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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
CIRCUIT LOCAL DIVISION FOR THE NORTHERN CIRCUIT COURT
MIDDELBURG

CASE NO: CC98/2012

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

....
DATE SIGNATURE

In the matter between:

THE STATE

And

NKOSI, MDUDUZI ISAAC

SUMMARY

Criminal law and procedure – murder and attempted murder – committed on isolated plot/farm – crimes well-planned and executed – sentence – absence

of substantial and compelling circumstances – sentence of imprisonment for life only appropriate sentence.

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] There is no perfect judgment in any case, especially in circumstances where the court is sitting on circuit, because of a lack of resources and other issues, but what follows hereafter is the judgment in this matter.

Mr Mduduzi Isaac Nkosi, ("*hereinafter the accused accused*"), who was legally represented by different counsel throughout the trial, is charged with the following four offences:

1. Housebreaking with intent to rob and robbery with aggravating circumstances, allegedly committed at a farm at Plot [6……] [K……], [M…….] MP on 22 January 2010, ("*Count 1*").

2. Murder, allegedly committed on the same date and place as mentioned in count 1. In this regard it is alleged that the accused killed Johannes Eldorus Venter, ("*the deceased*")

("*Count 2*"). The robbery victim is the deceased as well as his surviving wife, Ms Emmarentia Katarina Venter, ("*the complainant*")

3. Count 3 relates to the attempted murder of the complainant on the same date, place and time as in court 1, the State alleging that the accused shot at the complainant with a firearm, ("*Count 3*").

4. Counts 4 and 5 allege the unlawful possession of a firearm and ammunition respectively, on the same date and place mentioned in count 1.

THE HISTORY OF THE TRIAL

[2] The history of the trial is significant. The annotations on the court file show that on 17 September 2012 the trial was postponed to 12 November 2012 for the accused to finalise arrangements for private legal representation which he required. On 12 November 2012, the trial was postponed to 3 December 2012, again for the accused to obtain legal representation. On 3 December 2012, the trial was postponed to 15 April 2013, however, the latter date was thankfully brought forward to 5 February 2013, when the trial eventually commenced.

THE COMMENCEMENT OF THE TRIAL

[3] At the eventual commencement of the trial before me in February 2013, the accused pleaded not guilty to all the charges. He exercised his constitutional right to remain silent and did not disclose his defence in terms of the provisions of sec 115 of the Criminal Procedure Act, 51 of 1977 ("*the Criminal Code*"). At that stage, the accused was represented by Advocate Jacobs.

At the same time of the plea, certain formal admissions were made and recorded by the court in terms of the provisions of sec 220 of the Criminal Code. These were essentially that the deceased mentioned in count 1 and 2 died as a consequence of the injuries sustained during the crimes in question, that the body of the deceased sustained no further injuries on 22 January 2010 apart from the injuries mentioned above, and until the post-mortem examination was conducted on the body of the deceased by Dr Mahlangu on 26 January 2010, and that the facts and findings of Dr Mahlangu were correct in finding that the cause of death was, "*Brain injury*". There were also admissions relating to the photos and key thereto of the post-mortem examination as well as of the crime scene.

AT THE CRIME SCENE

[4] On the road between Middelburg MP and Stoffberg, about ten kilometres outside Middelburg, is a farm or plot, [6……] [K…..], ("*the crime scene*"). On Thursday night, 21 January 2010 the complainant, ("*Ms Venter*"), her husband, the deceased, as well as their adult son, Jaco Venter, ("*Jaco*"),

were at the crime scene. They had visitors that night, who later left. Jaco went to sleep in his own bedroom at about 21:00. At about midnight the complainant and her husband, the deceased, aged about 59 years, went to sleep in their main bedroom.

The doors and windows were closed and locked, according to Ms Venter. At approximately 01:20, the morning of 22 January 2010, the complainant was awakened by some noise at the window. The cause of the noise was apparently somebody at the window. The window is directly next to her husband, about one metre away. She then shook the deceased, who was asleep, saying there was an intruder in their bedroom.

The deceased immediately woke up and jumped off the bed. He was confronted by an intruder. The complainant, however, could not see well as the lights were switched off in the bedroom. The deceased grabbed the intruder by his arms. The complainant also jumped off the bed. A second intruder came through the same window and shot the complainant on the arm. The bullet entered the one side of the arm and exited on the other side of it. As a result, the complainant experienced excruciating pain and bleeding from her injuries. She lost consciousness briefly.

The assailants demanded money. She handed over her handbag. The handbag was recovered near the same window in the garden the following morning with all its contents in place. During the attack in the bedroom, a second shot was fired which fatally struck her husband. Both shots were fired

by the same intruder. The complainant then ran down the passage from her bedroom in order to access what she called the Marnet that is a radio to contact farm neighbours.

She screamed, this after one of the assailants threatened to shoot her. Her son, Jaco, whose bedroom was next to the Marnet, appeared. He was frightened, with a torch in hand. The complainant asked for help through the Marnet. Jaco pressed the panic button. Shortly thereafter the police and the paramedics arrived on the scene. This part of the evidence, or events, relating to the arrival of the paramedics, was, in fact, corroborated by one of the accomplices, or co-accused, Mr Limini G Ralinala, as discussed later below in the judgment.

The deceased was declared dead by the paramedics. The complainant was transported to hospital where she underwent an emergency operation, since it was discovered that the gunshot to her arm had also penetrated her stomach. She remained in the intensive care unit, ("*ICU*") for several days. In short, the complainant still had after-effects and *sequelae* of the incident and other medical problems which lasted up to the commencement of the trial.

THE EVIDENCE OF MR JACO VENTER

[5] When he testified, Jaco corroborated his mother's evidence about the uncontested events that night and the early hours of the following morning. He confirmed that, based on his observations, the assailants gained entry to his

parent's bedroom through the window, as shown in photograph A of the crime scene photographs and album. The particular window was fitted with burglar-proofing which were in place shortly before the incident. However, the following morning, the burglar bars were not on the window and were later retrieved by Jaco in the garden not far from same window. He said that he was not armed with any weapon that night, as suggested by parts of the evidence in the trial. He was awoken by the screams for help of his parents, and shortly thereafter he heard two strange gunshots. Neither the complainant nor Jaco could identify any of the assailants.

THE EVENTS LEADING TO THE ARREST OF ACCUSED

[6] The events leading to the arrest of the accused and three other co-perpetrators were rather dramatic and somewhat divergent. On 8 February 2010, the police at Middelberg received information that the accused and another person were travelling in an Opel motor vehicle ("*the Opel*"). The Opel was travelling from the direction of Groblersdal and heading for Middelburg town on the main road. As a consequence, several police officials comprising a task team and the investigating officer were assembled in order to intercept the Opel in Middelburg.

However, and on the version of the police, the Opel, upon observing the police, made a U-turn and sped off in the direction whence it came, i.e. Groblersdal. The police, in their respective motor vehicles, gave chase. The chase ended when the Opel reached what appeared to be a dead end on a

side gravel road. The driver of the Opel alighted and disappeared, whilst the accused was arrested.

The police officials involved in the arrest of the accused included Constable Jabulani Shadrack Mndebele, ("*Mndebele*"), Sergeant Pieter Stefanus Ferreira, ("*Ferreira*"), Sergeaent Noah Pahle, ("*Pahle*"), Sergeant Gerrit Johannes Maritz, ("*Maritz*"), Sergeant KS Mahlangu, ("*Mahlangu*"), and Captain Anadien Breedt, ("*Breedt*"), the investigating officer.

Breedt arrived at the scene after the accused was already captured. Maritz drove immediately behind the Opel during the high-speed chase, whilst Ferreira followed behind in a separate motor vehicle. The Opel turned off from the main road into a dirt road. Maritz testified that on reaching the dead end, the occupants of the Opel alighted and ran away. The accused was, however, caught, this after the accused realised that he could run no further. This was after midnight. Ferreira arrived. The accused was placed under arrest and placed in a police van. This after Breedt had identified him as the wanted suspect. Later, this accused was taken to the local police station.

THE DIVERGENCE IN EVIDENCE

[7] The divergence in the evidence during the chasing episode occurred firstly when the accused testified that the Opel was not evading the police, but merely took a turn off towards their destination. This version is clearly misleading in the light of the overwhelming evidence to the contrary. The

second diversion in the evidence was the accused's allegations that he was not provided with the reason for his arrest until much late, (he was told by Pahle later, at the police station), and that his constitutional rights were never explained to him at all. In fact, when he testified, the court gained the distinct impression that that complaint of the accused was still extant and I will deal with these allegations more fully later on.

Ferreira testified that at the arrest scene, or where the accused was captured, he saw Mndebele talking to the accused separately. Pahle, on his turn, confirmed this. Mndebele testified that he, himself, warned the accused fully of his constitutional rights at the arrest scene before the accused was driven to the Client Services Centre ("*CSC*") commander's office at the police station. The accused was not assaulted in any way at the arrest scene. Indeed, the names of Mndebele, Pahle and Mahlangu feature prominently in this trial. The foundation of the defence of the accused, besides his alibi defence, was that these witnesses had told him what to say later to other police officials or authorities.

Ferreira testified that at the Middelburg police station he explained to the accused his constitutional rights and handed him a copy of the SAP14A. This was about 04:07 on the morning of 8 February 2010. Exhibit "L" shows that the accused signed the notice of rights in terms of the Constitution at that time and place, and the date. Now, it is common practice and knowledge that the original of the notice is given to the detainee on being placed in custody. A copy is placed in the docket and a copy remains in the book.

[8] As I came to understand the defence counsel's argument later, not only were the rights of the accused not read to him, but if they were, the police officers who dealt with the accused were obliged to explain these rights in a meaningful manner to enable the accused to make an informed decision, and more about this later.

The evidence of the police officers as supported by the entry made in the occurrence book, namely Exhibit "M", on 8 February 2010 at 16:20 was that the accused was booked out of the cells by Pahle. He had no injuries. Pahle was accompanied by Mahlangu and not Mndebele. This becomes significant later. The purpose of taking the accused from the cells was to question him, and this questioning occurred in an office of the police about 70 metres from the cells.

The accused was questioned about a certain unspecified case involving a motor vehicle, rape and murder. The interview lasted until about 18:25, when the accused was booked back into the cells, once more with an annotation that he had no injuries. However, on the version of the accused, it was at this interview that he was questioned about his involvement in the present crimes. He was told that his accomplices were already in custody and they have '*come clean*'. When the accused denied these allegations, and of involvement in the crimes, on his version, he was severely and variously assaulted by Mndebele, Pahle and Mahlangu, and he was further told what version, which implicated him in the present crimes, to convey to the other police officers, otherwise the assaults would continue.

On his version, the accused said that he opted to rather see a Senior Prosecutor or Magistrate. He said he was then taken to a magistrate, who later turned out to be a Mr de Klerk, ("*de Klerk*"). However, in the course of taking a statement, de Klerk observed an injury on the accused and promptly terminated the interview, tearing up the paper on which he had commenced writing a statement.

The police witnesses involved, namely Mndebele, Pahle and Mahlangu vehemently denied any assault or threat made to the accused as alleged by him. The main basis of their denial was on the contents of the occurrence book and that the cell officials would never allow any injured suspect in, or back into the police cells. It was also denied that Mndebele was present when the accused was booked out of the cells and interviewed as sketched above. The court will, at the appropriate time, say more about de Klerk.

There was on other witness who testified for the State, apart from the police. He was Mr Limini G Ralinala, ("*Ralinana*"), an accomplice, whose evidence was not without controversy. I prefer to deal with his evidence much later in the judgment, save to mention that the following undisputed facts occurred:

THE ORIGINAL ACCUSED PERSONS

[9] That there were originally, in this matter, four accused persons. The first accused was Mr Mpumelo Given Chisiko, ("*Chisiko*"), Mr Bheki Jacob Mthetwa, ("*Mthetwa*"), Ralinala and the accused, before me. Chisiko

previously appeared in the high court. He pleaded guilty to four counts under discussion, except for count 3. He was duly convicted as pleaded. Mthetwa, pursuant to his arrest, apparently passed away due to natural causes and whilst in custody. There is clearly no need at this stage, deal in full detail with these common cause facts.

THE TRIAL-WITHIN-A-TRIAL

[10] Contrary to the assertions of the accused, that he was later, (9 February 2010), taken to a magistrate as alluded before, the police testified that the accused preferred to be interviewed rather by Colonel Hall, ("*Hall*"), who he knew. It is not in dispute that the accused met Hall, however, when the State intended to lead the evidence of Hall, especially the introductory part of the interview he had with the accused, and as to exactly what transpired during the interview, the defence, through previous counsel, Mr Jacobs, objected to such evidence.

The grounds of the objection, as explained later, were simply that the intended evidence of Hall amounted to an inadmissible confession. As a consequence, the court entered into a trial-within-a-trial. It is more appropriate, once more, to deal with the proper sequence of the evidence in the trial-within-a-trial by deferring the evidence of Hall until later. In its place comes into immediate consideration the evidence of the challenged pointing out made by the accused to Colonel Moukangwe, ("*Moukangwe*").

[11] I must mention that, in addition to Hall and Moukangwe, the State called several other witnesses in the trial-within-a-trial. The accused also testified in his defence as the only witness. At the conclusion of the trial-within-a-trial, I made a ruling that in regard to the pointing out made by the accused to Moukangwe, as well as the confession made to Hall, shall be admitted as evidence in the trial. The ruling was subject to review by the court at the end of the whole evidence. At the same time, I undertook to furnish the reasons for the ruling as part of the main judgment. What follow hereafter are such reasons.

[12] Moukangwe was stationed at the Witbank detective services, with some 30 years' service in the South African Police Service. When he conducted the pointing out at Middelburg on 9 February 2010, he received a request from the investigating officer, Breedt, on 8 February 2010, to do so. He testified in English throughout his trial, and that he had no prior knowledge of the present crimes, nor was he part of the investigation in this matter. He also did not know the accused. He too, like the accused, was fluent in isiZulu language, however, Moukangwe preferred to make use of an interpreter, namely Constable Harry Molapo, ("*Molapo*").

[13] At the time of his evidence, Molapo was also stationed at the detective branch of the South African Police Service at Witbank, with some 13 years' of service. The photographer in attendance was one officer AS Tierney, ("*Tierney*"). The collective evidence of Moukangwe, Molapo and Tierney

came to this: The introductory formalities were completed with the accused in a room at Middelburg prior to the pointing out journey. This was about 13:05.

[14] The accused was asked questions based on the prescribed form. The accused knew why he was there; that is to show the police where the deceased was killed, at his own instance; that he wanted to co-operate with the police, and that he regretted his deeds. His constitutional rights were explained. When asked if he had been assaulted by anybody and had injuries, the accused replied in the negative. The accused was asked to undress. He had no visible injuries, and photos of him were taken.

What was of significance in the context of this case is that the accused had no visible injuries at that stage, or shown no hidden injuries to Moukangwe and his team, and did not request legal assistance after such rights were explained to him. It was equally significant that the accused did not tell Moukangwe that he had been taken to the crime scene earlier that day by Mndebele, Pahle and Mahlangu, that is on his version. Another further significant fact is that the accused never told Moukangwe the version he was instructed by the police, i.e. Mndebele, Phale and Mahlangu, to tell other police officers at the risk of continued assaults. The same appears to have been the case with Hall, as discussed later.

According to Moukangwe, the accused then proceeded to the pointing of the crime scene as well as a second scene, the relevance of which is questionable in this case. The pointing out was completed when the police

and the accused returned that day at about 14:20. The pointing out form was signed by all parties involved, including the accused. Moukangwe and his team were cross-examined closely. They withstood the cross-examination and remained consistent in regards to their co-version.

[15] Moukangwe also denied, in cross-examination, that the accused told him about a specific legal representative. The court also questioned Moukangwe intimately about the allegations often made by suspects in cases of this nature. He gave the court some credible replies to the questions. There was truly no reason of any substance advanced why the evidence of Moukangwe, Molapo and Tierney should not be accepted as credible and reliable.

[16] Significantly, further, at this stage there was no mention of an injury carried by the accused which was situated inside his mouth, so that the photographer clearly could at least have taken a photo of such injury, which became the defence of the accused throughout the trial. However, in the light of subsequent formal admissions made regarding the pointing out, this part of the matter should have no problems at all.

[17] The evidence of Hall was somewhat lengthy, problematic and also technical, and which at some stage required some expert input. This was largely due to the manner and circumstances under which he interviewed the accused in the course of taking down a confession after the pointing out on 9 February 2010 at about 17:29. This interview lasted until shortly before 18:53,

when the accused was booked back into the cells, "*free from injuries and complaints*".

It appeared to me that the problem was not only how the accused came to be with Hall, but also the nature of the interview. This was that Hall, over and above utilising the prescribed form in terms of sec 217 of the Criminal Code, simultaneously placed his own recorded, an Olympus, on the table. The recording was transcribed into Exhibit "O", and also listened to by the court during the trial. It was downloaded previously to his laptop and/or computer.

Hall was requested by the investigating officer, Breedt, to conduct the interview and take a statement from the accused. The more credible evidence was that it was the accused himself who preferred to be interviewed by Hall, since the accused claimed that he knew Hall from previous interactions in 2007. However, the accused disputed this aspect viciously later. He alleged that he wanted to see a Senior Prosecutor or Magistrate, but ended up with Hall. It was common cause that the recording was taken down in the Afrikaans language throughout.

[18] The objection of the accused, through his counsel, prior to the evidence of Hall and the introductory part of the interview came to this: that the printed Exhibit "O" was taken down in Afrikaans, which language the accused did not understand. That it was taken down without the accused's knowledge and prepared by Hall alone and unilaterally. When he testified, the accused alleged that when he got to Hall, the latter, that is Hall, realised that

there was a communication problem between them and Hall left the room and returned shortly thereafter with a third person, an interpreter, Malope.

The interview continued with Malope interpreting. The accused never had an interview alone with Hall, on his version. I shall revert to this version later on, as well as the State's contentions in regard thereto. Indeed, the manner in which Hall took down the statement from the accused, as well as what appeared to be the impeccable manner in which Moukangwe interviewed the accused, immediately bring into consideration some applicable legal principles which I prefer to deal with now, at this stage.

SOME APPLICABLE LEGAL PRINCIPLES

[19] Section 35(1) of the Constitution deals with the rights of arrested, detained and accused persons. It provides, *inter alia*, for the right to remain silent, to be informed promptly of the right to remain silent, and for the consequences of not remaining silent, and more relevantly here, not to be compelled to make any confession or admission that could be used in evidence against that person, etcetera, etcetera.

Section 35(2) entrenches the right to be informed promptly of the reason for being detained, to choose and consult with a legal practitioner and to be informed of this right promptly, and to have a legal expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

Finally, on the Constitution in this regard, sec 35(3) deals with every accused person having the right to a fair trial. In addition to the Constitution, sec 217(1) of the Criminal Code provides, *inter alia*, that:

> "*Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses, and without having been unduly influence thereto, be admitted in evidence against such person at criminal proceedings relating to such offence …*"

[20] It is by now settled law that evidence of whatever nature, including confessions and pointing outs obtained by unlawful means must be excluded by the courts in furtherance of the fair trial rights. In *S v Zuma and Others*, 1995 (2) SA 642 (CC), and in the process of considering the validity of sec 217(1) of the Criminal Code, based on the predecessor of sect 35(3) of the Constitution, namely sec 25(3), the Court said that:

> "*The right to a fair trial … embraces a concept of substantive fairness, but at the same time one should not neglect the language of the Constitution.*"

At the end of paragraph 16 of the judgment, the Court went on to state that:

> "*… Since that date, section 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appals to give content to these notions.*"

See also *Sipho Patrick Magwaza v The State*, (20169/14) [2015] ZASCA 36 (25 March 2015), particularly paragraph [11].

[21] In applying the above principles to the facts of the present matter, the conclusion that the evidence of the pointing out conducted by Moukangwe was not obtained unlawfully, became, irresistible. On his version, the accused had his rights explained. He did not have any injuries. He did not tell Moukangwe that he had been taken to the crime scene early that day by Mndebele, Pahle and Mahlangu, or other police. He did not tell Moukangwe the version alleged prescribed to him by the police, and *inter alia*, he did not tell Moukangwe about the injury in his mouth.

[22] Moukangwe was credible, and was materially corroborated by his crew of Molapo and Tierney. As stated below, the version of the accused in the trial-within-a-trial was simply pathetic and disingenuous, to say the least. It is, however, the confession taken by Hall, in my view, that continued to be problematic, and causing this court some agonising moments. However, since the closing argument last Friday, and based on the above legal principles, this reluctance to accept Hall's evidence dissolved gradually. The reasons therefor are obvious. The proper approach would be to separate the prescribed form from the additional recorder, later transcribed, used by Hall during the interview, depending on which version is more credible, probable and reliable.

[23] On the version of the accused, the interview occurred by means of an interpreter. As I said before, he never had a one-to-one interview with Hall in Afrikaans. The version was highly improbable. The recording which was played in court clearly shows that there are only two persons' voices coming

out throughout. This was confirmed by the expert witness, Fisher, on behalf of the State, who also found that the recording was not tampered with or edited subsequent to its original recording. This evidence was not countered at all and the assertions of the accused could not be sustained or taken further in closing argument last week Friday.

There is no evidence of an interpreter on the recording. It is so that the recording is susceptible to various criticism such as that it is in Afrikaans, thus on occasion high-flown and technical or legal terminology is used, and that some of the questions asked by Hall during the interview suggested the answers, however, and but all of these are destroyed completely by the version of the accused that there was an interpreter involved, which was clearly not the case. The recording was, of course, be listened to and viewed in its entirety and also in the light of all the other evidence. See, in this regard, *Motata v Nair NO and Another*, (2008) JOL 22 291 (T).

[24] When the contents of the recording is viewed as above, it became evident that the accused, although not eloquently, understood Afrikaans. For example, when Hall, at the end, read back to the accused the statement, the accused ventured to correct Hall. In addition, the transcript does not support the assertion that Hall omitted to explain to the accused his constitutional rights fully or properly. Neither does it show that Hall explained such rights by asking leading questions, as contended for on behalf of the accused. At the very least, these rights were explained in simple terms to the accused.

[25] Furthermore, it was contended that, to demonstrate the accused's ignorance of the Afrikaans language, he did not reply when asked by Hall whether he was promised anything in order to make the statement, but instead the accused responded that he was assaulted in regard to an unrelated incident. There was clearly no basis for such an inference, especially if the transcript is viewed in proper context and holistically.

[26] In any event, the main thrust of the version of the accused, as stated before, was that he was "*schooled*", by the police as to what to say, and should he default, he would again be assaulted. The assurance of Hall that the recording was not tampered with in any way cannot be discarded easily by this court in this regard. As mentioned before, Hall was corroborated by Fisher. It follows that that being the case, there was clearly no need for the State to lead any further evidence of an expert nature in regards to the recording.

Consistent with his cautionary approach and fairness during the interview, Hall did not ignore the allegations of the accused that he was assaulted previously by the police. He questioned the accused closely about this at the end of the interview. He required details of the culprits. He encouraged the accused to help him, that is Hall, helping the accused to lay criminal charges. The accused was reluctant. Hall took the accused to the charge office when he booked him back to the cells for this purpose.

The entry made in the occurrence book on that day at about 18:53 read in parts as follows:

> "*Prisoner back from investigation … Mduduzi Nkosi, free from injuries and complaints. Superintendent Hall reports to Superintendent Wasserman that the accused alleged he was assaulted. He did not want to open a docket, but want the members to stop the assault. Incident also reported to Inspector Breedt, investigating officer.*"

From this it was clear that Hall was not out to prejudice the accused unnecessary. It was, in fact, Hall who asked the accused to open his mouth whereat the injury on his inside lip was observed. Interestingly, the accused never opened his mouth to the other police officials, including Moukangwe. The court was satisfied that Hall acted properly and in the interest of justice. His evidence must be accepted.

[27] Properly viewed, Hall's conduct in using the recorder over and above the prescribed form was seen out of context and exaggerated incorrectly during the trial. On the contrary, the fact that the accused did not want to press charges against his alleged assailants may easily be interpreted as lacking any credibility and substance. His version, in the trial-within-a-trial, that during the alleged assault, Mndebele and others "*schooled*" him and prescribed to him what version to tell the other police officers was, in my view, an afterthought and excessively incredible. He did not convey the prescribed version to either Moukangwe nor to Hall.

As a witness in the trial-within-a-trial, the accused was not an impressive witness. He contradicted himself on occasion. He was evasive. He answered

questions by questions. In cross-examination, he pretended not to understand questions. The record speaks for itself. There are numerous other instances of his unsatisfactory and incredible testimony.

THE AGREEMENT BETWEEN THE PARTIES

[28] At the end of the provisional ruling made in regard to the trial-within-a-trial, agreement was reached between the parties as set out in Exhibit “A1”. In short, the agreement was that all the relevant documents can merely be handed in as exhibits. That it was not necessary for the State to recall all the witnesses to testify in the main trial. That all the evidence led in the trial-within-a-trial can be transported into the merits of the case and to form part of the evidence on the merits in the main trial. The rationale behind this was to shorten the proceedings by recognising that there was no prejudice to the accused.

Finally, in regard to the agreement, the court was requested to note, in accordance with the provisions of sec 220 of the Criminal Code, that it was admitted that during the pointing out conducted by Moukangwe, the accused, in fact, pointed out the house of the deceased in this matter, as depicted on the pointing out photographs. Since there is precedent and authority for the proposition envisaged in the agreement between the parties, Exhibit “A1”, the court sanctioned it.

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THE EVIDENCE OF RALINALA

[29] It is convenient, at this stage, to deal with the evidence of the accomplice, Ralinala. As was suggested, the nature of his evidence elicited extensive cross-examination, argument and debate during the trial. The main objection or criticism raised by the defence counsel can be summarised as follows: that since Ralinala was an accomplice, his uncorroborated evidence

had to be approached with the requisite caution; that some safeguards are required before accepting his evidence in order to reduce the risk of a wrong conviction. In this regard, reliance was placed on *S v Artman & Another*, 1968 (3) SA 339 (A) 340.

It was also argued that the evidence of Ralinala was unreliable since it was infested with contradictions. Of course, the cautionary approach suggested by counsel for the defence as set out above was the correct approach to be adopted by the court in viewing the evidence of Ralinala. But first the pertinent and relevant parts of Ralinala's evidence follow: he made what appeared to be a confession in a statement in support of his bail application, Exhibit "E", in regard to the present matter. I shall, for purposes of this trial, completely ignore Exhibit "E" for obvious reasons, and only have regard to the oral evidence given by Ralinala in the trial.

[30] His evidence extends over 107 pages of the transcript, of which some 23 pages consisted of cross-examination. He was arrested on 28 January 2010 at Carolina, Mpumalanga, in this matter. He was in custody at Carolina for some other case. Subsequent to his arrest, he pointed out co-accused, Chisiko, at the local township, Mhluzi. He was also present when co-accused, Mthetwa, was arrested. Thereafter, the accused before the court was arrested. All four appeared in the local magistrate's court in regard to the present charges.

[31] He testified that he was in the business of trading during 2010. From his evidence, it was more than apparent that he knew the accused from late 2009. On his version, he rented a bakkie from the accused. On the day of the commission of the present crimes, the accused came to his house. That was on 22 January 2010. He acceded to the accused's request to drive him in the bakkie to the vicinity of the crime scene. This, after the accused had first requested to have Chisiko and Mthetwa collected at Mhluzi. The purpose of the visit to the crime scene, as told by the accused, was that the accused and the others were, "*going to work*" at the crime scene.

Chisiko and Mthetwa were unknown to the witness. The bakkie belonged to the accused. The destination was preceded by visits, including a petrol station, where R100 worth of petrol was purchased. The directions to the crime scene were provided by the accused, who was occupying the front seat with Chisiko and the witness, whilst Mthetwa was seated at the back of the bakkie. On the way, and along the main road, the accused indicated to Ralinala where to drop off the occupants of the bakkie, and the witness made a U-turn, travelling back towards Mhluzi. However, before the U-turn was made by Ralinala, he observed that the accused and Chisiko were producing firearms and loading them with bullets in their respective firearms.

This meant that each of the accused and Chisiko had their own firearms. Chisiko had a 9 mm pistol whilst the accused had a revolver. Once more, before the U-turn, Ralinala asked the accused what was the purpose of the visit to the crime scene. The accused responded that it was, "*to collect*

money". Ralinala duly dropped off the trio at about 20:00 that evening, which is significant in this case, or will become significant later on. The arrangement was that the accused would phone Ralinala later that evening to collect the trio. Ralinala departed from the scene.

[32] He testified that between 02:00 and 03:00 the next morning, he received a telephone call from the accused with the request to be collected, which he did. However, on the way there, he received another telephone call from the accused to the effect that Ralinala must not collect the trio from exactly the same spot where he dropped them off previously, but to instead drive past slightly on the same main road. The accused arranged to flicker a small light at the agreed spot. This occurred, but only the accused and Chisiko appeared and boarded the bakkie. Mthetwa was said to have run away after the crimes were committed. This was in reply to a question by Ralinala.

On the way back, the accused freely and voluntarily, told Ralinala, on being asked, that when the trio were trying to take the money at the crime scene, the deceased woke up and fought with them viciously. When the accused noticed that the complainant, (Ms Venter), appeared to produce a firearm, the accused instantly shot her in the arm or in the hand. The child of the house, presumably Jaco, appeared in possession of a big firearm which was pointed at the accused. The accused in turn pointed the child with a firearm. The child ran away. The trio then, uncertain as to w hat the child would do next, fled the scene. Ralinala subsequently dropped off the accused and Chisiko at Mhluzi

and Witbank, respectively, that morning. The charges against him were subsequently withdrawn. He received from the accused telephonic calls and the request not to testify in this trial, the last of such call being on the morning of his testimony in this court.

[33] The evidence that Jaco appeared with a firearm during the crimes was, of course, and clearly contrary to what Jaco and his mother, Ms Venter, testified. This was, indeed, one of the criticisms levelled against the evidence of Ralinala in cross-examination and in closing argument. However, in my view, the source of the information and other details of the crimes remained the accused. Ralinala was clearly not present at the crime scene.

[34] As pointed out before, Ralinala was cross-examined intimately about his evidence and involvement in these crimes. The cross-examination, as expected, revealed a number of questionable and unsatisfactory features in his evidence. These included certain contradictions, as correctly conceded, in my view, by the State counsel. Indeed, and as pointed to the defence counsel during closing argument, it is trite that an accomplice might have special reasons to incriminate an accused person falsely. See, in this regard, *inter alia*, *S v Masuku,* 1969 (2) SA 375 (M), 375-7. In *S v Hlapezula and Others*, 1965 (4) SA 439 (A) 441, the court said:

> "*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 to falsely implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a*

deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, … there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the aforegoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication of the accomplice of someone near and dear to him … Satisfaction of the cautionary rule does not necessarily warrant a conviction for the ultimate requirement is proof beyond reasonable doubt, and this depends upon a appraisal of all the evidence and the degree of the safeguard aforementioned … Where corroborated evidence implicating the accused in the commission of the crime is given by another accomplice, the latter's evidence, if regarded as reliable, may, depending on the circumstances, satisfactorily reduce the risk of a wrong conviction …"

[35] In the context of the present matter, in spite of the shortcomings exposed in the evidence of Ralinala, and also based on the principle that an accomplice's evidence need not be perfect in all respects to be reliable, I find that there are sufficient safeguards in place to accept his evidence. His evidence, in spite of all its imperfections, placed the accused directly and squarely on the crime scene. It corroborated the contents of Hall's statement, as well as the pointing out contents of Moukangwe. He knew the accused too well, that is Ralinala, to want to implicate him falsely and to deceive this court.

Ralinala, throughout evidence-in-chief and in cross-examination stuck to his co-version. The contradictions in his evidence as pointed out and argued during argument, in my view, did not render his entire evidence unreliable. See, for example, *S v Mkohle*, 1990 (1) SACR 95 (A).

He was undisputedly not at the actual crime scene. This begged the question how he came to know what was described above, namely that the woman, (the wife), was shot in the hand and that, (the husband), was also shot, if the accused was not the source of this information. The accused admitted, although evasively, that he never had any problems with Ralinala. They worked together on occasions. This being so, and as stated above, it was highly unlikely and, in fact, improbable for Ralinala to have made attempts to falsely implicate the accused in these circumstances.

OVERVIEW OF EVIDENCE OF POLIE WITNESSES

[36] The evidence of the police witnesses overall, in spite of certain shortcomings as well, as correctly conceded, was reliable and credible on the merits of the case. It must be remembered that the events leading to the arrest of the accused occurred hurriedly, in a dramatic chase and a moving scene. To expect complete and accurate recollection from them would be unreasonable and impractical in the circumstances of the events which date back to 2010.

THE EVIDENCE OF THE ACCUSED ON MERITS

[37] The accused himself, when he testified in the main trial and in the process of rendering a version which was plainly false, could not remember exactly where he was on the day of the crimes in question. He gave a vague rendition that he went to Matau, KZN, during December 2009, and must have

returned to Gauteng [indistinct] on some unspecified time during January 2010. I observed the accused closely whilst in the witness stand. He was evasive, argumentative, anticipating questions in cross-examination.

[38] Even during evidence-in-chief, his counsel, Ms Fraser, was, at some stage, bordering on cross-examining him on one occasion. His unsubstantiated alibi defence, which he did not have to prove at all, and considered in the light of the totality of the evidence was, in my view, simply not credible. See, in this regard *S v Malefo and Others*, 1998 (1) SACR 127 (W) 158a-e.

If the version had to be reasonably, possibly true, the evidence of the accused implied a spectacular occurrence. That is that, there was a well-planned and orchestrated conspiracy and an immense one, for that, on the part of the police involved, including, Moukangwe and Hall, to falsely implicate him in the commission of the crimes under discussion from the start to the end. This is demonstrated in his version that Mndebele, Pahle, Mahlango, desperate to implicate him, thoroughly "*schooled*" him to render a certain version to the rest of the police officers he encountered. This, once more, was highly improbable, since this version was not relayed to either Hall or Moukangwe.

[39] It was only in cross-examination that the accused miraculously remembered that the names of Mthetwa and Mpumi Chisiko (Mthetwa and Chisiko), respectively, were previously also provided to him by the police who influenced him unduly. Once more, it was highly unimpressive and

improbable. The same applied to the initial defence or assertion, that on his arrest the accused was drunk. Thankfully, this assertion was not taken any further in evidence or in closing argument. The same applied to the allegation that the accused's version, that on his arrest he was taken to a local magistrate. There was simply no proof of this contention at all. I could put it no higher than that.

[40] As to the standard of proof in criminal cases, it is trite law that the *onus* of proof beyond reasonable doubt rests on the State, as was enunciated in *S v van der Meyden*, 1999 (1) SACR 447 (W). In my view, the accused, and save as discussed towards the end of this judgment, is as guilty as they come, and I am convinced that the State succeeded in proving its case beyond reasonable doubt.

DUPLICATION OF CHARGES

[41] The only debate and discussion which arose during closing argument was further, there is a duplication of charges in respect of the robbery with aggravating circumstances as part of count 1 and the attempted murder count, count 3, in the circumstances of this case. The defence counsel argued that there was indeed such a duplication and relied, for this contention, on the unreported decision in *Dyini v The State*, [2015] JOL 34428 (ECG). It was clear to me that the offence of attempted murder was committed in the process of the robbery. The robbery count was therefore a duplication of the counts. The State, if I remember correctly, conceded this much in argument.

[42] The evidence undoubtedly showed that it was the accused who shot the complainant and her husband in a well-planned and premeditated crime spree. The question of the operation of culpability for the joint possession of firearms and ammunition in respect of counts 4 and 5, and in the context of *State v Mbuli*, 2003 (1) SACR 97 (SCA), did not arise in this case since the credible evidence from Ralinala was that each of the accused and Chisiko had their own separate firearms which they loaded with bullets, as described above.

[43] The accused also clearly acted in the furtherance of a common purpose with Chisiko and Mthetwa, as enunciated in *S v Mgedezi and Others*, 1989 (1) SA 687 (A). It was he who contacted Ralinala. His bakkie was used in transporting the perpetrators to the crime scene. He furnished directions to the crime scene. He loaded bullets into a firearm he had. He arranged to be dropped off near the crime scene and to be collected later after the crimes were committed. He and his co-perpetrators spent some time and must have been observing the occupants of the house at the crime scene. As the court pointed out earlier, that on the version of Ralinala, he dropped them off on the main road at about 20:00 and there is a huge time lapse between the dropping off and the actual attack on the farmhouse. They must have been observing when the occupants of the house went to sleep before they struck.

These were the particular factors showing the prevalence of common purpose. The argument to the contrary was plainly without merit. The contents of the pointing out and the confession, made the participation of the

accused in these crimes more than unequivocal land proved beyond reasonable doubt by the State.

ORDER

[44] In the result, I make the following order:

44.1 Count 1, the accused is found guilty of housebreaking and theft with intent to steal.

44.2 Count 2, the murder, the accused is found guilty as charged.

44.3 Count 3, the attempted murder, the accused is found guilty as charged.

44.4 Counts 4 and 5, that is the unlawful possession of a firearm and the unlawful possession of ammunition respectively, the accused is found guilty as charged.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF JUDGMENT	2 DECEMBER 2015