

SOUTH AFRICA / JUDGMENT

# S v Selani (CC13/2023) [2024] ZAGPPHC 723 (29 July 2024)

[2024] ZAGPPHC 723

## COURT

North Gauteng High Court, Pretoria

## BEFORE

Mosopa

## CASE / FILE NUMBER

CC13/2023

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## Policy

## IN THE HIGH COURT OF

## SOUTH AFRICA

## GAUTENG DIVISION,

## PRETORIA

## CASE

## NO: CC13/2023

## DATE:

03-06-2024

(1)

REPORTABLE: YES / NO.

(2)

OF INTEREST TO OTHER JUDGES: YES / NO.

(3)

REVISED.

DATE: 29/07/2024  
SIGNATURE  
In  
the matter between  
THE  
STATE  
and  
PAMELA  
NCUMISA SELANI  
Accused

## JUDGMENT

MOSOPA, J: Initially when the trial commenced, there were two accused arraigned before me, namely Ms Pamela Ncumisa Selani referred

to as accused 1 and Mr S[...] J[...], referred to as accused 2. The state then withdrew charges against accused 2 and the trial commenced only in respect of accused 1.

The accused, Ms Pamela Ncumisa Selani is arraigned before me on the following charges.

1. Murder read with the provisions of Section 51(1), alternatively Section 51(2) of Act 105 of 1997 relating to allegations of the killing of Tshangisa during 2016.
2. Murder read with the provisions of Section 51(1), alternatively Section 51(2) of Act 105 of 1997 relating to the allegations of the killing of Gift during 2017.
3. Murder read with the provisions of Section 51(1), alternatively Section 51(2) of Act 105 of 1997 relating to the allegations of the killing of A[...] during 2018 and;
4. Defeating the administration of justice.

Accused who is legally represented by Advocate Mampuru pleaded not guilty to the charges levelled against her and exercised her constitutional right to remain silent, she did not proffer a plea explanation. The State on the other hand is represented by Advocate Sihlangu from the Director of Public Prosecutions.

The first State witness in this matter was S[...] who is the child of the accused. He was born on 22 November 2002, and he is currently 21 years old. His biological father is Mr M[...] J[...].

The deceased mentioned in count 1 was the accused's boyfriend. The deceased mentioned in count 2 was also the accused's

boyfriend and the deceased mentioned in count 3 was the child of the accused and S[...]’s brother who was born on 2 February 2000.

The accused, S[...], A[...] who is the deceased mentioned in count 3 and his younger sister, N[...] were all residing with the deceased

mentioned in count 1.

Before they stayed with the deceased mentioned in count 1 in his house, they were staying at Extension 2[...], O[...]. The deceased was staying alone at his premises, but he had three tenants known as K[...], M[...] and another person who he forgot her name but referred to her as granny in evidence.

In 2016, accused had an argument with the deceased mentioned in count 1 but S[...] did not know what caused the argument and he heard his mother insulting the deceased, both deceased mentioned in count 1 and the accused spent approximately 2 weeks without talking to each other.

That is when the accused's other boyfriend, Gift who is the deceased mentioned in count 2 emerged, and the accused informed him about argument she had with the deceased mentioned in count 1. He heard accused telling the deceased mentioned in count 2 that the deceased in count 1 made her sick with a disease that is unknown to him. The deceased mentioned in count 1 was not present at home at that time as he went to consume alcohol elsewhere.

After that conversation, the deceased mentioned in count 2 prepared to hide inside the toilet. S[...] was of the view that the accused told the deceased mentioned in count 2 that she wanted to kill the deceased mentioned in count 1. He also heard them saying that they must make a plan and at that time they were ready with a hammer. He saw the deceased mentioned in count 2 hiding inside the toilet with a hammer waiting for the deceased mentioned in count 1 to arrive home and when he arrived, they injured him.

The deceased mentioned in count 1 arrived home intoxicated, he did not know what was going to happen to him and he proceeded to his bedroom. As he entered the bedroom, the deceased mentioned in count 2 immediately attacked him with a hammer by hitting him at the back and they placed him on top of the bed, and they tied him.

The deceased was left on the bed for a period of approximately two weeks and he eventually died. He never received any medical attention before his death. Thereafter the deceased mentioned in count 2 took a spade and a pick, and he dug a hole in the yard. They undressed the deceased mentioned in count 1 and threw him into the hole and this was done during the night.

The accused and the deceased mentioned in count 2 then closed the hole and the deceased in count 2 said he will then come and reside with them at their home the accused then agreed.

S[...]’s younger sister, N[...] was born on 24 August 2014. At that time, they were selling beer and sorghum beer at his residential place. He was told that if inquiries are made about the whereabouts of the deceased mentioned in count 1, he must tell those people that he does not know where he is.

In 2017, his brother the deceased mentioned in count 3 and the deceased mentioned in count 2, who was still residing with them were no longer in good terms. The deceased mentioned in count 3 observed the manner in which the deceased mentioned in count 2 would treat the accused and he was not happy with that.

He would at times observe as the deceased mentioned in count 2 would push the accused, but he did not know the reason why he would do that. The deceased mentioned in count 3 then sat down with the accused and told her that he does not appreciate the manner in which the deceased mentioned in count 2 was treating her and he asked the accused as to how long is she going to allow the deceased to treat her in that manner.

They then agreed in S[...]’s presence that they will make a decision in a few days, that decision was to kill the deceased in count 2. They agreed that they will put poison in the deceased’s food and beer. This happened a week after they had a conversation about killing him.

On that day, the accused had cooked food and alcohol was consumed. They had rat poison called "halephirimi" with them and the accused put that poison in the deceased’s food.

A few minutes later foam came out of the mouth of the deceased, and he could no longer maintain his balance. The deceased mentioned in count 3 then filled the dustbin with water and they put the head of the deceased mentioned in count 2 inside the dustbin which was filled with water, and he could no longer breathe. They then took the deceased mentioned in count 2’s head out of the water.

Then the deceased mentioned in count 3 went to dig a hole in the yard, which was the same hole where the deceased in count 1 was buried in. The accused and the deceased mentioned in count 3 then assisted each other with carrying the deceased mentioned in count 2 and they threw him inside the hole, and they then closed it. This happened at night and S[...] was told that should there be any inquiries made about the whereabouts of the deceased in count 2, he must say that he does not know where he is.

After the death of the deceased mentioned in count 2, S[...], his sister, the accused and the deceased mentioned in count 3 continued staying at Extension 2[...], O[...].

The deceased mentioned in count 3 and the accused had an agreement that they will equally share money collected for rent from the tenants, as well as the money collected from child support grant for S[...] and his sister. They continued with that agreement for a period of time.

In 2018, it was during month end when the deceased mentioned in count 3 informed the accused that he wanted to wear expensive clothes and the accused told him that she could not afford such as she still had to pay for groceries in the house. That is when the deceased mentioned in count 3 said that if he does not get money he will go to the police and tell them about people buried in their yard.

The deceased mentioned in count 3 was abusing alcohol and was also using drugs such as Crystal Meth. The accused would after such request is made, give the deceased mentioned in count 3 all the money she had as she did not want to find herself in trouble.

The accused would give the deceased money regularly and he would use that money to go and drink alcohol with his friends. The last time when the accused gave money to the deceased was in November 2018. On that day the deceased was drinking alcohol at home with his friends when accused told S[...] that they must pack their bags together with their sister and leave the house.

They then went to G[...]’s place who was also the boyfriend of the accused, his place was situated in the same street as their place of residence. When they arrived there G[...] enquired as to why they came with bags to his place and the accused responded by saying that at her place there was an ongoing party and the deceased chased them away. The accused and G[...] then consumed alcohol and they all slept at G[...]’s place. The next day G[...] requested them to leave his place and they ended up on the streets.

His mother requested him to go and observe what was happening at their place and he found the deceased in count 3 and A[...] consuming

alcohol. The deceased requested him to quickly take what he was looking for and leave the place. He then took a toothbrush and a toothpaste, he left the house and went back to where the accused and his sister were and told them what he had observed.

After informing the accused of his observation, the accused kept quiet for a moment and then said she will wait until it was late at night, and she will then hurt the deceased. It was around 20h00 when the accused said that she could not be defeated by a child that she gave birth to.

The deceased was abusive to the accused, and he did not want to see the accused in possession of money. Every time when accused had money, the deceased will tell her a number of times that he will go to the police and report about what happened in their yard.

His mother requested him to go and observe what was happening at their house and he found the deceased in count 3 and A[...] that is when the deceased in count 3 chased him away. The deceased in count 3 then locked the house and he together with A[...] went to A[...]’s place of residence and S[...] informed his mother about that.

The accused then went home and hid herself in the room where they buried the two people and S[...] was with the accused and his younger sister.

They waited there until the deceased came back home at approximately 23h00 and he was accompanied by A[...]. He was at that stage carrying a lunch box and beers. He entered the house to cook, and he locked the door, then A[...] left.

Thereafter the accused requested S[...] to gain entry into the house through the bathroom window as he had a small frame. After gaining entry into the house, he opened the door for the accused to enter and the deceased was at that stage asleep.

The accused first checked whether the deceased was sleeping and then went to the toilet, and she came back with a hammer and assaulted the deceased many times with it on his head, his blood was all over the house. The accused locked the door so that no one could gain entry into the house. S[...] was at all material times present, and he was holding his younger sister.

The accused instructed him to watch over the deceased if he was still breathing while she left to dig the hole. After that he observed that the deceased was still breathing, then the accused instructed him to go and get a brick from the back of the house and she assaulted the deceased in count 3 with it on his head and he died. The accused then wiped off blood in the house and thereafter placed the deceased in a wheelbarrow and threw the deceased in a hole that she dug up.

She then cleaned the house with the aim of getting rid of the smell. The accused told S[...] that if people make inquiries about the whereabouts of the deceased, he must tell them that the deceased is in Cape Town.

After some days his cousins asked him about the whereabouts of the deceased in count 3, and he told them that the deceased was in Cape Town. Then he started to think hard about the incidents that had occurred and told himself that one day the accused will die and all things that happened will remain with him.

He then went to the police station at approximately 21h00 to inform the police about the people who were buried at a particular yard, but they could not take him seriously and chased him away from the police station.

At some point he went to his grandmother's place of residence with the aim of informing her about what happened in the yard. After telling her, his grandmother then took him to a traditional healer (referred to as a sangoma in evidence) known as Mr Tshuma. His mother was also involved in him being taken to Mr Tshuma's place.

He reported to Mr Tshuma about what was happening in their yard. He heard his grandmother and Mr Tshuma talking about what he said, and Mr Tshuma said that the truth must be told. Whilst at Mr Tshuma's place the accused and his grandmother brought him food which he ate.

S[...] left school at grade 10 in 2019 because he could not cope with what happened in their yard. The police obtained a statement from him whilst he was still at Mr Tshuma's place. He then identified their place of residence from EXHIBIT A which is the scene photo album.

He indicated on the sketch plan where the deceased mentioned in count 3 was sleeping, the shack of K[...], M[...] and where granny was residing. He also indicated the place where the bodies were buried. The place was a shack where the patrons would consume liquor, but the shack was demolished in 2019.

His younger sister has since been taken home to the villages in Eastern Cape. The grandmother that is residing in O[...] to whom he reported the matter to is the sister to his grandmother who is in the villages.

In cross-examination the witness mentioned that the mouth of the deceased mentioned in count 1 was closed with Sellotape. He denied that he was taken to a sangoma because he was not mentally well and said that it was because of the things that they did.

He was taken to the veld together with his mother and Mr Tshuma told him that he must tell the truth. The accused was told to call out names of people and apologise. She called out the name of Tshangisa (the deceased mentioned in count 2), Gift (the deceased mentioned in count 2) and A[...] (the deceased mentioned in count 3).

It was put to the witness that Mr Tshuma and the deceased in count 1 had an agreement that Mr Tshuma would assist him in getting more customers and that Mr Tshuma would come to their place to stay there, then they will move and stay in one of the shacks in that yard, After the deceased in count 2 died, Mr Tshuma came and enquired about him and the accused told him that he went to stay in Atteridgeville.

The State then handed in the Weskoppies report on the mental observation of the witness which was admitted into evidence as EXHIBIT C. The report in part reads thus:

*“At the time of the alleged offence the accused did not suffer from a mental disorder or intellectual disability that affected his ability to distinguish between the rightful and wrongful nature of his deeds. A mental disorder or intellectual disability did not affect his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds.”*

After the evidence of S[...], the State intended to introduce the statement made by the accused during the pointing out, the defence raised an objection to the admissibility of that statement. The basis of the defence’s objection to the introduction of such statement was that the statement was not made freely and voluntarily by the accused as Mr Tshuma told her what to say in the statement and that if she did not say so, she would die as a result of the spiritual effect that Mr Tshuma will cast on her.

It emerged in evidence that Mr Tshuma is a traditional healer. It was placed on record by the defence that there is no objection to the introduction of the proforma accompanying the statement that was made during the pointing out and its contents are not placed in dispute. I then ordered that the admissibility of such statement made by the accused be determined in a trial-within-a-trial.

At the end of the trial-within-a-trial I ruled that the statement was made freely and voluntarily, and the accused was not unduly

influenced to make such statement furthermore, that it be admitted into evidence. I promised to provide the reasons for such

ruling at the end of the case and I am going to do exactly that when I analyse evidence in its totality.

The State in the trial-within-a-trial led the evidence of Colonel Phillip Abokole Maluleke who was at that time a commander of the detectives at Brooklyn Police Station. He was not part of the investigations in the matter. He confirmed that on 8 August 2020 he went to O[...] Police Station to assist with the pointing out. He was allocated an office, and the accused was brought to him. In the office it was himself, a photographer who remained in attendance throughout the process and the accused.

He introduced himself to the accused and apprised the accused of her constitutional rights. The accused elected not to be legally represented during the whole process. The accused appeared to be normal to him and was not frightened but only informed the Colonel that he must protect her against the members of the community.

After filling in the proforma, the accused indicated that she is still willing to make pointing out of the scene. Extra police

personnel were arranged but when they were about to reach the scene, he saw a large crowd of people gathered there and for their safety as well as the safety of the accused they then returned to the police station without conducting a pointing out.

At the police station, he exercised his discretion and took down a statement from the accused which was in the form of question and answer. The accused never reported to him that there was any person who threatened her to make a statement to the police.

After taking down the statement, it was read back to the accused, and she signed it, the Colonel also signed.

The accused also testified in her defence in the trial-within-a-trial and she confirmed that her arrest was in August 2020. She further confirmed that they never reached the scene for a pointing out because of people who were gathered there. At the time she was not emotionally alright, she was crying and even requested a Painblok from the officer in charge of the pointing out as she was feeling pain on her ear.

She also told the officer that she is not alright. That she told the Colonel everything that she was told by Mr Tshuma and that she was not happy with the statement.

Mr Tshuma told her that she must tell the police that she is the one who killed the people as he did not want to be involved in the murders. There was a stage when Mr Tshuma poured muti into her ear and her ear is still painful and she currently attends treatment at Kalafong Hospital. She is afraid of Mr Tshuma as he threatened her with muti. Mr Tshuma told her that if she tells the police anything different from what he had told her, he will kill her and her son. She did not make such statement freely and voluntarily.

Both the State and the defence closed their cases after leading the evidence of the two witnesses. The Accused testified that when she informed the Colonel that she was not alright and that she had pain in the ear, while she was crying, the photographer was in and out of the room where the statement was obtained from.

In the interest of justice, I then called the photographer, Sergeant Phukenani Maphuta as a court witness in a trial-within-a-trial.

Sergeant Maphuta confirmed that he was assigned to be a photographer on that day and the fact that the pointing out could not be completed because of the people who were gathered at the scene.

He denied that he was in and out of the office at the time of the statement and that at some stage he was standing next to the window

which was approximately 15 metres from where the accused and Colonel Maluleke were sitting from. He testified that the room where the statement was obtained from was a very small room, giving an approximation of five metres by five metres and that he remained present throughout the whole process.

He did not see the accused crying and he did not hear the accused saying to Colonel Maluleke that she is not alright and that she was feeling pain in her ear, he could not remember the accused requesting Painblok from Colonel Maluleke as the process took place some years back.

After the admission of the statement into evidence, Colonel Maluleke was called to read the statement into record. The proforma and the statement were then marked as EXHIBIT D and EXHIBIT D1 respectively. I must pause to mention that there was an agreement between the State and the defence at the time when Colonel Maluleke was reading the accused's statement into record that Colonel Maluleke should not read into record certain confidential information pertaining to the accused health into record.

In the main trial the State then led the evidence of Wanda Maluleke, a sergeant in the South African Police Service stationed O[...] Police Station. He testified that he attended the scene on 4 August 2020 at Extension 2[...], O[...]. On arrival at the scene, he found a young man and his mother, that is the first State witness and the accused in the matter.

S[...], accused and K[...] the tenant were all arrested and K[...]’s arrest was as a result of the information they received that he assisted in burying the deceased. There was also another person, Mudlalifa Luseka who was arrested. The scene was then cordoned off when he left the scene to detain the people he had arrested.

In cross-examination he testified that he arrived at the scene at approximately 20h00 and left the place cordoned off.

The next witness for the State was James John Swart currently stationed at Sunnyside Police Station with the rank of a captain. During August 2020 he was a detective commander at O[...] Police Station. On the evening of 4 August 2020, he attended a scene at Extension 2[...], O[...] and the scene was dark.

When he arrived there, the uniformed police were already there, and the scene was cordoned off. The scene was guarded overnight, and he went back to the scene the following day. The experts were summoned to the scene, but they could only be there the following day that is 6 August 2020 and throughout the whole time, the scene was guarded by the police.

The community members were very angry and that is another reason why the scene was guarded. The experts arrived on 6 August 2020 and the forensic experts started to excavate the scene where they thought that the bodies were buried. The remains of the three bodies were found buried on top of one each other and next to one another.

After the removal of the remains, they were sealed in evidence bags and then handed over to him and he forwarded the remains to the forensic pathologists who were on the scene. He confirmed the scene depicted in EXHIBIT A as the scene where the remains were found. In cross-examination, he referred to a photograph 99 which shows that the body was covered with a blanket and that photos 104 to 106 which shows that the body had a pair of trousers.

The next witness for the State was Dr Servaas Hofmeyer Rossouw who is employed as a forensic pathologist. He confirmed that he conducted

the post-mortems on the three skeletal remains on 7 August 2020 and compiled reports. The first report was marked as EXHIBIT F with reference number DR933/20 which he described as skeletal remains of an adult male whose estimated age is unknown.

In the chief post-mortem findings, he concluded that the cause of death is not determined with post-mortem examination. On external

appearance he found that most hand and feet bones were missing. He found a small amount of localised mummified which is an advanced stage of decomposition soft tissue. He found a small uneven defect on the right frontal area which he attributes to have been caused by blunt force trauma. He also noted teeth loss which might have been caused in the lifetime of the deceased.

The second postmortem report was marked EXHIBIT G with reference number DR934/20 which is the complete skeleton of a young man who he estimated his age to be between 18 and 20 years. The cause of death was not determined with post-mortem examination. He observed small areas of saponified soft tissues on the pelvis area. He says that the remains are for a young man because the humerus head epiphyseal plates are not closed yet. That is bones in the arms.

The doctor observed a large bone defect on the left frontal and parietal area with fracture lines to the rest of the left parietal area and occipital region. The fracture line also extends through the maxilla to the left temporal bone. He also observed the dried remanence of the brain tissue in the cranial cavity.

The third post-mortem report was marked EXHIBIT H with reference number DR935/20 and describes it as the skeletal remains of an adult. The doctor could not determine the gender of the remains but found that the remains have female features. It is possible for a male to have female features and for a female to have male features. The cause of death was not determined with post-mortem examination. He observed a fracture on the right zygoma that is the right cheek bone that it might have been done during the lifetime of the deceased.

The doctor described the features that can be found in a female but there are instances where such features are present in males. The doctor testified that the pelvic bones of females are broader than that of males and the subpubic angle is 90 percent or more whereas in males it is smaller in angle. He estimated the percentage in the remains to be between 80 and 90 percent in angle. He received the bones from Mr DK Kau, a forensic officer for post-mortem purposes.

In cross-examination he testified that he found no serious injuries on the remains of the third body that he conducted a post-mortem on and that can be consistent with poisoning. After the testimony of Dr Rossouw the following documents were by agreement admitted as exhibits;

1. Section 212 affidavit deposed to by Captain Edward van der Westhuizen, a forensic analyst as EXHIBIT I.
2. Section 212 affidavit of David Kgwape Kau, a forensic officer as EXHIBIT J for reference number DR933/20.
3. Section 212 affidavit deposed by David Kgwape Kau, a forensic officer as EXHIBIT K relating to reference number DR934/20.
4. Section 212 affidavit deposed to by David Kau, a forensic officer as EXHIBIT L relating to reference number DR935/20.
5. DNA reference sample collection kit marked as EXHIBIT M and 6;
6. Section 212 affidavit deposed to by Salome Zuma from the biology section as EXHIBIT N.

The next witness for the State was Abednego Baloyi, a police officer with the rank of Sergeant stationed at O[...] Police Station and the investigating officer in this matter. He testified that the initial investigating officer in the matter was Sergeant Thimbane who has since been transferred to Limpopo. He then inherited the police docket for purposes of investigations after Sergeant Thimbane was transferred to Limpopo.

He went to house number 6[...], Extension 2[...], O[...] with the intention of serving a subpoena to Mr Brian Tshuma, a sangoma to appear in court as a witness, but he was informed by neighbours that Mr Tshuma was sick and has since relocated to Zimbabwe. He was pointed to his shack, and he was informed that Mr Tshuma was a tenant who was residing alone. He interviewed four to five people who all informed him that Mr Tshuma has since relocated to Zimbabwe.

One of the people he interviewed told him that he does not know Mr Tshuma's address in Zimbabwe and one of the people he also

interviewed gave him Mr Tshuma's phone numbers, but could not reach him on the phone and has since lost the numbers. He was in communication with Ms Kgomotso, a community leader who was trying to trace Mr Tshuma for him as he could not get Mr Tshuma's address in Zimbabwe.

Mr Tshuma made a statement in this matter and such statement was obtained by Sergeant Thimbane. In cross-examination he confirmed that he went to the address of Mr Tshuma two weeks before the commencement of the trial matter.

After the testimony of Sergeant Baloyi, the State intended to introduce the statement obtained from Mr Tshuma to form part of the evidence. The defence objected to the introduction of such statement as it amounts to hearsay evidence. After hearing submissions on behalf of the parties on the admissibility of such statement I made a ruling that such statement be admitted into evidence with full reasons and such statement was admitted as EXHIBIT O. The State then closed its case after the determination of the admissibility of Mr Tshuma's statement.

The accused exercised her constitutional right to remain silent and closed her case without testifying. Before I analyse evidence

in this matter, I find it prudent first to deal with the failure of the accused to testify.

Before the advent of the Constitution, the Supreme Court of Appeal in *S v Mthethwa* which was quoted with approval in the matter of *S v Tshabalala* 2003 (1) SACR 134 (SCA). At paragraph 20 the following was stated.

*"Where there is direct prima facie evidence implicating the accused in the commission of the offence his failure to give evidence, whatever his reason may be for such failure in general ipso facto tends to strengthen the State's case because there is nothing to gainsay it and therefore less a reason for doubting its credibility or reliability."*

In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) at paragraph 24, decided post Constitution, the Constitutional Court when dealing with failure to testify stated that:

*"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used as evidence against that person."*

It arises again at the trial stage when as accused has the right to be presumed innocent to remain silent and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attached to a decision to remain silent during the trial.

If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, the Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.

Whether such a conclusion is justified will depend on the weight of the evidence."

The State bears the onus to prove the guilt of the accused beyond reasonable doubt. There is no onus on the accused to prove his or her innocence.

In *S v Van der Meyden* 1999 (1) SACR 447 at 448 Nugent J stated that:

*“The onus of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. (See for example R v Difford 1937 (AD) 370 at 373 and 383). These are not separate and independent tests but the expression of the same test when viewed from the opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt.*

It will be so only if there is at some time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

The State led the evidence of S[...], a single witness to the killings of the all deceased in this matter is and also a single witness in the burials of the bodies of the deceased. S[...] is not only a single witness in the matter, but he was also at some stage arrested in connection with the commission of the offences and charges withdrawn against him when the trial commenced.

Section 208 of Act 51 of 1997 provides that:

*“An accused may be convicted of any offence on the single evidence of any competent witness.”*

In *S v Texeira* 1980 (3) SA 755 (A) at 761 it was stressed that:

*“In evaluating the evidence of a single witness, the final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.*

The underlying factor is that the Court should approach the evidence of a single witness with caution and it must be clear and satisfactory in every material respect.”

A measure of extra caution should be applied when admitting the evidence of S[...] as the accused is his mother and the deceased

mentioned in count 3 was his brother. S[...] was not warned in terms of the provisions of Section 204 of Act 51 of 1997 when he

testified. As a result, this Court need not determine whether he needs to be indemnified or not.

Following S[...]’s evidence it is clear that he was present at all material times, mainly at the times of the commissions of the offences. He played a major role in relation to murder committed in count 3 as it is his evidence that the accused asked him to enter the house through the bathroom window and to then open the door for the accused to enter inside the house.

It is also his evidence that he was requested to observe whether the deceased was breathing or not after he was assaulted with the hammer by the accused. After the accused returned from digging a hole, S[...] informed her that the deceased was moving. The accused then requested him to fetch a brick from the back of the house, that brick was then used by the accused to assault the deceased which then resulted into his death.

It can be said without fear of contradiction that S[...] through his actions made himself an accomplice in the murder of his brother, the deceased mentioned in count 3. This is an extra layer which required that his evidence should be approached vigilantly with caution. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA (CC) it was stated that:

*“As a general rule, it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity while still in the witness box of giving any explanation open to the witness and defending his or her character.”*

I am quoting this passage from SARFU as I realised that the bulk of S[...]’s evidence was not challenged which is construed to be admitted by the defence when he testified that:

1. That they were initially staying elsewhere with the accused before they went to stay with the deceased mentioned in count 1, who was staying alone in that property and he was a boyfriend to the accused. Further, that prior to the death of the deceased there was argument between the accused and the deceased.
2. That the deceased mentioned in count 2 was a boyfriend of the accused during the lifetime of the deceased mentioned in count 1 and that alcohol was sold at their residential place.
3. That after the death of the deceased mentioned in count 1, the deceased mentioned in count 2 came to reside with them until he died.
4. That the deceased mentioned in count 3 was using drugs and abusing alcohol and will from time-to-time demand money from the accused and if she did not give him the money, he would threaten to report her to the police and inform them about what happened in the yard and,
5. That the accused had another boyfriend called G[...] who resided in the same street as their residential place and that they spent a night at his place after the deceased mentioned in count 3 chased them away from their house.

Ms Mampuru on behalf of the accused in argument contended that the evidence of S[...] is not clear and satisfactory in every material

respect because of the material discrepancies in his oral testimony and the statement that he made to the police. I fully agree with Ms Mampuru that the evidence of a single witness should be clear and satisfactory in every material respect for the Court to rely on it.

It has been said in many respects that the exercise of caution must not be allowed to displace the exercise of common sense. S[...] was called upon in the year 2024 to give evidence of incidents which allegedly happened in 2016, 2017 and 2018. Although he is relatively young person at the age of 21 years old, he was expected to testify about the events which occurred eight years back when he was younger than when he took a stand and testified.

Part of the evidence he testified about which is relevant is for example after the alleged murder of the deceased mentioned in count 3, he decided to report the matter to the police and he was not taken serious by the police, they chased him away from the police station.

Another illustrative factor is when he reported the matter to his grandmother, it was said that there was something wrong with him

mentally and was referred to a sangoma for treatment.

The discrepancies highlighted in the testimony of the single witness were the following;

1. The witness in his oral testimony referred to a hammer that was used to kill the deceased mentioned in count 1, whereas his statement to the police made reference to an object.
2. In his oral testimony he indicated that the deceased mentioned in count 1 was kept for two weeks in the house before he died and buried in the yard, whereas in his police statement, he said that the deceased was buried the same day when he was killed.
3. That in his oral testimony he testified that the all deceased were undressed before they were buried but after the remains were excavated it is clear that one of the remains was covered in a blanket and the other had a pair of pants and;
4. That the deceased mentioned in count 1 while he was kept at the house before his death, his mouth was covered with Sellotape, an aspect that was never mentioned in his evidence-in-chief.

It is correct that S[...] only mentioned the aspect relating to the Sellotape only in cross-examination and he gave his reasons for doing so. Can an aspect which was not mentioned in evidence-in-chief affect one's credibility? In my considered view, such witness's credibility can be affected if the witness does not proffer a reason for such a failure.

The other aspects to be considered is the importance of such evidence. S[...] testified that there were occasions when the deceased in count 1 was fed and logic dictates that in such an event, the Sellotape which was covering the mouth of the deceased would have been removed. It is also not clear from evidence as to how long was that Sellotape covering the mouth of the deceased. The Court in the matter of *Mafaladiso v S* 2003 (10) SACR 583(SCA) (593j -594a-g) when dealing with a discrepancy in a police statement and oral testimony stated that:

The court must handle discrepancies between different versions of the same witness with circumspection. First the court must ascertain what the witness meant to say to determine whether there was a discrepancy and the extent of the discrepancy.

The fact that the statement to the police was not subject to cross-examination, language and cultural differences between the witness and the person who took down the statement and the fact that the police did not require any explanation of the statement.

Secondly, not every error by, or discrepancy in the statement of a witness affects the witness's credibility.

Thirdly, the different version must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness's credibility and whether the witness had sufficient opportunity to explain the discrepancies.

Lastly, the witness's statement to the police has to be weighed up against the witness's viva voce evidence."

Having regard to the above passage, S[...] is Xhosa speaking whereas the person who obtained the statement from him is Tsonga speaking. S[...] mentioned in his testimony that he used both Xhosa and English when he was making a statement. The statement was eventually reduced into writing in English. There is an issue of language and cultural aspects between the two persons, between the person who narrated the story and the person who reduced that into writing.

S[...] testified that he had to leave school at grade 10 because of what happened in their yard. He also explained the effect of being in custody for a period of three years and the fact that he was overwhelmed, which to me is a reasonable explanation considering how young he was when the alleged incidents took place.

I therefore find that the discrepancies highlighted are not material to affect the credibility of S[...]. The issue of identity in this matter plays no role and S[...] cannot be faulted to have made a wrong identification of people he testified about. S[...] witnessed all the incidents mentioned in the indictment with his naked eyes and he was not told by any other person.

S[...]’s version that the deceased in counts 1 and 3 were assaulted with a hammer and a brick finds corroboration on Dr Rossouw’s finding in his post-mortem report. He found defects on the skulls of the two deceased which he attributes to blunt force trauma. S[...] mentions that the deceased in count 2 was poisoned and drowned in a dustbin full of water and Dr Rossouw confirms that in the post-mortem as he said that he could not find serious injuries. The only defect he found on the deceased mentioned in count 2 he attributes that to have been done in the lifetime of the deceased.

S[...]’s evidence also partly finds corroboration in the statement which was made by the accused to Colonel Maluleke during the aborted pointing out. When asked by Colonel about the allegations the community were making against her about killing the deceased in this matter, the accused answered by saying that she cannot deny the allegations and that she did what they are alleging.

S[...] testified about the accused telling Gift, the deceased mentioned in count 2 that the deceased in count 1 infected her with a disease which was unknown to the witness. The accused in her statement mentioned that the deceased in count 1 has infected her and she is currently suffering from such medical condition and that she hates the deceased.

In her statement, accused mentioned that she had an argument with the deceased in count 1 and that is clear corroboration of S[...]’s

evidence that before the killing of the deceased mentioned in count 1, he was having an argument with the accused.

In her statement, the accused mentioned that the deceased died because she did not give him food for three days, but I fail to understand

why she had to lie to the deceased’s friends and customers that the deceased went to the village when they enquired about his whereabouts as she says in her own account that she is not liable for the killing of the deceased.

In her statement she also corroborates the evidence of S[...] that she together with the deceased mentioned in count 2 dug a hole and buried the deceased mentioned in count 1 in that hole. She further confirmed S[...]’s evidence in her statement that after the killing of the deceased mentioned in count 2, herself and the deceased mentioned in count 3 dug a hole and buried the deceased mentioned in count 2.

She also confirmed S[...]’s evidence that the deceased mentioned in count 3 was on drugs and would always demand money from the accused with the threat that he will report the two incidents to the police if he does not get money from the accused.

Finally, in her statement, the accused confirmed the evidence of S[...] that before the deceased mentioned in count 3 was killed, that he chased them away from their home and that the deceased was killed with the use of a hammer, even though she alleges that it was S[...] who did that.

It is trite that the admissibility ruling of an extra curial statement like the one did by the accused in casu at the trial-within-a-trial is interlocutory.

The final determination of the admissibility of such an extra curial statement is made at this stage of the proceedings. The defence did not place in dispute the contents of the proforma which was admitted into evidence as EXHIBIT D. The accused was asked certain questions which goes to the heart of the subsequent statement that she had made.

The accused alleged that she feared Mr Tshuma but when the statement was obtained from her, Mr Tshuma was far from her, and she received police protection against the community. At the time of the statement the accused was asked whether she was threatened by any person to make a statement and she said no.

Both Colonel Maluleke and Sergeant Maphuta denied that the accused was not alright emotionally at the time of the statement, that she was crying and that she was also complaining of the pain in her ear.

It is therefore my considered view that there are no compelling factors which authorise me to interfere with my earlier ruling. In my judgment on the admissibility of the statement of Mr Tshuma into evidence I promised that I will relook his statement when I am considering the evidence in totality.

The accused elected to exercise her right to remain silent and did not testify in her defence. As a result, Mr Tshuma's

statement as it was not cross-examined must be measured against the State's case.

It is accepted by both the State and the defence that S[...] did not on his own accord consult with Mr Tshuma but was taken there by his mother and grandmother. That piece of evidence is confirmed by Mr Tshuma in his statement. The fact that S[...] remained for a few days at Mr Tshuma's place is also confirmed in the statement by Mr Tshuma.

The fact that Mr Tshuma, accused and S[...] went to the bushes in order to perform rituals is the evidence which was introduced by the defence, it was admitted by S[...] and further confirmed by Mr Tshuma in his statement.

The only aspect which is contained in Mr Tshuma's statement which contradicts the State's version is the fact that when accused brought food for S [...], Mr Tshuma did not give him the food to eat whereas S[...] testified that he ate that food.

Having regard to the above I find no compelling factor to interfere with the ruling I made in admitting the statement of Mr Tshuma into evidence in terms of the Hearsay Act.

The accused after killing the all the deceased, she dug holes and buried the all deceased in such holes which were also covered.

S[...]’s testimony is that after the deceased were killed, the accused would clean the house and made it a point that she got rid of the smell.

S[...] was instructed that when inquiries are made about the whereabouts of the deceased in counts 1 and 2 he must say that he does not know where they are, also when he is asked about the whereabouts of the deceased mentioned in count 3 he must say that he is in Cape Town. S[...] even went to the extent of informing his cousins that the deceased mentioned in count 3 is in Cape Town.

The accused made it a point that no one knows that all the deceased were killed and buried in that yard. Mats were put on top of the place where the bodies were buried as depicted on the scene photo album, EXHIBIT A.

According to the accused statement, which was admitted into evidence, the deceased in count 2 would go around telling people that the accused killed the deceased in count 1 and that is the reason why he was killed.

The deceased mentioned in count 3 was killed because he would always demand money from the accused with a threat of reporting the incidents to the police if he is not provided with the money that he was requesting.

Having regard to the above I am satisfied that the State proved the guilt of the accused beyond reasonable doubt. S[...]’s evidence was satisfactory save for the discrepancies highlighted, which in my considered view is not material.

The rest of the State witnesses’ evidence was honest and satisfactory in all material respects and remains unchallenged.

Despite being highly implicated in the commission of the offences, the accused decided not to testify in her evidence. There was evidence calling for an answer on her part, but she elected to remain silent in the face of such evidence. It is because of this factor and the totality of evidence that this Court deems the evidence as sufficient in the absence of an explanation on the part of the accused to prove guilt beyond a reasonable doubt.

Having found the accused liable for the murders, the only aspect that needs to be determined is whether murders fall within the ambit of Section 51(1) of Act 105 of 1997 or not in that the murders were planned or premeditated.

From the evidence of S[...], it is clear that the murders were well planned in advance and not committed on the spur of the moment. In the first murder, there was first an argument between the deceased in count 1 and the accused and then the accused had a meeting with the deceased mentioned in count 2 that resulted in the execution of the plan to kill the deceased mentioned in count 1.

In the second murder there was initially a meeting between the accused and the deceased in count 3 about the way in which the deceased in count 2 was treating the accused and then there was a discussion between the accused and the deceased mentioned in count 3 on how to hatch out a plan to kill the deceased mentioned in count 2.

The third murder was as a result of a frequent request for money for a prolonged period of time by the deceased in count 3, coupled with threats to inform the police about what had happened in the yard and accused said to S[...] that she cannot be defeated by a child that she gave birth to. S[...] was sent on different occasions to observe the deceased. I am therefore satisfied that the murders fall under the ambit of Section 51(1) of Act 105 of 1997 and that they are planned.

It is as a result of the above that the following verdict is returned.

Count 1, Murder, read with the provisions of Section 51(1) of Act 105 of 1997 you are found guilty.

Count 2, Murder, read with the provisions of Section 51(1) of Act 105 of 1997 you are found guilty.

Count 3, Murder, read with the provisions of Section 51(1) of Act 105 of 1997 you are found guilty.

Count 4, Defeating the administration of justice you are found guilty.

MOSOPA, J

JUDGE OF THE HIGH COURT

DATE: 29/07/2024

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