

SOUTH AFRICA / JUDGMENT

S v T.M (SS059/2024) [2025] ZAGPJHC 345 (26 March 2025)

[2025] ZAGPJHC 345

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS059/2024

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

26

March 2025

CASE

NUMBER: SS059/2024

In

the matter between: THE
 STATE
 and
 T[...]
 M[...]
 Accused

Coram: DOSIO J

Heard: 24 March 2025
 Delivered: 25
 and 26 March 2025

JUDGMENT

DOSIO J:

Introduction

- [1] The accused is arraigned on three counts. Count one is a charge of murder read with section 51(1) and part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') in that the State alleges the accused killed Victor Molebatsi on 5 January 2024 at 8[...] D[...] Street, M[...]. Count two is a charge of housebreaking with intention to rob in that the State alleges on 5 January 2024 the accused broke and entered the house of Victor Molebatsi with the intention to rob him. Count three is a charge of robbery with aggravating circumstances in that the State alleges that on 5 January 2024 the accused assaulted Victor Molebatsi and took by force the following items, namely, 1 x black Samsung Plasma television, 1 x Samsung S20 cellular phone and 1 x laptop, aggravating circumstances being that the accused inflicted grievous bodily harm on Victor Molebatsi.
- [2] The accused is represented by Advocate Johnson and the State is represented by Advocate Phatlanyane.
- [3] At the inception of the trial the court explained the minimum sentence of life imprisonment in respect to count one, and the prescribed minimum sentence of 15 years imprisonment in respect to count three. The accused understood.
- [4] The accused pleaded not guilty on 18 February 2025. No admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') were made.
- [5] At the inception of the trial, the State addressed the court indicating that:
- a) On the 5th of January 2024, the deceased, Victor Molebatsi, was at his place of business and residence at number 8[...] D[...] Street M[...] where he was found by a friend badly injured and unable to talk.
 - b) The police and medical assistance were called to the scene.

- c) Upon arrival at the deceased's place, the police noticed signs of forced entry and that entry was possibly gained through a broken window. The following items were missing: a television, cellphone, laptop as well as coins from the snooker table.
 - d) The deceased was taken to hospital where he died on the 29th of January 2024 and the cause of death was determined to be "blunt force head trauma and complications thereof."
 - e) The accused was arrested on the 6th of January 2024 after he handed himself over to the police.
 - f) The laptop, cellphone and television were recovered.
 - g) It is alleged that the accused committed the offences set out above in furtherance of a common purpose with another. It is unknown to the State as to when and how the common purpose was formed. However, the State alleges that the common purpose existed at least immediately prior to and for the duration of the commission of the offences.
- [6] The State called the following witnesses, namely, Lucas Ramaboa, Lebogang Tshukudu, Matlapeng McDonald Phiri ('Matlapeng'), N[...] F[...] ('N[...]'), Bafana Sebetela ('Bafana'), Sabelo Msomi, John Owen Mchube ('Mdala'), Sunday Iyoke, Berry Mohale ('Berry'), Masefako Kgaswane, Sibongile Mokati, Tebogo Kaswane ('Tebogo'), Doctor Nciweni, Hosea Cheene Lelahane, Doctor Mafane, Gladys Hlaisi, Boitumelo Manyaka, Glen Mothobi, Eunice Mokoena, Doctor Mamokhele, Jonase Ramano, Dikgang Lacake ('Dikgang') and Tshidiso Nobela ('Tshidiso'). The evidence will be summarized in accordance how the events unfolded and not in the sequence in which they were called as witnesses.
- [7] The following exhibits were handed in;
- (a) Statement of Matlapeng marked as exhibit 'A'
 - (b) Photos taken by Captain Setati marked as exhibit 'B'
 - (c) The patient report form in respect to the deceased marked as exhibit 'C'
 - (d) Postmortem report compiled by Doctor Nciweni marked as exhibit 'D'
 - (e) The accused's notice of rights marked as exhibit 'E'
 - (f) Statement of Jonase Ramano , marked as exhibit 'F'
 - (g) SAPS 14 register marked as exhibit 'Gi' and 'Gii' respectively
 - (h) SAPS 10 register marked as exhibit 'H'
 - (i) Form 28 complied at Baragwanath hospital marked as exhibit 'J'
 - (j) Medical notes marked as exhibit 'K'
 - (k) Patient report form in respect to the deceased marked as exhibit 'L'
 - (l) Patient report form in respect to the deceased marked as exhibit 'M'

- (m) patient report form in respect to the deceased marked as exhibit 'N'
- (n) Sketch plan marked as exhibit 'O'
- (o) Identification of the body of the deceased marked as exhibit 'P'

Lucas Ramaboa

[8] He testified that Victor Molebatsi ('the deceased') is his friend. He went to the deceased's house on 5 January 2024 at quarter to seven am. When he arrived, he saw the gate was open. He called out the name of the deceased multiple times but there was no response. He then entered the yard and noticed the window at the lounge was broken. The door to the tavern, which is annexed to the house was also open. He entered the tavern and noticed that the slot machine which is used to insert R2 coins to play pool

had been broken out and was lying on the pool table. He was afraid to enter the premises further and waited for a young boy to accompany him inside. They entered and found the deceased sitting on the couch in the lounge with his head bent over. The deceased was bleeding from his nose, he was also bleeding on his head. This witness called out to the deceased but the deceased was only making a sound that was unrecognizable.

[9] This witness stated he was in the company of the deceased on 4 January 2024 and the deceased was fine on that day and the snooker table had also not been damaged.

[10] This witness stated that the size of the window that had been broken was 11.60cm in length and 4.60cm broad. This witness also noticed that the steel which was usually placed by the deceased on the inside of the door had also been removed.

[11] This witness impressed the court. He does not know the accused and he merely placed on record what he observed on 5 January 2024.

Matlapeng McDonald Phiri

[12] This witness testified that he resides at 3[...] M[...] Street, M[...]. On the 6th of January 2024, in the early morning hours between 01h00 and 03h00 he was asleep when he heard a knock. He was staying at Berry's house. He asked who it was and the person responded it is 's[...]'. S[...] is the accused before court. The accused asked him for something to smoke. The accused was accompanied by Gundi. When the accused entered he was holding something that looked like a TV. It was one meter in length and five to six centimeters in thickness. It was wrapped. This witness then told them to leave and to take this item out. He never asked them where they got it. He warned them that if anyone was asking about a missing TV, he would mention their names as possible suspects. The light was on when he spoke to the accused. He stated the accused lives close to Berry's house.

[13] During cross-examination, this witness stated that whatever the accused and Gundi did must have transpired on the 5th of January. He repeated that the accused asked him for something to smoke. He repeated the accused was carrying a TV wrapped up in a plastic like material resembling that used to cover leather chairs. The colour of this cloth was red and black.

[14] Although this witness states there was no communication breakdown when his statement was taken, it is clear there is a contradiction between what is included in his statement as opposed to what he said in his evidence in chief. These contradictions are the following:

- a) His statement reads that Gundi was carrying something wrapped in a carpet, whilst in his evidence in chief this witness is adamant it is the accused who was carrying it.
- b) In his statement he says he was sleeping at his residential place when the accused and Gundi came, whilst in his evidence in chief he stated he was sleeping at Berry's place.

[15] Matlapeng's statement and his viva voce evidence should be measured in light of the dictum in the matter of Mafaladiso [1] where the Supreme Court of Appeal held as follows:

'Firstly, it must be carefully determined: What the witness actually meant to say on each occasion. In order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard, the adjudicator of facts must keep in mind that a previous statement is not taken down by means of cross-examination. That the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail.

Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness, non-material deviations are not necessarily relevant...

Lastly, there is the final task of the trial Judge, namely: to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told despite any shortcomings.'

[16] The actual sentence in the statement of Matlepeng reads "Gundi was behind M[...]i holding something wrapped with a carpet". The person taking down the statement did not clear up if it was Gundi or the accused holding 'something wrapped with a carpet'. Matlepeng is adamant that he saw the accused. His version was not broken down in this respect. As a result, part of this statement is open to interpretation.

[17] The contradiction of this witness stating in his evidence in chief that he was sleeping in Berry's room when Gundi and the accused arrived, as opposed to his statement where he states he was sleeping in his own residence, this court does not regard this as material. The fact remains that according to the sketch marked exhibit 'O', Matlepeng's main house, namely 'D' is connected to the room of Berry which is marked 'C' on exhibit 'O'. This witness confirmed during cross-examination that on 6 January 2024 he was in fact sleeping in Berry's room. Due to the fact that there are no other contradictions in his statement as

opposed to his evidence in chief, this Court finds him to be credible when he maintained that it was the accused who was seen carrying the TV.

[18] The version of the accused was put to this witness. This witness confirmed that the accused resides with his girlfriend N[...] and her son S[...] in a shack belonging to Mdala. This witness confirmed he knows Mdala. This witness had no knowledge pertaining to the accused's version that the accused saw Gundi (namely Tsepang) leaving Berry's house on 4 January 2024 and that Gundi called out to the accused. This witness was adamant he did not see the accused or Gundi on the 4th of January

2024. This witness knew nothing about the accused's version that Gundi opened up a dustbin wherein a Plasma TV was found.

This witness stated he had no knowledge of the accused's version that Gundi told the accused that he got the TV in the suburbs. This witness also had no knowledge of the version put to him that Gundi had a black bag on his shoulder and a silver cell phone.

He had no knowledge of the version of the accused that Berry got very angry. This witness denied the version of the accused that Berry sold drugs to Gundi for R100 or that Gundi gave him R100. He denied the version put to him that Berry chased Gundi and the accused out, as he maintained he is the one who chased them out. He also denied the version put to him that the accused followed this witness to his house at 719 Mapasa Street or that Gundi joined them at this address and that Gundi came with a black bag and cell phone. This witness stated the accused's version of the accused not knowing where the TV was, was a lie. He also denied the version of the accused that Gundi phoned a Nigerian whilst in this witness house in order to sell a cell phone to him. This witness stated he knew nothing else that transpired after he locked the accused and Gundi out of the house of Berry. This witness confirmed that on 6 January 2024, he was living at Berry's house. This witness denied the version of the accused that on 6 January 2024, the accused stayed at this witness's house as the community had already beaten-up Gundi and Kamogelo.

[19] There may be some confusion regarding what is the address of this witness, however, it is not material as the accused confirms that Matlepeng lived next door to his room. Besides, Matlepeng has two properties over which he has control over. These two properties were depicted as 'D' and 'D1' on exhibit 'O'. The accused also stated in his evidence in chief that he knows Matlepeng well and that he does sometimes stay at Berry's house as they are friends and sell things together.

[20] Irrespective of these confusions about his address, this witness impressed this court. He was adamant that the version of the accused is all a lie. It is true that this witness is a single witness regarding his evidence that he saw the TV in the possession of the accused, however, as regards the rest of his evidence he was chronological as to what transpired that evening. This court finds no motive why he would want to falsely implicate the accused. Right through his evidence, this witness is adamant he was the only person who interacted with Gundi and the accused when they knocked at Berry's door, as Berry was asleep at the time.

Berry Abram Motale

- [21] This witness stated he knew Sunday Iyoke, as Sunday Iyoke gave him a cell phone after he realised it was stolen.
- [22] During cross-examination this witness stated he knows Gundi as they stay in the same location. He also knew Matlepeng who is a friend of his. On the evening of 5 January 2024, Matlepeng was staying with him. This witness also stated he knew the accused as they attended school together. The accused is also his friend.
- [23] This witness stated he has no knowledge of the accused's version that on the evening of the 4th of January 2024, the accused and Gundi came to his house at 23h30. He stated he was in bed as he was sick. As a result, he had no knowledge of the accused's version that the accused whilst knocking at this witness's door, saw Gundi opening a bin outside the house that contained a Plasma TV, or that this witness allegedly chased Gundi, the accused and Matlepeng out of his house, or that this witness allegedly sold drugs to Gundi for R100.00. This witness during cross-examination was adamant he had never discussed this case with Matlepeng. He confirmed he did receive the cell phone from Sunday Iyoke.
- [24] This witness impressed this court. He stuck to his version that on the evening 4 January 2024 he was sick and asleep. He is a friend to the accused and this court cannot find any reason why he would deny the version of the accused if it was indeed true.

N[...] F[...]

- [25] This witness stated she lived with the accused at 7[...] M[...] Street. On 5 January 2024, she woke up early and saw the accused was cleaning the yard outside. She went to town at 6 am and then went to work at 8 am. She came back from work at 10 am. She stated that on the evening of 4 January 2024, she went to bed and the accused was not at home. The accused arrived at around 22h00 or 23h00 and she was angry as the accused was walking around at night. Gundi gave her R150 and then the accused and Gundi left. They were there for about fifteen minutes. She only saw the accused again on 5 January 2024 when he was cleaning

the yard at 6 am. She states everything was okay until 20h00, when the police arrived accompanied by Tebogo. Tebogo stated and pointed to the police that the TV had entered this witness's house, and she pointed where. This witness was confused and did not know what was going on. The police questioned her whether the accused stayed there, and she replied 'yes'. She showed the police where the accused slept. The people then went across to the house diagonally across from hers as there was video footage from the cameras of that house. A certain Mdala then opened his shack and when the shack was searched for the first time, nothing was found. They searched for a second time and still found nothing. When they went back for a third time, they lifted the sofa and found a Plasma TV that was wrapped in a plastic mat. The TV was approximately one meter in length. This shack had no roof.

- [26] This witness states that the next day, namely 6 January 204, which was a Saturday, three boys, namely Tshepo, Luckyboy and Thando came. They were looking for the accused. The three boys then left and returned with Gundi and Gundi was assaulted in her yard. She then took her phone and phoned the police. The group then exited her yard and put Gundi in a taxi. The group came back and this time they came with Kamogelo and Gundi. They assaulted both of them again in her yard. The police then arrived and Kamogelo was taken to the police station and Gundi was taken to the hospital.
- [27] This witness stated that the same day, after midnight the accused arrived. She then left and went to stay at her parental home. The accused remained behind. This witness called the police. It was a different team of police men who had no knowledge of what had transpired earlier in her yard. The police took the accused and dropped him off somewhere in town. The original police who came earlier arrived at around at past two in the early morning looking for the accused. She told the police the accused was at Matlapeng's place.
- [28] This witness then accompanied the police to Matlapeng's place where the accused was arrested. Whilst at the police station, the police spoke to the accused. The police then came back with the accused and said they were going to fetch a laptop. The accused was put in the van and they went straight to the SAP.
- [29] This witness was also in the police van when they went to Bafana's place. The police stood outside the wall at Bafana's place and called out Bafana's name. Bafana then came out of the yard where he stays and he was carrying a laptop. The laptop was silver in colour and an old make as it was thick. This witness was brought home. Bafana remained at his house and the accused was taken to the police station.
- [30] During cross-examination this witness stated she is the one who found the Plasma TV which was wrapped in a plastic carpet. She repeated her version in her evidence in chief that on the 4th of January 2024 the accused left the house at past ten to go and buy her beer and only returned on the 5th of January at six am. The accused when her returned was in the company of Gundi. Gundi was in possession of a black sports bag and the accused and Gundi went straight to the bedroom. She repeated that Gundi gave her R150, after which she went to sleep. Gundi and the accused left. The next time she saw the accused was six am the next morning. She repeated she was angry with the accused as he had not slept at home. She repeated she left home at eight in the morning and returned at past ten in the morning. When she returned, the accused was still busy in the yard.
- [31] During cross-examination this witness was asked whether whilst Gundi was being assaulted by the community, did he mention the accused's name, to which she replied "He said yes after being asked if M[...] was at the scene."
- [32] During cross-examination she agreed that she was at U-Save in the afternoon when she saw Bafana and the accused. Bafana was carrying a reusable bag.
- [33] This witness had no knowledge of the accused's version which was put to her.

[34] This witness impressed this court. She stated what she had seen and it is clear she had no reason to falsely implicate the accused who was her boyfriend. This Court is aware of the many cases that state an negative inference cannot be drawn by a witness having no motive to falsely implicate an accused, however, the fact remains, this witness is in a close relationship with the accused and if anything, she would want to protect him. The fact that she went out of her way, due to fear, to implicate him, means that she clearly suspected the accused as having been involved in the crimes which led to the deceased's death and that she was afraid the community would implicate her for protecting the accused.

Bafana Sebetlela

[35] This was a section 204 witness in terms of Act 51 of 1977. This court warned him of the consequences of not telling the truth. He understood and stated that he lives twenty to twenty five minutes walk from the accused's residence. On 5 January 2024, he was sitting in his room when he heard someone whistling outside. He went outside and saw the accused carrying a black schoolbag on his back and holding a beer in his hand. The time was around ten am. The accused told him that he was looking for a buyer for the laptop. This witness told the accused they can go to Robert Broon which is a busy road. When they got there this witness called someone to come and buy the laptop. This man did not come so they walked to U-Save as the man said he would meet them there. At U-Save they saw N[...]. The man never arrived so the accused told this witness to bring the laptop to this witness's girlfriend. This is when the accused told him that he, together with Gundi, had broken into the deceased's place. The accused also had many R2 coins which he told this witness he had taken from the slot of the snooker table at the deceased's tavern. The accused had the R2 coins in a plastic bag. They then walked to this witness's girlfriends place where they gave her the schoolbag to keep. The accused returned to his place and this witness went to his own place of residence. This witness then asked his girlfriend to bring the schoolbag. He opened it and found the laptop inside. He closed the bag and kept it in his drawer for two days. The accused came to his place on 7 January 2024, accompanied by the police. His brother went out to see what was going on and returned to inform him the police were there to collect the laptop. This witness then handed over the bag. This witness made a statement at the police station of what had happened. He was not arrested. This witness stated the accused did not say anything when he came there with the police.

[36] This witness stated that the version of the accused, namely, that this witness picked up the laptop from where Gundi had hidden it, was not correct, as he stated he only met with the accused and not Gundi.

[37] During cross-examination this witness agreed he is friends with the accused and that he has gone to the accused's house frequently. He stated that when the accused asked him to find a buyer for the laptop, they had not yet agreed on a price. This witness stated they went to the place Robert Broon as the person who was going to buy the laptop lived near there, however, this potential buyer did not want people to come to his house. He confirmed that he phoned this potential buyer at twenty past ten in the morning. He also confirmed he knew this

laptop was stolen, however, he didn't know it was a crime to be in possession of stolen property. He stated when the police came to fetch the laptop, he did not see the accused. He repeated that when the accused arrived he had a transparent plastic bag which contained the R2 coins. This witness was adamant the accused was wearing jeans and not tracksuit pants or shorts. This witness was aware that he was a suspect in this case as people saw him walking with the accused on 5 January 2024. However, when the accused informed this witness of his involvement in the crime, it was the first time this witness had heard it. This witness also stated during cross-examination that he was shown certain video footage, however, this witness denied it is him who is seen on the video. This witness denied the version put to him by the counsel for the defence that this witness implicated the accused because he was found in possession of the stolen laptop. This witness states that the accused

told the police that he told this witness to keep the laptop. This witness also denied the accused's version that this witness is merely a home boy. This witness insisted he is the accused's friend.

[38] This witness denied the accused's version that this witness had heard that Gundi was selling a laptop. He also denied the accused's version that this witness took the laptop from behind Kabelo's shack. In fact, this witness stated he does not know Kabelo. He was adamant that the accused did tell him that the accused and Gundi went to rob at Jimmy's place.

[39] Although this witness is a section 204 witness, his evidence has been approached with caution. It is however important at this point to state that this witness did answer all questions by the State frankly and honestly. This court can find no reasons why he would say he is the accused's friend, if he wasn't in fact so.

[40] There is no evidence that Bafana was involved in the commission of the offences the accused is charged with. His involvement came only after the fact, when he accepted to receive property that he was told by the accused was stolen.

[41] This Court finds Bafana honest. If he wanted to fabricate the case against the accused he could have stated that the accused and Gundi approached him with the laptop, however he never said this. He only implicated the accused.

John Owen McNube ('Mdala')

[42] This witness's other name is Mdala. On 5 January 2024, this witness was busy opening a partly finished shack when the accused approached him and greeted him. When he entered his shack, he saw a plastic carpet that is referred to as a 'tapyt'. He asked the accused about this carpet and the accused replied by saying 'this is our thing'. This witness stated it was the first time for him to see this carpet in his shack. This witness asked the accused how he managed to put this thing in his shack and the accused replied he inserted it through the open top of the shack as the shack has no roof. This witness explained that this shack was not completed yet. This witness did not check what was wrapped up in the plastic carpet as the accused kept saying it was 'his' and 'theirs'. The accused did not mention to whom else it belonged. He then left with the accused and this witness went to his own room. At seven

o'clock that night, he heard a noise outside his room. He opened the door and saw a lot of people outside in the yard where he stays. He saw N[...] standing outside and he heard that people had

broken into a place somewhere down the road. He then heard that the accused has broken into a house down the road. Some boys searched his room. They found nothing. This witness then told these boys that he had seen a carpet in his shack. They then went to this shack and unlocked the door. Behind the couch, the plastic carpet was found. The people searching appeared very aggravated. The plastic carpet was unwrapped and inside a TV was found. It was a black flat screen plasma TV. The carpet was greenish in colour and had some flowers on it. The accused was not present when this TV was discovered. The police together with the people there took the TV. The carpet was left behind.

[43] During cross-examination this witness stated that when the community searched the shack, the police had not yet arrived. This witness had no knowledge of the accused's version. He denied the version put to him that:

- a) That on the morning of 5 January 2024 this witness saw the accused and gave him R10 for cigarettes
- b) that the accused never entered the shack with him. In fact, this witness was adamant the accused did enter the shack with him when he returned from work and that is when the plastic carpet was found.
- c) That the accused had no knowledge of a plastic carpet or TV being found in this witness's shack.

[44] During cross-examination this witness stated that N[...] never went into his shack and he had no knowledge of Skappie unwrapping this plastic. He stated the accused helped him to build this shack. He stated he knew Gundi by sight. He repeated his version that when he asked the accused how he managed to put it in the shack, the accused replied that they had inserted it from the top as there was no roof. This witness stated the height of the shack walls was approximately 3 metres high.

[45] In the matter of *S v Sauls and Others* [2], the Appellate Division as it then was held:

'There is no rule of thumb test or formula to apply when it comes to the 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 his testimony, and if he is satisfied that the truth has been told. The exercise of caution should not be allowed to displace the exercise of common sense'. [my emphasis]

[46] This court is satisfied that the evidence of Matlepeng, Bafana and Mdala is satisfactory.

Masefako Riany Vigaswane

- [47] This witness stated the deceased was her brother. Three months after the death of the deceased, she was asked by the police to come and collect his items at the police station. She pointed out a Samsung Plasma TV, a Samsung cell phone and a laptop. She recognised it was the deceased's TV from the size and the colour. She had last seen this TV at the deceased's place on 4 January 2024 when it was mounted to the wall in the lounge. She recognised the laptop as it was silver on the top and the bottom was black. She recognised the Samsung cell phone as it still had the telephone numbers of herself, her partner and the deceased's son.
- [48] This witness stated that when she went to the deceased's house on 5 January 2024, the deceased's face was swollen and he couldn't see. When they raised the deceased from the couch he was sitting on, he wet himself. The deceased was also unable to speak. The deceased's face was swollen and most of the damage was on his head.
- [49] This witness confirmed that when the deceased was put into the ambulance he did not suffer any further injuries.
- [50] This witness heard that the deceased passed away at the Chris Hani Baragwanath Hospital.

Tebogo Mickie Kgaswane

- [51] This witness stated the deceased was her uncle. When she entered the deceased's house on 5 January 2024, she noticed the deceased's house had been broken into as the window in the lounge had been broken. She saw how the deceased was removed from his house into the ambulance. She accompanied the deceased in the ambulance. When they arrived at Dr Yusuf Dadoo Hospital, they were referred to Leratong Hospital. This witness stated that whilst the deceased was in her presence, he received no further injuries.
- [52] This witness also stated she was present when the TV was found in the shack.

Dikgang Lelake

- [53] This witness stated that he resides at 2[...] N[...] Street, M[...] and that he has been residing there for years. He knows the accused for a number of years. Tebogo Kaswane is his wife. He stated that people refer to him as 'Skappie'. His wife called him to state her brother, the deceased, had been injured. He went to the hospital to visit the deceased. The deceased was then transferred from Dr Yusuf Dadoo Hospital to Leratong Hospital. He then went to the deceased's tavern.
- [54] Berry told this witness that there had been a lot of up and down movements outside his room. Berry informed him he chased the people from his room and the accused was carrying a TV.
- [55] This witness went to Matlapeng who also informed him he had seen the accused carrying a TV and that the accused was in possession of R2 coins as well as Gundi. The TV was wrapped in a plastic material. Matlapeng informed him he chased Gundi and the accused away from Berry's house.

- [56] His wife then informed him to go to Mr Nobela's house to look at camera footage. This witness phoned Tsedisio who is Mr Nobela's grandson. They started to play the video footage from 12am.
- [57] The video footage was played in court and at exactly 01:38:32 on 01-05-2024, Friday, one can clearly see two men entering the yard of the accused. This witness stated that he thought one of the men in the video was Bafana and because they entered the accused's yard, he assumed the other one was the accused. The man ,carrying the TV set, according to this witness entered the shack of the accused. The video footage then ends.
- [58] This witness stated that before the man carrying the TV entered the accused's room, he walked past the room and carried the TV to the shack which is in the accused's yard and which is marked as A1 on exhibit 'O'.
- [59] This witness stated that on the video-footage, the other man who did not enter the yard of the accused was carrying a schoolbag on his back.
- [60] This witness stated there was a second video which depicted one of these men entering the accused's room.
- [61] After viewing the footage, this witness, together with other family members went to the accused's room where they met N[...]. They searched the accused's room but did not find anything.
- [62] This witness then went to Mdala, who told this witness that he had asked the accused what he was hiding in his shack as he had heard the accused walking up and down. When Mr Mdala informed him about this, the accused was not present. When Mdala unlocked the shack this witness went in and he could see the plastic covering the bag, behind the couch. After pulling forward the couch, the police were called back as the TV was discovered.
- [63] When Bafana arrived and was shown the video footage he denied it was him on the footage. Instead, Bafana said it was the accused and Gundi on the video footage.
- [64] This witness stated that the video footage was downloaded onto Tshediso's phone who then sent it to this witness.
- [65] The video captured on this witness's phone, which was marked as video one, shows the man carrying what looks like a TV going towards the door of the accused's room.
- [66] A sketch plan was drawn up by this witness and marked as exhibit 'O'. Of importance is 'A1' which is the accused's room, 'A3' which is Mdala's shack, 'A' which is the main house where Mdala lives and 'E' which is Mr Nobela's house. 'C' is Berry's house, and 'D' is Matlepeng's main house and 'D1' is Matlepeng's shack.

- [67] During cross-examination this witness did state that Berry told him that the accused had come to his house and that he chased them away. This aspect of his evidence did not impress the court as it is in direct contrast to the evidence of Berry, however, this court will deal with this contradiction at a later stage in the judgment.
- [68] This witness stated that he was informed that when the accused and Gundi went to Berry's shack it was the accused who was carrying the TV and both the accused and Gundi had coins in their possession. Furthermore, that is when Matlepeng chased them the house.
- [69] This witness stated he and his wife, namely Tebogo, watched the video footage at Mr Nobela's house.
- [70] This witness confirmed during cross-examination that the people on the video footage were unidentifiable and that he presumed the object carried by one of them was a TV. He stated that on the second video footage that he was shown, the one person did enter the accused's room. This second video will be dealt with in more detail in the evidence of the next witness.
- [71] This witness repeated that he was present when the TV was found in Mdala's shack. He stated the TV was wrapped in a green plastic and it had lime flowers on it. This witness could not remember if N[...] entered the shack. He stated the first time the police came they searched the room, but not the shack. It is after they looked at the video footage and saw the man going past the accused's room that they decided to call the police back to search the shack. He denied they went back a 3rd time to search the shack.
- [72] This witness was confused as to what happened at Berry's house and who chased the accused and Gundi away, however, what remains constant is that the accused and Gundi were chased away from Berry's house. It is important to note that the statement of this witness was taken down 6 months after the incident happened so it is very possible that confusion may have arisen between whether it was Berry or Matlepeng who chased the accused and Gundi away from Berry's room.
- [73] During cross-examination this witness stated how the video footage was downloaded onto a memory stick by one called Lucas.

Tshediso Nobela

- [74] This witness stated he lives in the same street as the accused, diagonally across from the accused. He stated that on 5 January 2024 he showed the video footage to both Dikgang and Tebogo. This witness downloaded the footage onto his cellphone.
- [75] This witness stated that Lucas did indeed download the video footage onto a memory stick.

- [76] A second video was played in court. The date on this second video is till 5 January 2024, Friday and the time depicted is 02:34:24. The video also shows two men entering the yard where the accused stays. One of the men enters the accused's room. The reason why one can clearly see someone entering the accused's room is because the light inside the room is visible when the door is opened.
- [77] During cross-examination this witness stated that the video footage was downloaded on a memory stick a week after 5 January 2024.

Lebogang Tshukudu

- [78] This witness is a sergeant with 16 years of experience in the SAPS and based in Krugersdorp. She received a complaint of a business robbery at Dalinyebo Street. Together with constable Maluleke, she went to the scene of the crime. Upon arrival at the premises she noticed a broken window in the front of the property. There was broken glass on the inside and outside of the property. Upon entering the house, she saw the owner sitting on a couch. His eyes were closed and although he could hear her speaking, he did not reply. She noticed blood on the deceased's shirt, as well as on the tiles and in the dining room. Next to this room there was a tavern. One had access from the lounge to enter the tavern. She was informed by other people in the house that the deceased's laptop and TV had been stolen. The ambulance arrived and took the deceased away. No weapons were found on the scene. She called the Local Criminal Record Centre to come to the scene.
- [79] This witness impressed the court. She does not know the accused and she did not attempt to falsely implicate him. She merely narrated what she observed.

Hosea Cheene Lelahane

- [80] This witness testified that on 7 January 2024 he was working as a detective with the rank of sergeant at the Krugersdorp Crime Office. He received a call from Sergeant Ramano regarding an incident that had occurred on 5 January 2024 which was a robbery. Sergeant Ramano brought N[...] to his office and asked him to interview her. N[...] told him about the fact that her boyfriend knew where the laptop was that had been robbed. The accused was already in the waiting/holding cells at that stage. Sergeant Ramano who was the arresting officer, had placed the accused in the waiting cells. This witness went to the accused who was willing to point out the laptop. The accused was booked out at 03h40 to point out the laptop in Munsieville. At this address in Munsieville, Bafana's brother came out and they asked to see Bafana. Bafana was taken to the police station with the laptop bag and laptop. This was a black mecer laptop. Bafana informed him the accused had given him the laptop so he could find a buyer and sell it. Bafana informed him that because he could not find a buyer, he kept it. Bafana informed this witness that at the time he received the laptop he did not know of the robbery. The laptop was booked into the SAP 13 register with number 35/2024. At the time the laptop was recovered, the accused did not say anything.

- [81] During cross-examination this witness stated that the accused had already been brought to the police station at 1am. He repeated he went with the accused at 03h40 to look for the laptop. This witness could not shed any light when and where the accused's rights were explained.
- [82] During cross-examination this witness stated that he could not answer why Bafana never informed the police he had the laptop prior to 7 January 2024, however, he did say that Bafana told him that he later heard from the community about the robbery and that is when he asked the accused if the laptop was not stolen. This witness stated he did not arrest Bafana for being in possession of stolen property, as Bafana was regarded as a chain to show where the laptop was. This witness had no knowledge of any video footage that had been found.
- [83] This witness had no knowledge of the accused's version which was put to him during cross-examination.
- [84] This witness stated the accused never said anything of how the laptop ended up at Bafana's place.

Sabelo Msomi

- [85] This witness testified that he is a sergeant and has 16 years experience in the SAPS. He merely stated he took the pictures at the address where the deceased lived.

Sunday Iyoke

- [86] This witness stated that on 6 January 2024 he was at the garage to get fuel when he was approached by two men. The one person was Gundi, the other man he was seeing him for the first time and he would not be able to recognise him. Gundi informed this witness that he had a cell phone to sell. Gundi told this witness the phone belonged to him. This witness bought the phone for R500.00. It was a S20 Samsung cell phone, grey in colour. After 2 days, he received a call from someone who informed him the cell phone was stolen. This person told the caller to look for Gundi to give his money back and then he would hand over the phone to the owner. This witness then handed the phone over to Berry without ever using it.
- [87] This witness impressed this court.

Glen Mothopi

- [88] This witness testified he is a sergeant based at the Krugersdorp Detective Unit. He received information that someone was in possession of a stolen cell phone which belonged to the deceased in this matter. He interviewed Barry who informed him that he had obtained the cell phone from a certain man called Sunday who owned a pawn shop in Krugersdorp. He booked the cell phone into the SAP13 register. The SAP number pertaining to this cell phone was PA5003166630.

Sibongile Grace Mokati

[89] This witness testified that she is employed at the EMS based in Krugersdorp. Her duty is to save lives and to transport people to the hospital using an ambulance. On 5 January 2024 she was on duty when she received a call to attend a scene where a man had been robbed and assaulted. When they arrived at the scene, this witness noticed that the mans eyes were swollen and he had blood oozing from his nose. He could not speak and his mouth was shut closed and he was just mumbling. The deceased was placed on a stretcher and placed in the ambulance. Apart from his swollen eyes, the deceased's forehead was also swollen. The transport patient report completed by this witness was handed in and marked as exhibit "C". The deceased did not sustain any injuries from the time when she arrived up to when he was placed in the ambulance.

[90] This witness also impressed this court.

Gladys Hlaisi

[91] This witness testified that she works for EMS based in Krugersdorp and has 16 years experience. On 15 January 2024 she transported the deceased from Doctor Yusuf Dadoo Hospital to Leratong Hospital. The patient had "raccoon eyes", which means there were bruises around the eyes. He also had a laceration to his head and there was blood coming from his nostrils. This witness completed exhibit "L" which is a patient transport form. She noted the patient presented with a depressed skull fracture and his glycoma score was 14 out of

15. During the transportation of the deceased he received no further injuries.

Boitumelo Manyaka

[92] This witness testified she too works at EMS for six years and that on 6 January 2024 she transported the deceased from Leratong Hospital to Baragwanath Hospital and that during this period the patient did not sustain any further injuries.

[93] She stated that the patient presented with a depressed skull fracture and an epidural bleed which he had sustained on 5 January 2024 from an assault with a metal object to his head. He had raccoon eyes and bruises on his face. His breathing was self-maintained.

Doctor Funeka Nciweni

[94] This witness testified that she is a medical doctor working as a medical officer at the Diepkloof Pathology Services and employed as a Forensic Pathologist. She obtained her diploma in Forensic Pathology in 2016.

[95] She testified that she completed the post-mortem report herself and that the autopsy was completed on 1 February 2024 on body number DK186/2024. Death occurred on 29 January 2024 at 10h00 and the deceased had been admitted to the Chris Baragwanath Hospital on 6 January 2024.

- [96] This witness stated that there was a thick subdural haemorrhage over the right hemisphere, with subarachnoid haemorrhage, 9cm x 7cm x 3cm infarction over the right frontal pole and visible flattening of gyri and narrowing of sulci and pale.
- [97] She stated the mass of an average brain is 1300 grams for a 65 year old male, however, the deceased's brain, due to the swelling weighed 1443 grams.
- [98] She stated the injury to the head of the deceased was caused by a blunt object as a hammer would have caused a patterned appearance on the skull together with a fracture to the skull, which was not seen in this matter.
- [100] This witness concluded there was blunt force applied to the whole head of the deceased and it was not focal, i.e., the force had not been applied only to one specific area of the head.

Doctor Tshutshu Phalane

- [101] This doctor testified that she is a registrar specializing as a neurosurgeon and currently completing her masters degree in neuro surgery and working in the field of neuro surgery. She has been practicing as a doctor since 2018. She completed exhibit "J" which is a form completed when a patient dies from non-natural causes. She stated the deceased was admitted to the Baragwanath Hospital on 6 January 2024 at the age of 65 years old. He passed away on 29 January 2024. The patient had been brought from the Leratong Hospital prior to his admission at Baragwanath Hospital. The glaucoma score initially reflect E4, which meant the patient was opening his eyes continually, M6 which meant he was able to follow commands and follow what was being said, and V4, which meant he was able to say things, but he was very confused. She noted periorbital swelling which meant the eyes were swollen and the patient was still able to move the upper part of the body and his legs. There was no leak of cerebral spinal fluid

from the mouth and nose. It was noted the patient had sustained a traumatic brain injury and was classified as a closed depressed skull fracture as the deceased had a frontal bone sinus fracture plus a frontal bone fracture extending from his crown to the front of his head. The patient was diagnosed as suffering from pneumocephalus, which meant he had air inside the brain due to the fractures. He also had an intra-cerebral haemorrhage, which meant there was a bleed in the frontal lobe. He had contusions which meant the brain cells had been injured. The patient was closely monitored to ensure the bleed did not expand.

- [102] This witness testified the patient was sent for an elective interior cranial fossa repair where an attempt would be made to reconstruct the bone.
- [103] The patient was given a high flow of oxygen for the pneumocephalus, and the cerebral spinal fluids were monitored. He was given anti-epileptic drugs as an injury to the frontal lobe could cause convulsions. He was also given a pneumococcal vaccine to prevent the pneumococcal virus. She discharged the patient from the intensive care unit and he was sent to the neuro-surgery ward where he was seen by other doctors.

- [104] This witness proceeded to explain the remaining medical file, even though she was not in charge of the patient. She stated that on 13 January 2024, the doctor in charge noted the patient was unresponsive and the glycoma score had dropped 14 out of 15 to 8 out of 15. The patient was still able to localise the pain but made no sound, he was accordingly incubated to help him to breathe. The doctor in charge did a scan and noted a worsening of the oedema and a midline shift of the brain which meant one side of the brain had swelled pushing to the opposite side, indicating that the brain cells had swollen. The medical term used was an effacement of a basal cistern. The patient was therefore taken to theatre as the CT scan also showed an extra-dural haematoma. An extended craniectomy was performed which entails part of the skull bone was removed to remove the noted fractures to the skull and to allow some space for the swollen brain. During theatre a large acute extradural haematoma was also noted and removed. The patient was then taken back to the intensive care unit.
- [105] This witness saw the patient again on 15 January 2024 and the glycoma score had worsened more, to such an extent that the patient was regarded as a poor prognosis. A CT scan was requested which still reflected the subdural haematoma and the midline shift. The patient was gasping for breath and a tracheotomy was performed. Due to the worsening of the patient, he was declared as supportive care which meant nothing more could be done and he was put on a ventilator until he passed away.
- [106] This witness stated there was no negligence on her part whilst caring for this patient and that based on the injuries he had upon admission, had he not been treated and without intervention, he would most probably have died sooner.
- [107] This witness impressed this court.

Eunice Mokoena

- [108] This witness is the investigating officer. She is a sergeant with 20 years' experience based at the Krugersdorp SAPS. She went to the scene of the crime on 5 January 2024 and concluded that entrance had been obtained into the deceased's house through a window which had been broken and opened. She also noticed a long metal rod near the couch in the dining room which she believed could have been used by the attackers to assault the deceased.
- [109] She stated she knew that the shack where the TV was found was approximately 6 metres high.
- [110] She stated that although Gundi and Kamogelo were arrested, the case had been withdrawn against both of them.
- [111] She confirmed that when she arrived at the scene of the crime on 5 January 2024, the deceased's eyes were swollen and he could not speak. He also had blood oozing from his nose.

- [112] During cross-examination, this witness could not explain why Gundi was not prosecuted, even though it is common cause it is Gundi who sold the deceased's cell phone to Sunday Iyoke. She stated a statement was not taken from Gundi or Kamogelo.
- [113] As regards the statement taken from Mdala, this witness stated she took down the statement and read it back to the witness. She could not comment whether Mdala mislead the court when he said his statement was not read back to him. She stated it took a year to take his statement as he had left the yard where he previously stayed.
- [114] This witness stated no fingerprints were taken from the TV itself or at the deceased's house. Neither was the scene secured. She admitted the metal rod was also not sent for DNA analysis as it had rusted.
- [115] This witness agreed during cross-examination that Gundi and Kamogelo were assaulted by the community.
- [116] This witness agreed there was no evidence to suggest the accused himself had placed the TV in Mdala's shack. However, she stated that two men were seen entering the yard where the accused lived at around 01h05 and one of them was carrying a TV. She stated that a video was taken from a camera near the yard where the accused lived, however, it was not clear from the video who these two men were that were seen entering the yard of the accused. She stated the accused was arrested as he pointed out the laptop.
- [117] This witness impressed this court regarding the observations made at the scene of the crime however, she did not impress this court regarding the investigation of the matter. A lot more could have been done to obtain fingerprints on the broken window, the TV or within the deceased's house. There is also no logical explanation why Gundi was not arrested.

Doctor Precious Mamokhele

- [118] This witness testified she is a medical doctor and a second year intern working at Leratong Hospital. She received the deceased on 5 January 2024. He was alive on arrival at Leratong Hospital. His glycoma score was 14/15, he had raccoon eyes and was bleeding from his nose. He also had a basal skull fracture. Whilst the deceased was in her care and prior to being transported to Baragwananth Hospital, he did not sustain any further injuries.

Jonaso Ramano

- [119] This witness testified that he is a sergeant employed at the Krugersdorp SAPS. He has 15 years of experience.
- [120] He testified during the trial within a trial relating to the pointing out of the laptop that the accused pointed it out in possession of Bafana. The court ruled that the pointing out was admissible. He also testified in the main trial regarding the arrest of the accused on 7 January 2024.

- [121] He testified he received a call from N[...] on 7 January 2024 advising him that the person the police were looking for, was where she was. This witness then drove to 716 Mapasa Street in Munsieville. When he arrived, N[...] took him to a back room and pointed out the accused. The accused was arrested and taken to the Krugersdorp police station. N[...] was also taken to the police station and handed over to sergeant Lehalane. Before this witness could make an entry into the cell register the accused said that he knew where the laptop was which was taken during the robbery.
- [122] The accused then took this witness to Munsieville where Bafana lived. Bafana then handed the police the laptop. Bafana was also taken to the police station and sergeant Lehalane took his statement.
- [123] During cross-examination this witness stated it was possible N[...] took the police to Matlepeng's place to point out the accused, he could not remember. This witness was not aware of the accused being taken to the police station prior to his arrest. He admitted the accused went willingly with the police to the police station. He stated he could not remember well if the accused told him he first knew where the laptop was, or whether the accused told him the laptop was connected to the robbery.
- [124] This witness had no knowledge of the accused's version.
- [125] This witness could not remember if the accused informed him that Bafana had come to his house enquiring about Gundi's whereabouts or the laptop.
- [126] This witness confirmed that as per his own statement, he arrested the accused because Bafana said he had got the laptop from the accused.
- [127] This ended the evidence for the state.

The accused

- [128] The accused stated that he was employed at the school however, at the time of his arrest the schools were still closed. He confirmed all the points on exhibit 'O' as being correct.
- [129] He stated on 4 January 2024 between 23h00 and 23h30 he was at home as he had just finished eating. He then took a beer and went outside his room to smoke a cigarette. Gundi approached him and told him Benny did not want to sell him what he wanted.
- [130] The accused stated that he knew Berry as they had grown up together, so he decided to assist Gundi and went to knock at Berry's door.
- [131] The accused stated he knows Gundi as he lives 5 to 6 streets away, and Gundi had helped Mdala build his shack. Gundi had also grown up before this accused.
- [132] The accused went to knock at Berry's room and at this point Gundi opened a dustbin outside Berry's house revealing a TV which he stated he had got in the suburbs. Gundi also had a laptop, cell phone and money in his possession. The accused told Matlepeng that Gundi wanted to buy crystal and mandrax. Berry then woke up to come and sell to Gundi.

Gundi gave Berry R100 for the drugs. Berry asked to whom the TV belonged and both the accused and Matlepeng answered the TV belonged to Gundi. Berry then shouted at Matlepeng and the accused, that Gundi is naughty and Berry kicked the accused, Matlepeng and Gundi out of his house. The accused states that he and Matlepeng then went to Matlepeng's house to smoke. Gundi did not join them right away. When Gundi joined them he no longer had the TV. Gundi only had the laptop and the cell phone. Gundi phoned someone to sell the laptop and cell phone. Gundi then gave Matlepeng R100. The accused asked Gundi to buy him two beers. The accused and Gundi then left Matlepeng's house and Gundi was still in possession of the laptop. The accused stated he and Gundi then went to the accused's room where they found N[...] and her son. He changed his clothes. Gundi gave R150 to N[...]. After Gundi bought him beers they parted ways. The accused stated he then went back to Matlepeng's house to drink his beers and to smoke.

[133] The accused stated that Bafana came looking for Gundi and the accused told him that Gundi and Kamagelo had gone to the shops to buy clothes. Prior to leaving for the shops, Gundi had told Kamagelo to put the laptop behind Kabelo's shack. Bafana went into Kabelo's yard and came out with the laptop. The accused told Bafana he was going to u-save and Bafana agreed to accompany him.

[134] Whilst at u-save, the accused met N[...].

[135] Around 11 am on 5 January 2024 the accused saw the community gathering outside his room and he heard of the robbery at the deceased's house. He later saw Gundi and Kamagelo being assaulted by the community. He heard the community was looking for him as well. He was afraid to go home. He asked Matlepeng advise how to hand himself over. He stated that he handed himself over to the police on 6 January 2024 where a male and female police officer let him go as there was no case number. He was arrested officially on 7 January 2024 by sergeant Ramano. He went together with sergeant Lehalane and sergeant Ramano to point out the laptop at Bafana's place.

[136] He admitted that on video two, the light that is seen when his room is opened, is due to the electric light in the kitchen that always remains on as N[...]s son sleeps with the lights on.

[137] The accused did not impress the court for the following reasons:

- (a) He is unperturbed by the actions of Gundi, according to his version who brought a TV, Laptop and cell phone in the early morning hours.
- (b) when the accused finds out that the laptop, TV and cell phone are the goods stolen from the deceased, he elects to hide in Matlepeng's room, according to his version, without alerting the police in whose possession these items were last seen.

[138] The accused tried to blame everything on Gundi and distanced himself far away from Gundi, despite evidence suggesting that they are actually friends.

[139] His version as to what happened inside Berry's house kept changing.

[140] He did not impress as to how he knew that Bafana was able to find the laptop which was hidden behind Kabelo's shack.

[141] He kept blaming all his new evidence and omissions on either his Counsel's neglect or due to the questions asked by the State.

Evaluation

[142] The onus of proof in a criminal case is discharged by the State if the evidence establishes 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.

[143] In the matter of S v Chabalala,[3] the Supreme Court of Appeal held :

'... the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'.[4]

[144] The issues in dispute are:

- (a) That the accused perpetrated the offences.
- (b) That the accused was in possession of the TV robbed from the deceased.
- (c) That the accused had knowledge of and/or placed the TV in Mdala's shack.
- (d) That the accused was in possession of the laptop.
- (e) That the accused took the laptop to Bafana on 5 January 2024 for Bafana to sell.
- (f) That the accused is one of the persons going into his yard in possession of an item as seen on video one
- (g) That the accused is the person going into his room as depicted on video two.
- (h) That the accused is the unidentified person seen with Gundi on 6 January at 11h00 when Gundi sold a cellphone to Sunday Iyoke

Corroboration amongst State witnesses

[145] Matlepeng and Berry corroborate each other that at no stage was a TV brought into Berry's house and at no stage did Berry sell drugs to the amount of R100 to Gundi, or that Berry chased the accused, Gundi and Matlepeng out of his house.

[146] Bafana and sergeant Lehalane corroborate each other that Bafana heard from the accused and also told sergeant Lehalane that the accused had brought the laptop to Bafana so that Bafana could find a buyer and sell it.

Contradiction amongst witnesses

[147] In the matter of *S v Mkohle*,^[5] the Appellate Division as it then was stated that:

'Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B – C, they may simply be indicative of an error. And (at 576G – H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'^[6]

[148] There are contradictions as to the time when N[...] saw Bafana and the accused at U-Save, however, this court does not regard this as a material contradiction as it is common cause they all saw each other at U-Save.

[149] This witness Mdala stated the carpet was green in colour with flowers on it on it. Matlepeng stated the carpet was red and black. This is not material as Dikgang stated the TV was covered also in a green plastic with lime flowers on it. The fact remains, the TV was covered in a plastic like substance and the design was of flowers.

[150] N[...] states she went into Mdala's shack with Skappie, namely Dikgang and that is when the TV was found and Dikgang unwrapped it. Mdala denied this version and stated N[...] F[...] never entered the shack and he also does not know Skappie. N[...] also stated that the first time the shack was opened was in the presence of the police and nothing was found. Mdala knew nothing about that and he also had no knowledge of the police coming back for a second time to search his shack. Although there is this contradiction between N[...] and Mdala, the witness Dikgang, who is Skappie, confirms what N[...] and Tebogo stated. The contradiction between what Mdala stated in court is most likely attributable to the long period in which it took for the investigating officer to trace him and take down a statement from him. The fact that Mdala does not know the name 'Skappie' is not material, as there were many community members who came to search for this TV set and the fact that Mdala does not personally know who Skappie is, does not mean he was not there.

[151] Dikgang states Berry told him in the evening the accused Gundi knocked at his door and he chased them away. Berry states he was asleep and sick in bed. Although there is this contradiction, the court does not regard it as material, as Dikgang during cross-examination stated "He told me Matlepeng will tell me everything". This suggests Berry couldn't have had first hand knowledge of this knock on his door and the accused and Gundi coming to his house as he referred Dikgang to Matlepeng to hear the full story. If Berry had witnessed this first hand they would have been no reason to refer Dikgang to Matlepeng.

In fact, this witness stated that Berry "seemed to me a person who did not want to divulge anything to me". This court accepts this is so as he didn't see the items and also never the accused and Gundi that night. The fact that Berry told Dikgang what happened at his house does not necessarily mean he witnessed it. He could have been told by Matlepeng. Later, the evidence of Dikgang, he stated that Matlepeng chased the accused and Gundi away. This court accepts that this witness was changing his evidence between who chased the accused and Gundi away,

however, this court notes on the day that Dikgang presented his evidence in chief there were problems with the interpretation in this court, so much so, that another interpreter had to be called. During cross-examination when asked that it is due to the information spread by Dikgang that the accused was arrested this witness said that it is due to the information received from Matlepeng that the accused was arrested.

[152] There is a contradiction between Tebogo and Dikgang about where the video footage was seen at Mr Nobela's house, however, the court does not regard this as material as it is clear a large part of the community in the Munsieville all saw the video footage. It is important to note that Tebogo was not asked either in her evidence in chief or cross-examination if she viewed the video footage, so naturally she didn't mention it. Tshediso in any event corroborates Dikgang that he did indeed show the video footage to both Dikgang and Tebogo on 5 January 2024.

Probabilities

[153] The accused's version of Gundi opening a dustbin when he arrived at Berry's house is not supported by either Matlepeng or Berry. As a result, this version is merely a version that stands on its own as opposed to the version of Matlepeng and Berry. The accused has everything to gain by placing all the blame on Gundi, as Gundi was never charged and cannot speak for himself. Even if this Court has for a moment to believe this version of the accused, it makes no sense why Gundi who initially hid the TV in the dustbin would then reveal it to Matlepeng, Berry and the accused, if his intention was initially to hide it. This version is so unreasonable that this Court cannot accept it as being reasonably possibly true and it is rejected as false.

[154] The version of the accused that Gundi arrived at Berry's door carrying the black bag over his shoulder and holding a silver cell phone is also not supported by Matlepeng. If Matlepeng wanted to make the case stronger against the accused he would have said he also saw the black bag and cell phone which belonged to the deceased, yet he never said this. Matlepeng maintains he only saw the TV. As a result, the version of the accused in this respect is also rejected by the court as false and not reasonably possibly true.

[155] Both Matlepeng and Berry deny the version that Berry sold drugs to Gundi in the early morning hours of 5 January 2024 for R100. As result, the version of the accused in this respect is rejected as false and not reasonably possibly true.

[156] Matlepeng denies the version that he followed the accused back to Matlepeng's house after Berry allegedly chased them out of Berry's house, or that Gundi later joined them at Matlepeng's house, without the TV and called a Nigerian to sell the cell phone to him. Accordingly, this version of the accused is also rejected as false and not reasonably possibly true.

- [157] The version of the accused that Gundi opened the black bag in the presence of the accused and Matlepeng was never put to Matlepeng, accordingly, this is also a recent fabrication and rejected by this court as false.
- [158] The accused's version that he slept at Matlepeng's house during the morning hours of 5 January was never put to Matlepeng for his comment and accordingly this Court rejects it as false as being a recent fabrication on the part of the accused.
- [159] The version of the accused that he went back to Matlepeng's house to borrow a rake and spade on 5 January 2024 was not put to Matlepeng and this court finds it is a recent fabrication and the court rejects it as false.
- [160] The version of the accused that he asked Matlepeng advise how to hand himself over to the police was not put to Matlepeng for his comment, neither was the version that the accused told Matlepeng and Berry that he had heard there was a robbery at the deceased's house and that Matlepeng said 'Let's wait to compare the things stolen from that house with what Gundi brought'. As a result, it is all a recent fabrication and is rejected by this Court as being false and not reasonably possibly true. The version of the accused that Matlepeng was protecting him and not disclosing the accused's location to the police is not reasonably possibly true and this court rejects it as false.
- [161] The accused's version is that when Bafana came to his house between 1pm and 2 pm on 5 January 2024, Bafana said that Gundi told him he is selling a laptop, and Bafana was interested in buying it. Firstly, the accused stated Gundi did not have a cell phone so there is no logical explanation how Gundi informed Bafana that there was a laptop to sell. The accused's version that he never brought the laptop to Bafana's house on 5 January 2024 at 10 am and that Bafana came to his house instead, looking for the laptop, is rejected as false and not reasonably possibly true. Bafana has no reason to merely state that it is the accused who brought the laptop to him. If Bafana wanted to, he could easily have said Gundi brought the laptop to him. In that way he would have exculpated both himself and the accused. There is no reason for Bafana to have said the accused told him he broke into the deceased's place with Gundi. Once again, Bafana, who is the accused's friend could once again have said it was merely Gundi alone who broke into the deceased's house and not the accused who had broken into the deceased's tavern.
- [162] The fact that the accused and Bafana went together to u-save and that Bafana had the laptop in his possession at that stage, confirms the version of Bafana that the accused had asked him to sell the laptop. There is no logical explanation how Bafana would know where to find the laptop hidden behind Kabelo's shack. The version of the accused that Bafana came to fetch the laptop behind Kabelo's shack is rejected as false.
- [163] The version that Bafana is not the accused's friend is rejected as false. There is no bad interactions between the accused and Bafana, for Bafana to have maintained that it is the accused who brought the laptop to him to sell. The version of the accused that Bafana picked up the laptop where Kamagelo had placed it behind Kabelo's shack is rejected as

false and not reasonably possibly true. Had Kamagelo hidden this laptop behind Kabelo's shack, according to the accused's version, a number of people could have walked past it and stolen it themselves. In addition, how would Bafana have known Gundi had a laptop if Gundi did not have a cell phone to inform Bafana? The coincidence of Bafana and the accused meeting, is because the accused asked Bafana to find someone to sell the laptop. The fact that the accused told sergeant Lehalane and sergeant Ramano that he knew Bafana had the laptop, is because the accused took it to Bafana to sell. There is no way the accused could have known if Bafana still had the laptop and had not sold it yet. Bafana stated that he still had the laptop because the accused had not yet agreed on a price, that is why the laptop was still with Bafana.

- [164] The accused's version that Gundi often would place stolen items outside Berry's house was never put to Matlepeng or Berry for their comment. As a result, this version is a recent fabrication and rejected as false and not reasonably possibly true. Furthermore, there is no logical explanation why Gundi, according to the accused's version, would continue to hide stolen items in close proximity to where the accused lived, especially, since according to the accused's version, Berry and Matlepeng did not want Gundi to do this.
- [165] The accused's version is that he has no knowledge how the TV landed up in Mdala's shack. Mdala was a credible witness who stated that when he saw this thing wrapped in a carpet he asked the accused and the accused stated "This is our thing". There is no reason for Mdala to have fabricated this evidence. The accused even told him he inserted this object through the open roof. When the accused told him this object was 'his' and 'theirs', Mdala had no idea it was a TV. It is only when the community later came to the yard where Mdala and the accused lived, that Mdala later saw it was a TV. The version of the accused that Gundi placed the TV in Mdala's shack is rejected as false and not reasonably possibly true.
- [166] The version of the accused being falsely implicated by the community is rejected as false. The accused was implicated because he told Mdala the wrapped up object was his and when the boys from the community came to ask Mdala if he knew anything, Mdala said there was something in his shack, and that is what led to the accused being implicated in the robbery and housebreaking that had occurred at the deceased's house.
- [167] The accused's version that Mdala bought him cigarettes was also not put to Mdala and accordingly this is a recent fabrication which is rejected as false.
- [168] The accused's version that Gundi helped Mdala to build the shack where the TV was found was never put to Mdala for his comment, as a result, it is a recent fabrication and rejected by this court as false. In fact, Mdala stated that the accused helped him to build that shack, therefore the accused had knowledge that Mdala's shack had no roof.

Direct evidence and circumstantial evidence

[169] The nature of the evidence led by the State was both direct and circumstantial in nature. The circumstantial nature of the evidence pertains to the fact that there is no one who witnessed the house breaking and robbery, as well as the murder of the deceased and as a result, the court has to draw an inference regarding these offences.

[170] In the matter of *R v Blom*,^[7] the Appellate Division as it then was, stated that in reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- i. the inference sought to be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn
- ii. the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If the proved facts do not exclude all other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.^[8]

[171] In the matter of *S v Reddy and others*,^[9] the Appellate Division, as it then was stated that:

‘...in assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that the dictum in *R v Blom* can be applied.’^[10]

[172] In the matter of *Lachman v The State*,^[11] The Supreme Court of Appeal held that:

‘I bear in mind in this regard that circumstantial evidence should never be approached in a piecemeal fashion. The court should not subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality’.^[12]

[173] The inference that the State wants the Court to draw in this matter is that the accused is the one that broke into the house of the deceased on or about 5 January 2024, assaulted him on the head with a blunt object and took the following items from his possession, namely, a laptop, plasma TV, money and a cell phone.

[174] The video footage viewed in Video one and Video two was footage from a cell phone which was obtained after Tshidiso made a video from the camera footage with his cellphone. He then forwarded same to Dikgang. Dikgang testified that he gave the technician, who did not testify, an empty memory stick. Tshidiso did not know if the footage was downloaded onto the memory stick from the camera or from Dikgang’s cellphone,

[175] The defence counsel argued that it has not been proven beyond a reasonable doubt that the footage on the cellphones of both Dikgang and Tshidiso was not tampered with or altered in any way. The accused never disputed that the yard depicted on video one and two is the yard where he lives. In addition, the accused never disputed that the room into which a person is seen entering at 02:34:24 on Friday 5 January 2024, is in fact his house. Unless the accused has evidence to the contrary to negate the evidence the State presented, the

evidence presented by the State must be accepted. The State has produced evidence by way of the viva voce evidence of Dikgang and Tshediso to show the Court that there is no possibility of tampering with the recordings. The accused has adduced no evidence to suggest the videos were tampered with. Had this been done a trial within a trial would have been held to

determine same. As a result, this court finds the videos are authentic and have not been tampered with.

[176] The evidence of N[...] is that she saw the accused in the company of Gundi on the evening of 4 January 2024 between 22h00 and 23h00 and that they merely came to the accused's room where she saw them for 15 minutes. N[...] does not see Matlepeng, so it is accepted, that the accused and Gundi had not yet gone to Berry's house at the time N[...] saw the accused and Gundi. The accused is therefore unaccounted for between the time N[...] last saw him and the time he arrives knocking at Berry's house. After Gundi and the accused left his house, the accused never slept at his room during the early morning hours of 5 January

2024. The version of the accused that he slept at Matlepeng's house has already been rejected as false, therefore a proper explanation as to where the accused slept in the early morning hours of 5 January 2024 is unknown.

[177] It cannot just be a coincidence that the accused is in the presence of Gundi when the TV is pulled out of a dustbin, according to the accused's version, or that the TV is later pointed out by Mdlala to the accused and the accused tells Mdala "this is our thing". Furthermore, it also cannot be coincidence that the accused, according to his own version, is present and hears Gundi telling

Kamagelo to hide the laptop behind Kabelo's house, according to the accused's version.

[178] The coincidence of all these stolen items being found in close proximity to where the accused lived allows this Court to infer as the only reasonable inference that he was involved in the robbery of these items.

[179] It is a fact that the slot machines which contained R2 coins had been broken at the deceased's house. Bafana sees the accused on 5 January 2024, in possession of these R2 coins.

[180] The accused helped Mdala to build Mdala's shack so he was aware that the shack was incomplete with no roof and that it would have been easy to put a TV in the shack via the open roof.

[181] From the video footage of both videos shown in court, it is clear that there were two men who were wandering in and around the yard, where the accused lived, in the early morning hours of 5 January 2024.

[182] The first video shows two men arriving at the accused's yard at 01:38:32 on 5 January 2024. One of the men remain outside the yard while the second man enters the accused's yard carrying a large object. The man who is outside is seen carrying a bag on his back. The second video depicts two men approaching the accused's yard at 02:34:24 on 5 January 2024. One of the men remain outside the yard and the other man enters the accused's room where the light was on.

[183] The inference the court draws from the first video is that the TV is brought into the accused's yard at 01:38:32 whilst the laptop is probably carried by the second man who does not enter the yard. The second inference that the court draws is that it is the accused who is seen entering the accused's room at 02:34:24. The question is then what veracity is there to the version of the accused, stating that he was together with Gundi and Matlepeng in the early morning hours of 5 January 2024, when it is clear only two men are seen on the video in the early morning hours. The third inference this court draws is that it is the accused and Gundi who arrived at the yard at 01:38:32 and that the accused put the TV in Mdala's shack, whilst Gundi

remained outside carrying the deceased's laptop.

[184] It is an absolute enigma why Gundi is not before this Court as a co-accused. It is clear that he is the one who contacted the witness Sunday Iyoke to sell him the cell phone which was stolen from the deceased. It is very unfortunate that the investigation in this case was so poor. In addition to Gundi not being arrested, no fingerprints were taken from the broken window of the deceased's house or the metal rod that was found in the deceased's house, which could possibly have been the murder weapon. However, even in the absence of proper investigation, this Court is still able to make certain inferences.

[185] These inferences are as follows:

- (a) the window of the deceased's shack is broken. This is clear from the photos on exhibit 'B', photo one. There is no burglar proofing on this window so it's clear that once opened the person entering the house could easily climb through this window which is big enough for a human to get through. As a result, the offence of housebreaking was committed.
- (b) The slot machine was broken and money was taken from the slots, together with the deceased's flat screen TV, laptop and cell phone. Bafana sees the accused in possession of the R2 coins as well as the laptop. Matlepeng sees the accused in possession of the TV and Mdala confronts the accused about the object that is wrapped up and which is found in his shack. The inference this court makes is that it is the accused who together with other co-accused broke open the window of the deceased, entered his house and robbed him of these items.
- (c) It is clear the deceased was hit with a blunt object many times all over his head as the force had not been applied to only one area of the head. The medical evidence demonstrates that when the deceased was admitted his glaucoma score was very low, presenting signs of

traumatic brain injury. The fractures sustained as a result of the blows had caused air to build up in the brain. He was bleeding from the frontal lobe and had a subdural haemorrhage. It is clear that the deceased did not sustain any further injuries during the transportation from Dr Yusuf Dadoo hospital to Leratong hospital and then to Baragwanath hospital. Furthermore, all the procedures followed in the neurology department at Baragwanath hospital were done, which includes the craniectomy,

which was to allow more space for the swollen brain. There are no signs that any of these procedures contributed to the death of the deceased. In applying the *conditio sine qua non* test, the question this court must ask itself is, whether but for the conduct of hitting the deceased all over his head, would the deceased still have died. The answer to this question is no, he would not have died had he not been hit with a blunt object all over his head. There is no *novus actus interveniens*, or intervening act or event which has been proven broke the chain of causation or which could be found was attributable to the death of the deceased. The damage to the deceased's brain was done the evening that he was robbed and assaulted. This court infers that the accused was involved with other co-accused who are not before this court, in committing the house breaking and robbery of the deceased. The coincidence of being found in possession of the deceased's TV, R2 coins and a laptop belonging to the deceased, allows this court to infer that the accused removed these items from the deceased's house and that in the process the accused either alone or with another co-accused inflicted the blows to the deceased's head with a blunt object,

that invariably led to the deceased's death. Even if this court is wrong and it was either some other accused, who is unknown to this court, who inflicted the blows to the deceased's head, that on the basis of common purpose the accused participated in murdering the deceased. It is clear that on the basis of *dolus eventualis*, the accused must have foreseen that hitting the deceased with a blunt object many times on his head would result in a severe injury which could lead to the death of the deceased.

Findings

[186] In respect to count one, the accused is found guilty of premeditated murder read with section 51(1) and part 1 of schedule 2 of Act 105 of 1997

[187] In respect to count two, the accused is found guilty of housebreaking with intention to rob.

[188] In respect to count three, the accused is found guilty of robbery with aggravating circumstances.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF THE STATE: Adv. M Phatlanyane

Instructed by the Office of the National

Director of Public Prosecutions

ON BEHALF OF THE ACCUSED: Adv. S Johnson

Instructed by Legal-Aid SA

Date argued: 24 March 2025

Judgment: 24-25 March 2025

[1] Mafaladiso 2003 (1) SACR 583 (SCA)

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

[3] S v Chabalala 2003 (1) SACR 134 (SCA)

[4] Ibid para 15

[5] S v Mkohle 1990 (1) SACR 95 (A)

[6] Ibid 98f – g

[7] R v Blom 1939 AD 188

[8] Ibid page 202-203

[9] S v Reddy and others 1996 (2) SACR 1 (A)

[10] Ibid page 8c-d

[11] Lachman v The State (432/09)[2010] ZASCA 14 (15 March 2010)

[12] Ibid page 40

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