IN THE HIGH COURT OF SOUTH AFRICA

EASTEN CAPE LOCAL DIVISION – EAST LONDON

Case No: CC 59/2018

In the matter between:

THE STATE

vs

SIZIWE NOMVELISO DANISO	**ACCUSED 1**
VUYOKAZI NOMPUKU MAPIKATA	**ACCUSED 2**
NOMFUNEKO MJINGANE	**ACCUSED 3**
PHELISA NOVELO SHOTANA	**ACCUSED 4**
NOSICELO WEWE	**ACCUSED 5**
NOMVUYO QAWE	**ACCUSED 6**
ZWELIXOLILE NKOHLA	**ACCUSED 7**
PHELISWA NOBAMBAPHA VAKELE	**ACCUSED 8**
KHANYISA MBANDAYI VUMANI	**ACCUSED 9**
MAKAZIWE NOSAKHELE BONTE	**ACCUSED 10**
SAKHUMZI KOSHE	**ACCUSED 11**
SINETHEMBA MABHUTI DEYZANA	**ACCUSED 12**
LUBABALO MPITIMPITI	**ACCUSED 13**
LUSANDA DEYZANA	**ACCUSED 14**

MAKHI SAM **ACCUSED 15**

BONKE LUDIDI **ACCUSED 16**

JUDGMENT

MALUSI J:

[1] The fifteen (15) accused appear before this court on four (4) counts. The counts are set out in the indictment as follows:

1.1 **COUNT 1: MURDER**

In that on or about the 24th day of August 2017 and at or near Reeston, East London, in the district of East London, the accused unlawfully and intentionally killed **Nonkululeko Matiwane**, an adult female person.

1.2 **COUNT 2: ARSON**

In that at the time and place mentioned in count 1, the accused unlawfully and with intent to injure **Nokulunga Matiwane, her family and other people in the houses,** set on fire two houses, a garage and a shack, being immovable properties of the said **Nokulunga Matiwane** or properties in her lawful possession.

1.3 **COUNT 3: MALICIOUS INJURY TO PROPERTY**

In that at the time and place mentioned in count 1, the accused unlawfully and intentionally damaged the property as per attached annexure, the property or in the

lawful possession of **Nokulunga Matiwane,** by burning it with fire and throwing stones at it.

1.4 **COUNT 4: PUBLIC VIOLENCE**

In that at the time and place mentioned in count 1, the accused and divers other people unlawfully assembled with common intent forcibly to disturb the public peace or security or to invade the rights of other persons by blockading the road leading to Nokulunga Matiwane's home with stones and burning objects, throwing stones at the fire brigade vehicles and its occupants, throwing stones at the people and properties inside Nokulunga Matiwane's home and also threatening and attempting to kill people in Nokulunga Matiwane's home.

[2] All the accused pleaded not guilty to all the charges. They elected to exercise their right to silence as provided in the Constitution.

[3] All the accused made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. The admissions related to the chain evidence on how the deceased body was handled from the crime scene to the conduct of the post mortem examination by Doctor Zondi and the post mortem report;

3.1 The photographs of the scene of crime taken by Constable Zingayi;

3.2 The photographs of the crime scene taken by Warrant Officer Abram;

3.3 The forensic report by Captain Ramsundar relating to concrete and a plastic bottle from the crime scene;

3.4 The medical report by Doctor Sokhupha relating to an examination of Luthando Makhwenkwe Matiwane on 24 August 2017.

[4] There was no opening address by the State counsel. The outline of the State case was reflected in the summary of substantial facts attached to the indictment.

[5] All the accused were legally represented. Accused 1, 3, 6, 8, 13, 14, 15 and 16 were represented by Ms Dyantyi. Accused 2, 4, 5, 7, 9 10, 11 and 12 were represented by Mr Mhlaba. During the course of the trial on 31 March 2019 accused 4, Phelisa Shotana passed away. For convenience sake the Court directed that the numbers allocated to the accused would not change as evidence had by that stage been led and it would have caused confusion to reassign the numbers to the accused.

[6] The evidence relating to the events on the fateful day, 24 August 2017 is largely not in dispute. It is acknowledged that the well-established approach to break down the evidence into its component parts is a useful aid in understanding and evaluating a body of evidence. For a better understanding of the issues in *casu* it is necessary to first consider the mosaic of evidence though not slavishly adopting a broad and indulgent approach.[1]

[7] The background evidence indicates that there was a contestation between essentially two factions within the African National Congress in Ward 13 leading in the Buffalo City Municipality up to the 2016 Municipal elections. The contestation related to who was to be nominated as the ANC candidate for Ward 13. The Ward includes the settlement of Reeston. It appears that after a fierce contest the complainant in these proceedings, Nokulunga Matiwane, prevailed and was nominated as the ANC candidate in the aforesaid elections. Accused 1 *(Daniso)* was the leader of the opposing faction which contested Matiwane's nomination. Matiwane was duly elected as the Ward 13 councillor.

[8] For some reasons which are not necessary for present purposes it appears the ill-feeling between the two main factions did not dissipate after the elections. The problems within the Ward 13 ANC branch caused higher structures of that

[1] *S v Hadebe* 1997 (2) SACR 641 (SCA).

organisation to intervene in some way according to the contentions put up by the defence and disputed by Matiwane.

[9] In that cauldron of resentment, on the morning of 24 August 2017 the residents of Reeston woke to the news that two (2) traditional healers, Mrs Mpitimpiti and one MamBamba had been killed. It was alleged that Mr and Mrs Matiwane were the suspects in the murder of the two (2) traditional healers. They were arrested by the police as suspects. Four of the State witnesses who were close to Matiwane converged at her residence on hearing the news of the murder and her arrest.

[10] The evidence discloses that community meetings were convened in Reeston by a whistle being blown. At about noon on that fateful day the whistle was blown and members of the community converged near the community hall. A chaotic meeting ensued wherein a resolution was taken to set on fire the Matiwane residence. This was despite the protestations of Ncumisa Melana, the immediate past ward councillor, for the community not to take the law into their own hands. A crowd, ranging in estimates from more than 50 to more than a 100 people, proceeded from the meeting towards the Matiwane residence. Along the way their numbers were swelled by other community members who joined the crowd.

[11] The evidence indicates that the crowd was engaged in that particularly South African speciality, the toyi-toyi on their way to the Matiwane residence. Before the crowd arrived at the residence, the occupants of the Matiwane residence were forewarned by at least two women that the crowd was on its way to attack the residence. On their arrival at the perimeter fence of the residence the crowd pushed down the main gate to gain entry. A number of State witnesses testified that each of them had identified some of the accused as being part of the crowd that was standing at the gate before it was pushed down.

[12] The evidence discloses that Ntombikho Mkoko, Nontsuku Mkwambi, Andiswa Jozana and Thandiwe Dikani were seated in the patio adjacent to the kitchen exit door in the Matiwane residence. When the crowd assembled at the perimeter fence started throwing stones at the main house in the Matiwane residence the four women aforementioned ran into the kitchen and closed the door behind them. Andiswa Jozana while standing near the door realised that the attackers had poured petrol which was sipping under the kitchen door. She then opened the door and tried to push open the burglar gate. A struggle ensued over the burglar gate between Mkoko, Mkwambi and Jozana on the one hand and allegedly accused 16 and 13 on the other hand. It was alleged that the two accused drenched Mkhwambi and Jozana with petrol. Mkwambi and Jozana eventually managed to escape through the kitchen door. It was alleged that accused 16 and 13 set alight the petrol that was poured at the kitchen exit door.

[13] Various state witnesses testified that whilst the deceased, Mkoko and Aviwe Matiwane were inside the house a number of the accused proceeded to break the windows to the house and poured petrol into the house setting it alight. Aviwe Matiwane testified that after dousing the flames at the kitchen exit door he managed to escape and stood next to the wall of the second house in the property, more or less in the vicinity of the kitchen exit door of the main house. He allegedly observed accused 1, 5, 12 and 13 pick up the deceased from the patio where she had earlier fallen with Mkoko. The four allegedly returned the deceased into the rondavel of the burning main house. This version was corroborated by Mihle Finishi. Nomthandazo Dyabana took the version further and alleged that accused 12 and an unknown man called Lunga held the deceased down on a chair whilst accused 13 forced the deceased to drink petrol. She stated that she saw accused 1 and 5 appear from the crowd as the flames engulfed the deceased.

[14] Various state witnesses alleged that they saw some of the accused set fire on the vehicles parked in the property. Luthando Matiwane alleged that two of the accused tried to drag him into the inferno and when they failed they assaulted him causing two of his teeth to fall out.

[15] At the close of the State case, Ms Dyantyi on behalf of the accused she represents applied for their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 *(the Act)*. The basis of the application was that the evidence tendered by the State was not sufficient to carry a conviction. She correctly conceded that the fact of the attack on the Matiwane residence was common cause. She submitted that what was at issue was the identity of the attackers. She submitted that the reliability of the observations and identification by the State witnesses was highly questionable.

[16] Mr Mhlaba on behalf of the accused he represents indicated that he did not wish to apply for their discharge but intended to call all of them to testify in their defence. The Court, as it is obliged to do by binding precedent, *mero motu* placed at issue the discharge of those accused represented by Mr Mhlaba as I had the *prima facie* view that the evidence against them was poor and may not lead to their conviction if they did not to testify.[2]

[17] Mr Zantsi, who appeared on behalf of the State, opposed the discharge of all the accused. He submitted that most of the State witnesses who identified the accused as having been part of the crowd had previous knowledge of the accused. He argued the State had tendered sufficient evidence to identify the accused as part of the crowd of attackers. He submitted that a holistic reading of the indictment and the annexures thereto clearly indicate that the State relied on the doctrine of common purpose. As such if the accused were identified as being part of the crowd they were liable for all the acts that were committed by members of the crowd.

[18] Section 174 of the Act provides that:

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[2] *S v Lubaxa* 2001 (2) SACR 702 (SCA); [2002] (2) ALL SA 107 (A) at para 18.

"If at the close of the case for the prosecution at any trial, the Court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[19] The leading authority on this section in the Constitutional era is *Lubaxa* where it was stated:

"[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial that need not always be the case.

[21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances."[3]

[20] What is at issue in this case is not whether the accused were identified by the various State witnesses. The issue for determination is the reliability of the identification by the State witnesses of the accused as having been part of that crowd and perpetrated the acts alleged by the State witnesses.

[21] It is trite that due to the inherent fallibility of human observation and memory, the evidence of identification should be approached with caution as it is dangerously unreliable. It is not so much the question of whether the identifying witness is sincere, honest or even confident about the identity of the person he or she identified. A Court has to be satisfied that the evidence is reliable and further that every possibility of an honest but mistaken identity has been eliminated.[4]

[22] The Appellant Division as it then was stated that the correct approach to evidence of identification was the following:

"It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening a Court should be satisfied not only the identifying witness is honest but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification: The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability depends upon a great variety of factors or combination of factors for instance the period of observation, or the proximity of the persons, or the visibility of state of

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[3] *Lubaxa ibid* at para 19-21.
[4] *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C.

the light, or the angle of the observation, or prior opportunity or opportunities of observation, or the details of any such prior observation, or the absence or presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, clutches or bags, etc, connected with the person observed and so on may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely bona fide and honest. The necessity for a Court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really required to be stressed; it appears from such a considerable number of prior decisions; . . . The often patent honesty sincerity and conviction of an identifying witness remains, however, even a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."[5]

[23] The reliability of the identification by the various State witnesses in this case was very poor and in my view fell below the threshold. Mkoko stated that accused 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12 were known to her prior to this incident. She provided no attributes or peculiar features which would imbue her identification of the aforementioned accused as having been the people she saw on the scene of crime on that fateful day. Accused 13 and 16 were strangers to her on the date of the incident. Likewise she gave no physical attributes or peculiar features on the day which would render her evidence reliable. Accused 13 and 16 were strangers whose description by Mkoko falls below the threshold. She only noticed that accused 13 wore a school uniform and carried a spade. Under cross-examination she conceded that it was not stated in her police statement that accused 16 wore his hair in a dreadlocks.

[24] Andiswa Jozana previously knew accused 1 and 12. She gave no description of their physical attributes or peculiar features to bolster the reliability of her identification that these accused were at the Matiwane residence. Accused 5, 13 and 16 were strangers to her. She gave evidence that accused 5 was a chubby woman wearing a t-shirt and a denim skirt. Under cross-examination it was pointed

[5] *S v Mehlape* 1963 (2) SA 29 (A) at 32A-F.

out to her that in her police statement she only stated that *'there was a lady with a dark complexion'*. This is obviously a generic description that can fit innumerable people. She identified accused 16 due to his face, his built and the dreadlocks made her certain that it was him. She said it was a young man, slender built, light complexion and wearing dreadlocks. She described accused 13 as being a male, slender built, light complexion and clothed in full school uniform. It is manifest that the description of both accused 13 and 16 is wholly unreliable as it amounts to dock identification. It is of crucial importance that both accused 13 and 16 were not described in Jozana's statement to the police. The description provided in Court was clearly made with both accused in her clear view.

[25] Zameka Madyumdyum testified that accused 1, 2, 3, 7, 8 and 10 were known to her before the incident. Except for accused 1 no description of the physical attributes or peculiar features of the aforementioned accused on the day were provided by this witness. Regarding accused 1 she testified that she wore her hair in dreadlocks bound in a bunny at the back of her head. This is a wholly unreliable identification of these aforementioned accused by this witness. Madyumdyum testified that accused 12 and 13 were strangers to her on the day. Accused 12 was described as a young man, dark in complexion and wearing a black ankle length coat. Accused 13 was described as a young man light in complexion, wearing a brown school track top and grey school trousers and a white shirt. Both descriptions of accused 12 and 13 are wholly unreliable for lack of physical attributes and peculiar features. Again there were numerous discrepancies between Maduymdyum's police statement and her evidence in Court on identification.

[26] Nomthandazo Dyabana identified accused 1 and 5 as two unknown females who emerged from the crowd. She gave no description whatsoever of either accused. She testified that she just heard the name Mabhuti being shouted and such a person is unknown to her and she is unable to identify him. This does not pass muster as an identification and is entirely unreliable as Mabhuti is notoriously a popular name. Dyabana testified that she knew accused 13 very well as she resided

with him for a considerable period whilst undergoing training as a Sangoma by accused 13's mother.

[27] Although credibility plays a limited role in the exercise of a discretion in an application for a discharge, I am of the view that Dyabana's evidence regarding accused 13 was so poor that this Court may not rely on it. The main criticism is that though she claims to have witnessed accused 12 and 13 involved with the State witnesses on the patio adjacent to the kitchen exit door the place where she was purportedly standing is obscured from where the action took place. Under cross-examination it was pertinently pointed out that her evidence is at variance with her police statement.

[28] Her demeanour while testifying was that of a very uncomfortable person. It appeared to me that she was deliberately misleading the Court and her evidence was littered with gross fabrications. The worst of these fabrications was that accused 12 and a Lunga held the deceased on to a chair whilst accused 13 forced her to drink petrol. This was at odds with all the other evidence which indicated that at the time she says this force feeding of the deceased took place the house was already engulfed in flames. I find her evidence to be of no probative value due to the numerous exaggerations in it. I am unable to distinguish in her evidence the truth and the fabrications. In such circumstances I am obliged to reject her evidence.

[29] Sivuyile Rululu testified that he knew accused 1, 5, 9, 10, 11, 12 and 14 before the incident. He provided no description of the aforementioned accused on the fateful day to lend reliability to his identification.

[30] Emihle Asiphe Mabuya testified that she knew accused 12 before the incident. She provided no description of the accused on the fateful day. She testified that accused 11 was light in complexion, had a bigger body and was an African older male. Accused 9 was described by Emihle as a young male of slender built with a

dark complexion. Emihle conceded that accused 13 was a stranger to him and on the fateful day the accused was in grey trousers. She described accused 15 as a father figure *('tata'),* light skinned, middle weight and had seen him once before the day of the incident. All these descriptions do not lend reliability to Emihle's identification of the aforementioned accused amounted to dock identification and accused before her.

[31] Mihle Finishi described both accused 1 and 5 as strangers to her whom she recognised each by their respective faces as she *'saw their faces and can see it was them'.* This does not even qualify as a proper identification let alone a reliable one. She testified that accused 9, 10, 12 and 14 were known to her before the day of the incident. She gave no physical attributes or appearance and peculiar features on the day of the incident which made her realise that it is the people she knew previously. This renders her evidence unreliable. Both accused 13 and 16 were strangers to her on the day. She described accused 13 as a young man, light in complexion and wearing grey school trousers. She later made enquiries after the incident and was told that he was Mpitmpiti's son. Accused 16 was described as a young man in a black jacket. She stated that she recognised him *'because I saw him, I remember his face'.* Clearly the identification of both accused 13 and 16 is unreliable as no physical attributes were identified by the witness which can be said to be distinct to each of the two accused.

[32] Aviwe Matiwane described accused 1 as dark, of middle height, heavy build and wears her hair in dreadlocks. Accused 5 was described as dark with short hair and heavy build. He described accused 7 as dark, not tall with a big stomach. Accused 7 was a stranger to Aviwe. Accused 10 was described as dark and not tall. Accused 12 was described as dark in complexion and a bit tall. Accused 13 was described as light in complexion, a bit tall and wearing grey school trousers. Accused 14 was described as dark and not tall. Accused 15 was described as light in complexion, a bald head, a tinted beard and a bit tall. Aviwe testified that he could not recall the clothing accused 15 was wearing on the fateful day. It transpired under cross-examination that Aviwe had mentioned only Mabhuti in his statement to the

police. He is a minor child, 14 years of age and his evidence has to be treated with caution. If I exercise caution and consider the generic descriptions he gave for the aforementioned accused his evidence is clearly unreliable.

[33] Luthando Matiwane identified accused 9 as someone he knew before the fateful day. He described him as the young man with a dark complexion and medium build. He also identified accused 10, 12, 13 and 14. All the aforementioned four accused were set to be known to him but he gave no description whatsoever of any of them. Luthando described accused 15 as a male he knew before the fateful day. He said accused 15 was light in complexion with a beard that usually is tinted red and has a bald head. When pressed under cross-examination how he had identified any of the accused his stock answer was that God had told him these were the accused. His answer has to be understood in the context that although he is a 27 year old male his mind functions at a level of a 10 year old child. It is trite that his evidence has to be treated with caution. I place no probative value on his evidence due to the fact that he appeared to me to have been coached by someone on what evidence to give to the court. Due to his mental disability he is particularly susceptible to influence. Whilst giving evidence he was faking being drowsy so as to induce an adjournment. It became clear to me after a particular adjournment that he had been coached during the adjournment as his evidence took a sudden change. I even directed Mr Zantsi to ensure that he limited his contact with anyone so that he may not be influenced in his evidence. I reject his evidence in toto.

[34] None of the accused has yet testified in this trial. Each of the accused has instructed the respective legal representatives to indicate during the cross-examination of the various State witnesses that each accused denies being part of the crowd that attacked the Matiwane residence. Each accused has proffered a defence of an alibi.

[35] Accused 1, 2, 5, 7 and 15 have indicated that their alibi will be that at the time of the attack they were in an ANC meeting at Raynolds farm quite a distance away

from the Matiwane residence. Accused 3 and 13 have indicated that they were at their respective homes at time of the attack. Likewise accused 5 after 15h00, accused 10 after 13h00, accused 12 between 14h00 and 15h00 have indicated that they were also at home during those respective times. Accused 8 has indicated that she was at work engaged in her business as a hawker selling meat at the time of the attack. Accused 9 has indicated that he was in a completely different section of the Reeston settlement called Burundi where he was working on cars. Accused 10 has indicated that he was working as part of the expanded Public Works programme until 13h00 and thereafter has indicated he then went home. Accused 16 has indicated that he was at Chip-Chip tavern when he heard that the Matiwane household was on fire. On approaching the household he assisted Nomasomi, a next door neighbour of the Matiwane's whose house was illuminated by one of the burning cars next to Nomasomi's house.

[36] It is trite that where an accused defence is an alibi the State has an onus to disprove or negate beyond a reasonable doubt that alibi as part of the burden of proving the accused guilt. According to the common law where an alibi is raised for the first time at trial, then the Court, in determining whether the alibi is reasonably possibly true may take into account whether or not there has been an opportunity for the State to investigate the alibi properly.[6]

[37] The correct approach to the evaluation of an alibi defence was set out by Holmes AJA *(as he then was)* in the following terms:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. But it is important to point out that in applying this test, the alibi does not have to be considered in isolation . . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case and the Court's impression of the witnesses."[7] (Footnote omitted).

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[6] *R v Mashole* 1944 (AD) 571; S v Zwavi; Sv Mhlongo 1991 (2) SACR; S v Thandwa 2008 (1) SACR 613 (SCA) at para 13.
[7] *R v Hlongwane* 1959 (3) SA 337 (AD) at 340H-341B.

[38] It has been held that where a defence of an alibi has been raised and the trial Court accepts the evidence in support thereof as being possibly true, it follows that the trial Court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct.[8]

[39] Mrs Matiwane accepted under cross-examination that there is a reasonable possibility that the meeting at Reynold's farm took place though it was not authorised by ANC. Once that concession was made it was incumbent on the State to produce evidence that the contention about the meeting was actually false. The State did not do so. Nor did it challenge any of the alibis raised by the other accused by producing evidence to prove the alibis were false. That remissness amounts to a failure by the State to present a *prima facie* case.

[40] The State was obliged before closing its case to investigate and verify the alibis raised by the accused. The alibis were first raised during February 2019 at the start of this trial. After a period of six months has elapsed it appears the test has taken no steps whatsoever to investigate the alibis raised by the accused. The State has amply resources at its disposal to conduct such an investigation if it was so inclined. The feeble excuse by the investigating officer communicated from the Bar by Mr Zantsi that the investigating officer has difficulties with transport is simply not acceptable and will not pass muster. The State Counsel will be aware that it is his duty and in the interest of justice that all the necessary steps be taken to ensure that the truth is told.

[41] When the issue of investigating the alibis was raised with Mr Zantsi he submitted that the State is precluded from such an investigation. He cited as authority for that submission *State v Masoka* 2015 (2) SACR 268 (ECP) at para 14-18. The facts in Masoka are clearly distinguishable from the case before this Court.

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[8] *Musiker endorsed S v Liebenberg* 2005 (2) SACR 333 (SCA) at para 14 and 15; *S v Musiker* (272/12) [2012] ZASCA 198; 2013 (1) SACR 517 (SCA) (30 November 2012).

The prosecutor in Masoka went behind the back of the defence and obtained a statement from a defence witness during the trial. Such a statement was not disclosed to the defence until the accused in the trial Court testified. It was only at that stage that the accused was confronted with a statement obtained from a defence witness. In the matter at hand it appears to me various witnesses would be available to the State to verify the alibis put up by the accused without breaching the confidentiality of the defence cases of each of the accused. I do not understand Masoka to be authority for the proposition that once an accused raises an alibi the State may not investigate such an alibi during the course of the trial.

[42] It is now settled law that an accused is entitled to raise an alibi for the first time during the trial.[9] It follows that if the accused raises an alibi during the trial the State must be entitled to investigate such an alibi during the course of the trial. What was at issue in Masoka was the clandestine manner in which the State investigated the alibi and breach of confidentiality which was held to be unfair to the rights of the accused in that matter.

[43] In my view the State is not expected to wait until the close of the defence case before presenting evidence obtained in investigating the veracity of the alibi. In this case the State would have struggled if not unsuccessful in applying to re-open the State case to present the evidence obtained after the close of the defence case. The principles applicable in an application for a re-opening of the case are trite and in my view the State would not have satisfied those requirements due to the fact that it had known about the alibis for six months before it closed its case.[10]

[44] Even if I were wrong in my findings on the above issues in my view the State case is of such a poor quality that this Court acting reasonably would not convict the accused at the conclusion of these proceedings. The evidence of the State witnesses was riddled with material contradictions which undermine the probative

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[9] *Thebus & Another v The State* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).
[10] *S v Ndweni & Others* 1999 (2) SACR 225 (SCA) at 227E; *S v De Jager* 1965 (2) SA 612 (A) at 613 A-B.

value of the entire State case. According to Mkoko whilst Aviwe was fetching water from the bathroom to put out the flames the deceased was on fire in the dining room. Aviwe never mentioned the deceased being on fire in the sofa. He also never stated that he said *'I am giving up and leaving as I have been assaulted'.* The latter statements were attributed to Aviwe by Mkoko but he never confirmed them at any stage.

[44] Mkoko alleged that accused 1, 2 and 4 were at the kitchen door screaming that Aviwe must be assaulted to stop him extinguishing the flames. The aforementioned accused allegedly threw stones at Aviwe, according to Mkoko. Aviwe never mentioned any person having attempted to stop him extinguishing the flames at the kitchen door let alone stones being thrown at him. Mkoko stated that she and the deceased fell inside the kitchen floor before reaching the exit door because she was hit by accused 1 with a stone on her collar bone. This evidence was contradicted by Aviwe who stated that Mkoko went out of the kitchen door with the deceased and fell outside on the patio after being hit by accused 1. According to this version the deceased was returned inside the main house by accused 1, 5, 12 and 15. Regarding the same incident Mihle Finishi says it was only accused 1 and 5 who carried the deceased inside the main house from the patio with no mention of accused 12 and 15.

[45] Mkoko stated that she retreated further into the house as the kitchen floor and cabinets were on fire. It was impossible for her and the deceased to leave through the kitchen door after she had been hit and fell down. She stated that Aviwe met her and the deceased inside the main house after they had been prevented by fire in the kitchen from leaving. Against the probabilities he left through the flames in the kitchen unscathed if Mkoko were to be believed. On the contrary Aviwe says he found flames only at the door which he extinguished by throwing water from a basin and walked out of the house.

[46] Mkoko testified that both Mkwambi and Jozana were drenched in petrol poured by accused 13 and 16 whilst at the kitchen door struggling over the burglar gate. On the contrary Mkwambi did not say she was drenched with petrol only

stating that Jozana was drenched. If Mkwambi had been drenched it begs a question why would she not mention it in her evidence. Furthermore, Jozana in her own testimony did not mention that Mkwambi had been drenched with petrol.

[47] Mkoko testified that whilst running towards the side gate to escape the fire and the attackers she was directed by Mkwambi to go around the garage to the opening in the fence. In contradiction of this evidence Mkwambi testified that whilst she was running towards the back of the house she saw Mkoko inside the house breaking a window and trying to escape. She told Mkoko the house was on fire and she must escape from the house. She made no mention of directing Mkoko to an opening in the fence.

[48] Mkoko testified that the first reaction of the four women in the patio i.e. herself, Mkwambi, Jozana and Dikana was to run towards the side gate on the perimeter fence. This evidence was contradicted by Mkwambi who said the first reaction of the five including Zameka was to run towards the kitchen door and they did not go to the side gate.

[49] Jozana whilst under cross-examination stated that she could see accused 13 and 16 attacking her at the kitchen door. Under cross-examination she conceded that the petrol had an effect on her eyes. When it became clear that the consequence of the effect was that she could not see the accused she immediately changed and said the petrol had no effect on her eyes. I found her to be an unreliable witness on this aspect and the other aspects stated above.

[50] The evidence of the State witnesses was also riddled with contradictions with regard to whom of the accused committed a particular act. Jozana in her evidence in chief alleged that accused 12 had tripped her as she was escaping the house but under cross-examination changed to say it was accused 13 who tripped her. Madyumdyum testified that accused 12 jumped over the small gate to gain entry into

the Matiwane residence at the initial stages of the attack. This was contradicted by Emihle Mabuya amongst other who gave evidence that accused 12 and 13 were at the main gate carrying 2L containers. They jumped over the main gate into the yard of the Matiwane residence.

[51] Mkoko stated in her evidence that accused 12 was in possession of a spade whereas Aviwe, Luthando Matiwane and Madyumdyum testified that it was accused 10 who was in possession of the spade. To further muddy the waters Mkwambi testified that accused 13 was in possession of the spade. Whilst I accept that the spade is an item that is easily transmitted amongst people, it appears to me that each of these witnesses wanted to create the impression that the person alleged to be in possession of a spade had been in possession throughout the attack.

[52] Most of the State witnesses when they were confronted with discrepancies between their evidence in Court and their respective police statement stated that their evidence in Court had been relayed to the investigating officer, Warrant Officer Nqwelo. Surprisingly Nqwelo was not called to clarify these aspects at all. This has the result that the credibility of most State witnesses was undermined.

[53] An analysis of the evidence given by the State witnesses gives the strong indication that their evidence may have been discussed before the trial and there had been a deliberate attempt to mislead the Court. It appeared to me that the witnesses on a specific incident they testified about were regurgitating from a prepared script oblivious to their statements to the police.

[54] In these circumstances I am satisfied that on a conspectus of all the evidence led the State has failed to establish a *prima facie* case.

[55] I had considered to disallow Mr Mhlaba his fees or a portion thereof as a mark of the Court's displeasure at his grossly unsatisfactorily handling of the defence as

was done in *Khoza & Others v S* [2010] ZASCA 60, 2010 (2) SACR 207 (SCA) at paras 92-94. I came to the conclusion that Counsel must first be warned to desist and only if such conduct persists must action be taken.

[56] My sympathy is with the Matiwane family for having lost a child and property in these tragic circumstances. Our Courts are guided by the law no matter how sad the circumstances. In this case, the State has fallen short of the required standards.

[57] After anxious consideration I have a suspicion that some of the accused may well have been involved in the commission of these crimes. However, a suspicion is not enough to even put the accused to their defence. Our law requires that the accused be set free.

[58] I can only earnestly appeal to all the role players to resolve whatever differences they have peacefully. We are now a Constitutional democracy and must act in accordance with the law. There can be no justification for resorting to violence however grave the complaint.

[59] In the circumstances and for the above reasons, all the accused are found not guilty and discharged.

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T MALUSI
Judge of the High Court

***Appearances*:**

For the State: Adv Zantsi *instructed by*

Director of Public Prosecutions

GRAHAMSTOWN

For Accused

(1, 3, 6; 8; 13, 14,15 & 16): Ms Dyantyi *instructed by*

Legal Aid Board

EAST LONDON

For Accused:

2, 5, 7, 9, 10, 11 & 12 Mr Mhlaba *instructed by*

Legal Aid Board

EAST LONDON

Delivered on: 9 September 2019