IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE 18 January 2023 SIGNATURE

CASE NUMBER: A308/2021

In the matter between:

DONALD RAMETSI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeared before the Regional Magistrate Gauteng Central,

sitting in Pretoria, on a charge of murder. He was convicted of attempted murder and sentenced to a term of imprisonment of ten years, five years of which was to run concurrently with the term of imprisonment the appellant was serving at the time. Leave to appeal his conviction was granted on Petition to the High Court.

[2] At commencement of the trial the appellant informed the court that he did not wish to be legally represented, that there was no need for assessors to be appointed even though he was appearing on a serious charge of murder. Furthermore, that he understood that the minimum sentence for the offence he was charged with was 15 year's imprisonment. It was only during the cross examination of the deceased's mother that he changed his mind and informed the court that he required legal representation. The facts leading up to his change of mind shall be dealt with below.

[3] There were witnesses who were present at the scene who did not testify because they had died and these were one Vijo, Thabo and Bar One, and they were friends of the deceased and the appellant. The application for admission of hearsay evidence in terms of the Law of Evidence Amendment Act 45 of 1988 was made after
Ms Maphike and Ms Baloyi had testified and after the appellant had secured legal representation.

[4] Furthermore, Mr Viviers took over from Ms Els as legal representative for the appellant. It was only realized during the trial, when a transcript of the record was made available to him that the recording of the evidence of George Mathibele, the police officer who took down the statements of the witnesses and of the appellant was not transcribed. Their evidence was reconstructed from the notes of the presiding
Magistrate and read into the record.

BACKGROUND

[5] On 8 January 2008 the deceased sustained injuries, namely, one perforating gunshot wound to the pelvis and two gunshot wounds to his right leg. He died on 10 January 2008. In light of the issues in this appeal it is necessary to briefly traverse the events leading up to his death.

Ms Maphike

[6] Ms Dimakatso Maphike ("Maphike") was the deceased's girlfriend. She testified that at around 20:00 on 8 January 2008 she accompanied the deceased in his vehicle to Block D3 Mamelodi and, their four-year old son was present. Near a tavern in the next street from the deceased's home they were stopped by his friend Vijo. She heard Vijo say "stop I want to see you, don't come near me, that young man is here he is looking for you". At the time she did not know whom Vijo was referring to. Vijo was in his vehicle in the presence of his girlfriend and one Yvonne and her taxi driver boyfriend and all were known to her.

[7] The deceased alighted and walked towards Vijo's vehicle which was behind theirs. Shortly thereafter the appellant walked past their vehicle from the direction of the tavern. The appellant was known to her as the deceased's friend. Although there were street lights their vehicle was parked in a dark area. She later heard gunshots, and, on realising that the deceased was not returning to the vehicle she fled the scene in his vehicle to his home which was in the next street. She had hoped to find him there. On arrival she found one Daddy and the deceased's nephew and she learned that they had reported to the deceased's mother that 'the appellant had shot the deceased'.

[8] When she returned to the scene she found that the deceased had been transported to the Mamelodi Day Hospital. On her arrival there, she found Vijo and the occupants of his vehicle whom she had seen earlier on. The deceased was later transferred to the Pretoria Academic Hospital. At this hospital she got a chance to speak to the deceased. She enquired 'why he and the appellant were fighting' and

the deceased told her that “the appellant fired shots at him and he did not know why”. At the time the deceased was in pain and he could not speak properly; “hy kon nie ordentlik praat nie”[1]

[9] On her arrival from the hospital her brother Letlhogonolo informed her that the appellant had been to her home to ‘enquire if the deceased had returned, and the appellant asked for her numbers’. She called the appellant. They talked about the incident and the appellant told her that he was sorry, and that the deceased had refused to pay back the R700.00 owed to him. She learned later that day that the deceased had discharged himself from hospital.

[10] The appellant’s version put in his cross examination was that he denied that he had admitted having shot the deceased; he denied that he was in possession of a firearm; he denied that he had shot the deceased; he disputed that the deceased had

told her that he was the assailant and alleged that the accusation was made up. He put it to Ms Maphike that her statement was written on 23 March 2010 two years after

the incident. Cross -examination was suspended pending the holding of a trial-within-a-trial regarding her written statement to the police. Although she admitted that the signature on the statement was hers, that she had read it after it was written down and

before testifying, she disputed certain aspects in the statement and stated that the police officer had on his own added to her version, she informed the police officer that

she was not satisfied with the statement and he told her she would have an opportunity

to explain fully at court;

Ms Baloyi

[1] Transcript Page 19 Line 16

[11] Ms Baloyi, mother of the deceased testified that after receiving a report on the incident she immediately went to the tavern to make enquiries. There were many people and she was informed by Maggie the tavern owner that the appellant had shot the deceased. She was also informed that the deceased had been transported to the Mamelodi Day Hospital. She met up with the deceased in Casualty. She asked him what had happened and he explained that the appellant had shot him. At that time he had no difficulty conversing with her " hy kon ordentlik met my praat".[2]

[12] She did not have further conversations with the deceased after he was transferred to the Pretoria Academic Hospital because there, she was not allowed to see him at that time of the night as it was not visiting hour. When she went to visit the deceased the following day she was informed that the deceased had discharged himself from hospital. She did not find the deceased on her return to her home. He later called to inform her that he was at Nelmapius. Arrangements were made for the deceased to rather go to her sister's place at Mamelodi 'D' section. The deceased was seen by Dr Palafala who informed her that the bullet was lodged in the deceased's kidney and that it had to be removed, even though he had refused treatment and discharged himself, they still had to take him back for the procedure to be performed. The deceased was given an injection for pain. They did not take him back to hospital, instead they returned to her sister's place. After about seven to eight hours the deceased complicated, they took him back to the doctor, he was examined by the doctor in their vehicle and pronounced dead.

[13] She had also called the appellant wanting to know what problems he had with the deceased and why he had not consulted with her. The appellant did not reply and he dropped the phone. Later the appellant called her and told her that he was sorry

[2] Transcript Page 37 Lines 12-13

for what happened, that he did not know what he was doing: “dat hy nie geweet wat hy maak nie”.[3]

[14] Cross examination by the appellant presented with problems when she was questioned on the contradictions in the two statements made to the police. She acknowledged that she made two statements to the police and that the first statement was made when the incident was fresh in her memory on 12 March 2008 and the second on 23 March 2010. In the first statement she failed to report that the deceased had informed her that he was shot by the appellant. She became agitated and in some of her emotional outbursts she accused the appellant of being a murderer who was responsible for the death of other people. The altercation ended up with her refusing to give answers to the appellant. The proceedings were adjourned to allow her to cool down. Afterwards the purpose of the cross examination was explained to her. When the cross examination resumed an altercation ensued between the presiding magistrate, Mr Bosch and the appellant about whether the second statement had been properly introduced. At this point the appellant told the court that he was greatly disturbed by Ms Baloyi’s utterances in court, that he could not continue with the trial and he requested a postponement which was refused. The appellant then requested a postponement to seek representation from Legal Aid and the trial was postponed.

[15] Ms Baloyi was confronted in cross-examination with the two statements she made to the police, where in the first statement she mentioned that she was informed by Maggie the tavern owner that the appellant had shot the deceased. In the second statement she alleged she asked the deceased who shot him and he said it was the appellant who was well known to her. It was further put to Ms Baloyi that the appellant

[3] Transcript Page 40 Lines 13-14

denied having admitted in the telephonic conversation he had with her that he had shot the deceased and that he was sorry. She testified that the issue of his denial was not discussed but she inferred from the overall conversation that she had with the appellant that he was sorry for what he did and not that he actually said he was sorry.

She testified that the appellant and the deceased were good friends and, that she had relied many a times on the appellant to assist her during the deceased's previous incarceration. She testified that she called the appellant to inform him that the deceased "Tiego" had died and his only response was "Eish".

[16] Ms Els came on board as the accused's legal representative six months later. She informed the court that after consulting the appellant the trial-within- a-trial regarding Ms Maphike's statement was no longer necessary and she had no further cross examination for this witness. However, the record reveals that a trial-within- a-trial was held regarding only the certification of the statements. Mr Mathibele, a lieutenant testified that he attended the crime scene. He took down statements including that of Ms Maphike from a house in Mamelodi West. The statements were read back but were not certified. When he later returned to the police station the statements were certified by one Constabel Shishange.

[17] Ms Els resumed cross examination of Ms Baloyi on the contradictions in her two statements. Ms Baloyi again got agitated. She denied the version put to her that the appellant, after receiving a call from her, had denied that he shot the deceased.

Godfrey Mohlala and Letlhogonolo Maphike

[18] Godfrey was one of the occupant's in Vijo's vehicle, and he was in the company of Vijo, his girlfriend Siphiwe and Vijo's girlfriend Yvonne. He heard Vijo inform the deceased that the appellant was looking for him. Immediately after

hearing these words a gunshot went off, he hid himself in the vehicle. He heard the deceased say “I have your money why shoot me take the money” and he heard the appellant say “I don’t want the money, I want you.” He hid behind the steering wheel, Vijo sat behind him and the deceased was outside the vehicle behind the vehicle. After the shooting he and Vijo got out of the vehicle and found the deceased on the ground, Vijo picked him up and they rushed the deceased to hospital. He did not see the appellant. On further questioning he revealed that the appellant was not known to him even though he heard his voice.

[19] Letlhogonolo brother of Ms Maphike testified that he met appellant earlier in the evening before the incident at his home when the appellant came looking for the deceased and Ms Maphike and he took the latter’s telephone numbers.

Dr Palafala and Dr Blumenthal

[20] There was no objection from the defence to the handing in of Dr Palafala’s statement which confirmed his treatment of the deceased. Dr Blumental performed the autopsy. He testified that he found that the abdomen was full of puss, which was caused by an infection that had spread from the site of the pelvic region to the abdomen, throughout the body and to the lungs and that the deceased had suffered multiple organ failure. Although he was not a clinician, he confirmed the possibility that the infection had spread quickly. He was asked if the deceased’s refusal of treatment and his own discharge from hospital could have been a contributing factor to his death. His response was that the deceased needed surgical management and that the wound could have been treated if properly managed by a surgeon and a clinical physician.

The Appellant

[21] The appellant was a friend of the deceased. He admitted being in the vicinity of the shooting on 8 January 2008. Prior to the shooting he drove past the vehicle of the deceased and Vijo in the direction of the tavern. It was at night, the vicinity around the tavern was well lit and there were a number of other vehicles parked on either side of the street. He stopped his vehicle next to Thabo's, who was resident at the tavern. The deceased and Vijo stood in front of Thabo's vehicle and Thabo was in his vehicle. He stopped without alighting from his vehicle next to the deceased and Vijo because he wanted to inform the deceased that one Bar One, also known as Rufus Mathebe, was looking for him.

[22] Another vehicle arrived on the scene and parked behind the deceased's vehicle. There was not sufficient space for this vehicle to pass so he drove on in order to give way, and he parked his vehicle and walked back towards where the deceased and Vijo were standing. He only realized later that the vehicle which parked behind Thabo's belonged to Bar One. He saw the latter alight in possession of a firearm. The appellant testified that two shots were fired, he retreated and ran back to his vehicle and later several other shots were fired. According to the appellant, they were all friends with the deceased, that is, including Thabo and Bar One. The appellant testified that before the incident around 18.30 Bar One had called him to enquire why he had made the deceased get used to him because the deceased had an affair with his girlfriend Lerato.

[23] The appellant denied that he had made calls to Dimakatso and Ms Baloyi and admitted to them that he had shot the deceased and he denied that he asked for forgiveness. He contended that he may have been implicated because as the deceased's friend his family and girlfriend expected him to tell them who had fired the shots. He also had knowledge that after the deceased left hospital him and Bar One resolved their problems and they as friends did not foresee that his friend would die. He denied that the deceased owed him money but testified that it was him who owed the deceased. Initially he owed the deceased R1500.00, paid back R700.00 and owed the deceased R800.00 which he promised to pay back at a later stage. The relationship between him and the deceased deteriorated from November of the previous year due to his substance abuse.

[24] In cross examination he testified that he had lost contact with the deceased in November of the previous year because the deceased no longer lived in Mamelodi. On the day of the shooting he had parked his vehicle near Maggies Tarven and walked to Ms Maphike's home in search of the deceased. He did not have the deceased's number and on not finding her, he asked for her number. On his return he walked past Vijo's vehicle and asked Vijo to tell the deceased that he urgently needed to see him. Later in the evening as he was approaching Vijo's vehicle, he saw one William and Bar One in the street, he heard shots being fired, and saw Ms Maphike drive away in the deceased's vehicle. He was told that Bar One was responsible and he knows that after the deceased had discharged himself from hospital the deceased and Bar One met and made up. The police approached him and he gave them information on Bar One. The appellant testified that he was implicated by Ms Maphike and Ms Baloyi because he was a friend of the deceased and that he had not been forthcoming with information on who murdered the deceased.

THE ISSUES

[25] Although there were numerous grounds of appeal these were summarised in counsel for the appellant and respondent's heads of argument as follows:

The Appellant:

(i) The court *a quo* admitted hearsay evidence without observing the requirements provided for in section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ("the Act");

(ii) The lack of assistance to the appellant who was an undefended accused person resulted in an unfair trial;

(iii) The State failed to make findings on the presence of circumstantial evidence from which it could be inferred that there was an intention to kill especially where no direct evidence was presented.

The Respondent:

(iv) The court had to draw a distinction between the hearsay evidence of Ms Maphike and Ms Baloyi in that it was the deceased who told them that the appellant was the one who shot him and the admission which was made directly to them by the appellant was an informal admission '*ex facie curia,* and as such section 219(A) of the Criminal Procedure Act 51 of 1977 was applicable. Furthermore, that there was an admission made

directly to Ms Maphike by the appellant.

(v) That as a result of the admissions made by the appellant to Ms Maphike

and Ms Baloyi, the report by the deceased to them was not subject to

the provisions of Law of Evidence Amendment Act 45 of 1988

THE LAW

[26] It is trite that a court of appeal would only interfere with the findings of the trial court where there is a material misdirection on the fact and credibility findings of the witnesses.[4] It is also trite law that the state bears the onus to prove its case beyond a reasonable doubt. The accused bears no onus and if his version is reasonably possibly

true he is entitled to receive the benefit of the doubt and be discharged.[5]

The Lack of Assistance to an undefended during trial:

[27] It is common cause that the appellant was not represented at commencement of the trial and that such legal representation came about only later during the trial. It is apparent from the record that legal representation was sought after the presiding Magistrate declined a request for a postponement from the appellant after a heated cross examination of Ms Baloyi..

[4] R v Dlumayo and Another 1948 (2) SA 677(A) and S v Francis 1991(1) SACR 198(A) at 198j-199a "The power of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence-a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony". S v Monyane and Others 2008 SACR 543 (SCA) [15]
And in S v Hadebe and Others 1997 (2)SACR 641 (SCA) at 645e-f the court held:
.....in the absence of demonstrable and material misdirection by the trial court . its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[5] S v Van Der Meyden 1999(1) SACR 447; S v Shackell 2002(2) SACR 185 at para [30]

[28] Of importance is that there was no direct evidence linking the appellant to the murder of the deceased. The learned Magistrate disallowed a report made to Ms Maphike and the deceased's mother by one Daddy regarding the appellant and ruled that if the State was not going to call Daddy as a witness the evidence was inadmissible. The prosecutor indicated that he was not going to call Daddy as a witness. The appellant was not engaged or advised on the provisions sections 3(1)(c) of the Law of Evidence Amendment Act. The same occurred when the evidence of Ms Baloyi was led in that reference was made to this Act but nothing was explained to the appellant. It is trite that presiding officers are obliged to assist an unrepresented accused person in the conduct of the trial in order to ensure that the accused's rights are protected and not violated and that he receives a fair trial.

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[29] As I see it, the questioning of Ms Maphike by the prosecutor, which followed was about the conversation she had with the deceased at the Steve Biko Hospital and it was indirectly based on the hearsay reports that were disallowed. The report by the deceased was in my view not a spontaneous and unsolicited one. Ms Maphike did not pose a question as to what happened; she assumed that the hearsay report from Daddy was true and posed a question as a fact on what she had heard:

Ms Maphike

"By die hospital het u kontak gehad met die orrledene? Het u met hom gepraat

of hy met u gepraat of nie? – Ja ek het inderdaad met hom gepraat [6].....

Was hy by sy positiewe of nie? -Edele ek dink hy was in pyne gewees want hy

[6] Transcript Page 19 Lines 9-12

kon nie ordentilke praat nie.

Het u met hom gepraat? Kon hy verstaan? – Ja

Het u vir hom iets gevra – Ja

Wat vra u hom? – Ek het hom gevra waaroor baklei u en Tsietsi? Hoekom het hy op u gevuur?

Ja, het hy geantwoord? - Ja hy het

Wat het hy gese? – Die oorledene het vir my gese ja hy het op my gevuur en ek weet nie hoekom hy dit doen nie.[7]

Edelagbare ek gaan u versoek om dit toe te laat in belang van geregtiheid

Hof : Ek sal dit voorlopig toelaat, ek sal later daaroor uitspraak gee meneer. Ek

will eers sien wat u aanbied

Hof: Ek laat dit voorlopig toe. Dit kan later total wegval (my underlining)[8]

Ms Baloyi

Wat het u by die hospital aangetref toe u daar aankom mevrou - ……ek het inderdaad vir Tiego givind ….en hy kon ordentlik met my praat Edele en toe vra

ek hom wat het gebeur :

Die staat sal dan versoek dat heirdie getuienus voorlopig togelaat word Agbare

Hof: Goed die hof sal dit voorlopig toelaat in terme van artikel 3(1)(c)……die hof sal later beslis oor die finale toelaatbaarheid daarvan." (my underlining)[9]

[30] It was contended for the appellant that hearsay evidence was allowed to be led against an unrepresented appellant without any assistance and explanation 'of what hearsay evidence is, the procedure to be followed dealing with its admission and the consequences of its admission and his right to object thereto.' In S v Ndhlovu and

[7] Transcript Page 19 Lines 15-23
[8] Transcript Pages 19 Lines 24-25; 20 Lines 1,2 &4
[9] Transcript Page 37; Lines 10-18

Others[10] the court discouraged the application of the Act 'against an unrepresented accused to whom the significance of its provisions had not been explained'

[31] It was conceded for the respondent that the only evidence linking appellant to the murder was that of Ms Maphike and Ms Baloyi. It was contended that the appellant's admissions to them do not constitute hearsay and that instead section 219A of the Criminal Procedure Act 51 of 1977 was applicable.

[32] In my view, it was also the relevance and the import of allowing such hearsay evidence to be led that should have been explained to the appellant, that is, that it was tendered in the interests of justice as provided in the Act under consideration. As the record reflects, submissions and argument on the section 3 (1)(c) of the Law of Evidence Amendment Act were only heard after the evidence of Ms Maphike and Ms Baloyi was led and, also after the appellant had secured legal representation. Furthermore, in my view, if the state intended to rely on the extra curial statement by the appellant, such intention should have been mentioned by the state and also in that regard, the court had an obligation in that instance to explain section 219(A) of the Criminal Procedure Act as amended to the unrepresented appellant, the requirements that such statements should have been freely and voluntarily made and especially the discretion that the court would exercise for allowing admissibility of such statement. The record does not reflect that the state intended to rely on these extra curial statements as provided in section 219 (A) in that the state sought, throughout the trial an admission on grounds that the hearsay statements made by the deceased to Ms Maphike and Ms Baloyi were in the interests of justice and in terms of section 3(1)(c)

[10]S v Ndhlovu and Others 2002 (6)SA 305 (SCA) (In setting aside the conviction in S V Ngwani 1990 (1)SACR 449 (N) Didcott J stated " The accused who was unrepresented had to have the effect of the subsection fully explained to him, in contrast with the legal position were it not invoked. He then had to be heard on the issue whether it should be invoked. In particular, he had to be heard on the important one raised by para(iv), the issue whether he would be prejudiced were it to be invoked"

of the Law of Evidence Amendment Act. The respondent cannot rely as basis for admission of section 219(A) when this was not considered by the court *a quo.*

[33] When the appellant eventually obtained legal representation by Ms Els, the issue of the witness statement of Ms Maphike was discussed. The court had already heard the evidence relating to the said statement by the deceased. Giving Ms Els, who was not present, an opportunity to after the fact make submissions on the provisionally admitted evidence does not address the issue on whether it was fair for the trial to have continued without any assistance or any explanation whatsoever to the appellant.

Furthermore, the indication by Ms Els that she had instructions not to pursue the trial-within-trial pertained to the cross-examination by the appellant of Ms Maphike regarding when her statement made to the police, the appellant having contended that Ms Maphike and Ms Baloyi had colluded with each other. In my view, not pursuing that line of questioning was of no consequence. What was communicated to the court was that it was no longer necessary to pursue the trial-within-a-trial regarding the statements of Ms Maphike.

Admission of Hearsay Evidence

[34] The admission of hearsay evidence is regulated by Section 3 (4)[11] and thereafter where it relates to this matter the preconditions in section 3(1)(c)[12] of Act 45 of 1988 apply. The respondent did not address the provisions of these sections in

[11] 3 (4) "hearsay evidence means evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence"

[12] 3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

3(1)(c) The court having regard to

(i)The nature of the proceedings;

(ii) The nature of the evidence;

(iii) The purpose for which the evidence is tendered;

(iv) The probative value of the evidence;

the heads of argument despite the fact that the court *a quo* relied on the provisions of the Act for conviction.

[35] It is contended for the appellant that in in terms of 3(1)(c)(i) the court firstly had

to determine the nature of the proceedings. These were criminal proceedings which required even where hearsay evidence was admitted, that the state to establish the guilt of the accused beyond a reasonable doubt. Further, the issue of prejudice to the accused at trial was to be considered especially where the evidence sought to be tendered was the only evidence the court would rely upon in convicting the accused.[13]

It is common cause that none of the witnesses who were allegedly present at close proximity to the incident tendered any evidence implicating the appellant. The State did not call Daddy. Mohlala's evidence was not helpful. He heard a conversation between the deceased and someone and assumed that it was with the appellant. I use

the word assume because Mohlala testified that although he was behind the steering wheel of Vijo's vehicle he did not see the appellant and he did not know the appellant.

The only evidence that remained was that of Ms Maphike and Ms Baloyi.

[36] Section 3(1)(c)(ii) requires the court to evaluate with caution the evidence tendered as hearsay especially where it is in the form of statements made to Ms Maphike and Ms Baloyi by others and the alleged statements made by the deceased

to them. The reliability of the evidence so tendered needs to be assessed having

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(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) Any prejudice to a party which the admission of such evidence might entail; and

(vii) Any other factor which should be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[13] S v Ndhlovu and Others *supra* at para [16]….This court alluded in S v Ramavhale 1996 (1)SACR 639 (a) 647-8 and 649d-eto an intuitive reluctance to permit untested evidence to be used against an accused in a criminal case, observing that an accused usually has enough to contend with without expecting him also to engage in mortal combat with absent witnesses.' It concluded that 'a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so'.

regard to the evidence as a whole. Section 3(1)(c)(iii) requires the court to carefully consider the purpose for which the evidence is tendered. For example, in cross examination Ms Baloyi explained that she inferred from the conversation she had with the appellant that he was sorry for what he did, not that he told her he was sorry.

[37] It is contended for the appellant that the question to be asked is whether what was testified to by these witnesses represents the deceased's 'actual words quoted as spoken by the deceased or if it was a summary of his words, or if it was a conclusion drawn by the witnesses.' Both witnesses approached the deceased on the allegations made to them prior to them seeing the deceased in hospital. For example, the alleged report by the deceased to Ms Maphike is not a spontaneous narration of what happened. The question posed by her to the deceased was prompted by a foregone conclusion that the appellant was responsible. In my view I would have expected the deceased who was friends with the appellant to have informed them that he was shot by the appellant because he owed him R700.00. The deceased told Ms Maphike he did not know why he was shot by the appellant and to Ms Baloyi he pointed to the appellant as being responsible. This in my view questions the reliability of the deceased's statement to them.

[38] Also to be considered is the contradiction between Ms Maphike and Ms Baloyi of the state in which the deceased was when they had a conversation with him. Ms Maphike stated that the deceased was in pain and could not converse properly while Ms Baloyi stated that he was in good condition. The impression given in the latter's testimony is that she had a conversation with the deceased, but she did not reveal what the conversation was about. On the other hand, Mr Mohlala heard a conversation allegedly between the deceased and the appellant about money but he did not see

the appellant and he did not know the appellant. This again puts into question the reliability of the hearsay statement.

[39] The appellant on the other hand gave a different version. He testified that he owed the deceased money, an amount of R1500.00, that he had repaid R700.00 and still owed an amount of R800.00. He gave a version that Bar One was responsible for the shooting, that such information was given to the police, unfortunately Bar One died before the trial. His evidence that the deceased and Bar One met after the deceased had discharged himself from hospital was not investigated.

[40] The court in considering the probative value of the evidence as required in section 3 (1)(c)(iv) has to bear in mind that the state still bears the onus to prove an accused's guilt beyond a reasonable doubt. It is contended that the enquiry into the probative value must be two-fold (i) to assess the reliability and completeness of the transmission (ii) the reliability and completeness of what the deceased said[14]. Furthermore, that the 'probative value of the evidence depends on the credibility of the statement made by the deceased but also the credibility and reliability of the persons to whom the declaration was made. The utterances by the deceased must be spontaneous and unsolicited. The evidence must be corroborated by other 'surrounding evidence' which would give credence to the evidence of the witnesses and to the statement of deceased that it was the appellant who killed him.[15]

[41] I have already alluded to the testimony of Ms Maphike in that I found that the statement by the deceased was not a spontaneous report and it cannot be said that the report was unsolicited, neither can it be said that the report was complete. The deceased was not willing to disclose the reason for the shooting and since he was no longer present, the appellant would not be in a position to cross examine the

[14] S v Ramavhale 1996 (1) SACR 639 (A) at 649 E-G
[15] S v Sigcawu 2022 (1) SACR 77 (WCC) at para [36] and [37]

deceased. The court *a quo* rejected the appellant's version regarding the R700. In my

view even on the version of the state witnesses, that is, of Ms Maphike and Mr Mohlala

the evidence is not reliable in that it is not corroborated by any other evidence.

[42] Regarding the reliability of the hearsay evidence the other issue not

satisfactorily dealt with by the court *a quo,* was raised in cross examination by the

appellant pertaining to the statements made to the police by Ms Maphike. Although

Ms Els indicated that she had instructions to longer pursue the trial-within-a trial, Ms

Maphike testified that there were certain portions in the statement which she did not

agree with, which were incorrectly recorded or made up by the police officer when

taking down her statement. In my view, by abandoning this procedure the court *a quo*

and the appellant were not in a position to assess whether what Ms Maphike

complained about would have impacted on the hearsay evidence which the court had

admitted. Coming to Ms Baloyi her 'emotional uncooperative outbursts' tainted the

credibility and reliability of her evidence especially in my view,(i) when she refused to

answer questions regarding the two statements made to the police one in 2008 and

the other 2014 and (ii) why she had not mentioned in the first statement of 2008 what

the deceased had communicated to her, that the appellant was responsible for the

shooting (iii) her outbursts that the appellant was a murderer of many other people.

[43] Regarding section 3(1)(c)(v) the deceased's death renders impossible why the

hearsay evidence could not be given by the person upon whose probative value such

evidence depends. The other witness Vijo, the only eye witness also passed away

before trial. It is contended that the deceased's statement remains uncontentious,

except for the fact the appellant testified denying that he admitted to Ms Maphike and

Ms Baloyi that he was the one who shot the deceased.

[44] In admitting the hearsay evidence in terms of Section 3(1)(c)(vi) the court had to assess the degree of prejudice to the appellant. It is contended that the opportunity to cross examine the deceased on the identity of the person who shot him was rendered impossible because of his death and the failure by the learned Magistrate to assist the appellant when cross-examining Ms Baloyi on her inconsistent statements widened the possibility of prejudice to the appellant. In my view this also goes to the evidence of Ms Baloyi.

[45] Regarding section 3(1)(c)(vii) it is contended for the appellant that there are no factors that would justify the admission of hearsay into evidence. I have already alluded to the fact that the court *a quo* had failed to advise, to explain and to lend assistance before the hearsay evidence was led. The appellant was prejudiced because he was not legally represented and he would not have been in a position to consider the application of the requirements in section 3 (1)(c) (i) –(vii). The evidence was provisionally allowed with an indication on record that the learned Magistrate first wanted to hear what evidence was being put up and the admission of the evidence on grounds of the interests of justice would be dealt with at a later stage. This step in my view was irregular. While having correctly considered the cases relevant to the admission of hearsay evidence, the learned Magistrate when dealing with the reasons for admitting the said evidence in the interests of justice, stated the following on case lines:

> "Die hof moet die beskuldigde se regte opweeg . Die hof moet beskuldigde se regte opweeg ten opsigte van die begrip in belang van geregtigheid. Beskuldigde staan voor hierdie hof waar hy aangekla staan van moord op die

> oorledene day hy die oorledene geskiet het. Die enigste daadwerklike getuienis wat hom verbind is die mededelings waaroor hierdie aansoek gaan. Die hof kan nie sien hoe ons regstelsel die beskuldigde se regte kan oorheers bo die belang van geregtiheid nie……Beskuldigde kan nie net vry stap vandag omdaat oorledene dood is nie. Die hof is van oordeel dat die mededelings die hoorse getuinis in belang van geregtigheid is en did word toegelaat. (my underlining)

It is clear from the above statement, as is common cause, that the only evidence against the appellant were the reports made to Ms Mashike and Ms Baloyi and the alleged admissions by the appellant which he denied having made. I have already found that the learned Magistrate did not deal with the admissions allegedly made in terms of section 219(A) of the Criminal Procedure Act 51 of 1977 as amended. He concentrated mainly on the statements by the deceased to the witnesses in terms of section 3(1)(c) of the Law of Evidence Amendment Act dealt with above. According to the learned Magistrate because the appellant faced a serious charge, a murder charge, the rights of the accused cannot be allowed to dominate over the interests of justice. This stance ignores the only criterion being the fact that (i) hearsay evidence will only be admitted where the court has satisfied itself that all the requirements as set out in section 3(1)(c) have been considered,(ii) that *prima facie* there was evidence that implicated the appellant (iii) this coupled with his duty to assist the appellant by explaining the law and consequences of admitting hearsay evidence (iv) ensuring that the appellant who was unrepresented at the time evidence was led received a fair trial.

Conviction : Attempted Murder

[46] It is common cause that the deceased discharged himself from hospital without

being treated, that a day later he was seen by a doctor who stated that the injuries were treatable but recommended urgently his return to hospital for removal of the bullet from the abdomen. The deceased failed to heed such advice and succumbed two days after he sustained his injuries. The court *a quo* found that there was a *novus actus interveniens (*sepsis and multiple organ failure as cause of death) to the murder charge and convicted on attempted murder.

[47] It is trite that Attempted Murder is a competent verdict in terms of section 256 of the Criminal Procedure Act 51 of 1977 as amended. 'The state has the onus to prove the elements of attempted murder, (i) an attempt (ii) to kill another person unlawfully (*actus reus)* (iii) with the intent to kill with an appreciation that the killing is unlawful (*mens rea)*, the state of mind required for attempted murder is the same as for murder, the difference lies in the actus reus, in the case of murder the act allegedly

perpetrated by the accused must have actually resulted in death …….the same state of mind suffices for attempted murder…the prosecutor must prove the elements of attempted murder'[16].

[48] It is contended for the respondent that the inference sought to be drawn 'must be considered having regard to the totality of the evidence. It was contended that the

intention to kill could be inferred from (i) the multiple shots that were fired and the fact that multiple shots were fired which struck the deceased in different parts, the wound to the abdomen being the most serious one (ii) that the appellant was looking for the

deceased about money owed to him by the deceased (iii) that the appellant was heard

speaking to the deceased about the money before shots were fired (Mohlala's evidence). Furthermore, that if this court were to find that attempted murder was not proved, the court still had to explore whether on the evidence before the court other

[16] Kruger v S (A347/2013) [2014] ZAECHC 196 (17 December 2014) para [14]

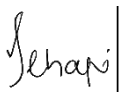
competent verdicts were proved, like ‘assault with intent to do grievous bodily harm, common assault, pointing of a firearm in contravention of any law.’

[49] The cardinal rules of logic regarding inferential reasoning were outlined by Watermeyer JA in R v Blom[17]. The circumstances from which the inference is drawn should be conclusive and must be proved by direct evidence, the inference sought to be drawn must be consistent with all the facts. In Kruger *supra* the elements as stated
of a charge of attempted murder must be proved beyond a reasonable doubt. In my view, although multiple shots were fired and the deceased sustained injuries, the evidence presented to the court *a quo* was inconclusive, as to inferences to be drawn
as to participation of the appellant at the crime scene; and inferences regarding the rest of the elements in particular the intention to kill, cannot be drawn from the evidence as tendered. It would be an exercise in futility if this court were to explore whether on the evidence before the court other competent verdicts were proved. In my view the appeal should be upheld.

[50] In the result the following order is given:

(1) The appeal is upheld;

(2) The conviction and sentence of ten years imprisonment on 10 March 2014 of the appellant for Attempted Murder is set aside.

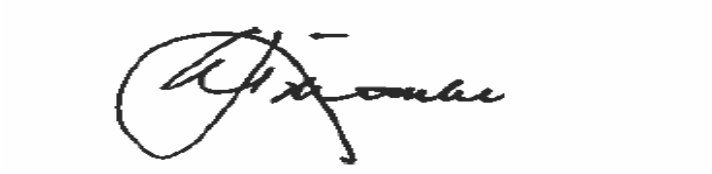


V.V. TLHAPI

[17] 1939 AD at 188 at 202 to 203

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA



I agree and it is so ordered

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N L TSHOMBE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED ON	**: 6 October 2022**
FOR THE APPELLANTS	**: Adv P Pistorius SC**
INSTRUCTED BY	**: Legal Aid Board of South Africa**
FOR THE RESPONDENT	**: Adv AP Wilsenach**
INSTRUCTED BY	**: National Director of Public Prosecutions**
DATE OF JUDGMENT	**: 18 January 2022**