

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: SS19/2008

In the matter between:

THE STATE

and

**ERIC DUTYWA
BONGANI POKOLO
SENZO SIKELE
THEMBALETHU KHAMENI
JOSEPH MATLABE**

**Accused No. 1
Accused No. 2
Accused No. 3
Accused No. 4
Accused No. 5**

JUDGMENT DELIVERED ON 17 MARCH 2009

INTRODUCTION

1. Perry Page, a 60-year old retired businessman and an American citizen from Los Angeles loved South Africa and more particularly the holiday destination, Hermanus, where he spent memorable holidays since his marriage to his South African-born wife, Sally-Anne, more than 25 years ago. According to the community newspaper, the Hermanus Times, Perry loved Hermanus so much that he wanted to have his ashes scattered in the sea bordering the family holiday home.
2. Perry collected a substantial sum of money in America for the Hermanus-cliff path, an environmentally friendly walkway running between the sea and

the holiday home.¹ Perry was indeed a committed friend of South Africa deserving the respect and recognition of all South Africans. The contributions that the Perry Pages of the world make to the economy of South Africa can never be over-estimated.

3. On Wednesday evening, 14 March 2007, Perry and Sally-Anne were relaxing at their holiday home. After dinner he was in the lounge watching television, whilst she was in the master bedroom writing in her diary. She heard a commotion in the lounge and unsuccessfully tried to activate the alarm system. Five villains had entered the house, ironically from the cliff path referred to above. One entered the bedroom where Sally-Anne was. She dodged him and ran past him down the passage towards the lounge. He tried to hold her back and tore her nightdress. In the living room she saw four other rogues, two with very large knives, surrounding Perry. She heard her husband shouting "*What do you want? I will give you anything*". She was grabbed and forced back to the bedroom. Her hands and feet were tied with curtain tiebacks. Her assailant restrained her in the bedroom and demanded money. She told him that there was money in a bag on the kitchen counter, which he duly fetched. Cash and an FNB card were taken and Sally-Anne disclosed the pin code of the card. A lot of noise and frantic talking emanated from the lounge. She became aware that her husband was lying just outside the bedroom door. When she turned around towards him, she was ordered not to look and asked where the safe was. She replied that there was no safe. There was talk about taking a car.

¹ Annexure "M" an extract from the Hermanus Times of 23 March 2007.

Some of the intruders came back to the bedroom since they could not get the car going. Sally-Anne offered to assist them. She was untied and taken through the corridor to the garage. After they started the car and opened the garage door with her assistance, she was taken back to the bedroom and tied up again. When she thought that they had gone, she managed to untie herself and raise the alarm.

4. Sally-Anne is a small-framed, mild-mannered, dignified lady. The horrific trauma that she suffered is too ghastly to contemplate. Despite his offer to give anything, her husband was brutally stabbed to death. During her evidence she was not asked for a detailed description of the murderers. She merely described them as "black men". She was also not asked to identify any of the accused. In the circumstances it is not at all surprising and one assumes that she was too traumatised to remember any details.
5. Apart from the motorcar and the FNB card, R700.00 cash, two watches, a digital camera, a Samsung cell phone, a gold neck chain and a cashmere shawl were robbed.
6. Members of ADT, paramedics and members of the SAPS arrived at the crime scene in no time. It appears as if they professionally took control of and secured the crime scene.
7. An expert forensic pathologist, Dr. Dempers, arrived at the scene of the crime at approximately 06h30 on 15 March 2007. He gave the necessary

instructions to preserve any possible forensic evidence. A cyanoacrylate test was for example envisaged to be performed in order to detect any latent fingerprints on the body and instructions were given that minimal disturbance of the skin should occur.

8. On 15 March 2007 at approximately 16h30 a post-mortem examination was performed by Dr. Dempers and the necessary forensic samples were secured. The chief post-mortem findings include an observation of eight stab wounds, an incised wound, as well as some abrasions. The cause of death was a loss of blood. One of the wounds in the abdomen was, in the opinion of Dr. Dempers, either peri- or post-mortem as it did not appear to have bled. He also expressed the view that the deceased was probably prone when stabbed in the liver. Trace evidence was collected from the clothing and both hands of the deceased.
9. An employee of the security company, ADT, Mr. Jacques de Villiers, returned to the crime scene in order to establish where the perpetrators gained access to the house. In the cliff path, adjacent to the garden wall and under a bush, he noticed a small piece of folded paper, lying partly under a bush. He examined it and discovered that it was an ATM-slip for a cash withdrawal of R50.00 at 19h45 on 14 March 2007. Mr. de Villiers handed this withdrawal slip to the SAPS.
10. This withdrawal slip was forwarded to the forensic laboratory for fingerprinting but was misplaced. Only a photostatic copy of this document

was handed in as evidence during the trial. Adv. Loots, acting on behalf of Accused No. 1, Mr. Eric Dutywa, objected to the admissibility of this photostatic copy. For the reasons stated hereunder this objection was overruled and the evidence allowed.

11. The sister of Mr. Eric Dutywa, Accused No. 1, Ms Madonna Ndumo, was the holder of the account in respect of which the withdrawal of R50.00 was made shortly before the murder. The said amount was withdrawn at an autobank situated at the Gateway Shopping Centre (also known as the Spar Centre) on 14 March 2007 at 19h45. This ATM is about 5 to 6km from the crime scene.
12. The account in respect of which the FNB card was stolen, is a non-resident bank account held by the deceased and his wife at the First National Bank in Hermanus. On 14 March 2007 six withdrawals of R500.00 each, was made from this account at the same autoteller machine from 21h39 to 21h43.
13. On 15 March 2007 a cash deposit of R2 500.00 was made into the bank account of Ms Ndumo at Standard Bank.
14. On Friday, 16 March 2007, Ms. Ndumo was arrested and her brother, Accused No. 1, was arrested the following day.

15. The Hermanus Times of 23 March 2007 extensively reported on the senseless killing. The following information was conveyed:

15.1. Mr Eric Dutywa (Accused No. 1) and his sister Ms Madonna Ndumo both of 1501 White City, Zwelihle, appeared in court as suspects.

15.2. An ATM deposit slip found at the scene showed that Accused No. 1 and his sister, who share the same pin number, withdrew R50.00 at Gateway Spar an hour before the robbery.

15.3. They used a bank card stolen from the Page's residence and the pin number they had demanded to withdraw R3 000.00 cash at the same Gateway Spar ATM.

15.4. Accused No. 1 and his sister then deposited the money into their account.

15.5. The stolen items were a few personal items including a purse with cash, a cell phone, a camera and a bank card.

15.6. Anyone with information that could lead to the arrest of the other two suspects were asked to contact the investigating officer at certain telephone numbers supplied.

16. In the 30 March 2007-edition of the Hermanus Times, it was stated that two other suspects were identified and would probably also apply for bail during the next hearing.
17. The Hermanus Times of 6 April 2007 reported that all the suspects involved in the murder had by then been arrested. It was specifically reported that Senzo Sikele (Accused No. 3) and Bongani Pokolo (Accused No. 2) had been arrested.²
18. It is not clear when Accused No. 4, Mr. Thembaletu Khameni, was arrested but Accused No. 5, Mr Joseph Matlabe, was arrested on 22 May 2007. This arrest took place after the state witness, Ms Sibisi, disclosed to the police on 21 May 2007, that Accused No. 1 was involved in the murder.
19. At least some of the accused applied for bail and bail was granted to Accused No. 2 and 3 during about June 2007. During this bail application Accused No. 2 and 3 disclosed their alibi-defences. Accused No. 2 specifically directed his legal advisor and the SAPS to the taxi rank in Hermanus in order to locate a register showing that he left Hermanus for the Eastern Cape on the 14th of March 2007, before the murder was committed.
20. The facts outlined above are either facts admitted by the accused or evidence which are not in dispute that emerged during the trial.

² See Annexure "M".

THE CASE FOR THE STATE

21. The five accused were indicted to appear in this court on 2 February 2009. They pleaded not guilty. Accused No. 1 gave no explanation of plea. Accused No. 2 and 3 both raised alibis as defences. Accused No. 4, and Accused No. 5, Mr. Joseph Matlabe, elected to exercise their right to remain silent. Subsequently it appeared that Accused No. 5 in fact denied all the allegations against him and maintained that he was at home on 14 March 2007 in the normal course of events. All the accused made certain formal admissions in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977. Certain additional admissions were made about the banking transactions referred to above.
22. The decisive evidence in considering this case, is the evidence of Ms Sibisi, Mr Mpuma and Ms Ndumo and we will deal with their evidence in some detail.

MS MAPASEKA SIBISI

23. Ms Sibisi is originally from Odendaalsrus, Orange Free State and has been living in Hermanus since January 2007. Initially she had lived with the brother of Accused No. 5, but after a disagreement she moved in with Accused No. 5. In March 2007 she was living with him in a shack in the backyard of the premises of his brother with whom she had been cohabitating before.

24. Ms Sibisi's evidence was that she arrived home from work on 14 March 2007 between 16h00 and 17h00. There was a meeting of Accused No. 5 with some of his friends in the yard outside. He was drawing a map and explaining something to these friends. Ms Sibisi was asked whether she remembered any faces or names. Her reply was that she could not be sure about names as Accused No. 5 was not using "real names".
25. Later that day, at about 20h00, one of Accused No. 5's friends knocked at the door and asked to speak to him outside. Ms Sibisi remained at the door and was ordered by Accused No. 5 to go inside. He was talking to his friends outside. There was also a young lady in their company. When asked whether she recognised anyone outside with Accused No. 5 when she stood at the door, she responded by saying that it was night and that they were wearing caps. She said that she knew one of them as "Eric". She however said that she could not put names to faces. Names were however mentioned, more particularly the names "Bongani" and "Senzo". Ms Sibisi also stated that the persons at the door were preparing to go somewhere. Mention was made that when they leave they must go past the Spar Mall to withdraw money for petrol. Accused No. 5 had earlier arranged with somebody on the phone to pick him up. Accused No. 5 thereafter entered the shack to fetch his bag and then left by car.
26. She also stated that Accused No. 5's friends came to their shack earlier that day, apparently before the second meeting referred to in paragraph 25 above, to enquire about the whereabouts of Accused No. 5. They left a message with her to tell him that they were looking for him.

27. According to Ms Sibisi Accused No. 5 returned alone at approximately 22h30. He had blood on him and was breathing heavily as if frightened. Ms Sibisi asked him what had happened and he said that he met somebody in the street who owed him money and that he stabbed this person. The jacket Accused No. 5 had on was not the jacket he was wearing earlier on when he left. It was the first time that the witness saw the particular jacket. Accused No. 5 also had a bag not belonging to him. He then left the house and locked the door from outside. Ms Sibisi searched the jacket and found a digital camera and a Siemens cell phone. She checked the bag and found a white towel with blood on it and rolls of notes and coins. There were R20.00- and R100.00 notes and the witness estimated the total amount to be about R3 000.00.
28. On 15 March 2007 early in the morning Ms Sibisi and Accused No. 5 had to appear in the Magistrate's Court in Hermanus. Accused No. 5 wrote a letter to the Magistrate explaining that he is working out of Hermanus. Ms Sibisi returned from Court with an order that they must vacate the shack where they were living before 12h00. The witness found Accused No. 5 drunk and with blood on him as if he had been involved in a fight. He had already arranged for another place for them to stay. From then on Accused No. 5 never stayed at home. He would return home late, at about 03h00. He would also phone her on occasion and ask whether anybody had been looking for him. Ms Sibisi said she was told to say that he went to Cape Town.

29. After the 14th of March 2007 Accused No. 5 regularly requested Ms Sibisi to buy the local newspaper, the Hermanus Times. She read in this newspaper that Eric's sister had been arrested. That very same afternoon Accused No. 5 said that they must go to Eric's place. On arrival Accused No. 1 confirmed that his sister had been arrested. Accused No. 5 wanted to know what they must do and Accused No. 1 responded by saying that there was nothing he could do except wait for the police to arrest him.
30. The witness was asked whether she knew why Ms Ndumo was arrested and she answered that it was said that a white person had been killed.
31. Soon thereafter Accused No. 5 told her that he was going home to Odendaalsrus. He later phoned to say that he was home. She asked him to go to her grandmother who also lives in Odendaalsrus. It was reported to her that he never went there.
32. Ms Sibisi testified that when Accused No. 5 left for Odendaalsrus, she was under virtual house arrest. She was closely watched by one of Accused No. 5's friends, a certain Pule. Her cell phone was taken away from her and Accused No. 5 phoned her on Pule's cell phone.
33. When Accused No. 5 returned on 18 May 2001, they had an argument and he told her to leave their house. He also assaulted her. He would not return her belongings and arranged for her to be followed. Later he sent a friend to apologise on his behalf and to say that he had been under stress.

On Sunday, 20 May 2007, she returned to his place of abode to recover her belongings which he still refused to give to her.

34. Ms Sibisi explained that she went to the police on Monday, 21 May 2007 in order to recover her clothes and personal effects from Accused No. 5. She was questioned by the police and in the end had no choice and had no choice but to tell the police what had happened. She said that "I had to tell the whole truth".
35. Under cross-examination by Mr. Loots for Accused No. 1, Ms Sibisi specifically said that when she went to the police on 21 May 2007 she spoke to a female Xhosa interpreter and that she told the interpreter about the meeting on 14 May. She specifically told her that Eric, Senzo and Bongani were involved.
36. When Mr. Loots put it to her that she would not have been able to recognise any of the accused since they were wearing caps, she responded by saying that Accused No. 1 was wearing a woollen hat. She also stated that Accused No. 1 came to Accused No. 5's house on several occasions. She started seeing the other accused on the 14th of March 2007.
37. When cross-examined about the name "Eric", she said that she read the name in the Hermanus Times on the 15th of March 2007. When she went to Eric's home on 16 March 2007, she realised that Accused No. 1 was

also Eric, because the address where she met him and the address in the Hermanus Times, corresponded. She also specifically explained that when she went to Accused No. 1's home on 16 March *"My mind gave me a certain belief that it must be him"*.

38. During cross-examination by Ms Andrews for Accused No. 2, Ms Sibisi alleged that *"they came several times before they left with Accused No. 5"*. She said that she could not match names with faces. She heard the name "Bongani" many times.
39. When adv. Giyose for Accused No. 3 put it to Ms Sibisi that his client will deny being at Accused No. 5's house on 14 March 2007, she replied that all the accused knew one other very well, and that *"every move that Accused No. 5 made, was made with them"*. She also testified that she saw Accused No. 1, 3 and 4, together with Accused No. 5, at their house on the 14th of March 2007. She however specifically stated that she was not sure about Accused No. 2.
40. When cross-examined by adv. Mahlasela for Accused No. 4, she repeated that she was quite certain that she saw Accused No. 3 and 4 but not Accused No. 2. She then testified that she also saw Accused No. 4 at their house on the 13th of March 2007. He was asking for Accused No. 5. On the 14th of March 2007, she saw all their faces. They were in one another's company from 16h00 onwards on the 14th of March 2007. She again

confirmed that she could not see their faces when they came to Accused No. 5's shack at 20h00 on 14 March 2007.

41. Under cross-examination by adv. Cox, acting for Accused No. 5, Ms Sibisi said that the towel that she found in the bag of Accused No. 5 was handed to the investigating officer, Inspector Payne, and that he put it in a plastic bag.

JOSEPH MPUMA

42. Mr Joseph Mpuma testified in chief that in the early morning on Thursday, 15 March 2007 he attended a meeting in Tambo square. The purpose of the meeting was to make burial arrangements for a certain deceased and also for community members to contribute to the funeral expenses. Mr. Mpuma said that he met Accused No. 2 at this funeral meeting. He indicated that he had known Accused No. 2 for some time. When he was asked in chief whether he had a conversation with Accused No. 2 at the funeral meeting, he explained that after he left, he again met Accused No. 2, not far from where the funeral meeting had taken place.
43. At this subsequent meeting Mr. Mpuma saw that Accused No. 2 had a silver watch and two cell phones as well as money on him. He estimated the amount of money in folded new notes to be about R1500.00 to R2 000.00. Mr Mpuma testified that he asked Accused No. 2 about the items in his possession. Accused No. 2 appeared to be sober and spoke freely to the witness. According to Mr Mpuma Accused No. 2 told him that

“they went to rob downtown”. Accused No. 2 allegedly said that he and Accused No. 3 found a white man in his house and stabbed and murdered him, whereupon they placed the body in the victim's car and dumped the body at a refuse dump. Accused No. 2 also said that he took possession of the watch during the robbery. Mr Mpuma described the watch as a silver-goldish watch. Mr Mpuma confirmed that Accused No. 2 contributed R100.00 towards the funeral expenses.

MS MADONNA NDUMO

44. Ms Ndumo testified that she was the sister of Accused No. 1. In the early part of 2007 she had been living with her brother (Accused No. 1) and his girlfriend as subtenants in White City, Zwelihle, Hermanus. She was unemployed at the time and was and still is a grade 12 pupil at night school. She attended lectures from Monday to Friday between 18h00 and 20h00. The witness testified that Accused No. 1, worked at a guest house in Hermanus at that time. According to Ms Ndumo she had no income of her own and was maintained by Accused No. 1.
45. She stated that she had a bank account at Standard Bank which she opened on behalf of her brother as he did not have an identity document. She was not in a position to provide the account number as the police confiscated “everything” at the time.

46. The witness was referred to a printout of certain banking transactions in respect of her account.³ She acknowledged that she made a deposit of R2500 into the account and that she received the cash from her brother on the same day that she made the deposit. She could not recall the date of the transaction. It was put to her that the transaction is reflected on the printout as being made on Thursday 15 March 2007. She confirmed that she received the money from her brother on the same day that she made the deposit. She deposited the money at the bank by completing a deposit slip. Ms Ndumo did not know the source of the money and was not given an explanation by her brother nor did she ask for an explanation. She had been given money by her brother from time to time.
47. During examination-in-chief Ms Ndumo also confirmed the withdrawal of R50.00 from the account as reflected on the said printout on the 14th of March 2007.
48. Ms Ndumo further testified that she had been issued with an ATM card and pin code and that she was the only person to use the card as her brother could not operate the machine.
49. During cross-examination Ms Ndumo specifically stated that she did not know Accused No. 5. Accused No. 2 did not live far from where she stayed and she had seen him pass by in the street. She also know his name. She knew the names of Accused No. 3 and 4 as "Senzo" and "Thembaletu"

³ Exhibit K.

respectively. She also knew Accused No. 3 by sight but had not spoken to either Accused No. 3 or 4.

50. Ms Ndumo was asked by the Court whether she had her ATM card in her possession when she made the deposit of R2500. She responded that she did not have the card with her at the time as she did not need it to deposit the money at the bank and that the card was at home at that time.
51. She was also asked by the Court whether she made the withdrawal of the R50.00 at the SPAR Shopping Centre on the 14th of March 2007. Ms Ndumo said that she used a bicycle to go to the Centre from where she lived. She went there on her own and withdrew the money to buy something to eat. Ms Ndumo also confirmed that on this occasion the ATM produced a withdrawal slip.
52. She was requested whether she could explain how it came about that the withdrawal slip was found outside the house where the murder was committed the following day. Her response was that she did not know. Ms Ndumo could not recall what she did with the withdrawal slip produced by the machine, whether she left it at the machine or left it on the table at home.
53. Finally it was put to her that she had said previously that she made a deposit at the bank into the account the following day, the 15 March 2007 and that on that occasion she did not have the ATM card with her and had

left it at home. Responding to a question by the Court where precisely at home she left this card, she said in a jacket behind the door where she normally keeps it.

54. Ms Nduma testified that she was arrested in connection with the case on the day following the incident, more particularly on Friday, 16 March 2007. She was in custody for two weeks. Accused No. 1 was also arrested soon afterwards, probably on Saturday the 17th of March 2007.

APPLICATIONS FOR DISCHARGE AND THE ADMISSIBILITY OF CERTAIN EVIDENCE

55. At the end of the State case, all the accused applied for discharge in terms of section 174 of the Criminal Procedure Act. Before the applications were heard two issues concerning the admissibility of evidence were determined.
56. It was ruled that the copy of the withdrawal slip was admissible despite the fact that the original went missing. All the accused made formal admissions in terms of section 220 of the Criminal Procedure Act concerning the contents of the withdrawal slip. The information contained in this document is therefore not in dispute. The relevant dispute is whether the original withdrawal slip was discovered near the crime scene on the morning after the murder. In the circumstances the copy of the original was admitted as evidence.

57. The other question of admissibility concerns the confession/admission allegedly made by Accused No. 2 to the witness Mr Mpuma. This evidence was admitted against both Accused No. 2 and 3, subject to re-assessment. In light of the conclusion as to the credibility of Mr Mpuma reached in this matter, as set out hereunder, it is not necessary to reassess the admissibility of this confession/admission.

THE DEFENCE CASES

58. All the accused gave evidence of their non-involvement in the crime. They all testified about what they were doing on the evening of 14 March 2007 when the crime was committed.
59. Accused No. 1 admitted that he handed over an amount of R2 500.00 to his sister to bank for him on Thursday, 15 March 2007. Mr Franco Scott testified that he was the manager of the guesthouse where Accused No. 1 was working at the time of the murder. Accused No. 1 was earning R1 860.00 per month. He also borrowed R300.00 against his salary during February 2007.
60. Accused No. 1 explained his possession of this amount of R2 500.00 by alleging that he was involved in a money-lending business. He lent an amount of R1 250.00 to a certain couple at the end of February 2007 and was repaid an amount of R2 500.00 on 14 March 2007.

61. Accused No. 2 testified in detail that he departed from Hermanus for the Eastern Cape at about 14h30 on the 14th of March 2007 with a friend, Mr. Lulama Ngwebo. Mr. Ngwebo also testified and confirmed Accused No. 2's version. Ms Lungiswa Mnyamana an employee of the Hermanus United Taxi Association who was on duty at the taxi rank in Hermanus on 14 March 2007 was also called as a witness. She confirmed that an extract from a register handed in as an exhibit⁴ was completed and signed by her on the day in question. In her own handwriting she recorded the names of Accused No. 2 and Mr. Ngwebo, as departing from Hermanus for Bellville by taxi on that day. She specifically testified that the last taxi for Bellville leaves Hermanus at about 18h00 and that she normally also works until 18h00.
62. Accused No. 2 went further and called three witnesses to confirm that neither he or Mr Mpuma attended any of the two funeral meetings held at that time, more particularly meetings held on 13 March and 16 March 2007. The evidence of all these witnesses were that Mr Mpuma in fact never attended any funeral meeting.
63. The two funeral meetings in question relate to the death of the brother of the witness, Mr Nobobo. Mr Nobobo specifically remembers that the body of the deceased was transported to the Eastern Cape on 16 March 2007. All the witnesses agreed that the first meeting took place on a Tuesday and the second meeting on a Friday.

⁴ Exhibit O.

64. Accused No. 3's evidence entailed that he was planning to leave for the Eastern Cape with Accused No. 2 on 13 March 2007. However, he was delayed, missed his taxi and could only leave for the Transkei the following day on 15 March 2007.
65. Accused No. 3's evidence that he was at a barber shop and at home on the evening of the 14th of March 2007 when the murder was committed, was confirmed by two further witnesses, a friend as well as his girlfriend. These witnesses related the occurrences about which they were giving evidence to an evening when Accused No. 3 was preparing to go to the Eastern Cape.
66. Accused No. 5 also denied any involvement with the murder whatsoever. He said that the evidence of Ms Sibisi is blatantly untruthful. He admitted purchasing the Hermanus Times to look for jobs for both himself and Ms Sibisi. He further testified that he left for Welkom and returned to Hermanus on the 18th of May 2007. On returning home he found Ms Sibisi and a group of other people at his house smoking dagga and drinking. He furthermore noticed that certain items were missing. An argument broke out and he told her to leave his home. She got very angry and he slapped her. She was incredibly cross, angry and upset with him. The following Monday he was arrested. He further testified that he was involved in an identity parade and that he was not pointed out. The police also took a sample of his blood and he was also fingerprinted.

THE LEGAL POSITION CONCERNING THE EVALUATION OF EVIDENCE AND OTHER RELEVANT LEGAL ASPECTS

67. Both Mr Loots appearing for Accused No. 5 and Mr Andrews appearing for Accused No. 1, referred to the fact that the State's case is based on circumstantial evidence. The following well-known citation from R v Blom⁵ should therefore be considered.

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

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

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

⁵ 1938 (AD) 188 at 202 - 203.

68. The considerations concerning the evaluation of evidence discussed in the seminal judgment of S v Van der Meyden⁶, referred to by adv. Andrews, include the following:

*"1. The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt."*⁷

*"2. ... the conclusion of a criminal court is not to be reached merely by choosing what it considers to be the better of two competing versions (Hlongwane's case supra at 341A; S v Singh 1975 (1) SA 227 (N)). Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true- the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation."*⁸

⁶ 1999 (1) SACR 447 (W).

⁷ P. 448f – g.

⁸ P. 449b – e. See Also S v V 2000 (1) SACR 453 (SCA) at para 3 on p.454j – 455j; . S v Lubaxa 2001 (2) SACR 703 (SCA) at para 35 on p. 711d.

*"3. A court does not base its conclusion, whether it be to convict or the acquit, on only part of the evidence. The conclusion which it arise at must account for all the evidence."*⁹

*"4. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend upon the nature of the evidence which the court has before it. What must be born in mind, however is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*¹⁰

69. Adv. Giyose for Accused No. 3 persisted with the argument that Accused No. 3 should be found not guilty, since Accused No. 3 was entitled to be discharged at the end of the State's case. He submitted that the Court erred in dismissing Accused No. 3's application for discharge at that time. He pointed out that the evidence of Mr Mpuma concerning the confession/admission was vicarious hearsay or double hearsay as far as Accused No. 3 is concerned. Since there was also the evidence of Ms Sibisi implicating Accused No. 3 in the meetings prior to the crime being committed. It is however not necessary to re-assess the admissibility of the

⁹ P. 449h.

¹⁰ P. 449j – 450b. See also S v Van Aswegen 2001 (2) SACR 97 (SCA) at 100f – 101e.

alleged confession/admission made by Accused No. 2, to Mr Mpuma, as against Accused No. 3, because of the conclusion reached hereunder.

70. Adv. Cox also submitted that the evidence of Ms Sibisi implicating Accused No. 5 was that of a single witness. Although section 208 of the Criminal Procedure Act states that an accused may be convicted of an offence on the single evidence of any competent witness it was specifically concluded in R v Mokoena¹¹ that this section should not be invoked where the witness has an interest or bias adverse to the accused. The Mokoena-case was however qualified in S v Webber¹² where it was stated that the intensity of the bias must be determined by taking all the evidence into account.
71. Regarding the cogency of a dock identification, reference is made to S v Moti.¹³ In this instance there was evidence of an identity parade but it was not disclosed by the State whether Ms Sibisi was one of the witnesses attempting to identify the accused. In view of the risks involved in dock identifications, the Court should recognise the evidence of identification of a suspect at an identification parade as not only an effective investigative procedure but also as a procedure serving an important evidential purpose that can provide the prosecution with evidence that is of far more persuasive value than a dock identification which by itself is suspect.¹⁴

¹¹ 1932 (OPD) 79 at 80.

¹² 1971 (3) SA 754A at 759D to E. See also S v Sauls 1981 (3) SA 172 (A) at 179G – 180G.

¹³ 1998 (2) SACR 245 (SCA) at 257h – j. See also S v Mthetwa 1972 (3) SA 766 (A) at 768. S v Dlala 1962 (1) SA 307 (A) at 310 and also PHS van Zyl in De Rebus July 1978 p. 343 "Identification in Criminal Trials".

¹⁴ S v Eric Dina and Others, unreported judgment by Griesel J in Case Number A143/2004 handed down in the High Court of South Africa (CPD) on 13 September 2004 (para 25 on p. 13).

72. Since it was submitted by the State that Accused No. 1 was telling a lie when trying to explain where he sourced the R2 500.00 that was paid into the account of his sister, it should be taken into account that a lie by an accused does not necessarily justify a conclusion that such accused is guilty of the offence charged with.¹⁵

EVALUTATION OF THE EVIDENCE

73. I agree with adv. Stephen SC, who appeared for the State, that Accused No. 1's explanation that he was involved in a money-lending business as a sideline and that the amount of R2 500.00 was a repayment on a loan, was obviously false. He was not able to describe the nature and extent of his business in a credible manner nor could he properly explain where he obtained the funds from for his business. He could not do the most simple calculations that a moneylender should be able to do. The fact that he was forced to borrow R300.00 from his employee in February 2007, is also a factor mitigating against his version. I therefore conclude that Accused No. 1 was lying in this respect.
74. Accused No. 2 and the witnesses called by him, all referred to the 13th of March 2007 as the date of the first funeral meeting. There may however possibly be some doubt about their independent recollection of this specific date. The evidence of Mr Nobobo however displaces any doubt. He could

¹⁵ Bewysreg by Schmidt (4th Edition) p. 106 to 109; S v Lujaba 1987 (1) SA 226 (AD) at 235H to 236F; S v Steynberg 1983 (3) SA 140 (AD) at 147A to 148D; S v Mtsweni 1985 (1) SA 590 (AD) at 593A to 594D.

relate the dates to the date when his brother's body was transported to the Eastern Cape, more particularly 16 March 2007.

75. The evidence of Accused No. 2 and his witnesses therefore overwhelmingly establishes that the first funeral meeting was held on Tuesday 13 March 2007 and the second meeting on 16 March 2007. It is also clear that neither Accused No. 2 or Mr Joseph Mpuma attended any of these occasions. Mr Mpuma's evidence was that the meeting attended by both him and Accused No. 2 was held on 15 March 2007. The evidence by and on behalf of Accused No. 2 establishes that Accused No. 2 was not present in Hermanus from 18h00 onwards on 14th March 2007. This rules out any possibility of Accused No. 2's complicity in the murder. This conclusion is corroborated by the fact that Accused No. 2, despite minor contradictions between what he said in his evidence and what was stated in his explanation of plea and in statements made by his counsel in cross-examination, was a confident and impressive witness. All the witnesses furthermore testified that Mr. Mpuma never attended a funeral meeting. The evidence of Mr. Mpuma must therefore be rejected.
76. As far as Accused No. 3 is concerned, once the evidence of Mr Mpuma is excluded, the only remaining evidence against Accused 3, is that of Ms Sibisi that he was present at the meeting or meetings on the afternoon of 13 and 14 March 2007 and that his name was mentioned at the further meeting at 20h00. Accused No. 3 was also a persuasive witness. His version is corroborated by Accused No. 2 and his travel companion, Mr. Lulama Ngwebo. As stated above, Accused No. 3 also presented the

evidence of a friend and girlfriend to confirm his alibi. There is no reason to doubt the veracity of the evidence of these two witnesses.

77. In our opinion, adv. Stephen, was correct in arguing that much of the State's case against the accused rests on the evidence of Ms Sibisi. His submission that she could not have known that the police had or would acquire other evidence against Accused No. 2 and 3 which emanated from Joseph Mpuma is however obviously not correct. All the salient aspects of her version of the crime, including the names of Accused No. 2 and 3, appeared in the editions of 23 and 30 March 2007 of the Hermanus Times. Her evidence was that she read about the incident in the Hermanus Times.
78. As stated above, she averred in her evidence in chief that she concluded on 16 March 2007 that Accused No. 1 was involved after reading about his involvement in the Hermanus Times on 15 March 2007. She was recalled and confronted with the fact that the Hermanus Times did not report the name of Accused No. 1 before the edition of 30 March 2007 appeared. She then responded by stating that she must have read about these particulars somewhere else, but could not supply an plausible explanation in this respect.
79. It is significant to note that the items allegedly discovered by Ms Sibisi when she examined the jacket and bag brought home by Accused No. 5 corresponds to the items listed in the Hermanus Times.

80. Ms Sibisi's evidence that "*my mind gave me a certain believe that it must be*" Accused No. 1 is significant. Her evidence was that she came to this conclusion after reading about the incident in the Hermanus Times. The possibility that her evidence was influenced by the reports in the Hermanus Times can in our opinion not be excluded as a reasonable possibility.
81. Ms Sibisi's evidence is compromised by the fact that she mentions the names of Accused No. 2, 3 and 4 as being involved in what she perceived as a conspiracy to commit the murder under investigation. Once it is accepted that they are not guilty, the question arises why Ms Sibisi involved them. Her evidence was furthermore not convincing in a number of other respects.
82. In examination in chief, she did not mention Accused No. 4 at all. Under cross-examination she rather aggressively made allegations against some of the accused and specifically Accused No. 4 that was not made during her examination in chief. She for example referred to a meeting of the accused where Accused No. 4 was present at her residence on he 13th of March 2007.
83. Her estimation of the cash in Accused No. 5's possession when he returned to their residence on 14 March 2007 is also suspect. An amount of R3 000.00 was withdrawn from the bank account of the Page's. Ms Sibisi estimated without comment that the amount in the possession of Accused No. 5 was R3 000.00.

84. The State did not offer any evidence of the identity parade that was conducted. The question arises whether Ms Sibisi attended this parade and whether she attempted to identify the accused. On the other hand her dock identification of the accused was not convincing.
85. She clearly had a motive for testifying against Accused No. 5. She furthermore only approached the police more than two months after the incident when Accused No. 5 ended their relationship and assaulted her.
86. Ms Sibisi allegedly handed a towel with blood marks that she took from Accused No. 5 to the investigating officer. No forensic evidence was presented about this towel and the investigating officer, Inspector Payne, did not refer to this towel in his evidence. Ms Sibisi's evidence about the towel was therefore not corroborated in this respect, as it easily could have been done.
87. The State was not assisted by the fact that none of the items stolen were ever recovered. Ms Sibisi furthermore mentioned a Siemens cell phone found in the possession of Accused No. 5, whereas a Samsung cell phone was in fact stolen from the Pages.
88. Ms Ndumo was originally charged. For some or other reason unknown to this court the charges were withdrawn. It is also not clear why her evidence was at all presented by the prosecution. She did not further the case of the State but rather that of the accused.

89. Ms Ndumo's evidence was that only she knows the pin number of the Standard Bank account where the withdrawal of R50.00 was made shortly before the murder. She also specifically stated that Accused No. 1 cannot operate an ATM. Her explanation that she cannot remember whether she left the withdrawal slip at the ATM or took it home, is not convincing at all. The fact of the matter is that this slip was found at the crime scene soon after she made the withdrawal. There was also a contradiction whether she utilised the withdrawal of R50.00 to buy something to eat or groceries. We conclude that her evidence concerning the withdrawal slip is false. A reason for this false evidence is possibly to protect her brother, Accused No. 1. This however is not the only reasonable inference. The possibility that Ms Sibisi herself lost the withdrawal slip near the crime scene, can certainly not be excluded as a reasonable possibility.
90. The fact that Accused No. 1 was telling a lie about where he obtained the R2 500.00 from is also not conclusive. The fact of the matter is that Accused No. 1 could have been lying to protect his sister. He could also have been lying to conceal the fact that he had acquired the amount of R2 500.00 from another illegal source.

CONCLUSION

91. There are no words to describe the extent of the tragedy that occurred. It is difficult to imagine the intensity of the trauma suffered by Perry and Sally-Anne Page. Every South African should be ashamed that American

citizens so well-disposed to South Africa are treated so cruelly, brutally and inhumanely.

92. It is also disconcerting that the apparently thorough and professional examination of the investigating officer, Inspector Payne, and the other members of the SAPS involved could not secure a conviction. There is no direct evidence before this Court of the result of the forensic testings. It is disconcerting to think that the perpetrators of this horrendous crime are still at large.
93. In all the circumstances we are unanimous in our conclusion that the accused must receive the benefit of the doubt. All the accused are found not guilty of all the charges.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

WH VAN STADEN, AJ

17 MARCH 2009