

REPUBLIC OF SOUTH AFRICA

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



**SOUTH AFRICA
PRETORIA**

CASE NO: CC71/2022

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

SIGNATURE: PD. PHAHLANE

A handwritten signature in black ink, appearing to read 'PD. Phahlane'.

DATE: 12-06-2023

In the matter between:

THE STATE

And

JOHN

MALOPE

NTSHABELENG

ACCUSED

JUDGMENT

PHAHLANE, J

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

Count 1: Murder, read with the provisions of sections 51(1), alternatively section 51(2) as well as Part I and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Act") and further read with section 1 of the Criminal Law Amendment Act 1 of 1988 - in that on or about 7 August 2022 and at or

near Schoemansville, in the district of Hartbeespoortdam, the accused did unlawfully and intentionally kill NKWELENG MARTHA ZAMBO, an adult female.

Count 2: Housebreaking with intent to murder read with the provisions of section 262 of the Criminal Procedure Act 51 of 1977 (“the CPA”), in that on or about 7 August 2022 and at or near Schoemansville, in the district of Hartbeespoortdam, the accused did unlawfully and intentionally broke in and entered the house of Lydia Gcinisa at 135 Afsaal, Rietfontein with intent to murder.

- [2] The State alleges that the murder was pre-meditated, and this also appears from the indictment. Before the accused could plead to the charges, the court fully explained the provisions of sections 51(1) and 51(2) of the Act to the accused. The implications of pre-meditation were also explained to the accused by the court, and so did Ms. Simpson appearing on behalf of the accused who informed the court that she has also explained same to the accused.
- [3] The accused pleaded NOT GUILTY to all the charges and made a formal admission in terms of section 220 of the CPA in respect of count 1 in which he stated that on 6 August 2022, he acted negligently by stabbing the deceased once behind her ear with a knife and consequently caused her death. He denied the allegation proffered against him in respect of count 2.
- [4] The accused made further formal admissions in terms of section 220 of the CPA, the effect of which was explained to the accused by the court. The section 220 admissions relate to the following:
1. The admission themselves were marked as **Exhibit A**
 2. **Exhibit B** is the post-mortem examination report compiled by Dr Kgolane Yvonne Kgoete after conducting a post-mortem on the body of the deceased on 8 August 2022 in which she recorded the cause of death as:

“INCISED PENETRATING INJURY OF THE NECK”.

3. **Exhibit C** is the photo-album and the sketch plan thereto, depicting *inter alia*, the scene of crime; the broken window used by the suspect as the entrance to the house at the time of the incident; substance resembling blood from the broken glass on the stoep outside the house; the body of the deceased; a knife next to the body of the deceased; a white jersey received from Sergeant Mabe that was allegedly worn by the suspect at the time of the incident; and the accompanying statement of warrant officer Sydney Motau.

The authenticity and the correctness of the report and findings of Dr Kgolane Yvonne Kgoete were confirmed by the accused.

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

[6] The first witness on behalf of the State was warrant officer **Sydney Motau**. He is a member of the South African Police Services (SAPS) and an official photographer and draughtsman who compiled the photo album of the scene in respect of this case under CAS 57/08/2022 Hartbeespoortdam. He collected the exhibits found at the scene and sealed them with seal bag number PAD002510885. He subsequently took the exhibits to the forensic science LAB and was provided with the acknowledgment of receipt as proof that the exhibits were not tampered with. The evidence of this witness was not contested as there was no cross-examination of the witness.

[7] The next witness was **Ms. Itumeleng Lydia Gcinisa** ("Lydia"). She testified that in 2022 she resided with her boyfriend Mr. David Mathebula ("Mr. Mathebula") at the address mentioned in count 2, and stated that she had known both the deceased and the accused for six (6) months prior to the date of the incident. Further that the deceased and the accused were in a love relationship and had been residing together as her neighbours in the front opposite house. She testified that it was after 17:00 on 6 August 2022 when the deceased came back from work, and they were seated at her

house drinking Savanna and Black Label beer and listening to hymns/music playing on the radio. The accused, whom she refers to as “malome John” (meaning, Uncle John), bought liquor for them and was also drinking, but he was not seated with them. She said on the morning of 7th August around past 2am while still relaxing, the accused entered her house through the open door and said he was there to fetch the deceased, uttering the words: “**let us go**”.

7.1 She testified that the deceased wanted to sleep over at her place and indicated to her that she does not want to go with the accused because the accused is going to kill her. When the deceased said this, the accused was present in the house. After the deceased had said that the accused responded by saying: “*I am going to kill you right here*”. Lydia indicated that, seeing that the accused had already consumed liquor, she told him to leave and that they will talk in the morning. The accused then left, and she locked the door by tying up the chain and hooking the padlock and punched it closed to lock it. After locking the door, she showed the deceased the room where she would sleep and the deceased went to sleep, and she also went to her room. She said it did not take long after she had entered her bedroom (ie. it could have been 5 minutes), and before she could undress to get to sleep, she heard a sound of a window breaking and she stepped out of her bedroom. The deceased also came out of the room where she was and said: “*John it looks like you have come back here in order to kill me*”. Mr. Mathebula was already sleeping at the time.

7.2 Lydia said when the deceased uttered these words, the accused was standing by the kitchen window which was broken. She said although there was a curtain on the window, she was able to see the accused because there was light in the stoep on the outside of the house which was illuminating the area because they never switch it off. Lydia further testified that after the deceased had said those words, she also asked the accused if he was going to enter the house through the window. The accused then jumped through and entered the house and launched at the deceased and stabbed her on the neck and the deceased fell to the ground. She said when the accused stabbed the deceased, the deceased was not doing anything and she was not armed, and the accused just blatantly

stabbed her. She testified that the accused thereafter chased her around and wanted to stab her as well. As he was chasing her around the table in the kitchen, the fridge fell on him, and she managed to jump over the deceased and ran to her bedroom.

7.3 She woke Mr. Mathebula up to explain what had happened and Mr. Mathebula proceeded to the kitchen, and she followed him. While walking behind Mr. Mathebula, the accused went for her and he wanted to go around Mr. Mathebula in order to stab her. She used the pan that she had previously cooked meat in to ward off the accused. She explained that the accused unleashed a few stabbing blows which landed on the pan that she used as a shield. He was determined to stab her. When this was happening, the accused was chasing her around Mr. Mathebula in an attempt to stab her. Mr. Mathebula called the police and asked for the house keys from the witness and when he could not find them, he ripped the lock open. When Mr. Mathebula was breaking the lock, the accused was still inside the house.

7.4 Mr. Mathebula stormed out of the house and went to fetch the police because they had asked him to come and fetch them at a point of interest as they could not locate their house. After Mr. Mathebula stormed out of the house, she quickly went to her bedroom and blocked the door to prevent the accused from entering. The accused kept hitting the door with the knife he had. Lydia shouted for a tenant who resides in the outside room named "Maten-ten" to come and assist. She said she assumed that the accused had left because she could no longer hear him and Maten-ten arrived and enquired why he had been summoned. Mr. Mathebula arrived with the police and found Maten-ten with the accused pushing one another at the entrance to her house. The police then took the accused and loaded him in the police vehicle.

[8] Under cross-examination, she confirmed that when the deceased arrived from work on Saturday the 6th of August 2022 around 5pm, she found her at her next-door neighbour's house drinking and she was sharing drinks with other people. They were

drinking Savannah cider and Black Label beer (750 ml). Thereafter they proceeded to her house. They continued drinking until the next morning of the 7th of August around 2am. She could however not tell specifically how many beers she took. Regarding her state of sobriety, she testified that she was not under the influence of liquor. Responding to a specific question as to whether they were drinking from after 5pm until morning at 2am, she responded in the negative and stated that they were listening to hymns and that she was not drunk.

8.1 The witness was referred to photos 3 and 4 of exhibit C to explain how she was able to see the accused through a window which had a curtain, and she repeated her evidence as testified to in chief that when one is inside the house, one can see the happenings outside of the house when the light is switched on.

8.2 Lydia was confronted and taken to task about **exhibit D**, a statement she made to the police in which she had stated at paragraph 2 thereof that she was seated with the deceased and the accused at her house drinking alcohol and listening to music while her boyfriend David was in the bedroom sleeping, *vis-a-vis* her evidence in court that the accused was not seated with them. She responded that the accused was not seated with them all the time but took intervals where he would be seating with them for a bit and would then leave and go back to where he was initially seated. She testified that when the accused told the deceased that they should leave and go home to sleep, the deceased refused to go with the accused.

8.3 She was also confronted about paragraph 4 and 5 of her statement in which it is noted that after the accused had left her and the deceased at her house, he came back after a few minutes and knocked at the door and the deceased shouted and told him to go to sleep, where-after the accused broke the window and jumped through the window having a knife in his hand. It was put to her that what is noted in the paragraph differs with her evidence because she did not tell the court that the accused knocked at the door. She refuted this proposition and stated that there is no difference between her statement and her evidence in court. Regarding paragraph 6 of her statement, it was put to her that the reading of this paragraph indicates that the deceased was stabbed

multiple times as opposed to the evidence that the deceased was stabbed once. She responded that the incident happened a while ago and her evidence in court is the truth of what happened on the day of the incident.

8.4 Lydia disputed the accused's version put as follows:

- a) That they were all 'drunk'.
- b) That the accused had gone to buy beers and upon his return, he realized that he had been locked out and asked why he had been locked out after being sent to go and buy alcohol, and that he placed the two beers he had bought on the stoep, and an argument ensued between him and the deceased because the deceased was chasing him away.
- c) That the deceased hit him with a pan while he was outside of the house and the accused had asked the deceased why she hit him with a pan. In this regard, Lydia said she is the one who made use of the pan to ward off the accused.
- d) That when the accused got inside the kitchen, he took the knife from the deceased and they struggled and that at that time, she (Lydia) ran to her room and locked herself in.
- e) That the deceased clutched her teeth to bite him on the stomach and for her to release the bite, he stabbed her once behind the ear with a knife.

[9] Doctor **Kgolane Yvonne Kgoete** also testified on behalf of the State. She is a Forensic Pathologist at the Forensic science Laboratory in the Department of Health in the Northwest Province. On 8 August 2022 she conducted a post-mortem examination on the body of the deceased marked DR402/2022 and compiled a report admitted as **Exhibit B**. The chief post-mortem findings revealed the following:

- a) The deceased had an incised wound on the upper neck.
- b) There was a Penetrating injury of the left common carotid artery and internal jugular vein.

9.1 She testified that the stab wound on the deceased cut the jugular vein, which is the main vein on the neck, supplying blood from the heart to the brain, and

caused extensive haemorrhage. She was unable to determine the position of the deceased when the injury was inflicted on her – ie. Whether she was standing or lying down or facing the person who stabbed her when the injury was inflicted on her.

[10] The last witness for the State was **Mr. David Dodo Mathebula**. He confirmed that Lydia is his girlfriend and that on 6 August 2022, they were staying together and are neighbours with the accused. He testified that on this day, the 6th of August 2022 when he knocked off from work, he went home, and he arrived around 10pm. Upon his arrival, he found Martha (ie. The deceased) and Lydia singing hymns. He told them that he was exhausted and will not be joining them because he wanted to sleep, and he went to bed. Late around 12am Lydia came running into the bedroom and told him that there is a person in the house who had broken the window. He woke up, got dressed and proceeded to the dining room and upon arrival, he found the deceased lying on the floor and he then saw John, the deceased's boyfriend. John is the accused before court.

10.1 Mr. Mathebula testified that when he saw the deceased lying on the floor, he said to the accused: "*what have you done*". He said he wanted to know what the deceased was doing on the floor and the accused did not answer. At the time, the lights were illuminating in the house. He noticed blood flowing from the deceased and he focused his attention on the accused. He asked Lydia where the keys were, and she did not respond and appeared to be confused. He decided to break the door to the house so that he could call the next-door neighbours to assist him in apprehending the accused. When he went outside to call the neighbour Maten-ten, Lydia ran into the bedroom where he was sleeping, and the accused was still in the sitting room. Maten-ten came over for assistance and he managed to grab and restrain the accused. The witness said he got the opportunity to go and fetch the police because they had already been called. He met the police at the main gate and they proceeded to his house, and upon

arrival, they found the accused at the door of his house with Maten-ten, and the police managed to apprehend the accused and loaded him into the van.

10.2 Mr Mathebula testified that when he came back with the police, the deceased was still lying in the house and the police ordered them to vacate the house and told them that no one was allowed to enter the house. Thereafter, a photographer arrived and took photos and subsequent thereto a mortuary van arrived. The officials went inside the house, and he saw them loading something, and he does not know what they were loading because he was not standing nearer to the house. He eventually entered the house after being told by the police to do so, and when he entered the house, the deceased was not there.

[11] Under **cross-examination**, he stated that he is a salesperson at Dreyers Hardware Ifafi, in Hartbeespoort dam. He confirmed arriving home from work around 10pm and that he found the deceased and Lydia singing hymns. When asked about the state of sobriety of Lydia and the deceased, he responded that he does not know whether they had taken liquor, save to say that when he entered the house, he found them in a jolly mood. He stated that he did not take any liquor that day and was exhausted from work.

11.1 Responding to the question whether Lydia had left the bedroom or stayed there after waking him up, he said Lydia remained in the bedroom. He disputed the accused's version that when he (Mr Mathebula) arrived from work, he joined the accused, Lydia and the deceased, and they all enjoyed liquor and food. He confirmed that he did not see the accused on the day of the incident up until when he was called by Lydia.

[12] The State closed its case, and the **accused** also took the witness stand and gave *viva voce* evidence. He testified that the deceased had been his girlfriend for a period of 2 years and 8 months and they resided together. He further testified that he was invited by the deceased to come over at Lydia's house because they have cooked, and some of the crockery from his house was taken over to Lydia's house to be used for dishing

up. At the time he was so invited, he was at the tavern next door. He said at Lydia's house, he was seated with Lydia; Mr. Mathebula; and the deceased, and Mr. Mathebula was having meals with them. According to him, they were seated together with Mr. Mathebula from 5pm until after 2am when the incident occurred. He testified that at the time when he went out to buy liquor and came back only to discover that he had been locked out, he looked inside the house and he could only see the deceased and Lydia, and he did not see Mr. Mathebula.

12.1 With regards to his state of sobriety, he first stated that he could not tell or explain his exact state of sobriety, and then changed and said that he "was drunk". He continued saying "*all of us were drunk*". Responding to the question of how much liquor did he consume, he testified that he was unable to count how many bottles of liquor he had consumed, but he was buying 750 ml in 4's.

12.2 He said when he came back and found that he had been locked out, the deceased chased him away and asked him to go home and sleep. He asked the deceased why he should leave while she remained behind, and the deceased started hurling insults at him. According to him, the deceased is the one who broke the window when she hit him with a pan through the window. He explained that he was closer to the windowpane and the deceased unleashed a blow against the window pane and it smashed, and the smithereens thereof cut him on the forehead and he sustained cuts and was bleeding.

12.3 He told the deceased to see how she had injured him and the deceased kept swearing at him and said he must leave. He then said to the deceased: "*I am going to enter this house*". The deceased dared him to enter, and he then entered the house through the window. He did this by sticking his hand through the hole of the broken pane and grabbed the leaver of the window and opened it. After he entered the house, Lydia darted into her bedroom and he remained with the deceased, and a fight ensued between them. He testified that as they were fighting, the deceased was in possession of a knife and as they were struggling over the knife, the deceased managed to clutch on his stomach with her teeth. He managed to subdue her and disarm her of the knife and wanted to

scratch the deceased to get her to loosen her bite. He said his intention was not to stab her, but to scratch her to make her to loosen up the bite.

12.4 The accused said after scratching the deceased with the knife, he threw it away because the deceased had at this moment let him loose. He thereafter pushed the deceased away from him. When asked if he knew what he was doing was wrong, he first responded by saying that he did not notice the realization, and that at the time when the deceased was screaming for help, he came to a point of wanting to assist her, but he did not. The following question was posed to him:

Question: *“Did you know what you were doing at the time you were stabbing the deceased? Can you still recall the events – that means in your conscious you knew that this is happening now, this is the event taking place, or is it that you can’t recall what happened?”*

Answer: *“I was conscious of my actions”.*

The accused said he did not have the intent to kill the deceased. He denied breaking the window at Lydia’s house and insisted that it was the deceased who broke the window.

[13] Under **cross-examination**, the accused was asked what came to his mind when looking at photo 65 of **exhibit C** depicting the body of the deceased, and he stated that he was afraid and cringing to look at this photo because by a mere glance at the photo, he gets heartbroken because they loved each other. It was put to him that it was by his hand that the life of the deceased was taken away, and he responded that it was not his intention to end the life of the deceased. He was then asked the following questions:

Question: *“When you pleaded and the court asked you how you are pleading, you started off by saying you are pleading guilty, and your counsel had to say to the court that you are not pleading guilty”.*

Answer: *“Initially when I was pleading guilty, I was actually admitting to the wrongfulness of my actions”*

Question: *You admit the wrongfulness of your actions and that you killed the deceased”*

Answer: *“Yes”.*

Question: *“Would you agree that a knife is a dangerous weapon”*

Answer: *“Yes it is”*

Question: *“You already conceded that a knife is a dangerous weapon. Do you agree that using it might cause serious injury to a person which might result to death”.*

Answer: *“Yes, I agree”.*

[14] It was put to him that he was acutely aware that he was stabbing the deceased, and he responded that he was not stabbing her because to his mind, he was telling himself that he was scratching her. It was further put to him that he is underplaying the fatal stabbing of the deceased by calling it a scratch and he repeated his previous answer. When confronted with the version put to Lydia that the deceased hit him with a pan while he was outside, he said his counsel did not properly put his instructions to Lydia. He testified that he did nothing to cause the deceased to act the way she did when she took the pan and hit the windowpane, but that there is a possibility that they could have exchanged chilling words, but according to his recollection, he did not say anything to the deceased. When it was put to him that when he used the lever to open the window to gain entry into Lydia’s house without her permission, that act constituted an act of housebreaking, he changed his version and said he first asked for permission to get inside the house and was given such permission.

14.1 When pressed on about not having been given permission to gain entry, he then conceded that he was not given permission to get inside the house because he had already said – *“I am coming in”* – and that is at the time the deceased had dared him to come in. The accused testified that he was angry when he got injured because of the splinters of the window. He further testified that he went into the house because his girlfriend was inside the house, and he wanted to

leave with her. It was put to him that he should not have forced his way into the house because his girlfriend had made it clear to him that he should go, and he responded that he was curious to see what was in the house which they did not want him to see when he was told to leave.

[15] In respect of count 1 of murder, Mr. Tshabalala on behalf of the State submitted that the State succeeded in proving its case beyond a reasonable doubt, and more particularly, that it has proved that the murder of the deceased was pre-meditated. It is the State's contention that when the accused entered the house of Lydia, he was carrying out the words he had uttered earlier, that he 'will kill the deceased right there' because he was conscious of his actions and has conceded that he was aware that a knife is a dangerous weapon that could potentially cause serious injury or harm or death if used against another person.

15.1 The State argued that although the accused had consumed alcohol, it did not affect him to the extent that he did not appreciate the wrongfulness of his actions or that he could not conduct himself with the appreciation of that wrongfulness because he indicated when he initially pleaded guilty that he was admitting his wrongfulness in killing the deceased. It was further argued that to show that the accused was conscious of his actions, he was able to give a step-by-step detailed explanation of what transpired on the day of the incident. It was submitted that the evidence of Lydia was clear as regards the stabbing of the deceased in that it was corroborated by the accused himself, although he gives a different reason as to why he stabbed the deceased.

[16] On the other hand, Ms. Simpson appearing on behalf of the accused submitted that Lydia was a single witness, and her evidence should be treated with the necessary caution because it is not reliable, and it is false. She insisted that the evidence of Lydia can only be relied upon if it is clear and satisfactory on all material aspects. She argued that the court should take into consideration the contradictions in **exhibit D** as they relate to Lydia's evidence in court. In this regard, Ms. Simpson argues that there was

over exaggeration and fabrication of evidence because Lydia was under the influence of alcohol at the time of the incident.

16.1 It was submitted that the court should consider that the accused had throughout his case stated that “he did wrong and did not have the intent to kill the deceased”. It was further submitted that “*the accused had realised that what he was about to do was wrong, but he thought that is how the events unfolded. That apart from that, it cannot be overlooked that although not a defence, the accused was also under the influence of alcohol, and that those were the decisions that he made when the incident was unfolding*”.

[17] 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 an 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.

[18] The defence submission that the evidence of Lydia should only be relied upon if it is clear and satisfactory on all the material aspects should not be elevated as an absolute rule of law. Section 208 of the CPA makes it clear that “an accused person may be convicted of any offence on the single evidence of any competent witness”. The cautionary approach applicable to evidence of a single witness has been dealt with by the courts over the years. Our courts have stressed the fact that the exercise of caution must not be allowed to displace the exercise of common sense. (Underlining added for emphasis)

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

[19] In *S v Sauls and Others*² Diemont JA explained how the rule should be applied by trial courts. The learned Judge said (at 180E):

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his 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”.

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

[21] Considering the evidence tendered before court, I do not agree with the defence submission that Lydia's evidence was over exaggerated or that it was a fabrication as it relates to the number of times the deceased was stabbed because her *viva voce* evidence is corroborated by the accused himself and the evidence of doctor Kgoete that the deceased was stabbed only once. In my view, the statement which Lydia made to the police is in line with, and similar in content with the evidence which she gave in court.

[22] The fact that Lydia indicated in her statement that the accused stabbed the deceased on her upper body and that when she came back from waking her boyfriend up, the accused was busy stabbing the deceased, does not in my view, translate to having said that the deceased was stabbed multiple times as argued by Ms Simpson because the statement does not specifically state the number of times the deceased was stabbed. At the end of it all, the deceased was stabbed on the upper part of her body, which is on the jugular vein located on the upper neck. On the same token, the argument that Lydia contradicted herself in as far as it relates to the question whether or not the

² 1981 (3) SA 172 (A)

accused knocked first before being told by the deceased to go home and sleep, is a nonstarter.

[23] Mr Tshabalala arguing for the State and invoking *S v Mafaladiso en Ander*³ submitted, and correctly so, that the criticism of contradictions levelled against the evidence of Lydia are trivial and not material. In my view, the contradictions were indeed immaterial. They were slight and peripheral and do not justify a finding or an inference that Lydia was exaggerating when she gave her statement to the police. Neither can it be concluded that she was fabricating her evidence.

[24] Contradictions do not necessarily lead to the rejection of a witness's evidence but must always be judged within context because it is not every contradiction or deviation that affects the credibility of a witness. Having said that, this court is tasked to weigh up the witness' previous statement against the *viva voce* evidence to consider all the evidence, and to decide whether it is reliable or not, and whether the truth has been told despite any shortcomings⁴. In evaluating possible contradictions in the witness' evidence, the Appellate Division in *S v Mkhohle*⁵ stated that:

"In each case, the trier of fact has to 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".

[25] In light of the above pronouncement in *Mkhohle*, a consideration of the evidence before court shows a *prima facie* case having been proven against the accused, which relates to the fact that the accused failed to dispute the evidence of Lydia that he had earlier warned that he will kill the deceased. It is on this basis that the State submitted that when the accused killed the deceased, he was carrying out the action that he had

³ 2003 (1) SACR 583 (SCA).

⁴ *S v Mafaladiso*

⁵ 1990 (1) SACR 95 (A) at 98f-g.

set out to do - more particularly because he was fully aware that the knife he used could potentially cause harm or kill if used against another person.

[26] Regarding failure of the accused to dispute the evidence that he had forewarned that he was going to kill the deceased, Ms Simpson submitted that - that was an oversight on her part, and that the accused should not be penalized for such failure. On the other hand, counsel tried to argue a similar point noted at paragraph 3 of Lydia's statement which was also not taken up with her. To this end, Ms Simpson submitted that even if Lydia would have been confronted with this version and told that the accused had not uttered those words, she would have denied it. Along with this submission is the argument that the State would not be prejudiced by failure to confront Lydia because the accused denied uttering those words. In my view, if this notion were to be accepted, it would completely disregard the rules of evidence and the applicable legal principles which every legal practitioner should be acquainted with.

[27] Ms Simpson stated the following: "*I concede that it was never put to Lydia nor denied or disputed that the accused had not said that he will kill the deceased right there at Lydia's house*". Surprisingly, when the accused was asked about this aspect, he had a different view. The following questions were asked by the State:

Question: "*Did you tell your lawyer about this version that you never said you will kill the deceased right there, and why was this not put to Lydia? Why was her evidence not disputed?*"

Answer: "*No. I was confused. Those words came as a surprised to me and threw me on a tailspin*".

Question: "*So, what do you mean they threw you on a tailspin, because the most serious charge you are facing is murder, which has a potential of seeing you serving a life sentence - would not cause you any surprise*" (sic)

Answer: "*It will throw me on a tailspin*".

Question: "Your counsel is saying she did not tell Lydia that you had said that you will kill the deceased right there. I put it to you that having followed the evidence of Lydia, it was upon you to raise that with your lawyer so that this aspect can be put to Lydia, and you failed".

Answer: "I thought that after the witnesses have testified, I would have an opportunity to answer the questions and respond to their evidence - What they have testified about. I did not know that I had to tell my counsel about the evidence that is crucial".

Question: "But do you confirm that after the evidence of Lydia you consulted with your counsel"

Answer: "Yes, we did consult".

Question: "So, you are saying these utterances that you said in front of Lydia that you will kill the deceased == you did not raise with your counsel because you thought you will be given an opportunity to come and answer questions in relation to that evidence".

Answer: "Yes".

Question: "So, it is no longer your version or evidence that when you heard that, it put you in a tailspin"

Answer: "I don't know these things - that I had to tell my counsel".

[28] In my view, the defence' submission holds no water because throughout the address on closing argument, counsel repeatedly said "my instructions are...". This shows that it was incumbent upon the accused to inform his counsel of any version that needed to be put to Lydia, and that was not done. It is for this reason that the State argued that it was not only the accused's counsel who had not raised that aspect with Lydia, but that the accused had a duty to give instructions to his counsel to do so, rather than saying the evidence was not disputed because he was taken on a tailspin.

[29] The right to cross-examine is trite in our criminal justice system. It follows that the importance and purpose of cross-examination cannot be ignored. In *Carroll v Carroll*⁶ HENOCHSBERG AJ said:

“The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party”.

[30] The accused did not challenge the evidence of Lydia regarding the allegation which in my view is one of the most important aspects that should have been put to Lydia during cross-examination, which relates to the aspect of premeditation. There is a principle in our law that where the accused does not challenge any allegations made by a witness, such will be accepted by the court as the truth or as the fact which the State has proven beyond a reasonable doubt against the accused. In the absence of the version by the accused or any rebuttal thereof, I am of the view that the accused's "silence" dispelled any reasonable doubt that he had threatened to kill the deceased. Put differently, the *prima facie* evidence that the accused had uttered the words that he will kill the deceased became conclusive proof⁷.

[31] According to P.J. Schwikkard *et al*, 4th Edition, 2016:- *“Proof of a fact means that the court has received probative material with regard to such fact and has accepted such fact as being the truth for purposes of the specific case”.*

⁶ 1947 (4) SA 37 (W) at 40

⁷ In Ex parte The Minister of Justice: In Re R v Jacobson & Levy 1931 AD 466 at 478-479 the court held that: “In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus”.

[32] It is important to note that the accused had conceded, during examination in chief; under cross-examination and during clarification by the court that he was conscious of his actions when he was stabbing the deceased. The inescapable and undisputed evidence before court is that the accused told the deceased in the presence of Lydia that he was going to kill her right there at Lydia's house. By his own admission, when he entered the house of Lydia on the morning of 7 August 2022, he had expressly stated that he will enter the house, even after the deceased had told him to leave. In his version, he did this by sticking his hand through the hole of the broken windowpane and grabbed the leaver of the window to open it.

[33] It has been established by our courts that in order to prove premeditation where there is evidence or proven facts, the State must lead evidence to establish the period of time between the accused forming the intent to murder the deceased, and the carrying out of his intention. The State succeeded to lead evidence and prove premeditation. In my view, this intention was formulated at the time when the accused uttered the words: "*I am going to kill you right here*", and later carrying out that intention by stabbing the deceased. There is no doubt in my mind that the accused knew exactly what he was doing and how he planned to end the life of the deceased. According to the evidence of Lydia, it took him five (5) minutes from the time he expressed his intention to murder the deceased, to the time of carrying out his intended action.

[34] Referring to the case of ***S v Raath***⁸, Ms Sampson argued that it could not have been possible for the accused to have planned to kill the deceased in a period of five (5) minutes and submitted that the State failed to prove pre-meditation. I do not agree with this submission because the requirement in respect of leading evidence as stated in ***S v Raath*** has been complied with⁹. Furthermore, the requirement relating to the time passed between when the decision was made to kill the deceased and carrying it

⁸ 2009 (2) SACR 46 (C).

⁹ See also: *S v Makatu* 2006 (2) SACR 582 (SCA).

out has been complied with because even a few minutes are enough to carry out a premeditated action. The Supreme Court of Appeal in *S v Kekana*¹⁰ stated that:

“It is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action”.

[35] It was argued that the accused was in an ‘emotional rage’ because his girlfriend did not want to return home with him, and he wanted to see what they were hiding from him when the deceased chased him away. It was further argued that when the accused was hit with the pan and got injured, that had an emotional effect on him. Ms Simpson also argued that the court should accept the accused’s version that he negligently caused the death of the deceased because he did not act reasonably and did not foresee the consequences of his actions. In this regard, she submitted that should the court find that there is no culpable homicide but the intention to kill, then the court should consider intention in the form of *dolus eventualis*. She further submitted that the court should take into consideration that the accused was under the influence of alcohol, although the degree of intoxication is not known.

[36] On the other hand, the State submitted that even though the accused had indicated that he had consumed liquor, his state of intoxication did not prevent him from appreciating his actions and to act in accordance with such appreciation. Mr Tshabalala further submitted in his heads of argument that when accused stabbed the deceased, he had the requisite *mens rea* in the form of *dolus directus* because he was fully conscious of his actions when he returned to Lydia’s house, having warned that he will kill the deceased – and indeed carried out the threat he had made and fatally stabbed (not scratch) the deceased. It is the State’s submission that the accused directed his actions wilfully at the deceased who was not armed when she was attacked.

¹⁰ [2014] ZASCA 158 at para 13.

[37] I am inclined to agree with the State's submission because the accused knew exactly what he was doing. I say this being mindful of the fact that when the accused testified, his evidence was in detail as he gave a detailed step by step account of what happened the day he fatally stabbed the deceased. I am alive to the fact that he also stated that he was drunk and cannot remember some of the things that happened. He then summersaulted and changed his evidence to state that he was not that drunk because he was able to see what was happening around him.

[38] When clarification was sought by the court to explain what he meant by saying he was drunk and could not remember some details while at the same time giving the details of exactly what happened on the day of the incident, he responded that he did not say that there are things he cannot remember and qualified his response by stating that he did not hear himself saying that. His counsel had at this point stood up to address the court and submitted that she confirms what is being put or asked by the court to the accused as the correct version of what the accused had said. The accused had difficulty answering questions posed to him and chose not to respond. He denied saying that he was conscious of his actions and knew exactly what he was doing when testifying in chief. A recording of this part of evidence was played for the benefit of the accused to capture his response to that specific question posed by his counsel. The recording revealed his response as follows: "Yes, I was conscious of my actions". He declined to make any comments about his recorded response.

[39] With regards to the submission that the accused was emotional when he stabbed the deceased because the deceased did not want to return home with him, there is no evidence before court to suggest that the accused was emotional. Neither was it his evidence that he was emotional when he acted in the manner that he did. He however indicated under cross-examination that he was angry when he got injured by the splinters of the window. When asked if that was the reason for him to enter Lydia's house without permission, he hesitated and refused to give an answer. When asked by the court to explain what did he mean when he said he does not know the reason

why there was a fight between himself and the deceased, he responded that: *“I was assuming that when I was still outside the house and the deceased was inside – when we exchanged words, it could be that words were uttered during this altercation did not sit well with either of us”*. (sic)

[40] Turning to the question whether it can be concluded that the accused and Lydia were so intoxicated to the extent of having diminished capacity to appreciate what really happened on the day of the incident, an evaluation of the evidence before court does not support any averments that both were under the influence of liquor. There is no evidence before court regarding how much liquor was consumed by both. Lydia remained steadfast in her evidence that she was not drunk because she was able to see clearly and was fully aware of everything that was happening around her on the night of the incident. She testified under cross-examination that she did not drink that much and was sharing her drinks with other people.

40.1 She also made it clear that she did not drink all the time from 5pm until 2am because they were listening to hymns on the radio. As for the accused, when asked about his state of sobriety, he first started by saying that he cannot tell his exact state of sobriety, and thereafter changed his version to say he was drunk. When asked about the deceased's state of sobriety, he replied that they were all drunk. As already stated above, when the accused was confronted with the detailed explanation he gave regarding the events that happened, he changed his version yet again, and specifically stated that although he had consumed alcohol, he was conscious of his actions and knew exactly what was happening. To be more specific, he was conscious of his actions when stabbing the deceased.

40.2 In the circumstances, I can find no reason or justification to conclude that both Lydia and the accused were drunk. To my mind, both were fully conscious of their surroundings. Similarly, I cannot find any convincing reasons to conclude that alcohol had played a role in the actions taken by the accused on the date of

the incident when the accused repeatedly said he was fully conscious of his actions when he was stabbing the deceased.

[41] The general considerations that are important when a court weighs and 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 of the respective witnesses; the absence of interest or bias; the intrinsic merits or demerits of the testimony itself; inconsistencies or contradictions and corroboration. Probabilities must be considered in the light of proven facts, and no proper inference can be drawn unless there are objective facts from which to infer the other facts. (See the following cases regarding the holistic approach required of a trial court in examining evidence: *S v Mdlongwa*¹¹; *S v Van der Meyden*¹²; and *S v Chabalala*¹³)

[42] In the process of evaluating all the evidence before court, I must also determine whether the accused's version is reasonably possibly true, which would entitle him to an acquittal.¹⁴ A conspectus of the evidence does not support the suggestion that the accused was negligent in causing the death of the deceased. Lydia's evidence was without a doubt, very clear and to the point. The indisputable evidence and proven facts before court are as follows:

42.1 The accused threatened to kill the deceased five (5) minutes before he carried out his threat into action, by saying to the deceased: "*I will kill you right here*".

42.2 The accused unlawfully entered the house of Lydia after being told by the deceased to leave and go home. In this regard, he conceded under cross-

¹¹ 2010 (2) SACR 419 (SCA) at 11

¹² 1999 (1) SACR 447 (W)

¹³ 2003 (1) SACR 134 (SCA) at 15

¹⁴ S v Trainor 2003 (1) SACR 35 (SCA).

examination that he was not given permission by Lydia to enter the house and was not supposed to open the window to enter the house. There is corroboration on this evidence.

42.3 The accused planned to kill the deceased

42.4 The deceased died as a result of the actions of the accused.

42.5 The accused was fully conscious of his actions when killing the deceased.

[43] Argument was presented on behalf of the accused was that the accused admit that he committed culpable homicide and did not foresee the consequences of his actions. Ms Simpson advanced the argument that there is circumstantial evidence in deciding the issue of intent and negligence. There is no merit in this argument because the accused's evidence was that he was conscious of his actions. On the other hand, there can be no question of circumstantial evidence when there is direct evidence before court by both Lydia and the accused which explains what exactly happened on the day of the incident.

[44] With regards to the evidence of Mr Mathebula, he corroborated the evidence of Lydia in all material respects, save for the aspect relating to the fact that when he left the bedroom, he left Lydia behind. He did not hear the words uttered by the accused and did not witness the accused stabbing the deceased. In my view, the difference in his evidence and that of Lydia in respect of this portion of evidence is immaterial and will have no bearing on the crucial element which relates to the fact that the accused had warned the deceased in the presence of Lydia and had carried out his warning into action which ultimately saw the deceased losing her life.

[45] On a consideration of the evidence in its totality and in the light of the probabilities and improbabilities in this case, I am satisfied and of the view that the State succeeded in proving beyond a reasonable doubt, that the murder of the deceased was pre-

meditated. Accordingly, the submission that the accused acted negligently in killing the deceased cannot stand.

[46] In respect of State's duty to lead evidence to establish the period between the accused forming the intent to murder and the carrying out of his intention, Mr Tshabalala submitted, and correctly so, that the intention to murder the deceased was formulated at the time when the accused uttered the words: "*I am going to kill you right here*". A consideration of the totality of the evidence supports a finding that the accused had the direct intent to kill the deceased. In **Director of Public Prosecutions, Gauteng v Pistorius**¹⁵ the court stated that: "*In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased*".

[47] Consequently, the aspect of *dolus eventualis* does not find application in the circumstances. In my view, the actions of the accused in executing or carrying out his plan is in par with what the court stated in **Taunyane v The State**¹⁶ that:

"....Premeditation refers to something done deliberate after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, while planning refers to "a method of acting, doing, proceeding or making - which is developed in advance as a process, calculated to optimally achieve a goal"

[48] There is no doubt in my mind that the accused knew exactly what he was doing and how he was planning to do it. His conduct on 7 August 2022 indicates that he had thoroughly thought out his plan to kill the deceased. I say this because even when he claims to have loved the deceased, he did not care that the deceased's life was ending right before his own eyes. This is so because he testified that after stabbing the deceased, the deceased was screaming for help, and he "pushed her away from him"

¹⁵ (96/2015) [2015] ZASCA 204 at para 26 (3 December 2015).

¹⁶ Unreported Judgment: case number A140/2015, South Gauteng Division (28 September 2016) at para 27

after throwing the knife away. Ironically, when asked about his feelings looking at the body of the deceased, he stated that he was afraid and cringing to look at this photo because by a mere glance at the photo, he gets heartbroken because they loved each other. One would have expected him to assist the deceased than leave her lying in a pool of blood as depicted in photo 65 of **exhibit C** and dying right there on the spot, considering the submission made by his counsel that the accused had realised that what he was about to do was wrong. With regards to count 2 of housebreaking with intent to murder, I am satisfied that the State managed to prove its case against the accused beyond reasonable doubt, given the concessions made by the accused that he was not given permission to enter the house and concedes that he was not supposed to open the window to gain entry without permission.

[49] Regarding the demeanour of witnesses, and in particular Lydia, she presented herself as an impressive witness. She gave a coherent explanation of the events of 6 August 2022 leading to the 7th of August in a clear manner. She did not hesitate to answer questions and her evidence was never shaken, even with the toughest questions posed to her under cross-examination. This court accepts her evidence as being honest, credible, and reliable. The accused on the other hand was not an impressive witness. Most of the times he hesitated answering questions and changed his version on several points to suit him. He was unable to give a plausible reason or explanation as to why he entered the house of Lydia, and when probed for an answer, his explanation was that he was thinking of the way to phrase his answer and when he ultimately answered, he said he was curious to see what Lydia and deceased were hiding from him. Consequently, I find that the accused is incapable of telling the truth and his version is rejected as being false and not reasonably possibly true.

[50] In the circumstance, the following order is made:

1. Count 1 (Murder) : the accused is found guilty of premeditated murder, read with the provisions of sections 51(1) and Part I of Schedule 2 of the Act.

2. Count 2 (Housebreaking) : the accused is found guilty of Housebreaking with intent to murder read with the provisions of section 262 of the CPA.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the State : Mr. V. Tshabalala
Instructed by : Director of Public Prosecutions, Pretoria
Counsel for the accused : Ms. S. Simpson
Instructed by : Legal Aid South Africa
Heard on : 10 -18 May 2023
Date of Judgment : 12 June 2023