

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
JOHANNESBURG

CASE NO: SS 220/12  
DPP REF NO: JPV 2012/805  
DATE: 22nd MARCH 2013

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
28/3/13	
DATE	SIGNATURE

In the matter between:

THE STATE

and

CELE, FANISWA THANDAZANI

Accused

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J U D G M E N T

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MUDAU, AJ:

INTRODUCTION

[1] On the night of 17<sup>th</sup> March 2012 at about 9:30 pm, the complainant and the deceased in this matter were outside a tavern at Thembalihle squatter camp, Lenasia when two men, one of who was armed with a knife, accosted them. The men stole a Toyota Corolla motor car, an identity book, as well as

R1025-00 from them. During the process, the deceased (David Thana), was fatally wounded and the complainant (Reshawn Madramoothoo), sustained serious knife wounds.

[2] Arising from these facts the accused, Mr Faniswa Thandazani Cele, was arraigned for trial on an indictment consisting of three (3) charges. The charges are: Count 1, robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 (the Act) in that upon or about the 17<sup>th</sup> March 2012 at or near "D" Section, Thembalihle Squatter Camp, Lenasia in the district of Johannesburg the accused did unlawfully and intentionally assault David Thana and Reshawn Madramoothoo and with force and violence take from their possessions the items referred to above. Count 2, murder in that on or about the date mentioned in count 1 in the district of Johannesburg, the accused did unlawfully and intentionally kill David Thana. The indictment explicitly stated that the provisions of ss 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 (the so-called minimum sentences legislation) apply respectively to the counts of murder and robbery. Lastly, Count 3, attempted murder in that on or about the date and place mentioned in count 1, in the district of Johannesburg, the accused did unlawfully and intentionally attempt to kill Reshawn Madramoothoo.

[3] The accused pleaded not guilty to all of the charges against him. In addition the accused decided, as he was entitled to do, to tender no explanation of his plea.

[4] The accused initially appeared with Kabelo Cornelius Nthupi (as accused no 2). Throughout this trial, Kabelo Cornelius Nthupi, was referred to by his first name, Kabelo. For purposes of convenience I shall refer to him in this judgment by his first name, Kabelo. Kabelo (then 19 years of age), subsequently entered into a plea and sentence agreement with the state<sup>1</sup> and was convicted. Currently, he is serving a 13 years prison term for his role in the robbery and assault charges only. Kabelo has since turned state witness.

[5] The central issue in this trial is whether the State has proved beyond a reasonable doubt that the accused was one of the two men who robbed and killed the deceased, as well as making an attempt on the life of the surviving victim.

[6] The State relies principally on the evidence of the surviving victim (Madramoothoo) who is also the complainant, Kabelo who has already been convicted and sentenced as well as the evidence by the two arresting officers (Warrant Officer Madavha and Constable Setumo).

### THE EVIDENCE

[7] From the onset, the accused made formal admissions (Exhibit "A") that are recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977. The formal admissions inter alia are with regard to the identity of the deceased; the date and place of the deceased's death; the cause of his death, this being as a result of a "penetrating incised wound of the chest to the heart"; that the body of the deceased sustained no further injuries from the time of his death until a post mortem was conducted by Dr James Blair Mwesigwa as recorded on Exhibit "B"; the depiction of the scene of crimes as well as the key thereto. The defence also admitted formally that the accused was pointed out at an identity parade (exhibit "E") held on the 2nd of June 2012 by the surviving complainant, Mr Madramoothoo.

[8] In addition, a number of evidential materials tendered as evidence by the state were admitted by the defence, i.e. a jacket, knife and car keys that were used by the murderer. It was also formally admitted that the sample of the deceased's blood was subjected to a DNA analysis through a process that requires competence in biology. In support hereof, an affidavit tendered in terms of s 212(4) (a) of the Criminal Procedure Act 51 of 1977, was also handed in by the State. In an appendix thereof, DNA has been described as an abbreviation for "Deoxyribonucleic Acid". Furthermore that:

*"DNA is a complex chemical found in cells throughout the human body. DNA is constant for an individual and does not change during a person's lifetime. Each person's DNA is the same in all of their cells, so the DNA recovered from blood cells will be the same as that found in other tissues and body fluids, such as semen and hair roots. Each person's DNA is unique, except for identical twins and therefore indicates differences between individuals."*<sup>2</sup>

[9] The significance of the DNA analysis in this matter is that the DNA results of the knife and a jacket seized by the police (PA30000765141) match the DNA results of the sample of blood from the deceased with seal number 07D4AB2466XX.

[10] It will become apparent from the evidence that I shall deal with below, that the primary issue for determination is whether the accused is implicated in this matter, by direct and (or) circumstantial evidence. A summary of the relevant oral evidence presented before court is as follows.

[11] Reshawn Madramoothoo (Madramoothoo), the complainant in respect of counts 1 and 3 testified essentially as follows. The deceased and his family were tenants at number 9263 Acturious St, Extension 10, Lenasia in an outside property. The landlord was Madramoothoo's friend. At the time of this incident, Madramoothoo had temporarily moved into the main house with the landlord. The deceased was the owner of a Toyota Corolla with registration number LPN 105 GP. Each night, the deceased used to park his car at a secure separate address also in extension 10, Lenasia.

[12] On the date of this incident (17/3/2012), Madramoothoo accompanied the deceased to park his car. Along the way, they decided to buy some beers from a tavern namely, Mbawuleni, at Thembalihle informal settlement. This informal settlement is at the outskirts of Lenasia. On arrival at Mbawuleni tavern, the deceased got out of the car taking the car keys with him. Deceased went inside the tavern to buy beer, as Madramoothoo remained seated in the front passenger seat. The car doors were not locked. To Madramoothoo's surprise, the driver's door opened, and a man he later

identified as Kabelo, got into the car and sat on the driver's seat. He saw the man clearly because the interior light of the car lit up. Kabelo was dressed in a black Adidas jacket.

[13] Kabelo looked around for the car keys, but in vain. When he asked Kabelo what he was doing, not only did Kabelo order Madramoothoo to shut up, but he also punched him in the face. Kabelo punched him about 3 times before he (the complainant) fought back. Whilst they were fighting, the rear right door opened and a second man got inside the car. He identified the 2nd man as the accused (Cele). He was able to have a full view of the accused, as he had turned to his right to fight Kabelo. The accused was about a meter inside the car. In the meantime deceased had returned to the car. Before the accused got into the car, he had seen the accused wearing a blue jacket. At that stage the accused was in front of the deceased outside the car. There was another man behind the deceased.

[14] The accused was dressed in a blue Adidas jacket with yellow shoulder pads and yellow stripes on both sleeves, as well as a black pair of jeans. Except for the colour, the accused's jacket looked exactly the same as the jacket worn by Kabelo. The complainant (Madramoothoo) also identified a blue Adidas jacket (exhibit "1") described above, as the jacket he saw the accused dressed in.

[15] It was at that stage that the witness opened his door and ran out of the car for his life. The accused blocked Madramoothoo's way. Madramoothoo ran into a yard of the house parallel to where they were parked. It is into this yard that Kabelo chased after him. He had his cell-phone in his hand, which he threw away with the hope that Kabelo will be distracted, which in turn would have given him an opportunity to jump over the fence behind the house to safety. As he ran away, he could hear the deceased screaming in pain.

[16] Kabelo caught up with him, and held him by the front of his belt, searched his trousers 'pocket and took about R25-00 as well as his ID. The outside lights from the neighbouring houses provided adequate lighting for

him to see properly. Kabelo kept on screaming for the keys of the car and for the cell-phone. The complainant told him he had no keys and neither did he have a cell-phone, since he had dropped it inside the car. Kabelo tried to pull him out of the yard by his belt.

[17] It was at that point that the accused came running into the yard brandishing a knife, which the witness identified as exhibit "2" in this matter. The complainant punched Kabelo, but the accused, who was nearer, stabbed him above his heart and on the rib-cage. He, as a result, fell down next to a plastic chair, which he used to ward off further blows. At that stage Kabelo was throwing bricks at him. His skipper was ripped to shreds, as the accused held on to it. The next moment the accused ran out of the yard. Moments later he heard the engine of the deceased's car start and running at high revolutions. Kabelo threw the bricks on the ground and ran out of the yard. Moments later, he heard the deceased's car drive off. He knew it was the deceased's car as it was the only car in the street at that time. The witness jumped the fence at the back to seek help from the neighbours. After knocking at the door of one of the neighbouring houses, the neighbour refused the complainant any help, but advised him to run away, which he did.

[18] Madramoothoo ran away and hid in the bushes. After some time, he made his way to a street and eventually found his way home on foot. On his arrival at home, he made his way to the deceased 'cottage (or outer-room) where he knocked. However, no one responded. He proceeded to the main house where, the landlord opened for him. As he explained what happened to their landlord, he passed out from loss of blood. He later regained consciousness when the police had arrived and to the deceased's wife's screams. At that stage, other women were also crying.

[19] Madramoothoo made a statement to the police at the Lenasia police station at about 4am, on the morning of the 18th March 2012. Once he was done, he refused a suggestion to be taken to hospital. He had previously worked at a pharmacy and was familiar with medication. Once he was done at the Lenasia police station, he went to a pharmacy where he bought pain

tablets, gauze swipes (to clear the knife wounds), bandages, and other medication. At the time of giving his testimony, Madramoothoo exhibited the scars on his upper body as a result of the stabbing by the accused. The scar above the heart was measured as 1cm long x 3mm in width. On his ribcage, the scar was 3cm long x 5mm in width.

[20] Before this court, Madramoothoo identified the car keys (exhibit "2") as the property of his deceased friend. On the 2nd of June 2012, he attended an identification parade where he pointed out Kabelo and the accused, as the two men who accosted them on the night of the incident. He did not know the two men before this incident. It took him a minute to identify the accused. He had recognised the accused during the identification parade by his thick lips and eyes, which he could never forget.

[21] During cross-examination, Madramoothoo further testified that when he made a statement at 4am on Sunday the 18th of March 2012, the accused was not at the Client Service Centre (or charge office) as suggested by the defence. The complainant categorically refuted a suggestion that the accused was pointed out to him by Warrant Officer Madavha of the Lenasia police. The complainant pointed out that as far as he was aware Kabelo and the accused had not yet been arrested when he made his statement at 4am, that day.

[22] Mrs Angelina Tryphina Tshabalala (Tshabalala) was at the time of the incident, the deceased's wife. It is her version that the deceased originally came from Malawi. Between them, they had 7 children. Of her 4 children, the deceased fathered two. In her testimony, she repeated the gist of Machamothoo's evidence, in so far as it affected her.

[23] The accused's former co-accused, Kabelo Cornelius Nthupi (Kabelo), testified essentially as follows: It is Kabelo's version that he and the accused were friends. Before this incident, they had known each other for at least a year. On Friday the 16th March 2012, he went to pay his friend (the accused), a visit. When he visited, he had already decided to spend the night at his friend's place of residence at Thembalihle Squatter camp, Lenasia. On his

way to the accused's place of residence, he bought two Adidas jackets that were exactly similar in size one black and the other one blue, from a shop. He gave the blue Adidas jacket (exhibit "1") to the accused as a gift, and kept the black one for himself.

[24] On Saturday the 17th March 2012 and at about 6 or 7 pm, he and the accused went out to drink alcohol at a tavern in Thembalihle. They were both adorned in their new jackets that he had bought the day before. It was there that they met another friend Louis, with whom they later went to Embawuleni tavern, where this incident happened. Later at about 10pm, the accused wanted them to leave. They all went outside. Whilst they were outside, Louis went to play dice whilst the accused went to the toilet. It was whilst he stood outside the tavern waiting for the accused that the deceased and an Indian man he later got to know as Madramoothoo (the complainant), arrived in a silver/grey Toyota Corolla. The deceased, who at that stage was unknown to him, was the driver of the said car. The car was parked about 5 meters from him (Kabelo). The deceased alighted and went into the tavern whereas Madramoothoo remained on the front passenger seat. It was then that he (Kabelo) approached the driver's door that he opened. From this point of his testimony, Kabelo confirmed Madramoothoo's testimony to the extent that it implicated both himself and the accused.

[25] He also testified that on his return from the tavern, the deceased carried 4 bottles of beer. It was at that stage that the accused, who was returning from the toilet, accosted the deceased by grabbing him (deceased) by the front of his upper clothes.

[26] At the stage when the accused followed him inside the yard, where the witness was robbing the complainant (Madramoothoo), the accused had a knife (exhibit "2") in his hand. The accused had blood on his blue jacket (exhibit "1"), which was not there before he (accused) fought the deceased. As he (Kabelo) fought the complainant, the accused stabbed the complainant. For fear that the accused might kill Madramoothoo, he (Kabelo) disarmed the accused of the knife (exhibit "2"), which he put inside the pocket of his jacket.



Thereafter, he and the accused left the yard. When they went out of the yard, the accused handed him the deceased's wallet that contained the deceased's Identity document, R1000-00 in cash, as well as the car keys as the accused could not drive.

[27] They left the deceased leaning against the fence, holding his chest and crying out in pain. The deceased's t-shirt was soaked in blood. He took the driving seat and the accused sat on the front passenger seat. The accused directed him to drive to Soweto to sell the car. It was around midnight when they arrived in Soweto where they met two young men who, according to the accused were to buy the car. One of them (the two young men), took over the driving, when all four of them drove to Casban tavern, Protea Glen (Soweto), where they enjoyed some more beer. In the meanwhile, the accused had taken off the jacket and left it inside the car since it had blood stains. The proposed deal (to sell the deceased's car) fell through, as the two young men, later disappeared.

[28] At about 6:30am, they abandoned the car, which they left parked in a street corner. By then, the accused had washed the blood off the blue jacket (exhibit "1") with the beer he was drinking and had the jacket on again, since it was cold. Besides the blue jacket, the accused was dressed in a black pair of Levy jeans, a summer shirt decorated with flowers and black casual shoes. Thereafter, he and the accused took a taxi to Lenasia. Once there, they made their way to the railway station where the accused continued drinking beer. It was at that stage that, filled with guilt coupled with fear, he decided to walk and report the incident at the nearby Lenasia Police station.

[29] At the police station, he reported the incident to Warrant officer Madavha, which led to the arrest of the accused where he had left him earlier. When he reported the incident, he also handed to Madavha the deceased's car keys (exhibit "2"). He took the police to the place in Soweto, where they had left the car. On their way to Soweto, he had wanted to smoke. He put his hand in the pocket of his jacket to find a cigarette. As he did so, he found the knife (exhibit "2"), which he had earlier taken from the accused. He took the

knife and handed it to Warrant officer Madavha. Upon their arrival in Soweto, they did not find the car where he had left it around a corner. The deceased's car was traced to a police compound where he identified it to the police. He subsequently, made a statement (exhibit "K") to the police on the same day. The next day (19th/3/12), he was arrested as a result of this incident, which led to his conviction and sentencing.

[30] In his statement to the police (exhibit "K" para 2) on the date of the accused's arrest, Kabelo had stated that --

*"...one of my friends by the name of Gift (Chico) came out from the tavern straight to the car that parked outside the tavern and opened the drivers door and started assaulting the driver and stabbed him with the knife..."*

Gift and Chico are names that the accused is also known by. When this inconsistency, which suggested that the deceased was stabbed by the accused inside his car and in Madramoothoo's presence, was brought to his attention under cross-examination, he responded that he feared that he could be arrested. It was for that reason that he had lied. The reason to lie was not there anymore since he has subsequently been convicted and sentenced.

[31] Kabelo conceded under cross-examination, that he did not witness the actually stabbing of the deceased by the accused, but it was what he inferred had happened.

[32] Kabelo was questioned about his knowledge of the accused's family. He testified that the accused's mother's name was MaCele. When it was put to him that the accused's sister's name is Phindile Zondi, he disputed this. It is Kabelo's evidence that Phindile Zondi is in fact the accused's girlfriend and not his sister. After taking further instructions in this regard, counsel for the deceased conceded this aspect. Kabelo also disputed a suggestion that he and a man named Vusi took the accused for a drive to Soweto.

[33] The police officer (Madavha) who arrested the accused testified briefly as follows. He is a veteran of 29 years' service, in the South African Police

Services. He is currently attached to the detective section at the Lenasia police station. He confirmed Kabelo's evidence that on Sunday the 18th March 2012, and at about 11:20 am, Kabelo, whom he knew as a registered informer, came to the police station and reported to him about this incident.

[34] Madavha's version is further that, after he received a full description of how the accused was dressed (as well as the blue Adidas jacket); Kabelo pointed out where he had left the accused. He and another police officer (Constable Setumo) could from the front of the police station see where the accused was, from the description of the jacket that was given. They took a short walk to where the accused was sleeping, and arrested him. The accused was informed of the reasons for his arrest, but kept quite. Next to the accused was a half consumed bottle of beer.

[35] The blue jacket (exhibit "1") that the accused was wearing was blood-stained. The accused had no obvious injuries, and could not explain where the blood stains originated from. He ordered the accused to take off the jacket, which he (Madavha) handed over to Constable Setumo for safe-keeping. He thereafter kept the accused firmly in his grip, as he took him to the police station where he was detained in the holding cells. Madavha also confirmed Kabelo's evidence regarding how the deceased's car was recovered. He also testified that he did not know the state witness Madramoothoo at that stage. During cross-examination, Madavha refuted suggestions that he had told Madramoothoo that the accused was one of those involved in the incident. It is Madavha's evidence that he never took Madramoothoo to where the accused was as it is irregular to do so. When he was asked why the accused was not photographed whilst wearing the blue jacket (exhibit "1"), he (Madavha) explained that to make those arrangements would have consumed time.

[36] Constable Setumo also testified, and confirmed Madavha's testimony.

[37] The investigating officer in this matter (Sgt Kgatle) testified to the effect that the holding cells at the Lenasia police station are under constant

supervision by two police officers at any given time posted outside the holding cells. This is meant to control access to the detained prisoners. Members of the public do not have direct access to the detainees.

[38] Finally, warrant officer Mabasa, who was the officer in charge of the identification parade at the Eldorado police station, testified that since the suspects (the accused and Kabelo) enjoyed legal representation at the time, it was only after they were pointed out by Madramoothoo that the accused (Cele) registered a complaint to the effect that the said *"witness saw him in the CSC (charge office) during the time of his arrest"*. That concluded the state's case.

[39] The accused was the sole witness to testify in his own defence. His version in brief, is as follows. He denies all the charges levelled against him. He denies that he was arrested whilst dressed in the blue Adidas jacket (exhibit "1"). He furthermore, disputes that he and Kabelo are friends. Contrary to an informal admission that was made, he disputes that Kabelo slept at his house on Friday, the 16th March 2012.

[40] It is furthermore his version that between 20h30 and 24h00, he had spent time drinking alcohol and had also acquired the sexual services of a prostitute, in Lenasia. From there he proceeded to Dudu's tavern in Lenasia. It is there that he found a man he knew as Vusi standing next to silver Toyota Corolla. Vusi told him that the car belonged to a family member and that he (Vusi) was waiting for the driver. He (Cele) went inside the tavern but stayed for only a short while. On his return to Vusi, he saw Vusi approach Kabelo (whom he referred to as Mahommed). The two of them got inside the Corolla with Kabelo taking the driver's seat. When he asked Vusi whether they were leaving, Vusi invited him for a drive. He accepted the offer. From there the three of them drove to Casban tavern, Protea Glen, at Soweto. They spent the night drinking alcohol at the said tavern until he left them the following morning at 8am. He took a taxi back to the railway station in Lenasia to re-join the prostitute he was earlier with, until he was arrested. When the police

arrived he was surprised that they asked him about Vusi and Mahommed (Kabelo).

[41] During cross-examination, he further testified that he got to know Kabelo through Vusi. The reason he suspects Kabelo is implicating him in this matter, is because they had a fallout. Kabelo's friend had acquired sexual favours from his (accused) regular prostitute called Nomsa, but did not pay. He (the accused) also got involved when Nomsa wanted her money as they (Kabelo and his friend) did not want to pay. The accused was reminded that this version was never put to state witnesses. He responded that he did not brief counsel in this regard. As for his reason to leave Kabelo and Vusi in Soweto, he stated that they were boring him. It is further his testimony that he did not require a jacket that night since there was a fire outside at the Casban tavern which kept him warm. At the stage he left the two (Kabelo and Vusi), the deceased's car was still there parked under a tree.

[42] With regard to the identification parade, he testified that the witness Madramoothoo was able to identify him as he had seen him firstly, when he was brought to the cells by Madavha to identify him after his arrest and secondly, because the said witness had seen him on many occasions when he (accused) appeared in the Protea Magistrates' Court. It was pointed out by the state that the accused's version as put to state witnesses and as supported by the complaint in form SAP 329 was that the said witness saw him in the CSC (Charge Office). Furthermore, Mr Madramoothoo was never confronted about his (the accused)'s court appearances. The accused's standard answer in this regard was: *"it was because I was never asked"*.

[43] In response to clarificatory questions by this court, it is the accused's version that he and Kabelo are not friends. Furthermore, contrary to what was informally admitted by the defence, Kabelo never slept at his house on Friday, the 16th March 2012. With this evidence, the defence case was closed.

[44] In *casu*, it has not been disputed or seriously challenged in respect of the murder and robbery charges that the State was successful in proving all the essential elements of the said crimes.

### THE LAW

[45] However, it is an established principle of our law that the State bears the *onus* of proving the guilt of the accused beyond reasonable doubt. There is no reverse onus on the part of the accused to prove his innocence. As it was held in *S v Van der Meyden*<sup>3</sup>, which was approved and applied by the SCA in *S v Van Aswegen*<sup>4</sup>, an accused is entitled to be acquitted if there exists a reasonable possibility that he might be innocent regard being had to the totality of the evidence. In assessing whether or not the guilt of the accused has been established the SCA in *S v Hadebe & Others*<sup>5</sup> approved of the approach adopted in *Moshephi & Others*<sup>6</sup> in which the following was stated:

*"The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is inappropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."*

[46] In dealing with evidence of the State a convenient point is to start with the evidence of Kabelo, who was convicted of crimes arising out of the same incident. In the result, Kabelo is an accomplice whose evidence must be treated cautiously, and added to this is the aspect that he is (or was) a registered informer. The cautionary rule in the case of evidence by an accomplice is aimed at overcoming the danger of an accused being wrongly convicted on the evidence of an accomplice who not only has a motive for

telling lies but is, by his inside knowledge of the crime, peculiarly equipped to convince the unwary that his lies are true. In *Scott-Crossley v State*<sup>7</sup> the court quoted the following by Holmes JA in *S v Hlapezula & Others*<sup>8</sup>:

*"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency". See also R v Ncanana<sup>9</sup> as well as R v Nqamtweni<sup>10</sup>.*

[47] To overcome this, the evidence of an accomplice and (or) a police informer (In this case Kabelo), requires corroboration. What constitutes corroboration was set out in *S v Gentle*<sup>11</sup>:

*"It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant and which renders the evidence of the accused less probable, on the issues in dispute."*

### EVALUATION OF THE EVIDENCE

[48] In this case, Kabelo had already been convicted and sentenced by the time he gave his testimony. In addition, Kabelo's evidence is not "single and unconfirmed" within the meaning of section 208 of the Criminal Procedure Act, but is corroborated, in material respects by the evidence of the surviving complainant, Mr Madramoothoo. Mr Madramoothoo's evidence stands out as he was not contradicted in any material way.

[49] In this case however, I find that the evidence of Kabelo has materially been corroborated by the evidence of the surviving victim (Madramoothoo) with regard to how the offences were committed. He gave his evidence in a satisfactory manner and despite a few discrepancies on minor points of detail (i.e. the accused's black shoes, which Madavha described as brown whereas, the accused described them as black and brown). I accept his evidence in regard to the essentials in respect of most of which his evidence is corroborated by other State witnesses. For example he testified that the

accused had accosted the deceased followed by the deceased's crying in agony, which Madramoothoo also confirmed. There is, consequently corroboration not only of the evidence of the accomplice on all the main points but also evidence not implicating the accused i.e. no one witnessed the accused actually delivering the fatal blow on the deceased. Kabelo's conflicting statement to the police may well be accounted for by the natural desire to minimize his involvement in the crimes by alleging that he had no role to play. It is not required of accomplices that they be perfect witnesses. In *S v Engelbrecht*<sup>12</sup> the SCA had on this occasion repeated what was stated in *S v Francis*<sup>13</sup> which set out the position thus:

*"It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether, after due consideration of the accomplice's evidence with the caution which the law enjoins, the Court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one."*

I find that Kabelo's version is in its essentials, a true story in this matter.

[50] The evidence by the two arresting officers (Madavha and Setumo), is formal in nature and accordingly, requires little scrutiny. There is corroboration with regard to the accused's manner of dress with particular regard to the Blue jacket (exhibit "1"). The two officers also confirmed Kabelo's testimony. Setumo however, contradicted Kabelo with regard to the stage at which the knife was handed to Madavha. I find this discrepancy to be of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction.

[51] In *S v Mkohle*<sup>14</sup>, it was said that:

*"contradictions per se do not lead to the rejection of a witness' evidence; they may be indicative of an error made by a witness and not every error made by a witness affects his credibility; and in each case*



*the trier of fact has to make an evaluation taking into account such matters as the nature of the contradictions, their number and importance and the bearing on other parts of the evidence."*

[52] In dealing with the evidence of the accused, there is no doubt in my mind that his version is riddled with improbabilities and contradictions of a serious nature. A few examples follow hereunder. From the onset, it is the state's version that Kabelo and the accused are (or) were friends as at the time of this incident. This aspect was informally admitted and again confirmed during the defence's closing remarks. Yet the accused denied this aspect in his evidence. I find it hard to believe that the accused would have travelled with Kabelo and Vusi (whose further details are unknown), for a joyride if he was not friends with the accused, who quite clearly was in possession of a stolen car. The difficulty I find with the version of the accused in this regard is that, Kabelo was at no stage confronted about the accused's denial of their friendship. This in my view is a crucial aspect which is central to the state's case.

[53] Apart from the improbability of this central pillar of the evidence of the accused, his evidence at every other turn is just as improbable. But improbabilities apart, the evidence of the accused is irreconcilable with other established facts. Contrary to the accused's version, Kabelo was able to mention the accused's mother's name (MaCele). Kabelo went as far as correcting the defence counsel when it was suggested that Phindile Zondi is the accused's sister and not the girlfriend. This demonstrates that contrary to what the accused would have this court believe, they were in fact, friends. One is tempted to ask a rhetorical question and that is, how did Kabelo know about the details of the accused's private life if they had not been friends?

[54] The version by the accused that he did not need a jacket to keep warm as there was a fire lit outside the Casban tavern in Soweto, was never put to Kabelo. In contrast, it serves to confirm the state's version that it must have been chilly through the night, which would explain the need for jackets for both the accused and Kabelo.

[55] I find it improbable, that the accused would have left Kabelo and Vusi in Soweto at about 8 am, without even bothering them for a lift. Besides, according to the evidence by Constable Phawene, the car was found and impounded shortly after their morning parade held at 05:45am at Naledi, which contradicts the accused's version that it was parked under a tree in Soweto, when he left for Lenasia by taxi at about 8am.

[56] Finally, it is highly improbable that Kabelo would have guessed the accused's whereabouts the morning of the accused's arrest, had they not been together, as Kabelo had testified. I find accused to be a most unsatisfactory witness in both manner and the substance of his evidence. To the extent that the accused's version is contradicted by that of the State, his version is, accordingly, dismissed as false beyond reasonable doubt.

[57] In this matter not only is the accused directly implicated by the evidence of Kabelo and Mr Madramoothoo with regard to the attack, on the latter, but by circumstantial evidence as well. The rules of reasoning by inference are an established part of our law. In *R v Blom*<sup>15</sup>, Watermeyer JA said the following:

*"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*

*1 The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*

*2 The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".*

[58] It is common cause in this matter that the deceased was stabbed by means of a knife (exhibit 2). I find that since there is ample DNA evidence linking the deceased's blood to the jacket (exhibit "1") worn by the accused, that the only reasonable inference to be drawn is that it was the accused who stabbed the deceased to death.

## CONCLUSION

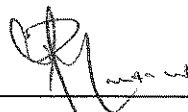
[59] The evidence presented by the prosecution, which I summarised above, justifies an inference, in the absence of an alternative explanation, that the accused and Kabelo associated in a common purpose to commit these crimes. Their presence together at Mbawuleni Tavern, Thembelihle squatter camp, in Lenasia, their departure together shortly after the crimes were committed, their continued association until the following morning, and their rendezvous at Kasban Tavern, Protea Glen, Soweto till they returned to Lenasia the next day without any sign of disassociation by any of them, all point to collaboration in a plan to rob and assault both victims, as well as the murder of the deceased by the accused. With regard to the attempted murder charge, the wounds do not seem to have been that deep to warrant a conviction on the main charge. Besides, there was no medical evidence led to support the allegations.

[60] In the result I find the accused, (Cele, Faniswa Thandazani) guilty in respect of:

Count 1: Robbery with aggravating circumstances.

Count 2: Murder.

Count 3: Assault with intent to do grievous bodily harm.



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**T P MUDAU**

**ACTING JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG**

**MATTER HEARD FROM: 8TH MARCH TO 20TH MARCH 2013**

**DATE OF JUDGEMENT: 22ND MARCH 2013**

**APPEARANCES:**

**FOR THE STATE: ADV L SURENDRA**

**ON BEHALF OF THE ACCUSED: ADV VDT NOLUTSHUNGU**

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<sup>1</sup> in terms of section 105A Act 51 of 1977.

<sup>2</sup> See also, *S v Maqhina* 2001 (1) SACR 241 (T).

<sup>3</sup> *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448.

<sup>4</sup> 2001 (1) SACR 97 (SCA).

<sup>5</sup> 1998 (1) SACR 422 (SCA) at 426e-h.

<sup>6</sup> *Moshephi & Others v R* (1980-1984) LAC 57 at 59F-H.

<sup>7</sup> 2008 (1) SACR 223 (SCA).

<sup>8</sup> 1965 (4) SA 439 (A) at 440D-H.

<sup>9</sup> 1948 (4) SA 399 (AD) at pp 405-6.

<sup>10</sup> 1959 (1) SA 894 (AD) at pp 897G-898D.

<sup>11</sup> 2005 (1) SACR 420 (SCA) at 430j-431a.

<sup>12</sup> 2011 (2) SACR 540 (SCA) at 547para 17.

<sup>13</sup> 1991(1) SACR 198 (A) at 205f-g.

<sup>14</sup> 1990 (1) SACR 95 (A) at 98f-g.

<sup>15</sup> 1939 AD 188, at 202 to 203.