section 174 of the CPA. These decisions culminated in the Supreme Court of Appeal finally deciding the issue in the matter of *S v Lubaxa*,⁵ as follows:

“[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights

¹ *R v Shein* 1925 AD 6; *Rex v Herholdt & Others* 1956(2) SA 722 (W); *S v Mpetha & Others* 1983(4) SA 262; *S v Shuping & Others* 1983(2) SA 119 (B); *S v Lubaxa* 2001(2) SACR 703 (SCA).

² *S v Shuping & Others* 1983(2) SA 119 (B).

³ Page 121 at paragraph A.

⁴ 1992 (2) SACR 544 (V).

⁵ 2001 (2) SACR 703 (SCA).

that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence.

[19] The right to be discharged at that stage of trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12”.

[70] It has been held that the credibility of state witnesses plays a very limited role at this stage in the proceedings.⁶ It must be noted that relevant evidence can only be ignored if “*it is of such a poor quality that no reasonable person could possibly accept it*”.⁷

[71] In *S v Agliotti*⁸ Kgomo, J (as he then was) developed the approach further by stating the following:

“[272] In *S v Lavhengwa* 1996 (2) SACR 453 (W) the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this

⁶ *S v Agliotti* 2011 (2) SACR 437 (GSJ) at para 257

⁷ *S v Mpetha and Others* 1983 (4) SA 262.

⁸ See footnote [6].

court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused's silence in this context. ...

[273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also 'unwise to attempt to banish issues of credibility' in the assessment of issues in terms of s 174 or to 'confine judicial discretion' to 'musts' and 'must nots'"

[72] In the matter of *S v Dewani*,⁹ Traverso DJP summarised the legal position regarding applications in terms of section 174 of CPA as follows:

"a) An accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;

b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;

c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted."

[73] The test applicable in the nature of this application is that the prosecution must establish a *prima facie* case against the accused as opposed to the applicable test in criminal cases being that the State must prove its case beyond reasonable doubt.¹⁰

[74] The three eye witnesses, Keneilwe, Magata and Lerato, have presented conflicting and contradictory accounts on various critical aspects relating to the assault on the deceased. These contradictions are material, particularly concerning the manner of the assault on the deceased on the night of the incident.

[75] It is apparent from the evidence that the deceased was suspected of housebreaking by some of the occupants at 463, Sedibeng section Tembisa. This suspicion led to the

⁹ [2014] ZAWCHC 188.

¹⁰ *S v Hepworth* 1928 AD 265.

apprehension and interrogation of the deceased during the early morning hours. Given the involvement of a group of people and the dark conditions at the time of the incident, the court must exercise caution in evaluating the eyewitnesses accounts.

[76] I find the contradictions in the evidence of the eye witnesses namely, Keneilwe, Magata and Lerato rather disquieting. Just to mention a few;

1. Keneilwe omitted mentioning that the deceased was instructed to place his footprint next to one found at the back of the shack where the alleged housebreaking took place. This crucial detail, integral to the suspicion of the deceased's involvement in housebreaking was not brought up by Keneilwe of Lerato.
2. Magata stated that during the assault of the deceased accused 2 entered his shack and returned with a rope where he tied the deceased's hands and feet. Keneilwe did not corroborated this even though she was present at the scene. These facts were also not corroborated by Dr Apatu as she found a white rope around the left wrist and an electrical wire around the right ankle of the deceased. No mention was made by any of the eye witnesses that an electrical cable was used to bound the deceased.
3. Discrepancies in the accounts of the assault include variations in the actions attributed to each accused, such as the use of fists, belts and kicking. The different versions of the eyewitnesses in this regard further complicated my understanding of the events. In this regard, Keneilwe stated that accused 1 kicked the deceased, accused 2 hit the deceased with a belt and accused 3, 4 and 5 assaulted the deceased with open hands. She also testified that at some stage during the assault accused 1, 3, 4 and 5 also took belts and assaulted the deceased with the belts. Magata described the assault on the deceased as follows; accused 1, 2, 3, 4 and 5 hit the deceased with clenched fists and belts and according to her testimony they also kicked the deceased.
4. Conflicting evidence regarding whether all the occupants returned to their houses after the police and the deceased left the yard. Keneilwe testified that

after the police and the deceased left the yard she and all the occupants returned to their houses. Magata did not corroborate Keneilwe's evidence in this regard, in fact Magata stated that they all, including Keneilwe stood at the gate when the police left at which time the deceased was assaulted for a second time. Later during Magata's cross-examination she stated that Keneilwe was not present during the second assault outside the yard. Oddly, she testified that during her earlier testimony she was confused and having time think about the incident following an adjournment, she remembered that Keneilwe was not present during the second assault.

5. Lerato testified that on her arrival on the scene the accused were assaulting the deceased with a belt and those of them not in possession of belts were kicking the deceased. She further stated that during the assault she instructed accused 1 to approach the street committee member, Bigman, where after accused 1 and Keneilwe left the yard to report the incident to the street committee member. Neither Keneilwe or Magata corroborated Lerato on this aspect, in fact the court only heard this version during the testimony of Lerato.
6. Lerato provided unique details about the phone calls made to the deceased's family and the second assault of the deceased. These details were not corroborated by Keneilwe or Magata, thus raising questions about the consistency of the accounts. It is evident from Lerato's evidence that these phone calls were made prior to the police being called to attend to the scene.
7. Lerato further stated that after the police left the scene the deceased attempted to flee, but accused 4 caught the deceased, where after the deceased was again assaulted by accused 1, 2 and 4. She testified that Keneilwe, Magata and accused 1, 2 and 4 were present during the second assault outside the yard. In contradiction, Magata testified that all the accused assaulted the deceased outside the yard after the police left. She also stated that accused 4, tied the deceased to the pole outside the yard, this was not corroborated by Keneilwe or Magata.

8. Lerato also testified that accused 1 did not kick the deceased but used a belt to assault the deceased. She conceded during cross-examination that she informed the police that the deceased was also assaulted with a unknown object, like a pipe.

[77] Undoubtedly, minor variations and contradictions in the evidence of witnesses will not tilt benefit of doubt in favour of an accused, but when contradictions in the evidence presented by the State proves to be fatal, such contradictions go to the root of the matter and in such cases the accused should get the benefit of the doubt.

[78] I am alive to the fact that the credibility of the state witnesses plays only a limited role at this stage of the proceedings.¹¹ However, the court is entitled to disregard the State's evidence and discharge the accused where the evidence is of 'such poor quality' that no reasonable man could convict the accused on it.¹² I am of the view that the guilt of an accused should be proved by the State, without the assistance of the accused.

[79] Therefore, when there is no evidence on which a reasonable man, or reasonable court may convict, the accused must be discharged or found not guilty of the crime which they are charged.

[80] From the above, it is quite clear after evaluation of the oral evidence of the eyewitnesses that there are far too many contradictions and adverse issues of credibility to sustain a possible conviction in the face of an absence of a defence version. The state witness contradicted themselves in important material aspects.

[81] In my view the State did not present a *prima facie* case that requires the accused to answer to. Therefore, the accused stand to be discharged in respect of both counts they have been charged with.

¹¹ *Mpetha* supra (note 7 above) at 265D – G.

¹² *Ibid.*

Order

[82] In light of the above, I make the following order:

1. The application in terms of section 174 in respect of all accused succeeds and the accused are discharged on all counts against them in terms of section 174 of the CPA.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand- down is deemed to be 16h00 on 5 December 2023.

DATE OF HEARING:

10, 11, 12, 13, 17, 18, 21 October, 7, 15, 25, 28 November 2022, 11, 12, 13, 17, 18, 19 April, 3, 7 July, 16, 18, 20 October 2023, 4 and 5 December 2023

DATE JUDGMENT DELIVERED:

5 December 2023

APPEARANCES:

For Accused 1: Advocate Xuma/ Mr Pillay

For Accused 2: Mr Leshabana

For Accused 3: Advocate Thumbu

For Accused 4 and 5: Advocate Lekgothoane

For the State: Advocate Mbaqa