

REPUBLIC OF SOUTH AFRICA



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

Case Number: SS57/2022

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| (1) | REPORTABLE: Yes/No |
| (2) | OF INTEREST TO OTHER JUDGES: Yes/ No |
| (3) | REVISED: Yes/ No |

27/06/2023

DATE

SIGNATURE

In the matter between:

THE STATE

and

MOELETSI TEBOGO MESHACK

JUDGMENT

BHOOLA AJ

Introduction

[1] Mr. Moeletsi Tebogo Meshack ('the accused') was arraigned in this court on three charges. According to the indictment, he was charged as follows:

- a. Count one: Arson, where the State alleged that the accused, on the 11th of December 2021, unlawfully and intentionally injured Thabiso Godrey

Kwadi (the deceased) in his property, set fire to it and thereby damaged or destroyed a house which was his property or in his lawful possession.

- b. Count two: Murder¹, where the State alleged that the accused unlawfully and intentionally killed the deceased in count 1 on 11 December 2021 at Mohlakeng, Randfontein.
- c. Count three: Defeating or obstructing the administration of Justice, where the State alleged on the date and place mentioned in Count 1, the accused did unlawfully and with intent to defeat or obstruct the cause of justice, commit an act, to wit, instructed and/or hired other people to clean and paint the RDP house number 2470 Gumenke Street, Mohlakeng, which is a crime scene in an attempt to remove and conceal evidence at the murder scene, and thus the accused did defeat or obstruct the administration of justice.

[2] At the onset of the trial and before the accused pleaded to the charges, the import, and implications of the penal provisions of the Minimum Sentence Act, competent verdicts, and admissions in terms of section 220 were explained to the accused. He understood the import thereof.

The plea

[3] When the charges were put to the accused, he pleaded not guilty to all the counts proffered against him and the provisions of section 115 of the Criminal Procedure Act 51 of 1977 (the Act) applied. He was represented by Advocate Nel, who confirmed that the plea was in accordance with her instructions, and she did not tender any plea explanation on the accused's behalf. The accused exercised his right to remain silent and elected not to disclose the basis of his defence.

[4] The defence also made certain admissions in terms of section 220 of the Act. The statement of Mr. Tiitsetso Motsuenyane, (Mr. Motsuenyane) was also admitted into evidence as part of the probative material. I shall return to this later.

¹ read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act) and further read with section 258 of Criminal Procedure Act 51 of 1977.

The application in terms of section 174 of the Act

- [5] At the close of the State's case, Advocate Nel, moved an application in terms of section 174 of the Act in respect of all three charges that the accused faced.
- [6] Section 174 of the Act 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."
- [7] Advocate Mongwane, who appeared for the State initially opposed the application in respect of all three counts and later conceded that no evidence was led in respect of count three which implicated the accused. Consequently, the application for a discharge was granted in respect of count three only being the charge of defeating the ends of justice. I declined to discharge the accused on counts one and two. The accused was, accordingly, placed on his defence for these two counts.
- [8] I shall in this judgment deal with the evidence relating to counts one and two. In doing so I shall not deal with the evidence in the sequence in which it was led, but rather in a chronological sequence of the narrative. I will also deal with count two before count one because the State first led evidence on count two before leading evidence on count one.
- [9] This case turns on a factual dispute or basis. I shall first consider the factual disputes of the case before pronouncing on the rights, duties and liabilities of the parties engaged in the dispute.² Thereafter, I shall 'test' and 'weigh' the evidence and ascertain whether the State, who has been burdened with the onus of proof has discharged the onus.

The evidence

- [10] The National Prosecuting Authority (the State) led the evidence of six witnesses. Two of the witnesses Mr. Motsuenyane and Mr. Katlego Desmond Modikoe (Mr. Modikoe) alleged they witnessed the accused set the deceased alight. I will refer to this as scene one. Two other independent eye witnesses, Ms Dimakatso Margarete Matamane (Ms. Matamane) and Mr. Jabulani

² Schwikkard and van der Merwe 2005:494

Thabang (Mr. Thabang) testified they saw the deceased running to the tap whilst ablaze past their dwelling and the accused followed him in proximity. I will refer to this as scene two. I will then refer to scene three as to what transpired after the fire was put out at the house and the evidence of witnesses Mr. Jameson Tseke (Mr. Tseke) and Mr. Thapelo Johnson Kwadi, (Mr. Kwadi) the deceased brother who testified about the events which transpired the day after the incident.

[11] Mr. Motsuenyane, a close friend of the deceased who lived with the deceased on the 11th of December 2021, testified that at about 20h00, he was inside the house, in the kitchen washing dishes, when the accused entered the kitchen and proceeded to the dining room where the deceased was seated with Mr. Modikoe. The accused requested his money from the deceased. The deceased did not answer him. He subsequently informed the deceased that he was leaving and will return. The accused returned after five (5) minutes, with a five-litre container of petrol, and poured the petrol over the deceased, who was seated on the sofa and set him alight. When this happened, he and Mr. Modikoe fled the dining room through the window because the accused blocked the door. According to him, when they were outside, he screamed and called the tenants for assistance. After a while, the house was ablaze. He and Mr. Modikoe then entered the house through kitchen door, opened the dining room door and found the accused kicking the deceased inside the dining room whilst he was ablaze. They pulled the deceased outside the house to take him to the tap. The accused continued kicking the deceased whilst he was outside the house. He dragged the deceased to the tap and the accused followed them to the tap, still requesting his money from the deceased. The accused eventually wrapped the deceased in a curtain to extinguish the flames, put him inside his car and took him to the hospital.

[12] Mr. Katlego Desmond Modikoe (Mr. Modikoe), corroborated the narrative of Mr. Motsuenyane regarding the accused setting the deceased alight only. This was not without contradictions. His evidence was that the accused returned with a

two-litre bottle after twenty to thirty minutes. He was uncertain whether the bottle contained petrol or paraffin. According to him when he stood up to go out, the accused pushed him back and closed the door. He then jumped out through the window and ran away from the scene to his house. He returned to the scene after the accused took the deceased to hospital.

[13] Ms. Matamane was visiting a tenant, Ms Nobuntu Zenzhile on the 11th of December 2021, she lived on the deceased's property. At about 20h15 whilst she, Ms. Zenzhile, and Mr. Thabeng were chatting inside the house, she heard a person screaming and saw this person running in the direction of the tap. This person was on fire. She opened the door and went outside. She later realised that the person that was ablaze was the deceased. She also observed that the person who followed the deceased was the accused. She followed them to the tap and heard the deceased saying to the accused, he was sorry, and the accused also told the deceased 'Those things you have taken were very expensive' and the deceased kept on saying 'I am sorry brother.' Both Ms. Zenzhile and Mr. Thabeng also followed her to the tap. Whilst they were with the deceased at the tap, she noticed the house was burning and that was when the accused, Mr. Thabeng, Mr. Modikoe and Mr. Motsuenyane extinguished the fire. After they extinguished the fire, the accused took the deceased to the clinic. She did not witness how the fire occurred and when the accused took the deceased to the clinic. The next day she noticed people were painting the house and it was clean. She had no idea why they painted the house.

[14] Mr. Thabeng, testified that on the night of the incident, he was at his girlfriend's place Ms Nobuntu Zenzhile and they were with Ms Matamane inside the house, chatting. He corroborated Ms Matamane's evidence. However, he did not hear what the deceased and the accused spoke about. When he went outside, he found the deceased burning, sitting in a drain under an open tap with water flowing down on him and the accused was standing next to him busy talking to him. He also noticed the deceased's friends Mr. Motsuenyane and Mr. Modikoe

who were standing at a distance. He then observed that the house was burning so he ran back to his house, fetched a bucket, and assisted to extinguish the fire from the outside. The accused also assisted to extinguish the fire in the house. Thereafter, the accused took the deceased to the clinic or hospital. He met with him an hour later and he informed him the deceased will be fine.

[15] Mr. Tseke, testified that on the 12th of December 2021, he was on his way to the deceased's place, when he met Mr. Motsuenyane, who informed him about the deceased's demise. Mr. Motsuenyane further informed him that the accused arrived in the company of Mr. Modikoe and requested people to paint the deceased house and he would pay them R200.00 each. They continued with the painting, and they never saw the accused again. The next day they were short on money for food and the accused gave him R100.00 to buy food. He did not get paid for the job he did, and the word was the deceased had passed on and the accused was arrested.

[16] Under cross- examination, he conceded that the accused did not offer him a piece job and neither did he pay him for painting and cleaning the house. He also confirmed that the accused usually gave him money for food.

[17] Mr. Kwadi, the deceased's brother testified that on the 12th of December 2021 he received information that his brother was burnt. He went to his house and noticed Mr. Motsuenyane and others were cleaning the house. He enquired from Mr. Motsuenyane about the whereabouts of his brother, and he informed him that he was in hospital, and he was fine. Whist removing the goods from the house he observed that Mr. Motsuenyane was hiding something from him. As they were cleaning the accused arrived greeted them and he and Mr. Motsuenyane spoke to each other. He did not know what they spoke about. Mr. Motsuenyane then returned to them and informed them that the accused requested that they must clean, and paint. They continued to clean the entire day. The following day, they continued to clean not knowing that the deceased

had passed on. The deceased's sister arrived and enquired as to why they were they cleaning and who had instructed them authority to clean up. Mr. Motsuenyane said they were requested to do so by the accused.

[18] That was the evidence for the state.

[19] The accused testified and called one witness who was his *alibi*, Mr. Oompie Pendani.

[20] The accused, testified that on the 11th of December 2021, a Saturday, he commenced work at 9h00 and took his two children with him to work. He knocked off work at 18h00. After knocking off work, he stopped to buy food at KFC and returned home immediately thereafter. When he reached home, he opened the gate and drove in. He was busy dishing up the food when he heard noise that people were screaming. He went outside on the paving to have a look what was happening. He saw smoke was coming out of the deceased's house. He ran out of his gate, he passed Mr. Pendani on the Street who was screaming 'its burning, its burning!' and entered the deceased's premises through the small gate.

[21] As he entered the premises, the deceased walked out of the kitchen and was burning. He told the deceased to go to the tap. No one else was in the vicinity. He followed the deceased to the tap. When they reached the tap, he put the deceased under the tap in the drain and opened the tap for the water to run on him. He shouted at and scolded the deceased telling him 'Do you see now what you are doing with friends! I told you they will get you into big trouble.' This was not the first time he reprimanded him about his friends. He asked the deceased what had happened, and the deceased replied that he was sleeping.

- [22] When they were at the taps, he noticed Mr. Motsuenyane arrived and stood about four to five meters away from the tap. There was also a female at the tap. People came out of their homes and assisted to extinguish the fire in the house. He also assisted to extinguish the fire after he stopped the deceased from burning. Someone then asked whether the ambulance was called. He said the ambulance will take long and he will take the deceased to the clinic.
- [23] Upon arrival at the clinic, there were two nurses present. The deceased was talking, and they asked him if he wanted a wheelchair. The nurses were at causality room A. They requested him to wait at the bench. One of the nurses came out and assisted him, by dressing his wound. He went to buy the deceased 'amahew' and bananas and returned to the clinic. He asked the deceased again what really happened, and the deceased informed him that he went four days without any sleep, he was tired and sleepy. He was sleeping with two friends. The nurse informed him that she was going to transfer the deceased to the Leratong Hospital, and that he could leave.
- [24] On the Monday after the incident, the deceased's sister approached him and enquired if he took the deceased to hospital. He confirmed that he did, and they requested him to go to the South African Police Service (SAPS) with them which he obliged. He went with them to Randfontein SAPS. He spoke to a Sergeant and informed the Sergeant that he took the deceased to the clinic. They asked if he knew what happened and he informed them that the deceased said he was sleeping. They thanked him and informed him that the deceased passed on. The police did not take his statement. He received a call on Tuesday from one Godfrey Xaba, a police officer who informed him he wanted to see him. He went to the Randfontein SAPS on the Sunday at 18h00 and was arrested. He denied being inside the house when the deceased was set alight and did not set the deceased alight that evening.
- [25] Under cross- examination he testified he passed Mr. Pendani on the street because he was running to the scene. He later saw him standing in the deceased's yard with people who assisted to extinguish the fire, but he did not

participate to put out the fire.

[26] Mr. Pendani, the accused's *alibi*, testified he is a tenant at the accused's yard. He was in his room when he heard noises outside. He went out and stood by the wall fence at the gate. The accused came from inside his house and passed him at the gate while he was standing by the wall. At that time, he saw two ladies who had buckets of water at the deceased's place. These ladies were there before the accused arrived at the scene. He did not go out of the yard and did not enter the deceased's property. The accused returned to fetch his car. He put the deceased in the motor vehicle and left. He did not make a statement to the police because they did not come to him to make a statement.

[27] That was the case for the defence.

[28] Advocate Mongwane for the State contended that the state witnesses testified honestly in that the accused was at the deceased house before the deceased was set alight. He contended that the defence witnesses contradicted each other on how the events happened. It was submitted that the version of the accused and his *alibi* witness could not be reasonably possibly true as it had material contradictions and that the State witnesses testified honestly.

[29] Advocate Nel for the Defence submitted that the version of Mr. Motsuenyane was both highly improbable as well as not credible because his version of the events was contradicted by his own statement, as well as the remainder of the State's other witnesses. Counsel contended State witnesses Mr. Tseke and Mr. Kwadi both cast doubt on the honesty of this witness, more so regarding his actions on the scene and in reporting what had happened to the deceased. Counsel submitted of greater concern was that whilst leading his evidence in chief, the State Counsel failed to alert this Honourable Court to the fact that this elaborated version of the evidence was divulged to him during consultation and that it was not contained in Mr. Motsuenyane's statement, and this must result in serious doubt regarding his credibility.

[30] The defence submitted that the accused was an honest, reliable, and credible witness and that his version was reasonably possibly true. The State did not succeed in disproving the evidence that the accused and his witness testified that the accused arrived home shortly prior to the commotion at the deceased's house, he came from work and had his two minor children with him, he was seen on arrival, he was seen when he was inside his house a few minutes before the commotion took place and he was seen leaving his premises to assist, and he was seen assisting.

Issues

[31] The following are the issues to be determined in this matter:

- a. two mutually destructive versions before the court.
- b. did the State, prove that the defence of the *alibi* was false beyond a reasonable doubt.
- c. whether the state who was burdened with the onus, discharged the onus, and proved its case beyond a reasonable doubt that the accused was the assailant who committed the offences.

Applicable legal principles

Two Mutually destructive irreconcilable versions

[32] In this case, it is apparent that two mutually destructive versions are before the trial court. This essentially means were there are two conflicting statements or versions before the court, each contradicting the other, both these versions cannot coexist or be reconciled with one another due to their contradictory or conflicting accounts of events.

[33] The approach by the courts to resolving two irreconcilable, mutually destructive

factual versions is a well-established with sound doctrine in our law.³ Simply put in order to resolve the disputed issues, I must make findings on the credibility of the various factual witnesses, their reliability, and the probabilities. After having assessed the credibility, reliability, and probabilities, I will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.⁴

[34] In *S v Janse van Rensburg and Others*⁵ the Court said

'logic dictates that where there are two conflicting versions or two mutually destructive stories, both cannot be true-only one can be true. Consequently, the other must be false. However, the dictates of logic do not displace the standard of proof required in either civil or criminal matters. To determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and the process measures against probabilities. In the final analysis the court must determine whether the state has mustered the requisite threshold- in this case proof beyond reasonable doubt.⁶

[35] When assessing two conflicting versions all the evidence should be considered and none should be ignored.⁷

Alibi

[36] The legal principle regarding alibi's is that the accused bears no onus to prove his *alibi*⁸. Once an alibi is raised the onus is on the State to disprove it or to prove that it is false beyond reasonable doubt.⁹

[37] In *Maila v The State*,¹⁰ the SCA referring to the case of *Tshiki v S*¹¹ held:

[20] It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to

³ Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others para 5, (427/01) [2002] ZASCA 98

⁴ Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others para 5, (427/01) [2002] ZASCA 98

⁵ S v Janse van Rensburg and Others 2009 (2) SACR 216 (c) at para 8 and S v Singh 1975(1)SA 227(N) at 228

⁶ S v Saban en 'n Andere 1992(1) SACR 199 (A) at 203j to 204 (a- b); S v Van der Meyden 1999 (1) SACR 447 (W) at 449 g-j – 450 a -b and S v Trainor 2003 (1) SACR 35(SCA) at para 9.

⁷ S v Langeberg [2017] ZAFSH 49.

⁸ S v Shabalala 1986 (6) SA 734 (A).

⁹ S v Musiker 2013(1) SACR 517 (SCA) para 15-16.

¹⁰ Maila v S(429/2022) [2023] ZASCA 3

¹¹ Tshiki v S [2020] ZASCA 92 (SCA)

corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty.

[21] The only responsibility an accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the *alibi* defence, after investigations, prove to be solid.

[38] The correct approach is that an *alibi* must be considered in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.' An *alibi* may only be rejected by court where it was proven beyond reasonable doubt that it was false.¹² The effect of a false *alibi* is that an accused is placed in a position as if he has not testified at all.¹³ If there is evidence of an accused person's presence at a place and at a time making it impossible for him to have committed the crime and if in the totality of the evidence there is a reasonable possibility that the *alibi* evidence is true, the effect is that there is a possibility that he has not committed the crime.¹⁴ The onus does not change; however, it was observed that the vulnerability of an unsupported *alibi* defence will depend on the court's assessment of the truth of the accused's testimony.¹⁵

Evaluation

[39] When evaluating the evidence before this court, the proper approach to be adopted was laid in *S v M*¹⁶ where the court held '...the totality of evidence must not be measured in isolation, but by assessing properly in the light of the inherent strengths, weaknesses, probabilities, and improbabilities on both

¹² *Shusha v S* [2011] ZASCA 171 para 10 and *S v Musiker* 2013(1) SACR 517 (SCA) para 15-16.

¹³ *S v Liebenberg* 2005 (2) SACR 335 (SCA)

¹⁴ See *R v Biya* 1952 (4) SA 514 (A) at 521E-D

¹⁵ *S v Mathebula* 2010 (1) SACR 55 (SCA) para 11

¹⁶ *S v M* 2006(1) SACR 135 (SCA)

sides the balance which must weigh so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded.¹⁷

[40] The evaluation of evidence adduced is a crucial phase in the fact-finding process. A court should first determine the factual basis of a case before pronouncing on the rights, duties and liabilities of the parties engaged in the dispute, which is determined by evaluating all the probative material admitted during the trial. The weight of the evidence is determined during this process of fact-finding to determine whether the party carrying the burden of proof has proved its allegations in accordance with the applicable standard of proof.¹⁸

[41] A conspectus of the evidence on the disputed facts reveal a lot of material contradictions and inconsistencies on what transpired in this case. There are contradictions both by the State and the Defence in this trial. Some witnesses more frank, honest, and candid than others. Ultimately the Court must look at the evidence in totality. My evaluation of the probabilities are as follows:

- a. Regarding scene one which related to what materialized in the house, immediately before and during the alleged burning. Before the burning Mr. Motsuenyane's evidence was did not consume any illegal substances on the day of the incident however, Mr. Modikoe's evidence was that when he arrived at the deceased's house, there were no other people there besides the deceased and Mr. Motsuenyane. They were both smoking illegal substances (mandrax) in bottle necks, and they did not want to share with him. Mr. Motsuenyane on the other hand testified that there were many people present and they all ran out of the dining room when the accused doused the deceased with petrol. Strangely, the State did not call any independent witness to corroborate this version.

¹⁷ Id footnote 16

¹⁸ Schwikkard and van der Merwe 2005:494.

- b. Mr. Motsuenyane's oral testimony, and his written statement did not corroborate each other. His statement omitted relevant material evidence. His oral testimony was elaborated. For example, according to his oral testimony the incident occurred at 20h00 yet in his statement he indicated the incident took place at 09h00. Whilst on the aspect of what time the incident occurred, there is a further contradiction in the hospital records which indicated that the accused was admitted on two different days at two different times which I will refer to later. The independent witnesses and the accused and his *alibi* testified that the incident occurred between 20h00 and 20h15. From the evidence before the court, It was highly improbable that the incident occurred at 09h00. When looking at the evidence I find it is more plausible that the incident occurred between 20h00 and 20h15 not at 09h00.
- c. Mr. Motsuenyane's oral testimony contradicted his written statement in the following respects:
- i. he provided no particularity in his statement of the events that occurred in comparison to his oral testimony.
 - ii. His statement made no mention about him being in the kitchen and washing dishes, nor was any mention made about the fact that the accused closed the dining room door, which forced them to jump out of the window.
 - iii. He made no mention in his statement that there were other patrons at the deceased home, who ran out through the dining room door when the accused doused the deceased with petrol.
 - iv. Furthermore, in his statement he averred after the accused poured the deceased with petrol, he lit the deceased with a gun lighter yet in his oral testimony he stated that the accused asked him and Mr. Modikoe for matches and Mr. Modikoe gave him a lighter which he used to set the deceased alight.

- v. I find that there was no consistency and corroboration in his oral evidence and the statement he filed in Court.

- d. What was disturbing was that Mr. Motsuenyane did not testify, nor did he mention in his statement the events that transpired at the deceased house on the 12th of December 2023. It was alleged that he informed Mr. Tseke and Mr. Kwadi that the accused gave him instructions to obtain people to clean and paint the deceased premises. This piece of evidence only surfaced when Tseke and Mr. Kwadi testified. He conveniently removed himself from the activities that transpired on this day.

- e. When comparing Mr. Motsuenyane's evidence with that of Mr. Modikoe they contradicted each other in the following respects:
 - i. According to Mr. Motsuenyane when the accused left the deceased house he returned after five (5) minutes with a five-liter container of petrol and according to Mr. Modikoe the accused returned after twenty to thirty minutes with a two liter of petrol or paraffin. Clearly there was no corroboration in this regard.

 - ii. When Mr. Motsuenyane testified in his evidence in chief his version of how the events unfolded was that the accused poured the petrol on the deceased, asked him for matches, he did not have matches and he then used one of the lighters handed to him by Mr. Modikoe, which he used to set the deceased alight. Mr. Modikoe's testimony of what transpired, was that Mr. Motsuenyane, walked in and out the kitchen and dining room but was present when the deceased was set alight. According to him, the accused poured the deceased with a flammable substance, used his own lighter and could not set the deceased alight with it. He, thereafter, requested matches from him and not Mr. Motsuenyane. He then took a lighter that was lying on the bed and gave it to the accused who used it to set the deceased alight. This is very suspicious behaviour from witnesses who claim that the deceased was their friend. The evidence was the deceased was lucid and incapacitated. Why would they not run out

with the other patrons and make a noise to attract attention that there was a problem at the house.

- iii. The accused version of this scene was he was not present when the deceased was set alight, he was not at the crime scene as alluded to above. His evidence was at the time of the incident he was somewhere else doing something else. This aspect of his testimony was unchallenged and corroborated by his *alibi*. The defence did not disprove this aspect of his testimony. In as much as they contradicted each other on other aspects, this material issue was corroborated.

- f. Mr. Motsuenyane testified after jumping out the window, they screamed for the neighbours to help, and he and Mr. Modikoe entered the house again through the kitchen door. They pulled and dragged the deceased to the tap, and they put him under the tap. Mr. Modikoe on the other hand testified when he jumped out of the window he ran straight home and only returned to the scene later when the deceased was taken to the hospital. It was highly improbable that Mr. Modikoe would have assisted in the pulling and dragging of the deceased to the tap because he was not on the crime scene. This contradiction is material to the case.

- g. Scene two refers to what transpired outside the house. Mr. Motsuenyane testified that he and Mr. Modikoe dragged the deceased to the tap and set out the fire. The accused version was when he got to the deceased house, he was already on fire coming out of the kitchen and no one was in the vicinity. He told the deceased to go to the tap, he opened the tap and made the deceased sit under it so that the flames were put off. Bearing in mind Mr. Modikoe's evidence was he fled the scene the moment he jumped through the window. Ms Matamane, and Mr. Thabang were independent witnesses. Ms Matamane's testimony was she heard screams coming from outside. When she looked outside, she saw a person on flames running to the tap and another person following him. Later she discovered it was the deceased who was on fire and the

accused was following him. She testified she only saw the deceased at the tap with the accused. She added she saw Mr. Motsuenyane and Mr. Modikoe five (5) meters away looking on. This evidence was corroborated by Mr. Thabang. Her evidence does not corroborate Mr. Motsuenyane's evidence of the narrative but in fact it corroborates the accused's version. Therefore, the State's version that Mr. Motsuenyane and Mr. Modikoe dragged the deceased to the tap is improbable because if that happened then Ms Matamane and Mr. Thabang would have at least seen both these witnesses when she saw the deceased running past the house on flames and screaming. It was improbable that Ms Matamane and Mr. Thabang saw Mr. Modikoe, as his testimony was that he was not at the scene at that time. Interestingly, the accused also did not see him at the scene of crime at this particular time

- h. Mr. Motsuenyane's testimony was that the accused used a curtain to extinguish the fire on the deceased's body. This was denied by the accused. This is improbable because it contradicts his own testimony that he dragged the deceased to the tap and opened the tap to put out the flames. There were no other witnesses corroborated this evidence.
- i. Scene three referred to what transpired after the fire was put out. it was common cause that after the fire at the house was extinguished, the accused put the deceased in his car and took him to the clinic. None of the clinic personnel were called as witnesses and no evidence was tendered regarding what transpired at the clinic other than the accused version. I was informed there were no statements obtained from the clinic personnel. Surprisingly, the investigation officer elected not to testify in this but and the prosecution in argument submitted there were no records from the clinic. This was speculation and conjecture and cannot be considered as evidence. But for the accused's version there was no evidence before this court regarding what happened at the clinic. It was simply not investigated.
- j. If I accept the States version, that the deceased was set alight by the

accused, it is highly improbable that the very witnesses who saw the accused setting the deceased alight, would allow the accused to take the deceased to the clinic or hospital alone. The actions of the accused are not consistent with someone who just set the deceased alight. At this stage there were lots of people present at the scene, Mr. Motsuenyane could have informed everyone at the scene that it was the accused who set the deceased alight and insist that the accused does not take the deceased to the clinic or hospital in his car. If I were to accept his version that they feared the accused, which I reject, there was a further opportunity, for both him and Mr. Modikoe (who had now returned to the scene) to inform everyone at the scene that the accused set the deceased alight, but they did not do so. They could have reported this to the police, but they did not do so. This type of behaviour from the two key witnesses of the State is suspicious and questionable regarding factual causation.

- k. Turning to the medical records which the State accepted as evidence in terms of section 220 admissions. It was common cause that the findings of the post-mortem report reflected the cause of death as 'severe burns.' The medical records and the post-mortem report reportedly reflected that the fire was caused in the shack by a 'candle whilst asleep.' The medical records reveal that the accused was taken to the hospital by paramedics on 12th December 2021 at 01h10 and was admitted on the same day at 16h25. Part 1 of the Mortuary report reflects the date and time of admission as 11th December 2021 at 17h58. The post-mortem report also reflects that patient had slept with a candle on and the shack caught alight. Dr. Nkondo who conducted the post-mortem examination indicated there were no specimens collected and no investigations conducted. Despite the inconsistencies in the post-mortem report, the State did not call any expert witness and relied on the section 220 admissions made. These section 220 admissions were not consistent with the testimony of any of the witnesses and the State left it unchallenged.

- I. The court then called two expert witnesses Dr Kodisang from the mortuary and Dr. Nkondo who conducted the medico- legal post-mortem examination. Both witnesses maintained the correctness of their reports which were submitted as admissions in terms of section 220. Regrettably, the experts did not assist the State's testimony as both experts testified that the burn wounds were consistent with burns caused by a flammable substance and was also consistent with burns caused by a house catching alight with a candle. They could not with certainty rule out the fact that the possibility existed that the deceased burns could have been caused by the candle setting the shack alight.

- m. This then caused me to deduce that the evidence of the State witnesses when considered in totality, there was no corroboration with the version submitted by the State witnesses.

- n. The state did not also lead the evidence of the EMS/ambulance driver who transported the deceased from the clinic to the hospital. This witness was a key witness to complete the chain evidence especially in the light of the fact that no admission was made in terms of section 220 in this regard.

- o. When considering the accused's version, he raised the defence of an *alibi*. There were also contradictions in accused's testimony and that of his *alibi*. The defence version was that the accused was not present in the room when the deceased was set alight. His version regarding his *alibi*, was he returned home with his minor children from work. He was dishing up food for them in the kitchen when he heard noises coming from outside. He went outside and saw smoke coming from the deceased's home. He ran to the deceased home to assist. Enroute, he passed Mr. Pendani on the street who was screaming 'its burning! Its burning! The accused's *alibi* corroborated the accused's version in respect of the time he arrived from work which was shortly before the deceased house was

set alight. He was seen when he arrived home and he was seen leaving his home going to crime scene. He confirmed the accused came running past him. These issues were not challenged and were material aspects to the charges before the court. Up to this stage there was corroboration of the accused's version.

- p. Interestingly, the SAPS were informed of the accused's *alibi* on the date of his arrest, but no attempts were made by the police to verify the accused's alibi's version, and no one even bothered to obtain his statement.
- q. The accused and his *alibi* did not corroborate each other in respect of the chronology of events to the effect that the *alibi's* version was that he never left the accused's premises and that at all material times he was behind the closed gate next to the wall fence and watched everything from there. He also he did not scream 'its burning, its burning!' These issues to me are not material.
- r. The *alibi* also testified that he saw two ladies carrying buckets of water before the accused arrived at the scene extinguishing the fire. This clearly contradicts the narrative of how events unfolded and the chronology. This was a moving scene, and this bit of evidence was not consistent the chronology of the accepted facts.
- s. The *alibi* witness to me was truthful, candid, and sincere. In so far as these material aspects to the case, I find he was a credible witness.

[42] It is so that there are contradictions both by the State and the defence. In *Mafaladiso v S*¹⁹ it was stated that discrepancy in a statement caused by one sentence only could be interpreted in one of two ways. It must be read in context of the whole statement. It was held that the court must handle discrepancies between different versions of the same witness with circumspection. First the court must ascertain what the witness meant to say to

¹⁹ Mafaladiso v S 2003(10 SACR 583(SCA) (593j -594a-g)

determine whether there was a discrepancy and the extent of the discrepancy. Secondly, not every error by or discrepancy in the statement affects the witness's credibility. Thirdly, the different versions must be evaluated holistically.

[43] When considering these discrepancies, the court was guided by the decision of *Sithole v The State*²⁰ the court stated at para 4 that "It is trite law that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies, and other defects in the evidence and, in the end, to decide whether on the totality of the evidence that state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also must take into account the circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witness."

[44] Having considered all the evidence in the matter and the improbability of the narrative of each scene by the witnesses, holistically, I find that the pieces of the puzzle do not fit together to complete the picture. A few pieces of the puzzle still need to be found. The anomaly and the contradictions as indicated above were so material so much so that they affected the overall credibility of the States version.

[45] According to *S v BM*²¹, the Court held that the purpose of a criminal trial is not to obtain a conviction at all costs. The duty of the prosecution is to gather all relevant information and evidence and then decide whether such evidence is sufficient to result in a conviction.²²

The burden of proof

²⁰ *Sithole v The State* (2006) SCA 126 (RSA)

²¹ *S v BM* 2014(2) SACR 23

²² *S v Masoka* 2015(2) SACR

[46] The burden of proof represents the way a court determines whether sufficient weight can be attached to evidence adduced before an accused can be convicted of any crime. In *S v Van der Meyden*²³ the Court held

'In order to convict, the evidence must establish the guilt of the accused beyond a 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.'

[47] Three important concepts play a role in determining whether determining whether a standard of proof is satisfied in a Criminal case: 'beyond a reasonable doubt', 'reasonably possibly true' and 'probabilities.' Additionally, there must be interaction between these three concepts:

- a. An accused cannot be convicted if his version can be regarded as reasonably possibly true.
- b. An accused can only be convicted if the prosecution is able to prove its case beyond a reasonable doubt.
- c. The manner to attain the standards in 'beyond a reasonable doubt' and 'reasonably possibly true' is dependent on the degree of probabilities of the truth of a case, as required by the case

[48] In *R v M*²⁴ it was further held in amplification of the concept of 'reasonable possibility' as a defence, does not necessarily have to be believed by the court for it to be successful. It also does not have to believe it in all its details. It is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.' The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.²⁵ The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to be acquitted.

²³ *S v Van der Meyden* 1999 1 SACR 447 (W) 448G-H

²⁴ *R v M* 1946 AD 1023

²⁵ *S v V* 2000 (1) SACR 453 (SCA) at 455B.

[49] In order for the State to discharge the onus that it is burdened with; the following requirements must be proved:

- a. compliance with the principle of legality in that the conduct the accused is charged with are recognised crimes,
- b. the accused must have committed an act,
- c. the act must comply with each definitional element of the all the counts the accused is charged with,
- d. including the fact that the act is unlawful in that no grounds of justification have been raised and
- e. the unlawful act must have been committed with culpability in that the accused was endowed with the necessary criminal capacity and possessed the necessary intention.

[50] Something needs to be said about the shoddy investigations in this matter.

- a. No evidence was submitted that any investigations or collection of exhibits were conducted by the Police on the scene of crime.
- b. No expert evidence was obtained to ascertain what caused the fire.
- c. No evidence whatsoever was placed on record by the State to disprove the following:
 - i. that the deceased was walking and talking at the time he was taken to the clinic,
 - ii. that the accused did indeed take him to the clinic,
 - iii. who the nurses or staff at the clinic were neither what had happened and what conversations took place at the clinic,
 - iv. no member of any EMS/ ambulance driver was called. The only evidence available regarding the deceased's medical condition and treatment was contained in exhibit "C".

- v. The State provided no explanation whatsoever regarding the “candle that set the house alight” by any experts.
- vi. No photograph album was placed before the court.

[51] In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of the accused's 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 about the accused's guilt.²⁶ Considering the conspectus evidence in its totality, I am satisfied that the State witnesses were not honest, clear, and truthful. I find that both the eyewitnesses who testified in scene one was not credible witnesses and therefore their testimony was not reliable having considered all the probabilities mentioned above. In the light of the all the evidence presented to me, the accused's version, as dubious as it, his defence of the alibi as alluded to above appears to be reasonably possibly true in so far as his whereabouts when the incident occurred as it remained unchallenged by the State and was not disproved. I find that the State failed to prove its case beyond a reasonable doubt that the accused was the person who had set the deceased alight thereby causing his demise and the burning of his house.

Order

[50] As the result, I make the following order:

- a. The accused is found not guilty on count 1.
- b. The accused is found not guilty on count 2.
- c. The accused was found not guilty and discharged in terms of section 174 of Act 51 of 1977 on count 3.

²⁶ S v Chabalala 2003(1)SACR 134 (SCA) para 15.

C B BHOOLA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

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Instructed by :

Dates of Hearing:

20 to 23 February 2023.

1 March 2023, 6 March 2023, 3 April 2023

20 April 2023; 29 May 2023

Date of Judgment

:

27 June 2023