

SOUTH AFRICA / JUDGMENT

S v Tsiane and Another (CC41/2023) [2024] ZAGPPHC 469 (17 April 2024)

[2024] ZAGPPHC 469

COURT

North Gauteng High Court, Pretoria

BEFORE

PD Phahlane

CASE / FILE NUMBER

CC41/2023

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REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG

DIVISION, PRETORIA

CASE

NO: CC41/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

17-04-2024

SIGNATURE:PD. PHAHLANE

In

the matter between:

THE
STATE
And
MASPOPI
LEBOGANG DORAH TSIANE
ACCUSED
1
SHADRACK
SHIMANE SETAISE
ACCUSED
2

JUDGMENT

PHAHLANE, J

- [1] The accused are charged with one count Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”) in that on or about 31 December 2022, and at or near Willow Farm Informal Settlement, Nellmapius, Extension 3, in the district of Mamelodi East, the accused did, while acting in common purpose, unlawfully and intentionally kill HENDRICK TSHABANGU, an adult male person.
- [2] The accused are legally represented, and they both pleaded not guilty to the charge and gave a plea explanation, which is in fact, their individual statements made to Captain JK. Maseko and Lieutenant Colonel EM. Malinga, during their interviews after their arrest.
- [3] The statements were admitted as exhibit A and B respectively. As indicated supra, the State alleged that the accused acted in the furtherance of a common purpose when committing the offence and the principle of common purpose was as such explained by the court to the accused. The accused made formal admissions in terms of section 220 of the Criminal Procedure Act 77 of 1977 (“the CPA”), which includes the photographs of the body of the deceased and the deceased burned shack, as well as the post-mortem report compiled by Dr Dorothea Maria Joubert in which she recorded the cause of death as: “BURNS”. The correctness and accuracy of what is reflected on the photographs, as well as the correctness and findings of the post-mortem report were not in dispute and were accepted and confirmed by the accused.
- [4] The State called four (4) witnesses in support of its case and both the accused testified and accused 1 called two witnesses.

[5] The first witness on behalf of the State Ms Mbalenthle Mahlati (Ms Mahlati) testified that she knows accused 1 as a person who runs a business of trading as a hawker at a tavern named Jefferson's place. On 01 January 2023 she was at Moretelepark and she saw accused 1 at the food stall where she was selling while she was on her way to the bathroom. When she returned, she stopped at the stall and told accused 1 that she has heard about an incident that occurred and enquired from accused 1 what had actually happened.

5.1 Accused 1 explained to her that the deceased, Citheka, provoked her unnecessarily and that she went with her boyfriend to the deceased's place and upon arrival, they found the deceased, and there was a disagreement which ended up in a fight. Accused 1 further explained that her boyfriend fought with the deceased with hands. Accused 1 said because she was angry, she took a bottle of paraffin and poured it over the bed of the deceased and set it alight. Accused 1 further told her that after igniting the fire, the deceased ran outside and was in flames. Accused 1 and her boyfriend then left the deceased and went into two different directions.

5.2 Accused 1 said she was walking alone, and along the way, she met a fire brigade and she thought to herself that it seems that what had happened was serious. Accused 1 informed her that the deceased is her ex-boyfriend and after she narrated the story, the witness then told accused 1 that she has heard that the deceased has passed on. Accused 1 then explained that the deceased was still alive and was doing well because she visited him at the hospital. Further that she also spoke to the deceased's sister over the phone and the sister said the deceased was alright. Ms Mahlati testified that accused 1 was sober

when she spoke to her.

5.3 It is common cause that Ms Mahlati made a statement to the police on 4 January 2022. She testified that at the time of making her statement, everything that accused 1 had narrated to her was still fresh in her mind and could remember it. The contents of her statement are a confirmation of her evidence in court save for the part where it is noted that accused 1 informed her that she poured paraffin on the body of the deceased. Consequently, she confirmed the contents of her statement admitted as exhibit F.

[6] Under cross-examination, on behalf of accused 1, she testified that Mr Jefferson is her boyfriend and the father of her child. She said she did not go to Jefferson's place on 31 December 2022. As regards her interaction with accused 1, she stated that they are not friends, but she usually greeted her when seeing her at Jefferson's place where she normally sells her products. It was her first time sitting and talking to accused 1 when she went to ask her about what happened on the 1st of January 2023 in Moretelepark. She repeated her evidence and stated that the deceased was a friend of her father, though not close.

6.1 Ms Mahlati confirmed that the incident and the death of the deceased was a topic amongst the community members and denied any knowledge of any meetings being held by the community regarding this case.

6.2 It was put to her that accused 1 called the sister of the deceased, Ms Rose Shabangu in her presence to enquire about the passing of the deceased, and the sister reported that the deceased has passed on and she (the witness) overheard the conversation. She disputed that saying she was not present when the call was made, but that accused 1 had in fact told her that she called the deceased's sister. When asked why the accused would confide in her about what she did since they were not friends, she responded that accused 1 confided in her because she was scared and felt that she was in more trouble and felt like telling her.

6.3 The following versions were put to her as being denied by accused 1:

- (a) That accused 1 did not mention anything about visiting the deceased at Steve Biko hospital.
- (b) That accused 1 informed her that the deceased was her boyfriend.
- (c) That accused 1 and 2 assaulted the deceased.
- (d) That the accused poured paraffin on the mattress or bed of the deceased and set it alight.
- (e) That accused 1 did not confide in her about what happened because she had told the truth to the police when she was interviewed by the police.
- (f) That accused 1 does not know how the fire was ignited, because she only came inside the shack when accused 2 and the deceased were on flames, and she tried to put out the fire from accused 2.

6.4 The witness disputed the version of accused 1 as not being true and stated that she has no reason to falsely implicate accused 1. She insisted that she was only testifying about what accused 1 had told her - and that the version of accused 1 is a lie. She testified that there was no need for her to take a leave of absence from work just to come to court and testify about something that is not the truth.

6.5 Under cross-examination on behalf of accused 2, she testified that accused 1 told her that she is the one who poured paraffin on the bed after they fought with the deceased.

[7] Ms Ester Mboweni (Ms Mboweni) also took the stand and testified that she has been friends with accused 1 for a period of seven years. She also knows accused 2 because they stay in the same area and said accused is like a brother to her. She testified that the deceased had a love relationship with accused 1 and were living together, but not all the time because accused 1 also has a love relationship with 2 and are cohabiting.

7.1 She testified that on 31 December 2022 around 8am while walking in the street, she met accused 1 who told her that it was her birthday and that she had just killed a person. The accused identified the person she killed as "Malome". That is how she and accused 1 referred to the deceased. She said she asked accused 1 how did she kill the deceased and the accused responded by saying they were beating him.

7.2 She asked accused 1 who is the other person that she was talking about and accused 1 responded that it was her boyfriend Shimane who is accused 2 before court. She stated that accused 1 explained that while accused 2 continued beating the deceased, she poured paraffin on the deceased, and they ignited the fire. She did not believe the accused and brushed it aside and then said to the accused: “you are lying, you are joking”. She explained that there was nothing out of the ordinary when she was talking to the accused, and she thought the accused was making a joke because she always does. Their conversation ended there, and they parted ways. She did not ask who between them ignited the fire.

7.3 She proceeded home to where she resides and after thirty minutes, she saw the fire-fighters and the fire trucks at the deceased’s place, and she rushed over there. Upon her arrival, she noticed the deceased lying on the grass a little distance from his shack.

7.4 Ms Mboweni explained that it was ‘so terrible’ when she arrived because the deceased was burned, and his room was also burned. She noticed that the deceased’s whole body had burn wounds including his back, and was also injured, but his face was not burnt.

[8] Under cross-examination, it was put to her that it was improbable that accused 1 would report to her that the deceased was set alight after being poured with paraffin and she (the witness) did not ask who ignited the fire between accused 1 and 2, - and she responded that she did not ask because she thought accused 1 was only joking. Several versions put to her which she disputed are as follows:

8.1 That accused 1 only told her that she had a fight with the deceased.

8.2 That accused 1 deny telling her that she killed the deceased by assaulting him and pouring him with paraffin. The witness disputed this version and was adamant that accused 1 personally told her what she did to the deceased and that her version is not the truth.

8.3 That accused 1 was not present when the fire was ignited inside the shack.

8.4 That she is falsely implicating accused 1 because she was the deceased’s friend and wanted to satisfy the community. Further that she is falsely implicating the accused because the deceased used to buy her alcohol. In this regard, she responded that the deceased never bought her alcohol, but he used to buy alcohol for his own friends who she hung around with. She denied ever being friends with the deceased and said she addressed the deceased as Malome because of accused 1.

[9] Ms Mboweni testified that she made a statement to the police after talking to accused 1 and she never talked to anyone before giving her statement to the police. This statement was taken at Jefferson’s

place on 04 January 2023. She confirmed the version that accused 1 used to be a heavy drinker before the incident and stated that on the day of the incident, and at the time accused 1 reported to her what she had done to the deceased, she was sober because she does not consume alcohol anymore. She confirmed that there was a community meeting around the area where the deceased resided but did not attend that meeting.

[10] Under cross-examination on behalf of accused 2, she testified that she stays about fifty metres away from Jefferson's place and was called by Jefferson's mother who indicated that the police were present at her home, and there were people around who notified the police that she was also present on the day of the incident. She stated that when she got there, Jefferson's mother pointed her out to the police who then enquired from her about what happened. She related to the police what she knew and testified that what she thought was a joke made by accused 1 ended when she saw the deceased injured. Responding to the question why she did not go to the police to report what accused 1 had said to her, she said she had no right to get accused 1 arrested.

10.1 She testified that she never approached accused 2 about the allegations made by accused 1 regarding his involvement in the matter. She disputed accused 2's version that what accused 1 said about him is not true and stated that the report made to her by accused 1 was true and correct because when she arrived at the scene on the day of the incident, she found 'exactly' what accused 1 had told her.

10.2 It was then put to her that accused 2 does not deny being at the deceased's place, but that he went there to ask the deceased why he had damaged his property, only for the deceased to be aggressive. Further that accused 2 did not intentionally pour paraffin on the deceased and set him alight. She stuck to her testimony and stated that: "what accused 1 told me, she said it with her mouth, and it means it is true". (sic)

[11] The third witness on behalf of the State was Ms Rose Shabangu, the sister of the deceased. She did not know any of the accused before the incident but came to know them after the death of the deceased. She testified that she was at her house when people came to tell her that something had happened at the deceased's place, but they did not disclose what that was. She went into the house to change her clothes because she was still in her pyjamas, and immediately thereafter went to the deceased's place. Upon arrival, she found the shack of the deceased burned, but it was already extinguished. She also found the deceased inside the ambulance which had already been summoned. She could not at the time speak to the deceased because the ambulance personnel told her that they need rush to the hospital, and she should follow them.

11.1 She did as requested and followed the ambulance to Mamelodi hospital. Upon arrival at the hospital, she managed to speak to the deceased. She said the deceased was crying and told her that he was in pain. She observed that the deceased was burned from the neck to the feet and it was reported that the deceased was severely burned and has to be transferred to Steve Biko hospital. She travelled to Steve Biko hospital with the deceased and once there, she took pictures

of the deceased. She testified that the deceased gave her information relating to the incident and the injuries he sustained. I will deal with this aspect later in the judgment.

11.2 She also took the pictures of the deceased's shack, developed them and gave them to the investigating officer of this case. On the morning of 1 January 2023, she received a phone call from the hospital informing her that the deceased had passed on.

[12] Mr Joseph Mashiane was the last witness for the State. He stated that the deceased stayed in the same areas as he did, and was in a love relationship with accused 1. He knows accused 2 by sight as he used to meet him at drinking places and in the streets. He testified that on 31 December 2022 he heard from Mr Sithole that the deceased's

shack was on fire, and he went there to assist, and they managed to extinguish the fire.

12.1 He explained that he saw the deceased lying on the ground with his legs outstretched and facing the easterly direction. He also observed the burn wounds on the deceased. He testified that after the fire was extinguished, he talked to the deceased who gave him certain information which I will also deal with later in the judgment.

[13] He explained under cross-examination that upon his arrival at the deceased's place, the door of the shack was open – and confirmed that the community was angry about the incident but does not know if community meetings were held.

[14] Accused 1 also took to the stand and stated that the deceased was her “makhwapheni” – meaning her secret boyfriend. She testified that on the evening of 30 December 2022, she was home preparing food to go and sell at Jefferson's tavern. Around 11:30 pm, she left with her boyfriend, accused 2, and headed for Jefferson's place where upon arrival, he assisted by setting up the table where the food would be placed that is to be sold. He also assisted in making fire for roasting meat, and he thereafter left saying that he would return later.

14.1 She testified that after an hour the deceased arrived at her stall and said, “today I want you to know who I am”. According to her, the deceased was not himself that day and he looked like he was either on drugs or drunk and was in a confused state. She said she could see that the deceased was not alright because she has never seen him in that state before. She testified that she tried not to be angry at the deceased and spoke to him in a low tone, and as she was speaking to him, the deceased pushed her table - and she requested him to calm down.

14.2 She stated that the deceased was uncontrollable and too angry. She then requested one of the employees at the tavern to call the tavern owner to come and reprimand the deceased. The tavern owner arrived and found them arguing and told the deceased to leave, but the deceased did not want to listen. She stated that the tavern owner then pulled the deceased and slapped him once and told him to leave, and thereafter left and went back inside the tavern and the deceased followed him. She explained that throughout this altercation, accused 2 was not present.

14.3 She continued working until 3am and thereafter accused 2 returned. They spoke for about five minutes and accused 2 received a telephone call from his mother. She could overhear the conversation on the phone when the mother reported that there is a person who was throwing stones at the gate and at the yard.

14.4 She (accused 1) told accused 2 that this person might be the deceased. She testified that accused 2's mother reported that when this person was throwing stones in the yard, she also heard him hurling insults – stating that accused 1 is his wife and accused 2 took his wife. She said accused 2 asked why is she saying that it is the deceased, and she responded that the deceased came earlier and was pushing her tables and she ended up calling the tavern owner to come and reprimand him.

14.5 She said accused 2 left for home but came back soon thereafter and indicated that she (accused 1) was right about the deceased. They continued working until 7am and she suggested that they should go and talk to the deceased - and requested accused 2 not to fight with the deceased because she knows that the deceased is not a bad person.

14.6 They left and went to the deceased house and upon arrival, accused 1 told the deceased not to repeat what he had done the previous night and that he should accept that accused 2 is her boyfriend. Accused 2 also indicated that he is accused 1's boyfriend and was brought there by accused 1 so that they could talk.

14.7 According to her, the deceased got angry about what accused 2 had said and they had an argument. The deceased pushed accused 2 and a fight ensued. She tried to separate them but failed, and she finally went outside to look for help but the neighbour's doors were closed.

14.8 When she returned to the shack, she found the deceased lying on the floor and accused 2 was on top of him. She said she could see that the lower right leg of the deceased had already caught fire and accused 2's right hand was also on fire. She told accused 2 and the deceased that they were on fire and the two then separated. She helped accused 2 to take off his jersey because it was on fire and thereafter went to look for assistance. She does not know how the fire got started.

14.9 According to her, when they looked around, the deceased was no longer in the shack. They went outside looking for him and they could not find him. Accused 1 testified that they could not remain at the deceased's house because (1) the deceased was not there, and (2) the community would think that they are the ones who set the place on fire.

14.10 Along the way, they met Esther and she stopped to talk to her while accused 2 continued walking. She told Esther that they were from the deceased's place and that accused 2 and the deceased were in a fight, and the two ended up catching fire, but she managed to separate them.

14.11 She testified that Ms Mahlati approached her when she was at her food-stall in Moretelepark and indicated that she was surprised to see her at the park after what happened the previous day. Ms Mahlati told her that she heard from Jefferson's mother that the deceased had passed on, and she (accused 1) said that that was not possible because the deceased was only

burned on the lower right leg and could not have died from that. She also told Ms Mahlati that she called the deceased's sister who informed her that the deceased had not passed on but was still in hospital.

14.12 She testified that she went to Steve Biko hospital and asked the hospital staff if there was a person brought named Hendrick Mahlangu and she was given the deceased sister's telephone number. She called the deceased sister on the 31st of December 2022, and she went back home to prepare for her trip to Moretelepark. She said she asked Ms Mahlati to come and listen to her conversation with the deceased's sister when she called the sister for the second time. She denied telling Ms Mahlati that she killed a person and had poured paraffin over the mattress.

14.13 Accused 1 stated that she knows Mr Joseph Mashiane because he was always with the deceased. She confirmed that she used to hang around with Ms Esther Mboweni.

[15] Accused 1 testified under cross-examination that she has been in a love relationship with accused 2 for three and half years, and when asked about the exact year of when their relationship commenced, she said it was in 2019 but was not sure. She said her relationship with the deceased started in December 2022 when she started hanging around Ms Ester Mboweni. She then changed and said she was in a relationship with the deceased and met accused 2 in 2019, and that even after she met accused 2, she was still in a relationship with the deceased. She testified that at the time of the incident, she was no longer in a relationship with the deceased because it had been almost six months since she told the deceased that she does not love him anymore. She said accused 2 was not aware of her relationship with the deceased and that he only found out on 30 December 2022 when the deceased came

to where she was hawking.

15.1 She confirmed taking accused 2 to the deceased's place because accused 2 did not know where the deceased was staying. She stated that they confronted the deceased because the deceased troubled and bothered her by acting strange on 30 December 2022. When asked to explain how the deceased had bothered her since they had been separated for six months, she responded that the deceased did nothing to her and she thought that if she does not tell accused 2 the truth, the deceased would continue coming to her business to bother her.

15.2 It was also put to her that it was not necessary for her and accused 2 to confront the deceased because Mr Jefferson had already solved her problem by chasing the deceased away, and she responded in the affirmative and stated that she also wanted accused 2 to tell the deceased to leave her alone because they had not been in a relationship for six months and she was now in a relationship with accused 2.

15.3 She testified that she did not deem it necessary to go and report the deceased to the police or get a protection order against the deceased because the deceased was not a bad person - and that is why she did not want to get him arrested and decided that accused 2 should talk to him. She explained that when they arrived at the deceased's place, the deceased was calm. She told the

deceased that they came to tell him that she was accused 2's girlfriend and the deceased then said accused 1 owed him money. She said when accused 2 asked how much is being owed to him, the deceased responded by saying accused 2 should not get involved and pushed accused 2. Accused 2 then warned the deceased that "it should be the last time that he goes to his home and throw stones", – and thereafter the two started fighting physically.

15.4 She testified that as the two were fighting and throttling each other, she tried to separate them by pulling accused 2 away from the deceased and when she failed, she screamed at them and told them to stop fighting. She thereafter went outside and stood by the neighbour's fence, while remaining in the deceased's yard

- and screamed for help and no one came out to help.

15.5 When asked if accused 2 was not angry with her for having a love relationship with the deceased, she responded that he was not too angry because she had already requested him not to be angry since her relationship with the deceased was not that serious. In her own words, she said: "I requested him before we left home that he should not be angry because me and the deceased were not involved in a serious relationship". (sic)

15.6 She said she went to the deceased's house with accused 2 and did not want him to go alone because they might argue, and she did not know how it would end.

[16] It was then put to her that she foresaw that there would be a fight between herself, accused 2, and the deceased – and she responded in the affirmative. She explained that sometimes when she is with accused 2 and they are talking about issues such as the one the deceased was to be confronted about, accused 2 would say that he will not get angry, but she knew that when accused 2 finally meet with the deceased, he will fight with him.

16.1 When asked if they had reported to the police that the deceased was throwing stones at accused 2's house and had damaged the property, she said they did not report the matter. She stated that after getting a report from the deceased's sister that the deceased was in hospital, she panned on first visiting the deceased in hospital and that on her way back home, she would go to Silverton police station to report the incident.

16.2 With regards to the injuries sustained by accused 2 after fighting with the deceased, she started off by saying that accused 2 sustained burns from the wrist to the shoulder because his jersey caught fire during the scuffle, and then changed her evidence and said he did not sustain burn injuries because she helped him take off his jersey. She again changed her version and said she could not remember what injuries accused 2 sustained.

16.3 Accused 1 stated that she does not know how the rest of the deceased's body caught fire because when they left his shack, the fire was not so big as to cause him to burn severely. It was put to her that according to the post-mortem report, 80% of deceased body was covered with burns as confirmed by the photos depicted in exhibit E.

16.4 The witness responded that had there been a conflagration, she would have helped the deceased first. It was further put to her that what is depicted on the photos – as regards the damage and injuries sustained by the deceased – is in line with what the deceased reported to his sister and Mr Mashiane, as well as what she (accused

- 1) told Ms Mboweni and Ms Mahlati. In this regard, she came up with a new version and responded that Ms Mboweni and Ms Mahlati saw how the deceased was burned and are fabricating evidence to say that she had told them that she was responsible. She qualified her answer by coming up with yet another version and stated that the community told Ms Mahlati what to say so that her story should be line with those of other witnesses.

16.5 When confronted about the head injuries sustained by the deceased, she said the deceased had a scar on his head and finally conceded that the deceased suffered a blunt force trauma to the head as noted by the doctor, and that these head injuries were sustained during the fight with accused 2. Having made such a concession, she tried once again to exonerate herself as regards the assaults on the deceased and the report he made to Mr Mashiane – and stated that the deceased saw it fit to tell another person that she had burnt him. She further testified that they made a mistake of not leaving when it became apparent that the deceased was angry when they confronted him.

[17] Mrs Maggie Setaise is accused 2's mother and was called as a witness on behalf of accused 1. She testified that on 31 December 2022 a man came to her home and hit the gate and windows with stones around 1am. She got out of the house and confronted this man, asking him what his problem was. The man said he was looking for Maspopi. She told this man to come the following day so that they could talk, and the man refused. She testified that she did not see this man and does not know who he is because it was at night and there were no lights. More specifically that even on the day she was giving her testimony, she did not know who that man was. She also does not know the deceased.

[18] Under cross-examination on behalf of accused 2, she testified that this man came to her house four times, and she warned him that she will call the police. She stated that when this was happening, accused 2 was at the tavern working. She called him thrice and accused 2 said he was busy, and he never came home. When asked if accused 2 was aware that there was a person in the yard damaging the property, she responded that she told him the same night when this man arrived, and she does not remember the date, but it was on a Friday. She explained that this man damaged the gate and the windows. She called someone to come and fix the gate and after the gate was fixed, accused 2 arrived back home and it was around 9am. It was put to her that accused 2 came home twice to fix the gate and she disputed that saying he only came once.

18.1 Under cross-examination by the State, she confirmed that she does not know the date when this man came looking for Maspopi and she also does not know that person. It was put to her that accused 2 made a statement and stated that she (the witness) called him and reported that Citheka came to her house and damaged the gate and broke the window – specifically that she

told accused 2 who this person was, and she responded that she does not know that person. She testified that accused 2 never came home at night after the call, but that he only came home in the morning around 9am.

[19] Mr Thobile Jefferson Manyana, the owner of Jefferson's place also took the witness stand and testified that on 30 December 2022 around 12 midnight, accused 1 came and reported to him that she was experiencing a problem with a certain man who was bothering her. He immediately went outside with accused 1 and he met this man by the name of Citheka.

19.1 It is common cause that Citheka is the deceased in this matter. Mr Jefferson stated that the deceased was drunk and angry, and did not want to talk, and also wanted to fight with him. He pushed the deceased and chased him away, and he thereafter went back inside the tavern.

19.2 He testified under cross-examination on behalf of accused 2 that he did not see accused 2. He stated that the police came to his home on 04 January 2023, and he gave his statement at his home. He said he only became aware on this day (04 January

2023) that the deceased had passed on.

19.3 On cross-examination by the State, he refuted accused 1's evidence that he dragged and slapped the deceased and explained that he only pushed him and did not slap him. He confirmed that he did not see how accused 1 was bothered as she alleged and does not know what happened after he chased the deceased out of his tavern.

[20] Accused 2 also testified in support of his case. He stated that he knew the deceased by sight, and he did not see him on 30 December

2022. On the day of the incident around twelve, he left home after packing his goods into the trolley and went to Jefferson's tavern where he runs his business. He testified that after an hour his mother called and told him that there is a person throwing stones at the house and the gate fell. He went home to check who this person was and upon arrival, he enquired about what happened and a report was made by his mother. He lifted the gate and also picked up the stones which were thrown in the yard with the help of his mother. He stated that there were no lights outside because it was nighttime.

20.1 When asked to comment about his mother's evidence that he only came home the next morning around 9am, he responded that he knocked off at 9am and went home, but he was going home for the second time because he had already responded to his mother's first call by going home after that call. He explained that he received another call around past five to six from home and was informed that the person who previously threw stones at his home has started throwing stones again and he went back home after telling accused 1 about a report he received. He stated that maybe his mother forgot some of the things that happened when she testified about the time he arrived home.

20.2 He further stated that he went home with accused 1 and they had a discussion and agreed that they should approach the deceased. He informed his mother that he is going to approach the man who came to the house to enquired why was he throwing stones at his home. Accused 1 said she will go with him because she knows where the deceased lives.

20.3 Upon arrival at the deceased's place, he asked the deceased what the problem was, and the deceased told him not to say anything or get involved because accused 1 owes him. He did not leave when being told not to get involved because he wanted this problem to be solved.

20.4 He said the deceased hit him with clenched fists and he fought back by grabbing the deceased with his clothes and punched him with a fist and they started to wrestle, and they fell. He explained that he could see that they were in a serious fight and that he would not just stand and do nothing when the deceased was assaulting him. There was a burning paraffin stove on top of the small cabinet which tilted and fell, and the paraffin from the stove spilled on his jersey and on the leg of the deceased.

20.5 He explained that the deceased was on the ground, and he grabbed him, pressing him down - and as he pulled his hand to make a swing to punch him with a fist, and they both caught fire. There was also fire where the paraffin spilled in the room. He set himself loose and let go of his grip from the deceased and pushed him and went outside. Accused 1 came and assisted him to take off his jersey and when they looked, the deceased was not there. They checked for the deceased outside the shack, and they could not find him. He further explained that, there and then, the shack was ablaze because other things in

the house caught fire.

20.6 He told accused 1 that they should leave because he thought that people might think that they were there to steal, damage and burned the deceased's place. They went home and thereafter he went to Stanza Bopape clinic where he received medical attention.

[21] He confirmed under cross-examination by the State that he does not know the person who was throwing stones at his mother's house. He further confirmed that his mother did not tell him who the person was because she does not know him, and neither does she know this person's name. Most importantly is the concession that his mother did not see this person. He also confirmed that having gone home after receiving the second call from his mother – that the person who threw stones earlier had returned to throw stones again – he still did not know who the person was when he returned to his business site. He testified that accused 1 had not been to his home and does not know who was throwing stones at his home.

21.1 After telling accused 1 that someone was looking for her at his mother's house, accused 1 started telling him of what happened when he was not around. He only found out that the deceased was the boyfriend of accused 1 when accused 1 told him that the deceased came earlier and was pushing her tables and bothering her. He said he was surprised but not angry when accused 1 told him about her relationship with the deceased and did not trust and believe what accused 1 was telling him because the deceased was older than him and he thought accused 1

would have cheated him with someone his age. He conceded having knowledge of the many male persons accused 1 was having a love relationship with and was living with.

21.2 He said accused 1 did not tell him how she was bothered by the deceased but had explained that Mr Jefferson came and chased the deceased away. Even though they both did not know the person who had gone to his home and called out the name of accused 1, he discussed and concluded with accused 1 that that person was the deceased. He conceded that when he went to the deceased's house with accused 1, they were just speculating that it might have been the deceased who threw stones at his home.

21.3 He conceded having a common purpose with accused 1 to confront the deceased for allegedly causing damage to his mother's house and to tell him that accused 1 was his girlfriend – but denied having common purpose to murder the deceased. Accused 2 testified that they did not ask the deceased if he was the person who damaged his mother's property.

[22] It is not in dispute that the deceased made a dying declaration to his sister Ms Shabangu and Mr Mashiane respectively. The State made an application to lead the hearsay evidence of a dying declaration made by the deceased to Mr Mashiane before he was taken to the hospital and to his sister Ms Shabangu while he was in hospital.

[23] The application was met with an objection, with both defence counsels arguing that the accused will be prejudiced. On behalf of accused 1, the following reasons were advanced: (1) that accused 1 will not be able to cross-examine the deceased; (2) that the accused will not have a fair trial; (3) that the evidence to be led is unreliable because its truthfulness is dependent on the people who were in the shack when the incident unfolded; and (4) that the interests of justice do not permit the hearsay evidence to be admitted.

23.1 On behalf of accused 2, the grounds for objection are as follows: (1) admitting hearsay will enable the court to have knowledge of what the deceased has told the sister, and such evidence cannot not be tested in cross-examination; and (2) the deceased may have harboured resentment towards the accused because they have attacked him and he may want to falsely implicate the accused.

23.2 The third ground is totally irrelevant and will not be considered as it deals with the reliability of the evidence of what accused 1 said to Ms Mboweni and Ms Mahlathi about how the petrol was poured in the shack of the deceased.

[24] With regards to the second ground raised on behalf of accused 2, there is no basis for raising such an issue because no evidence has been led to suggest that what the deceased has reported to his sister and Mr Mashiane is a fabrication because both the accused placed themselves in the shack of the deceased. Having said that, this ground is in fact an admission that corroborates the attack on the deceased as reported to his sister because the ground specifically says: "the deceased may have harboured resentment towards the accused because they have attacked him". (emphasis added)

24.1 A dying declaration forms one of the six specified exceptions to the hearsay rule. In my view, the interests of justice will best be served if the evidence of Ms Shabangu is presented/admitted because it represents the version of the deceased as to what happened to him, and there is compelling justification for admitting and relying on that evidence.

[25] The remainder of the objections raised on behalf of both the accused are in my view without merit because when the State laid the basis for its application to lead hearsay evidence, it specifically placed reliance on the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (“the LEAA”) that the evidence be admitted in the interests of justice. The defence seem to ignore the fact that section 3(1)(b) of the LEAA is not the only consideration and the criterion upon which the court should determine whether hearsay evidence should be admitted or not.

[26] There are other considerations which the court must have regard to in addition to the six specified factors under section 3(1)(c) of the LEAA. Admissibility of hearsay evidence will also be depended on the following factors: (1) The statement must be one which the deceased could have repeated in court had he or she lived; (2) The death of the deceased must be the subject, both of the charge and the statement itself; and (3) The statement must be made in the ‘settled, hopeless expectation of death’. Death must be expected soon albeit not immediately.

26.1 The above factors are those factors which are referred to under section 3(1)(c)(vii) of the of the LEAA where the court has to consider any other factor which in the opinion of the court should be taken into account in order to make an informed decision on whether it is in the interests of justice to admit the hearsay evidence.

26.2 In the book titled: Principles of Evidence[1] the author stated that: “Under common law dying declarations could be admitted into evidence provided the following requirements were met: (a) the declaration was relevant to the cause of death; (b) the evidence was adduced on a charge of murder or culpable homicide; (c) the deceased would

otherwise have been a competent witness; and (d) at the time of making the statement the declarant “was under a settled hopeless expectation of death”. The rationale underpinning this exception was necessity and reliability”.

[27] Having heard the application and submissions made by all parties, I was of the view that the court cannot reject the evidence based on two aspects raised by the defence, while there are other factors, as indicated on the preceding paragraph, which the court had to take into consideration when deciding whether it was prudent to accept hearsay evidence. Consequently, I was of the view that the hearsay evidence of Ms Shabangu and Mr Mashiane can be presented in the interest of justice.

[28] I will now deal with the evidence of these witnesses. Ms Shabangu testified that when she got to the hospital, the deceased was complaining of pain and when she asked him what happened that he should be in that condition, he replied that he was burned by Maspopi and Shimane who are accused 1 and 2 before court. He also said they had a fight. She enquired from the deceased as to why did he not go out so that he could not be burned, the deceased said the pair fastened/tied him and locked him in the shack.

28.1 This evidence is corroborated by paragraph 8 of her statement which she made to the police on 3 January 2023, two days after the deceased had passed on. She noted that the deceased informed her that on “Saturday morning Maspopi and Shimane came to his shack and they fought with him and they poured him with paraffin and locked him inside the shack and set him alight and left him in the shack”. The statement was admitted as exhibit G.

28.2 It was put to her under cross-examination on behalf of accused 1 that the deceased was bully and uncontrollable, and that he lied when he said accused 1 and 2 fastened him, poured him with paraffin and set him alight, and locked him in the shack. The witness was adamant that her evidence relates to what she had been told by the deceased before he passed on.

28.3 She disputed the version of accused 2 put to her that accused 2 denies being in the company of the deceased on 30 December 2022, and that he had locked him in the shack and poured him with petrol.

[29] With regard to the evidence of Mr Mashiane, he testified that after helping to put out the fire, he asked the deceased what happened, and he (the deceased) explained that he was burned by his girlfriend, Maspopi, (referring to accused 1) and Chicks (referring to accused 2). The deceased explained that accused 1 and accused 2 came and assaulted him, and thereafter set him on fire.

[30] Section 3(1)(c) of the LEAA provides:

- (1) Subject to the provisions of any other law hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless:
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court having regard to –
 - (i) the nature of the proceedings.
 - (ii) the nature of the evidence.
 - (iii) the purpose for which the evidence is tendered.
 - (iv) the probative value of the evidence.

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends.
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account if the court is of the opinion that such evidence should be admitted in the interests of justice.

[31] The facts in the case of *S v Mbanjwa and Another*[2] are almost similar to this case. The two accused were charged with the murder of the deceased who sustained severe burn injuries (on 5 December 1996) which caused her death. The Court dealt with the admissibility of statements made by the deceased prior to her death. The hearsay evidence consisted of certain statements which the deceased made to three State witnesses very shortly after she had been burnt. The hearsay evidence in question identified the two accused as the persons who had burnt her, with the deceased intimating that she had been made to drink petrol; that she had been doused with petrol on her body; that her hands had been tied and that she was tied to a tree and set alight.

31.1 The court approached the aspect/matter of the admissibility of the hearsay evidence on the basis of the six specified considerations provided for by s 3(1)(c) of the LEAA and took into consideration the following aspects, namely: –

- (a) That this was a criminal case and that there was a reluctance to permit untested evidence against the accused.
- (b) The purpose of the evidence in this case was to prove that there was no reasonable possibility that the version of the two accused about the burning incident was untrue and as such the evidence was clearly very important.
- (c) That the witnesses who had testified as to what the deceased had said were independent, unbiased, impressive and truthful witnesses, and that their evidence was substantially true, and there was no reasonable possibility that any of the witnesses could have prompted the deceased as to what to say.
- (d) That there were certain safeguards present in the objective facts which guaranteed the reliability of the hearsay evidence. Meaning, hearsay should be admitted where there is sufficient corroboration to warrant its reliability.
- (e) That the evidence of the deceased's statement could have been admissible under the common-law exceptions to the rule against hearsay evidence, namely dying declarations and spontaneous statements. In the light of all the circumstances the court was of the opinion that the interests of justice demanded the admission of the hearsay evidence.

[32] In *S v Shuping*[3] the accused, Mrs Shuping, was convicted of murder and arson. The state relied on circumstantial and hearsay evidence of what deceased

have said to the State witnesses shortly after he was burned. Having considered all the aspects of the case, the court was satisfied that the evidence of the witnesses about what the deceased said to them was substantially true. The court had regard to all the factors outlined in section 3(1)(c) and held that it was not necessary to determine conclusively whether the deceased's statements would definitely have qualified as either a dying declaration or a spontaneous statement. It further held that the interest of justice demands the admissibility of the hearsay evidence because there was compelling justification for admitting and relying on that evidence.

[33] In *S v Mpofu*[4] the court held that: “the reception of hearsay evidence under s 3(1)(c) of the LEAA should not logically be divorced from a consideration of those factors which at common law made for admissibility of the evidence, and further that the court is endowed with a wide discretion when it comes to admitting hearsay”.

[34] In the current matter, the application and analysis of the six factors outline in section 3(1)(c) are as follows: -

(a) The nature of the proceedings – this is a criminal case – and the death of the deceased is the subject of the charge of murder for which accused 1 and 2 has pleaded to. Be that as it may, the State bears the onus of establishing the guilt of an accused beyond reasonable doubt. The fact that the state bears the onus will be of considerable importance not only regarding the question of the admissibility of the hearsay evidence but also in as far as the weight to be attached to the evidence.

· It is for this reason that the court in *Metedad v The National General Insurance Company Ltd*[5] emphasised that “the exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained, might be a far greater injustice than any uncertainty which might result from its admission”. Not only was “the 1988 Act designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position”[6], but the court is also endowed with a wide discretion when it comes to admitting hearsay. What is clear is that the facts of each matter will be decisive regarding the admissibility of the hearsay evidence[7].

(b) The nature of the evidence – it is oral evidence given by Ms Shabangu and Mr Mashiane. It relates to a dying declaration which the deceased made to his sister Ms Shabangu and Mr Mashiane. It appears from their evidence that the deceased made this report of a dying declaration freely without any influence from them. It is common cause that the deceased made this report on the day of the incident. It can be inferred from *Hewan v Kourie NO and Another*[8] that the courts are primarily concerned with the reliability of the evidence when considering its nature. This criterion is also prominent in considering probative value. It must be borne in mind that the factors listed in s 3(1)(c) cannot be viewed in isolation and will be weighed collectively in determining whether it is in the interests of justice to admit the evidence.

· The court in Mpofu supra held that if the evidence is carried the hallmark of truthfulness and reliability, then its reception is doubtless justified. The State submitted that the impediment of unreliability can be removed when there is significant corroboration for the truth of the evidence, and that reliability of this hearsay evidence can be found in the following instances:

- (i) The two accused and the deceased were alone in the house of the deceased when the incident occurred.
 - (ii) The two accused place themselves at the scene with the deceased
 - (iii) They admit that there was some or other physical altercation between them and the deceased and that paraffin was involved.
 - (iv) The two accused admits that the fire started due to the paraffin.
 - (v) The accused admits that the cause of the death of the deceased is “Burns” – this admission was made in terms of section 220 of the CPA.
 - (vi) The hearsay evidence constitutes evidence of a witness to the incident who cannot testify because he passed away.
 - (vii) The deceased explained to two persons separately on two separate occasions what had happened, and
 - (viii) The deceased, given the horrific injuries that he sustained – as confirmed by the post-mortem report and is clear from the photographs – could not have had the time to falsify the version that he told his sister Ms Shabangu and Mr Mashiane.
 - (c) The purpose of tendering the hearsay evidence – was to prove what occurred in the house of the deceased when the horrific burns were inflicted as a result of which the deceased died.
 - (d) The probative value of the evidence – The SCA in Ndhlovu[9] defined “probative value” in the following terms: “Probative value’ means value for purposes of proof. This means not only, ‘what will the hearsay evidence prove if admitted?’, but ‘will it do so reliably?’ In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness”.
- The enquiry also encompasses the extent to which the evidence is considered to be reliable as well as the exercise of balancing the probative value of the evidence against its prejudicial effect[10].
- The probative value in this matter is high on the objective facts as it guarantees the reliability of the hearsay evidence given by the two witnesses. One of the objective facts is the fact that Ms Shabangu did not know who Maspopi and Shimane were when the deceased made a report to her. She did not know them prior to the incident, and even on the day of the incident because according to her evidence, she only came to know about them for the first time when they appeared in Mamelodi court. Accordingly, there is nothing to suggest that she would/may have wanted to falsely implicate them.

· The evidence of Ms Shabangu confirms a statement of the deceased made to Mr Mashiane shortly after the incident and before he was taken to the hospital. Having said that, the reliability of the hearsay evidence of these two witnesses is corroborated by the evidence of Ms Mahlati and Ms Mboweni as to what accused 1 had told them about the incident and her involvement. Not only did accused 1 make a report to the Ms Mahlati and Ms Mboweni, but she, together with accused 2 place themselves in the scene and confirms the version of the deceased, save for the issue of whether they are indeed responsible for the demise that befell the deceased.

· In *Van Willing and Another v State*[11] the SCA considered the admissibility of hearsay evidence in terms of section 3(1)(c) of the LEAA. When dealing with the probative value of the evidence, the court assessed it under two heads, namely, the reliability and completeness of the witness transmission of the deceased's words and the reliability and completeness of whatever it was that the deceased did say. The court found that the admission of the hearsay evidence was in the interests of justice. On the other hand, in *Mbanjwa supra*, the court admitted hearsay evidence because there was sufficient corroboration to warrant its reliability.

- (e) The reason why the person from whose credibility the probative value of the statement depends (did not come to testify) – is because he has died as a result of the injuries he sustained.
- (f) Any prejudice to the accused – It is a fundamental legal principle that where the interest of justice requires the admission of hearsay, the provision does not require the absence of all prejudice. In *Ndhlovu supra*, the court stated that: “Prejudice in s3(1)(c)(6) clearly means procedural prejudice to the party against whom the hearsay is tendered. Prejudice which is always present when hearsay admitted, must be weighed against the reliability of the hearsay, in deciding whether despite the inevitable prejudice, the interests of justice require its admission.

A just verdict based on evidence admitted because the interests of justice require it, cannot constitute prejudice. Where the interests

of justice require the admission of hearsay, the resultant strengthening of the opposing case, cannot count as prejudice for statutory purposes since in weighing the interests of justice the court must have already concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requirements are fulfilled, the very fact that hearsay justifiably strengthens the opponent's case, warrants its admission, since its admission would run counter the interests of justice”.

· When a court admits hearsay evidence after exercising its discretion in terms of s 3(1)(c), it has the effect that the person who made the statement cannot be cross-examined. The question that arises is whether this is in conflict with an accused's constitutional right to challenge evidence. The Supreme Court of Appeal in *Ndhlovu supra* held that it is not.

(9) Any other factor which should in the opinion of the court be taken into account if the court is of the opinion that such evidence should be admitted in the interests of justice – The State submitted, and correctly so, that it will suffer prejudice if hearsay evidence of Ms Shabangu and Mr Mashiane is not considered by the court. In any event, the hearsay in question would have been admitted at common law under the exceptions of a dying declaration and spontaneous statement.

· I already indicated that the court in *S v Mpofu supra* held that “the reception of hearsay evidence in terms of section 3(1)(c) of the LEAA should not logically be divorced from a consideration of those factors which at common law made for admissibility of the evidence. This approach was also followed in

Mbanjwa *supra*.

[35] Having regard to the above, the fact that the accused persons did not have the opportunity to cross-examine the deceased cannot in

my view, result in the hearsay evidence being inadmissible where there is sufficient corroboration by two independent witnesses,

namely, Ms Mahlati and Ms Mboweni.

[36] The State argued that Ms Mahlati is not a friend to any of the accused persons, nor the deceased, but what is important about the evidence of Ms Mahlati is that when she approached accused 1 to enquire about the incident that occurred, accused 1 out of her own free will, voluntarily made admissions to her that there was an altercation between her, accused 2 and the deceased which ended up in a physical fight.

[37] The physical fight is confirmed by both the accused persons because according to the evidence of accused 1, when she came from the outside at the deceased house, she found accused 2 on top of the deceased - who was at the time lying on the floor - fighting with him and told them that they are busy fighting, and they are on fire. Accused 2 himself confirmed this evidence by

demonstrating to the court how he was in a kneeling position on top of the deceased and pressing down on him and fighting with him - striking him with a blow before the fire started.

[38] It is on this basis that the State further argued that this aspect is further corroborated by the independent objective findings of the post-mortem report compiled by doctor Joubert who conducted the post-mortem examination on the body of the deceased and noted the blunt force injuries sustained by the deceased.

[39] Corroboration denotes other evidence which independently confirms or supports other evidence which renders the evidence of the accused less probable on the issues in dispute[12].

[40] Ms. Mahlati testified that accused 1 told her that she poured paraffin on the bed of the deceased and set it alight. It is not in dispute that a fire was started because of paraffin and the deceased was burned because of the paraffin. It is on record, as confirmed by both accused persons that when they left the scene the disease was in flames. The burn wounds sustained by the deceased are confirmed by the post-mortem report which specify that the deceased suffered 80% burn wounds. It is on this basis that the State argued that what accused 1 said to Ms Mahlati corroborates the dying declaration of the deceased.

[41] On the other hand, there is evidence by Ms Mboweni, whom it is not in dispute that she is a friend of accused 1. Her evidence is that she met accused 1 on the road and accused 1 made a confession. She explained that accused 1 was in her sound and sober sense because she does not consume alcohol. It should be noted that this confession was freely and voluntarily made because it is her

evidence that when she met accused 1, the accused indicated that it is her birthday and she just came from killing a person. And when she asked accused 1 who she was talking about, accused 1 responded that she was talking about Malome, being the deceased because they both used to call him Malome. She however did not believe accused 1 and thought she was joking but she realized later that day when she saw the fire trucks going to the deceased house that what accused 1 was saying to her was actually not a joke.

[42] Accused 1 did not only say to Ms Mboweni that she had killed the deceased, but she explained how that was done. Ms Mboweni testified that accused 1 indicated that they, referring to herself and accused 2 - have assaulted the deceased and poured him with petrol and ignited the fire. This aspect corroborates the dying declaration made by the deceased to his sister Ms Shabangu that he was burned by Maspopi and Shimane, being accused 1 and 2. The photographs of the deceased admitted by both the accused confirms the post-mortem report and what the deceased reported to his sister.

[43] In my view, this clearly shows that when accused 1 was making this confession to Ms Mboweni, she knew exactly what she was talking about and appreciated her actions - that she had indeed killed the deceased.

[44] Having said that, Mr Mashiane also told the court that the deceased reported to him that he was assaulted by the accused before court and thereafter set him alight.

[45] As indicated above, both the accused place themselves in the scene, right inside the shack of the deceased. They confirmed or corroborated the deceased as regards the fight and assault, they confirm that there was fire caused by paraffin, and that the deceased was burning when they left. Their evidence was also that there was no one in the street or around the house of the deceased.

[46] The general considerations that are important when a court evaluates the evidence at the end of a trial is to first weigh the evidence as a whole and not to be selective in determining what evidence to consider. The trier of facts must have regard to all considerations which

reasonably invite clarification, and in doing this, the court should take the following into consideration, among others: all probabilities and improbabilities; reliability and opportunity for observation of the respective witnesses; the absence of interest or bias; the intrinsic merits or demerits of the evidence itself; inconsistencies or contradictions and corroboration. Probabilities must likewise be considered in the light of proven facts, and no proper inference can be drawn unless there are objective facts from which to infer the other facts. (See the following cases regarding the holistic approach required of a trial court in examining evidence: *S v Mdlongwa*[13]; *S v Van der Meyden*[14]; and *S v Chabalala*[15])

- [47] In considering the reliability and completeness of what the deceased said to his sister and Mr Mashiane and taking into account what accused 1 had reported to Ms Mahlati and Ms Mboweni respectively, there is nothing to suggest that the deceased had a motive to falsely implicate the accused persons as argued by Mr Moeng. What is of importance with regards to the two dying declarations and the evidence of Ms Mahlati and Ms Mboweni is that they are similar in content, and thus making the dying declaration reliable and truthful.
- [48] In my view, these four witnesses did not contradict themselves. Both Ms Mahlati and Ms Mboweni gave a coherent version of the admission and confession made to them individually by accused 1. Their evidence is therefore accepted as truthful, reliable, and satisfactory. I am alive to the evidence of all these four witnesses as well as the accused persons that there was never a problem or bad blood between them.
- [49] There is no doubt in my mind that the only people who could have burnt the deceased in the manner as depicted in the photos, was accused 1 and 2 before court.
- [50] Having considered all the evidence before me in respect of the hearsay evidence of a dying declaration, I find that the admission of hearsay evidence in the interests of justice is not in violation of the accused's constitutional right to a fair trial as submitted by Mr Motshweni. In my view the interest of justice demands the admissibility of the hearsay evidence and there is compelling justification for finally

admitting and relying on that evidence.

- [51] The fundamental principle of our law in criminal trials is that the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. The State must also discharge the evidential burden by establishing a prima facie case against the accused. Once a prima facie case is established, the evidential burden will shift to the accused to adduce evidence to escape conviction.
- [52] The State submitted that it has proven its case against the accused persons beyond a reasonable doubt. Mr. Motshweni on behalf of accused 1 argued that that State failed to prove its case against the accused. Counsel submitted that the court should draw an inference that the person who went to accused 2's home saying he is looking for his wife is the deceased, coupled with the

fact that he was troubling accused 1 while she was selling at Jefferson's place. Further that accused 1 had a reasonable explanation of going to the deceased house to confront him and tell him that she has a new boyfriend and should stop bothering her. It is accused 1's contention that Ms Mahlati and Ms Mboweni are falsely implicating the accused because they wanted to make the community happy.

- [53] Mr Moeng on the other hand submitted that the accused 2 did not act in common purpose with accused 1 in respect of murder and that the version of accused 2 that he went to the deceased's house to confront him for merely talking to him is reasonably possibly true. Further that the fire was accidentally ignited because the paraffin stove tilted and fell, and not because accused 2 set the deceased on fire.
- [54] Accused 1 and 2 testified that they went to the deceased's place to confront him because he was troubling accused 1. They both allege that the deceased also went to accused 2's home and threw stones and broke the gate. Both accused 1 and 2 confirms that when a certain man was throwing stones at his home, they were not there. Accused 1 called Mr Jefferson in support of her case to come and confirm that he was called by accused 1 to come and reprimand the deceased who was troubling her. He testified that the deceased was not sober and he ended up chasing him away from his establishment and the deceased left.
- [55] It may be so that the deceased was pushing the tables of accused 1 when she was selling, but Mr Jefferson did not assist the case of accused 1 in any way as regards the charge she is facing. What cannot be avoided is that after the deceased was chased away, he left and accused 1 continued selling and running her business peacefully.
- [56] Accused 1 also called Mrs Setaise, the mother of accused 2 regarding what happened at her home. This witness also could not assist accused 1's case at all because she specifically stated that the person who was throwing stones at her house came around 1:00 AM. She said that it was dark outside and even though she went outside to see who was causing trouble outside, she did not see this person, and could not identify him. She could also not tell the court who this person was.
- [57] She testified that after calling accused 2 and reporting to him that someone was at the house throwing stones at the window and damaging the gate, accused 2 said he is busy and he never came home. Accused 2 only arrived home the next day around 9am after he knocked off. She said she called someone to come and fix the gate.
- [58] Accused 2 on the other hand says he went home twice and fixed the gate and picked up the stones thrown in the yard. When confronted about the contradiction between his version and his mother's version, his response was that maybe his mother forgot some of the things that happened. Most importantly, that his mother never told him who this person was – who came to the house because she did not know who came to her house.

- [59] In what is clearly a speculative assumption, accused 2 tell his mother that he is going to confront the deceased that he should stop coming to his house to damage the property. He testified that he had a discussion with accused 1 that they should go to the deceased's house to confront him. When they arrived there, the deceased specifically said he does not want to talk to accused 2 and should not get involved in things that do not concern him because accused 1 owes him. Instead of leaving, the accused do not leave. In his own version, accused 2 said he did want to leave because he wanted to solve the problem which is – telling the deceased that accused 1 is his girlfriend and that he should stop coming to his house.
- [60] Surprisingly enough, they did not ask the deceased if he is the person who went to accused 2's house to damage the property. Accused 2 specifically said he did not even bother to ask the deceased about that.
- [61] I accordingly concur with the State's submission that the speculation by both the accused that the deceased must have been the person who threw the stones at accused 2's home is far-fetched and devoid of the truth.
- [62] Both their counsels conceded that the accused were speculating when they said the deceased caused trouble at accused 2's house, but that the court should infer that it was the deceased who came looking for accused 1 at accused 2's house. It is illogical that the defense would make such a submission when no evidence has been placed before the court to substantiate that submission.
- [63] The State submitted that the accused went to the house of the deceased with the purpose of killing him and they acted with common purpose and had the intention to kill the deceased because according to accused 2, they sat and discussed about going to the deceased house, having speculated that it must have been the deceased who threw stones at his home.
- [64] It is inconceivable what intention - other than killing the deceased would have led the accused to go to the deceased house. The objective probabilities surrounding the circumstances leaves no room for doubt that the accused planned to end the life of the deceased. The conduct of the accused on 31 December 2022 indicates that accused 1 and 2 had thoroughly thought out their plan on that day. I say this being mindful of the evidence of accused 1 that she was scared that her secret love affair with the deceased was exposed and that she was worried about what accused 2 would do to the deceased if he were to confront him.
- [65] Responding to a specific question by the State as to whether she knew that accused 2 would harm and injure the deceased or even cause a fight, her answer was that she knew that the deceased was a kind person and not troublesome, and that if accused 2 approaches him, there might be a fight. Clearly, there was no reason for accused 1 and 2 to confront the deceased at his home because he was not bothering accused 1 and there was no trouble because hours have passed since the deceased was ordered by Mr Jefferson's to leave his premises.

[66] The concept of planned or premeditated murder was described In S v Raath[16] as follows: “Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances... Only an examination of all the circumstances surrounding any particular

murder, including not least the accused’s state of mind, will allow one to arrive at the conclusion as to whether a particular

murder is ‘planned or premeditated’. In such an evaluation the period of time between the accused forming the intent

to commit the murder and carrying out this intention is obviously of cardinal importance

[67] The court in Taunyane v The State[17] stated that: “The distinction between ‘planning’ and ‘premeditation’ was made on the basis of dictionary definitions in S v Raath 2009

(2) SACR 46 (C) but has subsequently been examined in some detail in S v PM 2014

(2) SACR 481 (GP) where it was found that the concepts were distinct from each other – premeditation referring “to something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension” while planning refers to “a scheme, design or method of acting, doing, proceeding or making which is developed in advance as a process, calculated to optimally achieve a goal” (at para [36]). (See also: S v Kekana[18])

[68] If one has regard to the evidence of Ms Mboweni that accused 1 told her that they poured the deceased with paraffin, the two dying declarations and specifically that the deceased reported that he was poured with paraffin, the photographs of the house of the deceased which completely burned to ashes, and the photographs of the burn wounds sustained by deceased which clearly show his whole body being covered with burns, as well as the findings of the post-mortem report, all these aspect are indicative of the description of the concept given in the case of Taunyane and Raath.

[69] If on the version of the accused the deceased got out of the house before the whole house caught fire and he was only burnt on his foot, he would not have sustained those serious injuries. Both stated that they left the deceased’s house because they were afraid that the community would think that they were there to harm cause trouble and burn the house. In my view, if they were as innocent as they want to portray themselves, they would not have left the house burning.

They allege that they did not see the deceased when they left but Mr Mashiane saw him being at a distance of 50 metres from the house. It is therefore improbable that when accused 1 and 2 left the house, the deceased was not there. Accused 2 came up with an illogical excuse that maybe the deceased went back inside the house and that is why he was covered with 80% burn wounds.

[70] I find the evidence of both the accused as untruthful and unreliable. It was apparent during cross-examination that they were trying to cover each other's participation and exonerate themselves as they went along with their evidence. In some instances when the questions became tough, they could not answer the questions posed by the State. There was clearly no reason why the deceased had to be attacked because by her own version, accused 1 said the deceased is not a troublesome person; and he "did not do anything to her, and he was calm when they approached him". Mr Mashiane said the deceased was a kind and friendly person.

[71] In the process of evaluating all the evidence before me, I must also determine whether version of accused 1 and accused 2 is reasonably

possibly true, which would entitle them to an acquittal.[19] The SCA In *S v Trainor*[20] held that: "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety".

[72] On a consideration of the evidence in its totality and in the light of the probabilities and improbabilities in this case, there is no doubt in my mind that the accused planned and had the intention to kill the deceased. I am of the view that the evidence of the accused persons is not reasonably possibly true, and it is accordingly rejected. The inescapable evidence before court is that:

72.1 Both the accused planned to confront and attack the deceased at his house. This is so because both of them admit having had a discussion while they were still at Jefferson's place that they will go to the deceased house.

72.2 They went to the deceased house to confront him about the damage of property knowing very well that they do not know who the perpetrator was at accused 2's home. This much is clear from the evidence of accused 2's mother that she also does not know who came to her house and did not see this person. When they left accused 2's house, they told the mother that the reason for confronting the deceased was about the damage allegedly caused at the house.

[73] Having said that, the proven facts which are common cause are as follows:

73.1 Accused 1 and 2 went to the house of the deceased – and were the only people at the house of the deceased before the horrific incident occurred and were the last people to leave soon after the house caught fire and it was left to burn to ashes.

73.2 The deceased was assaulted and sustained injuries.

73.3 The house of the deceased caught fire while accused 1 and 2 were in the house of the deceased.

73.4 The deceased was left alone while the accused escaped the scene of crime not wanting to be seen by anyone, as they both confirmed same.

73.5 The deceased gave his version of how the incident occurred by means of a dying declaration.

73.6 Accused 1 made a confession to Ms. Mboweni and an admission to Ms. Mahlati,

[74] Having considered all the evidence before me and the submissions made by all counsels, I am satisfied, and of the view that the State succeeded in proving its case against accused 1 and 2 beyond a reasonable doubt.

[75] In the circumstance, both accused 1 and 2 are found guilty of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

APPEARANCES

For the State : Adv. Instructed by : Director of Public Prosecutions, Pretoria For Accused 1 : Adv. J. Motshweni For Accused 2 : Adv. S. Moeng Instructed by : Legal Aid South Africa Heard : 2-14 February 2024

Judgment

Delivered : 17 April 2024

[1] Principles of Evidence, PJ Schwikkard et al, 4TH Edition, 2015, at page 308.

[2] 2000

(2) SACR 100 (D),

[3] (CC161/05)

[2006] ZANWHC 5 at para 48 (1 January 2006)

[4] 1993

(2) SACR 109 (N)

[5] 1992 (1) SA 494 (W).

[6] S v Ndhlovu and Others 2002 (2) SACR 325 (SCA).

[7] S v Mpofu 1993 (2) SACR 109 (N) at 115c-d.

[8] 1993 (3) SA 233 (T) at 239.

[9] At para [45]

[10] Kapa v S 2023 (1) SACR 583 (CC) (24 January 2023)

- [11] The unreported judgment in case no: 109/2014 (SCA) (27 March 2015).
- [12] See: *S v Gentle* 2005 (1) SACR 420 (SCA).
- [13] 2010 (2) SACR 419 (SCA) at para 11.
- [14] 1999 (1) SACR 447 (W)
- [15] 2003 (1) SACR 134 (SCA) at para 15.
- [16] 2009 (2) SACR 46 (C) at para 16.
- [17] Unreported Judgment: case number A140/2015, South Gauteng Division (28 September 2016) at para 27
- [18]
- [2014] ZASCA 158 at para 13
- [19] *S v Trainor* 2003 (1) SACR 35 (SCA) at para 9.
- [20] 2003 (1) SACR 35 (SCA) at 9

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