IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO
(3) REVISED ✓
DATE 3/3/16 SIGNATURE

CASE NO: A78/2012

DATE: 11/3/2016

IN THE MATTER BETWEEN

GODFREY TSHABALALA APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

PRINSLOO, J

[1] There was some delay in the preparation of this judgment, which is regrettable. The matter was already heard on 27 February 2015, and supplementary heads were filed by counsel in late March or early April 2015.

I need not dwell on the reasons for the delay, and although I was alive to the fact that the appellant was already granted bail pending the finalisation of the appeal as long ago as on 12 June 2013, the delay is nevertheless regretted.

Introduction and brief notes on the chronological history of the case

[2] Procedurally speaking, this case has a long and tortuous history. In the paragraphs that follow, I will attempt to summarise some of these details, although they do not, in every respect, emerge clearly from the record.

[3] In the court below, the appellant, as accused, was charged with four counts. Count one was one of murder (at the commencement of the trial, the charge-sheet was amended by agreement, to introduce a reference to section 51(1) of Act 105 of 1997 to make provision for imposition of the prescribed minimum sentence, in the event of a conviction) and three counts of contravention of the provisions of the Firearms Control Act, Act 60 of 2000, namely the possession of an unlicensed firearm, unlawful possession of ammunition and the pointing of a firearm.

Counts three and four, also erroneously, refer to 2 March 2004 as the date when those offences were allegedly committed, although it is common cause that the date was 27 March 2004, a Saturday. Also at the commencement of the trial, these incorrect dates were suitably adjusted by means of an amendment.

[4] The alleged offences were all committed on 27 March 2004, almost twelve years ago, and count one reads as follows:

"In that upon or about 27 March 2004 and at or near Olifantshoek in the district of Hlanganani the accused did unlawfully and intentionally kill Mphepu Lerisa Ngobeni, an adult female person."

[5] The trial commenced on 20 April 2009 when the appellant, who was legally represented, pleaded not guilty to all the charges. In a detailed plea-explanation, he denied any involvement in the alleged offences and offered full particulars of an alibi defence which he would advance. I will return to the subject of the alibi, but, broadly speaking, it amounts to this: on 27 March 2004, the appellant was in Johannesburg, where he stayed at the time, and worked as a security officer, and assisted his then girl friend to engage the services of a plumber known to the appellant, to do some plumbing work at the girl friend's home. He was busy with this activity until the evening of 27 April, and slept in Johannesburg, and again saw the plumber the next day, 28 April. The plumber gave evidence as a defence witness in support of the accused (appellant). The appellant offered a plausible explanation for his inability to call the girl friend as well, as their relationship had come to an end in the meantime, for understandable reasons, and he could not trace her.

[6] According to an entry on the index to volume 3 of the record, the learned trial Judge, Makhafola, AJ, (as he then was) gave judgment on 5 June 2009, convicting the appellant on all four the counts.

I could not find the date of the judgment in the record, and the transcript of the judgment was signed by Van der Merwe DJP on 25 February 2011 on behalf of the learned trial Judge.

[7] The conviction was followed by a process of the obtaining of a pre-sentence report and also a victim impact report and evidence led in aggravation and mitigation of sentence.

I consider it appropriate to add that the appellant was a first offender, a family man with two children and gainfully employed at all relevant times, barring, of course, the period when the appellant was incarcerated following his arrest (later to be released on bail pending the trial) and the period when he was incarcerated after he was sentenced until bail was granted, as I have pointed out, on 12 June 2013, pending the finalisation of the appeal.

When the appellant gave evidence in mitigation, before he was sentenced on 30 July 2010, he was already 36 years of age, and gainfully employed earning a salary of some R10 000,00 per month. When he gave evidence in mitigation, he insisted that he did not commit the offence and that he was framed by the state witnesses, because of a family feud, to which I will refer in greater detail.

[8] On 30 July 2010, the appellant was sentenced to life imprisonment in respect of the murder count, and to twenty months imprisonment in respect of counts two, three and four which were taken together for purposes of sentencing. It was ordered that the sentences in respect of counts two, three and four would run concurrently with the sentence on count one. This, in any event, would follow *ex lege*.

[9] On 15 March 2011, Van der Merwe DJP (in the absence of the learned trial Judge) granted leave to appeal in respect of both the convictions and the sentences. Leave was granted to the Full Court of this Division. This is the appeal which eventually came before us.

In his judgment, the learned Deputy Judge-President confirmed that he only had access to the judgments in respect of convictions and sentences and the notice of appeal, and some other documents but not to the record. The learned Deputy Judge-President then added:

> "What I am prepared to say is that on the evidence as summarised by the learned trial Judge there is a reasonable prospect of success that another court may find that the state failed to disprove the alibi raised by the accused. It is clear from the papers, more in particular the judgment, that the alibi was raised at an early stage."

[10] After leave was granted, almost five years ago, the appeal travelled a somewhat complicated procedural road. The main reason for this is that the evidence of the defence witnesses could not be traced and transcribed. Already on 1 August 2012 a well-known senior official in the Digital Court Recording Section of the Justice Department, who was also a supervisor in that capacity, Ms Weber, deposed to an affidavit to the effect that she does have access to the "BCB Server" which was operated by the previous transcribing contractor at the time. Ms Weber was told that the audio could not be located. "The external hard drive that it was saved on crashed in June 2009 and it is not possible to retrieve any data on the hard drive, ... hence the

audio cannot be submitted for transcription of the three defence witnesses in the court *a quo*".

It is not clear who the "three" defence witnesses are because, in his judgment, the learned trial Judge only refers to two such defence witnesses. There are also some suggestions in the record that the main, and single, witness on whose evidence the state case is based, Ms Mhloti Tiny Ngobeni, the daughter of the deceased, was recalled to testify. That evidence, such as it may have been, does not appear from the record presented to us.

[11] Against this background, I gather from some of the older heads of argument and memoranda from counsel in the file, that the appeal was on the roll on 29 May 2013, and then postponed to 5 February 2014 for purposes of reconstruction or transcription of the missing portions of the trial record. Counsel for the state also prepared a memorandum dated 19 December 2013 referring to the difficulties flowing from the flawed record. He deals with Ms Weber's affidavit. He concludes by stating that the defence witnesses, Mr Carlton Mabade (the plumber) and Ms NwaPiet Makuma were called and extensively cross-examined by the state but their evidence is missing from the court record. The state and defence do not have their personal notes and their recollection is limited to the judgment by the trial court in so far as the evidence of the two defence witnesses is concerned. There was also an indication that the learned trial Judge was prepared to meet with counsel in an effort to discuss the dilemma.

[12] There is a court order dated 5 January 2014 (perhaps erroneously so in view of counsel's memorandum that it was postponed from 29 May 2013 to 5 February 2014).

Nevertheless, in terms of this order the matter was postponed to 23 July 2014 and the appellant's bail was also extended until that date. This would have been the bail granted on 12 June 2013.

[13] According to another court order, the matter came before the Full Court on 23 July 2014 when it was postponed to 10 November 2014 and the appellant's bail was again extended. The earlier, 29 May 2013, order is also available recording that the matter was postponed to 12 June 2013.

The 12 June 2013 order deals with the bail granted to the appellant pending the outcome of the appeal and the bail conditions. It also orders a postponement of the appeal to 5 February 2014.

[14] There is also an order of 12 December 2014 reinstating the appeal which evidently had lapsed at some stage and re-affirming the granting of bail pending the outcome of the appeal and restating the bail conditions.

Paragraph 1 of this order of 12 December 2014 reads as follows:

> "That reinstating his appeal to the Full Court under case number A78/2012: the application for condonation to be heard by the Court of Appeal."

[15] When the appeal came before us, Mr Pistorius appeared for the appellant and Ms Creighton appeared for the state. Neither counsel dealt with this issue of condonation which, I assume, has to do with the lapsing of the appeal. I do not have an independent recollection as to whether or not we considered an application for

condonation, but it seems that we allowed the matter to proceed before us so that the condonation would have been granted. Inasmuch as it may be necessary, I would hereby grant such condonation.

More notes about the reconstruction of the record

[16] As to the reconstruction of the record, the court file contains a "final memorandum – reconstruction of court record", dated 30 January 2014 and signed by counsel for the state, Mr Davhana and counsel for the defence, Mr Malatji. These counsel appeared in the trial, but not one of them appeared before us in the appeal.

The memorandum was signed at Thohoyandou on 30 January 2014 by these two counsel. It is convenient to quote the contents of the memorandum:

> **"To: the Full Court Bench (North Gauteng High Court)**
>
> 1. Adv Davhana for the state and Adv Malatji for the appellant appeared before Honourable Makhafola J in chambers at Limpopo High Court Thohoyandou.
> 2. Honourable Makhafola J, raised the following issue with counsel.
>
> 2.1 Whether the summary of evidence by various witnesses including defence witnesses who testified during the trial of the appellant and appearing in his judgment are inaccurate and/or incorrect.
>
> 3. Both counsel in response agreed that summary of evidence by all witnesses for the state and the defence in the judgment is accurate.

4. In the result it is submitted by both counsel for the appellant and respondent that the appeal should proceed as scheduled relying on the judgment for the missing part of the record."

[17] As will appear from this judgment, I find myself in respectful disagreement with both the summary of the evidence as it is contained in the judgment as well as the evaluation thereof.

[18] In my respectful view, it cannot be that a Court of Appeal on fact, particularly one like the present where there are deep rooted differences between the two sides and where mutually destructive versions are offered, can be bound by an "agreement" signed by the two trial counsel more than a year before the appeal was heard when the counsel did not even take part in the appeal. Moreover, it appears from the memorandum that the appellant was absent from these proceedings where the "agreement" was reached.

[19] For purposes of the hearing before us, neither counsel filed his or her own heads of argument: Mr Pistorius offered heads of argument presented by a predecessor in May 2013, and Ms Creighton relied on very concise heads, prepared by Mr Davhana in July 2014. It is only after some debate with us, that both counsel presented additional heads of argument after the hearing as I have indicated.

[20] Mr Pistorius attached a "practice note" to the first heads of his predecessor. The practice note contains the following paragraph:

"5.2 The parties concur that all prescribed steps have been taken to reconstruct the outstanding parts of the record and that the appeal can

> be adjudicated on the record as filed. The parties concurred that the judgment of the Presiding Judge (Makhafola AJ) (my note: of course, it had since become Makhafola J) addresses sufficiently the evidence of the outstanding evidence (*sic*?) of the record and is satisfied that the appeal record has been properly reconstructed as required (see attached memo regarding construction process filed on 19 December 2013)."

No memorandum is attached, let alone a memorandum of 19 December 2013. The memorandum referred to can only be that of 30 January 2014, which I have dealt with.

In his practice note, counsel does not appear to go so far as to agree, as was done by the other counsel in the 30 January 2014 memorandum, that "summary of evidence by all witnesses for the state and the defence in the judgment is accurate" (emphasis added). Indeed, I find counsel's practice note rather cryptic. It is not clear what he means by "addresses sufficiently the evidence" let alone "the evidence of the outstanding evidence". It seems, however, that he limits his note to the summary of the evidence of the defence witnesses which, of course, is not available for consideration, neither was it available to the learned trial Judge, although, of course, he would have been able to rely on his notes.

[21] In the main, this is a so-called "facts appeal". It is trite that the power of the Court of Appeal to interfere with the factual findings of the trial court is limited to instances where the trial court misdirected itself – see, for example, *R v Dhlumayo* 1948 2 SA 677 (A) and *S v Francis* 1991(1) SACR 198 (A) at 198j-199a.

[22] I consider, against this background, that it would not be an overstatement to point out that to bind a Court of Appeal in a "facts appeal" to an "agreement" to the effect that the summary of the evidence of all the witnesses (including the crucial defence witnesses whose evidence was not even transcribed) who testified during the trial is accurate would be to curtail the already limited powers of the Court of Appeal and to virtually close the door to the appellant to launch a successful "facts appeal". The same applies to the "agreement" providing "that the appeal should proceed as scheduled relying on the judgment for the missing part of the record".

[23] These issues were not dealt with by counsel in their original (outdated) heads of argument nor in their later heads which were received after the hearing.

[24] I consider all this to be an unfortunate state of affairs, but, where the hearing was allowed to continue, I will attempt to deal with the appeal in the appropriate manner, and by paying due regard to the test as laid down in *Dhlumayo* and *Francis* and many other decisions, but on the basis that this Court of Appeal is not bound by the "agreement" of 30 January 2014.

A brief overview of the evidence

[25] I will attempt to limit this overview to aspects of the evidence which appear to me to be of relevance for purposes of coming to the right conclusion.

(i) **Khazamula Wilson Mathebula ("Mathebula")**

[26] He visited the scene of the crime with some other police officers. He does not mention the time but the next witness said the incident occurred at about 19:00 on 27 March 2004. He was an inspector in the police.

[27] He checked for clues but found nothing "as already the sun has set".

[28] At the scene he found the body of the elderly lady, her husband Mr Ngobeni and her daughter Tiny Ngobeni. Tiny, in broad outlines, told him what happened. She was seated outside with her mother when the stranger arrived, was offered a seat, said he came to bring money and then shot the mother and walked away. When asked why he did not follow up information obtained from Tiny or her father, he said "I only visited the scene of crime as I was not the investigating officer of this case".

[29] He asked Tiny who the perpetrator was and Tiny did not give him the names of the person but "what she said was that if that person can be arrested, she will be in a position to identify the person".

[30] Tiny told the witness that she saw the perpetrator for the first time on the day of the incident.

I pause here to mention an argument raised fleetingly in heads of argument although not presented before us with some force or dealt with in the judgment. It is this: the appellant testified, in my view in compelling fashion, that Tiny knew him before the incident and because of the family feud between the appellant's family and Tiny's family, to which I will refer in greater detail, she pointed him out at the identification

parade. Tiny denied that she knew the appellant beforehand. The argument is that if Tiny knew him, it would have been easy for her to give his name and other particulars to the police witness or other people. Of course, the counter-argument is that if she knew the appellant which, on the weight of the evidence, I consider to be the most probable state of affairs, but did not disclose his identity to the police witness, it is probable that the perpetrator was not the appellant!

[31] Mathebula did not take the matter much further. He did not speak to the father, who was still in the house when the incident occurred. Tiny told him that the suspect spent 15 minutes at the home of the deceased. Tiny told him that the suspect said that he had been sent by one Knox to bring the money to them. It is common cause that Knox Ngobeni is the brother of Tiny and the son of the deceased.

[32] Knox did not give evidence. The state did not present any evidence about a possible link between the appellant and Knox and no reason was advanced for the failure to call Knox as a witness. I consider this to be a *lacuna* in the state's case.

[33] In cross-examination, Mathebula was asked if Tiny gave him a description of the suspect and he said the following:

> "Tiny told me that the suspect ... the suspect was a short person and again physically small and since it was during the night, she could not see the other things and the suspect's body."

Importantly, this is not quite what Tiny said when she gave evidence under cross-examination. She was asked what description she gave of the suspect to the police on 27 March 2004 (on the probabilities to Mathebula). She answered:

> "I told the police officer that if I can see the suspect I will be able to identify him, and I told the police officers that I did not know the suspect's name since he did not give us his names, and again I was able to see how the suspect was clad on that day.
>
> And what else? --- That was it.
>
> You just told the police to say, look, this person, if he can be brought, I will identify him. --- Yes I did tell that to the police.
>
> And secondly, that you were able to see or to see the way he was clad. --- Yes.
>
> And that was all. --- Yes."

Later in her evidence under cross-examination, she became considerably bolder and embroided on her own version as follows:

> "And do you know where the description that you provided to the police, how the police went to Johannesburg to arrest this accused person? --- I only gave the accused's description to the police officer, his features, how he was clad, his facial features, how he was clad, so as to how did the police officers went to Johannesburg and got to arrest the accused, that is unknown to me."

This, of course, is in contradiction to what she told Mathebula and what she, herself, had said earlier.

As I will attempt to illustrate later, from a reading of the record, I was left with the impression that Tiny's evidence was unsatisfactory, and probably dishonest, in a number of respects.

As to her statement to Mathebula that the appellant was short in stature, I find it appropriate, at this time, to add that, judging by a photograph, exhibit "H2", of the eleven participants in the identification parade, the appellant appears to be the shortest, barring one, of the participants. An exception is what appears to be an individual hidden behind two taller participants on the left of the picture. I will revert to the issue of the identification parade later, because it formed the main subject of the supplementary heads of argument presented to us.

[34] In cross-examination, Mathebula was also confronted with the fact that the appellant is related to Tiny's family by marriage. Perhaps understandably, Mathebula denied any knowledge of these family relationships.

[35] In cross-examination of Mathebula, counsel for the appellant also raised the point which I mentioned earlier, namely the possible reaction of Tiny in her communications to the police had she known the perpetrator. The question was put as follows:

> "Right, then my instructions are that Tiny knows the accused person by virtue of this relationship, and if this accused person is involved in this particular case, Tiny would have informed you that the deceased was shot by the accused before this court ..."

Mathebula, again perhaps understandably, simply said that he did not know details of the family ties mentioned.

[36] None of the points of criticism of Tiny's evidence, which I raised when dealing with Mathebula's evidence, was mentioned in the judgment of the court *a quo*.

(ii) **Mhloti Tiny Ngobeni ("Tiny")**

[37] I have dealt with some of her evidence, and will attempt to avoid unnecessary repetition.

[38] She was seated in the lapa inside their yard with her mother at about 19:00 on 27 March 2004 when the incident occurred.

[39] There was an electric light stuck on the outside wall which lit up the lapa area.

[40] She saw the stranger entering through the gate and approaching them. The late mother told her to fetch a chair for the visitor which she did.

[41] Although her description of where the visitor finally sat down is a bit cryptic, it seems that, according to her, the single light bulb was coming from behind her and her mother "reflecting on our backs" so that the stranger would have faced the light if he sat opposite them. The two of them were sitting on the ground, on reed mats, so that the stranger was sitting higher than what they were.

[42] In chief, and quite uninvited, she kept on saying that she was constantly looking at the stranger's face, also when she brought him the chair and put it down for him. "Whilst I was busy giving the bench to the unknown person, I was putting it down, I was still looking at him."

This even prompted counsel for the state to ask her -

> "Why did you do that? --- The reason why I did that was that the person was unknown to me, so I wanted to see him."

This, I consider to be inherently improbable. It is more likely, in my view, that the witness was well rehearsed on the importance of the question of identity, especially if it was offered by a single witness. I am not suggesting any impropriety on the part of the state counsel. My impression of Tiny's evidence is that she is intelligent and "streetwise" if I may use that expression without being derogatory. She was already 20 years old at the time of the incident, having been born in 1984, according to her evidence. She gave this meticulous evidence five years after the event, in April 2009.

[43] Tiny confirmed the evidence of Mathebula that the stranger told them that he had been sent by her brother Knox to bring some money. She also said emphatically on two occasions that Knox was in Rustenburg and not Johannesburg.

Because it is common cause that the appellant was based in Johannesburg at the time, it again begs the question why Knox was not called to testify and, also, how Knox from Rustenburg would have linked up with the appellant in Johannesburg. These issues were also not raised in the cross-examination of the appellant.

[44] She initially said that she did not see the stranger producing a firearm - "At that stage the strange person was searching himself, and I did not see the object that he produced, but after that I heard a sound ... I heard a sound and my father (*sic*) was shot at three times."

This may have something to do with the visibility at the time, but later, in response to a leading question, she said that she did see the attacker producing the firearm.

[45] When the stranger started walking away after the attack she screamed and followed him. He turned around and pointed a gun at her. This is where the conviction on count four originates from.

She went to the home of her brother Edward Ngobeni and told him what the stranger looked like. Edward did not see the stranger. Edward did not give evidence.

[46] Late in her evidence in chief, and in answer to a question from counsel, she said that the stranger was wearing a cap - "The cap did not cover the face but it was covering his head only."

[47] In her evidence in chief, Tiny said very little about the identification parade, except that it was easy for her to identify the perpetrator. I will revert to the subject.

[48] In cross-examination, she gave evidence about the description she gave to the police. I have fully dealt with this issue.

[49] I proceed to briefly deal with certain subjects canvassed in Tiny's cross-examination.

- **Evidence about the identification parade.**

[50] She was "told at the door" what to expect at the identification parade. She had not attended such a parade before.

[51] She was not told that the appellant "this accused person", was amongst the people at the parade, but it is clear, from a general reading of her evidence, that "what I was told was that I had to point out at a person", and "but I was only told that I had to go and point out the person that I alleged that I can identify".

[52] What is clear, is that she was not explicitly told that the suspect she had in mind may not be present at the identification parade.

[53] She passed grade 10 and "I do know time". She does not think she spent more than ten minutes during her efforts to identify the appellant.

I mention this, because in the identification parade form, exhibit "H1", it is stated in paragraph 25(1), that the time taken by the witness to point out the person on parade was forty minutes. At the commencement of the proceedings, counsel for the appellant pointed out that this issue was in dispute and, according to the appellant, it did not take more than two minutes.

It is of some importance to point out, as will appear later, that the "member in charge of the parade", Captain T A Bvukeya, did not give evidence.

In fairness, it must, however, be recorded, that, on the list of section 220 admissions, handed in at the beginning of the trial, there was, added to the typed list of items the correctness of which was not in dispute, a hand written item:

> "8. Identification parade forms and photo album, photos 1 to 2 for identification parade, exhibit 'H1' and 'H2' respectively."

[54] When she was asked

> "Why did it cause you to take a long time looking at the suspect? Did he look suspicious or otherwise? --- The reason was that I did not know the person, so I wanted to know him.
>
> Yes, but did he appear to be very strange to you or what was the position? --- Yes the person was unknown to me."

[55] Against this background, it is difficult to overlook the fact that Tiny said, at a late stage in her evidence in chief, that the suspect who killed her mother had been wearing a cap and that Tiny told Inspector Mathebula "the suspect was a short person and again physically small and since it was during the night, she could not see the other things and the suspect's body".

[56] As will appear from the next subject which I will deal with, namely the family feud, there was strong evidence, although disputed by Tiny, that she knew the appellant, and prior to his arrest, there were rumours circulated in Tiny's family that the appellant

had been hired by members of his own family to kill the deceased. There is also strong evidence that the family briefed the investigating officer on where to look for the appellant in Johannesburg for purposes of arresting him.

In short, I am of the respectful view that in this criminal trial, it ought to have been difficult for the learned Judge simply to overlook the reasonable possibility that the appellant was identified at the identification parade by Tiny who knew him and who was involved in the family feud, and not on the strength of observations she made during the incident itself.

- **Brief remarks about Tiny's evidence in cross-examination about the family feud.**

[57] I consider it convenient, and necessary, to quote fairly lengthy extracts from this cross-examination on this particular issue.

I do so, because I consider this subject to be of crucial importance and the central issue of the case. In my respectful view, the undisputed existence of this family feud coupled with the undisputed and detailed alibi evidence should, at the very least, have sown the seeds of reasonable doubt in the mind of the learned Judge.

Instead, the learned Judge paid very little, if any, attention to these issues in his judgment and did not accord it the weight that he should have, in my respectful view, on a total conspectus of the evidence. I consider this to be a material misdirection on the part of the learned Judge, of the kind contemplated in cases such as *Dhlumayo* and

Francis, *supra*, and the type of misdirection which justifies this Court of Appeal to interfere with his findings of fact.

[58] I now turn to quoting extracts from Tiny's evidence on this subject, cumbersome as such a procedure may be.

> "Now, Ms Ngobeni, my instructions are that this accused person and your family, including yourself, are known to each other. What is your response?
> --- I do not know of the suspect's family.
> Thank you M'Lord. Do you know one deceased person, Mashango Grace Ngobeni? --- Yes I know her.
> Do you know that Ms Mashango Grace Ngobeni passed away during December 2003? --- Yes that I know.
> My instructions are that Mashango Grace Ngobeni was the daughter to Ms Lengwhisa Makamu, who is also called Mwabethi? --- Yes that I know.
> (My note: it seems that Mwabethi, which is the name commonly used during the trial, is the same person as NwaPiet Makuma, who was one of the defence witnesses, related to the appellant and whose evidence was dealt with in the judgment, under the circumstances which I described when dealing with the "agreement" of 30 January 2014.)
> My instructions are that the late Grace Ngobeni was married to the Famanda family, and you are a member of the Famanda family, including your late mother? --- Yes, the Famanda's are my family.
> My instructions are that this accused person, he is the brother to the late Mashango Grace Ngobeni, in that the mother to the late Mashango Grace Ngobeni is the '(speaks in African language)', the aunt to this accused person?

--- That I do not know. (My note: as will be observed, a feature of Tiny's evidence, which I consider to be unconvincing and disturbing, is that she readily makes admissions, until the issue gets closer to the bone and the shoe starts pinching, when she offers bare denials. My reasons for criticising Tiny's evidence, and for considering it, in certain respects, to be probably less than honest, are these: at the time of the incident, she was approximately 20 years old. She is quite intelligent, with grade 10 qualifications and, by then, she was probably a senior member of her family, living in a close knit rural society with the rest of the family. There is no indication that she was living or working elsewhere. Consequently, it is, in my view, inherently improbable that she would only have known some aspects of the family feud but not the more important ones, as will appear from her evidence.)

On or about 20 December 2003, it was the day that Grace Mashango Ngobeni was brought for purposes of conducting a funeral, her body was brought at home, for purposes of conducting a funeral? --- Yes.

And the mother to Grace, Mwabethi, quarrelled during the funeral and refused that people should even look at her body? --- At that stage I had not yet arrived at the said homestead, but I arrived after the body of the deceased was brought home.

But my instructions are that you, yourself, you heard when Ms Mwabethi Ngobeni was shouting that her daughter could not die alone? --- I did not hear that, one meaning that when it was said I had not yet arrived. (My note: another example of her evasive evidence. At the very least, the overwhelming probabilities would dictate that she would have heard about this when she arrived at the funeral).

My instructions are that you even told the police that you heard Mwabethi shouting that her daughter will not die alone? --- I do not know that, and the police officers were not told by me.

Alright, my other instructions are that you also heard Mwabethi shouting that all '(speaks in African language)' the ..., M'Lord, I am trying to get an English word for ('speaks in African language)', people that are married in a certain kraal. (My note: here follows an exchange between the court and counsel, from which it emerged that the 'all' referred to were the daughters-in-law.)

Yes. My other instructions are that you also heard that the daughters-in-law, or the '(speaks in African language)' from the Famanda family will die one by one before six months? --- That I do not know and I did not say that. They were not told by me.

Do you deny that, Ms Ngobeni? --- Yes, I do. (My note: In my view, another prime example of the evasive nature of Tiny's evidence and her refusal to admit something which, on the overwhelming probabilities given the particular circumstances, would have come to her notice. The alleged sensational outburst by Mwabethi was never disputed.)

Alright. And that you also informed the police that when Mwabethi was referring to the Famanda's family, she was referring to your family, I mean, when Mwabethi was referring to the daughters-in-law in Famanda's family, she was referring to your mother as well and other ladies or wives that were married by the brothers to your father? --- That I do not know, and I did not hear it when it was said. (My note: the evasiveness, and apparent dishonesty, and the inherent improbability that Tiny would have known about all this, is, in my view, quite obvious.)

And then the funeral at home of your mother, my instructions are that it occurred on or about 5 April 2004? --- My mother was shot at on 27 March, a Saturday, so the following Saturday she was buried.

Or may be to put it this way, the Monday after the funeral, you are correct, I am the person that did not put it correctly, my instructions are that the Monday after the funeral it was on about 5 April, you informed the police that Mwabethi had sent a child to your house to find out if members of the Famanda family had already gathered as she also had a complaint? --- I did not tell them, but I was surprised when Mwabethi and the police vans arrived at our place whilst I was busy packing the utensils.

My instructions are that you informed the police that she sent a child to call your father's brother's wife? --- That I do not know and they did not hear this from me.

And that your father's brother's wife refused when Mwabethi wanted her to come? --- That I do not know.

And you informed the police that Mwabethi came to you, the homestead where the Famanda's family had gathered and complained that Mwabethi had hired a person to kill your mother? --- (Interpreter speaks to witness.)

No, the people at Olifantshoek were complaining that Mwabethi hired a person to kill her mother. --- I did not hear the things that were said by other people, so that I do not know."

(My note: in my view, this is another clear example of dishonesty or, at the very least, unacceptable evasiveness on the part of Tiny. It should be borne in mind that details put to her about the family feud, and Mwabethi's outbursts, and rumours that she had

hired someone to kill Tiny's mother, were never disputed during the trial. At this point, there was an interruption of the evidence of Tiny on this particular subject and I will revert to it at a later stage. At this point, however, it is convenient to add that in the learned Judge's summary of Mwabethi's evidence, which, as I have illustrated, was not transcribed, the learned Judge also alludes to the fact that Mwabethi complained about allegations that she had hired someone to do the killing.)

- **Tiny's evidence in cross-examination about the appellant's alibi evidence.**

[59] I again go through the cumbersome process of quoting from the record what was put to Tiny in cross-examination about the appellant's alibi evidence. As it was put, it represents, in broad terms, the alibi evidence of the appellant which he confirmed when he gave evidence and which, as far as I can gather from the learned Judge's summary of the evidence of the plumber Carlton Mabade, was also confirmed in the same terms by Carlton when he gave evidence, which, as I have said, was not transcribed.

[60] Moreover, what also emerges from this evidence, as well as the evidence of the next and last state witness, is that, on the weight of the evidence, as I read it in totality, Tiny's family, when alleging that Mwabethi hired someone to shoot Tiny's mother, harboured the theory that the hit man would have been the appellant, a relative of Mwabethi, and, as a security officer, probably in possession of a firearm. It is clear from the weight of the evidence that Tiny and her family briefed the police in this regard and also gave them a lead on how to arrest the appellant in Johannesburg.

[61] I now proceed to quote the relevant extracts from Tiny's evidence.

[62] "Now do you know how this accused person, how did the police arrest this accused person? --- I do not know.

And do you know with the description that you provided to the police, how the police went to Johannesburg to arrest this accused person? --- I only gave the accused's description to the police officer, his features, how he was clad, his facial features, how he was clad, so as to how did the police officers went to Johannesburg and got to arrest the accused, that is unknown to me. (I have dealt with this issue in some detail, pointing out that Tiny's earlier evidence, both to Mathebula and in her evidence in chief, was far less detailed when it came to her ability to provide a description of the appellant. I will not embark on unnecessary repetition. The weight of the evidence suggests, as I have said, that Tiny and her family fingered the appellant as the hit man and assisted the police to find him and arrest him in Johannesburg.)

My instructions are that this accused person, or he will testify if necessary, that he is only a victim of circumstances in this case? --- I saw him, I know him.

My instructions are that on 27 March 2004, this accused person was not at Olifantshoek, he was in Johannesburg? --- In the evening I saw him.

My instructions are that on 27 March 2004, this accused person knocked off from work in the morning and went to his flat at Hillbrow where he slept for a while? --- I saw him.

My instructions are that he woke up in the afternoon and requested his friend, a plumber, one Mr Carlton Mabade, to go with him to Rosettenville or Kenilworth, to go and give a quote on a drain which had blocked at his girl friend's house? --- I saw him in that evening.

My instructions are that that afternoon accused person went with this Carlton and the quotation was done and a job was completed on 28 March 2004? --- I saw him.

My instructions are that at no time between 27 March 2004 to 28 March 2004, that the accused left his girl friend, Maria Kemmone Khutswane's premises? --- I saw him.

My instructions are that the suspicion that the accused has of him being implicated in this matter, is to the effect that because he is a security guard in Johannesburg, and that he is a relative to Mwabethi, then it is assumed that he might be having a firearm and therefore could be the best person to be hired to commit this offence? --- [Interpreter speaks to witness.]

The fact that he is a security, it is suspected that he is having a firearm, but he does not have a firearm. --- That I do not know, but what I know is that I saw him.

My instructions are that the accused does not possess a firearm, and on 27 March 2004, he was not a person who was in possession of an unlawful firearm at Olifantshoek? --- I saw him. I saw him and that what you have just said to me, it is unknown to me.

My instructions are that on 27 March 2004, accused person is not a person who is suspected to have been in possession of ammunition at Olifantshoek? --- I saw him.

My other instructions are that this accused person denies that he was at your premises or at your parental homestead on 27 March 2004? --- I saw him very well. (I take the liberty to revisit my earlier remarks about Tiny's apparent disability to describe to the police in any detail what the appellant looked like.

She could only tell Mathebula that it was a short person ... 'and since it was during the night, she could not see the other things and the suspect's body'. It was dark, and the suspect wore a cap, covering his head but not his face.)

And my instructions are that he is not the person who is alleged to have pointed you with the firearm as of 27 March 2004 at Olifantshoek? --- It is him who pointed me with the firearm.

And my instructions are that this accused person denies that he is a person that committed this crime of murder on 27 March 2004 at Olifantshoek? --- It is him."

[63] At this point the cross-examiner moved on to a different subject, involving statements made by Tiny to the police. There are some discrepancies between those statements and their evidence, which I do not consider necessary to dwell on. There is also some evidence which, in my view, fortifies the conclusion, fully dealt with earlier, that she could not properly identify the perpetrator. For example, in one of the statements she says "the suspect was wearing a short trouser with a blue colour on the chest". It was readily conceded that this evidence makes no sense. Excuses were offered that her testimony to the police, in Shangaan, was wrongly translated into English.

It also emerges from one of the statements that she may have told the police that the suspect was staying at her brother's place. This she denied, adding further to the confusion.

The cross-examiner also wanted to put the contents of a witness statement, in the possession of the police, to Tiny, but was not allowed to do so, for reasons, which,

with respect, I have difficulty in following. The cross-examiner said the following about this statement:

> "MR MALATJI: For the witness to confirm. Now the state is scared that the contents of this statement, because it was divulged in advance or part of the contents was divulged in advance, if the original statement is that it is exposed to the court and to the witness, is going to contradict this witness, that in other words, this witness' testimony under cross-examination will be contradicted directly by the statement that she made to the police, and this is what the state is scared and afraid of, and it is aware that this witness was not telling the court the truth or her version is not consistent with the statement which she made to the police."

I take this issue no further.

[64] Ultimately, the cross-examiner returned to an issue, which I have touched on before, and which, as I have indicated, I consider to be of crucial importance for purposes of deciding this case. It is a central issue which has a direct bearing on the alleged identification of the perpetrator, his subsequent arrest, the identification parade, the evidence of Mwabethi or NwaPiet and the evidence of the appellant. I have indicated that this evidence was, with respect, largely ignored by the learned Judge in his evaluation during the course of his judgment, which I have already expressed to be a material misdirection in the spirit of the test laid down in cases like *Dhlumayo* and *Francis*.

[65] It is necessary, although cumbersome, to deal with this evidence yet again:

"MR MALATJI: My instructions are that it is not true that you do not know the accused person? --- I said that I did see the person, but I do not know his names.

Yes, my instructions are that this accused person is your family by virtue of marriage or by affiliation through marriage of her sister to your ... to the Famanda's family? --- My aunt, her surname is Makamu, and she is being married to the Ngobeni's, so I know of the family relations existing between the Ngobeni's and the Makamu's.

My instructions are that this accused person was present even at the funeral of the late Grace Famanda, or the late Grace Makamu (*sic*), as you put it? --- I was crying and I was in pain, so I did not see the accused or any other people there. (My note: this is another example, in my view, of the evasive nature of the evidence of this witness. She was clearly an intelligent person, and streetwise as I have said and an alert 20 year old at the time of the funeral and, probably, a senior member of that family in a closely knit environment.)

You did not see him because of grief or do you deny that he was present? --- I do not deny the fact that the accused person was present at the funeral, but personally I did not see him.

Yes the question was, you did not see the accused because of grief or do you deny that this accused person was at the funeral of the late Grace Mashango? --- I said that I did not see him.

But can you deny that he was present? --- I do not know as to whether the accused person was there at the funeral or not.

Alright, my instructions are that he was present as a member of the family? --- I cannot deny that, as you are saying that he is family, he is a relative."

[66] And then later, after the cross-examiner failed to persuade the learned Judge to conduct some cross-examination on the statements, the following exchanges took place in further cross-examination:

> "My other instructions, Ms Ngobeni, are that Mr ... the accused before court, at the funeral of his sister, he was even the one who was reading the ... [indistinct] at the graveyard? --- I did not see that. (My note: the reference to what the appellant was reading was later clarified to mean 'the wreaths'. Again, I consider the denial of Tiny to be verging on the nonsensical, and totally improbable.)
>
> Yes, my instructions are that this accused person was even reading the [indistinct] at the graveyard? --- At the graveyard I did not see people as I was seated down crying in grief.
>
> My other instructions are that it is not true that you do not know this accused person, because at Olifantshoek where he was staying, the accused person is not staying. ... His homestead is not far from where ... from your homestead? --- I only know the place where Malangwana's people used to stay, it is an old place, ... so I am not aware as to whether the accused person was related to those people.
>
> And my instructions are that you knew the accused before he left for Gauteng in 1990, he actually left for Gauteng in 1990. --- That I do not know as I was born in 1984. (My note: this is a point which the learned Judge considered to be of some importance when he found that Tiny did not know the appellant before the shooting incident and when he found that Tiny's evidence as a single witness was completely satisfactory and to be preferred ahead of the version of

the appellant and the plumber and NwaPiet which he rejected as not being reasonably possibly true. I consider this approach, with respect, to be a misdirection.)

Yes, my other instruction is that this accused comes and visits homes whenever there are funerals and he is a known person there? --- That I do not know. (My note: in my view, this is completely unlikely given the close nature of the family environments in the area and the obvious involvement of Tiny in the affairs of the families.)

Lastly, the suspicion that the accused has why perhaps he was arrested, it could be as a result of the fact that the police officer called Leonard Maluleke, a next-door neighbour to your house, and perhaps he might be the one ... or his arrest could be as a result of the influence between Leonard and your family, that is why he was arrested, Leonard Maluleke, not Leonard Khoza? --- I have never had a conversation with Leonard Maluleke.

And the suspicion that the accused has also is that this Leonard Maluleke, probably after his discussion with your family, he is the one that came to show the police, this other police officer, Leonard Khoza and Joseph Shilubane, his place of employment in Johannesburg? --- That I do not know.

Yes my other instructions are that it is ... it could be so because this Leonard Maluleke is probably the only person between Leonard Khoza and Joseph Shilubane who knew where the accused was employed and where he was staying in Johannesburg? --- That I do not know and I was not there. (My note: only in the cross-examination of the investigating officer Inspector Leonard Khoza who arrested the appellant, did it emerge that Leonard

Maluleke accompanied him and the other police officer to Johannesburg when the arrest was effected.)

Lastly, this accused instructs that you were aware that the Famanda's family and Mwabethi's family, which is accused's family, are not in good terms since the death of Grace? --- That I do not know. I do not know as to that these two families are not in good terms, the Famanda's and the Mwabethi's family."

(Again, and for reasons repeatedly mentioned, this is totally unlikely and, probably, quite untruthful. At the very least, this version of the defence, if not highly probable on the totality of the evidence, which I find to be the case, should have been adjudged by the learned trial Judge to be reasonably possibly true, and an issue which should have alerted him to be more cautious about unreservedly accepting Tiny's evidence. I have expressed the respectful view that the learned Judge's apparent total ignorance of this issue is a misdirection which is material in nature and which allows this Court of Appeal to intervene.)

(iii) **Gezani Leonard Khoza**

[67] He was the investigating officer. He never went to the scene of the crime and was only appointed as investigating officer two days after the event.

[68] He appointed "an informer" who came up with information that the perpetrator was one Godfrey.

[69] He went to Johannesburg on the strength of the information and finally arrested the appellant at his place of employment, Magnum Security Company.

[70] Understandably, he was not prepared to identify the informer.

[71] He said that he was not related to Tiny and her family but got to know them after this incident.

[72] In cross-examination he said that the informer was not an eye-witness "but he was just suspicious". He then offered the hearsay evidence that the informer saw the accused (appellant) at about 12:00 on 27 March at Olifantshoek. This hearsay evidence was not pursued or analysed any further during the hearing.

[73] Then, for the first time in cross-examination, the witness was asked whether he went to Johannesburg with Leonard Maluleke (and the other police officer Joseph Shilubane) which he admitted to be the case.

[74] Then came the following exchange:

> "Right do you know if Leonard Maluleke knows the accused person? --- It can be possible that Leonard Maluleke knows the accused.
>
> Is it Leonard Maluleke that showed you the accused's flat? --- No we were all looking around for the accused's flat, asking around. (My note: on the overwhelming probabilities, this evidence is false: in compelling fashion, the appellant testified that after his arrest, he was informed that the family of the deceased (which would include Tiny) had a meeting from which an allegation emerged that his aunt (obviously Mwabethi or NwaPiet, which must be the same person) gave him R10 000,00 to kill the deceased. He testified

emphatically (and this remained undisputed) that he knew Leonard Maluleke for many years also as a neighbour where they used to live at Olifantsfontein and later they were also at Pretoria where they worked and were neighbours. Maluleke visited him at his flat in Johannesburg and knew exactly where it was and Maluleke, according to his information, was present at the aforementioned family meeting. Although this evidence, to an extent, amounted as hearsay, it was not objected to or disputed and, to an extent, corroborated by Mwabethi if I understand the learned Judge's brief summary of the latter's evidence correctly.)

[75] His evidence about Tiny's description of the suspect is the same as that of Mathebula:

"Tiny did give me the description of the suspect, she said that the suspect is short and that if she can see the suspect again, she will be able to identify him."

[76] A statement by Tiny dated 27 March 2004 reflecting him as the Commissioner of Oaths, is incorrect. He only took over later. This is an irregularity which I do not propose dealing with any further.

[77] He testified about another description Tiny gave in the statement -

"The suspect was wearing a short trouser with a blue colour on the chest and also a cap. I can identify the suspect if he can be found and arrested ..."

Here she says nothing about the length of the suspect. The witness said that to him, Tiny said that the suspect was short, but he cannot remember evidence about how he

was clad. He also does not understand the description about the "short trouser with the blue colour on the chest".

[78] The witness could not deny that the appellant was identified at the identification parade because Tiny knew him.

[79] The witness admitted that there was a feud between the two families.

> "There was a feud between the two families. Police officers were involved, so the public prosecutor sent me to Mwabethi to obtain her statement as the prosecutor wanted to know what was happening between the two families.
>
> Do you remember what Mwabethi told you in her statement? --- It happened a long time ago, so I cannot remember.
>
> This issue of Mwabethi being accused of having hired a person to kill the deceased, do you know about it or do you not know about it? --- I do not know it.
>
> Did you hear about it? --- Yes I once heard it from Mwabethi. She told me that people are saying that she has hired a hit man.
>
> You can finish, what did Mwabethi tell you? --- Mwabethi told me that the community members are saying that she is the one who hired a hit man to kill one Lerisa Ngobeni. (My note: this evidence was repeated when the learned Judge asked for clarification. This evidence is clear corroboration of the evidence of the appellant, to which I have referred.)

[80] After the evidence of this witness, the state case was closed.

[81] It is noteworthy that Leonard Maluleke was not called to give evidence.

[82] An application for the discharge of the appellant in terms of section 174 of the Criminal Procedure Act no 51 of 1977 was refused.

(iv) **The appellant, Godfrey Tshabalala**

[83] I have dealt with the major portion of his evidence.

[84] He was subjected to lengthy and intensive cross-examination, almost to the point of exhaustion.

In my view, he came across as a strong and convincing witness, and he was not in any way discredited. He insisted throughout that he was not in any way involved with the shooting, did not own a firearm and was the victim of unfair accusations flowing from the family feud. He insisted that him and Tiny knew each other.

[85] He gave compelling evidence about the alibi. He gave an acceptable and plausible explanation about his inability to call his girl friend as a witness. Because of the incarceration and the consequences of him being charged, and convicted, he lost touch with the girl friend and their relationship came to naught. He tried to trace her but was unable to do so.

[86] He gave strong evidence about the alibi, which, of course, is undisputed. His compelling evidence about the rumours in Tiny's family that Mwabethi had hired a hit man was, as I have said, corroborated by the investigating officer, Inspector Khoza.

[87] His evidence about his strong acquaintance with Maluleke, to which I have referred, was undisputed.

[88] I consider it unnecessary to analyse any further aspects of his evidence.

[89] On the totality of the evidence, and given the strong and convincing showing of the appellant in the witness-box, and unequivocal evidence about the family feud and probable foul play on the part of Tiny and her family, and strong indications, on the probabilities, that Tiny's family accused Mwabethi of having hired a hit man, pointing fingers at the appellant, I am of the view that the learned Judge's decision to reject the appellant's version as not being reasonably possibly true is a clear misdirection.

In *S v Shackell* 2001 4 SA 1 (SCA) the following was said at 12I-13C:

> "There is a more fundamental reason why I do not agree with this line of reasoning by the court *a quo*. 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 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."

(v) **Phumudzo Carlton Mabade**

[90] This is the plumber. It should be remembered that he testified five years after the event.

[91] I have dealt with the fact that his evidence was not transcribed and I have referred to the "agreement" between the trial counsel that the learned Judge's summary of his evidence is accurate.

[92] The summary of his evidence comprises one page. It amounts to the following: he is not related to the accused (appellant) neither is the appellant his friend. On 27 March 2004 he was in Johannesburg and did meet the appellant. He is employed at Boost Property Management as a plumber. On 27 March 2004 he saw the appellant between 13:00 and 14:00. He came to him and asked him to accompany him to Rosettenville where he made a quotation for plumbing at the accused's girl friend's flat. They went to a hardware in Rosettenville where they did not get all the stuff they needed for plumbing. From there they went to a hardware in Hillbrow where they found all the materials they needed. He loaded all the materials into a Hyundai which he thinks belongs to the accused's girl friend. From there they proceeded to his office where he cut the pipes. Thereafter they waited for Kelvin Pfari and Tshilidzi because there was a sort of a stokvel. At about 18:00 to 19:00 he parted ways with the appellant. (My note: all this is in line with the evidence of the appellant. The time mentioned is also the alleged time of the shooting.)

He then saw the accused on the 28th in the morning around 07:00 at Rosettenville, where he went to fix toilet joints and some other supply pipes of water. He was paid R950,00 and issued an invoice receipt. Next to the total amount of money on the receipt appears the signature of the owner one Tiny or Tini whose real name he does not know. He does not know what has happened to the original receipt book. At a certain time a policeman wanted to see the receipt book. According to him he saw the accused at about 14:00 because he was with him "unless he had used a broom or bread(?)" (My note: the last phrase I do not understand. The signature on the receipt, or invoice, is not of one Tiny, but clearly that of Khutswane, his client and appellant's girl friend.)

[93] All this is directly in line with the evidence of the appellant, subject to the remarks I have made.

[94] The invoice is exhibit "K". It is for an amount of R950,00 and is for "Rosettenville plumbing, blockages and reput the PVC pipe". It is dated 28 March 2004 although the 8 of the 28 may have been tampered with or changed. The amount due is reflected as R950,00 (no changes) and at the bottom the "total" is also R950,00 although the 5 seems to have been changed from R900,00 to R950,00. This puts it in harmony with the similar figure appearing higher up in the column.

This invoice contains the clear signatures of "Mabade" and "Khutswane" which is the name of the appellant's girl friend. All this, in my view, constitutes clear corroboration of the alibi evidence.

[95] All the learned Judge had to say about Mabade's evidence when evaluating the evidence was the following:

> "Carlton Mabade could not take the alibi evidence of the accused any further. He denied that the accused has ever left Johannesburg. The invoice was issued by him to support the date of 28 March 2004 as the date on which he was with the accused. But the 8 of the 28 on the receipt had been altered by him and he stated under cross-examination he had no answer as to the changed date."

Of course, not having had the benefit of reading the transcribed evidence, one must be careful not to be unduly critical of the approach of the learned Judge, but it does seem that, apart from this perceived irregularity in the form of the changed date, the alibi witness, by and large, corroborated the evidence of the appellant in every material respect. There is also no indication that he had any reason, flowing, for example, from a close association with the appellant, for supporting the latter's evidence.

[96] Counsel for the appellant, in supplementary heads of argument, referred us to *State v Liebenberg* 2005(2) SACR 355 (SCA) at 358h where the following was said with regard to an alibi defence:

> "The approach adopted by the trial court to the alibi evidence was completely wrong. Once the trial court accepted that the alibi evidence could not be rejected as false (my note: this may not be the case here, but given the fact that the alibi evidence, apart from the amended invoice, was undisputed, it seems that the same approach in this matter would be valid) it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence

linking the appellant to the offences (my note: for the reasons mentioned, this did not happen in the present case) the acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.

'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.' – at 359c-e."

In this case, the alibi evidence is compelling and undisputed and corroborated by Mabade.

In view of the authorities quoted, I am of the opinion that the learned Judge's rejection of the alibi evidence as not reasonably possibly true amounts to a material misdirection.

(vi) **NwaPiet Lengwhisa Makamu**

[97] As stated, her evidence was also not transcribed. The summary of her evidence by the learned Judge is contained in one page of the judgment. It amounts to the following: she knows the appellant. His mother is her younger sister. She knows why the

appellant has been arrested. She was surprised to hear a rumour that she gave the appellant R2 000,00 to kill Lerisa.

She heard from her son-in-law that there was a meeting where Gezani (my note: the investigating officer, Khoza) said she had given R2 000,00 to the accused to kill Lerisa. She went to Gezani's place to ask him why he had said she had killed his wife. Gezani was in the company of people and nine policemen.

When she confronted Gezani about the rumour he denied having said that. Then Ndavezitha Khamanyani who is no longer alive replied that they had heard Gezani say so. At this meeting there were nine policemen and she knew one of them Leonard Maluleke.

She also knows Tiny Ngobeni and this Tiny knows the appellant. She is related to Tiny Ngobeni because her child was married at the same homestead with Tiny's mother.

At the funeral of her child the appellant was present and he read the wreaths. It is not true that Tiny does not know the appellant. She does not know who killed Lerisa. She had heard the name Nwalangwane mentioned at Mafamandu.

[98] If anything, this evidence corroborates that of the appellant and also, in a way, that of Khoza.

[99] The criticism of the evidence of NwaPiet, in the judgment, if any, is difficult to ascertain, it seems to amount only to an observation that the witness could not convincingly confirm that Tiny knew the appellant because she was still a child when the appellant left Olifantshoek in 1990. I have dealt with this aspect.

[100] So much for a summary of the evidence. I turn to brief conclusionary remarks.

Conclusionary remarks

[101] Most of my conclusions have already been spelt out in some detail.

[102] An observation by the learned Judge that Tiny had no motive to falsely implicate the accused because she did not know him before the incident is clearly an over-simplification and a misdirection. The only criticism of the evidence of the appellant, that I can see, is that -

> "He was also evasive during cross-examination. He could not answer direct questions with direct answers except to resort to 'I believe'. What he believed could be hardly tested by cross-examination because beliefs do not amount to facts."

I have difficulty with this criticism, such as it may be. No details are given about the perceived evasiveness and failure to give direct answers. I repeat that, in my view, the appellant was a strong witness and not in any way discredited in lengthy cross-examnination. It cannot be said that the appellant's version is not reasonably possibly true, especially in the light of the uncontested evidence about the family feud and the uncontested alibi evidence.

[103] The learned Judge, in his evaluation, makes the following remarks about Tiny's evidence:

> "Although Tiny Ngobeni is a single witness who placed direct evidence before court inculpating the accused as the perpetrator of the shooting of the deceased it is alarming surprising to observe that it was never directly put to her by the defence that her observation was mistaken or that he does not know the accused from 27 March 2004. This is so despite Tiny's direct evidence that she had observed the person who shot at the deceased for a considerable time. Instead it was put to her that she was related to the accused which factor she denied knowledge of.
>
> It was never put to her that she had known the accused prior to the shooting incident nor was it ever put to her that accused had known her prior to the incident."

This summary is clearly wrong and not in line with the evidence which I have dealt with in some detail. This observation also amounts to a material misdirection.

[104] Although there may have been some irregularities in the manner in which the identification parade was conducted, details of which I briefly referred to, I do not consider it necessary to make a finding in that regard.

In my view, given the overwhelming evidence of a family feud and a clear motive on the part of Tiny to falsely implicate the appellant, such a state of affairs would in any event lead to the identification parade being tainted.

[105] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that the learned Judge erred, and misdirected himself, in finding that the verion of the appellant, including the alibi evidence, could not be said to be reasonably possibly true. There was no evidence about counts two and three, alleged unlawful possession of a firearm and ammunition. Count four, pointing of a firearm, is linked to the murder count. The appellant was clearly entitled to an acquittal.

The order

[106] I make the following order:

1. The appeal against the convictions and sentences is upheld.
2. The order of the court *a quo* and the convictions and sentences are set aside and replaced with the following:

"The accused is found not guilty and discharged."

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A78/2012

I agree

N M MAVUNDLA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

A A LOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 27 FEBRUARY 2015
FOR THE APPELLANT: P F PISTORIUS
FOR THE RESPONDENT: H CREIGHTON