REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO: CC 14/2019
DPP REF: M 69/2018

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.
05 November 2021

In the matter between:

THE STATE

v

LUCAS THULANI MALUKA **ACCUSED**

JUDGMENT ON MERITS

MOOSA AJ:

[1] **MR LUCAS THULANI MALUKA ('accused')** is arraigned on the following charges:

[1.1] **COUNT 1**:

MURDER - read with the provisions of Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act No 105 of 1997

IN THAT during the period 25-27 November 2017 and at or near Daantjie, in the district of Pienaar, the accused did unlawfully and intentionally kill **GIVEN SIBUSISO MALUMANE**, an adult male person.

[1.2] **COUNT 2:**

ROBBERY WITH AGGRAVATING CIRCUMSTANCES as defined in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of Act 105 of 1997

IN THAT during the period 25-27 November 2017 and at or near Daantjie, in the district of Pienaar, the accused did unlawfully and intentionally assault **GIVEN SIBUSISO MALUMANE**, and did then and there and with violence take from the said **GIVEN SIBUSISO MALUMANE** an Alcatel cellphone. The property or in the lawful possession of the said **GIVEN SIBUSISO MALUMANE,** aggravating circumstances being present in that the said **GIVEN SIBUSISO MALUMANE** was killed.

[1.3] **COUNT 3:**

ATTEMPTED EXTORTION

IN THAT on or about 27 November 2017, and at or near Daantjie in the district of Pienaar the accused did unlawfully and intentionally induce, threaten, subject to pressure or inspire fear in the mind of **BUSISIWE FAKUDE** by informing her that she must pay the accused an amount of R 6000.00 (six thousand rand) and if she did not, the deceased would be killed, and therefore the accused did then by means of the said threat, inducement or, unlawfully and intentionally attempt to obtain an advantage not due to him, to wit an amount of R 6000.00 (six thousand rand).

[2] At the commencement of the trial the State handed in a psychiatric report in terms of section 79 of the Criminal Procedure Act ('CPA') by three Psychiatrists, namely: Prof E. Weiss, Dr T. J. Nkoana, and Dr MP Pitjeng as **Exhibit "A";** and which report the accused did not object to or dispute the contents thereof and the findings therein. The aforementioned panel found that the accused is fit to stand trial, and that he had the capacity to appreciate the wrongfulness of his actions at the time of the alleged offence, and he had the ability to act in accordance with appreciation of the wrongfulness of his actions.

[3] The accused pleaded not guilty to the charges which he faced in the indictment. Mrs Erasmus, ('Erasmus') on behalf of the accused confirmed that the accused's plea was in accordance with her instructions, and that his defence was a bare denial to the charges preferred against him.

[4] The accused was duly explained the provisions, application and implications of the Criminal Law Amendment Act No. 105 of 1997 ('Minimum Sentences Act'), as well as the seriousness thereof. He confirmed that he accordingly understood the provisions of the aforementioned Act.

[5] During the course of the trial, and as part of the formal admissions in terms of section 220 of the CPA, the accused consented to the handing in of both sworn affidavits in respect of collection of blood-stained t-shirt and shoe laces of the accused, and crime scene photo album by Warrant Officer Ncamiso Boshomane ('Boshomane') as Exhibits "**B"** and "**C"** respectively.

[6] The accused further made formal admissions in terms of Section 220 of the CPA, inter alia, briefly (**Exhibit "D"**):

> [6.1] admitting that on 25 October 2018, Sergeant Bonisile Daphney Mjali collected buccal reference samples from the biological mother of the deceased, namely Lizzy Shongwe with DNA Reference Sample Collection Kit, bearing unique alphanumeric code to wit 13D2AB2502TF. She further closed it with a tamper proof seal and placed it in an evidence bag that bore unique

alphanumeric code to wit PA4001798304, and which she also sealed with a tamper proof seal.

[6.2] admitting the chain of evidence in respect of the exhibits; and that on 26 October 2018, Sergeant Ralph Dorington Mapahanga ('Maphanga') delivered the buccal reference samples to the Forensic Sciences Laboratory at Silverton, Pretoria ('FSL').

[6.3] admitting that the deceased did not sustain any further injuries from the crime scene, until Dr Gantcho Prodanov Gantchev conducted a medico-legal post-mortem examination on the body of the deceased on 28 November 2017, and recorded his findings on form GW7/15, with Death Register NO. 561/2017, and which has been handed in as **Exhibit** "**E"**.

[6.4] admitting that the originality, authenticity, facts and findings in the medico-legal post-mortem examination report by Dr Gantcho Prodanov Gantchev, handed in as Exhibit **E** are correct, and the cause of death of the deceased is correctly recorded as: **"BLUNT HEAD TRAUMA"**

[6.5] admitting that on 31 January 2019, Senior Forensic Analyst, namely: Captain Regina Cecilia Janse van Rensburg who is in the service of the State at Forensic Science Laboratory, Silverton, Pretoria subjected the blood from the shoe laces found in the accused's bedroom and the buccal reference sample from the mother of the deceased to a DNA analysis system, by a process requiring skill in biology and deposed to an affidavit in terms of section 212(4) of the Act ('DNA report') in which she reported her findings; and which affidavit may be admitted as **Exhibit "F"**.

[7] To discharge the onus upon it to prove that the accused committed the crimes charged, the prosecution called the following seven viva voce witnesses:

[7.1] **Cst Ralph Dorington Maphanga** ('Maphanga'), a member of the South African Police Services and the investigating officer testified, inter alia, as follows:

[a] On 27 November 2017, whilst on duty he received information of a murder at Komani Trust, and accordingly attended at the scene. Upon his arriva,l he observed members of the community present where a body was found lying in a ditch, and which was covered with grass and soil. He observed the deceased to be rolled in a blanket.

[b] Upon further investigation he discovered that the body was found at the same premises wherein the accused was residing at the time.

[c] He spoke to the accused's relative, one Jabulile, and who informed him that she was duly contacted by a neighbour and advised that there was something suspicious around the homestead. She proceeded to investigate, and subsequently discovered a body. In addition thereto, she discovered blood in the pit toilet, and which caused her to contact the members of the SAPS.

[d] He was informed that the accused was the only person who resided in the room, and he accordingly sought permission from Jabulile to enter and search the said room. Upon entry therein with Jabulile, he found a blue T-shirt that was blood stained, and which he was informed belonged to the accused. In addition thereto, he found shoelaces that were covered in blood. These items were accordingly seized as exhibits, the scene was photographed, the body was removed from the scene, and the exhibits subsequently sent to the FSL in Pretoria. At this stage the whereabouts of the accused were unknown.

[e] During his investigation he had occasion to speak to the accused's sister and was informed that the accused was in Ogies. He was further informed that the accused's elder aunt suspected the accused of being involved in the death of the person who was found at

the accused's place of residence. Consequently, members of the Ogies SAPS were duly summoned, in order to arrest the accused.

[f] Both himself and W/O Lekuleni travelled to Ogies in order to fetch the accused. At the time of fetching the accused, he was informed by the accused that he had forgotten some of his clothes at his eldest aunt's home. The accused's younger brother handed over some items of clothing, as well as an Alcatel cellphone to this witness.

[g] Whilst they were on their return journey, the Alcatel cellphone rang and he answered it. The caller identified himself as one Daniel Khoza ('Khoza'), and requested to speak to Given Malumane ('Malumane').

[h] Khoza further informed him that he was Malumane's uncle and that he was looking for his nephew. Maphanga then requested Khoza to attend at the Pienaar SAPS the following morning, as he was tracing the identity of the body that was discovered, and wanted the family to attend an identification of the body. Khoza further informed him that the deceased had left his home on the Sunday evening and disappeared. Maphanga then came to the conclusion that the body found might well be that of Malumane.

[i] On 28 November 2017, Khoza arrived with his sister and the body was positively identified as Malumane (hereinafter referred to as the deceased). In addition thereto, the deceased's cellphone was positively identified.

[j] In addition to the deceased's cellphone that was found in the accused's possession, a while later he received the deceased's trouser and cavallo shoes from the accused's younger brother, Carlson Andries Lubisi ('Lubisi'). In amplification hereof, this witness testified that at the time of the accused's arrest by members of the Ogies SAPS, the accused had put aside two pieces of clothing. Lubisi had learnt at a

certain stage, after the accused's arrest, that the deceased's family had mentioned that certain of the deceased's clothing had still been missing. Lubisi then contacted this witness and subsequently handed him a pair of black Nike shorts and the cavallo shoes that were positively identified as belonging to the deceased.

[k] A forensic DNA analysis of the blood found on the accused's clothing and the shoelaces confirmed that such sample matched the deceased's blood.

That in essence concluded the evidence of the 1st witness, Maphanga.

[7.2] **Nomsa Shongwe** ('Shongwe'), the deceased's mother testified, inter alia, as follows:

[a] She confirmed that she was staying with the deceased and her daughter, Busisiwe Fakudze ('Fakudze') at the time of his disappearance on Sunday, 26 November 2017. She last saw him on the aforesaid date at 14h00, when he had gone out to buy some food.

[b] On Monday, 27 November 2017 she contacted his employers at Spur and was informed that he had not reported to work, and they had not seen him since the Friday. She thereafter requested Fakudze to call the deceased on his cellphone, in order to find him.

[c] Fakudze dialed the deceased's cellphone number and it was answered by an unknown male person. The telephone was subsequently given to Shongwe and she spoke to this unknown male, who had answered the deceased's cellphone. This person identified himself as Musi Shibango ('Shibango'), and when asked that she wanted to speak to the owner of the phone, he asked her as to who was the owner of the cellphone. She informed him that the cellphone belonged to Given. Shibango then told her that Given had gone out to buy another phone, as the current one was not working properly.

[d] The conversation continued and she insisted on speaking to her son, Given. Shibango then terminated the call, which resulted in both herself and Fakudze calling the deceased's cellphone incessantly. Shibango subsequently answered the phone and informed Shongwe that her child (Given) owed him the amount of R 6000.00 (six thousand rand). He then demanded the aforementioned amount, and she then queried from him as to whether he would return her child, if she paid over the money. Shibango said that it was fine and that he would give her child to her.

She subsequently advised Shibango that she would arrange to make payment to him at the SAPS. He refused to meet her at the SAPS, and this made her realise that her son was in trouble, if he were alive. She was subsequently informed of a dead body and due to the fact that it was late decided to proceed to the spot the following day where the body of the deceased was found.

[e] She confirmed that a buccal sample was taken from her during the investigation of this matter. Further, she positively identified the clothes, shoes and cellphone of the deceased, and which he was wearing and had in his possession at the time of his disappearance.

[f] During cross examination she confirmed that she was not told by the unknown person that he would kill her son, if the money was not paid.

That in essence concluded the evidence of the 2nd witness, Shongwe.

[7.3] **Ncamisa Boshomane** ('Boshomane'), a member of the SAPS and holding the rank of warrant officer, stationed at the Local Criminal Record Centre, Mbombela testified, inter alia, as follows:

[a] He attended the crime scene on 27 November 2017, at 52 Daantjie Trust, Pienaar where he took photographs of the scene and collected exhibits as follows:

i). 1 x navy golf shirt with possible human blood inside the accused's room;

ii). 1 x grey trouser with possible human cells inside the accused's room;

iii). 2 x white shoe laces with possible human skin cells inside the accused's room, near the bed.

[b] On 01 May 2018, he forwarded the collected samples to the FSL in Pretoria for analysis.

That in essence concluded the evidence of the 3rd witness, Boshomane.

[7.4] **Busisiwe Figiswa Fakudze** ('Fakudze'), the deceased's sister testified, inter alia, as follows:

[a] She confirmed that she was staying with the deceased and her mother, Shongwe at the time of his disappearance on Sunday, 26 November 2017. She last saw him on the aforesaid date at 14h00, when he had gone out to buy some food for her child.

[b] She confirmed that on 27 November 2017, when she called the deceased on his phone, that it was answered by an unknown young male, and who refused to identify himself. He indicated that he had the owner of the phone and that it would not be possible to speak to him. He subsequently introduced himself as one Sizwe Shibango, and demanded the amount of R 6000.00 (six thousand rand) to be paid in order for Fakudze to speak to him. He then terminated the call.

[c] She then reported this matter to her mother, who subsequently spoke to Shibango, and who reiterated his demand for R 6000.00 (six

thousand rand) in order for them to speak to the deceased. She subsequently reported the matter to her uncle.

[d] She was clear that Shibango had said that he would kill the deceased if the amount of R 6000.00 (six thousand rand) was not paid.

[e] She positively identified the deceased's Alcatel cellphone, as well as the black Nike shorts and cavallo shoes.

[f] During cross examination she confirmed that Shibango had told her that the deceased owed him R 6000.00 (six thousand rand) and that he requires payment, and that he would kill the deceased if the money was not paid.

[g] During cross-examination, the accused admitted that he had spoken to Fakudze, whilst using the deceased's phone.

That in essence concluded the evidence of the 4th witness, Fakudze.

[7.5] **Daniel Sydney Khoza** ('Khoza'), the deceased's uncle testified, inter alia, as follows:

[a] He learnt of the disappearance of the deceased on 27 November 2017, and assisted the family by calling the deceased's cellphone.

[b] He confirmed that he spoke to a member of the SAPS, and who confirmed that he was in possession of the deceased's cellphone, and requested him to attend at the SAPS in order to identify the cellphone.

[c] He duly proceeded to the SAPS and identified the deceased's cellphone.

That in essence concluded the evidence of the 5th witness, Khoza.

[7.6] **Carlson Andries Lubisi** ('Lubisi'), the accused's elder brother testified, inter alia, as follows:

[a] On 27 November 2017, the accused arrived at approximately 08h00 at his place of residence at Paula Trust in Ogies, with a bag containing clothing.

[b] He confirmed that the accused was arrested on the aforesaid date and that he handed the accused's bag to the arresting officers.

[c] At a certain stage he attended at the Graskop court as a witness in order to testify, and where he met the accused's family thereat. Whilst at court he overheard the deceased's family discussing the clothing that the deceased was wearing at the time of his disappearance, as well as the fact that they had not recovered his clothing.

[d] He duly realised that the clothes which the accused had left behind, had in fact not belonged to him, but the deceased. He gave Maphanga the black Nike shorts and the cavallo shoes. These items were positively identified as belonging to the deceased.

[e] He further confirmed that he had given the accused's bag to the SAPS, together with the cellphone that the accused had in his possession on the day in question.

That in essence concluded the evidence of the 6th witness, Lubisi

[7.7] **Busi Pinky Mndawe** ('Mndawe'), the accused's aunt and owner of 52 Daantjie Trust, Pienaar testified, inter alia, as follows:

[a] She confirmed that she was no longer residing at the aforementioned address and that it was only the accused who was

residing on her property as at 27 November 2017; and she identified the room depicted on the photographs wherein the exhibits were found, as the room where the accused was residing in.

[b] Mndawe confirmed that on 27 November 2017, she communicated with her aunt in Ogies regarding this matter. Her aunt informed her that the accused was in Ogies. She was rather surprised that the accused was in Ogies at 08h00, despite the fact that he was at her residence the night before, between 20h00 – 22h00.

That in essence concluded the evidence of the 7th witness, Mndawe and the case for the state was accordingly closed.

[8] The Accused testified in his defence and stated, inter alia, as follows:

[a] As at 27 November 2017, he was residing at 52 Daantjie Trust, Pienaar, and confirmed that he was present at his residence. He was present thereat at 05h00 – 06h00, and thereafter proceeded to Witbank due to the items that were found in his room. He confirmed that he was at Mndawe's residence on the evening of 26 November 2017 between 20h00 and 22h00, and as testified to by her.

[b] He arrived at his residence during the early hours of 27 November 2017 after visiting taverns, and upon his entry therein noticed several items of clothing in his room, and which did not belong to him. He further observed blood on his takkies and T-shirt and did not know as to how the blood had got onto his items. He was surprised to find a cellphone on his table and a pair of black Nike shorts that had blood on them. Further, he found a pair of cavallo shoes and which were not blood stained and decided to wear them for his trip to Witbank.

[c] He put the items in his bag and proceeded to Witbank. Upon his arrival thereat, he found out that the elders had gone to town, so he decided to wash his bloodied takkies.

[d] He did not report his finding of the items in his room to anyone at Daantjie Trust, Pienaar, and to seek assistance, as he was scared.

[e] He confirmed that Fakudze was speaking the truth when she testified that someone had demanded the amount of R 6000.00 (six thousand rand). To this end, he confirmed that it was him that had demanded the aforesaid amount from Fakudze. He further stated that he had informed Fakudze that the owner of the phone was unavailable and that he had left the phone with him.

Fakudze demanded the phone and he then informed her that she would need to pay an amount of R 6000.00 (six thousand rand) if she wanted the phone to be brought to her.

[f] He denied speaking to Shongwe and Khoze regarding the cellphone and the demand of R 6000.00 (six thousand rand).

[g] He denied sleeping at his room on the evening of 26 November 2017, and further denied any knowledge regarding the death of the deceased.

[h] During cross-examination, he stated that he took some of the bloodied items from his room and left others therein. He further confirmed having seen the blood stains in the toilet, as depicted in the photograph album.

[i] During cross-examination he denied any knowledge as to how blood had got onto his takkies, and denied seeing the blood stained shoelaces that were recovered from his room, near his bed.

[j] He was of the view that someone wanted to frame him for the murder of the deceased. Further, he believed that it was better to go to his aunt than the SAPS, when he found the items in his room.

[k] During a clarifying question from the court, the accused admitted that he demanded the amount of R 6000.00 (six thousand rand) from Fakudze as she was demanding the return of the cellphone. He further admitted that he was found in possession of the deceased's cellphone and his (accused's) blood stained takkies.

That in essence concluded the evidence of the accused and his case was closed.

EVALUATION OF EVIDENCE

[9] It is trite that in order to succeed with the prosecution, the State has to discharge the onus to establish the guilt of the accused beyond reasonable doubt and on the other hand the accused bears no onus but will be entitled to a discharge if he presents an explanation of innocence which is reasonably possibly true. This trite legal test is more succinctly and elegantly stated by Nugent JA in **S v Mbuli**[1] as follows:

'It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. In whichever form the test is applied it must be satisfied upon a consideration of all the evidence'.

'An accused version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test an accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable'. [2]

[10] In **S v Shackell 2001(2) SACR 185 SCA** it was held that " 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 enough is the observance that, in view of this standard of proof in a criminal case, a court

[1] 2003 (1) SACR 97 (SCA); See also S v Trickett 1973 (3) SA 526 (T)
[2] Susha v S 2011 JOL 27877 (SCA)

does not have to be convinced that every detail of the 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. It is indeed permissible to test the accused's version against the inherent probabilities. 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."

[11] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. In **S v Shilakwe**[3] at page 20, para [11], the Supreme Court of Appeal approved of the following *dictum* :

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

See **S v Hadebe and others**[4] and **S v Mbuli**[5].

[12] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

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[3] 2012 (1) SACR 16 (SCA)
[4] 1998 (1) SACR 422 (SCA) at 426 F – H
[5] 2003 (1) SACR 97 (SCA) at 110, para [57]

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."
See **S v Chabalala**[6]. In this regard it is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in **Magadla v S**[7], delivered on 16 November 2011, (unreported), at paragraph [22] and further.

[13] I am mindful of the basic principles to be applied when evaluating evidence. In this regard, it is trite that evidence must be weighed in it's totality and that probabilities and inferences must be distinguished from speculation and conjecture.

> Navsa JA in **S v Trainor**[8] stated as follows: "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in it's entirety"

[14] The quote from the judgment of Malan JA in R v Mlambo[9] at 738 A and B is apposite:

> 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature

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[6] 2003 (1) SACR 134 (SCA) paragraph [15]
[7] 80/2011 [2011] ZASCA 195
[8] 2003 (1) SACR 35 (SCA) at 9
[9] 1957 (4) 727 (AD)

consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable inference which are not in conflict with, or outweighed by, the proved facts of the case. Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts; a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so'.

[15] I pause to mention that there are no eye-witnesses who actually saw the robbery and the killing of the deceased by the accused. Hence, the State has relied to a certain extent on circumstantial evidence, the testimony and version of the accused, as well as the objective medico legal evidence; in order to prove the allegations against the accused, and in an attempt to prove it's case against the accused. I am therefore required to objectively and in an impartial and balanced manner, consider all the evidential material in coming to a decision.[10]

[16] It is trite that once a court is faced with circumstantial evidence it naturally flows that it is duly called upon to draw inferences from the evidence thus presented.

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
(2) The proved facts should be such, that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude

[10] S v Ntsele 1998 (2) SACR 178 (SCA)

other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."[11]

[17] The value of circumstantial evidence is often found in a whole range of independent circumstances, all giving rise to the same conclusion. It is imperative for the court to consider all these circumstances as a whole and not to assess each in isolation.

> "The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."[12]

[18] In De Villiers supra at 508 it is said: "…even two particles of circumstantial evidence-though taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone…."

[19] Circumstantial evidence is indirect proof from which a court is required to draw inferences which, when weighed with all other evidence, may contribute towards proving a fact in issue. The inference must comply with certain rules of logic.[13] The reasonable inference has to be drawn only from proved facts and not from facts based on suspicion.[14]

Circumstantial evidence has on occasion been described as a chain, the links of which consist of pieces of evidence. This is not correct as it implies that the chain will

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[11] S v Blom 1939 AD 188 at 202; See also S v Mtsweni 1985 (1) SA 590 (A) at 593

[12] S v De Villiers 1944 AD 493 at 508-509

[13] S v Burger 2010 (2) SACR 1 (SCA)

[14] S v Mseleku 2006 (2) SACR 574 (D)

be broken once one piece of evidence is rejected. It is better to compare it with a braided rope: as the strands break, the rope weakens and conversely, as strands are added, the stronger it gets. The gist of the matter is that one piece of circumstantial evidence may be inconclusive, but once other evidence is added, it gains probative force.

[20] The principles that are to be applied in assessing circumstantial evidence were re-stated as follows in **S v Reddy & others 1996 (2) SACR 1 (A) 8 at c-h:** "In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'."

[21] The *ratio* of Hendricks J in **S v Nkuna 2012 (1) SACR 167 (B)** sets out the approach to circumstantial evidence, at paragraph 121 as follows:

> "The evaluation of circumstantial evidence must be guided by a test of reasonableness. The onus on the State is not that it must prove its case with absolute certainty or beyond a shadow of a doubt. All that is required is such evidence as to satisfy the court and prove its case beyond a reasonable doubt. It is trite law that the accused is under no legal obligation to prove his innocence. The State must prove the guilt of the accused beyond a reasonable doubt".

[22] Having carefully considered the totality of the evidence and the mosaic of proof before me, I do not deem it necessary to traverse the evidence of all the witnesses that testified during the trial, for the sake of brevity and to avoid unnecessary prolix, as the issue to be determined is crisp and unambiguous. As

such, the only issue that this court has to decide, is whether the accused was involved in the commission of the crimes, as charged.

[23] I pause to mention that upon a conspectus of all the evidence before me, the following can be regarded as common cause between the parties.

[a] The accused resided at house number [....] Nkomani Trust, Daantjie as at 27 November 2017;

[b] The deceased was found dead near the accused's room, in a shallow grave, wrapped in a blanket and covered with grass and gravel;

[c] The accused arrived at Phola, Ogies on Monday 27 November 2017 in possession of the deceased's cellphone, clothes of the deceased (a pair of black, size 9 cavallo shoes and a black Nike shorts), and which the deceased was wearing when he was last seen on Sunday, 26 November 2017;

[d] The ownership of the cellphone and the clothes belonging to the deceased, which were subsequently recovered from the accused;

[e] That the accused's takkies were blood stained;

[f] That the DNA that was found on the shoe laces recovered inside the accused's room matched that of the deceased.

[g] That the accused did not report to anyone the fact that he allegedly found the items in his room, upon his return thereat during the early hours of Monday, 27 November 2017;

[h] That he took the cellphone and other items of clothing, placed them in a bag, leaving other bloodied items in his room and proceeded to Phola Trust, Ogies on 27 November 2017;

[i] That he spoke to Fakudze and demanded an amount of R 6000.00 (six thousand rand), and which amount was never handed over to the accused.

[24] Essentially, having distilled all the common cause facts between the parties the only dispute to be adjudicated upon is the determination of whether the accused was involved in the commission of the crimes so charged.

[25] It is clear from the evidence that the deceased was found dead near the accused's room, and whilst he (accused) had made haste to Ogies, in possession of the deceased's belongings. The accused does not deny being in possession of the deceased's items, but explains that he had come across the items in his room, and was surprised at the presence of these unknown items that were in his room.

[26] The accused explained that he did not report this find and the fact that he had observed bloodied items of clothing, as well as blood in the toilet to the SAPS or to any other member of his community or family member in the vicinity of his home. In my view, one would have expected an innocent person to have immediately sounded the alarm regarding the discovery of these unknown items within his room. The accused simply does not report this to anyone, but decides to place his bloodied takkies in his bag, takes the deceased's clothes and cellphone, proceeds to wear the deceased's shoes, and travels to Phola Trust, Ogies arriving at 08h00 on 27 November 2017.

[27] The accused whilst in possession of the deceased's cellphone proceeds to answer same, provides a false identity to Shongwe and Fakudze and demands R 6000.00 (six thousand rand) to either release the deceased and/or not to kill him. If the accused is as innocent as he makes out to be, then in my view he would have immediately both positively and properly identified himself to the aforementioned, and would have explained to them the circumstances under which he allegedly found the phone. The accused simply does not do so, but provides a false name and address and proceeds to demand the aforesaid amount from the witnesses. Surely, this cannot be said to be the conduct of an innocent person, who is bewildered at finding items in his bedroom, approximately 200 kilometres (two hundred) away.

I pause to mention that the accused advised the witnesses that they are unable to talk to the deceased as he is not available. In my view, the accused was speaking the truth that the deceased was unavailable to take the call, as he knew that the deceased was already dead.

[28] I have carefully applied my mind to the post mortem examination report in coming to a conclusion regarding the guilt of the accused in the commission of the crimes on counts 1 and 2.
The following injuries were observed on the deceased during the post mortem examination:

[a] Four superficial and non-life threatening stab wounds to the left side of the neck, sized from 8mm to 25mm in length respectively;

[b] Left supra-orbital ridge laceration sized 30 mm in length revealing an open fracture of the underlying bony structure of the skull;

[c] Laceration to mid and left upper side of upper and lower lip revealing underlying fracture of the upper and lower jaw (due to heavy blunt impact);

[d] Abraded tip of the nose middle and right side featuring palpable fracture of the underlying bony nose.

[29] It is clear from the nature of the aforementioned injuries and the resultant cause of death being “Blunt head trauma” that the person inflicting the injuries had a single minded resolve when using severe force to cause the injuries, which ultimately resulted in death. It is clear in my mind that together with the nature of the injuries, the vast amount of blood in the toilet and the fact that the deceased was fairly well built, that the intention was to simply seriously injure the deceased, in order to subdue him and to rob him of his belongings. Further, the nature and type of the injuries inflicted, in my view, is indicative of a degree of planning and/or premeditation.

[30] As regards the identification of the perpetrator, I am of the view that the crisp answer to the identity would be found in the objective DNA evidence. It is clear that

the shoelaces which contained the deceased's blood was found on the floor of the accused's bedroom and near his bed. I find that in the absence of any reasonable explanation from the accused that the only reasonable conclusion in this regard, is that it was the accused who was the one who robbed and killed the deceased during the period 25 – 27 November 2017.

This finding is further fortified by the fact that the accused was found in possession of the deceased's cellphone and items of clothing, and the added fact that he attempted to extort money so as not to kill the deceased.

[31] I find it highly improbable that someone else other than the accused robbed, killed and hid the body of the deceased at the accused's residence, removed the shoelaces from the accused's shoes, stained them with the deceased's blood, and thereafter planted them together with the deceased's cellphone and clothes in the bedroom of the accused. Unfortunately for the accused there is not an iota of evidence before this court to support such an outlandish contention.

[32] Accordingly, I have carefully analysed the evidence before me and applied the necessary caution where necessary, and accordingly am unable to find any reason to doubt the *ipsissima verba* of the State witnesses. They gave their evidence in a clear and concise manner without any material contradictions. On the other hand the accused made a very poor impression on this court during his testimony. His version seemed to be very far fetched on the available evidence, and on any analysis of his evidence it simply cannot be believed.

[33] After careful consideration of the evidence of all the State witnesses, and the totality of the circumstantial evidence in support of the charges, I am satisfied that the evidence of the State is satisfactory in all material respects to sustain a conviction on the charges. The state witnesses made a good impression on this court, whilst the accused was an unimpressive and an unsatisfactory witness.

[34] I have looked at the merits and demerits of this matter coupled with the totality of the evidence before me and accordingly reject the version of the accused, as being false beyond reasonable doubt. I duly accept the evidence of the State

witnesses. I further find that on a consideration of the totality of the evidence the prosecution has discharged the onus to prove beyond reasonable doubt that the accused has committed the crimes as charged. On the other hand the accused has failed to give an explanation of innocence which is reasonably, possibly true and his version is accordingly rejected as beyond false.

[35] I have weighed all the elements that points towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strength and weaknesses, probabilities and improbabilities on both sides, and having done so, I find that the balance weighs so heavily in favour of the State so as to exclude any reasonable doubt of the accused's guilt.

[36] I therefore conclude that the only reasonable inference to be drawn from a conspectus of all the evidence before this court, which includes circumstantial and viva voce evidence, is that the accused had the necessary intention to rob the deceased during the period 25 – 27 November 2017, and during this process inflicted severe injuries which caused his death, and subsequently attempted to extort monies from the deceased's family.

[37] In the result, the accused is found guilty as follows:

[a] **COUNT 1**

MURDER READ WITH THE PROVISIONS OF SECTION 51(1) AND PART 1 OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997.

[b] **COUNT 2:**

ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977 AND READ WITH THE PROVISIONS OF SECTION 51(2) OF ACT 105 OF 1997.

[c] **COUNT 3:**

ATTEMPTED EXTORTION.

C I MOOSA
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA
05 NOVEMBER 2021

Counsel for State:	**Adv M R Molatudi**
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	Mpumalanga
Counsel for Accused	**Adv I Erasmus**
Instructed by:	**Legal Aid SA**
	Mbombela
	Mpumalanga
Dates of hearing:	**13 October 2021**
	14 October 2021
	15 October 2021
	02 November 2021
	04 November 2021
Date of judgment:	**05 November 2021**