

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF
GAUTENG DIVISION,**



**SOUTH AFRICA
PRETORIA**

CASE NO: CC72/2019

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

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31-01-2022

PD. PHAHLANE

In the matter between:

THE STATE

And

J

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ACCUSED

JUDGMENT

PHAHLANE, J

[1] The accused was charged with three counts, namely:

Count 1: Murder, read with the provisions of sections 51(1) of Act 105 of 1997 ("the Act") in that on or about 1 March 2019 and at

or near Sterland, Acardia, in the district of Pretoria, the accused did unlawfully and intentionally kill SIBUSISO PHUTHI KHWINANA, an adult male, by stabbing him with a knife or another sharp object.

Count 2: Robbery with aggravating circumstances (read with the provisions of section 51(2) of the same Act in that on or about 1 March 2019 and at or near Sterland, Acardia, in the district of Pretoria, the accused did unlawfully and intentionally assaulted SIBUSISO PHUTHI KHWINANA and did then there by force and with violence took a cellular phone from him, the property in lawful possession of SIBUSISO PHUTHI KHWINANA, thus robbing him of the said cellular phone.

Count 3: Contravening the provisions of section 49(14) read with sections 1 and 23 of the Immigration Act 13 of 2002, - (Presentation of a fraudulent temporary asylum seeker permit),- in that during 2019, the accused for purposes of entering or remaining in or departing from or facilitating or assisting the entrance into residence in or departure from the Republic, committed a fraudulent act or made a false representation by conduct, statement or otherwise, by presenting a temporary asylum permit allegedly issued by the department of Home Affairs in terms of section 22 of act 130 of 1998 in Marabastad on 22 April 2019.

Alternatively, contravention of section 37(a) read with sections 1 and 22 of the Refugees Act 130 of 1998. in that during 2019, the accused for purposes of entering or remaining in or departing from or facilitating or assisting the entrance into residence in or departure from the Republic, committed a fraudulent act or made a false representation by

conduct, statement or otherwise, by presenting a temporary asylum permit allegedly issued by the department of Home Affairs in terms of section 22 of act 130 of 1998 in Marabastad on 22 April 2019.

[2] Before the accused could plead to the charges, the court fully explained the provisions of sections 51(1) and 51(2) of the Act which is normally referred to as the Minimum Sentences Act, and the implications thereof. The accused is legally represented by advocate Mtsweni who indicated that he also explained the provisions of the Act to the accused, and the accused confirmed that.

[3] The accused pleaded NOT GUILTY to all the charges and no plea explanation was given as the accused elected to exercise his right to remain silent. The accused also made formal admission in terms of section 220 of the Criminal Procedure Act 77 of 1977 (“the CPA”), the effect of which was explained to the accused by the court. The section 220 admissions relate to a wide range of exhibits which are inclusive of the affidavits; asylum seeker temporary permits of the accused; identity parade “(ID)” photos; the chain of evidence relating to the ID parade; photo-album and the key thereto relating to the crime scene; photo-album relating to the body of the deceased; the Post-mortem report compiled by Dr Ryan Blumenthal in which he noted the cause of death as:

“PERFORATING STAB WOUND THROUGH THE HEART”.

The correctness of the contents of all the affidavits; the report and findings of Dr Ryan Blumenthal were confirmed by the accused.

[4] The State called nine (9) witnesses in support of its case and the accused also testified in his defence and did not call any witnesses.

- [5] The first witness on behalf of the State was Ms Mbali Phethile Mncube (“Mbali”). She testified that on the evening of 1 March 2019 around 22:00 to 23:00, she was in the company of her friend Sedzani Raduvha (“Juju”) coming from McDonalds in Pretorius Street where they had to collect food which they had earlier ordered and heading home to her flat which is situated at 675 Mathuba Building, Arcadia, Pretoria. Four other friends were walking behind them at a distance of 10 meters.
- [6] She testified that while walking, two boys came running out of Sterland Mall towards their direction, one in front and the other following from behind. The one who was running from behind grabbed the one who was running in front and a struggle ensued between the two. The one who was grabbed took out an object and stabbed the one who grabbed him. Mbali said they were seven paces from where the struggle ensued, and when she saw the one stabbing the other, she was walking on the sidewalk and the incident happened in the middle of the street next to parking lot. She identified the person who was stabbed as the deceased.
- [7] At the time when the deceased was stabbed, they were four paces away from where the deceased was stabbed and that is when she and her friend stopped and trying to take note of what was taking place. She managed to identify the deceased and the boy who stabbed him because at the place where the two were struggling, there was sufficient light provided by streetlights. There were also lights illuminating from the Sterland Mall and a church nearby. Nothing was obstructing her view when the incident occurred.
- [8] She said she did not see where on the part of the body was the deceased stabbed because when this person stabbed the deceased, he turned his body towards the deceased. The deceased let loose or set free the person who stabbed him and screamed in agony and fell.

The person who stabbed the deceased ran away, heading straight to their direction. He ran past the witness, - that is, right next to where the witness and her friend Juju were. She could see and identify the perpetrator clearly because she had eye contact with him when he was running away from the scene.

[9] The perpetrator was wearing a cap, a checked or scotch shirt with jeans. He also had dreadlocks hanging down below his cap up to his neck and he had beard. His complexion was not too dark, and she did not see the shoes he was wearing. This person ran into a dark open veld where there is a bridge, and from the bridge, he ran towards the veld where there is a bush.

[10] Mbali testified that thereafter, two boys came out of the Sterland Mall and went to the deceased and started kicking him while the deceased was still lying on the ground. As they were kicking the deceased, a certain lady and a male person came out of Mall and the lady was screaming for help. The witness and her friend Juju also called out to their friends who were walking behind, and the two boys who were kicking the deceased left him and ran to the same direction where the first perpetrator ran to.

[11] She said she went to this lady who was screaming for help and asked her if she was with the person who was stabbed and thereafter she phoned the ambulance. The ambulance arrived and the paramedics went to the deceased who was lying on the ground and attended to him. They certified the deceased dead and covered him with a plastic.

[12] She identified the accused before court as the person who stabbed the deceased. On 17 May 2019 she attended an ID parade at Bosman police station. She was called by Warrant Officer Tlhotse to attend the ID parade, and she was fetched from her flat by two police officers. Her friend Juju who was with her on the day of the incident also went with her to where the ID parade was held. On arrival at the police station, they were placed in a waiting room and were informed that the ID parade room is being prepared. After 30 minutes, they were taken separately to the parade room where they had to make identification.

[13] She testified that as she entered the room where she was supposed to identify the person she saw as the perpetrator on the day of the incident, and she saw about six to seven people in the line-up behind the glass. She immediately recognised the accused who was standing in the middle of the line-up and identified him and stated that everything that she saw on the day of the incident flashed back into her mind. The accused was holding a card with number 9 on the line-up as depicted in photos 3 and 4. When she was done with identification, Warrant Officer Shipalale was called to give her counseling, and after the counselling session, they were taken back to their residence. The photo album of the ID Parade was admitted into the record as exhibit D.

[14] Under cross-examination, she testified that she is the one who informed Juju about the ID parade after she was called by the police when she was at the campus residence. She said they found Tsakane Maluleke at the police station. She explained that while still in the waiting room, Tsakane Maluleke was crying and so was she. She cannot remember who amongst the ladies was taken outside to be calmed down.

[15] The witness was cross-examined at length about the ID parade, and it was put to her that she made a mistake in identifying the accused as the person who stabbed the deceased on the day of the incident, because there was another person on the line-up who also had dreadlocks. She refuted that saying that she saw the accused clearly when he was stabbing the deceased and when he ran past where she was standing with Juju because of the source of light around the area.

[16] She maintained that she had eye contact with the accused when he was running away. It was put to her that - because she was terrified or frightened on the day of the ID parade, she wrongly pointed the accused as the person who stabbed the deceased because the accused was not at Sterland on 1 March 2019. It was further put to her that on the day of the incident, the accused was at his spaza shop working and he knocked off around 20:00 and went home and stayed at his flat and never left. The witness refuted that and insisted that she clearly saw the accused.

[17] She testified that although she did not see where the deceased was stabbed on his body, but it was on the upper body. To the question whether she knew that the deceased was popular or a well-known artist, she stated that she only became aware after the incident and when she saw the news broadcast on television when it was announced that the deceased was an actor in a film called "Matwetwe", and on the newspapers and social media.

[18] She stated that she never wanted to talk about the incident because she did not feel comfortable talking about it. The witness was given exhibit C2 which is an album containing photographs of the scene of the incident, to identify the exact spot where the incident took place

and where the deceased fell as she observed or witnessed incident unfolding. I will deal with exhibit C2 later in the judgment.

[19] The next witness was Tsakane Maluleke (“Tsakane”). She testified that on 1 March 2019, around 16:00, she was in the company of Tebatso Mashishi (“Tebatso”) at a fish and chips store at Bosman street. Later that day she met the deceased at his flat which is situated in the CBD, at Bosman Street. While at the flat, Tebatso introduced Sibusiso (the deceased) to the witness. Tebatso received a telephone call inviting him to go to Sterland to watch the premiere of a movie called “Matwetwe”. Sibusiso then requested the services of a metred taxi (ie. Taxify) to take them to Sterland Mall. The taxi arrived and they all went to Sterland Mall.

[20] Upon arrival at the Mall and as they entered, she inquired about the people who had invited them to go to the movie because at the time, the movie had already started. About 5 to 10 minutes later, people came out of the movie theatre and were making noise and taking pictures with them. Tebatso then indicated that he wanted to get cash from the ATM and he left with the deceased. When they came back, the deceased went to stand in a queue to buy movie tickets.

[21] She was seated with Tebatso and there were people who came to greet Tebatso and wished him well, and also made remarks about the movie. After the deceased bought movie tickets, they went inside the movie theater to watch the movie. When they came out, there was a commotion of people coming from watching the movie and were happy that they were watching the movie with celebrities.

[22] The deceased then said that he is hungry and they should buy food and eat there at the Mall, but Tebatso suggested that they should rather buy food and eat at the flat. They went to Chicken Licken which is inside the mall and bought food, and the deceased called the Taxify because it was already late at night, around 22:00. They decided to wait for a taxi outside the Mall at the stairs. Regarding visibility at the stairs where they were waiting for the taxi, she said there were lights illuminating from Sterland Mall, and there were also streetlights providing sufficient light.

[23] She stated that Tebatso and the deceased sat on the stairs. The deceased took pictures of the three of them, using his own cellphone. She was busy posing for the pictures when she noticed someone on the side looking at them with high concentration -as she puts it. This person was 2 to 3 metres away from where they were taking pictures. He was standing on the right side of the deceased, and he was closer to the deceased. She testified that she first took notice of this person when they were busy posing for pictures and she thought maybe the person wanted to take pictures with them because he was focusing on them. This person kept looking at them for about four to six minutes. Tsakani said she decided to look at this person when she realized that he was steadily looking at them. She stated that she had eye contact with him even at the time when this person made his move and went closer and snatched the deceased's phone and ran away.

[24] In describing this person, Tsakane testified that this person was dark in complexion and had short dreadlocks. He also had beards. She stated that after this person ran away with the deceased's phone, the deceased gave her (Tsakane) the bag he was having and started running after this person. She immediately alerted Tebatso that someone snatched the deceased's phone and ran away. According to

her, Tebatso followed them. She heard Tebatso screaming for help and after a while Tebatso returned to where she was and asked her to sit down. Tebatso explained to her that the deceased has fallen and sustained injuries and asked her to call the ambulance. She said she went with Tebatso to the scene where deceased was, and she found the deceased lying on his back facing up. She kneeled next to the deceased and the deceased was bleeding heavily.

[25] She noticed blood coming from the injury which was on the left side underneath his breast. She explained that people started gathering around. She said Tebatso was using papers to stop the bleeding. When asked about the source of light around the area where the deceased fell, she said there was sufficient light because she could clearly see where the deceased was and the people around them. She however does not know where the light was coming from.

[26] She stated that she took her gown from her bag and compressed it so that it could look like a ball and placed it to on the body of the deceased to cover the wound, and she pressed on it in an attempt to stop the bleeding. She stated that she tried speaking to the deceased, but he did not respond and then she started praying. The first ambulance arrived. The paramedics asked if the deceased had a medical aid, and the witness and Tebatso responded that they have no knowledge of that. The paramedics searched for a medical aid from the deceased and when they could not find it, they left. The second ambulance passed and did not stop, and after a short while, another ambulance arrived with the police officials.

[27] The paramedics requested everybody to move away from the deceased so that they can assist him. They checked for his pulse, and thereafter said he has passed away. The deceased was declared dead, and his body was covered. She said the police cordoned off the

scene and instructed people who gathered around to leave and she refused, saying they cannot just leave. One of the police officials asked who the deceased was with and the witness and Tebatso responded by saying that the deceased was with them. They were then instructed to get on board the police vehicle and were asked about the deceased's next of kin. The police searched the deceased's bag and found contact numbers of his friend Veja. Veja was contacted and requested to come to the scene, and he did.

[28] The witness testified that on 17 May 2019, she attended the ID-parade held at Pretoria Central Police Station. She stated that she saw Mbali and Juju for the first time when they were transported by a vehicle from Sunnyside Police Station to go and attend the ID-parade, and she did not know them and did not even speak to them. She was seeing them for the first time on the day of the ID parade. She stated that while waiting in one of the offices at the Pretoria Central Police Station, she left the room because Juju and Mbali were sobbing. She was later called and led to a place where the ID parade was supposed to be conducted. It took her less than a minute to point out a person holding a card with number 3 on the line-up as depicted in photo 14 of exhibit D. This person is the accused before court.

[29] Under cross-examination, she repeated her evidence and confirmed that the accused was two meters away from her when he snatched the deceased's phone, and that she came face to face with the accused and saw him from behind. She said during the six minutes when she was looking at the accused who was focusing his concentration on them, she did not see him talking to anyone. She repeated that the accused was two meters away from her. It was put to her that she has mistakenly identified the accused as the person who snatched the deceased's phone and she refuted that.

[30] She disputed the accused version that he was not at the scene of the incident, but at his place of residence. To the question whether there were lights on the wall of Sterland Mall, she stated that there were bright lights on the wall of the Mall which were illuminating on the outside where they were, and there were also streetlights. She closed her evidence by stating that the deceased phone was a new smart phone which he only had for three days.

[31] Nelisiwe Patricia Mdluli (constable Mdluli) also took the witness stand. She is a constable with the South African police services stationed at the Pretoria police station and attached to the Local Criminal Record Centre ("LCRC"). She is a crime scene investigator and her main duties being that of a draftsman; photographer; and being responsible for taking fingerprints. On 1 March 2019 she was on duty when she received a phone call at 23:40 from constable Khoza from Sunnyside police station who informed her that there was a murder scene at Sterland building at the corner of Steve Biko and Pretorius street in Arcadia. She went to the crime scene using an unmarked police vehicle and arrived there at 12 midnight.

[32] Upon arrival and when trying to observe what had happened, she found the deceased lying on the ground and was already covered with foil. She went back to the vehicle and put on her personal protective gear and took her equipment, that is the camera, and started taking photographs of the scene and asked someone to open the foil so that she could take pictures or photos of the deceased. She noticed that the deceased was injured on the left side of his chest. She observed a wound on the left side of the torso, on the frontal side and she then put a marker on the wound. According to her, the wound was clearly visible.

[33] Regarding visibility at the scene, particularly where the deceased was lying, she testified that the area was visible because there were light illuminating the scene. The lights were coming from the building of the Mall and streetlights, as depicted on photos three and four, and were three meters from where the deceased was lying. With regards to the vehicle lights/headlamps facing the spot where the body of the deceased was as depicted in photo three and four, she stated that the area was visible enough to see everything and explained that the reason why she left her vehicle lights on is that when they visit a crime scene at night, they usually leave the vehicle lights on and the engine running for safety purposes. She stated that when she was done, she went back to the office and took the SD card for downloading and then prepared photographs. The photo album was already admitted as exhibit C2.

[34] Tebatso Mashishi (Tebatso) also testified in support of the State's case. He is an actor by profession and has appeared in different television soapies such as Muvhango; Matwetwe and others. Him and the deceased were the main characters in "Matwetwe". On the day of the incident, he went with the deceased and Tsakane Maluleke to Sterland Mall to watch the premiere of "Matwetwe". He cannot remember what time they arrived at Sterland. They went inside the cinema/movie theater to watch Matwetwe and when they came out, they went to Chicken-Licken to buy food and called a taxi to take them home, but it took too long to arrive. After a while, the taxi driver who was supposed to come and fetch them called and said he is no longer coming because the owner of the vehicle that he was driving had problems and he had to go and assist him. The deceased then called another taxi and they went outside to sit on the stairs at the entrance of the Mall.

[35] He testified that as they were seated on the stairs waiting for the taxi, he was facing down because he was tired. At the time, the deceased was busy taking selfies with the fans. He noticed someone standing not far from where the deceased was, - about two metres from where the deceased was standing, but he did not see the person's face. He heard the deceased screaming, and when he realized that the deceased was screaming because his phone was stolen, the deceased was already chasing the person who took his phone.

[36] He noticed people chasing the person who took the deceased's phone and he followed them. He did not see clearly what was happening because he has vision problems, especially at night. He noticed that the deceased had fallen and was lying on the ground. He went to him thinking that he might have injured his leg and when he tried to wake him up, someone alerted him that the deceased was bleeding. The deceased could not talk, and he was still alive by then.

[37] He said they tried to stop the bleeding and Tsakane took her jersey and placed it where the blood was coming out, and the people around them called the ambulance. The taxi driver arrived and they asked for his assistance and he indicated that he cannot help. Tebatso said he moved around asking owners of the vehicles that were parked there to assist and they refused to help. He then went to Chicken Licken and asked to use their phone because the people who were phoning around could not get hold of the ambulance people. Still, he did not get assistance from Chicken Licken and he decided to go back to Tsakane and the deceased. He decided to help Tsakane who was still trying to stop the bleeding and he also spoke to the deceased and tried to encourage him to hold on because help was on the way.

[38] According to him, the deceased was bleeding heavily. The deceased tried to respond but he could not hear his response because he had difficulty breathing and he stopped moving. When the ambulance arrived, they were still trying to stop the blood. The paramedics tried to resuscitate him using the machine, but it was too late. The paramedics told them that the patient is no longer alive. He explained that the deceased was lying on the pavement, and the area where the deceased was lying was illuminated and clearly visible.

[39] He stated under cross-examination, that he cannot identify the perpetrator and can also not tell what clothes he was wearing.

[40] Phuthi Emanuel Thlotse is a warrant officer in the SAPS. He is the investigating officer of this matter, and he was allocated the docket on the same day of the incident. He said he joined SAPS in 1988 and he is attached to the Serious and Violent Crime Unit. He testified that he received a call from Mbali Mncube who indicated that she saw the person who killed the deceased somewhere in the street selling sweets when she was walking to school. Mbali asked him to meet her at the small entrance gate at the TUT campus which is situated at Stanza Bopape in Acardia, because she did not want this person to see her.

[41] He drove to Acadia with his colleagues to meet Mbali who then pointed this person as the person who killed the deceased. This person is the accused before court. He approached the accused and introduced himself and produced his appointment certificate to identify himself. He spoke vernacular to the accused and the accused responded in English and said he does not understand the language he was speaking. He explained that the accused was speaking fluent English. He said he switched to English and explained to the accused

that he is under arrest for murder. Thereafter he informed the accused of his constitutional rights and took him for detention.

[42] He testified that during the investigation of this case, he received a section 212 statement from the Department of Home Affairs which stated that the accused was illegal in the country, and it was for this reason that his Legal Aid representative withdrew his application for bail. This was coupled by the fact that when the police went to verify the address which he gave to the police as his, the people staying at the address he provided, said they do not know him. The witness also testified that the following night after the incident took place, he went to Sterland Mall to request a video footage of the exact place where the incident happened.

[43] He said the Mall manager took him to the office where they both looked at the video monitors, but unfortunately the footage showed people struggling and it was difficult to see the faces of those people. The mall manager explained that the mall was using the old camera system and he decided to take the video footage to the technicians at SAPS to fix it so that it can be clearer, but it was not possible to fix because of the age of the cameras. As part of the investigation, he used a system called GRAPPA used by SAPS to trace the deceased's phone but the trace was unsuccessful. He thereafter applied for a section 205 to still try and trace the deceased cellphone and the efforts were fruitless. Regarding the ID parade, he said he was not involved, save for calling the witnesses.

[44] Under cross-examination, it was put to him that when he arrested the accused, he took two cellphones and a needle that he uses for sewing the shoes and he refuted that saying the accused was selling sweets. Further that he was also not sure if the accused was in possession of a cell phone because the docket was at DPP's office

from the time when the trial started and was therefore unable to respond to the question asked. Responding to the question whether the accused's attorney was informed about the ID parade, he said he was informed by the people who conducted the ID parade that the accused's attorney said he was not going to attend the ID parade.

[45] He testified that there were no cameras installed inside the Mall at the Sterland, and that he only received the footage for the outside premises. He disputed the defence contention that if there were cameras installed inside the mall, they would have given a better perspective of what was happening in the mall and showing the person who snatched the deceased's phone. In this regard, he testified that he was happy with the evidence he received from the witnesses because the video footage was only going to be a bonus to the investigation.

[46] Responding to the question why he did not go to the shops opposite the Sterland, or SASSA offices nearby to check if their cameras were working, he said he went to all the surrounding businesses and offices around Sterland and he was informed that their cameras were not in working condition.

[47] He testified that there is a big camera at the corner of Beatrix and Steve Biko Street and on the nearby buildings, but those cameras were not working. He went to the City of Tshwane to enquire why the cameras were not working and he was informed that there were problems with the contractors and that is why the cameras were not working. It was put to him that on 8 March 2019 when he arrested the accused, the accused gave his asylum document to his colleague who ripped it apart. He refuted that saying that he asked the accused if he had any documents and the accused said he does not. Regarding the accused's constitutional rights, he said he explained to

him the right to silence; right against self-incrimination; right to legal representation and to contact his next of kin.

[48] The next witness was Sedzani Raduba (“Juju”). She testified that on 1 March 2019 she was a student at TUT main campus situated at Pretoria West. On the day of the incident around 9 pm, she was in Pretoria central with Mbali Ncube and other friends coming from McDonalds using Pretorius Street to go back to their residence. While walking, they noticed some boys fighting one boy at the Sterland Mall. She explained that two boys were kicking this boy and he fell. She did not see what the other boy took out but he took out something from the left side of his body and the one who was attacked fell. She also testified that as they were about to run away, the boy who was attacked managed to grab one of the assailants and she noticed the very same boy who was attacked falling again and was placing his hand on his left-hand side part of the body. Thereafter those boys ran past them on her right-hand side and entered the bush where there is a bridge which is just close to a church.

[49] She stated that there were no lights in the bridge, but there were lights illuminating from the church and streetlights were also illuminating. She said the source of light where the fighting took place, was from the Chicken Licken delivery entrance and the stairs. She went closer to the boy who fell and noticed that he was bleeding profusely and had placed his hand on the area where blood was coming from.

[50] She testified that she was about five metres from where the incident took place. She said the person who attacked the deceased was wearing a shirt with checked squares and a cap and takkies. He was dark in complexion and had dreadlocks. She also saw him face to

face when he was approaching and running towards their direction. She only made eye contact with the person who had dreadlocks. They walked towards the deceased and when they arrived, they found a lady and a male person. The lady took off her jacket and placed it on the wound of the injured boy. The ambulance was called but it took a while before it could arrive. The paramedics attended to him and thereafter they were told that the boy has passed on.

[51] Juju said she attended the ID parade on 17 May 2019 at the Pretoria Central Police Station. She was transported with Mbali by two police officers, a male and a female. She said *en route* to the police station, they were crying because they did not know what was going to happen and they were frightened. Upon arrival at the police station, they were taken to a room where they met other people including Tsakane Maluleke. They were still crying in the waiting room and the social worker was called to come and assist them. She was finally taken to a room where she had to identify the perpetrator and it took her five minutes to point out the person who was holding a card with number 9 written on it as the perpetrator, and as depicted on photo 2 of exhibit D.

[52] Under cross examination it was put to her that her evidence differs materially from that of Mbali as she testified that she saw one boy running out of Sterland and was chased by the victim, whereafter the boy turned and stabbed the victim and ran away. She responded that she can only testify about what she had seen or how she witnessed the incident unfolding and not how Mbali testified. It was further put to her that there were no lights illuminating from the delivery entrance of Chicken Licken as it appears from photos 1 to 3 and that is why the police vehicles which came to the scene had their headlamps on to illuminate the area.

[53] She was adamant that the Sterland building had lights and stated that she cannot make any comments about the police vehicles having illuminated the area one hour after the incident had happened because she was not present when the police were there. It was further put to her that it is not probable that she could have seen the perpetrator because she was frightened by what she had seen, and she responded that she clearly saw the accused.

[54] Sergeant Patrick Mafanele testified that on 17 May 2019 he was tasked with holding an ID parade where he was stationed at Pretoria central because Sunnyside police station did not have the facilities to do same. He said constable Khose worked as the photographer and that when he explained the rights to the accused in English, including the right to legal representation during an ID parade, the accused said he will be okay to proceed without an attorney. According to his observation and the communication he had with the accused, the accused followed and understood what was explained to him and never raised issues that he does not understand everything explained to him or the procedure.

[55] With regards to the 30 minute time taken by the witness Sedzani Raduvha to make identification, he explained that the witness was scared and also crying, and he had to calm her down and reassure her that the people on the line-up cannot see her, and having done that, the witness finally pointed out at the person holding number 9, and that person is the accused before court.

[56] Referring to identification parade form admitted as exhibit F, Mbali Mncube took two minutes to identify the accused. Thereafter, the accused indicated that he wanted to swap numbers and positions, and after that was done, the accused was holding a card with number

3 and standing at position 4. Tsakani Maluleke who was the next witness to make identification took one minute to identify the accused. He explained that none of the witnesses looked comfortable because they were all scared and that Sedzani Raduvha was crying.

[57] He testified under cross-examination that he did not make a statement regarding the ID parade because all the information that was supposed to be furnished in the statement is in the ID parade form. He said he never saw the investigating officer at the parade and that the last time he saw him was when he was briefed to conduct the parade. It was put to him that the accused did not understand what was happening during the parade and was just following what the others were doing, and he refuted that saying his job was to make sure that the accused understood what was going on and he therefore got the impression that the accused understood what was happening with the parade because he never raised any objection or indicated that he had difficulty.

[58] Sergeant Phike testified that on 17 May 2019 he transported three witnesses, ladies from Sunnyside to Pretoria Central Police Station to attend an ID parade. On arrival at Pretoria central, he left the witnesses on the third floor at the offices of the detectives, at room number 304 where he was supposed to hand them over to female police officers.

[59] He explained under cross examination that he left one witness at office 3.1 and the other witness at office 3.6 and the third witness was taken to another room. When it was put to him that the witnesses have testified that they were put in the same office, he

said he left them at different offices and does not know what happened after he had left them.

[60] The last witness for the State was Mahlaule Walter Metebe. He works for the Department of Home Affairs and is attached to the Refugee unit. He is a Refugee Reception Manager at the Desmond Tutu office situated at corner Johannes Ramogoashe and Du Toit street. He joined the Home Affairs in 1995 and has been working at the Refugee Centre from 2007. His specific duties entail registering new people coming into the country and issuing them with asylum seeker documents. He was assigned to deal with the temporary asylum seeker permit of the accused to verify its authenticity and not to issue a permit.

[61] He explained that he found the permit to be fraudulent. According to him, there was no information on the Home Affairs system showing information of the accused. He testified that Exhibit G1 was a fake application for asylum seeker permit, and that Exhibit G2 asylum seeker permit application was original. Exhibit G2 did not bear the accused's names. He investigated the file number as per Exhibit G2 and found that it was not the particulars of the accused, and further indicated that the accused was illegal in the country.

[62] The accused also took the stand and gave *viva voce* evidence. He testified that he came to South Africa in 2003 and used his passport which subsequently expired. In 2015, he went to the Department of Home Affairs to apply for asylum permit and declared himself to be a refugee seeking asylum permit. He said he was inside the Home Affairs building when an official approached and asked how much he had so that he can be granted an asylum permit. He responded that he had R2 000 and the official demanded R2 500 so that he can

assist him to get same. He said he gave the money to the official who told him to wait for an hour as he was going to capture the accused details. This person came back with a permit which he handed over to him and he did not know that the asylum permit was fake.

[63] He further testified that on the morning of 1 March 2019, he left his residence around 6:45 at Parkview hotel which is opposite the Union Building in Arcadia going to the place where he runs his business. He said his business is situated at the corner of Church Street and Nelson Mandela Drive opposite TUT college and has been selling in the streets for nineteen years. He operated his business until 18:30 when he knocked off, and immediately went straight home where he found his girlfriend Getrude and his child. He said he never left home that evening until the next morning when he had to go back to work. He testified that on the day of the incident, he was wearing a long-sleeved white shirt with red stripes; a black Jean and sandals. He later changed his evidence and said that he was wearing a black short; red T-shirt; and a black hat or cap.

[64] He further testified that he does not know anything about the incident that took place on 1 March 2019, or the death of the deceased. In this regard, he stated that the police unlawfully arrested him and violated his rights and have destroyed his life by accusing him of a crime he did not commit.

[65] He testified that on the day of his arrest on 09 March 2019, he left home and went to his workplace and around 9:00, three police officers, including the investigating officer of this case, approached and arrested him. He said they searched him without telling him the reasons thereof and they found R5 000 and a cellphone in his possession. They then put him at the back of a police bakkie and was taken to the police station. He said they interviewed him in English

and Setswana language and that he did not understand anything they were saying. He explained that he does not know Setswana very well but he understands the basics.

[66] He testified that he was taken to court for the first time on Monday, 18 March 2019 but that he was first taken to the ID parade before being taken to court. He said he was informed about the ID parade on the same day. He avers that there was no interpreter at the ID parade and as such, did not understand what was happening and was just following what the others were doing.

[67] Under cross-examination, he testified that his hometown is Dar-es-Salaam in Tanzania, and that he passed Grade 7 back home and did not study further when he came to South Africa. He confirmed that although the official language in Tanzania is Swahili, he was also taught in English, and could therefore communicate a little bit in English. He said his girlfriend Getrude, with whom he is residing, is a white South African citizen and that she communicates with him in English and a bit of Afrikaans. He also communicates in English with their son. He confirmed that after his passport expired, he did not have proper documents and he approached the Home Affairs for the first time in 2015 in order to apply for an asylum permit.

[68] It was put to him that when he entered the country, he was not an asylum seeker because he was using his passport. He confirmed that and said he came into the country as a visitor and stated that life was difficult for him in South Africa and when his passport expired, he went to Home Affairs to apply for asylum seeker permit. He said he is an orphan because his parents and siblings were murdered back in Tanzania, and that he only wanted to improve his life in South Africa. It was then put to him that the murder of his family was not politically

motivated, and he was therefore not qualified to seek refuge or apply for a permit. He answered in the affirmative but insisted that it is not save for him in Tanzania, hence the application he made at the Home Affairs.

[69] The accused said his real name is **J L M** as it appears in the section 22 asylum seeker permit admitted as exhibit G1. He stated that his personal particulars on the document are correct, including his photo and confirmed having dreadlocks on the photo. It was put to him that exhibit G1 was applied for in 2019 and not in 2015 as he testified, and he stated that he received this particular permit when he was in prison. When asked whether it can be accepted that exhibit G1 is fake since his evidence is that he only applied for a permit once in 2015, he responded that exhibit G1 and the file number appearing on the permit is also fake.

[70] He was further asked if exhibit G2 is the true and correct permit, and he responded that exhibit G2 is the original permit and the file number on the permit is the number he was given by Home Affairs and has been using it. The following is noted during his evidence regarding exhibit G2:

Question: *The personal particulars written in this document, who do they belong to?*

Answer: *I don't know, but it is for Gideon Peter Kelvin*

Question: *You can read perfectly, you can speak perfectly and read G2 perfectly?*

Answer: *Yes*

Question: *Is the picture in G2 yours?*

Answer: *No. It is not my picture*

Question: *Are you aware that this application was dismissed and not granted?*

Answer: *I have no information about that or the person appearing on the photo of Exhibit G2. I don't know him, but he is from Tanzania*

Question: *The file number was given to you. Why would they give you the same file number as this person?*

Answer: *According to me, it looks like I committed a fraud because they paid money*

Question: *According to you, G1 and G2 are fake, correct?*

Answer: *Yes. I can see that because they are having the same file number, and because the pictures are clear.*

Question: *Why does your name appear on a fake asylum document if you did not apply for it?*

Answer: *It looks like the people from Home Affairs gave people permits with my photo. The photo in G2 is not mine including the particulars, but the file number is mine. The fingerprint is also not mine.*

[71] With regards to his whereabouts on the night of the incident, he was asked to explain his version put to Tsakane Maluleke that he closed shop early at 20:00 on that day and went home where he spent time with his girlfriend and son. He responded that he has never closed shop at 20:00 because at that time he was already home. He explained that he was with his girlfriend and son and went to bed at 21:00. Further that his girlfriend went out with her friends, locking him and the child in the house and she came back around 23:00.

[72] He testified that he remembers very well that Sterland Mall is at the corner of Pretorius street and Steve Biko Street. To the question whether there are streetlights outside the mall and near the mall, he responded in the affirmative. He also confirmed that there are streetlights on Pretorius Street. Responding to the question whether there are lights on the stairs at Sterland Mall, he said: *"on the wall there are lights and also on the gate there are lights"*.

[73] He denied being at the scene and said he was wrongly pointed out at the ID parade. It was put to him that Mbali Ncube told the court that the person who stabbed the deceased was wearing a cap, jeans, and scotch shirt while he on the other hand says he was not at the scene where the deceased was killed, he stated as follows: “*I was wearing those clothes, but I was not at the scene*”.

[74] The fundamental principle of our law in criminal trials is that the burden of proof rests on the prosecution to prove the accused’s guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. The State must also discharge the evidential burden by establishing a *prima facie* case against the accused. Once a *prima facie* case is established, the evidential burden will shift to the accused to adduce evidence to escape conviction. However, even if the accused does not adduce evidence, he will not be convicted if the court is satisfied that the prosecution has not proved guilt beyond a reasonable doubt¹. Having said that, the question is whether the evidence presented before court is enough to point at the accused as the person who robbed and killed the deceased.

[75] Advocate Nethononda on behalf of the State argued that the state succeeded in proving its case beyond a reasonable doubt against the accused because Mbali; Juju and Tsakane positively identified the accused at the ID parade on 17 May 2019, and further that the evidence of these witnesses was partly corroborated by the version of the accused as regards the source of light at the Mall and the sidewalk on the day of the incident. Counsel submitted that the alibi of the accused must be rejected as there is no evidence placed before court by the accused to gainsay otherwise, taking into

¹ Principles of Evidence, PJ Schwikkard et al, 4th Edition, 2015, at page 602.

consideration that the accused failed to call a witness to corroborate his alibi.

[76] Advocate Motsweni on the other hand argued that the evidence of Mbali and Juju should be rejected because it was riddled with contradictions. In this regard, he argued that it is improbable that two witnesses who were next to each other, facing the same direction would see things differently regarding what transpired when the offence was committed. This argument is based on the fact that Mbali testified that the deceased chased the perpetrator until he grabbed him and was stabbed, and thereafter two male persons came running from Sterland and went to kick the deceased before running away, while Juju testified that said four male persons came running from Sterland and three of them attacked the deceased until he fell – meaning that there were three perpetrators who attacked the deceased at the same time, one of which stabbed the deceased before running away.

[77] It was further argued on behalf of the accused that it was surprising that both of these witnesses being women continued to walk towards the scene of crime and witness what was happening and were not afraid that they will themselves be robbed and that they never informed the four friends they were with. It was submitted that their evidence should be rejected because:

- i. they never saw what happened
- ii. visibility around the area was very poor
- iii. they were told what happened by other people
- iv. they wanted to be heroes as the deceased was a celebrity.

[78] Advocate Motsweni further submitted that there was no sufficient lighting at the mall and referred to photos 2, 3 and 4 of exhibit C, stating that the light facing the direction of what the State allege to be the body of the deceased, was provided by the headlights of the police vehicle and not the streetlights or church lights as testified to by the witnesses.

[79] These submissions in my view are unfounded because there is no evidence before court that Mbali and Juju were told what happened at the scene of the crime. The evidence of these witnesses was very clear as regards visibility around the area. Both testified that the area where the struggle ensued and where the deceased was stabbed was illuminated by lights coming from the Sterland Mall and streetlights. Juju testified that apart from the lights at the mall and streetlights, the other source of light was from Chicken Licken delivery entrance and the nearby church.

[80] This evidence was corroborated by Tsakane who testified that there were bright lights on the wall of the mall which were illuminating on the outside, as well as streetlights. A further corroboration was by constable Mdluli who testified that Sterland building had lights illuminating the scene where the incident took place, and that these lights are fixed or placed at the corner of the building which is not depicted from photo 1 because the photo was taken at an angle and from afar. Corroboration denotes other evidence which independently confirms or supports other evidence which renders the evidence of the accused less probable on the issues in dispute. See: **S v Gentle²**.

² 2005 (1) SACR 420 (SCA).

[81] Constable Mdluli further explained that when she arrived at the scene, she found the police vehicles already parked with their headlamps on. Her uncontested evidence was that the scene would still be visible without the vehicle lights because the area was bright enough to see because of the streetlights.

[82] Consequently, the evidence of constable Mdluli remains unchallenged with regards to the fact that the building had lights which do not appear from the photos. Her evidence also remains unchallenged with regards to her explanation as to why the police had their vehicle headlamps switched on when they were at the scene. It follows that the submission that there were no light bulbs on the wall of the building on photo 1 of exhibit C cannot stand. On the same token, the defence submission that one cannot clearly identify the body of the deceased on photos 2, 3, and 4 cannot stand. Constable Mdluli found the body of the deceased at the scene and took photographs as depicted from photos 2 to 7, and more clearly on photos 8 to 6.

[83] It is important to note that the accused made admissions in terms of section 220 of the CPA in which he admitted the correctness of the photo album, photos depicting the body of the deceased and sketch plan taken by constable Mdluli.

[84] It is for this reason that the State argued, and correctly so, that the evidence of Tsakani as regards the source of light on the sidewalk and the evidence of Juju with regards to the evidence that there were lights on the wall of the mall is corroborated by the accused himself when he testified that there are streetlights outside the mall and near the mall, as well as on the wall of Sterland building.

[85] Mbali and Juju witnessed the deceased being stabbed, and both had eye contact with the accused when the accused ran from the scene, heading towards their direction and passing right next to them after stabbing the deceased. Mbali testified that there was nothing obstructing her view when she witnessed the accused turning to stab the deceased, though she did not see on which part of the deceased body was he stabbed.

[86] Mbali and Juju described the clothing worn by the accused on the day of the incident. Not only are they sure about the description of the accused, but the accused himself testified under cross-examination that he was wearing the clothing described by Mbali but denied being at the scene. It would therefore be wrong to conclude that Juju failed to give a description of the clothing of the accused as counsel argued. It cannot be a coincidence that the accused was wearing similar clothes worn by the person who attacked the deceased and ended up killing him.

[87] I am therefore satisfied that both Mbali and Juju managed to see the accused clearly and identify him as the person who stabbed and killed the deceased. Having said that, the evidence that remains unshaken is the fact the two clearly saw the accused with nothing obscuring their view. They both did not know the accused before the day of the incident and they both place the accused at the scene, and more particularly, they place him at the scene where the body of the deceased was found.

[88] There is no doubt in my mind that the accused was correctly identified by these witnesses. Their evidence is therefore accepted as truthful, reliable, and satisfactory. Their observation of what

transpired on the day of the incident passed the test as clearly outlined in the case of **S v Mthetwa**³ where the following is said:

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witnesses; the opportunity for observation, both as to the time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait and dress; the result of the identification parades, if any; and, of course the evidence by or on behalf of the accused. This list is not exhausted. These factors, or such of them that are applicable in a particular case, are not individually decisive, but must be weighed up against the other, in light of the totality of the evidence, and the probabilities"

[89] On the other hand, Tsakane's evidence is that she saw the accused inside the mall at a distance of 2 to 3 metres away from where they were taking pictures. She explained that what caught her eye was the way the accused was focusing his attention/concentration on them. She said the deceased was closer to the accused when his phone was snatched by the accused. Like Mbali and Juju, she also had eye contact with the accused, even at the time when the accused made his move and went closer to snatch the deceased's phone and ran away. The evidence of these witnesses, namely, Mbali, Juju, and Tsakane is strengthened by the fact that they all pointed the accused at the ID parade.

³ 1972 (3) SA 766 (A) at 768

[90] The accused wanted to discredit the procedure followed during the ID parade where he was pointed out by Mbali, Tsakane and Juju on 17 May 2019. It appears on some of the photographs that only two people had dreadlocks on the line-up, being the accused and another person. In this regard, advocate Motsweni argued that out of nine people who constituted the line-up to the parade, five people with dreadlocks should have formed part of the line-up of the parade.

[91] I do not agree with this notion. To ensure fairness, several rules of police practice have been developed as a guideline for how identification parades should be held. When these rules of practice have been observed properly, the effect is that the identification of an accused acquires a reliability that it may not otherwise have. The rules may vary in importance and ought to be applied by the courts in a common-sense manner, rather than formalistically.

[92] The rules are provided for in section 37 of the CPA. In terms of Rule 8 thereof, the 'suspect and persons in the parade should be more or less of the same build, height, age and appearance - for example. The purpose of Rule 8 is to ensure that the suspect is not made to stand out like a sore thumb, which would obviously attract attention to him or her, and increase the likelihood of him or her being identified, while also increasing the chance of error. Of course, an identification parade is not necessarily useless because it is imperfect:

[93] It is clear from Rule 8 that the accused was given the necessary protection because he was not the only person with dreadlocks on the line-up which would have made him the obvious target. On the other hand, he was given the opportunity to change position and numbers as stated in paragraph 29 of exhibit F. In my view, the

identification of the accused by the witnesses strengthened the reliability of their evidence as regards the identity of the person they saw on the day of the incident and who stabbed and killed the deceased.

[94] According to Exhibit F, Mbali took two minutes to identify the accused, while Tsakane took only a minute to point him at the ID parade. As for Juju, she took five minutes to point the accused at the parade. She explained the 30-minute time noted on exhibit F and stated that they were crying in the waiting room before they went for identification, and it had to take the social worker to calm them and give them counselling before then. It is not in dispute that these witnesses were crying even when they were transported to the venue of the ID parade.

[95] Juju explained that the the 30-minute time noted is inclusive of the time when they arrived at the venue of identification until the whole process was finalized. This evidence was further made clear by Sergeant Mafanele who testified that Juju was scared and crying, and that he had to calm her down and convince her that the people on the line-up cannot see her, and as a result thereof, Juju was able to positively identify the accused.

[96] The argument raised on behalf of the accused that Mbali and Juju testified that they were four inside the police vehicle, including the police officers, when they went for an ID parade, while Tsakane testified that they were five when conveyed by the same police officers to go for an ID parade is immaterial. I am of the view that the evidence of Mbali, Juju, and Tsakane was not a material contradiction as argued by advocate Motsweni. What is important though is

whether the witnesses managed to identify the perpetrator they saw at the scene of crime on the day of the incident.

[97] In determining whether a witness' evidence is nevertheless reliable and whether the witness has told the truth despite any shortcomings in his own evidence, or between his evidence and that of other witnesses, the contradictions in a witness' evidence must be weighed holistically.

[98] The Appellate Division in **S v Mkhohle**⁴ stated that:

“Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility. In each case, the trier of fact must make an evaluation taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence”.

[99] This was affirmed by the Appellate Division in **S v Sauls and Others 1991 (3) SA 172 (A)** when the court stated that:

“The trial Judge will weigh [a witness'] evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told”

See also **S v Mafaladiso en Andere**⁵

⁴ 1990 (1) SACR 95 (A) at 98f-g

⁵ 2003 (1) SACR 583 (SCA)

[100] In my view, the evidence of all these witnesses in relation to the aspect of identification is without a doubt, satisfactory. The accused's contention that he was wrongly identified and that the ID parade was not properly conducted is misplaced. The accused submitted in his heads of argument that the deceased was a celebrity and that this matter was highly publicised, and as such, it was easy to point out a person who was already arrested for killing a celebrity.

[101] This aspect was never put to the witnesses who identified the accused at the ID parade to respond thereto, and it is rejected. It is important to note that according to the evidence of Tsakani - Mbali and Juju were not known to her. In my view, the identity of the accused by the three witnesses could not have been mistaken, as argued by his counsel. I am satisfied that the accused was positively identified by Tsakane when she saw him standing two metres away from the deceased before he snatched his cellphone. Consequently, the evidence of the State witnesses is accepted by this court.

[102] The general considerations that are important when a court weighs up the evidence or when it evaluates the evidence at the end of a trial is to first weigh the evidence as a whole and not to be selective in determining what evidence to consider. In essence, a trier of facts must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others: all probabilities; reliability and opportunity for observation of the respective witnesses; the absence of interest or bias; the intrinsic merits or demerits of the testimony itself; inconsistencies or contradictions and corroboration. It is however important to distinguish inferences and probabilities from conjecture and speculation. No proper inference can be drawn unless

there are objective facts from which to infer the other facts. Probabilities must likewise be considered in the light of proven facts.

[103] In ***S v Mdlongwa***⁶ the Supreme Court of Appeal endorsed the following principle enunciated in ***S v Van der Meyden***⁷ where NUGENT J stated that:

“A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence...”
“The proper test is that an accused is about to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored”.

[104] In ***S v Chabalala***⁸ the Supreme Court of Appeal amplified as follows the ‘*holistic*’ approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accuse:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all

⁶ 2010 (2) SACR 419 (SCA) at 11

⁷ 1999 (1) SACR 447 (W)

⁸ 2003 (1) SACR 134 (SCA) at 15

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 weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt"

[105] In the process of evaluating all the evidence before me, I must also determine whether the accused's version is reasonably possibly true, which would entitle him to an acquittal. The accused denied that he was anywhere near Sterland Mall and further denied all the allegations proffered against him. Coincidentally under cross-examination, he confirms the type of clothing described by the witnesses which they said were worn by the person who robbed and stabbed the deceased. It is important to note that neither of the witnesses knew the accused or have seen him before the day of the incident.

[106] Nine days after the incident, he is spotted by Mbali when she was on her way to school. Warrant officer Thlotse testified that when Mbali called and reported to him that she has seen the person who killed the deceased, she was terrified and did not want the accused to see her. The traumatic experience she had endured on the day of the incident was relived and displayed during her testimony. The court observed her several times breaking down and she had to be given a break on three, if not four occasions.

[107] An application for an *inspection in loco* in respect of the scene where the deceased was stabbed to death was made and granted. However, the *inspection in loco* could not be conducted because Mbali was visibly traumatised. Ultimately the State brought an application in

terms of section 153(2) of the CPA on the basis that Mbali might suffer harm. The application was granted in the interest of justice.

[108] Similarly, the same application was made on behalf of Tsakane and Tebatso as they could also be seen that they were still traumatized and could not testify in court. Tebatso was assisted by a therapist, Ms. Van Dansen, who has been counselling him for a period of two years after the incident, and clearly one could see that Tebatso was still affected because before giving evidence, and as soon as the first question was asked as to whether he knew the deceased, he broke down and could not proceed. It is for this reason that Ms. Van Dansen had to be allowed to sit next to Tebatso when he was testifying. It should however be made clear that Ms. Van Dansen did not take any part in the proceedings.

[109] Regarding the arrest of the accused, warrant officer Thlotse testified that when he arrested the accused, he immediately identified himself to the accused and explained his Constitutional rights to him upon arrest. The accused disputed that indicating that his rights were violated. Throughout his evidence, he kept changing his version when it suited him. At times he would be vague or refuse to answer questions posed during cross-examination.

[110] Looking at the counts of murder and robbery, the evidence before court shows that the deceased lost his life at the hands of the accused. He was stabbed and kicked as a means of robbing him of his cellphone. This act of violence constitutes a requirement or is one of the elements for the crime of robbery. The assault on the deceased was a means by which the unlawful possession of his property was obtained. The court in ***S v Dlamini***⁹ stated that:

⁹ 1975 (2) SA 524 (N).

“Robbery is an aggravated form of theft, namely, theft committed with violence. The violence (assault) and the theft are joint features of the one crime. The key considerations justifying a conviction of this composite crime are proof that the assault and the theft formed part of a continuous transaction and that the assault was a means by which the unlawful possession was obtained”.

[111] As already indicated that the postmortem report reveal that the cause of death is reported as **PERFORATING STAB WOUND THROUGH THE HEART**. The photographs of the heart of the deceased tell a story of their own. On photos 11-13, there is a large wound which clearly shows that the object used was inserted from the front and piercing through to the back where it exited. This stab wound has been identified as *Stab wound A*, and the following injuries are noted -

Stab wound A

- The central aspect of this wound is located overlying this precordium.
- The central aspect of this wound is located approximately 16cm inferior from the left clavicle.
- The central aspect of this wound is located 3cm lateral-and-to-the-left of the anterior sternal midline.
- The central aspect of this wound is located approximately 8cm inferior-and-medial from the left nipple.
- Examination shows an obliquely orientated wound which measures 3.5 cm in length.
- This wound penetrates the anterior pericardium and this pericardial injury measures 2 cm in length.
- This wound then perforates through and through the ventricles of the heart.
- This wound penetrate the posterior pericardium and this pericardial injury measures 0.5 centimeters in length.

- This wound then penetrate the lower lobe of the left lung and this injury measures 0.5 cm in length.
- It is also noted that the == Features are in keeping with that of a perforating stab wound caused by sharp-bladed and pointed weapon such as a knife.

Chest

Thoracic cage and diaphragm

- *Stab wound A* penetrates and fractures the 4th rib, costochondral junction, on the left side of the sternum. This stab wound is located approximately 3 cm lateral-and-to-the left of the anterior sternum midline. This wound measures approximately 3cm in length
- The left thoracic cavity contains approximately 1200 ml of blood.

Heart and pericardium

- *Stab wound A* penetrates the anterior pericardium and this pericardial injury measures approximately 2cm in length.
- This wound then perforates through-and-through the ventricles of the heart. The anterior ventricular aspect of the heart shows at 2.5cm stab wound defect. The posterior ventricular aspect of the heart shows a 0.5cm stab wound defect.
- *Stab wound A* penetrates the posterior pericardium and this pericardial injury measures approximately 0.5cm in length.
- The heart-and-pericardium have therefore sustained perforating through-and through stab wound.
- The left anterior descending coronary artery has been severed by *stab wound A*.

[112] This clearly indicates that the deceased died a gruesome death at the hands of the accused. It is on record that the deceased and Tebatso were actors in a movie called “Matwetwe”. He was an upcoming talent making a contribution to the Arts and Culture which impacts positively to making a contribution to the economy of this country. There were clearly no justifiable reasons why his life should be ended for a device such as a cellphone. The actions of the accused

clearly shows that he had the intention to end the life of this young man, because he has no regard for human life.

[113] With regards to the count of presentation of a fraudulent temporary asylum seeker permit, I have already indicated that the accused had admitted during cross-examination that both exhibit G1 and G2 are fraudulent. His counsel also conceded during address that the documents were fraudulent and no submissions were made in that regard.

[114] The accused has been illegal in the country for 19 years. This is so because even before he went to the Home Affairs according to his evidence, he was illegal for quite a number of years. What is sad about this matter is that even though the accused was illegal in the country, he did not appreciate the fact that he was a guest and had to respect the laws of this country and do right by the citizens who accommodated him. However, for his own selfish reasons, he killed the deceased and does not appreciate the wrongfulness of his actions as he kept on professing his innocence throughout the trial.

[115] Regarding the demeanour of witnesses, and in particular, Tsakane; Mbali; Juju; and Tebatso; they presented themselves and came out as impressive witnesses. They gave a coherent explanation of the events of the 1 March 2019. They did not hesitate in answering questions and their evidence was never shaken. The same goes for constable Mdluli, who gave her answers backed up by evidence. This court accepted their evidence as being honest, credible and reliable. The bare denial by the accused that he was never at the scene and committed the offences for which he has been charged with, is rejected. His version is not reasonably possibly true and is rejected as false.

[116] The Supreme Court of Appeal in **S v Trainor**¹⁰, stated that:

“A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety”

[117] Having considered all the evidence before me and the submissions made by both counsels, I am satisfied and of the view that the State succeeded in proving its case against the accused beyond a reasonable doubt.

[118] In the circumstance, I make the following order:

1. Count 1 : The accused is found Guilty of Murder read with s51(1) of the Act.
2. Count 2 : The accused is found Guilty of Robbery read with s51(2) of the Act
3. Count 3 : The accused is found Guilty as charged



PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁰ 2003 (1) SACR 35 (SCA) at 9

Heard : 19 October 2020
Last day of Trial :3 December 2021
For the State : Adv Nethononda
Instructed by : Director of Public Prosecutions, Pretoria
For the Defendant : Adv Motsweni
Instructed by : Legal Aid South Africa, Pretoria Justice
Centre
Date of Judgment : 31 January 2022