

SOUTH AFRICA / JUDGMENT

# S v Mashaba (CC 29/2021; M 18/2021) [2021] ZAMPMBHC 51 (2 November 2021)

**[2021] ZAMPMBHC 51****COURT**

Mbombela High Court, Mpumalanga

**BEFORE**

C I Moosa

**CASE / FILE NUMBER**

CC 29/2021

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**Policy****REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MBOMBELA****HELD****AT GRASKOP****CASE****NO: CC 29/2021****DPP****REF: M 18/2021****REPORTABLE:**

YES

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

In

the matter between:       THE  
                                      STATE  
                                      v  
                                      CHRISTOPHER  
                                      VELLY MASHABA  
                                      ACCUSED

## JUDGMENT

### ON MERITS

MOOSA AJ:

[1] The fateful day of Monday, 26 April 2021, would always be remembered in the Mkansi household forever, as it changed the family dynamics with a single gunshot. Sadly so the unfortunate events of that afternoon culminated in the death of a loved one and the subsequent arrest of the accused on a charge of murder. At the end of that evening one of the Mkansi son's had met his death with a single gunshot, whilst the other faced the might of the law having pulled the trigger of his firearm, and which caused the untimely death of his brother.

[2] MR CHRISTOPHER VELLY MASHABA ('accused') is arraigned on the following charge:

[2.1] COUNT 1:

#### MURDER

- read with the provisions of Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act No 105 of 1997

IN THAT upon or about 26 April 2021 and at or near Dumphries Trust, in the district of Bushbuckridge, the accused did unlawfully and intentionally kill ELVIS MKANSI, an adult male person.

[3] The accused pleaded not guilty to the charge that he faced in the indictment. Mr Mashele, ('Mashele') on behalf of the accused confirmed that the accused's plea was in accordance with his instructions. In amplification of the plea of not guilty, the following submissions were made on behalf of the accused:

[3.1] On 24 April 2021, the deceased and his brother, Reason returned to their parental home whilst being intoxicated. They then began quarrelling with their parents, which caused their mother to leave the homestead and sleep elsewhere that night.

[3.2] The following morning the accused whilst on his way to work observed that both his parents were standing on the verandah of their residence. He was concerned and accordingly stopped his motor vehicle and approached his parents regarding the fact that they were standing outside. He was briefly informed of the events of the previous evening, and assured his parents that he would call them later that day to discuss the matter further, as he needed to be at work.

[3.3] At a later stage that morning he telephoned his parents, and they informed him in greater detail regarding the events of the previous night, and the harassing conduct of the deceased and his brother. He further undertook to attend at his parental home on the following day, so as to have a discussion regarding the challenges that were being faced by his parents with his two siblings. He was further informed by his mother that she did not feel safe at her homestead, and was prepared to relocate to her parental home for the sake of her own personal safety.

[3.4] On 26 April 2021, the accused proceeded to his parental home after work, in order to resolve the personal differences between his parents and his siblings. He did not find the deceased and his brother, Reason and decided to return later. At approximately 17h00 he parked his motor vehicle at his residence, after having it repaired, and walked to his parental home. He observed that the deceased was present and decided not to discuss the matter without Reason being present.

[3.5] He pleaded with the deceased and advised him that what he was doing was wrong. A fight then broke out between the accused and deceased. The accused then tried to calm the deceased by holding his hands down. The deceased punched the accused and the accused retaliated by slapping the deceased. The deceased then threw an empty beer crate at the accused.

[3.6] The accused then left his parental home as the deceased was unruly. Whilst on his way to his home he heard his sister, Nikiwe shouting for help and saying: "He is killing us, help, help". He then proceeded to his home, opened the safe and removed his firearm, and ran in the direction that the sound was coming from.

[3.7] As he was approaching the gate he saw the deceased in possession of a panga, and who was running towards him. The accused then pulled out his firearm, and whilst doing so was struck on his hand with the panga. As a result of fear and shock he pulled the trigger when he was hit on his hand. He fired one shot and which struck the deceased on the chest. The deceased then fell down onto the ground.

[3.8] He attempted to attend to the deceased, and who was no longer conscious. He thereafter ran to his house and put his firearm in the safe. He then loaded the deceased into the rear of his bakkie and took him to the local hospital. The deceased was declared dead upon arrival. He duly requested the authorities to contact the police. Upon the arrival of the SAPS the accused informed them of what had transpired and he was subsequently arrested.

[4] The accused made formal admissions in terms of Section 220 of the CPA, inter alia, briefly (Exhibits "A", "B" and "C"):

[4.1] admitting that he is the biological brother of the deceased, and the licensed possessor of a Stoeger Arms 9MM parabellum pistol, with serial number [...] (“the firearm”).

[4.2] admitting that on 26 April 2021 he knocked off duty and went to his house which is adjacent to his parent’s homestead. He later went to his parental homestead to address the complaint registered by his parents against his brothers, the deceased and Reason Mkansi, on 25 April 2021.

[4.3] admitting that when he arrived at his parent’s homestead the deceased was not present. The deceased later arrived and they never discussed the complaint laid by his parents. A fight broke out between himself and the deceased.

[4.4] admitting that he had left the parental homestead and whilst proceeding to his home, he heard his sister Nikiwe Mkansi screaming. He then took out his firearm and went towards the direction where Nikiwe Mkansi was screaming and whereupon he met the deceased.

[4.5] admitting that the firearm that he was carrying went off and the deceased was shot once on the chest.

[4.6] admitting that the deceased is the person in the indictment to wit Elvis Mkansi, and who sustained a gunshot wound on his chest on 26 April 2021. That on the aforesaid date he transported the deceased with his motor vehicle from Dumphries Trust to Thulamahashe Health Care Centre, where he was declared dead by Taunyane Tepanyela of Tintswalo Emergency Medical Services.

[4.7] admitting that on 26 April 2021, the deceased’s body was transported from Thulamahashe Health Care Centre to Tintswalo mortuary by Chris Mohlala of Tintswalo Medico Legal Laboratory.

[4.8] admitting that on 28 April 2021, Dr Donald Vella Mabunda (“Dr G Mabunda”) performed a medico-legal post mortem examination on the body of the deceased and recorded his findings on the forms GW7/15, with death Register Numbers DR 54/21, herewith handed in by consent as EXHIBIT ‘B’; and that the deceased’s cause of death is correctly recorded in Exhibit ‘B’ as “Gunshot Chest with Haemorrhagic Shock”; and that the body of the deceased did not sustain any further injuries from the time he was transported from Dumphries Trust, until the post mortem examination was performed.

[4.9] admitting that the facts and findings of the medico-legal post-mortem examination recorded by Dr Mabunda in the post-mortem report, EXHIBIT ‘B’ are correct, and that the originality, authenticity, facts and findings in the medico-legal examination report and the affidavit in terms section 212 (4) of the CPA are not in dispute.

[4.10] admitting that on 26 April 2021, Warrant Officer Joseph Lefa Mabela (“W/O Mabela”), from the Acornhoek Local Criminal Record Centre, attended at Thulamahashe Healthcare Centre and compiled an album consisting of 28 photographs. Further, that the photo album is admitted as accurate and handed in by agreement as Exhibit “C”.

[4.11] admitting that on 26 April 2021, W/O Mabela confiscated the accused's firearm and a magazine containing 15 (fifteen) live rounds, which exhibits he booked into the Mhala SAP 13 register with reference number 173/2021. Further, that on the aforesaid date, he booked out the exhibits from Mhala SAP13/173/2021 and registered them in the Acornhoek LCRC exhibit room.

[4.12] admitting that on 05 May 2021, W/O Mabela forwarded the aforementioned exhibits to the ballistic laboratory in Pretoria; and that the exhibits were not tampered with from the time that the exhibits were received from the accused until they were transported to the Forensic Sciences Laboratory.

[5] The accused was duly explained the provisions, application and implications of the Criminal Law Amendment Act No. 105 of 1997 ('Minimum Sentences Act'), as well as the seriousness thereof. He confirmed that he accordingly understood the provisions of the aforementioned Act.

[6] To discharge the onus upon it to prove that the accused committed the crimes charged, the prosecution called the following two viva voce witnesses:

[6.1] Nikiwe Mkansi ('Nikiwe'), the accused, deceased's and Reason Mkansi's sister testified, inter alia, as follows:

[a] On 24 April 2021, she observed that the deceased and her brother Reason had returned home intoxicated, and had quarreled with their parents. This incident culminated in her mother having to sleep elsewhere that evening. She was aware that the accused had been notified of the events and that he was going to return to the parental home on 26 April 2021, in order to resolve the issue between the aforementioned siblings and his parents.

[b] On 26 April 2021 at approximately 17H00 she was at home sitting outside together with her father, the accused's son ('Future') and other children when the accused arrived. The accused indicated that he was looking for the deceased and Reason. Both the deceased and Reason were not at home at the time.

[b] The deceased subsequently arrived and questioned why was the accused there. He then clicked his tongue. The accused informed the deceased that he was looking for him and Reason. The deceased then responded by saying "Did they send you to prosecute me". Nikiwe reprimanded the deceased not to disrespect the accused.

[c] The accused said to the deceased that he should sit down as that they should talk. The deceased refused to listen and which caused the accused to stand up and approach the deceased. He grabbed the deceased by his T-shirt on the chest area. The deceased retaliated by striking the accused with an open hand. The accused thereafter struck the deceased with an open hand on his face.

[d] She separated the accused and the deceased. The accused said to the deceased that he still wanted to beat him. During this stage the deceased continued hurling items at the accused, and which included an empty beer crate. Both the accused and deceased subsequently left to their respective houses.

[e] She thereafter observed the deceased emerging from his residence with a panga, and which caused her to scream for help. She shouted “help me”, as she did not know as to who he was going to strike with the panga. She approached the deceased and he pushed her, and she fell to the ground.

[f] She stood up and ran towards the direction from which the deceased emerged from, and whilst proceeding she heard a gunshot. She subsequently came upon the deceased who was lying on the ground, and a panga was next to him.

[g] During cross-examination Nikiwe confirmed that the deceased and Reason were troublesome, especially when they consumed alcohol. In fact, she had previously reported their conduct to members of the SAPS Thulamahashe.

[h] During cross-examination it was put to her that the accused would testify that the deceased had a panga in his hand. To which she stated that she had no comment.

[i] Further she was in agreement with the proposition that the accused had not planned to kill the deceased.

[j] When questioned by this court regarding any injuries suffered by the accused, she stated that he had been injured on his finger, but did not know if he had received any treatment for such injury.

[k] It is noteworthy to mention that Nikiwe brought a panga to court and informed the court that the aforesaid panga as demonstrated to the court, was in fact the one that was in the possession of the deceased.

That in essence concluded the evidence of the 1st witness, Nikiwe.

[6.2] Joseph Lefa Mabela (‘Mabela’), a member of the South African Police Services stationed at the Acornhoek Local Criminal Record Centre and a crime scene investigator testified, inter alia, as follows:

[a] On 26 April 2021, at approximately 21h00 he was requested by Sergeant DN Maputso of Mhala SAPS to attend at the Thulamahashe Health Care Centre. Upon his arrival, the scene and relevant points were pointed out to him. He accordingly took photographs as per Exhibit “C” and collected exhibits.

[b] He was specifically requested to take photographs of the accused’s hands when the primer residue test was being performed.

[c] He did not observe any injuries on the hands of the accused at the time when he took photographs 14 and 15 of Exhibit "C". He referred to the aforementioned photographs and was adamant that there were no injuries present on the accused's hands at the time when he had taken the photographs, at approximately 21h30.

[d] He stated that had he observed any injuries, he would have immediately focused on the injury, and in order to capture the fact that the accused was injured. He further testified that the accused did not inform him of any injuries on his hand at the time when the photographs were taken.

[e] During cross examination Mabela was adamant that the accused did not tell him that he had been injured on his hand by the panga, but told him that the deceased was approaching with a panga and then he shot him.

[f] He was adamant during cross examination that at no material time did the accused ever tell him that he was injured on his hand, and neither did he observe any injuries thereon. In fact he stated that he had gone to the extent of asking the accused if he had any injuries and the accused said that he had none.

That in essence concluded the evidence of the 2nd witness, Mabela and the case for the state was accordingly closed.

[7] Accused 1 testified in his defence and stated, inter alia, as follows:

[a] On 25 April 2021, at approximately 05H00 he left his residence and proceeded to work. As he passed his parent's home he saw them standing outside on the veranda. The accused then proceeded to make enquiries from his parents regarding the fact that they were standing outside at that part of the morning. They briefly informed him of what had transpired the night before. He undertook to revert to them later that morning, as he was late for work.

[b] He subsequently contacted his parents that morning and they informed him that the deceased and his other brother, Reason had returned home on 24 April 2021, whilst under the influence of alcohol, and they began quarrelling with their parents. The discord caused their mother to leave the homestead and sleep elsewhere. The accused's

mother further indicated that she intended leaving the house permanently as a result of the behaviour of his siblings. He duly

undertook to attend at his parent's home on 26 April 2021, in order to resolve this issue.

[c] On 26 April 2021, he subsequently attended at his parental home after work. He found his parents, Nikiwe, his son (Future) and other children sitting outside. He enquired about the whereabouts of the deceased and Reason and was told that they were not at home. He then indicated to his father that he is unable to address the issue as his two siblings were not present. The deceased arrived whilst they were still talking. The deceased then pointed at him and said: "You are here to resolve the matter and what are you afraid off" and he clicked his tongue.

[d] His father and Nikiwe then reprimanded the deceased for being disrespectful and chasing their mother from her own home. The accused then stood up and grabbed the deceased by his T-shirt on his chest. The deceased then struck the accused with his open hand on the left shoulder. The accused retaliated by striking the deceased with his open hand on his cheek. Nikiwe then separated the accused and the deceased.

[e] The deceased then threw a wooden bench at him, and which did not strike him. However, the deceased threw an empty beer crate and which made contact with the accused's left rib.

[f] The accused was then told to go to his home. Whilst he was entering his property, he heard Nikiwe screaming for help. She said loudly: "Please help, please help, someone is going to be killed". He ran into his house, opened the safe and placed his firearm in its holster, and tucked the holster into his trouser.

[g] He then left his house walking fast and met the deceased as he (deceased) was opening the gate. He observed that the deceased was in possession of a panga, and stated that it was the same one that was shown to the court by Nikiwe. At this stage, he had the firearm on his waist.

[h] When the deceased lifted up the panga, he drew his firearm with his right hand. Just as he was in the process of pulling out the firearm with his hand and as he was reaching up, he was struck with the panga, and at that moment the firearm discharged itself. In amplification he stated that his finger was on the trigger and when the panga struck his finger it caused his finger to press the trigger, which caused a bullet to be discharged.

[i] He saw the deceased fall on the ground, and returned his firearm to his holster. He thereafter ran to the house and placed the firearm in his safe and returned to where the deceased was lying on the ground. He requested for water to pour on the deceased and tapped the deceased on his head in order to resuscitate him.

[j] He thereafter loaded the deceased at the rear of his bakkie and transported him to the Thulamahashe Health Care Centre. The deceased was certified dead upon arrival. He requested the clinic staff to contact the SAPS, whereupon he was subsequently arrested.

[k] He denied having any discussions with Mabela, and stated that he only told Captain Mashele ('Mashele') that the deceased was attacking him with a panga. He further informed Mashele whilst at the clinic that he had suffered injuries and the injuries were observed on him. He stated that he received Panado syrup for his injuries at the clinic.

[l] On 27 April 2021, Mashele conducted an interview with him and completed a warning statement.

[m] He denied that he had planned or had the intention to assault or kill the deceased and that he loved his brother.

[n] During cross-examination he admitted that Mabela did not have any reason to falsely implicate him and could have made a mistake regarding the injuries on his hand.

[o] During cross-examination he conceded that he did not tell the court about the nature of his injuries, as he had informed his legal representative in this regard.

[p] He admitted that the report that was given to him on 25 April 2021 by his parents, and more especially the fact that his mother had stated that she was going to relocate to her parental home did not sit well with him and had angered him.

[q] He further admitted that on 26 April 2021 and at the time when the deceased disrespected him he became angry, and the situation was further aggravated when the deceased assaulted him.

[r] During cross-examination the accused stated that he went inside his house to arm himself so that when he went to investigate the cause of Nikiwe's shouting, he would be armed.

[s] He stated that he quickly drew his firearm and cocked it when he saw the deceased emerge with the panga. His intention was to threaten the deceased and hoped that he would retreat.

[t] During cross examination he stated that the deceased held the panga in two hands and the deceased then swung the panga from his left and struck the accused on the right hand and more specifically his fingers.

[u] He stated that it did not cross his mind to shoot at the arms of the deceased at the time when the deceased was wielding the firearm. In addition thereto, he stated that he wanted to fire a warning shot in the air.

[v] During a clarifying question from the court, the accused confirmed that he had suffered a visible injury to the knuckle and finger of the right hand, at the time when he was struck with the panga. Further, that the skin was removed from his index and middle finger and that his injury was bleeding.

[w] He further confirmed to the court that he did not render assistance to the deceased once the shot was fired. Further, that he had forgotten to tell members of the SAPS about the panga that was in the possession of the deceased, as he was confused.

That in essence concluded the evidence of accused 1.

[8] Alfred Mashele ('Mashele'), an erstwhile member of the South African Police Services stationed at the Acornhoek SAPS and the investigating officer, holding the rank of Captain at the time of his retirement testified, inter alia, as follows:

[a] He was present at the time of the arrest of the accused, and he interviewed the accused at the Thulamahashe Health Care Centre, whilst the deceased was lying at the back of the bakkie. The accused told him that he shot the deceased, as the latter wanted to chop him with a panga.

[b] At the time of this disclosure, the accused did not show him any injuries and only told him of injuries on 27 April 2021, and at the time when he was making a statement. He thereafter observed the accused's right hand and noticed injuries thereon.

[c] During cross-examination he was adamant that he did not see any injuries upon the accused at the Thulamahashe Health Care Centre. He however was informed and shown injuries only during his interview of the accused at the Calcutta SAPS on 27 April 2021.

[d] During cross examination he further confirmed that the accused was incorrect when he testified that this witness had seen the injury, whilst the accused was at the Tulamahashe Health Care Centre.

[e] During a clarifying question from the court the witness confirmed that he did not attempt to locate the panga, and no one approached him regarding the panga.

That in essence concluded the defence case and his case was closed.

#### EVALUATION OF EVIDENCE

[9] It is trite that in order to succeed with the prosecution, the State has to discharge the onus to establish the guilt of the accused beyond reasonable doubt and on the other hand the accused bears no onus but will be entitled to a discharge if he presents an explanation of innocence which is reasonably possibly true. This trite legal test is more succinctly and elegantly stated by Nugent JA in *S v Mbuli*[1] as follows:

'It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. In whichever form the test is applied it must be satisfied upon a consideration of all the evidence'.

'An accused version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test an accused's

version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable'.

[2]

[10] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. In *S v Shilakwe*[3] at page 20, para [11], the Supreme Court of Appeal approved of the following dictum :

*“But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”*

See *S v Hadebe and others*[4] and *S v Mbuli*[5].

[11] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

*“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 weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See *S v Chabalala*[6]. In this regard it is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in *Magadla v S*[7], delivered on 16 November 2011, (unreported), at paragraph [22] and further.

[12] I am mindful of the basic principles to be applied when evaluating evidence. In this regard, it is trite that evidence must be weighed in its totality and that probabilities and inferences must be distinguished from speculation and conjecture.

Navsa JA in *S v Trainor*[8] stated as follows: “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 of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety”

[13] The quote from the judgment of Malan JA in *R v Mlambo*[9] at 738 A and B is apposite:

‘In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused’s claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable inference which are not in conflict with, or outweighed by, the proved facts of the case. Moreover, if an accused deliberately takes

the risk of giving false evidence in the hope of being convicted of a less crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts; a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so’.

[14] I pause to mention that there are no eye-witnesses who actually saw the shooting of the deceased by the accused. Hence, the State has relied to a certain extent on circumstantial evidence, the testimony and version of the accused, as well as the objective medico legal evidence; in order to prove the allegations against the accused, and in an attempt to prove it’s case against the accused. I am therefore required to objectively and in an impartial and balanced manner, consider all the evidential material in coming to a decision.[10]

[15] It is trite that once a court is faced with circumstantial evidence it naturally flows that it is duly called upon to draw inferences from the evidence thus presented.

*“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such, that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”[11]

[16] The value of circumstantial evidence is often found in a whole range of independent circumstances, all giving rise to the same conclusion. It is imperative for the court to consider all these circumstances as a whole and not to assess each in isolation.

*“The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”[12]*

[17] In De Villiers supra at 508 it is said: “...even two particles of circumstantial evidence-though taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone....”

[18] Circumstantial evidence is indirect proof from which a court is required to draw inferences which, when weighed with all other evidence, may contribute towards proving a fact in issue. The inference must comply with certain rules of logic.[13] The reasonable inference has to be drawn only from proved facts and not from facts based on suspicion.[14]

Circumstantial evidence has on occasion been described as a chain, the links of which consist of pieces of evidence. This is not correct as it implies that the chain will be broken once one piece of evidence is rejected. It is better to compare it with a braided rope: as the strands break, the rope weakens and conversely, as strands are added, the stronger it gets. The gist of the matter is that one piece of circumstantial evidence may be inconclusive, but once other evidence is added, it gains probative force.

[19] The cardinal rules of logic as stated in *R v Blom*[15] and also in *S v Mtsweni*[16] stated as follows are the accepted method of reasoning by inference:

‘The inference sought to be drawn must be consistent with all the proved facts which should exclude every reasonable inference save the one sought to be drawn. In other words the inference must be distinguished from speculation and must be based on properly objective facts’

[20] The ratio of *Hendricks J* in *S v Nkuna* 2012 (1) SACR 167 (B) sets out the approach to circumstantial evidence, at paragraph 121 as follows:

*“The evaluation of circumstantial evidence must be guided by a test of reasonableness. The onus on the State is not that it must prove its case with absolute certainty or beyond a shadow of a doubt. All that is required is such evidence as to satisfy the court and prove its case beyond a reasonable doubt. It is trite law that the accused is under no legal obligation to prove his innocence. The State must prove the guilt of the accused beyond a reasonable doubt.”*

[21] Having carefully considered the totality of the evidence and the mosaic of proof before me, I do not deem it necessary to traverse the evidence of all the witnesses that testified during the trial, for the sake of brevity and to avoid prolix, as the issue to be determined is crisp and unambiguous. As such, the only issue that this court has to decide, is whether the accused had the necessary intention to shoot and kill the deceased, at the time when he fired the shot.

[22] It is common cause that Nikiwe is a single witness in respect of the incident that occurred at the parental home and what transpired prior to the shooting of the deceased on 26 April

2021. Having duly taken cognisance of the aforementioned, it is settled that in terms of the provisions of Section 208 of Act 51 of 1977, a court is however entitled to convict an accused person on the evidence of a single witness, even if that single witness is a child.

The evidence should be approached with caution and has to be sufficiently reliable in order to discharge the onus of proof of guilt beyond reasonable doubt.[17] However, it is accepted that a court should not easily convict upon the evidence of a single witness, unless the evidence tendered is substantially satisfactory in all material respects or unless it is corroborated.[18] The exercise of the cautionary rule must however not be allowed to displace the exercise of common sense.[19]

- [23] In *S v Weber* 1971 (3) SA 754 (A) the Honourable Rumpff JA held that It is not possible to prescribe a formula in terms whereof every single witness' credibility can be determined, but it is essential to approach the evidence of a single witness with caution and to weigh up the good qualities of such a witness against all the factors which may diminish the credibility of the witness.
- [24] I pause to mention that the events that preceded the fatal shooting of the deceased are common cause between the parties. It is further common cause that Nikiwe did not see the shooting of the deceased, by the accused.
- [25] Further, the following facts are in dispute:
- [a] That the accused was struck by the deceased with a panga.
  - [b] That the accused acted in self defence.
  - [c] That the accused's action of pulling the trigger was involuntary.
  - [d] That the accused intended to discharge his firearm in the air.
  - [e] That the accused had visible injuries on his right hand, at the time of his arrest.
- [26] Accordingly, in order to make a proper determination regarding the intention and action of the accused on the day under review, it is important to, inter alia, appraise the events that preceded the events of that fateful day, the version of the accused, as well as what transpired after the shooting of the deceased.
- [a] It is common cause that there was a problem within the Mkansi household with the accused's two siblings that required his intervention on 26 April 2021, as promised to his parents.
  - [b] During the discussion, the deceased disrespected the accused and they exchanged blows, but not before the accused grabbed hold of the deceased by his T-shirt. In addition thereto, the accused was struck with an empty beer crate, which was thrown by the deceased. He was subsequently requested to return to his home.
  - [c] The accused admitted that the conduct of the deceased and Reason on 24 April 2021, did not sit well with him and he was angered by the fact that there was the reasonable possibility that his mother was going to return to her parental homestead, as a direct result of the conduct of his siblings.
  - [d] The accused whilst entering his property heard Nikiwe shouting for help, and thereafter proceeded directly to retrieve his firearm from his safe. The reason he furnishes for arming himself is that he wanted to be armed when he returned to the source of the plea for help.

One needs to pause at this juncture and take note that the accused was prepared to use his firearm, if necessary, should the need have arisen, and in my view this is where the action of the accused becomes problematic and comes into question. If the accused was not intent in using his firearm, he would have immediately turned around and proceeded to investigate the reason as to why Nikiwe was shouting for help, without being armed. However, one can only conclude that the accused had already made the intention to use his firearm, when he removed it from the safe.

[e] It is further clear that the accused full well knew that Nikiwe was referring to the deceased, as he was the only one that he (accused) had a confrontation with, just prior to him returning to his home and prior to hearing Nikiwe's call for help.

[f] The accused, inter alia, submitted that he was acting in self-defence when he shot the deceased. He initially submitted that he fired a shot at the deceased, out of fear and shock, at the time when the accused was about to hit him with a panga.

In Criminal Law, Sixth Edition by CR SNYMAN at page 102 Private Defence is described as follows:

*"A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack".*

In *S v Manona* 2001 (1) SACR 426 (Tk), Kruger AJ made the following remarks: "An assault and the killing of a human being is an action which is prima facie unlawful. Once it becomes common cause that the accused has assaulted or killed the deceased or the victim in self-defence, an evidential burden is placed on the accused to rebut the prima facie presumption of unlawfulness".

[g] It is noteworthy to mention that among the admissions that the accused made in terms of Section 220 of Act 51 of 1977, the accused informed the court that he was acting in self-defence and during his cross examination his defence changed to acting involuntarily, to the extent that he involuntarily pressed the trigger, as a result of a blow on his right hand, after being struck with a panga, and which was wielded by the deceased.

[h] In my view, the critical aspect to examine in minutae is what transpired at the precise time of the shooting of the deceased, and whether there was a lawful excuse for the accused to have acted in the manner in which he did on the day in question. In my view, the accused has muddied the waters when it comes to the reason for the shooting of the deceased. Accordingly, one needs to examine both the defences raised by the accused and the reasonable possibility thereof.

[i] In the main, the accused submitted that he had acted in self defence at the time. His second version is that he had acted involuntarily when struck by the panga. In support thereof, the accused testified

that he was injured on his right hand. In my view, this aspect is absolutely critical to the defence of the accused, and to the

explanation of his conduct on that day.

[j] If one is to accept the explanation that the deceased wielded the panga from his left and struck the accused on his right hand, it is clear that the muzzle of the firearm would have moved to the left of the accused and to the left of the deceased, and at the time when the shot was fired.

Further, one would have expected the accused to have had visible injuries, having been struck by a dangerous weapon. Sadly so, the objective medical evidence regarding the entrance wound, trajectory and exit wound do not support this version of the accused. It is clear that the deceased was shot from the right hand side, at an angle and with the exit wound being in the region of the left scapula.

[k] In respect of the version that the accused was acting in self defence, it is clear once again that the accused would have sustained injuries on his hand. On both versions as propounded by the accused, the cornerstone for their survival is the fact that he sustained injuries as testified to by him. However, to this extent, no visible injuries were observed by Mabela that same evening at 21h30, when he took the photographs of the accused. His evidence is further corroborated by the defence witness Mashele, in that he confirmed that he did not see any injuries on the accused's hands, whilst at the Thulamahashe Care Centre.

[l] Accordingly, from the objective evidence contained in photographs 14 and 15, as well as the testimony of Mabela and Mashele, I conclude that the accused simply did not have any injury/injuries on his hand.

I further conclude that the injury/injuries were caused by the accused after his incarceration, in order to spin a version so as to exculpate himself of the charge which he faced. What is critical, in my view, to the defence of the accused is the fact that he simply did not have an injury on his hand, as testified to by him, and accordingly his version must be rejected.

[m] If one accepts, for one moment that the accused did not have the necessary intention to shoot and kill the deceased, then one needs to examine the conduct of the accused after the deceased was shot. In my view, one would have expected of a reasonable person in the position of the accused, having just fired a shot inadvertently or alternatively acting in self - defence, to have immediately shown remorse and to have rendered assistance to the deceased.

However, the subsequent conduct of the accused is simply not commensurate with the actions of a person who may have erred in the circumstances. Strangely so, the accused does not render any assistance to the deceased, but casually returns his firearm to his holster, and walks back to his house and replaces the firearm in his safe, whilst the life of his loved one oozes out onto the ground.

Further, if one has to accept the accused's version regarding the call for help, one would have expected him to have proceeded to Nikiwe to further investigate the cause of her shouting. However, he does not do so, but returns to his home in order to replace his firearm in his safe.

In my view, the fact that the accused did not render any immediate assistance, as well as the fact that he did not proceed to Nikiwe fortifies the fact that the accused single-mindedly had made the intention to shoot and kill the deceased.

[n] I further find the version of the accused problematic to the extent that had the deceased struck him with the panga on his hand, it is clear that they would have been in close proximity with each other. This fact is not supported by the medico legal evidence in that there is no tattooing at the entrance wound on the chest of the deceased. This in my view is indicative of the fact that the deceased was greater than a metre away from the accused when the shot was fired. Hence, this objective evidence does not support the initial defence of the accused that he was acting in self - defence. I pause to mention that one would have expected the accused to have fired a shot at other parts of the body of the deceased, if he in fact was acting

in self defence. The fact that he fired a shot at the chest area of the deceased is indicative of a single minded resolve to kill the deceased. Nothing more, nothing less!

[o] It is noteworthy to mention that one would have expected a reasonable person in the position of the accused to have immediately retrieved the panga and handed it over to the SAPS and to have shown them his injuries to support his initial version that he was acting in self- defence. However, neither the panga, nor any injuries are shown to the arresting officers or the investigating officer. Strangely so, this important piece of evidence, in my view, only sees the light of day when Nikiwe testifies in court.

[27] It is clear in my mind from the aforementioned that the totality of the objective facts clearly do not support the version/s of the accused. I find the evidence of the state witnesses to be credible and further find that the accused has failed to discharge the onus placed upon him to prove that his act of killing the deceased was justified and reasonable under the circumstances. I further reject that the accused was acting in private defence, or that he involuntarily pressed the trigger of the firearm.

[28] Accordingly, I have carefully analysed the evidence before me and applied the necessary caution where necessary, and accordingly am unable to find any reason to doubt the ipsissima verba of the State witnesses. They gave their evidence in a clear and concise manner without any material contradictions. On the other hand the accused made a very poor impression on this court during his testimony. His versions seemed to be very far fetched, on the available evidence, and on any analysis of his evidence simply cannot be believed.

- [29] After careful consideration of the evidence of all the State witnesses, and the totality of such evidence in support of the charges, I am satisfied that the evidence of the State is satisfactory in all material respects to sustain a conviction on the charge. The state witnesses made a good impression on this court, whilst the accused was an unimpressive and an unsatisfactory witness.
- [30] I have looked at the merits and demerits of this matter coupled with the totality of the evidence before me and accordingly reject the version of the accused, as being false beyond reasonable doubt. I duly accept the evidence of the State witnesses. I further find that on a consideration of the totality of the evidence the prosecution has discharged the onus to prove beyond reasonable doubt that the accused has committed the crime as charged. On the other hand the accused has failed to give an explanation of innocence which is reasonably, possibly true and his version is accordingly rejected as beyond false.
- [31] I therefore conclude that the only reasonable inference to be drawn from all the facts and the totality of the evidence before this court is that the accused had the necessary intention to shoot and kill the deceased on 26 April 2021.
- [32] In the result, the accused is found guilty as follows:

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) AND PART 1 OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997.

C I MOOSA

ACTING JUDGE OF THE HIGH COURT

02 NOVEMBER 2021

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Instructed by:

Director of Public Prosecutions

Mbombela

Mpumalanga

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Dates of hearing:

18 October 2021

19 October 2021

20 October 2021

22 October 2021

28 October 2021

Date of judgment:

02 November 2021

[1] 2003

(1) SACR 97 (SCA)

[2] *Susha v S* 2011 JOL 27877 (SCA)

[3] 2012

(1) SACR 16 (SCA)

[4] 1998

(1) SACR 422 (SCA) at 426 F – H

[5] 2003

(1) SACR 97 (SCA) at 110, para [57]

[6] 2003

(1) SACR 134 (SCA) paragraph [15]

[7] 80/2011

[2011] ZASCA 195

[8] 2003

(1) SACR 35 (SCA) at 9

[9] 1957

(4) 727 (AD)

[10] *S v Ntsele* 1998 (2) SACR 178 (SCA)

[11] *S v Blom* 1939 AD 188 at 202

[12] *S v De Villiers* 1944 AD 493 at 508-509

[13] *S v Burger* 2010 (2) SACR 1 (SCA)

[14] *S v Mseleku* 2006 (2) SACR 574 (D)

[15] 1939 (AD) at 202-3

[16] 1985

(1) SA 590 (A) at 593

[17] Mlendile v S [2011] ZAFSHC 49; Cele v S [2010] ZAKPHC 26; J v S [2011] JOL 26715 (ECG)

[18] S v Ganie 1967 (4) SA 203 (N)

[19] S v Sauls and Others 1981 (3) SA 172 (A) at 180 E-G; S v Artman and Another 1968 (3) SA 339 (SCA)

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