

SOUTH AFRICA / JUDGMENT

S v Sejake (28/2022) [2022]

ZAFSHC 265 (15 September 2022)

[2022] ZAFSHC 265

COURT

Free State High Court, Bloemfontein

BEFORE

Africa

CASE / FILE NUMBER

28/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

Number: 28/2022

Reportable:

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

THE

STATE

versus

MOLEFI

SOLOMON SEJAKE

Accused

HEARD

ON: 14

SEPTEMBER 2022

CORAM: AFRICA

AJ

DELIVERED

ON: 15

SEPTEMBER 2022

JUDGMENT

INTRODUCTION

[1] MOLEFI SOLOMON SEJAKE, an adult male (“hereinafter referred to as the accused”) is charged with:

MURDER; read with the provisions of section 51(1)[1] of the Criminal Law Amendment Act 105 of 1997, (“the CLAA”), as amended[2]. It is alleged that on or about 24 – 25 September 2021, and at or near 14830 Zamdela, in the district of Sasolburg, the accused did unlawfully and intentionally kill TSREBO ALINAH KGMASE, an adult female person, (“hereinafter referred to as the deceased”)

The state will allege pre-meditation.

[2] The State is represented by Adv. Georgi and the accused is represented by Adv. Seitheisho from Legal Aid South Africa.

[3] The court explained the applicability of the provisions of section 51(1) of CLAA 105 of 1997, as amended as well as Competent verdicts in terms of the provisions of section 256,258,259, and 92(2) of the Criminal Procedure Act 51 of 1977 (“CPA”).

[4] The accused indicated that he fully understood the implications of the abovementioned sections and Adv Seitheisho also confirmed that he fully explained same to the accused, which he understood.

[5] The charge was put to the accused and he indicated that he understood the charge levelled against him. He pleaded not guilty thereto.

[6] The legal representative confirmed that the plea of not guilty was in accordance with his instructions.

In terms of section 115 of CPA 51 of 77, the accused gave the following plea explanation:

1. On the morning of 24 September 2021, the deceased and the accused woke up and the accused assisted with household chores.
2. In the afternoon the accused went to the ATM to check if his salary was deposited into his account.
3. His salary was not deposited and he went back home.
4. The deceased borrowed R100 in order for the accused to go to Sebokeng.
5. The accused left his bank card with the deceased. Thereafter the accused left for Sebokeng, arriving at 17h00, to attend a funeral.
6. Between 24 September 2021 at 17h00 and 26 September 2021, the accused was at Sebokeng at a relatives’ funeral.

7. Accused denies that between 24 September and 26 September, that he caused the death of the deceased, by stabbing her with a knife.

[7] The following Exhibits was admitted into evidence by the defence in terms of section 220* CPA 51 of 1977:

A

- Photo Album*

B - Declaration of death*

C

- PM Report*

D

- Receipt

E1

- Notes on Pointing Out

E2

- Record of Movements

E3

- Photos 1 to 21

F1

- Notice in terms of section 212B CPA 15 of 1977

F2

- Notice in terms of section 212B (3)

[8] AMOS MOTAUNG (“Amos”) testified under oath that he resides in Sasolburg and knows both the deceased and the accused, for about 2 (two) years. The deceased

referred to him as brother-in law and he saw the deceased on the evening of 24 September 2021, where at some stage he had remained

alone in the house with the accused and the deceased. Also present was Nkosi, Nombulelo, Modiye and the accused.

[9] When asked if he knew anything about a bank card or a knife, Amos said “no”. He confirmed that the state had a consultation with him and he was given his statement to peruse. When the state indicated that she wishes to bring an application to declare the witness hostile, Amos said on resumption of proceedings that he wanted to tell the truth.

Amos said that on that evening he was left with the accused and the deceased, whilst the others had left to buy liquor. The accused had given Nombulelo and Nkosi the Capitec Card to buy more liquor at the tavern. By then, the deceased was seated on the couch, asleep, resting her head on her right hand. The accused was seated next to him on another couch, when the accused suddenly stood up, walked straight to the deceased and stabbed her with a knife that he took from his pants pocket. When Amos tried to stop the accused, he pushed Amos away. The accused left without saying anything.

- [10] The deceased was lying on the dining room floor after being stabbed, as depicted on photos 3,4,5 and 6. Amos confirmed that he too consumed alcohol that night, namely Black Label and pineapple beer. He confirms that he was drunk having consumed a 750ml of beer and thereafter continued drinking pineapple beer. According to Amos, the accused could still walk and talk normal, but from his face one could see that he (accused) had been drinking. He never had any prior problems with the accused but he was afraid of the accused, after what had transpired in his presence. Amos said that initially when saying that he knew nothing of the card or knife, he was confused and afraid of the accused.
- [11] During cross examination Amos was asked whether he was still afraid to which he responded that he was not normal in his head. Amos went on a tangent in explaining that he once had a head injury. When the court enquired clarity of the word “normal”, whether it meant “slow” or “mental illness” the accused explained that sometimes when he engages in a conversation, his mind “drifts off”. When asked how this condition is affected when he consumes alcohol, Amos said that when he consumes alcohol, he will simply walk off.
- [12] He said that he arrived around 6h30 on the evening in question, where he found people seated inside the house consuming alcohol and he can’t say whether there were other people inside the remainder of the house. When it was pointed out that he did not mention the accused as one of the people present inside the house when he arrived, Amos insisted that the accused was present and he that he send Nombulelo to go and buy liquor. When asked to identify a person by the name of George, Amos confirmed that he knows George by the name of Vakele. Amos could not say if he was present in a different part of the house. When it was put to him that the card was given to George, Amos responded that he was not sure if it was given to Nkosi

and Nombulelo because Nkosi and Nombulelo said they were going to the shop, hence he thought that they also received the card to go buy the liquor. Amos said that he did not see the Capitec card, and he overheard a voice saying that they must get some liquor but he knows nothing about a PIN number.

- [13] When asked to describe the knife he saw, Amos said that the way the accused was holding the knife, he only saw the blade protruding, which was ±9cm in length. When asked to describe what accused wore on the night in question, Amos said he cannot recall whether it was a long or short pants, but the pants had pockets on the side and beige in colour.

- [14] When asked where on the body the deceased was stabbed, Amos demonstrated and showed that it was the stomach and upper body area. Amos said that he went and stood at the gate looking for the people who was sent to buy the liquor but he did not know where they had gone to, so he decided to go home and sleep.
- [15] Amos did not notice anything on the accused clothing but said when the accused pushed him on the chest, a bloodstain remained on his clothing as the accused had pushed him with the hand still holding on to the knife. Amos said that he chose to go home because he was confused as it was the first time he had seen something like that.

The version of the accused that he was not present on the night in question, was denied by Amos.

- [16] PHILLEMONT SERAME MBELE (“Phillemon”) testified under oath that he resides at Zamdela in Sasolburg and was at his residence on 24 to 25 September
2021. He was home consuming alcohol in the company of his girlfriend, when the accused arrived at his place after midnight. He has known accused since 2008 and they are friends. When he enquired about the bloodstains on accused’s shorts, the accused informed him that he was accosted by robbers. Phillemon said that the accused had a knife was ±20-25 cm in length but he did not look if the knife had any blood on it. The accused requested to stay over and left the next morning around 7h00. Phillemon said that until today he and the accused are still friends and they never had any problems since 2008.
- [17] During cross examination Phillemon conceded that there is a difference between the colour white and beige but noting more emanated from cross examination.
- [18] VIOLET MOSIA (“Violet”) testified under oath that she resides in Phase 2, Sasolburg. The deceased is known to her as Alinah and they are neighbours. She confirms that she was at the deceased place on the 24th of September 2021 and present was the accused, Nombulelo, Vakele, Nkosi and Mogotsi (“Amos”). She explained that Aletta is known as Nombulelo; George is Vakele and Jacob Booie is known as Nkosi.
- [19] Violet said that the accused and the deceased was in a relationship and living together. On the day in question, she went to the deceased place where they were drinking, including the accused. They were all having a good time and at some stage the accused ask them to go buy more liquor. The accused gave Nombulelo and Vakele his bank card and they left. Violet confirmed that exhibit “D” was the receipt they received when they bought the liquor at the tavern. When they left, the deceased was left slouching on the couch, in the presence of the accused, Nkosi and Mogotsi (“Amos”). On their way back, near the neighbours’ gate, they saw the accused, who walked fast past them, saying nothing. When they entered

the house, they saw the deceased lying on the floor, covered in blood. They did not see who killed the deceased and Violet never had any problems with the accused that she knew of.

[20] During cross examination, Violet said that she arrived around 19h00 at the deceased place, and they all drank pineapple beer. Around 23h00 that night they went to purchase the beer and she was no longer sober. She said that Nombulelo was given the card and the accused wrote the PIN on Vakele's hand. Violet intimated that she did not see the accused exit the gate at the deceased place but that the neighbours gate was ±15 meters away from the deceased' gate. She confirmed that a person standing at the neighbours gate can see someone exit the deceased gate. They did not find Amos or Nkosi

inside the house when they returned from the tavern.

Violet denied the version of the accused that he was not in their company on the day in question.

[21] JACOB BOOI ("Nkosi") testified under oath that he has known the accused and the deceased for many years. They never had any problems and on the 24th of September 2021, he went to the accused place, where they consumed alcohol. Present was Aletta, Vakele and Amos. The deceased was asleep on the couch, slouched to the side. When the accused noticed that they ran out of beer, he sent Aletta and Vakele to buy more liquor. Accused wrote them the PIN. Himself, Amos and the accused remained behind, but his daughter came to fetch him, before the others returned with the liquor. He does not know who killed the deceased.

[22] During cross examination he said that they all mixed beer and pineapple beer that night and the deceased had a lot to drink. The accused was still normal and Amos was tipsy when he arrived there. He does not know where they got the PIN number from, as he only overheard the accused saying that he is writing them the PIN. Nkosi denied the version of the accused that he was not present.

[23] ALETTA MOLO ("Aletta also known as Nombulelo") testified under oath that the deceased is her mother and that her mother and the accused has been in a live-in relationship for a very long time. On the 24th of September 2021, she was at her mother's place, where they were all seated together. Present were the accused, George, Violet and Amos. Later that night the accused send them with his card and PIN to buy more liquor and she left her mother asleep on the couch, slouched over. Aletta intimated that the accused gave George the PIN which he wrote on his hand. Herself, Violet and George then left to buy the liquor and when they returned they met the accused. He was holding the back of his head with both hands and when they asked where is he going to, as they have bought the liquor, the accused did not respond. They proceeded to walk on slowly and when Aletta looked back, the accused was running. When they reached home, Aletta pushed the door open, to find

her mother lying on the floor covered in blood.

[24] Aletta intimated that they were all joyful and laughing that day and everybody were all moderately drunk, except for the accused who did not appear like someone who has been drinking. By the time they left to buy the liquor, the accused, Amos and Nkosi was left behind. On that night, the accused wore a grey long sleeve top with a Khaki shorts with side pockets.

- [25] During Cross-examination, Aletta conceded that there is a difference between the colours white, and khaki but she does not know the colour beige. When it was pointed out that some witnesses said accused shorts were white and beige respectively; whilst some witness said the accused top was black not grey, Aletta responded that we sometimes see colour differently. Aletta said that on that day she was drinking “Droids” a type of a liquor, whilst the others drank black label and pineapple beer and the accused drank Heineken. They started drinking from 9h00 in the evening but she did not check the time. She maintained that the accused gave Violet and George the card and PIN number, which George wrote on his hand. When it was pointed out to her that another witness said that it was the accused who wrote his PIN on George’ hand, Aletta responded that she can only testify as to what she has witnessed. When asked if George was seated in the same room as them, Aletta said that at the time the accused indicated that he wants to send them to buy more liquor, she went to called George from the shack.
- [26] Alletta confirmed that there was an Apollo light which lit up the vicinity, where the deceased resides and it was visible where they met up with the accused. She said that she did not notice any blood on the clothing of the accused, because he was in a hurry. She did not notice any person who exited the gate, neither did she notice if accused carried a knife because he was holding the back of his head with both his hands.
- [27] Alletta denied the version of the accused that he was at Sebokeng on the 24th of September around 17h00 until the 25th. Aletta however conceded that her mother informed her that the accused was to attend a funeral on that Friday, but he never left.
- [28] During re-examination, Alletta conceded that Khaki and Beige are both light colours.
- [29] MARIUS ENGELBRECHT (“Engelbrecht”) testified that he is a Warrant Officer within the SAPS[3] stationed at Zamdela Police station. He confirmed that he was on duty on the 25th of September 2021 and was called out to a crime scene at 14830, Zamdela. On his arrival, it was around 12h30 at night and he found an African female lying on the floor. He could see that she was deceased as there was blood on the floor and couch. The witnesses present gave an account of what transpired that night and stated that the accused was also present. The witnesses said that he wore a white shorts and grey top, but that night the police was unable to find the accused. During the course of his investigations, Engelbrecht received the cellphone number of the accused and when he called the accused, he identified himself as a police officer. The accused responded saying that he is Solomon. When asked where he is, the accused said in Afrikaans that “Hy weet dat hy ‘n fout gemaak het en dat die polisie soek hom”. The accused indicated that he will come to the police station but after 20 minutes the accused phone went to voicemail.
- [30] On the 26th of September, they received information that the accused was attending at funeral at Sebokeng. That is where the accused was arrested and Alletta was present.

[31] Engelbrecht confirmed that he interviewed the accused who informed him that he threw the knife in a Dam at Walter Sisulu and that the white shorts he wore that night, was in one of the rooms at the crime scene. The accused was detained at Zamdela police station. The accused indicated to Engelbrecht that he is willing to show where he threw the knife into the dam. Engelbrecht asked if he wanted a lawyer and the accused said yes. Engelbrecht contacted an attorney, a certain Mr. Van Bokhoven and gave the phone to the accused to speak with the attorney. The attorney indicated that he is on his way and when he arrived, he consulted with the accused. The attorney informed Engelbrecht that the accused is willing to do a pointing out to show where he threw the knife.

[32] Engelbrecht requested Lt. Colonel Erasmus to assist with the pointing out. On that Monday, the 27th the attorney was present during the pointing out. Engelbrecht said that the accused wore a grey T-shirt as described by the witnesses, depicted on photos 9,10,11,12.

Engelbrecht added that when he asked accused about his torn T-shirt at the back, the accused explained that it happened when the guy tried stop him.

[33] During cross examination, Engelbrecht was asked the state of sobriety of the witnesses that he interviewed. He stated that he could smell alcohol on their breath and only obtained their statements the next morning. When asked what rights he explained to the accused before interviewing him, Engelbrecht said he explained: the reason for the arrest; that accused has the right to remain silent; that anything he say may be recorded and used against him in a court of law; that he has the right to an attorney and if he can't afford one, the state can provide him with one.

Engelbrecht said that these rights were explained at the time of arrest and the accused was given his Notice of Rights at the police station. Engelbrecht conceded that he did not explain the rights of the accused, immediately prior to asking him about the knife. Engelbrecht conceded that Mr. Van Bokhoven was not employed by the state but that the accused was happy to speak to Mr. Van Bokhoven.

The state and the defence agreed that the evidence of the Pointing Out amounted to an issue of Credibility and not Admissibility. Exhibits E1-3 were admitted into evidence by the defence.

[34] DANIEL ERASMUS ("Erasmus") testified under oath that he is a Lieutenant Colonel within the SAPS, stationed at Moakeng, with 39 years' service. He has conducted many pointing-outs and said that Engelbrecht contacted him to assist with a pointing out. He knows nothing about the facts of the case. Erasmus proceeded to read Exhibit E1 into the record. Erasmus confirms that all pages were signed by himself, the interpreter, the accused and the attorney. Erasmus said that on his arrival, he found the attorney consulting with the accused, and the accused never indicated to him that he was dissatisfied with the attorney. If that was the case, Erasmus said, then he would have given the accused an opportunity to get a new lawyer or apply for legal aid. Erasmus said that accused did answer some questions in Afrikaans but he still made use of the interpreter, Mr. Khumalo. According to Erasmus, the accused made the pointing out freely and voluntarily, being in his sound and sober senses,

in the presence of his attorney. Erasmus also explained what each photo depicted from the time they left the police station, until their return.

[35] During cross examination, Erasmus said that when he read a question in English, the interpreter would interpret to the accused in Sotho. When asked to explain paragraph 1[4] on page 2, Erasmus said that the accused had asked him to do it in Afrikaans, which he did. When asked what happened at paragraph

7, Erasmus explained that accused answered “nee”. When asked whether he made the accused understand that he was there for a pointing out, Erasmus said that you have to look at it in context of the follow up question at paragraph 8. Erasmus denied that he was leading the accused at paragraph 8 because that would mean that neither the accused or his attorney who was present, knew why they were there. It was put to Erasmus that accused said that he pointed out a hiking spot. This was denied by Erasmus who said that he noted what the accused pointed out.

[36] During re-examination, Erasmus confirmed that Part 4 was read back to the accused and he was satisfied with everything. Erasmus never got the impression that there was a communication problem between himself, the accused or the lawyer.

[37] JABULANI ELLIOT KHUMALO (“Khumalo”) testified under oath that he is a constable within the SAPS. He was the interpreter present on 27 September 2021, with Erasmus. He is both conversant in Sotho and English. On the day in question, Erasmus read the questions in English and he would interpret it for the accused. At some point when accused understood the question posed, he would answer directly in Afrikaans. Khumalo said that accused at no stage indicated that he did not know why he was there because he would have interpreted that to Erasmus. Khumalo conceded that he, Erasmus, the accused and the attorney signed all the forms and he also sign the certificate at the end of the document. Khumalo said that there were no communication problems and on that day, the accused demonstrated how he threw the knife away.

[38] During cross examination, Khumalo said that accused will answer some questions directly, using Afrikaans or some questions he would answer in Sotho and Khumalo will interpret into English. When it was put that Erasmus did not say that accused would answer some questions directly, Khumalo said that was how it happened.

THAT CONCLUDED THE STATE’S CASE.

[39] ACCUSED testified under oath that on the 24th of September 2021, he woke up that morning with the deceased, where after they did some house chores. Thereafter, he informed the deceased that he wanted to go to the ATM, to see if his salary has been paid into his bank account. Once at the ATM, he discovered that his bank balance was R0.

- [40] He went home and informed the deceased accordingly, who then went to borrow R100 for the accused to travel to a family funeral. After he ate and bathed he left the house around 14h30, for Sebokeng. He arrived in Sebokeng after 17h00 and 45 minutes after his arrival, he notified the deceased that he received a notification that his salary was paid into his account. That was the last time he spoke to the deceased on that day. On the 25th of September he did not speak to the deceased at all.
- [41] On the 26th of September, whilst at the funeral, warrant officer Engelbrecht arrived and asked “who is Solomon”. When the accused said that it was him, Engelbrecht informed him that he is being arrested for his wife. Only at the car was it explained that he is being arrested for Murder. Accused informed Engelbrecht that he knew nothing.
- [42] Driving towards Sasolburg, they did not have any conversation and he was taken to Sasolburg Police station, where he was placed in a cell. Engelbrecht enquired about the knife and the short-pants and accused said that he knew nothing of those items. Engelbrecht then told the accused that he is taking him to the house to show Engelbrecht what clothes he was wearing. Accused said that when he was arrested, he was wearing the same blue overall, black T-shirt and track top that he left the house in, on the 24th of September. At the house Engelbrecht asked him to remove the T-shirt that he wore and a photo was taken of it. The accused intimated that the T-shirt was still clean and had no dirt on it.
- [43] When asked when did he first notice this lawyer ‘person’, the accused said that this ‘person’ who he thought was a police officer, accompanied them to the house, and was introduced to him as his Lawyer, once back at the police station. The accused intimated that he never chose or elected a legal representative. Engelbrecht then approached him in the cells asking him to show the place where he was walking that day.
- [44] On the 27th accused was taken to an office where he met his lawyer and the interpreter. Minutes later Erasmus arrived and introduced himself being from Kroonstad SAPS. The interpreter was interpreting and when Erasmus asked whether he knew why he was there, he said ‘no’. Erasmus told him that he was send by Engelbrecht and that the accused must show him where he was walking. Accused told Erasmus that he does not have a problem with that. Thereafter the accused was made to sign the documents and the interpreter and lawyer also attached their signatures.
- [45] Accused then proceeded to take them to the hiking spot. On their way, they stopped at the Dam and accused was ordered to alight. Someone took a photo of his shoe-print and whilst walking, he was ordered to stop and more photos were taken. He again asked why are they taking photos, but there was no reply.
- [46] Accused intimated that the time Amos said he was present at the deceased place, in the presence of Nombulelo, Violet and Nkosi, is incorrect because at that time he was at a funeral.

- [47] Accused further stated that he denies furnishing his bank card to buy alcohol and suspects that it was given to them by his wife as she was the only person who knew his PIN number and because he left her with his bank card.
- [48] Accused denies the version of Nkosi, that he and Amos was left in the company when the others left to buy more alcohol.
- [49] Accused denies that at some stage he was left with Amos, where after he stood up and stabbed the deceased multiple times.
- [50] Accused denies the version of Philemon that he visited his home that night, having a knife and when enquiring about the blood on his pants, accused said that he was in a fight.
- [51] According to the accused he does not know why all these witnesses will fabricate this version against him.
- [52] During cross examination, the accused stated that he receives his salary electronically every fortnight, the 24th of September being one of those days. The accused said that he did not enquire from whom the deceased borrowed the R100 as the deceased knew that accused would pay it back. He said that he hitchhiked and paid R10 for the lift to Vereeniging. From there he paid R20 for the taxi to Sebokeng. His sister from Hillbrow was present at the funeral as well as other relatives. He greeted everyone upon his arrival and assisted with the preparations.
- [53] Accused could not say why the witnesses will on that specific day falsely implicate him, more so his long standing friend Phillemon. Accused persisted in his defence that he was not present on the night in question.
- [54] The accused maintained that Engelbrecht did not introduce himself, did not tell him the reason for the arrest and most importantly did not explain any rights, infact they did not talk. It was put to the accused that it was never put to Engelbrecht that he did not explain any rights as his experienced council would have put this crucial point to the witness. The accused the said that Engelbrecht only asked him about the clothes, whilst driving from Sebokeng, not about the knife. When it was pointed out that in Chief he said that Engelbrecht asked him about the knife and shorts at the police cell, the accused changed his version again saying yes, he was indeed asked at the cells and not on their way from Sebokeng.
- [55] Accused denied that Engelbrecht asked him about his T-shirt that was knotted or torn at the back. It was put to the accused that this version too, was never put to Engelbrecht.

- [56] It was put to the accused that his rights were explained by Engelbrecht and there was nothing sinister about Engelbrecht assisting him to obtain legal representation. Accused conceded that he spoke to Mr. Van Bokhoven and accepted him as his legal representative. The accused then again changed his version and said that he never consulted with Van Bokhoven, not at the house and neither at the pointing out. When accused was asked what Van Bokhoven was doing there the whole time, accused said that he does not know.
- [57] Accused said that Engelbrecht asked him to point out the road to the hiking spot. When asked if he in fact told Engelbrecht that he hiked from Sasolburg, the accused said no. When asked how will Engelbrecht know his whereabouts from the time he left his house, the accused struggled to answer saying he also wondered how it came about that Engelbrecht asked him to show the hiking spot.
- [58] It was put to the accused that what he pointed out was not the hiking spot but the place where he threw away the knife.
- [59] Accused conceded that Erasmus introduced himself as a detective from Kroonstad and that Erasmus spoke English and it was interpreted to him. When asked whether he also answered some questions put by Erasmus directly, as he did in court, the accused said that he waited for the interpretation. The accused denied that he ever spoke Afrikaans to Erasmus or that he made the utterances at paragraph 8[5], 9 and 19 specifically.
- [60] It was put to accused that according to him most of the form was completed by Erasmus, with facts not given by him. Accused responded that he was not asked any such questions.
- [61] Accused conceded that his lawyer is depicted in the background at the pointing out on Exhibit E3, photo 6. When asked what he was pointing at on photos 9,10,11 and 12, the accused gave conflicting answers. When asked what he was pointing at on photos 13 and 14, he responded that Erasmus told him to point like this (demonstrating) and then they took the photos.
- [62] It was put to the accused that he is lying because he was in fact pointing at the place where he discarded the knife, something only he had knowledge of, which is also the reason why he told Engelbrecht that he wanted to make a pointing out.
- [63] Accused denied that Erasmus asked him whether he was satisfied with the manner the pointing out was conducted. When asked why he did not tell Erasmus that he has a problem, the accused said that he was not asked. When asked why he would sign every page if not satisfied, accused said that he was told to sign every page, which he did because he was still dizzy. The accused maintained that what he pointed out was the hiking spot.

THAT CONCLUDED THE EVIDENCE FOR THE DEFENCE.

The State argued for a conviction and the defence argued for an acquittal.

[64] A CAREFUL CONSPECTUS OF THE EVIDENCE DEMONSTRATES THAT THE FOLLOWING ASPECTS OF EVIDENCE ARE NOT IN DISPUTE:

- That accused and the deceased was in a love relationship for 15 years and resided together.
- It is not in dispute that Aletta (deceased daughter), Nkosi, Violet, Amos and George was at the residence of the deceased on the 24th of September 2021 and that they are all known to the accused and vice versa. They had no squabbles with each other.
- It is not in dispute that the state witnesses present, were consuming alcohol with the deceased.
- It is not in dispute that Alletta, Violet and George purchased alcohol from a nearby tavern, using the Bank Card of the accused, as depicted on Exhibit “D”.
- It is not in dispute that upon their return, the body of the deceased was found lying on the floor covered in blood.
- It is not in dispute that according to the Medico-Legal Post Mortem Report, the cause of death was determined as “Hemorrhagic shock multiple stab wounds”.

[65] THE ISSUES IN DISPUTE ARE

- a) Whether the state has proved beyond a reasonable doubt that accused was present on the 24th of September 2021 at the scene of the crime and whether accused is the person who unlawfully and intentionally killed the deceased, as envisaged in terms of section 51(1) CLAA.

Thus, the crux of the dispute turns around the issue of identification in light of an alibi defence raised by the accused.

[66] Labuschagne J stated that the onus to prove all the essential elements of the alleged crime against the accused rests on the state throughout. The state must discharge that onus beyond a reasonable doubt. There is no onus on the accused and if he gives an explanation which may reasonably possibly be true, then he cannot be convicted.[6] It is my duty to carefully consider the totality of the evidence and the probabilities in order to decide if the state has discharged its onus. The concept of reasonable doubt does not mean all doubt[7] and with reference to S v Pallo and others[8] it was stated that the there is no obligation upon the State to close every avenue of escape which may be said to be open to an accused. [9]

[67] In S v Saban en ‘n Ander[10] it was stated that where the versions of the state and the defence are contradictory, the relative honesty of the two conflicting

versions is indeed of great importance. Before, however, a finding as to the objective truth of the one version and the falsity of the other can be reached, not only the honesty of the version has to be considered, but also-and more particularly-the reliability thereof. What has to be proved is the truth of the onus-bearer's version and not merely the honesty of a witness(es) who put it forward. Honesty and objective reliability are not synonymous. The opportunity for observation which an honest eyewitness had, plays an important role, so also the probabilities.

- [68] The state called a number of witnesses in proving their case against the accused, and setting up the factual matrix in attempting to prove the guilt of the accused beyond a reasonable doubt.
- [69] Juxtaposed, the defence argued that the number of contradictions in the version of the state, must point to a finding, favouring the version of the accused.
- [70] Indeed when assessing evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused has been proved beyond a reasonable doubt, upon a consideration of all the evidence.[11]
- [71] The state bluntly admitted that Amos was not a brilliant witness, because according to him, his mind wanders. This sentiment is shared by this court. However, the test to be applied to the evidence of a single witness was authoritatively set out in *R v Mokoena* 1932 OPD 79 at 80, where it was stated that the uncorroborated evidence of a single competent and credible witness is no doubt declared to be

sufficient for a conviction by [the section], but that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Moreover, the exercise of caution should not be allowed to displace the exercise of common sense.

- [72] Bearing in mind that there is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of a single witness, the trial judge will weigh the evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in the testimony, and that he is satisfied that the truth has been told.[12]
- [73] Moreover, this court is mindful of the provision of section 280 of the CPA 51 of 1977 which provides for a conviction to follow on the single evidence of a competent witness.
- [74] The defence levelled criticism at the testimonies of the state witnesses, mainly as the argument goes, because they consumed alcohol on the night in question. The latter part being true, the court must still evaluate the evidence holistically, in determining whether the party burdened with the onus of proof has succeeded in discharging it.

[75] The evidence of Amos is assailed on the grounds that he contradicted the evidence of the other witnesses as to who was sent to buy the liquor, to whom was the bank and or PIN number given, who remained in the house after the others left, the fact that he did not see Nombulelo and the others in the street and the fact that he said the short pants worn by the accused was beige.

[76] Amos frankly admitted that he consumed a 750ml bottle of beer and pineapple beer on the night in question, but maintained that he still remembered what happened. It is evident from the evidence of Amos that he could not say who all was present that day based on the fact that he did not notice George. It was however explained by Nombulelo, that when they were sent to buy the alcohol, she had to fetch George from the shack.

Further Amos explained that despite not being sure about the PIN number, he was certain that it was the accused who furnished his Bank Card to purchase more alcohol. Amos said that he was also certain that the accused used a knife to stab the deceased, as the blade protruded from his hand. He said that after witnessing the attack, he tried stopping the accused without success. He said that after the accused ran away, he was afraid and after noticing no-one on the street, he went home.

[77] It must be borne in mind that when Nombulelo and the others met the accused at the neighbours gate, Nombulelo said that the accused he was holding the back of his head with his two hands. At that stage they had a conversation with the accused asking him where he was going as they bought the liquor he has asked for. The accused did not answer them. Nombulelo said that she continued to walk slowly, however when she turned back to look at the accused, he was running. It is evident that at some point the focus of Nombulelo and the others was on the accused because it must have been strange to them, seeing the accused

walk away without saying a word, yet he was the one who had sent them with his Bank Card and PIN number. As the scene was clearly not static, do I not find it strange under these circumstances, that they did not see Amos exit the yard.

[78] The defence further argue that to establish whether the accused was present on the day in question, the aspect of what he wore on the said day becomes a crucial aspect. In the present matter Amos described the short pants as beige, Nombulelo described the pants as Khaki and Phillemon described the same pants as white in colour. Further to that Nombulelo said that the T-shirt worn by the accused had stripes on the sleeve. The state in this regard, referred the court to case of *S v Mkohle*[13] where it was stated that contradictions per se do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.

- [79] Indeed, it is trite law that where two or three witnesses contradict each other on a particular aspect it does not follow that the witnesses are not telling the truth or that the aspect does not exist.[14] It is further accepted law that there is no reason in logic why the mere fact of a contradiction or several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness.[15]
- [80] The state further argued that the contradictions were not material and despite the shortcomings or contradictions in the version of the state witnesses, it is an undeniable fact that the golden thread is that they corroborated each other in the most important aspect, which is that the accused was present at the crime scene on the 24th of September, consuming alcohol with them and the deceased.
- [81] The defence wants this court to believe that Phillemon was possibly mixed up with the day that he said the accused visited him after midnight, having a knife and with blood spatter on his shorts. The accused confirmed that he and Phillemon had been friends for the past 8 years, with no squabbles amongst them. Despite being friends, the accused could not say why Phillemon will give false evidence against him.
- [82] In fact, Phillemon in the view of this court testified in favour of the accused when he said that accused told him that he was in a fight with some robbers, when explaining the knife and the blood stains on the short pants. This is not the behaviour of someone who is out to incriminate the accused. Even when asked to describe the emotional state of the accused, he said that the accused did not appear normal as he refused to sleep and did not want to drink the beer that was offered. It is the view of this court that Phillemon impressed as an honest and credible witness whose evidence can be accepted as credible and reliable.
- [83] This court having found the evidence of Phillemon trustworthy is satisfied that the evidence of Amos is materially corroborated pertaining to the presence of a knife by the accused on the night in question.
- [84] In my view, the contradictions highlighted by the defence is an indication that there was no conspiracy amongst the state witnesses to falsely implicate the accused.
- [85] In returning to the core of this matter, which is one of identity, this court is mindful of the case *S v Mtetwa*[16], where Holmes JA warned that because of the fallibility of human observation, evidence of identification is approached by courts with some caution. In this regard this court is mindful that it is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. One of the listed factors to be considered as argued by the defence, was the clothing allegedly worn by the accused, on the night in question. And in light of the contradictions in this regard, this court should find in favour of the accused that he was at Sebokeng, on that fateful night.
- [86] In this regard this court refers to the case of *R v Dladla*[17], Holmes JA, referred with approval to the remarks by James J – when he observed that one of the factors which in our view is of greatest importance in a case of identification, is the witness' previous knowledge

of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. In a case where the witness has known the person previously, questions of identification, of facial

characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the

degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was

made.

[87] This principle more recently was reaffirmed in *Machi v The State*[18] where the witnesses stated that they knew the appellant and he too admitted that he knew them. The court said in these circumstances there is no room for mistaken identity.

[88] The same view is held by this court insofar as the reliability of the state witnesses' identification of the accused as the person who was present at the scene on the 24th of September and who not only consumed alcohol with them, but furnished them with his bank card and PIN number, to buy the alcohol.

[89] It is an irrefutable fact that all the state witnesses that placed the accused on the scene and its vicinity, knew him very well, Phillemon having known the accused for 8 years, not to mention Nombulelo, who has known the accused for 15 years.

[90] This court finds that notwithstanding the fact that all the state witnesses present at the deceased home on that dreaded night, consumed alcohol, this court can place reliance on their account of events and they materially corroborated one another. This court had the opportunity to observe the respective state witnesses and being cognizant of the environment the witnesses found themselves in on that night, am I satisfied that they impressed as open, forthright and frank, with no intent of fabricating a version against the accused such as that they all saw the accused stab the deceased. They maintained steadfast in their version that accused was present at the scene, despite rigorous cross-examination.

[91] This court is however mindful that demeanour can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or appearance of frankness and candour.[19]

[92] The version of Engelbrecht and Erasmus, in my view is not open to criticism. This court at the onset of Erasmus' testimony, was informed that the evidence pertaining to the pointing out, was one of credibility and not admissibility, hence no trial within a trial will ensue.

[93] Likewise when Engelbrecht testified and intimated that the accused made certain utterances, namely "Hy weet hy het 'n fout gemaak en hy weet dat die polisie soek hom" and "that he threw the knife in a Dam at Walter Sisulu" and that he "left the shorts in one of the

rooms at home”, no objection was forthcoming from the defence. When asked by this court what did the said utterances amount to, the defence said it amounted to an Admission.

Bearing in mind that the defence is seized with the witness’ statement, I found it peculiar that the defence will argue after the fact, that the utterances made by the accused should be ignored, because the accused’ constitutional rights were not explained, immediately before the utterances were made and because accused is a lay person.

[94] The requirements for an admission is clearly stated in section 219A of the CPA 51 of 1977[20], yet the defence raised none of these grounds of objection, when this evidence was tendered by Engelbrecht.

[95] The state correctly argued that this utterance was in line or similar to what was stated to Erasmus at during the pointing out. The statement made to Erasmus reads as follows: “ek weet ek het ‘n fout gemaak ek is ‘n groot man en ek wil straight loop. Ja ek wil die regte ding doen.”

[96] The argument as advanced by accused that Erasmus is the one who wrote the said words, is without merit and baseless. Why, if it was the intention of either Erasmus or Engelbrecht to falsely implicate the accused, did they not outright for example stage a murder weapon to cement the proverbial nail into the coffin. Instead, no weapon was found.

Likewise, the version of the accused that no rights were explained to him by either Engelbrecht or Erasmus, without merit. If that was the case, as reasoned above, then surely the experienced defence council would have vehemently objected to documents E1-E3 being handed in by consent. To support my reasoning that the version of the accused is without merit, the defence, in a last minute attempt to salvage the credibility of the accused, argued that maybe the reason why the accused is deviating from his consultation when answering certain questions, is because he believes that the ‘lies’ he tells will may exonerate him.

[97] This court finds this statement most disheartening, as it implies that the accused will say anything to be vindicated. I find the version of the accused in this regard inherently so improbable for it to be rejected as false.

[98] I find the version as accounted to by Erasmus and Engelbrecht reliable and trustworthy.

[99] This court is cognizant that; whether I subjectively disbelieve the accused is not the test. I need not even to reject the State’s case in order to acquit him. I am bound to acquit him if there exist a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.[21] The court is not entitled to convict unless satisfied not only that the explanation is improbable, but that it is beyond a reasonable doubt false.[22]

- [100] It is the view of this court that the version of accused is fraught with improbabilities and inherently so improbable to be rejected as false beyond a reasonable doubt. If the court believes his version that accused was in Sebokeng on the 24th of September 2021 from 17h00, then the court must accept the version that accused was not present at the crime scene and that all the state witnesses including Engelbrecht and Erasmus, conspired and concocted this version against the accused, despite there being no quarrel between them.
- [101] The state correctly argued that there is no onus on the accused to prove his alibi, but in light of the fact that he was amongst family, the court should find it strange why no one was called to confirm his alibi. The defence in refuting this argument states that notwithstanding the fact that accused is a single witness in his account of the events, this court must accept that you meet various people at a funeral and one person can't be expected to be with you the whole day. This argument, with respect is illogical as the bone of contention turns on where the accused was as from the 24th of September at 17h00, not the day of the actual funeral. But this argument also fails because his own sister was one of the people present at Sebokeng. Again this argument by the accused that he was with many people throughout, appears to be a last ditch attempt on the part of the accused to escape blame in circumstances where the totality of the evidence overwhelmingly, points to his guilt.
- [102] Having found that where an alibi is raised there is no onus on the accused to establish it and that if it might reasonably be true he must be acquitted, with reference to the case *R v Hlongwane*.^[23] Placing reliance on *Hlongwane* (supra) the alibi of an accused should not be considered in isolation but should be viewed in the light of the totality of the evidence of the particular matter and the court's impression of the witnesses. This court finds that the accused's alibi being assessed against the totality of all the evidence presented by the state, could not stand and is accordingly rejected. I pause to mention that the assertion by the state that accused failure to call any witnesses should be viewed in a negative light, notwithstanding the fact that the accused bears no onus to prove his innocence, is echoed in *S v Teixeira*^[24] where the Court stated that the failure to call an available witness may not be without consequences. This court would be justified to infer that the failure to call some or any of these possible witnesses was possibly because they may have contradicted the testimony of the accused in this regard.
- [103] The court found the state witnesses were generally honest and reliable and that the overwhelming weight of the evidence supports a finding that the state had proved beyond a reasonable doubt that the accused was the person present at the crime scene and who unlawfully and intentionally, without justification, killed the deceased.
- [104] This court makes the following factual findings:
1. On the 24th of September 2021, the accused was with the deceased, Nombulelo, Violet, Nkosi, Amos and George.

2. They socialized and consumed alcoholic beverages.
3. At some point when the alcohol was depleted, accused send Nombulelo, Violet and George with his bank card and PIN number to purchase more alcohol.
4. Before they returned, Nkosi had left to go home.
5. Amos was left with the accused and the deceased who was asleep, slouched over on the couch.
6. The accused stabbed the deceased several times with a knife, which Amos observed, without justification.
7. Amos tried stopping the accused, without success.
8. The accused, fled the crime scene.
9. On his way the accused met Nombulelo, Violet and George, holding his head and without saying a word, the accused ran way.
10. The accused still in possession of the knife and wearing a bloodstained shorts went to the house of Phillemon.
11. The accused told Phillemon that he was attacked by robbers when Phillemon made enquiries about the knife and bloodstained pants.
12. The accused stayed over at Phillemon's place, sleeping in an upright position and refusing the beer offered to him, which was out of the ordinary.
13. The evidence of Amos is find to be clear and satisfactory in every material respect, notwithstanding any contradictions or shortcomings. Equally is the evidence of the remainder of the state witnesses accepted and credible, reliable and trustworthy, notwithstanding any contradictions.
14. The accused left Phillemon's place early on the morning of the 25th of September.
15. The accused cell number was called on the 25th of September and when Engelbrecht asked where he was, the accused responded and said" Hy weet hy het 'n fout gemaak and weet die polisie soek hom".
16. The accused made this utterance spontaneously.
17. On the 26th of September, the accused was traced to an address in Sebokeng where he was arrested. When Engelbrecht asked what happened to his T-shirt, he said that it got torn when the man tried to stop him. The T-shirt was confiscated.
18. Accused was explained of his constitutional rights. On the way to police station, the accused said that he will show where he threw the knife.

19. Once at the police station, accused was given his constitutional Notice of Rights and accused informed Engelbrecht that he wanted a Lawyer.
20. Engelbrecht contacted Mr. Van Bokhoven who spoke to the accused telephonically and again consulted with him, whilst at the cells. Mr. Van Bokhoven was present at all relevant times, even at the pointing out.
21. The accused agreed to make a pointing out as to where he threw the knife.
22. The accused' constitutional rights were explained by Erasmus and accused said that "ek weet dat ek 'n fout gemaak het..."
23. With the assistance of Mr. Khumalo, Erasmus posed questions, which the accused answered either in Sotho or Afrikaans or directly.
24. The attorney of the accused was present at all times.
25. The accused was not pointing out the way to the hiking spot, as alleged, but the place where he tossed the knife at or near the Dam.
26. The accused, Erasmus, Mr. Van Bokhoven and interpreter signed all the pages of Exhibit E1.
27. The interpreter affixed his certificate that he accurately and to the best of his ability interpreted the contents of the Notes and any questions put to the accused.
28. The accused appended his signature on the last page of Exhibit E1, confirming that after the conclusion of the pointing out, the Notes were read to him and interpreted once again.
29. The accused made the utterance that "ek weet ek het 'n fout gemaak" to both Engelbrecht and Erasmus and his denial that he spoke Afrikaans is simply to distance himself from the inescapable conclusion that when he made the said utterance, he was referring to the fact that he stabbed the deceased multiple times.
30. The alibi defence is found to be a fabrication and stands to be rejected, in light of the totality of the evidence.

[105] On a balanced consideration of the totality of the evidence, I find the accused to be a deliberate and calculated fabricator. Material aspects of the accused version was never put to certain witnesses. In *S v P*[25] it was stated that it would be difficult to over-emphasize the importance of putting the defense case to witnesses. In this instance

this court was not entitled to see or hear the reaction of the witness (s) in relation to accused' version. It is therefore

grossly unfair for the accused to now argue that witnesses must be disbelieved.

[106] The state argued that this court should find that the actions of the accused was premeditated and their assertion was purely based on speculation. Even if there may be suspicions that the accused acted with premeditation, the state bears the onus of proving

the guilt of the accused beyond a reasonable doubt. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. Convictions based on suspicions or speculation is the hall mark of a tyrannical system of law. [26]

[107] The court is satisfied that the state through accepted evidence has proved its case beyond a reasonable doubt that the accused stabbed the deceased multiple times with a knife, resulting in her death. Insofar as version of accused differs from that of the State, the court accepts the evidence of the State beyond a reasonable doubt and rejects the version of accused as false, beyond a reasonable doubt.

[108] ACCUSED IS ACCORDINGLY FOUND GUILTY OF:

MURDER, with the requisite form of intention being *dolus directus*, read with the provisions of section 51(2) read with part II of Schedule 2 of Act 105 of 1997, as amended.

A. AFRICA AJ

[1] Part 1 of Schedule 2.

[2] Also read with sections 92(2), 256, 258, of the CPA 51 of 1977.

[3] South African Police Services.

[4] Exhibit E1

[5] Exhibit E1.

4 S v Radebe 1991 (2) SACR 166 (T).

[7] S v Van Aswegen 2001 (2) SACR 97 SCA.

[8] 1999

(2) SACR 558 (SCA).

[9] It is sufficient for the State 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 charge. He must, in other words, be morally certain of the guilt of the accused. An accuser's claim to the benefit of a doubt, when it may be said to exist, must not be derived from speculation, but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences, which are not in conflict with or outweighed by, the proved facts of the case.'

[10] 1992

(1) SASV 199 (A).

[12] S v Sauls and Others 1981 (3) SA 172 (A).

[13] 1990

(1) SACR 95 (A).

[14] See *S v Mokoena* 1978 (1) SA 229 (O) at 232F.

[15] *S v Oosthuizen* See 1982 (3) SA 571 (T) at 10 576.

[16] 1972 (3) SA 766 (A) at 768A.

[17] 1962 (1) SA 307 (A) at 310C-E.

[18] (256/2020) [2021] ZASCA 106 (30 July 2021).

[19] *R v Lekaota* 1974 (4) SA 258 (O) at 263.

[20]

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained.

[21] *S v Kubeka* 1982 (1) SA 534 (W).

[22] *S v V* 2000 (1) SACR 453 SCA 455A.

[23] 1959

(3) SA 337 AD at page 340H.

[24] *S v Teixeira* 1980 (3) SA 755 (A).

[25] 1974 1 SA 581 (RA) at 582 E – G.

[26] See *S v T* 2005

(2) SACR 318(E) para 37 Plasket J.

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Prepared on 10 October 2026 · Esheria