

SOUTH AFRICA / JUDGMENT

S v Moyo (SS25/2021) [2022]

ZAGPJHC 56 (4 February 2022)

[2022] ZAGPJHC 56

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS25/2021

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

SOUTH

GAUTENG HIGH COURT

CASE

NUMBER : SS25/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

4/2/2022

In

the matter between:

THE

STATE

and

SAMSON

MOYO

ACCUSED

JUDGMENT

DOSIO J:

INTRODUCTION

- [1] The accused is arraigned on two counts. The counts are as follows, count 1 murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'), and count 2 attempted murder.
- [2] In respect of count 1 the State alleges that on the 3rd of August 2020 the accused was involved in the murder of Lewis Pereira, an 83 year old male by hitting him with a hammer and an unknown object. In respect to count 2, the State alleges that on 3 August 2020, the accused attempted to kill Mrs Rosa Pereira, an 80 year old female, by strangling her and assaulting her.
- [3] Prior to the accused pleading, the court apprised the accused of the provisions of the minimum prescribed sentence of life imprisonment in respect to count 1. The accused understood. The court also apprised the accused of his right to have an assessor as count 1, is a charge of murder. The accused elected to proceed without an assessor.
- [4] The accused is represented by Advocate Milubi. The State is represented by Advocate Ngubani. The accused understood both counts and pleaded not guilty in respect to both counts. No plea explanation was made.
- [5] At the inception of the trial formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "Criminal Procedure Act") were handed in by agreement.
- [6] The following exhibits were handed in, namely:

Exhibit A (i) and (ii) – the formal admissions together with photos of the injuries sustained by the complainant Mrs Rosa Pereira.

Exhibit B – the declaration of death of the deceased

Exhibit C – the chain statements in connection with the body of the deceased and the post-mortem report of Dr Hlalele.

Exhibit D - the Photographs of the various scenes and exhibits found

Exhibit E - a sketch of the scene where the murder and attempted murder took place.

Exhibit F – a medical report J88 depicting the injuries sustained by the complainant Mrs Rosa Pereira.

[7] The accused confirmed the admissions which were marked as exhibit 'A'. The formal admissions consist of the following:

- a).That the deceased is the person mentioned in the indictment, to wit Mrs Lewis Pereira an adult white male person.
- b).That the deceased was assaulted several times on his body on 03 August 2020 with an unknown object at [...] Queen Street, Little Falls Roodepoort and that the deceased died on the scene.
- c).That Mc Murray Ryan Paul who is employed as a Healthcare Professional at EMER-G-MED certified the deceased dead on the crime scene as per exhibit B.
- d).That Phatlhane Samnuel Mtimkulu of the Roodepoort Government Mortuary received the body of the deceased from W/O Rademeyer and marked the body as DR 680/2020.
- e).That Gavin Keith Pereira identified the body of the deceased which was already marked DR 680/2020.
- f).That Buti Lucas Molefe who is a Senior Forensic Officer in the department of health and employed at Roodepoort forensic Pathology Services handed the body of the deceased to Dr Oumakie Sannah Hlalele.
- g).That Dr Oumakie Sannah Hlalele conducted a medico-legal post mortem examination on the body of the deceased marked DR 680/2020 on the 04 AUGUST 2020.
- h).That the cause of death was determined to have been 'Multiple blunt force injuries to the head and face' as per Post-mortem report paragraph (iv) of Exhibit "C".
- i).The correctness of the findings of Dr Oumakie Sannah Hlalele were admitted, and the contents of the medico-legal post-mortem examination report were admitted and accepted as Exhibit C.
- j).the photographs, annexed hereto as Exhibit D, are photographs depicting the body of the deceased on the scene of the crime.
- k).That Sgt B Mathebula photographed the scene on 03 August 2020 at [...] Queen Street, Little Falls, Honeydew and that he further photographed items found at [...] Poortjie Avenue, as reflected in Exhibit D.
- l).That Captain Motaung pointed out the scene of crime to Sgt B Mathebula to photograph on 03 August 2020 as reflected in Exhibit D.
- m). That Sgt B Mathebula compiled a key to the photo plan as reflected in Exhibit D and that this key to the photo plan is accepted as being correct.

n).That Sonja Kairuz is the daughter of Mrs Rosa Pereira and that she visited her mother at Flora hospital on 03 August 2020 and that she used her cell phone to take the pictures of the injuries on her mother. The photographs are admitted as correct and that it depicts the injuries sustained by the victim (Mrs Rosa Pereira). The content and the correctness of the statement of Sonja Kairuz was admitted.

THE EVIDENCE

[8] The following witnesses were called, namely Mrs Rosa Pereira, Nicholas Carreira, Maruping John Sekwati, Makome Edward Sekwati, Tyrone Wayne Richard, Donovan Matlou, Christiaan Pieter Rheerder, Captain Johannes Paulus Van Wyk, warrant officer Bongani and Zamakwakhe Ngcobo, That ended the State's case. The accused then came to testify.

Rosa Pereira

[9] This witness testified that she lived at [...] Queen Street, Little Falls. She stated that the gardener she employed was indisposed due to covid so she gave someone else an opportunity to work in her garden and this man's name was Jafta.

[10] Jafta came three times to work for her, she had accordingly met him three times. On a Sunday night prior to this incident, Jafta sent her a Whatsapp message and said he had no money and no food and could she help him out. She replied and told him to come on Monday. She received the Whatsapp message on 2 August 2020 stating that Jafta had his brother from Malawi and he wanted to show him how to work.

[11] On 3 August 2020, her husband, namely Lewis, got up and made her coffee and she went to open up for the two men that were already standing at her gate. The two people were Jafta and the other person Jafta had mentioned the night before.

[12] When this witness got to the outside room she asked the other man what his name was and he replied his name was Samson. She even remarked "like the strong man", and he replied "yes". The time was around 08h00 in the morning and she was facing Samson who stood between a meter and a meter and a half away from her.

[13] As she was about to open up the room outside, one of the men put his arm around her neck and throat and put his other hand over her nose and mouth so that she couldn't scream. She couldn't breath and passed out, losing consciousness.

[14] At this stage her husband was still inside the house getting dressed.

[15] She regained consciousness and felt this man pushing her down and it felt like he wanted to break her neck. She could hear her teeth/dentures grinding as he pushed her face down into the paving. She managed to pull the one finger on this man's left hand and she bit him on the side of his left palm. This is when she managed to breathe a little. She then lost consciousness a few times and she regained consciousness when she was in the hospital. Her face was badly bruised and damaged. She had lots of cuts and bruises inside her mouth. She was 80 years old when this incident happened. She was also bruised around her scapula

and around her neck. She had two broken vertebrae in her back and two broken ribs. She was kept in the hospital from 23 August to 28 August 2020.

- [16] This witness heard later that her husband had been bludgeoned with a hammer on that day whilst still inside the house.
- [17] She returned to her home a month after the incident had happened and noticed that there was some money missing which she kept in her wardrobe as well as a bag of R5 coins in her side drawer near her bed. A ring of hers was missing as well as her husband's watch.
- [18] As a result of her injuries, this witness cannot stand for long periods as her back gets very sore and she tires easily. She never experienced these problems prior to the assault.

Nicholas Rodrigues Carreira

- [19] This witness stated that he visited [...] Poortjie Avenue in Little Falls which is where his parents stay. On 3 August 2020 he heard a commotion at Queen Street. He saw vehicles of the security company and security officers on the street and they appeared frantic. He returned to the back of the premises of [...] Poortjie Avenue and then walked to the driveway. Inside the property and standing next to the gate he found an unknown person. The witness questioned the unknown person who he was. At first there was no reply. This witness then asked what he was doing in the yard to which the unknown person responded "open the gate". This witness pressed the remote to let this person out.
- [20] This witness was in the company of this unknown person for 30 seconds and he noticed the man was wearing light blue shorts and a navy blue top. He was dark in complexion and his hairstyle was short shaven hair on the sides and spikey dreadlocks on the top. He was also wearing hi-top shoes resembling boots.
- [21] After this witness opened the gate the unknown person walked into the road and as soon as he passed the security gate he started sprinting. This witness ran out into the street and started shouting to get the attention of the security officers. He also pointed to the man that was running.
- [22] The security chased this man. This witness also ran after the unknown person. There were no other people running. At the corner of Poortjie and Rapid's Avenue the unknown person was caught by the security officers. During the chase, this witness stated he never lost sight of the unknown person. The security officers then escorted the unknown person up Poortjie Avenue towards Queen Street.
- [23] The security officers accompanied this witness to check whether there was anyone else hiding at [...] Poortjie Avenue. In that garden, and placed next to a tree, clothes were found which were unknown to this witness. The clothes are those depicted on photos 39, 40, 41, 42 and 43 of Exhibit D.

[24] This witness stated that he would be able to identify this unknown person if he saw him again.

Maruping John Sehoko (“Mr Sehoko”)

[25] This witness stated he is a security officer and on 3 August 2020 he was on duty at Little Falls. At 07h20 he received a panic signal from [...] Queen Street. When he arrived at [...], the owner of these premises told him he had heard a scream next door at [...] Queens Street. This witness went to [...] Queen Street where he found a black male standing inside the premises of [...] Queen street in front of the door of the house. This witness was standing outside the gate when he was joined by the neighbour of [...]. This witness asked the man in the premises of [...] Queen street what he was doing in the yard but he did not respond. Later this man replied that he was a gardener and that his owner had opened up for him. The owner of [...] Queen street then stated that the man standing in the yard of [...] Queen street was not the gardener. That is when the witness went to his vehicle and called for backup. His backup was Eddie Sekwati.

[26] When backup arrived this witness pushed open the gate at [...] Queen street and the man standing in the yard ran to the back of the house.

[27] This witness stated that when he was speaking to the man in the premises of [...] Queen street, he was 6 meters away from him. The man was facing the door of the house but every now and again he would turn towards the witness. The conversation lasted for 4 minutes. During the conversation the man told him that the owner of [...] Queen street was still looking for the tools he would use in the garden and that the owner was busy making tea for him.

[28] This witness stated that the man he saw at [...] Queen street was wearing a pair of jeans and a blue top. He had short hair on the sides and on the top of his head he had short dreads. This man was also wearing a small round hat and he had a schoolbag or rucksack. This witness was shown photo 41 of Exhibit D whereupon he stated the accused was wearing something red on his hands. He was not sure if it was the red gloves that were depicted on photo 41.

[29] This witness pointed to the accused and stated that the accused is the man he saw standing in the premises of [...] Queen street.

[30] After the accused started to run away this witness chased him but the accused jumped over the wall of [...] Queen street into other premises.

[31] Upon entering the premises of [...] Queen street this witness saw a lady lying on the floor and she was bleeding. Although this lady was asked if she was ok, she did not respond.

[32] This witness compiled a sketch which was marked Exhibit E. On this sketch the following points were marked, namely:

Point A is where the security officer was standing.

Point B is where the accused was standing.

Point C is where the lady was found lying on the floor.

Point D is the front door of the house at [...] Queen street.

Point E is where the accused was later apprehended.

[33] This witness stated that where he was standing, namely point A, one could not see the front door which was at position D. The witness also stated that from point A one would not be able to see the lady lying at point C. However, the accused who was standing a meter away from point C would have clearly seen the lady lying on the floor.

[34] This witness stated that when the accused jumped the wall he did not follow the accused. Instead he went back to help the lady who was lying on the floor. It is at this point that this witness heard someone screaming at [...] Poortjie Avenue. This witness saw the accused coming out of the gate at [...] Poortjie Avenue and he and Eddie Sekwati chased the accused and captured him at the corner of Rapids Avenue and Poortjie Avenue. The distance from [...] Queen street to where the accused was caught was approximately 39 meters. When the accused was caught he said his name was Samson Moyo.

[35] When the accused was caught he had changed his clothing that he had worn at [...] Queen street. The clothing the accused was wearing at [...] Queen street was found at [...] Poortjie Avenue. The clothes consisted of a blue top and jeans. At the time of the accused's arrest he was wearing a light blue short trouser and a blue T-shirt. He was still having the same hairstyle which depicted shaved sides and dreadlocks on the top of his head.

Makome Edward Sekwati ("Mr Sekwati")

[36] This witness was on duty as a security officer on 3 August 2020 at Little Falls. He received a call that his colleague Mr Sehoko needed backup at [...] Queen Street. When he arrived at [...] Queen Street he saw a person wearing blue jeans, a blue jacket and a woollen hat which was blue in colour with white stripes. Whilst talking to this person, the woollen hat was continuously put on and removed.

[37] This witness then grabbed the gate at [...] Queen Street and pulled it thereby opening it. This is when the man ran away. This witness gave chase and then saw the lady lying on the floor, her face was covered in blood. He then went to the vehicle to call the paramedics. He, together with Mr Sehoko then walked up and down Queen Street looking for the man who ran away. At this point he saw a white man who informed him an unknown person had been standing in his garden at [...] Poortjie avenue and that when this white man opened the gate the man ran away towards Rapids Avenue. He, together with Mr Sehoko shouted to the man who was running to stop, but he did not. This man was wearing blue boxer shorts and a blue T-shirt. When they grabbed

this man he said “it was not him”. The man they caught at Rapids Avenue was the same man they had spoken to at [...] Queen Street. This man informed them that he had come with Jafta to do gardening at [...] Queen Street.

- [39] This witness identified the person they spoke to at [...] Queen Street and the person they apprehended at Rapids Avenue as being the accused before court.
- [40] This witness was shown, photo 36 on Exhibit D and he stated that the rucksack depicted on this photo was the very same rucksack that the accused was carrying while he spoke to him at [...] Queen Street.
- [41] This witness was shown photo 40 on Exhibit D which depicts blue jeans and a blue top and he answered that these clothes were found at [...] Poortjie avenue and that they were the clothes the accused had been wearing at [...] Queen Street when he spoke to him. The woollen hat depicted on photo 41 of Exhibit D was identified by this witness as being the same hat the accused had been wearing at [...] Queen Street.

Tyrone Wyne Richards

- [42] This witness is a medical doctor who was on duty on 3 August 2020 at the Life, Flora Emergency Unit. He examined Mrs Rosa Pereira and completed the medical J88 form. Mrs Rosa Pereira had multiple bruises on her face, abrasions to her left elbow, abrasions to the upper part of her back, a fracture of the second and third thoracic vertebra, a fracture of the 9th rib on the left side and contusion of the lungs. The CT scan revealed bleeding inside the chest which was related to the fracture of the second thoracic vertebra.
- [43] This witness explained that the fracture of the rib was potentially life threatening in that had the rib pierced the lung of Mrs Rosa Pereira it would have caused her death.

Donovan Matlou

- [44] This witness stated that he is a constable employed at the Honeydew SAPS. On 3 August 2020 he was on duty and he attended an incident at [...] Queen Street in Little Falls. When he arrived he entered the house and found an old white male lying on the floor who had passed away. The man had blood on his head.
- [45] Whilst at [...] Queen Street, a suspect was brought to him. This witness asked the suspect what his name was and the suspect replied it was Samson Moyo and he was from Malawi. This witness pointed to the accused as being the suspect who was arrested on 3 August 2020.

Christiaan Pieter Rheeder

- [46] This witness testified he lived at [...] Queens Street which is next door to [...]. He heard his dog barking and he went into his yard and whilst going back into his house he heard a noise like a thump from [...] Queens street which sounded similar to the sound of something heavy being moved around. He then decided to summon the security company.

[47] When the security arrived he accompanied them to the front gate of [...] Queen Street whereupon they found a person inside the yard of [...] Queen street. There was initially only one security officer who questioned this man. The man inside the yard of [...] Queen street replied he was a gardener. This witness informed the security officer that the man was not the usual gardener who worked at [...] Queen street. At this point another thumping noise was heard inside the house of [...] Queen street. When the second security officer arrived, the questioning of the man in the yard of [...] Queen street continued and this witness could see that from the demeanour of the second security officer that he was now more alert and that he was trying to peer into the gate to get a better view. That is when the man in the yard started running away towards the back of the house and the security guards started pushing the gate. This witness did not give chase. He stood at the gate and never saw anyone else exiting the gate of [...] Queen street.

[48] This witness was able to see the person that was caught by the security officers and he immediately noticed that the man was wearing short trunks which looked more like underpants than normal clothes. He also noticed a blood stain on the lower leg.

Captain Johannes Paulus Van Wyk

[49] This witness stated he is a captain stationed at Honeydew SAPS. He also attended the scene at [...] Queen Street on 3 August 2020. Constable Matlou showed him the body of the deceased who was in the main bedroom.

[50] This witness then proceeded to the Flora Clinic where he obtained the statement from Mrs Rosa Pereira. He did this as he was afraid Mrs Rosa Pereira may die as she was severely injured. Mrs Rosa Pereira mentioned only 2 names to him, namely, Jafta and Samson. He stated even though the name Samson does not appear in the statement of Mrs Rosa Pereira, this witness was adamant that she had mentioned this name.

Warrant Officer Bongani Zamokwakhe Ngcobo

[51] This witness stated he is a warrant officer stationed at the Honeydew SAPS. When he arrived at the scene, the accused had already been arrested. The accused was wearing a blue T-shirt and short pants blue in colour. This witness questioned the accused whether the clothes found at [...] Poortjie avenue were his and the accused said they were not his clothes. The accused told him the clothes he was wearing when he was arrested were the same clothes he had on when he arrived with Jafta to do gardening work at house [...] Queen Street.

[52] This witness asked the accused if the clothes he was wearing were suitable to do gardening work, the accused replied that his work suit was in the bag that Jafta had been carrying. The accused also told him that Jafta ran away when the security officer came. When this witness asked the accused why Jafta ran away the accused was evading the question. When this witness asked the accused how he left the property at [...] Queen street, the accused also evaded this question.

[53] The accused took this witness to where Jafta lived but the owner of those premises said Jafta had left.

[54] This witness stated that a hammer had been used to kill the deceased and that this hammer was found with blood on it. The hammer was taken to forensics.

[55] The state then closed its case and the accused came to testify.

The accused - Samson Moyo

[56] The accused stated that prior to August 2020 he did not know Jafta. In the month of August 2020 he was residing in Honeydew at Plot 52. His version is that he met Jafta on 3 August 2020 and that Jafta offered to pay him R300 for the day. He accompanied Jafta and another man to Jafta's bosses' place. They alighted a taxi on route to Clearwater Mall and they then walked from there to [...] Queen Street. The accused was speaking in Zulu to Jafta. The accused was unaware that Jafta was a Malawian citizen. He only became aware of that when he took the police to Jafta's home and a Malawian passport belonging to Jafta was found. The accused described the 3rd person as being the same height that he was. When they arrived at the

gate at [...] Queen street an old white lady came to the gate and unlocked the gate for all 3 of them. The accused was adamant 3 people arrived and not 2. He also stated he never gave his name to the old lady. The white lady told them to go and change while she spoke to Jafta and showed him what to do.

[57] The accused stated he then entered an outside room which he pointed as being depicted on photo 1, 2 and 3 of Exhibit D.

[58] The accused stated he removed his top which had the inscription "Adidas Valentine" as well as his blue jeans. He was wearing a blue short beneath his trouser.

[59] The accused placed the rucksack he was carrying on the floor and at this stage he heard a noise outside as if someone was crying. He went outside and left his trousers on the rucksack in the room. The crying appeared to be close to the house. He called for Jafta and walked towards the gate. When he got to the gate the security vehicle arrived and the security came out and asked him his name and how he had got there. He told them his name was Samson. He also informed the security officers that they were 3 people who had arrived at [...] Queen street and that the old lady had opened the gate for them and that this old lady was now inside.

[60] The accused stated that the 3rd person that he had arrived with then asked the accused who he was talking to and he replied he was talking to the security. The 3rd man looked scared. The accused stated that where the security were standing they could not see this 3rd person, and neither could this 3rd person see the security. The security were only able to see this 3rd person when the 3rd person ran away, this 3rd person had been standing at the door depicted on photo 5 of Exhibit D. When this 3rd man ran away the security got into the

vehicle and drove after the 3rd person in an attempt to apprehend that person.

- [61] The accused stated he only saw 2 security officers, he did not see the neighbour from [...] Queen Street.
- [62] The accused was adamant he did not run away. He remained at the gate. He also did not see a lady lying on the floor.
- [63] The accused stated the security came to the gate 4 times, they were coming and going. On the 4th occasion the accused opened the gate and Jafta came behind him and asked why was he not running away. Jafta then went past the gate and turned round the bend and the accused did not know where Jafta hid. Jafta was wearing a big yellow jacket and he was running very fast. The accused did not believe he needed to run away.

EVALUATION OF THE EVIDENCE

- [63] The witness Mrs Rosa Pereira impressed the court. She recalled everything that transpired that day with much detail. She was adamant that there were only 2 people who arrived that day and she was adamant that the accused did tell her his name was Samson. She even remarked during the cross examination that she had a good memory. This witness did not state it was the accused who strangled her as she said the person who did it to her was standing behind her. As a result this witness did not implicate the accused falsely. This witness was a single witness and the cautionary rule has been applied to her evidence. Having considered her evidence, I am convinced that in the absence of any contradictions in her evidence, or any motive to falsely implicate the accused that she was a credible witness and I accept her evidence as being true and correct.
- [64] Nicholas Carreira, Mr Sehoko and Mr Sekwati also impressed the court with their evidence. This court could find no reason for Mr Sehoko and Mr Sekwati to falsely implicate the accused as being the person they had seen in both the yards of [...] Queen street and later at the corner of Rapids and Poortjie avenue where he was apprehended. Neither could this court find any reason why Nicholas Carreira would want to falsely implicate the accused. The evidence of Dr Richard was not disputed. Constable Matlou, Christiaan Rheeder, Captain Van Wyk and warrant officer Ngcobo also impressed this court.

Contradictions amongst state witnesses

- [65] It is true that Mr Sehoko and Mr Sekwati testified that the accused was standing at point B on the sketch plan marked exhibit E, whereas Mr. Reeder testified that the person the security guards were talking to was standing just a foot away from the gate at [...] Queen street. This is not a material contradiction as Mr Rheeder was standing behind the wall and did not have a clear vision of the man inside the yard. Each witness may view a scene from different angles.

Common cause

[66] It is common cause that:

1. The accused was wearing blue jeans when he arrived at [...] Queen street.,
2. He had short dreadlocks and his hair was shaven on both sides.
3. He arrived at the house of Mrs Pereira with Jafta.
4. The accused had a conversation with the security guards who were standing outside the gate of [...] Queen street
5. From the house [...] Poortjie avenue the accused ran away from the security and he was caught by the security officers.

The accused

[67] The accused did not impress the court. There are certain aspects of his evidence which are contradicted.

1. The accused stated that he did not leave the yard at [...] Queen street, yet later in his evidence in chief he stated that he went to the house at [...] Poortjie avenue which is depicted as point F on exhibit E.
2. The accused initially says he never saw the man at [...] Poortjie avenue, then later he says he did see him speaking to the security guards.
3. During cross-examination the accused stated he did not run away, yet in his evidence in chief he stated he did run, yet he says he ran towards the security to tell them about Jafta. Yet during cross-examination he admitted that he did run from the security officers as Jafta had told him that he must run away so he was scared. Later he said he was scared because Nicholas Carreira was shouting. If he had not done anything this Court cannot understand what he would be scared of.

Probabilities

[68] When considering a criminal case it is important to consider the totality of the evidence and then to assess the probabilities emerging from the case as a whole. The court must evaluate the evidence of the State and the defence.

[69] In *S v Mthethwa* 1972(3) SA 766 (A) at 768 a-c Holmes JA said 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the

mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification

parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities”.

- [70] The incident occurred in broad day light and Mr Sehoko and Mr Sekwati were in close proximity to the accused when they spoke to him at [...] Queen street. They had sufficient opportunity to observe the accused before he ran away. The court has as already declared these two witnesses as honest witnesses. The circumstances, under which the identification was made, were favourable to amount to a reliable identification.
- [71] Both Mr Sehoko and Mr Sekwati corroborate each other that the accused whilst at [...] Queen street, before he ran away, was wearing blue jeans and a blue top and he had a hat which the accused was continuously removing and putting back on his head. Both witnesses state that the man at [...] Queen street was dark in complexion and that he had short/shaven hair on the sides with short dread locks on the top of his head and that he was carrying a rug sack. Nicholas Carreira also corroborates Mr Sehoko and Mr Sekwati that the man he saw in the yard at [...] Poortjie avenue had shaven hair on the sides and dread locks on top. Both Mr Sehoko and Mr Sekwati state that when they caught the accused he was wearing blue shorts and no longer the long jeans.
- [72] The clothing of the accused as noted by Mr Sehoko and Mr Sekwati is to a certain extent confirmed by the accused in that in the accused's evidence in chief he states when he arrived at work he was wearing jeans and that below the jeans he was wearing blue shorts. The accused also stated that when he entered the room to change he placed his trousers on the rucksack and then he heard a scream and he went out towards the gate to look for Jafta. If this is the case then both Mr Sehoko and Mr Sekwati would have seen the accused wearing these blue shorts before he ran away, however, they did not say that. Both Mr Sehoko and Mr Sekwati corroborate each other that the accused still was wearing the long jeans when they saw him within the yard at [...] Queen street. Furthermore, the accused never stated that he went back to put the jeans on, so by implication he must have been wearing the shorts according to his version when he was first seen by the security guards. However, this version of the accused wearing shorts when the security officers first saw him was never put to either Mr Sehoko or Mr Sekwati. When asked by the State Advocate why this version was never put to either Mr Sehoko or Mr Sekwati the accused replied “I don't know”. It is important to note that on photo 3 and photo 4 of exhibit D, which is the room where the accused allegedly changed and took off his trousers, there is no jeans in this room. This means they were never left there. In addition, if he did put his trousers on top of the rucksack that he was carrying in the room depicted on photo 3 and 4, then it is unexplained why his rucksack was photographed in photo 37 of Exhibit D as lying outside the garden of [...] Queen street and not inside the room depicted on photo 3 and 4 of exhibit D. It was never put to the security or Constable Donovan Matlou that they tampered with the scene before photographs were taken, in fact it makes no sense for the securities to have moved the

rucksack from inside the house and place it outside. The accused also never moved the rucksack, therefore his version that he left it in the room depicted on photo 3 and 4 of exhibit D is improbable. The Court rejects this version of the accused taking off his jeans and putting it on the rucksack and leaving it in the change room and then wearing shorts whilst he was in the yard at [...] Queen street as completely false and not reasonably possibly true.

[73] The clothes found in the garden at [...] Poortjie avenue were a pair of jeans and a blue top as well as a woollen hat which the witness Mr Sekwati stated he saw the accused was wearing at [...] Queen street. These clothes are the same clothes that were found at [...] Poortjie avenue. The man identified by Mr Sehoko and Mr Sekwati sported a hairstyle which had shaved sides and short dread locks on top of the head. Nicholas Carreira also saw a man sporting the same hairstyle in the property at [...] Poortjie avenue. If the same clothes were found at [...] Poortjie avenue which Mr Sehoko and Mr Sekwati saw the accused wearing and due to the fact that the description of the accused's hairstyle seen by Mr Sehoko and Mr Sekwati is the same hairstyle which Nicholas Carreira saw the man having at [...] Poortjie avenue, then the only reasonable inference the court can draw is that it is the accused who was seen at [...] Queen street and who later entered the yard of [...] Poortjie avenue and who later removed these clothes leaving them behind in the garden at [...] Poortjie avenue. At no stage did the accused state that either Jafta or this 3rd person had a hairstyle that was shaved on the sides with dread locks on top, therefore, the only person who had this hairstyle and who was seen by the 2 security officers in [...] Queen street and by Nicholas Carreira inside the yard at [...] Poortjie avenue was the accused and no one else.

[74] The accused admitted in cross-examination that he had a hair style which consisted of shaved sides and short dreads on the top. The accused also stated that he never saw the hairstyle of the 3rd person as that person had a hat on all the time. There is no reason for Mr Sehoko and Mr Sekwati to falsely implicate the accused by stating that the accused was the one who had the hairstyle as mentioned in their testimony. Accordingly, the inability of the

accused to positively give any credible identifying features of this 3rd person makes his version improbable. The fact that this version of the 3rd man wearing the woollen hat was never put to either Mr Sehoko or Mr Sekwati suggests that this was a recent fabrication of the accused and accordingly the court rejects it as false.

[75] The accused's version that he never saw Mr Nicholas Carreira at [...] Poortjie avenue is rejected by this court as false. In fact, during the cross-examination the accused stated that Nicholas Carreira did alert the police. It is common cause Nicholas Carreira did not know the accused prior to this incident, therefore there is no reason for Nicholas Carreira to have alerted the security officers and to point out the accused if he did not suspect the accused of having been in the yard at [...] Poortjie avenue. This court finds it was the accused who was in the yard at [...] Poortjie avenue and whom Nicholas Carreira let out of the yard by opening the gate.

- [76] The version of the accused that he stood outside the gate of the property situated at [...] Poortjie avenue was never put to Nicholas Carreira for his comment. When he was confronted with this version the accused stated he was waiting for his turn to come and explain this. The fact that the accused's counsel never put it to Nicholas Carreira is because the accused never told his legal representative and accordingly this amounts to a recent fabrication and is rejected by this court as false.
- [77] There is an additional piece of clothing that this court would like to refer to and this is the red garden gloves that were also found at the premises of [...] Poortjie avenue. The accused says he never saw these gloves on the 3rd man that ran away, he only saw that this 3rd man wearing the woollen hat that was found in photo 41 of exhibit D. Mr Sehoko stated that he saw that the accused had something red on his hands. The fact that these gloves were found with the other items of clothing at [...] Poortjie avenue suggests to this court suggests that it was the accused who was wearing them.
- [78] The accused's version is that when the security officers asked him where the owner of the house was the accused replied that the lady was in the house. This version is similar to what Mr Sehoko and Mr Sekwati say was the response by the accused. The only additional aspect which the two security officers state is that the accused told them what his name was and that the accused informed that that the lady was inside the house making tea. The court rejects this as false as immediately after he ran away, both Mr Sehoko and Mr Sekwati found the lady lying on the floor severally injured and motionless.

According to Mr Sehoko the accused was standing at point B on exhibit E while he was talking to him. The old lady was lying at point C on exhibit E. This short distance of roughly a meter between where the accused was standing at point B and point C where Mrs Rosa Perreira was lying makes it impossible for the accused not to have seen Mrs Rosa Perreira. Accordingly, the accused's version that he did not see her is rejected by this court as false and not reasonably possibly true.

- [79] The accused stated that there was a third person who ran away and that the security officers must have seen this person. The accused also states that Jafta also ran away and that he last saw him when Jafta reached the T-junction and that he was wearing a yellow jacket. Firstly, in regard to this version of Jafta wearing a yellow jacket he would have been highly identifiable. In addition, if he was running at the T-junction and he ran out of the yard of [...] Queen street, then the neighbour at [...] Queen street would have seen Jafta running out of the yard as the neighbour remained at the gate. Mrs Rosa Perreira was a highly credible witness and I find no reason to dispute that she saw only saw 2 people, namely the accused and Jafta that morning. None of the State witnesses saw Jafta or this 3rd person running away which means either Jafta managed to escape before the security arrived and that possibly the accused was still trying to finish up what had been started. Therefore, the version of the accused that there were 3 people and that the other 2 other men ran away whilst the accused remained at [...] Queen street is rejected as false and not reasonably possibly true.

- [80] The accused states that he was arrested at the cul de sac in Queen street. His reason for returning back to the house at [...] Queen street was “My thinking was that the security would infer I was running away so I decided to go back to the house”. The court rejects this as false and not reasonably possibly true as Mr Sehoko, Mr Sekwati and Nicholas Carreira all saw the accused was caught at the corner of Rapids Avenue and Poortjie avenue. In addition, Mr Rheeder who was living at [...] Queen street did not see the accused being arrested at the cul de sac in the street where he lives.
- [81] The accused’s version is that he did not know anything untoward that was going on at [...] Queen street. The accused himself stated in his evidence in chief that he was thinking of going to the security to tell them that Jafta had run away. If the accused was aware of Jafta running away and another 3rd person running away, then the opportune time to tell anyone was when he was being questioned by the 2 security officers at the gate. Yet he did not do this. The question this court must ask is why did he not. Instead according to his evidence he just went towards [...] Poortjie avenue and then he walked back to [...] Queen street. This version does not make sense, and the reason why it does not make sense is because the accused did not want to alert the security as to what was going on at [...] Queen street as he was involved in the commission of the offences that had occurred there. In addition, if he wanted to help the security to find Jafta, then why did he run away forcing the security to chase him. The only inference the court can make is that the accused ran away because he was involved and was caught at the scene. The inability of the accused to point out on the sketch, namely exhibit E, where Jafta came out of the house at [...] Queen street suggests to this court that it was a mere fabrication on the part of the accused. Accordingly, the version of the accused wanting to tell the security about Jafta is rejected as false and not reasonably possibly true.
- [82] There are two main questions that this Honourable Court has to decide. These are:
1. Whether the accused took part on the attack of the complainant and the deceased.
 2. Whether the accused is guilty of the crime of murder and attempted murder based on the doctrine of common purpose.

FINDINGS

- [83] It is true that there is no evidence that the accused and Jafta knew one another prior to the 3rd August 2020. It is also true that there is no evidence that there were any weapons that were brought to the residence by the accused or that any fingerprint evidence or DNA evidence was obtained to link the accused to the commission of the offences.
- [84] The defence counsel also argued that the fact that the accused ran away from the scene does not necessarily mean that there was common purpose to commit any crime.
- [85] This Court must look at the context in which the accused ran away, namely:

1. The accused was aware that Mrs Rosa Pereira was lying motionless on the floor very close to him.
 2. The accused failed to alert the security officers of Mrs Rosa Pereira lying in the yard and failed to ask for assistance to help Mrs Pereira.
- [86] This is not the behaviour of someone who wants to exculpate himself. On the contrary it depicts the actions of someone who wants to conceal the commission of a crime.
- [87] What is clear is that the accused was either guarding the outside of the property while the crimes were being committed or he had committed them himself and it was too late to leave the property before he was noticed by the security officers. If the accused was as innocent as he says he was, why would he run away and jump over the wall of [...] Queen street into the property of [...] Poortjie avenue. In addition, the removal of his jean trouser and blue top and the fact that he ran away from the security officers wearing shorts that resembled underpants, demonstrates the actions of someone who did not want to be recognised.
- [88] This is not the behaviour of an innocent person who wanted to alert the police as to the crimes that had been committed by Jafta at [...] Queen street. His actions are more of someone who was caught red handed and accordingly had to escape.
- [89] The doctrine of common purpose allows for the imputation of the conduct of one party (the immediate party) to another party (the remote party) in either of two situations.[1] The first is where there is an agreement or 'mandate', express or implied, between those parties to do the act in question, and the act falls within the borders of what has been so expressly or impliedly agreed upon[2]. The second is where, even if no actual agreement, whether express or implied, existed between the parties, the remote party actively associated himself with the conduct of the immediate party by actually committing some act of association with the intention of associating himself with the conduct of the immediate party[3]. In both forms of common purpose, it must be shown that the requisite mens rea or fault was present in respect of the remote party[4]. Where mens rea in the form of intention (or dolus) is required, as in the case of murder, either dolus directus or dolus eventualis will suffice[5].
- [90] In *S v Mgedezi* 1989 (1) SA 687 (A) the court stated that in order for common purpose to be proved certain factors should exist:
1. The accused must be present where the violence was committed;
 2. He must have been aware of the assault on the victims;
 3. He must have intended to make common purpose with those perpetrating the assault;
 4. He must have manifested his sharing of the common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;

5. He must have had the requisite mens rea.

[91] In the case of 'active association', it must be shown, inter alia, that the remote party was not merely present at the scene but that he committed some act of association and that he intended to associate himself with the act of the immediate party[6].

[92] The Supreme Court of Appeal warned that 'care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group'[7].

[93] Mere approval of the conduct of others is not enough to constitute active association[8]. There must be a close proximity between the conduct constituting the active association and the result, and the conduct must be significant and not a limited participation removed from the actual execution of the crime.

[94] In the present case the accused has not played open cards with the court and accordingly this court must make certain inferences as to his involvement from the set of facts presented before this court. This form of inferential reasoning is based upon the available circumstantial evidence. The cardinal rules of logic were set out in the case of *R v Blom* where the learned Watermeyer JA stated that:

'(1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then 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.'

[95] Mrs Rosa Periera stated that Jafta sent her a whatsapp the night before to state that his brother was in South Africa and that he came from Malawi and could he bring him to work the next day. The accused's version that Jafta was unknown to him prior to the incident is improbable as it cannot be mere coincidence that the person he brought to work was a Malawian. As a result, the Court can infer that the accused was known to Jafta prior to this incident. The fact that Jafta had mentioned he would bring a second person to work the next day implies that Jafta and the accused had discussed the lay out at [...] Queen street and what would transpire on 3 August 2020. As stated by Mrs Rosa Pereira, immediately after Jafta and the accused had entered the premises at [...] Queen street and after she had opened the outside room she was immediately attacked from behind.

[96] I find that the accused was present when Mrs Rosa Pereira was grabbed from behind as it happened almost immediately when he and Jafta entered the premises at [...] Queen street. In no way did the accused attempt to stop what was happening. Neither did the accused call out for help to stop the attack from happening. Whether or not it is the accused or Jafta who grabbed Mrs Rosa Pereira from behind, thereby strangling her and assaulting her, it is clear that the accused must have been aware of the assault on Mrs Rosa Perreira. In addition, due to the close proximity where the accused was seen standing when the security officers spoke

to him and where the lifeless body of Mrs Rosa Perriera lay, it is clear he was aware that she had been severally assaulted and that she could die. Although I cannot find that the accused either committed the act of strangling

Mrs Rosa Perreia himself, what the court can find is that at most he intended to make common purpose with the assault on Mrs Rosa

Perreira. Whether it is the act of directly administering the blows to Mrs Rosa Periera or just standing guard while Jafta did this, it is clear that there was conduct on the part of the accused and that there was mens rea in the form of dolus eventualis that Mrs Rosa Perreira could be killed due to the severe strangling and suffocating actions applied to her elderly body and the many blows administered to her body which fractured the vertebra and rib. I am accordingly satisfied that the accused actively associated in the commission of attempting to kill Mrs Rosa Perreira.

[97] As regards the count of murder, it is important to note that in murder cases there will be a causal connection between the conduct of the immediate party and the death of the victim, and since the conduct of the immediate party is attributed to the remote party, a causal connection between the actual (i.e. non-attributed) conduct of the remote party and the death of the victim need not be proved. It should be noted that the doctrine of common purpose lends itself to use in crimes that are known in our law as 'consequence crimes', where a causal nexus is required to exist between the conduct of the accused and a specific, prohibited result. Since the doctrine has the effect of imputing to one party (the remote party) the conduct of

another (the immediate party), the doctrine has great efficacy in helping the prosecution to prove its case when it is unable to

establish a causal nexus between the accused's own conduct and the result in question.

[98] If two or more persons decide to murder Y, for all of them to be liable as co-perpetrators it is not necessary that each of them should stab Y or fire a shot at him. It is not even necessary for each of them to touch Y, or be present at the scene of crime. There may, for example, be a causal connection between X's act and Y's death even if he merely transports Z to and from the scene of crime, or supplies him with information about Y's whereabouts, or stands next to him while he attacks Y, ready to help if necessary, or stands guard outside the building while Z does the killing, or merely encourages or incites him to shoot Y, or merely gets him to do it. To be merely a passive spectator or witness of the murder is, of course, insufficient[9]. It should be noted that the crucial requirement is that the persons must all have had the intention to murder and to assist one another in committing the murder[10].

[99] Once again, due to the accused not playing open cards with the court, this court needs to make certain inferences on the circumstantial evidence that has been presented.

[100] The post-mortem report states that the cause of death was multiple blunt force injuries to the head and face. As a result, this was not a single blow, but many blows. This must have taken a considerable amount of time. If this took some time, the question the court must

ask is what was the accused doing during this time. Whether or not it is the accused or Jafta who administered the deadly blows to the deceased, the fact remains that the accused knew what was going on because if it is Jafta who had administered the blows then because this murder happened inside the house the accused must have noticed that Jafta had vanished and gone inside the house which would have been abnormal in the circumstances. Furthermore, because Jafta and the 3rd person, according to the accused's version, came out looking scared then the accused should have realised something bad had happened inside the house and should have started screaming for help. He did not do this, instead when asked by the security officers where the owner was, he lied by saying she was inside the house making tea. Whether it is the accused who administered the blows to the deceased or not, this court finds there is enough evidence at least to find that he actively associated himself with the heinous crime that was being committed inside the house.

Count 1

[101] In respect to count 1, on the basis of common purpose the accused is found guilty as a co-perpetrator of the crime of murder as it is clear that there was an unlawful killing and that due to the number of blows inflicted to the head and face of the deceased there was an intention to kill the deceased. Even if the court is wrong as regards the culpability of the accused in respect to count 1, there can be no doubt that the accused is guilty of being an accessory after the fact to the crime of murder in that he concealed what had happened inside the house. Accordingly, on count 1, the accused is found guilty as charged for the crime of murder.

[102] In respect to count 2 the evidence presented by the doctor confirms that due to the old age of Mrs Rosa Perreira and due to the serious injuries that were inflicted on her, she could have died. Once again, it is not clear whether the accused or Jafta inflicted these injuries, however, on the basis of common purpose the court finds that the accused actively associated himself with the assault that was taking place and that on the basis of *dolus eventualis* he could have foreseen that the victim may have died. Accordingly on count 2 the accused is found guilty of attempted murder of Mrs Rosa Perreira.

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ACTING JUDGE OF THE HIGH COURT

Date Heard

2 February 2022

Judgment

handed down 4 February 2022

Appearances:

On behalf of the State Adv Ngubane

On behalf of the Accused Adv Milubi

[1] See *Shange & others v S*

[2017] 3 All SA 289 (KZP) at [45], where the court distinguished clearly between the two situations; see also *S v Sithole & another* (unreported, GP case no 777/15, 20 February 2017) at [24]; *Tshikila & others v Minister of Police* (unreported, GJ case no 16/06499, 23 April 2019) at [12]).

[2] *McKenzie v Van der Merwe* 1917 AD 41 46; *R v Duma & Another* 1945 AD 410 at 415; *R v Mkize* 1946 AD 197 at 205; *R v Shezi & Others* 1948 (2) SA 119 (A) at 128.

[3] *S v Safatsa & Others* 1988 (1) SA 868 (A), *S v Mgedezi & Others* 1989 (1) SA 687 (A) and *S v Singo* 1993 (1) SACR 226 (A).

[4] *S v Sithole & Another* (supra) at [24] and [26].

[5] *S v Mgedezi & Others* at 705; *S v Papu & Others* 2015 (2) SACR 313 (ECB) at [14].

[6] *S v Le Roux & Others* 2010 (2) SACR 11 (SCA) at [17]–[19] and *Scott & Others v S*

[2011] ZASCA 121 (unreported, SCA case no 473/10, 31 August 2011).

[7] *S v Safatsa & Others* 1988 (1) SA 868 (A) and *S v Mgedezi & Others* 1989 (1) SA 687 (A). In *S v Toya-Lee van Wyk*

[2012] ZASCA 47 (unreported, case no 575/11, 28 March 2013).

[8] *S v Dewnath*

[2014] ZASCA 57 (unreported, SCA case no 269/13, 17 April 2014).

[9] *S v Barnes* 1990 (2) SACR 485 (N) at 419b

[10] See *S v Nkabinde* 2017 2 SACR 431 (SCA)

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