

SOUTH AFRICA / JUDGMENT

S v Mabape (CC3/2019) [2019] ZAGPPHC 1110 (27 November 2019)

[2019] ZAGPPHC 1110

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane

CASE / FILE NUMBER

CC3/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: CC3/2019

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

DATE: 27-11-2019

In

the matter between:

THE

STATE

And

FREDDY

RAMATHIBE

MABAPE ACCUSED

JUDGMENT

PHAHLANE, AJ

INTRODUCTION

[1] The accused is charged with one (1) count of @ read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Act”).

[2] The specific allegation is as follows:

That on or about 12 July 2018 and at or near DAGGAFONTEIN SQUATTER CAMP, in the district of Springs, the accused wrongfully and intentionally killed KHUNGEKA RWEXWANA an adult female person, by stabbing her with a knife.

[3] Before the accused could plead to the charge, the court fully explained the provisions of section 51

(1) of the Act, which is normally referred to as the Minimum Sentences Act, to him. The accused is legally represented by Advocate Khoza who also confirmed that the provisions of the Act have been explained to the accused. The State alleges that the murder was premeditated and this also appears from the indictment.

[4] The accused pleaded NOT GUILTY to the charge and Advocate Khoza confirmed that the plea is in accordance with his instructions. The accused then gave his plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (“the CPA”) which was read out by his counsel, wherein he set out the basis of his defence.

4.1 The explanation was given as follows:

4.1.1 “That the accused denies assaulting, stabbing or killing the deceased. That on the day of the incident, the accused met the deceased who was in the company of Kedibone and Itumeleng and informed the accused that they were on their way to Sekwaila’s place to watch TV as they normally do. The accused asked the deceased to have a word with her and the two friends left and went ahead to Sekwaila’s place. Two weeks before this meeting, the accused and deceased had separated and when they met, the accused had the intention to make up with her on their intimate relationship.

4.1.2 The deceased did not give the accused the chance and said she will think about it and the accused left and went home. The accused was of the conclusion that the deceased was going to follow her friends at Sekwaila’s place, since they were all going there. After 40 minutes, the accused received a call back message from Kedibone who informed him that he had killed the deceased and that she (Kedibone) and the community members are on their way to burn the accused’s house for allegedly killing the deceased.

4.1.3 The accused ran to his brother at Ormonde and explained the whole story to his brother. He stayed there for some weeks without going to work and fearing for his life which was under the threat and danger of the community for the offence he never committed and having no idea how same transpired. His brother then received a call from the Springs police informing him that they are looking for the accused and the brother called the attorney, who in turn instructed counsel to hand over the accused to the Springs police station wherein he was detained and thereafter released on bail the following morning.

4.1.4 The accused has never fought with the deceased but the deceased is the one who would sometimes be aggressive to the accused and upon realising that, the accused would go to the police who would take the situation to be trivial and warn them to go and make peace. There were times when they would go to the police station and the police would advise them to fix things.

4.1.5 On the day of the incident, the accused called the police to inform them that there is a person who threaten to burn his house. However, he was threatened with arrest and that was the reason why he ran to his brother in Ormonde. The accused does not have a record of selfless behaviour and is free from fights and assault, and he never possessed a dangerous weapon in his entire life”.

[5] The accused made formal admission in terms of section 220 of the CPA, the effect of which was explained to the accused by the court. I will only read out the parts of the sections 220 admissions which in my view, are important, and they relate to the following:

1. The admission themselves were marked Exhibit A
2. Exhibit B comprises of two statements by warrant officer Maropeng Rolphus Mokuru accompanying a photograph album depicting inter alia, the scene of crime; a knife removed from the body of the deceased; and the deceased's body inside the ambulance, and the key thereto.
3. Exhibit C is the post-mortem examination report compiled by Dr Mohamed Sarang after conducting a post-mortem on the body of the deceased on

13 July 2018.

That the cause of death of the deceased is correctly recorded as: ‘MULTIPLE STAB WOUNDS’.

[6] The State called four (4) witnesses in support of its case and the accused also testified on his behalf and called one (1) witness.

[7] The first witness on behalf of the State was Ms Kedibone Mashaoi (“Kedibone”). She testified that on Thursday the 12th of July 2018 at around 19h55, she was at her home in Daggafontein Squatter camp with Pozi and Khungeka (ie. the deceased). Pozi is the deceased's sister, and she is also known as Veliswa. They were just sitting, and the deceased said they should go

and watch TV at Mr Sekwaila's home because they do not have electricity at her home. Mr Sekwaila ("Sekwaila") does not have electricity either, but he uses a generator. She left with the deceased and Itumeleng, and Pozi remained behind. On their way to Sekwaila's place, she was walking behind the deceased and Itumeleng. The deceased then said to Itumeleng: "did you see Kgaogelo and his footsteps entering a passage", which she explained to be the footprints from his shoes. Itumeleng replied by saying she did not see him. Kgaogelo is the person who was in a love relationship with the deceased and he is the accused before court. She said it takes about five minutes' walk from her home to Sekwaila's home. While walking, the accused appeared from the passage where the deceased said she saw him. The accused pulled the deceased by her arm. This, he did by holding the deceased on her wrist and said he wanted to talk to her. The deceased responded that she does not want to talk to the accused.

- [8] The deceased asked Kedibone to run to her house and call her father. She did and when she came back, she told the deceased that her father said he is coming. It took her four minutes going to the deceased's home and four minutes coming back from the deceased home. The accused was still there and holding the deceased's hand (forearm). The accused told them (ie. Kedibone and Itumeleng) to leave because he wanted to talk to the deceased. The deceased kept saying she does not want to talk to the accused, but the accused insisted that he wanted to talk to her.
- [9] Kedibone and Itumeleng then left and went to Sekwaila's place. They watched a TV soapy called Generations and during the interval, Rooi went outside and he quickly came back. Rooi is the cook at Sekwaila's place. It was only after five minutes of arriving at Sekwaila when Rooi went outside. When he came back, he called Sekwaila and said there is a person dying outside. They all went out of the house running to where this person was, and they found Zodwa and her husband at the scene. Zodwa is the mother of her friend Amahle. She does not know Zodwa's husband's name. At the scene, they found the deceased lying on the ground and facing down. There was a knife stuck on the right side of her waist.
- [10] Kedibone said she touched the deceased and when she looked up, she saw many people around them. The deceased said she was feeling hot and that she should ask the people to move back because she wanted fresh air. Her phone rang and when she checked, it was the accused. She answered the call and said to the accused, 'look what you have done'.
- [11] In his response, the accused said he could see that the deceased was still alive, and he will follow the ambulance and finish her up. Kedibone understood him to be saying he will come and kill her and make sure she is dead. Quoting the exact words used by the accused, the accused said: "keya mmona ha a shwa, ke tla latela ambulance, ke moxetella". This loosely translates to mean: "I can see that she is not dead, and I will follow the ambulance and finish her off". She does not know why the accused called her.

- [12] Kedibone said after saying these words, the accused hung up the phone. People started calling the ambulance and when it arrived, the ambulance people took the deceased away and then she went home. Kedibone testified that she has known the accused for one and a half year. She knew him as the deceased's boyfriend. She does not know how long they dated, but they dated for years. Prior to the date of the incident, the accused and the deceased were no longer in a relationship for about 3-4 weeks. When they were dating, they were staying together and when they broke up, the deceased had a new boyfriend. At the time when the incident took place, the deceased's boyfriend was at work.
- [13] Kedibone testified that on the same evening after the deceased passed away, her mother called the accused and told him that the deceased passed on. The accused said: "I know, why are you crying". The accused then hung up. She testified that she never phoned the accused and she never sent him a 'please call me' request. When asked about the relationship between the accused and the deceased, Kedibone said when the deceased and the accused were in a relationship, the accused used to assault her (ie. the deceased).
- [14] She explained that the accused assaulted the deceased in such a way that she would get injuries. He did this by trampling on the deceased's body while wearing his shoes. At times, he would assault her by using a belt and this happened several times. She said she knows about the assaults because she has seen the injuries on the body of the deceased. She explained that the deceased showed them where she was assaulted with a belt and where she was kicked with the cavela shoes.

When saying the deceased showed them – 'them', meaning Pozi, ousi Masentle and Itumeleng. Ousi Masentle is her sister. Kedibone said she stayed in the same areas as the accused and she used to see him every time when he was coming home from either work or from the shops.

- [15] Under cross-examination, she testified that the police came to her on the morning of 13th July 2018. It was a day after the incident. The police wanted her to explain what had happened and she did. She was conversing with the policeman in Sotho and her statement was written in English. After giving her statement to the police, the statement was never read back to her, but she signed it. Advocate Khoza wanted to cross-examine on the statement, but the statement not having been read back to the witness, the counsel could not cross-examine the witness as regards the contents of the statement.
- [16] Regarding visibility, Kedibone said it was not too dark when they went to watch TV, and the moon was shining. She disputed the version of the accused that he did not appear from the passage, but from behind them when he approached. She confirmed that the accused grabbed and pulled the deceased and said he said he wanted to talk to her. She testified that when she left to call the father of the deceased, she left the deceased with the accused and Itumeleng. She does not know what the three were talking about in her absence. It was put to her that when the accused wanted to talk to the deceased, he asked the deceased to make up with her, and the deceased said she will think about it. The witness refuted this version.

[17] It was further put to her that when she and Itumeleng left the deceased behind, going to Sekwaila's place, it was not at the request of the accused but at the request of the deceased. She disputed that, saying the accused told them to leave. She insisted that the accused said he will go and finish off the deceased. It was put to her that the police officer who took down her statement will be called to tell the court that some of the information she testified about, differs from what is contained in her statement. She responded by saying that she gave evidence about what happened on the day of the incident and

that some of the things she testified about, were not contained in her statement but in her journal/notebook. She explained that as the days went by, she remembered the things which the accused said and did to the deceased, and she wrote them in her journal. She did not tell the police who took down her statement that the accused called her, but it is something she wrote in her journal.

[18] It was also put to her that the purpose of taking down the statement was to have a true reflection of the events that happened on the day of the incident and that she should have explained everything that happened. She repeated her evidence which she gave in chief that the deceased used to tell them how the accused had assaulted her and also show them the scars/injuries. She said all they could do was make a comment that they would never allow a person to assault them that way. She cannot remember if the deceased was advised to open the case against the accused. When asked if the accused ever assaulted her, she responded that the accused never assaulted her and that she has never seen him assaulting any other person.

[19] Counsel put to her that the accused denies ever assaulting the deceased. She responded that she has never seen the accused assaulting the deceased but insisted that the accused had assaulted the deceased because the deceased always showed them the bruises and injuries, and also told them of the assaults perpetrated on her by the accused. She described the accused as being a very quiet person and that the accused used to drink alcohol. She said although she did not witness the stabbing of the deceased, the accused "had a nerve to call her and tell her that he will finish off the deceased. She continued saying: "I do not agree that the accused did not stab the deceased. He called me and said he could see that the deceased was still alive, and he will follow the ambulance and finish the deceased".

[20] Counsel further put to her that she is suspecting the accused because he is the last person to be seen with the deceased. She responded that it is true that the accused was the last person to be seen with the deceased and repeated that the accused called while the deceased was lying on the ground to inform her that he will finish her off. Kedibone testified that when she found the deceased lying on the ground facing down and having a knife stuck on the side of her body, Pozi was not there, but while still waiting for the ambulance, Pozi arrived. She said it took her 10-15 minutes to arrive. The deceased did not tell her what had happened to her and she did not ask because she was scared after seeing a knife stuck on the deceased's

body. She did not see how many times the deceased was stabbed. She never saw the accused again after the deceased was stabbed.

- [21] Still under cross-examination, Kedibone explained to court that the deceased reported the assaults at least about five to six times to her. This is known by herself, her sister, the deceased sister and the deceased parents. On the day of the incident when the accused came from the passage and approached, grabbing and pulling the deceased by her hand, he appeared to be aggressive and angry as he asked to talk to the deceased. The deceased also looked angry and did not want to talk to the accused. In explaining her state of mind when giving her statement to the police, Kedibone said she was crying; confused; and she could not say some of the things she wanted to say because she was overcome with emotions. She could not remember some of the things at the time, because of the state she was in. She wrote some of the things she did not mention to the police in her file which she kept at home. She stated that she remembers some of these things especially when she sees the son of the deceased who stays at her home. Her family and that of the deceased are taking care of the child. She was never called by the police to make another statement.
- [22] The next witness was Thabelo Robert Mushadu ("Mushadu"). He is a fireman and works at Ekurhuleni fire station, at Selection Park. He was on duty on the 12th July 2018 and reported for duty at 18h00. Around 20h00 he received a call from Daggafontein regarding an assault. He was told that there was a person who has been assaulted and that there is something stuck on her body. He went there with his colleague, but they had to get an escort whom they met at a pickup point to show them the scene. He explained that they normally use an escort because most of the times when they go to a scene, there are no addresses or street names and it is important that a person should wait at the pickup point so as to show them where they are needed. On this day he was taken to the scene and upon arrival, they found the patient lying on the ground and there were many people around that person.
- [23] He found an impact on her back and the patient was still alive because he talked to her. She was breathing and had a pulse. They put her in the ambulance and put her on oxygen. At that time, Mushadu already called for backup from the control centre for advance life support system. He told the control centre which road to use in order to go to the Far East Rand hospital. His colleague was at the back with the patient. As they approached Springs Mall, he could hear the patient talking to his colleague at the back. A few minutes later Mushadu met with the person who brought the advance life support system. He pulled out of the road and this person came to him. He explained to him that he has P1, meaning a very serious patient (or Priority 1).

The person who brought the life support system is Mr Mogorosi. Mushadu handed over the patient to Mr Mogorosi.

- [24] Mushadu was shown Exhibit B which is a photo album. He explained that photos 11 and 12 depicts the laceration on the arm of the deceased; photos 13 and 14 depicts the wound on the chin; the other wound is on the armpit; a knife which was stuck on the back of the body

of the deceased and was taken out or removed by Mr Mogorosi of Advance Life support as can be seen on photos 25 and 26 respectively. He saw the knife when it was removed from the body of the deceased. The ambulance was stationery when the knife was removed. He explained that the reason for not moving at the time was because they had to assist Mr Mogorosi with the patient and they had to do CPR. The patient then started to gasp because she was not stable at the time. The CPR was done for 15 minutes and it was not successful. Mr Mogorosi declared the patient dead. Thereafter they took the deceased to Springs police station because it was no longer a medical call which would require them to take the patient to the hospital. When they were driving to the police station, a relative of the patient was in front with him and it was a lady. He explained that this situation was what they referred to as trauma or assault – meaning Murder. According to him, if this patient was someone who was just sick, they would have taken her to the hospital.

- [25] Mushadu said at the police station, some paperwork had to be done and their statements were taken and thereafter the body of the deceased was transported to the government mortuary. The police mortuary vehicle was not available, so they went to the mortuary with the police escort and then drove back to the station.
- [26] Under cross-examination, he said he does not know the accused before court, and neither does he know his name or heard any mention of the name Freddy Kgaogelo Mabape and the deceased did not mention his name.
- [27] Raymond Mogashoa (“Mogashoa”) also took the stand. He is a sergeant at Springs police station with 18 years’ service in the South African Police Service, 12 years of which were served as a detective. On 12 July 2018 he was a constable. He is the current Investigating officer (IO) in this case and was at the time of the incident, assisting constable Mohlophe who was the initial investigating officer. He took over as the new IO this year in 2019.
- [28] He assisted the previous IO in taking statements of witnesses. He knew a day after the incident who the suspect was, after receiving information from the witnesses he took the statements from. He testified that the suspect is Kgaogelo Freddy Mabapa and there were no other suspects. Kgaogelo Freddy Mabapa is the accused before court. He said the accused was at the time working at Distel company at Nafield, Springs. A day after the incident, Mogashoa went to this company with his colleague and upon arrival, they talked to the security and explained who they are and why they were there. The security showed them the manager who they were supposed to talk to. They went and introduced themselves to the manager, but the manager refused to give them his names but said he can assist with the copy of the ID of the suspect and documents relating to the profile of the suspect. The manager said he does not want to get involved in the matter. Mogashoa was given a copy of the accused’s ID, which he put in the docket. He was also given a document showing that the employer of the accused, Workforce, was contracted to Distilers. He also received information about the accused’s next of kin, which is his sister Agnes and his brother Isaac, as well as their cellphone numbers.

[29] Mogashoa explained that the accused was not at work at that time and was informed that the accused resides at Daggafontein. He called Freddy's number (Freddy being the accused) but his phone was on voice mail. He called his brother Isaac and explained the reason why he was calling him. Isaac said he does not know where the accused is, but that if he gets hold of the accused, he will contact him. Mogashoa thereafter called Agnes' number and explained the reasons for calling. Agnes told him that she was staying in Limpopo where she works and promised to contact him when she finds Freddy. She also told him that

the accused is in charge of their home in Limpopo and has the keys to the house. Mogashoa said his understanding of Agnes'

explanation was that the accused was staying together with Agnes in Limpopo because she said they are the only two left and he has the keys. Mogashoa said neither Isaac nor Agnes called him, and that he is the one who called them. He followed up regularly to find out where the accused was. He ultimately gave up and stopped calling the family of the accused and waited for them to call him because he was using his personal phone to call them. He stated that he did not get help from the family of the deceased either, but they told him that the accused has a family in Tembisa but they do not have the address. At the time of the incident, the accused was renting a shack at Daggafontein. He asked the people from Daggafontein about his whereabouts, but they did not know where he went. The witnesses showed him the shack of the accused. They looked in the shack and they did not find him. He testified that the community burned the clothes of the accused outside the shack because the shack did not belong to him.

[30] Mogashoa said days before the accused was arrested, he received a telephone call from a man who identified himself as advocate Khoza who said he will be able to bring the accused. It was on Monday 27th August 2018 around 16h00. Advocate Khoza explained over the phone that he has heard reports that the police are looking for the

accused. Mogashoa informed the previous IO, constable Mohlophe about advocate Khoza's telephone call. He testified that when the accused and advocate Khoza arrived, they found him in the company of constable Mohlophe and they introduced themselves. Mogashoa explained that, because they already had a copy of the accused's ID, constable Mohlope approached the accused who was in the presence of his counsel. He is the same counsel who is before court and representing the accused. The accused had his ID document with him. Mogashoa compared the copy of the ID which they had with the original ID document which the accused had. There was also a photograph of the accused in the docket, and he does not know where the photograph came from. During the meeting with the accused and his counsel, constable Mohlophe read the accused his rights. The accused never explained why it took him a while to hand himself over and he said he wanted to remain silent. He was then detained in the police cells at Springs police station.

[31] Mogashoa was asked about the statement he took from Kedibone Mashao on 13 July 2018 at 10h00. In explaining how he takes statements from a witness, he said normally when he takes statements from witnesses, he would ask them to explain what they know about the

incident. He stated that every time he takes down a statement of a witness, he only listens to the witness as he/she narrates the story from the beginning until the end without writing and thereafter he will start writing. If a witness mentions many names, he writes them down and when he realized that he gets confused, he will write what the witness says. Once this

is done, he will inform the witness that he is going to start writing everything that the witness has said. He explained that the witness will lead 'him bit by bit' and he will write down what is being said. In responding to the question that Kedibone told the court that her statement was never read back to her, he responded by saying it is true that he did not read back the statement to Kedibone because they were doing it 'bit by bit'. He said he was satisfied that he had written down everything that was told to him by Kedibone. When asked about the demeanor of Kedibone when her statement was taken, Mogashoa said one could see in her eyes that she was sad and not happy, and her eyes were red. He said it has happened many times that a witness give him a statement of events, or a 'story', as he puts it, and he forgets some of the information given to him.

[32] Under cross-examination, he confirmed that he was working with constable Mohlophe on murder cases and after they were informed about the case at springs, they went to springs to get the docket. They received information that the incident took place at Daggafontein and the witnesses were also at Daggafontein, and they started making follow-ups at Daggafontein. He confirmed taking a statement from kedibone. He also confirmed that when taking Kedibone's statement, he was satisfied with what he has written down. The following question was posed to him:

Question: Did you ask her if that is all that she wanted to say in her statement

Answer: Yes. But i did not read back the statement to her.

[33] He further confirmed that looking at Kedibone in her eyes, one could see that she was sad. She was not crying but one could see in her eyes that she was sad. The witness was given the statement of Kedibone to read, and it was handed in as Exhibit D. He repeated his earlier evidence that the accused has a brother named Isaac and a sister named Agnes. He stated that before verifying the address, he could not confirm if he was talking to the Isaac staying in Ormonde because he was just calling the number given to him previously. Further that when speaking to Agnes, he informed her that he received her number from the accused's workplace and Agnes said she does not know where the accused was. He testified that he did not know where to find the accused until advocate Khoza contacted them. To the question whether it was safe for the accused to stay in Daggafontein, Mogashoa said it was not safe because the community was angry. He said when he arrived at the place where the accused resided, he found that his belongings were burned, and it was only ashes.

[34] The last witness for the State was Vuliswa Rwexwana @ Pozi. She is the sister of the deceased. The deceased was younger than her and was 21 years old at the time of the incident and she (Pozi) was 25 years old. She testified that on the day of the incident at

around 19h55, she was in the house alone. The deceased, Kedibone and Itumeleng arrived and said they should go and watch TV at Mr Sekwaila's place, but she said she was not feeling well. The witness explained that the three left and after 30 minutes, she heard a scream or a cry from the outside. She explained that it was the scream of the deceased calling her name saying she was dying. Pozi went outside because she wanted to know where the scream was coming from and it was not easy to know out where it was coming from. As she went outside, she met a lady named Zodwa. Zodwa is her mother's friend. Zodwa was calling her mother's name and she replied to Zodwa, saying her mother was not home and that she was alone in the house. Zodwa took her to a place where her sister was lying on the street. Zodwa said the deceased is dying. On arrival, she saw her sister lying on the ground in the street. She kneeled towards her and asked her what was going on. The deceased said Kgaogelo stabbed her. She knew who the deceased was talking about because there was only one Kgaogelo, and he had a relationship with the deceased. She went to look for transport, but she did not find it. She then called the ambulance. The ambulance people told her to wait at the place where people normally wait for an ambulance, and that place is called Penta-transport. She gave them directions and told them that the patient is critical and will not be able to walk to Penta-transport.

- [35] The ambulance arrived at around 20h45 and the deceased was still lying on the ground. The ambulance crew asked what was happening and she said she does not know. She said she saw blood flowing from the deceased's abdomen going downwards. The ambulance crew took the deceased and put her in the ambulance and the ambulance left. She was with the deceased in the ambulance. As they were traveling, the ambulance stopped along Springs Mall and the crew said they are waiting for other paramedics because the situation was becoming worse for the deceased. While waiting, they took off her clothing because they wanted to see where the blood was coming from. After they had done that, they found that the deceased had seven stab wounds on her body.

They asked her to go out of the ambulance because they wanted to assist the deceased as it was difficult for her to breath. She did as she was told and after 30 minutes, she was told that the deceased was no more, she has died. She was then told to get into the ambulance, and they went to Springs police station. On arrival at the police station, she was told go get off the vehicle and approach one of the police officials.

- [36] She met a police officer who asked what had happened. She explained to him what happened, and her statement was taken down. At that time, the deceased was still in the ambulance and she was informed that they were waiting for the hearse. The police asked where the person is, who did that. She said she knows the person and she can point him out. She also told the police that she knows this person by his name, and it is Kgaogelo Freddy Mabapa. Pozi testified that she knew the accused for two years. The accused had a love relationship with her sister for two years, and she started knowing him when their relationship started. At the time of the incident, they were not in a relationship any longer because it had been two weeks since their relationship ended. After giving her statement to

the police, the police said she must go and show them where the accused lives. She took the police to his house in the early hours of the morning. It was at 2am and they found ashes of the accused's belongings on the outside of his house. They found a man who was staying at the same premises with accused. She does not know this person's

name but only by sight. They asked this man where Kgaogelo was and this man said: 'what more do you want because the property of the accused is already burned'. They found out that it was the community members who burned the accused's property. They then went to the scene where the deceased was lying and photographs and measurements were taken. She went there with the police.

- [37] Explaining the relationship between the accused and the deceased, she said she and her family were not happy. Pozi said the first time she saw the accused, she did not feel good about him because of the way he treated the deceased. She explained that when the accused was drunk, he would assault the deceased. She never saw the accused assaulting the deceased, except on one occasion. She explained that the deceased would come home and report that she had been assaulted by the accused and showed them the bruises, and where she was hit with a belt. The deceased reported at least seven times about the assaults. There was an incident when the accused assaulted the deceased in her presence and when she tried to intervene, the accused held her by her clothes and threw her on the ground. She (Pozi) called her mother and the accused started insulting/swearing at her mother.
- [38] Her mother did not see the accused assaulting the deceased. She only called her mother because she was unable to stop him. She stated that the accused and the deceased were staying together but when they broke up, the deceased moved back to their parental home to stay with them. To the question regarding her observation of the wounds she saw on the body of the deceased when she arrived at the scene where she found her lying on the ground, she said she saw a wound crossing towards her cheek and wounds on her fingers. She saw the other wounds while she was in the ambulance and she also saw a knife stuck on the right side of her body.
- [39] She stated that she does not know any other person named Kgaogelo, other than the accused. When the deceased said Kgaogelo stabbed her, she cried and was calling her child's name. Pozi did not say or ask her anything and the deceased said she was feeling hot and that she should ask people to give her space. The deceased also said some words which she could not make sense of, and she slept. In explaining what the accused was like, she said when the accused was not drunk, he was a quiet person. The deceased did not open a case against the accused and she does not know why. When the deceased was staying with the accused, they never went to her house for a visit. She testified that in one incident, she went to the deceased and accused's

place and the accused had an outburst, and she could not control him, and she backed off. What made her to back off was the words said by the accused when he said he will cut the deceased into pieces and bury her with his cavala shoes. She does not know what the accused meant by that.

- [40] She is not sure if the deceased had another boyfriend when she broke up with the accused. Pozi said before the incident, the relationship between the accused and the deceased was not a healthy one because he was doing bad things to the deceased, like illtreating her for example, and she tried to reprimanded the accused, but the accused would tell her that he is not afraid of the police. The accused also bragged about having a lawyer whom he has been paying for ten years. She stated that she did not make an official statement to the police on the day of the incident but only explained to them what happened, and they took down her statement the following day.
- [41] Under cross-examination, she repeated what she testified to in chief, that the deceased told her that the accused stabbed her. She said she was kneeling when the deceased told her this, and Kedibone was just standing next to them. She said when she arrived at the scene, the community members and Kedibone were already at the scene. Later it became difficult for the deceased to speak. She did not tell the ambulance crew that the accused is the one who stabbed her sister, but she told the police. She said she was too scared at the time.
- [42] It was put to her that Kedibone never told the court that Kgaogelo stabbed the deceased. She responded that she cannot dispute what Kedibone had told the court because when she arrived at the scene, there were people around that area. She said when Zodwa came and told her that her sister was dying, she did not say much but only took her to the place where the deceased was lying. The deceased was lying on the ground in the street where there are houses nearby and a dumping side. She did not check the time and she is not sure how long it took her to get to the scene. She said Zodwa lives next to the place where the deceased fell. She stated that after the deceased was declared dead, she called her mother to inform her about the news. Pozi explained that in the ambulance, the deceased was speaking softly and there were things the deceased said, and she could not make sense of what she was saying.
- [43] Regarding the reports of the assault on the deceased, she said the deceased reported several times to her that the accused had assaulted her, and she also showed her the bruises. On the day when the deceased broke up with the accused, the accused assaulted the deceased in her presence. She has been to the accused place thrice and the deceased went to her parent's home every day. At the time of the incidence, the deceased's child's father was not around Daggafontein.

[44] The State closed its case and the defence made an application in terms of section 174 of the CPA for the discharge of the accused. The application was refused because the court was of the view that the accused had a case to answer to. I had at that stage indicated that the reasons for such refusal would follow at the end of the trial.

[45] The accused took the stand and gave evidence. He testified that he stays in Ormonde and on the day of the incident, he was staying at Daggafontein. On the day of the incident, he left his house as he was going to the shop and on the way, he met the deceased; Kedibone and Itumeleng. He was not sure where they were going. He approached them and then held the deceased by her arm and asked them where they were going. The deceased said she was going to Sekwaila to watch TV. He testified that the deceased requested Kedibone to call her father,

and he does not know why she said that. Kedibone left, and as she was leaving, he remained there talking to the deceased and telling her to 'fix things' between them. The deceased said she needed time to think about it. Later Kedibone came back and said the father of the deceased said he is coming. He said the deceased told Kedibone and Itumeleng to leave because she was still talking to him and they left. The accused asked the deceased how long she needed to think about what he was talking about and she said she is not sure.

[46] When they parted ways, the deceased said she was going to Sekwaila, and he went to the shop. While on his way to the shop, he received a 'call back' request from Kedibone and he responded immediately. The first thing Kedibone said was: 'did you see you have killed Kungeka? He responded by saying he did not. Kedibone told him that she was coming with the community members to burn his house. The accused then hung up the phone. He said he was surprised as to why they were going to burn his items because he knows nothing. He then said he became scared that he has killed a person and the community

was looking for him. In his own words he said: "I became scared that I have killed a person and the community was looking for me". He said he organised a metered taxi going to Ormonde because his brother stays there. He told his brother that someone called and said he has killed a person and his brother wanted to know why the community was after him. He later received a telephone call from the police who explained that they were looking for him.

[47] He stated that he does not know the person who stayed in the same yard with him where he was staying in Daggafontein but his nickname is Maliza. He did not call this person when he was staying at his brother's house. While in Joburg at Ormonde, he met a person who told him that his belongings were burned and that his girlfriend was deceased. He stated that he did not have the information about the funeral arrangement. He further testified that if his belongings were not burned, and he was not told that his girlfriend was deceased, he would have gone to the funeral. When asked about his relationship with the sister of the deceased (ie. Pozi), he said they had a good relationship because they used to talk and laugh. He disputed the evidence of Pozi that he assaulted the deceased in her presence. He however explained that they used to have verbal arguments like shouting at each other and the

deceased would go to her parental home. With regards to his relationship with Kedibone, he said Kedibone was a nice person and they were good friends. He testified that Kedibone used to come and visit them (ie. him and the deceased) and when he worked night shifts, she would come and sleep over at his house. He stated that his relationship with Itumeleng was a good one and he does not know Zodwa. The accused said he did not drink on the day of the incident or the night before. He denied owning a knife which is depicted on the photo album which he admitted in terms of section 220 of the CPA.\

- [48] Under cross-examination, he said when the deceased passed on, they were still in a relationship. He said their relationship at that stage was good but explains that there was a distance between them, and things were not the same as before. He enquired from the deceased what was happening with their relationship because he does not know what was happening. He said he wanted their relationship to be back to where it was before. He admitted that when he approached the deceased in the street, she was with her friends. According to him, it was the right time for them to speak at the time because when he is working,

he does not get a chance to see her. He testified that when he approached the deceased at the time, they were no longer staying

together. He asked the deceased why she left the place where they were staying together. The accused then changed his earlier explanation about their relationship and said their relationship was not good at the time he approached the deceased because she had left and that is why he wanted to find out what was happening.

- [49] He stated that in his mind, the deceased was still his girlfriend even though there was a distance between them. He said he does not know if the deceased was involved in a relationship with another man and there was no question about the deceased seeing another man. It was put to him that it cannot be true that the deceased was still his girlfriend because in his section 115 statement, he indicated that he had separated with the deceased. When asked what was there to fix if their relationship was ok, and what did he mean when he said there was a bit of a problem between him and the deceased, he responded that 'two weeks before the incident, 'things were not the same and the deceased had move back to her parental home'. He thought they were still in a relationship'. It was put to him that the witnesses had told the court that he had broken up with the

deceased and he responded that he does not know what they mean and he only wanted to fix things with the deceased. He confirmed that he held the deceased by her forearm.

- [50] He testified that he does not know why the deceased asked Kedibone that she must go and call her father. He then somersaulted and said he made a mistake when he said the deceased send Kedibone to call her father. It was then put to him that the deceased told Kedibone to call her father because she was afraid of him as they had broken up. He gave no response to what was put to him but said when Kedibone and Itumeleng left him and the deceased, it is because the deceased said they should leave and they did. He repeated what

he said during examination in chief - that he wanted to fix things with her, but the deceased repeatedly said she will think about what he was saying. He said he left the deceased there and went to the shops while the deceased took a route going to Sekwaila's place. He then changed his version again saying he does not know if the deceased took the route going to Sekwaila. When asked why he did not go the police when Kedibone threatened him, he said he was frightened because they said he had killed a person and that he knows nothing about that. The accused said when he tried calling the police and explained what happened, the police also threatened to arrest him and he got scared.

- [51] He testified that he never went to work because his employer never called him to come to work. He explained that he only goes to work when called by his employer. It was then put to him that he was not telling the court the truth because his manager explained to the police who went to his workplace that was also surprised that he (the accused) never peached up for work, and further that the manager gave the police a copy of his identity document and said he will contact the police if he reports for duty. The accused instead responded that when he told his brother about what Kedibone said, his brother said he was going to assist him in finding the truth, and when he did, he found nothing. He then changed and said his brother was too busy to find the truth about what happened because he did not have time to get information about something he knew nothing about.

[52]

When asked if he made efforts to attend the funeral of the deceased, he said he did not go to the funeral because he did not know where the funeral was going to be held. He then said he did not have enough information if 'this person' really died. He said he did not know if Kedibone was telling the truth or not, about the deceased having passed on. He also did not call the family of the deceased because he did not have their numbers.

- [53] He testified that he used to fight with the deceased, but they would only argue and their fights never got physical. He then said the deceased was in the habit of fighting with him and he would just ignore her. He explained that there was a time when he fought with the deceased and they both went to the police and the police advised them to go home and sort out their problems. When it was put to him that Kedibone and Pozi told the court that they have seen the bruises on the body of the deceased and that the deceased said he had assaulted her, the accused said he knows nothing about that and further that they are fabricating evidence against him. The accused said he had never had problems with Kedibone and that he had a good relationship with Pozi. He confirmed that he was good friends with Kedibone. He said he does not know why Kedibone said he grabbed the deceased by her hand. When asked why he never went back to work, he responded that he never went back to work because he foresaw that it

was not safe for him. This response is in contradiction with his previous evidence that he never went back to work because he was

never called to come to work.

[54] The defence called Mr Maropeng Samuel Molepo (Molepo). He testified that the accused is his aunt's son and he stays with the accused. He stated that on 12 July 2018 he was at his house and the accused arrived after 10pm. He was surprised why the accused was there so late and the accused said he received a call from someone saying they were going to burn his belongings. He asked the accused if there was a reason behind the phone call, and the accused said someone called him and alleged that he had killed a person. Molepo asked if he did kill this person and the accused said he did not do it. He told the accused to go to sleep and said they will see what do in the morning. He told the court that he did not see any need for the accused to go to work because it was not safe.

[55] Responding to the question whether any of his siblings had called him, he said he has a brother named Isaac and a sister named Agnes, but none of them called to say the police were looking for the accused. He said the police called looking for the accused and told him that it is alleged that the accused had killed his girlfriend. He explained that he called his lawyer, Mr Khoza, and he went to his office with the accused. He gave the lawyer the number of the police who called him. Mr Khoza then suggested that they should go to Springs police station, and they did. He further said that when they arrived police

station, Mr Khoza went inside with the accused and the accused was arrested. When asked about the behaviour of the accused, he said the accused conducted himself in a good manner. He stated that the accused never did anything in violation of the law and he has never seen him being physical with anyone. He further said if he were to be told that the accused had a fight with someone, he would never believe that because he has never seen him fight.

[56] Under cross-examination, he said he is not Isaac, but Isaac is his brother who stays with him in Ormonde. He also has another brother named Isaac who lives in Limpopo. He stated that Isaac and the accused are of the same age. He is the older brother and Agnes is a sibling to the accused. With regards to the incident, he said he believed the version of the accused because he knows him personally. He testified that he waited for the police to call him and tell him if something really happened. He believed the accused when he said he did not kill the deceased. He explained that from 12 July to 27 August the accused did not go to work. Molepo said he feared for the accused's life because he was not permanently employed. The accused told him

that the person whom it is alleged that he killed, is his girlfriend. He did not encourage the accused to go to the deceased's place or the funeral and he never thought that it was important for the accused to go to the funeral. He concluded his evidence by saying the accused never told him that he wanted to go to the funeral. The accused then closed his case.

[57] Advocate Van Der Westhuizen on behalf of the State argued that the evidence of Kedibone that she was phoned by the accused to tell her that he had stabbed the deceased, as well as the dying declaration made by the deceased to her sister Pozi, should be accepted by the court as confirmation that it was indeed the accused who had stabbed and killed the

deceased. She argued that both Kedibone and Pozi have seen the evidence of abused by the accused on the deceased in that the deceased had reported the assaults or physical abuse to them several times and showed them the bruises on her body every time she was assaulted by the accused. She further argued that the accused corroborated the evidence of Kedibone and that there was no reason why both Kedibone and Pozi would want to fabricate evidence against the accused since the three of them were good friends and no bad blood existed between them, as testified to by the accused.

- [58] Advocate Khoza on the other hand argued that the allegations of assault were never reported to the police by either the deceased or her family members. On this aspect, counsel confirmed that there was corroboration but submitted that this corroboration must be rejected because even though there were many reports of the assaults and bruising which were shown to the family by the deceased, nothing was done in terms of going to open a case to the police. He further argued that the evidence of Kedibone that the accused called her and reported that he will follow the ambulance and finish off the deceased, is not contained in her statement, and should as such be rejected by the court. He insists that the dying declaration made to Pozi should also be rejected as Pozi is a single witness as regards this aspect and that this declaration was only reported to her instead of being reported to the paramedics who assisted the deceased. Counsel also argued that Pozi had a motive to fabricate evidence against the deceased as she indicated that she does not like the accused.
- [59] The evidence of Kedibone was very clear, and in many respects corroborated by the accused himself. The accused confirmed the evidence of Kedibone that he found the deceased walking with Itumeleng and Kedibone while they were on their way to Sekwaila's place. He also confirmed and corroborated her evidence that he grabbed the deceased by her forearm and told her that he wanted to talk to her. He further confirmed that Kedibone left them in the street to go and call the father of the deceased. He also confirmed that when Kedibone returned, he was still in the presence of the deceased and Itumeleng. He further confirmed that he remained behind with the deceased while Kedibone and Itumeleng left them on the street and proceeded to Sekwaila's house. What he however denies is that he did not stab the deceased.
- [60] The accused testified during examination in chief that as soon as he met with the deceased and her friends, he held her by the arm and the deceased asked Kedibone to go and call her father. He explained that he does not know why the deceased asked Kedibone to call her father. Under cross-examination, he changed his version and testified that Kedibone was not sent by the deceased to call her father but instead, Kedibone left on her own to go and call her father. He struggled several times to explain to the court why he had changed his version. He said he kept asking the deceased that he wanted to resolve some problems with her and the deceased repeatedly said she needed time to think about what he was saying. It is clear from this evidence that

the deceased did not want to speak to the accused or be in his company as testified to by Kedibone, and that is why the deceased

asked Kedibone to go and call for help.

[61] Advocate Khoza submitted that Kedibone is falsely implicating the accused without giving any reasons thereto. When one looks at the evidence of the accused that - after receiving a 'call back' request from Kedibone, and that upon him calling Kedibone - she said 'do you see what you have done', visa-vi the evidence of Kedibone relating to what exactly transpired when they met with the accused and at the time when she found the deceased lying on the ground at the scene, it cannot be said that Kedibone wanted to falsely implicate the accused. I can find no reasons why Kedibone would want to falsely implicate the accused because if she wanted to, she would have simply said she saw the accused stabbing the deceased or that the deceased had told her that it was the accused who stabbed her. I therefore do not agree with the submissions made on behalf of the accused because it became clear during the evidence of the accused that he had a very good relationship with Kedibone. He described her as a nice person and a good friend who used to come for sleep overs at his house. He even said there were no problems between himself and Pozi because they used to talk and laugh.

[62] When Kedibone was cross-examined, she was taken to task about a statement she made to the police and it was put to her that the purpose of taking down a statement is to have a true reflection of the events that happened on the day of the incident and that she should have explained everything that happened to the police. This witness (Kedibone) is a lay person, and it would be unfair to expect her to know the purpose to giving a statement to the police when she has no clue as to the importance of giving a statement to the police. She explained that she was emotional, crying, and confused. Her emotional state was confirmed and corroborated by sergeant Mogashoa who said she was emotional, sad, and her eyes looked red, though she was not crying. Kedibone testified that after seeing the deceased lying on the ground with an object sticking out on the side of her body, she was overcome with emotions.

[63] The incident occurred in the evening around 21:00 and she was still in that state the next morning at 10:00 when she gave her statement to the police. She told the court that she could not remember some of the things she was supposed to tell the police when giving her statement because of the state in which she was. She explained that she wrote some of the things which she did not mention to the police in a file which she kept at her home. Of relevance to the aspect which she omitted to include in her statement to the police, was the issue of a phone call between herself and the accused on the day of the incident.

[64] The statement Kedibone made to the police is in line with, and similar in content with the evidence which she gave in court. The only difference is that in addition to what is contained in her statement, she gave the court additional information which she noted in her diary or journal. There is no rule which prevents a witness from making notes of everything which

she remembers about a particular incident and in this instance, it is understandable why Kedibone did not tell everything to Sgnt Mogashoa when he took down her statement. She said she did not and could not explain everything to Mogashoa because the state in which she found herself in. She was emotional and I therefore accept her explanation that she was overcome with emotions at the time she gave a statement to the police and one could therefore not have expected her to give a statement in full details

under the circumstances.

[65] What is important or what stands out in the evidence of Mogashoa is that he confirms that he did not read back the statement to Kedibone after reducing it to writing. Neither did Kedibone know or realise that some of the things which she might have said to Mogashoa, were in the statement or not. It can therefore not be said that the evidence of Kedibone in court is a fabrication. I therefore do not agree with the submission made by the defence that the information given to Mogashoa

in a statement reflected all the events of the day of the incident as they unfolded and that such statement had to include everything which Kedibone had to say to the police.

[66] The State submitted that there were no contradictions in the evidence of Kedibone and that the evidence which she testified about, should not be regarded as a contradiction simply because she forgot to mention it in her statement to the police. The question is whether the evidence of Kedibone that the accused said he will finish off the deceased, should be rejected as false and unreliable because it was not contained in her statement made to the police.

[67] In S v Mafaladiso[1] the court stated that: Headnote:

“The adjudicator of facts must keep in mind that a previous statement is not taken down by means of cross-examination...The person giving the statement is seldom, if ever, asked by the police officer to explain the statement in detail. It must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Nonmaterial deviations are not necessarily relevant”.

And that:

There is a final task of the trial judge, namely, to weigh up the previous statement against the viva voce evidence to consider all the evidence and to decide whether it is reliable or not. And to decide whether the truth has been told despite any shortcomings.

[68] In S v Mahlangu & Another[2] the court stated the following:

“Police statements and statements obtained from witnesses by the police are notoriously lacking in detail, are inaccurate and often incomplete. A witness’ statement is in the main, required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge, and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack

of detail in a witness' statement to conclude that what the witness said in court was unsatisfactory or untruthful.....There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement, what he saw, in a minutest detail. Should a witness through a lapse of memory, or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. The court will in the final analysis consider the evidence as a whole in order to determine in what respect the witness' evidence may be accepted and in what respects it should be

rejected”.

[69] I am inclined to agree with the submission of the State. The fact that Kedibone gave more information to the court regarding an aspect which is not contained in her statement, does not mean that she is a poor or unreliable witness or dishonest. She gave an explanation which in my view, is justifiable.

[70] The Appellate Division in *S v Sauls and Others*[3] said the following:

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

[71] This was affirmed by the Appellate Division in *S v Mkhohle*[4] when the court stated that:

“Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility. In each case, the trier of fact 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”

[72] I am of the view that Kedibone did not fabricate or contradict herself with regards to her evidence relating to the phone call between herself and the accused. She gave a coherent version of the events of the day of the incident and nothing in her evidence contradicts what she wrote in her statement to the police.

[73] I interpose to make a comment on the manner in which Constable Mogashoa takes statements of witnesses. He explained that when given a statement by a witness, he does not write what the witness relates to him, but rather does that later at the end. It is worrying to say the least, that Mogashoa would, even when given a long story or version of events, still does not write what he is being told but would only do that after the whole information is given to him because the chances of him forgetting some of the important aspects are open. Meaning, the possibilities of him not including everything that was told to him in the statement are there.

[74] An application in terms of section 174 of the CPA was made after the State had closed its case and such application was refused by this court. I was at the time of the view that the accused had a case to answer to, given the fact that

- by his version to the witnesses and his section 115 statement, he had placed himself at the scene and in the presence of the deceased. His version and his section 115 statement corroborated the evidence of the State witnesses and it was apparent that he was the last person to be seen with the deceased.
- [75] Advocate Khoza argued and submitted that the area where the stabbing took place was never ascertained and that it became apparent that the deceased was stabbed where there were houses around the area. Counsel is of the opinion that the people around those houses did not hear anything.
- [76] I do not agree with this submission because if this notion were to be accepted, it would be a wrong approach to follow because this issue was never canvassed and there is no evidence to suggest that the people staying around the area where the incident took place were asked and they indicated that they did not hear anything or did not hear the cries of the deceased for example.
- [77] Turning to the aspect of a dying declaration made to Pozi, advocate Khoza submitted that the deceased was not stabbed by the accused because if she was, she would have told the paramedics or made a dying declaration to the ambulance driver at any time. He argued that the deceased should have told the paramedics even if she did not know them. He submitted that one does not have to be a biological sibling or related for them to make a dying declaration. Counsel says it is suspicious that the deceased only told her sister and no one else.
- [78] The submission by the defence is in my view, misplaced. There is no rule which requires a person to make a dying declaration to the first or second person he/she sees. It depends on an individual as to who they feel comfortable telling their last words or wishes to.
- [79] It is clear from the evidence of Mr Mushadu that there was no communication between himself and the deceased. He made it clear that his focus was on saving the life of the deceased. He said he did not ask the deceased any questions, and any argument or submission made that there was an obligation on the deceased to tell Mr Mushadu about the person who stabbed her without being supported by legal authorities stating that there is an obligation on a person making a dying declaration to make such a declaration to the first person that he/she meets, cannot in my view stand. It should be noted that this declaration was already made to Pozi whom the deceased felt comfortable with as they are related by blood, and that is why she (the deceased) did not even tell Kedibone that the accused had stabbed her. In my view, this argument is unfounded and is not supported by any authority.
- [80] There are no restrictions or requirements that a person making a dying declaration should call a witness or a second person as a witness so that the declaration can be heard by more than one person, and there is also no rule that requires a person upon whom the declaration is made to summon another person as a witness when the declaration is made to them.

- [81] Advocate Khoza argued on behalf of the accused that Pozi testified on hearsay evidence that should be rejected because the defence or accused did not agree to the admissibility of the hearsay evidence when the application was made by the State. Counsel submitted that the proper basis was never laid by the State when making the application for the court to allow hearsay evidence. He argues that allowing hearsay evidence will only be for the purpose of convicting the accused on ill-founded evidence which was a fabrication and which corroborates the accused's previous conduct, as opposed to the evidence of the accused's brother who corroborated the accused with regards to the fact that the accused is not a violent person and that he behaves well around members of the society.
- [82] This argument in my view, is without merit because when the State made an application to lead hearsay evidence of Pozi, the basis for the application was laid and specifically identified as being a reliance on the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 and were also given in summary. Advocate Van Der Westhuizen submitted that it is in the interests of justice to admit the hearsay evidence as there is compelling justification for admitting and relying on that evidence. Having heard the application and submissions made by both parties, I was of the view that the court cannot reject the evidence based on a single factor which the defence was raising, while there are other factors which the court had to take into consideration when deciding whether it was prudent to accept hearsay evidence. I was also of the view that the hearsay evidence of Pozi should be led in the interest of justice.
- [83] Section 3(1)(c) of the Law of Evidence Amendment Act provides:
- (1) Subject to the provisions of any other law hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (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;
 - (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 in the opinion of the court be taken into account if the court is of the opinion that such evidence should be admitted in the interests of justice.

[84] A dying declaration forms one of the six exceptions to the hearsay rule. The principles in admitting a declaration made by any deceased person upon the apprehension of death were set out in *State v Gabatlwaelwe*[5] This court held that:

“The dying declaration is a statement that may be oral or written or taken in the form of signs or gestures. It need not be made with the deceased’s dying words or dying breath. Although used in cases to incriminate the accused, they are equally admissible in his defense”.

[85] Admissibility is depended on the following factors:

- The statement must be one, which the deceased could have repeated in court had he or she lived.
- The death of the deceased must be the subject, both of the charge and the statement itself.
- The statement must be made in the ‘settled, hopeless expectation of death’. Death must be expected soon albeit not immediately.

[86] In *S v Mbanjwa and Another*[6] the Court dealt with the admissibility of statements made by the deceased prior to her death. The state and defense conceded that this was hearsay evidence.

The court considered the following aspects, namely:

- The six considerations in s 3(1)(c) of the Act.
- That this was a criminal case and the reluctance of courts to permit untested evidence against an accused.
- The witnesses who testified were independent, unbiased, impressive and truthful and that their evidence was substantially true.
- The court assessed the reliability and completeness of what the deceased said by considering the sincerity, memory, perception and narrative capacity of the witnesses.
- The court considered that the deceased statement could have been admissible under the common law exceptions to the rule against hearsay evidence, namely dying declarations and spontaneous statements.

[87] The court found that there were certain safeguards present in the objective facts which guaranteed the reliability of the hearsay evidence. Meaning, hearsay should be admitted where there is sufficient corroboration to warrant its reliability. It held that it was in the interests of justice that hearsay be admitted.

[88] In *S v Shuping*[7] the accused, Mrs Shuping, was convicted of murder and arson. The state did not have any eyewitnesses but relied on circumstantial and hearsay evidence. The hearsay evidence consisted of statements, which the deceased allegedly made to state witnesses shortly after he was burned. The state applied to have evidence admitted in terms of s 3(1)(c) of the Act. The court stated that the hearsay evidence must be excluded unless it was of the view that it should be admitted in the interests of justice. The court had regard to each of the six considerations in the Act and held that it was not necessary to determine conclusively whether the deceased's statements would definitely have qualified either as a dying declaration or spontaneous statement. It held that 'the interests of justice demands the admissibility of the hearsay evidence and there is compelling justification for admitting and relying on that evidence'.

[89] In *S v Mpofu*[8] it was held that:

"the reception of hearsay evidence under s 3(1)(c) of the Act should not logically be divorced from a consideration of those factors which at common law made for admissibility or not.....and further that the court is endowed with a wide discretion when it comes to admitting hearsay".

[90] In *Van Willing and Another v State*[9] as per Schoeman AJA, the Supreme Court of Appeal had to deal with the admissibility of hearsay evidence in terms of s 3(1)(c) of the Act. The person who made the statement was the deceased, after he was shot. The appellants were convicted of murder. The state elicited evidence that the deceased told at least three witnesses the identity of the perpetrators. The court when dealing with the probative value of the evidence, assessed it under two heads, namely, the reliability and completeness of the witness transmission of the deceased's words and the reliability and completeness of whatever it was that the deceased did say. The court found that the admission of the hearsay evidence was in the interests of justice.

[91] When a court admits hearsay evidence after exercising its discretion in terms of s 3(1)(c), it has the effect that the person who made the statement cannot be cross-examined. The question that arises is whether this is in conflict with an accused's constitutional right to challenge evidence. The Supreme Court of Appeal in *S v Ndhlovu and Others*[10] held that it is not.

[92] In *Metedad v The National General Insurance Company Ltd*[11] the court stated that:

"This section invests the court with a discretion, to be judicially exercised in the interests of justice...The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained, might be a far greater injustice than any uncertainty which might result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value".

[93] In the present instance, the application and analysis of the six factors outline in section 3 (1) (c) are as follows:-

- (a) The nature of the proceedings – this is a criminal case – and the death of the deceased is the subject of the charge of murder for which the accused has pleaded to.
- (b) The nature of the evidence – this relates to the statement or dying declaration which the deceased made to her sister Pozi. An inference can be drawn from the case of *Hewan v Kourie and Another* that the courts are primarily concerned with the reliability of the evidence when considering its nature.
- (c) The purpose of tendering the hearsay evidence – was to proof the identity of the perpetrator who inflicted the injuries sustained by the deceased as a result of which she died.
- (d) The probative value of the evidence – it is high on the objective facts – as it guarantees the reliability of the hearsay evidence given by Pozi. One of the objective facts in this case is the fact that the witness Pozi knew exactly who the deceased was talking about. There was no uncertainty regarding who the deceased was referring to when the deceased said ‘Kgaogelo stabbed me’. Pozi testified that this was the only Kgaogelo the deceased knew. She further said Kgaogelo is the only Kgaogelo who had been in a relationship with the deceased. There was no doubt in her mind as to who the deceased was talking about. At the same time, the accused admits seeing the deceased minutes before she was killed and he places himself at the scene. This was confirmed by Kedibone

that he was there minutes before the deceased was killed. Kedibone also testified that she saw the accused grabbing the deceased by her forearm and that was not a friendly gesture because this was followed by the deceased asking Kedibone to go and call her father. The accused himself does not deny this because he was present when this happened.

- (e) The reason why the person from whose credibility the probative value of the statement depends (did not come to testify) – is that Kungeka could not testify because she is deceased.
- (f) Any prejudice to the accused – In *S v Ndhlovu*[12] the court stated that:

“Prejudice in s3(1)(c)(6) clearly means procedural prejudice to the party against whom the hearsay is tendered. Prejudice which is always present when hearsay admitted, must be weighed against the reliability of the hearsay, in deciding whether despite the inevitable prejudice, the interests of justice require its admission.

A just verdict based on evidence admitted because the interests of justice require it, cannot constitute prejudice. Where the interests

of justice require the admission of hearsay, the resultant strengthening of the opposing case, cannot count as prejudice for statutory purposes since in weighing the interests of justice the court must have already concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requirements are fulfilled, the very fact that hearsay justifiably strengthens the opponent’s case, warrants its admission, since its admission would run counter the interests of justice.

[94] In casu, the fact that the accused did not have the opportunity to cross-examine and test the reliability of the statement, cannot in my view, result in the hearsay evidence being inadmissible. I have earlier indicated that the admission of hearsay evidence, in the

interests of justice, is not in violation of the accused's constitutional right to challenge evidence, - when also taking into consideration that the death of the deceased is the subject, both of the charge and the statement itself, as also outlined above.

[95] In the book titled: Principles of Evidence[13] the author stated that:

“Under common law dying declarations could be admitted into evidence provided the following requirements were met: (a) the declaration was relevant to the cause of death; (b) the evidence was adduced on a charge of murder or culpable homicide; (c) the deceased would

otherwise have been a competent witness; and (d) at the time of making the statement the declarant “was under a settled hopeless expectation of death”. The rationale underpinning this exception was necessity and reliability”.

[96] In dealing with the evidence of Pozi being a single witness, counsel submitted that Pozi had a motive to falsely implicate the accused as she had already told the court that she dislikes the accused. Relying on the case of Olawale v The State[14] counsel further argued that Pozi's evidence was supposed to be clear and satisfactory in every material respects.

[97] I cannot find any motive to falsely implicate the accused. It is important to note that there was corroboration between the evidence of Kedibone and Pozi with regards to the fact that the deceased have reported to them on many occasions that the accused have assaulted her. It was for this reason that Pozi was honest enough to say that she does not like the accused because of the way he was treating the deceased – and that explanation does not come close to being regarded as a motive to falsely implicate the accused. I have carefully considered the evidence of Pozi and applied the cautionary rule in an attempt to guard against any biasness; unreliability and untrustworthiness. None exists so far and the allegation of motive and submission made on behalf of the accused cannot stand.

[98] Be that as it may, section 208 of the Criminal Procedure Act 57 of 1977 (the CPA) makes it very clear that: “an accused person may be convicted of any offence on the single evidence of any competent witness”.

[99] In S v Webber[15] The court held that:

“Conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses”.

[100] In S v Sauls and Others[16] held that:

“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”.

- [101] Pozi's evidence was without a doubt, very clear and to the point. She knew the accused and described him as a quiet person. In my view, Pozi as a single witness, was credible and reliable and she did not contradict herself. She did not exaggerate her evidence and it is therefore accepted as the truth.
- [102] Advocate Khoza argued that Zodwa was an important witness that should have been called because she is the one who took Pozi to the scene where the deceased was found. I do not see how Zodwa would have assisted the court or corroborated the evidence of Pozi. Logic clearly says that if Zodwa were to be called, she would have just confirmed that she took Pozi to the scene and nothing further can be of assistance. With regards to the submission that the State failed to call Itumeleng to corroborate the evidence of Kedibone, both Kedibone and Pozi do not place Itumeleng at the scene where the deceased fell. Having said that, the accused himself corroborates the evidence of Kedibone that when he met with the deceased, the deceased was in the company of both Kedibone and Itumeleng. He also confirms and corroborate the evidence of Kedibone that he grabbed the deceased by her arm and further that Kedibone went to call the father of the deceased.
- [103] I am therefore of the view that there was nothing wrong in the State not having called Itumeleng and most importantly, the evidence of Kedibone is corroborated by the accused by placing himself at the scene and confirming the evidence of Kedibone in all material respects, save for the question of who stabbed the deceased.
- [104] With regards to the evidence of the accused's brother, Mr Molepo said he has a brother named Isaac and a sister named Agnes, but none of them called to say the police were looking for the accused. He said the police called looking for the accused and informed him that it is alleged that the accused has killed his girlfriend. He then called the lawyer, Mr Khoza, and he went to his office with the accused. What is strange about this evidence is that the police only had the number of the other Isaac and Agnes, who both promised the police that they would call when they see the accused. Molepo says both Isaac and Agnes did not call him. The police never had his number but it happened that he is the one who is called.
- [105] This begs the question of how the police would have called him because they did not have his number. In any event, the evidence of this witness did not assist the court in deciding whether it was, or was not the accused who killed the deceased. Advocate Khoza argued that character evidence of the witness should be allowed because Mr Molepo does not know the accused as a violent person and that he believed the accused when he said he did not kill the deceased. Counsel said the manner in which the accused used to live with his brother will also tell what kind of a person the accused is. There is no evidence before court

that the accused lived with his brother for him to know exactly what type of a person he is, but what is before court is the

evidence of the brother who said he believed the accused when he reported to him that he did not kill the deceased.

[106] This witness does not stay with the accused and does not know how the accused behaves when he is not with him. Nothing in his evidence suggested that he used to visit the accused or that he was in close contact with the accused for him to know how the accused would behave and relate to other people, especially the deceased, in his absence. He did not even know that the accused was in a relationship with someone and how they treated each other. What is worrying though is that when the incident is reported to him, he does not do anything. The accused told the court that his brother said - because of the allegations against him, he will take him to the police. But obviously that did not happen immediately because it took a period of weeks before that could be done. Molepo did not say he took steps to do something or clear his brother's name. The accused on the other hand made it very clear when he testified that his brother was too busy to find out anything about the deceased. But that is not the issue. The question is whether the evidence of this witness could assist the court in any way in making a decision regarding the issues before court. This witness in my view, did not assist the court in the determination of the crucial issues before the court, which relates to the death of the deceased. He was also not in the vicinity where the deceased was stabbed.

[107] The State relied on circumstantial evidence to proof its case against the accused person. From the outset of the proceedings, the court informed the accused about the importance of circumstantial evidence and the effect thereof and advocate Khoza confirmed that he has also canvassed the aspect of circumstantial evidence with the accused.

[108] In determining whether the circumstances of this case call for an inference to be drawn, if any, I have to consider all the evidence before me cumulatively. The question which I now have to make a determination on is whether the evidence presented before court is enough to point at the accused as the person who stabbed the deceased. The State argued and submitted that the circumstantial evidence available justifies the inescapable inference that the accused is the one who stabbed the deceased.

[109] In R v Blom[17] the court said:

“in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The first rule is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they excluded every reasonable inference from them save the one sought to be drawn. If these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. This second rule takes account of the fact that in a criminal case the state should furnish proof beyond reasonable

doubt”.

[110] In *Rex v De Villiers*[18] the court pointed out that:

“the court should not consider each circumstance in isolation and then give the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance. This approach can also be put differently: the state must satisfy the court, not that each separate item of evidence is inconsistent with the innocence of the accuse, but only that the evidence taken as a whole is beyond reasonable doubt inconsistent with such innocence”.

[111] The fundamental principle of our law is that in a criminal trial, 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. It will do this 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 in order 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 doubt[19]. Having said that, i take note that all circumstantial evidence is depended upon the facts which are proved by direct evidence.

[112] In *S v Mdlongwa*[20] the Supreme Court of Appeal endorsed the following principle enunciated in *S v Van der Meyden*[21] where NUGENT J stated that:

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

[113] In *S v Chabalala*[22] the Supreme Court of Appeal amplified as follows, the ‘holistic’ approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused person:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weights so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt”.

[114] In the process of evaluating all the evidence before me, I also have to determine whether the accused's version is reasonably possibly true, which would entitle him to an acquittal. In *S v Trainor*[23], the SCA stated that:

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

[115] The accused denied stabbing the deceased and causing her death. He testified that after receiving a threatening phone call from Kedibone, he ran to his brother in Ormonde. When asked why he did not call the police and explain to them that he is being threatened, he said he tried calling the police but the police also threatened him with arrest. This was however new evidence which only came out during cross-examination. He explained that when the police threatened him, it only made things worse. He testified that he never went to work because where he is employed, he can only go to work when he is called to come and work. He then changed his version to say that he did not go to work because he was fearing for his life. What stands out in his evidence is his explanation regarding the reason why he ran away from Daggafontein. In his own words, he said: “I became scared that I have killed a person and the community was looking for me. He said if his belongings were not burned, and was not told that his girlfriend was dead, he would have gone to the funeral. This does not make sense. How would he have known and gone to the funeral when he was not told? This clearly shows that the accused knew very well that the deceased was no more.

[116] On the other hand, in addressing the court and making submissions, his own counsel said the following: “The accused is a first offender who has never been arrested. The question that should be asked is: what would a first offender do? Further that: “we are dealing with the accused My Lady, he knows that I have killed a person. He does not know the law, but he knows that killers will be punished”.

[117] When one looks at the submission made by counsel and the evidence of the accused when he said he became scared that he has killed a person, one can therefore safely infer that this was an admission by both the accused and his counsel. This in my mind leaves no room for doubt that the accused is the one who stabbed the deceased and left her for dead.

[118] The inescapable evidence which is before court is that:

1. The accused places himself at the scene and confirms the evidence of Kedibone that he was left alone with the deceased who was clearly held against her will by the accused. A few minutes later, the deceased is heard screaming for help saying that she is dying. She is found stabbed and having a knife sticking on the side of her body and she is bleeding profusely.

2. When her sister Pozi gets to the scene, the deceased tells her who stabbed her, by saying that it was Kgaogelo who stabbed her. The deceased never knew any other person by the name of Kgaogelo, save for the only Kgaogelo whom she had a love relationship with, and that is the accused before court.
3. There is evidence of repeated physical abuse which was at least witnessed by Pozi on one occasion.
4. What cannot be avoided or overlooked, is the fact that minutes after the deceased was left alone in the company of the accused, she is found stabbed and she makes a report to her sister that the accused is the one who stabbed her. This court is also mindful of the fact that the accused says he parted ways with the deceased after talking to her and she was still alive. However, he indicated during examination-in- chief and in his section 115 statement that he went home but under cross- examination, he said he went to the shop when they parted ways.

[119] In setting out a test for determining when proof beyond reasonable doubt would nevertheless be necessary, Schreiner JA in *R v Mthembu*[24] said the following:

*“I am not satisfied that the trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown’s favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties. Circumstantial evidence, of course, rest ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the borderline between proof and probability is largely a matter of degree, as is the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may end their effect lead to a moral certainty (*Rex v de Villiers* 1944 AD 493 at 508)) so, it may fairly be reasoned, a number of probabilities as to the existence of facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused’s guilt”.*

[120] In his closing address, advocate Khoza said the following: “The offence for which the accused is charged, is very serious and prevalent in the jurisdiction of the court. Day in and day out it is reported that women and children are killed by people who are supposed to protect them. The courts are there to protect the interests of those who have been injured. We as officers of the law will not tolerate such behaviour and as such, it has become our daily duty to assess and make sure that these offences are tried in a very good manner. Every circumstance under which these crimes are committed is to be assessed properly in

order to assist the courts in reaching a sound decision after evaluating all the evidence and arguments submitted by both parties. It is trite that the wrongdoers must be punished and the innocent be protected by the law. The State is also expected to prove beyond reasonable doubt that the accused committed the offence to which he is being charged". I am in agreement with the statement made by counsel.

[121] The proven facts are as follows:

1. The accused was the last person to be seen with the deceased;
2. He made an admission to Kedibone by telling her that he can see that the deceased is still alive and he will come and finish her off;
3. The deceased told her sister that the accused is the one who stabbed her.
4. The admission by the accused when he said he became scared that he has killed a person and the community is looking for him.
5. A confirmation by his counsel that the accused is a first offender who knows that he has killed a person and knows that killers will be punished.

[122] In my view, the only inference to be drawn from all the evidence and proven facts taken and evaluated cumulatively, is that the accused is the one who stabbed the deceased. As such, the first cardinal rule in the case of Blom has been satisfied and complied with. It therefore follows that the second rule in Blom have also been satisfied with and complied with as the proved facts exclude and leaves no room for doubt or any other inference to be drawn, save for the one drawn by this court.

[123] The court also has to make a determination on whether, on the evidence at hand, it can be said that the State has proven its case against the accused beyond a reasonable doubt. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider.

[124] The general considerations that are important when a court weighs up the evidence or when it evaluates the evidence at the end of a trial is to first weigh the evidence as a whole. In essence, a trier of facts must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others: all probabilities; reliability and opportunity for observation of the respective witnesses; the absence of interest or bias; the intrinsic merits or demerits of the testimony itself; inconsistencies or contradictions and corroboration. It is however important to distinguish inferences and probabilities from conjecture and speculation. No proper inference can be drawn unless there are objective facts from which to infer the other facts. Probabilities must likewise be considered in the light of proven facts.[25]

- [125] Regarding the demeanour of witnesses, and in particular Kedibone and Pozi, they presented themselves and came out as impressive witnesses. They gave a coherent explanation of the events of the 9th November
2018. They did not hesitate in answering questions and their evidence was never shaken. I accept their evidence as reliable and credible. The accused on the other hand was not an impressive witness. He took long period to answer questions and he changed his version on several points to suit him. He tried to put much of a distance between himself and Daggafontein because he knew what he had done, and that is the reason he did not report for work. Regarding the funeral of the deceased, the accused was unable to give a plausible reason why he could not find out if his girlfriend was still alive or deceased. He said he did not go to the funeral of the deceased because he did not know where the funeral was going to be held. He also said he did not have enough information if 'this person' really died – referring to his girlfriend. And this is the man who claims to have loved the deceased and wanted to 'fix things' with her regarding their relationship. I find that he is incapable of telling the truth.
- [126] The bare denial by the accused that he never stabbed the deceased is rejected. His version is not reasonably possibly true and is rejected as false. I have in the beginning indicated that the State alleges that the murder of the deceased was premeditated.
- [127] 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 and the carrying out of his intention. The State managed to lead evidence and prove premeditation.
- [128] In my view, this intention was formulated from the time when the accused dragged the deceased and chased both Itumeleng and Kedibone away so that he can be left alone with the deceased. The intention was also displayed when he made a phone call to Kedibone and informed her that he will finish the deceased off. I am therefore satisfied that the State managed to prove that the murder of the deceased was premeditated.
- [129] Having considered all the evidence before me and the submissions made by both counsels, I am satisfied and of the view that the State succeeded in proving its case against the accused beyond a reasonable doubt.
- [130] In the circumstance, the accused is found guilty of premeditated murder.

P. D PHAHLANE

Acting Judge of the High Court, Gauteng Division, Pretoria

Heard on

: 17-20 September 2019

Date of Judgment : 27 November 2019

For the State

: Adv Van Der Westhuizen

Instructed by

: Deputy Director of Public Prosecutions Pretoria

For the Defendant : Adv Khoza

Instructed by

:

[1] 2003

(1) SACR 583 (SCA),

[2] (CC 70/2010) [2012] ZAGPJHC 114 (22 May 2012).

[3] 1981

(3) SA 172 (A)

[4] 1990

(1) SACR 95 (A) at 98f-g

[5] 1996 BLR 540 (HC).

[6] 2000 (2) SACR 100 (D)

[7] The unreported judgment in case no: CC161/05, 1-1-2006) (NWM)

[8] 1993

(2) SACR 109 (N)

[9] The unreported judgment in case no: cc161/05, 1-1-2006)(NWM)

[10] 2002

(2) SACR 325 (SCA)

[11] 1992

(1) SA 494 (W).

[12] 2002

(2) SACR 325 (SCA).

[13] Principles of Evidence, PJ Schwikkard et al, 4TH Edition, 2015, at page 308

[14] 2010

- (1) ALL SA 451 (SCA),
- [15] 1971
- (3) SA 754 (A)
- [16] 1981
- (3) SA 172 (A) 180
- [17] 1939 AD 188 202-3
- [18] 1944 AD 493 at 508-9
- [19] PJ Schwikkard *supra* @ page 602
- [20] 2010
- (2) SACR 419 (SCA) at 11
- [21] 1999
- (1) SACR 447 (W)
- [22] 2003 (1) SACR 134 (SCA) at 15
- [23] 2003 (1) SACR 35 (SCA) at 9
- [24] 1950
- (1) SA 670 (A) at 679-680
- [25] S v Chabalala 2003(1) SACR 134 (SCA)
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