

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS102/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES

In the matter between :

THE STATE

- v -

LEHLOIBI, THABO

KWENAMORE, THABANG

Accused

JUDGMENT

STRYDOM J :

[1] Initially, three accused were charged in this matter on a count of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997. The case against Mr Thabo Jacob Sibisi, accused 3, was withdrawn and he later became a state witness.

[2] Before this court on trial was arraigned Mr Lehloibi, Thabo (hereinafter referred to as accused 1) and Mr Kwenamore Thabang (hereinafter referred to as accused 2).

[3] In the indictment the state alleged that the two accused, on or about 10 October 2019 and at or near [...] Nyathi Street, Dlamini, Soweto, they did unlawfully and intentionally kill Matumelo Lehloibi, an adult female person ("the deceased").

[4] It became common cause in this matter that the deceased was the wife of accused 1.

[5] The two accused pleaded not guilty. Accused 1 tendered no plea explanation and accused 2 stated that he admitted being at the scene but denied that he killed anyone, nor that he had any arrangement with anyone.

[6] The accused were warned of the applicability of the applicable minimum sentences as contemplated in the Criminal Law Amendment Act, 5 of 1997 read with Part 1 of Schedule 2.

[7] Admissions were made pertaining to the cause of death of the deceased and the fact that she obtained no further injuries after she died. The cause of death of the deceased was determined to be consistent with asphyxia from pressure applied on the neck (strangulation).

[8] The case of the state was premised on an agreement which was reached between accused 1 and Mr Thabo Sibisi, the previous accused number 3, to stage a robbery at the house of accused 1. During the staged robbery the deceased was strangled to death. It should be mentioned at this stage that the version of accused 1 later transpired to be that he and the deceased were victims of a robbery during which his wife was killed and he was tied up. It transpired that there are mutually destructive versions between the state who wanted to prove a staged robbery which ended up in the deceased being killed and whether a robbery in the true sense of the word took place during which the deceased was killed.

The evidence of Mr Sibisi

[9] He testified that he knew accused 2 very well as he was his cousin but he also knew accused 1 as he met him two weeks prior to the date of the alleged incident in the yard where he stays where they used to drink and play games. He testified that accused 1 approached him and hired him to do a job at his place. Accused 1 asked him to secure the services of a second person that will work with him to do the job. Accused 1 told him that he worked at a company who trusted him to do cash deposits on their behalf. He would obtain large amounts of cash which he will keep at his home overnight to be deposited the next day. He asked that Mr Sibisi and his assistant come to pretend to rob him of the cash which would then be used to pay him for his assistance. He was promised to be paid R15,000 of the R30 000 which will be “robbed”.

[10] He testified that accused 1 surprisingly came to his place to confirm that he will assist him. Accused 1 gave some version that an amount of R70 000 “clicked in” on his cell phone and became available. Mr Sibisi wanted to obtain a deposit but accused 1 said it is not possible as his wife will become aware of their plans.

[11] He informed the court further that on the day of the alleged incident he and accused 2 went to accused 1’s place for the purpose of carrying out this staged robbery.

[12] In his evidence in chief he said that he then went to the place with accused 2, knocked on the door and when accused 1 opened the door, he grabbed him and they both fell on the corner of a couch and accused 2 then went towards accused 1’s wife who was lying on the bed. He grabbed her.

[13] Mr Sibisi started asking for the money which he thought would now be forthcoming but at that stage accused 1 said that they should first kill his wife before they could get any money. Mr Sibisi asked why and stated that this was not what they came for as agreed. Accused 1 said they will get their money after his wife has died. He then testified that accused 2 strangled the deceased using rope he got in

the room. He could not say where in the room he got the rope from. He then let go of accused 1.

[14] After accused 2 strangled the deceased with this rope, she was still alive but at that stage accused 1 proceeded to kill his wife himself with the same rope which was used by accused 2. He testified he did not see where the rope came from but that it was in the room.

[15] He testified that he had no intention to kill the deceased and had nothing to do with it. He was there to stage a robbery for which he would have been paid. He did not go there to kill the wife of accused 1.

[16] After the deceased was killed, accused 1 instructed him and accused 2 to tie him with the same rope accused 1 used to kill the deceased and with an electric cord and put a T-shirt into his mouth. Just before this accused 1 gave them a small cell phone and said they should switch it on at 11 am, this is after the forensic investigators have examined the scene, as he will make a call and inform them about their payment. They then left.

[17] At about 11 o'clock he wanted to put on the phone but he could not as it required a key passcode. He ended up receiving no money but was arrested by the police on the following day after which he freely and voluntarily made a statement to the police.

[18] During cross examination he testified that when he and accused 2 went to the room of accused 1, he first knocked on the door and when accused 1 opened he bought a cigarette. He then went out to smoke the cigarette but was followed by accused 1 during which period a further discussion took place and accused 2 was introduced to accused 1.

[19] During cross examination it was put to him that he was distancing himself from the killing of the deceased but he replied that he was present when she was killed and that he could not recall grabbing her. He testified that accused 2 left with

the phone and that he later handed this phone to a person to fix it and then to sell. He denied that R130 was also taken from the house of accused 1.

[20] Mr Sibisi was cross examined on the contents of the statement he gave to the police. In court he said that he did not know where the rope came from that was used to strangle the deceased and that he only saw the rope in the possession of accused 2. In contrast to this, in paragraph 5 of his statement, he stated that Thabo (accused 1) took out the rope which was inside a washing basket and strangled his wife. He testified that he never told the police that the rope which was used by accused 1 was taken from the washing basket.

[21] In his statement with reference to accused 2, he said while accused 2 grabbed the deceased, both of them fell on the floor and accused 2 closed her face with a pillow. In his statement he did not mention that accused 2 strangled the deceased with a rope, without killing her, and that accused 1 took a rope and strangled her to death.

[22] He was cross examined on various amounts he mentioned in his statement and testimony but said these amounts were mentioned by accused 1 as examples of the amount of money his employer entrusted him with.

[23] In his statement made to captain Dorcas Mabaso he stated that after his father phoned him stating that there were rumours that he was present at the crime scene he went to Maroka Police Station to inform the police what transpired. He stated that he told his version to the investigating officer Baloyi after his arrest on 11 October 2019 and repeated this in his statement made to the captain.

[24] Under cross examination by the legal representative on behalf of accused 2 it was put to Mr Sibisi that he phoned accused 2 in prison and told him that he came with a rope in his pocket. His answer was that he could not recall this.

[25] The next state witness was Mr Wallance Payi. He is the landlord on whose premises accused 1 and his wife resided.

[26] He testified that on 10 October 2019 he was sitting outside his premises sometime before 8 am in the morning when Mr Sibisi came into his yard accompanied with accused 2. According to him they came to buy a cigarette as he saw them smoking next to the wall. He later saw them leaving. It was then that his daughter informed him that accused 1 was calling him.

[27] He then went to accused 1's room and found that his hands were tied behind his back. There was a cloth in his mouth which he removed. Accused 1 told him he was robbed. He then saw the deceased lying near the couch. She was dead. He could see that there was redness around her neck.

[28] Accused 1 told him that he they were attacked by 3 people.

[29] He said he only saw accused 2 and Mr Sibisi who smoked next to the wall. Accused 1 told him that a phone of his wife was taken.

[30] In cross examination he agreed that he made a statement to the Investigating Officer Baloyi. He agreed that in his statement he did not mentioned that he saw accused 2 and Mr Sibisi enter his yard and smoked next to the wall. He said that he told the police that 2 boys entered his yard but that it was not written down. He saw that they bought a cigarette from accused 1.

[31] He was asked whether he was sure that accused 1 told him he was robbed by 3 people as in his statement reference was made about four people entering the yard.

[32] He was confronted with his evidence in court that no mention was made about money taken from the room whilst in his statement mention was made of R600 which was allegedly robbed. Also 2 cell phones. He was adamant that he did not say this to Baloyi and that it was a rumour. Later he conceded that money and the two cell phones were mentioned in the room by accused 1 but said that the incident took place a long time ago. He persisted with his evidence that accused 1 said 3 people robbed them and not 4. He said the investigating officer made a mistake.

[33] He said that Mr Sibisi used to come to his yard and that he and accused 1 knew each other. They were friends.

[34] At this stage of the trial the state indicated that it wanted to prove the statement accused 2 made to the police. A trial with-in-a-trial was conducted. It was placed on record that some of the contents of the statement which accused 2 made did not emanate from him. The court allowed the statement and the contents was read into the record by Col Ngobeni. It was testified by accused 2 in his trial-within-a-trial that there was a third person in the office where the statement was taken. This person said that he was in possession of a rope and shouted at him that he strangled the deceased with this rope. The court gave a judgment on record and ruled the statement to be admissible. When Col Ngobeni was recalled to read the statement into the record Mr Lidovho acting for accused 2 did not cross examine the witness with reference to the parts of the statement which did not emanate from accused 2. The statement was received into evidence as exhibit "F2".

[35] In this statement accused 2 mentioned the agreement between accused 1 and Jabu (Mr Sibisi) about the robbery. He stated he was promised R20 000 but never received money. It was stated that Jabu threw him a rope which he fastened around the neck of deceased. Jabu came and finally suffocated her. He thought that she only fainted. She was still breathing when he left her. He stated that there was a secret deal between the husband and Mr Sibisi.

[36] The state then indicated to the court that it wanted to prove a confession statement made by accused 1. Accused 1 objected to the admissibility of this statement. It was placed on record that accused 1's constitutional rights were not explained to him. Accused was threatened and assaulted and forced to admit to facts which was unknown to him. The statement was not voluntarily made.

[37] A further trial-with-in-a trial was held. The court gave a short judgment and found that the statement was not admissible in evidence. I do not intend to provide a summary of all the evidence in this trial within-a trial in this judgment. The court was of the view that the accused version how it came about that he made a statement was reasonably possible true and that the state has failed to prove that it was

voluntarily made. It was highly improbable that accused 1 would shortly after he was questioned admitted that he murdered his wife, just to come to court to deny this again. In fact on 14 October 2019 he made a statement to a Captain Nkala in which he denied killing his wife. What the court found improbable in the version of Colonel Mashele was that accused 1 already confessed to him on the day after the killing of his wife, on 11 October 2019, yet his statement was only taken on 13 October 2019. No proper explanation was provided for the delay. The version that he thought that accused 1 might want to first obtain legal representation did not hold water. The indication was rather that accused 1 did not confess to anything before he was assaulted. Moreover, there were discrepancies between the evidence of Sgt Baloyi and Colonel Mashele about the events. For instance, Sgt Baloyi said that after he brought accused 1 in for interrogation he took him to his office and not to the office of Col Mashele as the latter testified. It was then when accused 1 started crying and stated that he wanted to narrate what really happened.

[38] After accused 1 made the statement he used the first available opportunity to contradict this statement with a further statement made to Captain Nkala exonerating himself. This further statement was received in evidence as exhibit "M".

[39] This concluded the evidence for the state.

[40] Accused 1 was then called as a witness. He testified that on the day of the incident he was a tenant at Mr Payi's yard and was staying there with the deceased and their two children. He told the court that he did not know Mr Sibisi by them.

[41] He told the court that on 10 October 2019 he was in their room when Mr Sibisi knocked at the door. Mr Sibisi took out R10 to buy a cigarette. He went to fetch the cigarette and on his way back Mr Sibisi opened the door. He asked why he was opening the door. He did not answer. Instead he grabbed him. He fell and fought with Mr Sibisi. He tied his hands at his back with the cord of an iron whilst the iron was still attached to the cord. At that stage he heard his wife screaming and then only realised that there was a second person who came into the room. At that stage Mr Sibisi jumped over the couch and then took a rope out of his pocket. He was still lying on the floor and could not see on the other side of the couch. He heard his wife

screaming. The next thing he saw was when Mr Sibisi took a phone as well as R130 from a bag.

[42] He then saw the second person leaving the room. Thereafter Mr Sibisi left and then he screamed for help.

[43] Mr Payi's daughter came first and he told her to call her father. He came over. He asked him what happened and he untied him. He said he narrated what happened to him. He said that he did not see the second person properly as he was lying on the floor. He would not be able to identify him. He was adamant that he could not see what the second person did in the room.

[44] He denied that he met with Mr Sibisi two weeks prior to this incident. He said they are not friends. He denied that he planned the staged robbery or that he had any conversation with him. He never visited his place. He denied that he had any discussions with him regarding money which he will have in his possession belonging to his company. He denied that he agreed to pay R30,000 if Mr Sibisi staged a robbery. He denied that he asked Mr Sibisi to obtain a second person to help him.

[45] He also denied that he went outside with Mr Sibisi and had a cigarette with him. He denied that he gave a cell phone to Mr Sibisi and told him that he would later phone him.

[46] Accused 1 specifically denied that he had any participation in killing his wife nor did he give any instruction to anybody to do this. He denied that he tied the rope around the neck of his wife but he confirmed that Mr Sibisi took out a rope from one of his pockets.

[47] He further denied that he ever worked for a company which would entrust him with large amounts of cash. He said he had no knowledge of that and was surprised that Mr Sibisi came up with this version.

[48] On behalf of accused 2, Mr Lidovho asked no questions to accused 1 and Mrs Marasela on behalf of the state then cross examined accused 1.

[49] During cross examination accused 1 explained how Mr Sibisi managed to overpower him and tied his hands behind his back. He said he was tripped and he fell to the floor. He grabbed the cord of the iron which was on the ironing board and it fell to the ground. He was pinned down on the floor by the foot and one hand of Mr Sibisi. He said he used the other hand to grab the cord. After he managed to tie his hands he then jumped over the couch and went towards the deceased. His feet were only tied after he came back from the deceased who was on the bed when Mr Sibisi went towards her.

[50] He was asked how long did he leave him alone before he came back to tie his feet. He said it was a long time and added he could not see what was happening with his wife. The only thing he could see was that Mr Sibisi took a rope out of his pocket.

[51] He was then again asked when did he see the second person in the room and he said that when he was fighting with Mr Sibisi he saw the second person walk passed them.

[52] He was confronted whether he previously saw Mr Sibisi in the yard where he was staying where they used to play chess and drink beer. He said it was lies and he never saw people playing chess. But he also added that he used to stay indoors. He denied Mr Payi's evidence that he and Mr Sibisi were known to each other. He said that he never saw him before.

[53] He denied the version of accused 2 according to his statement, exhibit F2, that he and Mr Sibisi planned the robbery.

[54] He was asked about the cell phone and he said that the cell phone was not given to Mr Sibisi but they in fact took two cell phones from the room, that of his wife and one of his children.

[55] He was asked why he did not scream during the attack on him but he said that his wife was the one who screamed.

[56] The court then asked the accused why he did get up after Mr Sibisi jumped on the bed and left him lying on the floor whilst only his hands were tied and his feet were not. He replied that he could not balance himself.

[57] During re-examination, he said that he fought back and retaliated against the attack on him and that the person fighting with him asked for money.

[58] This then concluded the case on behalf of accused 1.

[59] Accused 2 then testified. He testified that he is the cousin of Mr Sibisi whom he referred to as Jabu. He told the court that Jabu came to his place on 10 October 2019. Jabu informed him that there was somebody who owes him money. Jabu asked him to join him to go and fetch the money while it was still early. Accused 2 wanted to know how much money was involved and Jabu said the person owed him R20,000. Jabu said that the person will give him a R5,000 deposit.

[60] Accused 2 asked Jabu what was the R20,000 for. Jabu informed him that the person wanted a job to be done for him. However he did not specify the job.

[61] Jabu then informed him that the person concerned is working for a trucking company and was given huge amounts to deposit on behalf of the company. Jabu further informed him that this person wanted them to act as if they were committing robbery and take the money.

[62] They then proceeded to the address in Dlamini where Jabu knocked at the door and accused 1 opened the door and Jabu bought a cigarette. When accused 1 went to fetch the cigarette he saw Mr Payi who was staying in a nearby room coming out of this room. The accused then came with a cigarette towards them. Accused 1 came to stand with them where they stood at the corner. He then asked Jabu who he was. Jabu informed him that he was his younger brother and he should not be worried.

[63] Accused 1 then said to Jabu that he wanted this mission to be accomplished and that he did not want someone who is not fit for this job. Accused 1 said they must finish the cigarette and as soon as they finished they must follow him.

[64] They went to the street to smoke whereafter they went back to the yard.

[65] Jabu knocked at the door and accused 1 opened the door. Jabu then grabbed accused 1 on his clothes on his chest. He pushed him back inside the room and he also then went inside the room. Jabu and accused 1 fell to the floor. At this stage he became aware of the women in the room who shouted something. He then approached her whilst she was in the bed between the blankets. He indicated to her that she must keep quiet by saying "shoosh" and putting his finger on his mouth. He got on top of the bed and stood on the bed. He told her not to look at him. She then took the blankets or duvet and covered herself. He then lost his balance and moved to the left but could not balance against the wall. This caused the mattress to move and he then jumped on top of the lady. At that stage he was wishing for her not to scream. He then took a pillow and covered her face with a pillow not to scream. He informed her that they were here for her husband and not for her.

[66] He then asked Jabu where is the money and he could hear that Jabu then spoke to accused 1 but could not hear exactly what he was saying. At this stage Jabu took out a rope from his pocket and he threw the rope towards him. Jabu then sharply told him to kill her but accused 2 replied by asking, "but where is the money?" Jabu said that he should kill her, this time aggressively. Accused 2 again asked for the money. Jabu for the third time said he should kill her.

[67] Accused 2 then testified that he realised that there was no money and he realised that it was expected of him to kill the lady. He was not prepared to do that and he left her. At that stage his phone fell on the bed. He wanted to run away. He saw Mr Payi through the window but told accused 1 and Mr Sibisi that he is now leaving. When he reached the door Mr Payi was now standing at the gate. He remained inside the room.

[68] This is when Mr Sibisi jumped on to the bed and he throttled the lady with the rope he took out of his pocket. He decided as soon as Mr Payi moved his position he will run out of the yard.

[69] At this stage accused 1 was still lying on the floor and Jabu then released the lady. Accused 1 then stood up from the floor. When he saw that Jabu has now left the lady. Jabu then went back to the bed a second time and he proceeded to throttle her for a second time. Accused 2 testified that he did not want to have anything to do with this but accused 1 said just wait a bit, do not go out yet. Jabu then left her and the deceased was not making movements any longer. Jabu then pulled her from the bed to the floor. Only at that stage did accused 2 see that the lady was not dressed.

[70] Accused 1 then approached the wardrobe and took out the deceased's handbag. He took out R130 plus a cell phone and he handed those items to Jabu. Thereafter accused 1 said he will call him at 11 o'clock. He then instructed Jabu to tie his hands behind his back. After he tied his hands Jabu said to accused 1 that he must say that he was attacked by three people. He said no, say four people. Accused said yes he will say that he was attacked by four people and they then left the place.

[71] He then testified that he was arrested on 13 October 2019. When he was asked about his statement he made (exhibit F2) he said he denied that he throttled the deceased. He said that there was another police officer present when he made his statement and this information came from this police officer.

[72] The court then asked him about the phone that was taken from the scene. He said he did not know what happened to the phone afterwards.

[73] Accused 2 was cross examined by Mr Mavatha. He was challenged why it was not put to accused 1 when he testified that there was an agreement to pretend a robbery. Accused 2 had no comment on this. He was asked why he attacked the deceased and explained that she started making noises and it appeared that she wanted to scream and that made him to approach her. He admitted that he placed a pillow over her face to prevent her from screaming. He again denied that he throttled

the deceased with a rope. He could not explain why his cousin would implicate him but he said that Jabu was lying to him. He denied that accused 1 used the same rope to finish off the deceased. He said that it was Mr Sibisi who did that.

[74] Accused 2 agreed that the whole situation was absurd as they pretended to rob but they ended up with no money. Instead, the deceased was killed.

[75] He denied that accused 1 smoked a cigarette with them as was testified by Mr Sibisi. He could not explain why certain issues were not taken up by his legal representative concerning the evidence of accused 1.

[76] During cross examination on behalf of accused 1, accused 2 emphasised that he did not say to Col Ngobeni that he used rope to strangle the deceased. He again said that there was another person who came up with this information. When he came up with this he decided not to make a statement but later he went back. But at that stage the person was not with Col Ngobeni any longer.

[77] He denied that they went there to rob and said that Jabu asked him to go with him to this place.

[78] During cross examination on behalf of the state he said that he only heard about the staged robbery on his way to the premises. He emphasised that he never went there to kill anybody and did not foresee the possibility that someone could get killed. He denied killing the deceased and said that the person who killed her was Mr Sibisi. It is Mr Sibisi who took the rope from his pocket and threw it on to the bed and instructed him to kill the deceased. He was not willing to do that and did not use the rope. He did not even touch the rope. When he refused to kill the deceased Jabu took it upon himself to throttle the deceased. He went to stand by the door. When asked why Col Ngobeni wrote that he throttled the deceased with a rope, he said that he told him that he used a pillow.

[79] This concluded the case on behalf of accused 2.

[80] Considering all the evidence certain issues has become common cause.

80.1 That deceased was killed by way of strangulation on 10 October 2019 at approximately 8h00 in the room she shared with her husband, accused 1.

80.2 When she was killed there were three people in the room to wit, Mr Sibisi, accused 1 and 2.

80.3 One or more of these 3 people killed deceased, either acting individually or in the furtherance of a common purpose.

[81] The main disputed issues are:

81.1 Whether the killing of the deceased came about during a robbery.

81.2 Whether there was a prior agreement entered between accused 1 and Mr Sibisi to stage a robbery which did not include an agreement to kill the deceased.

81.3 Whether there was a prior agreement to stage a robbery but only during the staged robbery accused 1 instructed Mr Sibisi and/or accused 2 to kill deceased.

81.4 If the instruction to kill deceased was only given during the staged robbery who killed the deceased and has the state proven that more than one of the people in the room formed a common purpose to kill deceased.

[82] According to the evidence of the state witness Mr Sibisi this was a staged robbery and only during this staged robbery did accused 1 instruct him and accused 2 to kill deceased before they would be paid any money. Accused 2 then obtained a rope from the room and strangled deceased but did not kill her. Accused 1 then went ahead and killed deceased with the same rope which he pulled tight around her neck.

[83] According to the evidence of accused 1 this was an ordinary robbery conducted by strangers and Mr Sibisi took out a rope from his pocket with which he

strangled and kill deceased. He could not say what roll accused 2 played in the killing but he was part of the robbery.

[84] According to accused 2 this was a staged robbery and he thought they will just collect the money and leave. He covered the face of deceased with a pillow to silence her and that she could not recognize him. During this accused 1 said his wife must be killed and he was not willing to do that. At that stage he disassociated him from the killing of deceased. Mr Sibisi then took out a rope from his pocket and strangled deceased to death.

[85] These version differ materially and the court must now consider whether the state has proven the guilt of the 2 accused beyond reasonable doubt and whether Mr Sibisi should receive an indemnity against prosecution for the death of deceased.

[86] Before the court is going to evaluate the evidence the court will remind itself of the legal principles which apply when evidence in a criminal matter is considered.

[87] The evidence of Mr Sibisi should be approached with caution as he was either an accomplice in the murder of deceased or at least compromised to the extent that he took part in a staged robbery during which deceased was murdered. He obtained sufficient knowledge as to what happened to be able to shift blame from himself onto the other 2 people that were in the room during the killing.

[88] The court was referred to the matter of S v Hlapenzula and Others 1965 (4) 439 (A) at 440 D-H where Holmes JA formulated the cautionary rule as applied to accomplices as follows:

“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. Third, by reason of his knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the

culprit. Accordingly, even where sec 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing 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 by the accomplice of someone near and dear to him; see in particular R v Ncanana 1948 (4) SA 399 (AD) at pp 405/6; R v Gumede 1949 (3) SA 749 (AD) at p 758; R v Nqantweni and Ano 1959 (1) SA 494 (AD) at pp 897G – 898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.”

[89] In Hlapenzula *supra* at p 440 H-I and 441 A it was further decided in relation to corroborative evidence provided by another accomplice as follows:

“Where corroborating 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.”

[90] In S v Francis 1991 (1) SACR 198 SCA at 205 e-g Smalberger JA found on the question whether the evidence of an accomplice could be accepted as follows:

“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 evidence with a 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 (R v Kristusany 1945 (AD) 549 at 556).”

[91] When evidence in a criminal case is considered the court must take cognizance of all the evidence. In this regard it was stated as follows in S v Van Der Meyden 1999(1) SACR 447 WLD at 449 H:

“A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.”

[92] When a court is faced with two or more irreconcilable versions, as in this case, the court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability and (c) the probabilities. See: Stellenbosch Farmers Winery Group Ltd and Another v Mattel ET, CIE and Others 2003 (1) SA 11 (SCA). In this matter it was further found as follows at p 15 D-E:

“ The hard case occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former , the less convincing will be the latter. But when all factors are equipoised, probabilities prevail.”

[93] The court will also bear in mind that the court does not have to believe the version of an accused before he is acquitted. See in this regard S v Shackell 2001 (2) SACR 185 (SCA) at 194 para [30]:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is [sic] true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

Evaluation of evidence

[94] The state relied exclusively on the evidence of Mr Sibisi to establish an agreement between accused 1 and himself to stage a robbery and to prove what role accused 1 and 2 played in the killing of his wife. It is trite that the extra curial statement made by accused 2 is not admissible evidence against accused 1. (*S v Litako and Others* 2015 (3) SA 287 (SCA)). The court must now consider the credibility of the evidence of Mr Sibisi who was, depending on the finding of this court an accomplice in the murder of deceased. This will be done in consideration of all the evidence lead in this matter. The court will also bear in mind that the evidence of Mr Sibisi in part dealt with the agreement to stage a robbery, which on all the evidence never included the killing of the wife of accused 1 up to the stage when accused 1 and 2 and Mr Sibisi were in the room, and further dealt with how deceased was killed. This should be considered as evidence may be truthful as far as certain aspects of the evidence are concerned whilst untruthful in respect of other aspects.

[95] The evidence of Mr Sibisi does not stand unblemished. He deviated from his statement provided to the police. His evidence rendered himself innocent as far as any act which may connect him with the killing of the deceased is concerned. In this matter the material questions for decision are why the deceased was killed, by whom and where did the rope come from. On these material aspects Mr Sibisi deviated from his statement which, according to himself, he freely and voluntarily gave to the police. In court Mr Sibisi said that the rope came from within the room. He was vague as far as this was concerned. In contrast in his statement given shortly after the incident he stated that the rope came from a washing basket. Mr Sibisi failed to explain this discrepancy and wanted to blame the policeman who took the statement. It should be noted that accused 1 said that Mr Sibisi took out the rope and Accused 2 also testified that Mr Sibisi took out the rope from his pocket.

[96] Crucially he stated in his statement that accused 2 “*closed her face with a pillow*”. Nowhere in his statement did he say that accused 2 strangled deceased with a rope for some time before accused 1 came to further strangled her as he did in court. In my view this is a material deviation from his statement which places a

question mark over the credibility of Mr Sibisi pertaining to the killing of deceased. This in my view does not necessarily render the entire version of Mr Sibisi pertaining to the staged robbery as false. The court must consider the evidence in totality and if sufficient corroboration is found to substantiate such a finding this part of the evidence can be accepted. The fact that a witness is lying about one aspect in his evidence does not mean that the entire testimony of the witness is false. See S v Francis quoted hereinabove.

[97] In his statement he never mentioned that they first bought a cigarette, spoke to accused 1 and introduced accused 2 to accused 1 before they went back into the room to stage the robbery. Even in his evidence in chief this was not mentioned as it only came out during cross examination. In my mind this is not decisive as there exist some corroboration for this version.

[98] The evidence of Mr Payi should be considered. He is an independent witness who can have no motive for giving untruthful evidence. His evidence was to the effect that accused 1 and Mr Sibisi knew each other. He referred to them as friends but even if this was not the correct description they met each other prior to the incident in the yard of Mr Payi. He also saw Mr Sibisi and accused 2 smoking near the room of accused 1. Although he did not see accused 1 with them he said they bought the cigarette from accused 1. This corroborates the version of Mr Sibisi on the important issue whether he and accused 1 knew each other. If indeed so then it becomes less likely that Mr Sibisi and accused 2 would go and rob people who was known to him. This places a question mark over the version of accused 1 that Mr Sibisi was a total stranger to him. Why will Mr Payi lie about this? He certainly had no motive to falsely implicate accused 1.

[99] When the version of accused 1 is considered there is a question mark as to the veracity of his version that this was an ordinary robbery which culminated in the death of his wife. In my view there are inherent improbabilities in his evidence. Two robbers arrive in the morning to rob him and his wife. They arrive without any weapons apart from possibly a rope, one will rather associate with an instrument to tie someone down. One of the robbers, Mr Sibisi managed to overpower accused 1. He manage to pin him down and simultaneously tie his hands at his back with the

cord of an iron, with the iron still attached to it. The fact that this could be achieved rather points to the lack of resistance. Most importantly his feet were not tied at that stage. Mr Sibisi then let go of him to go and kill accused 1's wife with a rope he had with him. Why this rope was not used initially to tie accused 1 was never alluded to in evidence. But what is strange is that accused 1 would have remained mobile as he could get up and attempt an escape. There was no threat to his life and he was not in danger nor did he face serious bodily injury if he tried to run away and seek help. At no stage before the t-shirt was placed in his mouth did he call for help. Why the focus so strongly diverted to his wife who posed no threat towards the robbers apart from making noise remains a mystery. Why kill her if, for instance, she could have been silenced with a pillow over her mouth? Why kill her and only tie accused 1 with the rope?

[100] The robbery itself on accused 1's version culminated only in the taking of an old cell phone and R 130 in cash. If it was a true robbery then why did accused 1 lie to Mr Payi as to how many robbers were involved. Also on how much money was robbed.

[101] The court finds that the version of accused 1 is so inherently improbable in light of all the evidence, including the evidence of accused 2 which I will deal with below, that it can be rejected as false beyond reasonable doubt. The court finds that the evidence of Mr Sibisi that this was a staged robbery was credible on the basis of the evidence he gave and supported by the probabilities.

[102] On the aspect of the staged robbery the evidence of Mr Sibisi was corroborated by the evidence of accused 2. But before a court can find corroboration for the evidence of an accomplice in the evidence of another accomplice the court must be satisfied that the other accomplice, to wit accused 2, was a credible and reliable witness.(see: *S v Hlapezula, supra*).

[103] The court is of the view that accused 2 was a credible witness despite the fact that his evidence deviated from his statement, exhibit "F2" which the court found, after the trial-within-a-trial, to be admissible evidence.

[104] Accused 2 was consistent in his defence that he did not kill the deceased nor throttled her with a rope. In his plea explanation he stated he was present when the deceased was killed but he did not kill her. Before the trial-within-a-trial commenced it was placed on record that he never told the police that he strangled the deceased with a rope. He repeated that in evidence during the trial-within-a-trial. The question for consideration during this trial-within-a-trial was whether accused was unduly influenced to make a statement. The court found on the version of the accused that he was not unduly influenced to make a statement as he went back the Colonel Ngobeni to make his statement after he at first refused to do so. The court did not make a credibility finding against accused 2 in the trial-within-the –trial. The court after accused gave credible evidence in the main trial has a doubt about whether the total contents of the statement emanated from accused 2. More specifically whether accused told Colonel Ngobeni that he strangled the deceased with a rope. At that stage the police already knew that deceased was strangled and obtained a version from Mr Sibisi implicating accused 2. All evidence should be considered and in this regard the court is mindful of what Mr Sibisi stated in his statement to the police, contrary to his evidence in court, that accused 2 only used a pillow to “*close her face*”. Mr Sibisi never said in his statement that accused 2 tied a rope he got from the room somewhere around the neck of deceased.

[105] A court is entitled to reconsider and overrule its decision in a trial-within-a-trial if subsequent developments in the trial create a doubt about the source of some information contained in the statement. See *S v Mkwanaazi* 1966 (1) SA 736 (A) at 743. See also *S v Muchindu* 2000 (2) SACR 313 (W) where the court at p 316 g found with reference to *Mkwanaazi* that a ruling on admissibility in a trial-within-a-trial is interlocutory, and can be reviewed at the end of the trial in light of later evidence. See further *S v Bakane and Others* 2017 (1) SACR 576 (GP) at para [22].

[106] Accused 2 during cross examination was again confronted by the legal representative of accused 1 and the state about the contents of his statement. In my view, he stood his ground firmly and repeated that he never strangled deceased with the rope. He persisted that he only placed a pillow over her face to prevent her from screaming. He never killed her or took part in her killing. His narrative of the events was detailed and he convinced this court as to the veracity of his version. The court

finds him to be a credible witness. From his testimony it becomes clear that Mr Sibisi gave him more than one reason why they had to go to this house of accused 1. Mr Sibisi misled him and kept him in the dark as to what exactly they were expected to do. Fact is when accused 2 entered the room he was of the view that they were there to stage a robbery, which deceased was not aware of, but which was arranged between accused 1 and Mr Sibisi. This will explain why he tried to silent deceased and ultimately disassociated himself from her killing.

[107] Accordingly, the court will disregard his statement made to the police and accepts his version as per his testimony in the main trial.

[108] As stated before Mr Sibisi as a state witness in my view was not truthful on all aspect of his evidence. But that does not mean that his entire testimony should be rejected. (see: *S v Francis supra*). There where his evidence is corroborated by the credible evidence of Mr Payi and accused 2 such evidence should be accepted. This evidence include the fact that Mr Sibisi and accused 1 knew each other, the reason why they went to the home of accused 1 i.e. to stage a robbery. Also that during this staged robbery accused 1 said that if they wanted money they should first kill his wife.

[109] The court finds that Mr Sibisi and accused 2 did not go to the home of accused 1 to rob anybody. The robbery was a mere pretence. Accused 1 lured them to his place with the sole purpose to kill or get his wife killed during the staged robbery. During this robbery accused 1 gave the instruction that his wife must be killed. He made it a condition before any money would be paid to Mr Sibisi or accused 2. He gave an old cell phone to Mr Sibisi and told him he will phone him later to discuss payment. He never phoned and the phone was sold.

[110] According to the credible evidence of accused 2 it was not accused 1 who strangled deceased to her death with a rope. This court does not have to decide whether it was accused 1 who killed the deceased by strangulation, as testified by accused 2, or whether it was Mr Sibisi, as testified by accused 1. The court however finds that the instruction was given by accused 1 and either he or Mr Sibisi then killed the deceased. The court cannot find whether the arrangement to kill the

deceased was made earlier when Mr Sibisi and accused 1 met but on strength of the evidence of accused 2, which was corroborated by the evidence of Mr Sibisi, the court finds that the instruction was given in the room by accused 1. He planned this outcome. The court finds that accused 2 was not part of, or responsible for, her death. He went there to take part in a staged robbery for which he would have been paid. When he was told to kill deceased he disassociated him from her killing.

[111] This does not mean accused 2 is guilty of nothing. On his own version he placed a pillow over the face of deceased to silence her. To this extent he suffocated her and that would amount to an assault which is a competent verdict on a count of murder. He should be convicted of assault.

[112] Concerning the evidence of Mr Sibisi he was a witness who was warned by court in terms of section 204 of the CPA. Despite the fact that the court accepted his evidence about the arrangement with accused 1 to stage a robbery in my view he failed to answer all questions put to him frankly and honestly and he is not discharged from prosecution on the count of murder or on a competent verdict.

[113] The following order is made:

113.1 Accused 1 is convicted on the count of murder as charged.

113.2 Accused 2 is acquitted of the charge of murder but convicted on as charge of assault.

113.3 Mr Sibisi is not discharged from prosecution on the count of murder or on a competent verdict.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing: 24 May 2021

Date of judgment: 24 February 2022

Appearances:

On behalf of the State: Adv. P Marasela

On behalf of the accused 1: Adv. A. Mavatha

On behalf of accused 2: Adv. G.J Lidovho