

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

2 August 2023

DATE

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SIGNATURE

CASE NUMBER: SS100/2022

In the matter between:

THE STATE

and

VUSI MICHAEL DUBE

ACCUSED

JUDGMENT

DOSIO J:

Introduction

[1] The accused is arraigned on a count of murder read with the provisions of s51(1) of Act 105 of 1997. It is alleged that the accused murdered Patricia Babekile Tshabalala on 13 July 2021 at 3065 Kaalfontein, Extension 5, Ekurhuleni.

[2] Prior to the accused pleading, the court apprised the accused of the provisions of the minimum prescribed sentence of life imprisonment as the charge is one of murder envisaged in terms of s51(1) of Act 105 of 1997. The accused understood. The court also apprised the accused of his right to have an assessor, however, the accused elected to proceed without an assessor.

[3] The accused is represented by Advocate Qoqo and the State is represented by Advocate Deoraj. The accused understood the charge and pleaded not guilty. No plea explanation was made.

[4] At the inception of the trial, formal admissions in terms of s220 of Act 51 of 1977 were handed in by agreement and marked as exhibit A. The s220 admissions are the following:

- (a) That the deceased is the person named in count 1 of the indictment, to wit, TSHABALALA BABEKILE PATRICIA.
- (b) That the deceased died on 13 July 2021 as a result of injuries consistent with sharp force to the neck, which the deceased sustained on 13 July 2021 at or near 3065 Kaalfontein 05, in the district of Ekurhuleni North.
- (c) That the body of the deceased sustained no further injuries from the time on which the injuries were inflicted on 13 July 2021 until a post mortem examination was conducted thereupon on 15 July 2021.
- (d) That Dr. E.A Apatu conducted a post mortem examination on the deceased, TSHABABALA BABEKILE PATRICIA on 15 July 2021 and recorded her findings on Exhibit 'B'.
- (e) That the correctness of the facts and findings of the post mortem examination as recorded on Exhibits 'B' by Dr. E.A Apatu are admitted.
- (f) That a photograph album depicting the crime scene- attached hereto as Exhibit 'C', correctly and accurately depicts the crime scene and observations recorded.
- (g) A statement of Lesibe Andrew Kekae marked as exhibit 'D'.

The evidence

[5] The following witnesses were called by the state namely, Nonhlanhla Kekae, Charmaine S bongile Tshabalala, Tebogo Nelson Monyelo, Phaladi Nonyana, Lesiba Andrew Kekae, Doctor Emefa Apatu and Nosipho Ngcobo. The accused then testified.

Nonhlanhla Kekae

[6] This witness testified that on 13 July 2021 at 18h00 she received a call from her younger sister Charmaine asking her to go to her mom's place. She proceeded with her husband to her mom's place. They met her uncle outside her mom's house who informed them he was going to call an ambulance. She then went into the house and saw Vuyisele (the accused) in the bathroom. She asked the people in the house to go outside. The accused was sitting in the bathroom behind the toilet and his legs were preventing the door being opened. This witness's husband, by the name of Andrew had to push the door open enabling access to the bathroom. There was blood on the floor, door and toilet. On the floor were broken bottles. Right behind the door lay the deceased, who is this witness's mother. The deceased was in a mess. She was wearing a torn t-shirt and her breasts and stomach were exposed. This witness believed that a fight had ensued between the accused and the deceased. On the deceased's neck was a black cotton cloth which was wrapped around her neck. There was a visible stab wound to the neck. This witness asked the accused what was going on and he merely mumbled saying 'my wife, my wife'. This witness was unable to call an ambulance so she decided to take her mother to the clinic herself. When she returned into the house she saw the accused wrapping her mother up with a blanket in order to carry her to the car. The accused accompanied them to the clinic. At the clinic they were told that the deceased had passed away and they were asked why did they take so long to bring the deceased as she had passed on long before.

Charmaine Sbhongile Tshabalala

[7] This witness testified that on 13 July 2021 whilst at a party at a friend's house, someone came up to her at around 18h00 and told her that her mother was lying on the floor in the toilet and that she was deceased. This witness rushed home and telephonically called her older sister called Nonhlanhla. She found her mother lying on the floor in the toilet. The toilet seat was full of blood. She later established her sister had taken her mother to the clinic. She was later told her mother had passed away. This witness stated when she initially arrived at her parent's house there were a lot of people talking inside the house. This witness did not pay attention to the neck and as a result she did not notice whether there was anything around the deceased's neck. This witness stated that the accused and the deceased had a good relationship, but during weekends they would fight about her sister, Chantal, that used to steal. Every weekend her parents would consume liquor. On one occasion, the accused assaulted the deceased with an axe on the head. This witness was later recalled as the defence wanted to

put a certain version to her, namely, that this witness had never mentioned in her statement that at some point the accused had hit the deceased with an axe, to this, the witness replied that she had never been asked that question before. She was adamant that every time the accused had consumed alcohol he would become abusive towards the deceased and hit her and that on one occasion he even hit her with a spade.

Tebogo Nelson Monyelo

[8] This witness stated that on 13 July 2021 he went to visit friends who were fighting amongst themselves. He asked one of his friends Phaladi to intervene. Phaladi came out of the house where the couple were fighting and had nothing to say. The friends this witness was talking about was the accused and his wife who is the deceased. When he got there he found the accused and the deceased drinking. He did not notice any animosity between the accused and the deceased as they were loved by everyone. The accused went into his own house followed by the deceased. He did not see what happened. He was told by a certain person by the name of Vumile that a fight started between the accused and the deceased. This witness knows the accused and the deceased for 15 to 16 years. This witness stated that when the accused and deceased would drink alcohol they would fight.

Phaladi Nonyana

[9] This witness stated that he arrived at the house of the accused and deceased on 13 July 2021 at four in the afternoon. He stated the deceased was already drunk. The accused and the deceased were sitting across their house in the neighbour's premises. The deceased then left and went to her house followed by the accused. Vumile then came to this witness and said that the accused was busy strangling the deceased. This witness went in to the house of the accused and the deceased and he saw the accused strangling his wife. Both the hands of the accused were criss-crossed in front of the deceased's throat. He then separated them. The accused stopped strangling his wife. The accused told him that the deceased had made him lose his job and that his kids do not listen to him. This witness saw the deceased wiping blood from the side of her head. This witness stated that the accused had used a broomstick to strike the deceased on her head.

Lesiba Andrew Kekae

[10] This witness stated that on 13 July 2021 at 18h00 he and his wife Nonhlahla were called by Nonhlahla's little sister, Charmaine, to go to the mother of his wife as the mother had been stabbed. When they arrived at the mother's house, there were a lot of people there and they met his wife's uncle who informed them he was going to call the ambulance. They went into the house and found the mother seated in the bathroom. She had been stabbed. This witness told everyone in the house to get out. The accused was also seated in the bathroom and when this witness asked him to open the door the accused refused. This witness then forcefully pushed the door open. The accused was seated on the left side of the bathroom with his legs behind the door. The toilet walls and floor were covered in blood. His wife stepped into the bathroom to check the pulse of her mother. He also checked the mother's pulse but there was no pulse. Whilst doing this, he had to slide down a dark black/bluish cloth, which looked like a t-shirt, that was around the deceased's neck. The cloth was tightly twisted around the deceased's neck. He then noticed wounds on her neck and upper part of the deceased's chest. This witness and his wife then called the ambulance. The accused tried to prevent this witness's wife from going out but this witness held the accused's shoulder and they exited the house. They then decided to take the mother to the clinic. They returned to the bathroom and they found the accused wrapping up the deceased in a blanket. This witness and Tshiamo then lifted the deceased and carried her, using the blanket, to the car. After lifting her, they saw a lot of blood on the floor and it looked like it had been there a long time as it had already clotted.

Dr Emefa Abra Apatu

[11] This witness is a medical doctor who examined the deceased during a post-mortem held on 15 July 2021. The death had occurred on 13 July 2021. Her findings depict a 3.5cm x 1.5cm penetrating incised wound to the left neck of the deceased. The wound went through the skin into the deeper parts of the body and it was caused by an instrument with at least one sharp edge. This injury caused further problems in that it caused injuries to the deeper lying structures of the left neck. This witness found that there was an injury to the left subclavian vein, which is under the collar bone, and which meets the left common jugular vein which goes up into the neck and splits into two. The cause of the death was the sharp instrument which had created the neck injury.

[12] As regards the internal examination of the deceased, this witness established a deep scalp laceration with an underlying intracranial haemorrhage. This haemorrhage would have been caused by considerable force to the brain. This witness stated it would most likely be caused by the deceased being struck with a blunt instrument on her head.

[13] The only internal injuries were those to the neck and head. There had been a great loss of blood.

[14] Although this witness did not observe a ligature around the deceased's neck when she examined her, she did state that such a cloth would not be put to prevent further loss of blood as such a cloth would obstruct the airways and prevent the deceased from breathing. In addition to the neck and head injuries, this witness saw the following injuries to the deceased:

- (a) a 3 cm x 1cm abraded penetrating incised wound on the left chin.
- (b) a 3cm x 1cm wound on the front chin.
- (c) a 5cm x 0.5cm laceration to the top of the skull.
- (d) a 4cm x 0.5cm laceration to the left skull. As regards the laceration wounds, this witness stated it was caused by a blunt object.
- (e) a 2cm x 0.5cm wound on the underlying left frontal lobe. This was a wound caused by a sharp instrument which went through the skin and stopped on the bone.
- (f) a 4cm x 0.5 incised wound on the underside of the chin on the left caused by a sharp instrument.
- (g) a 3cm x 1cm penetrating incised wound to the right front neck.
- (h) a 4cm x 1cm abraded penetrating incised wound.
- (i) a 2cm x 1,5 penetrating incised wound on the right shoulder caused by a sharp instrument.
- (j) a 1.5cm x 0.6cm abrasion on the upper right chest.
- (k) a 4cm x 3cm incised wounds below the left shoulder.
- (l) a 8cm x 4cm abraded penetrating incised wound to the left breast.
- (m) a 2cm x 0.5cm superficial incised wound.
- (n) a 2cm x 0.5 penetrating incised wound to the left buttocks.
- (o) a 3cm x 1cm penetrating incised wound to the right buttocks.

Nosipho Ngcobo

[15] This witness stated that her friend Lunka came to call her on 13 July 2021 telling her that someone was injured. This witness stated that she is a nurse. When she entered the house she found the accused inside the bathroom. He initially did not want to grant her access, but Lunka informed the accused that this witness was merely there to check on the deceased. This witness checked the pulse of the deceased and it was beating very slowly. This witness saw

scars on the neck of the deceased and the neck was reddish. She told the family to take the deceased to the clinic. The time was six in the afternoon.

[16] At the end of the State's case an application was made by the defence counsel for a discharge of the accused in terms of section 174 of the Criminal Procedure Act 51 of 1977. The application was denied.

The accused

[17] The accused came to testify and he stated that the previous day to this incident there had been a country wide looting and much alcohol had been stolen. As a result, people were seated all over drinking and many were very drunk. On the day of the incident a certain child had come to call him and he went to Mr Ntombela's house where he sat drinking alcohol. At some point he went to the shops of the Tshangaans to buy airtime. They did not have any airtime so he went to extension 4 to look for airtime. At some point he received a phone call. He saw Thabo and Mr Phaladi speaking. Ntombela's child, called Fazeka came up to him and asked him where is Shandu's mother, referring to the deceased. The accused told the child to go inside his house and look for her. The child left and returned screaming. The accused went into his house and he found a whole lot of people who had followed him. The bathroom door was open and inside was his wife. He pushed the door open and inside he found broken bottles on the floor of the bathroom. He found a trouser wrapped around the neck of the deceased and although he asked the deceased what had happened, she did not respond. The people behind him were screaming at him and saying he had killed his wife. He gave his phone to Charmaine and asked her to phone her sister and an ambulance. The accused stated he never prevented anyone from entering the bathroom.

Evaluation

[18] When considering a criminal case, it is important to consider the totality of the evidence and then to assess the probabilities emerging from the case as a whole. The court must evaluate the evidence of the State and the defence.

Nonhlanhla Kekae

[19] During cross-examination, this witness impressed the court. The version put to this witness that the accused was blocking the door to prevent the community from assaulting him

was denied by this witness. This witness stated the accused was blocking the door to prevent them from entering the toilet. This witness denied the accused's version that the family beat him up at the clinic. She did however admit that the accused had blood on his clothes.

Charmaine Sbhongile Tshabalala

[20] During cross-examination, this witness stated that the axe that the accused had used to assault her mother was 50cm long. She could not remember the name of the friend whom she had visited the night before her mother passed away. She stated that it was Fazeka who told her she had seen her mother lying down as if dead. Fazeka lives 8 meters away from her house. This witness stuck to her version and she impressed this Court. She mentioned that the accused was always abusive to the deceased on weekends after he drank and that on one occasion he hit her with an axe and that on another occasion he hit her with a spade. This Court cannot find any reason why she would want to fabricate this evidence and falsely implicate the accused.

Tebogo Nelson Monyelo

[21] This witness agreed that this incident happened the day after the insurrection had occurred and after much alcohol had been looted. This witness stated that he was with the accused and the deceased and he could not comment if there were 10 people who went into the house of the accused with the intention of assaulting the accused. This witness only heard the day after the incident that there were 10 people who were sitting at the house next door to that of the accused and the deceased. He was adamant that he had gone to visit the accused and the deceased on the day of the incident. He added that had he not been there on the day of the incident, he would not have been called as a witness. He stated he never saw the accused killing the deceased and he was aware they loved each other.

Phaladi Nonyana

[22] This witness impressed the Court. He was chronological as to what transpired on that day. During cross-examination he was adamant that he had seen the accused strangling his wife. This witness did not remember that the accused received a call whilst he was at Ntombela's place.

Lesiba Andrew Kekae

[23] This witness was adamant that the accused did prevent him from going inside the bathroom and that the accused could not have been scared to open the door, besides, he had no reason to be scared as the accused was talking to Nonhlanhla, Tshiamo and to this witness. This witness was also adamant that no one assaulted the accused at the house or at the clinic. This witness impressed this Court.

Doctor Apatu

[24] This witness also impressed this Court. During cross-examination she was certain that there were no pressure marks to the deceased's neck and that she saw no ligature wrapped around the deceased's neck when she examined her. She also stated she did not see any fractures of any bones in the neck to support strangulation.

Nosipho Ngcobo

[25] This witness also impressed the court. Neither the deceased or the accused were known to her prior to this incident, therefore there is no reason for her to fabricate a version that she saw scars and reddish marks on the deceased's neck when she examined the deceased.

[26] The accused did not impress this court. His version of not blocking the door and not preventing people from entering the bathroom is rejected as false and not reasonably possibly true. There is no reason for Lesiba Andrew Kekae and Nonhlanhla Kekae to fabricate this evidence. In fact, no version was put to them why they would fabricate this evidence. The version of the accused not being violent towards his wife is equally rejected as false and not reasonably possibly true.

[27] The accused's version is a complete denial. The witness Phaladi Nonyana saw the accused strangling the deceased and even though doctor Apatu saw no marks on the deceased, this court must bear in mind that the post-mortem took place long after this assault had taken place. The version of Phaladi Nonyana is corroborated by the version of Nosipho Ngcobo who saw reddish marks and scars on the deceased's neck. Due to the fact that doctor Apatu stated no bones in the neck were broken, she could not say that strangulation was the cause of death, however, from the version of Phaladi Ninyana and Nosipho Ngcobo, this court accepts their version that the accused did try to strangle the deceased on the day of this incident.

[28] There is no reason why Phaladi Nonyana would fabricate evidence that he saw the accused hitting the deceased with a broom stick and strangling her on the day she passed away. Phaladi Nonyana was a friend of both the accused and the deceased. No version was put to him why he would want to falsely implicate the accused who was his friend. The accused's daughter, namely, Charmaine Sbongile Tshabalala also had nothing to gain by saying when the accused became drunk he would hit the deceased with an axe or a spade as witnessed on previous occasions. No version was also put to Charmaine why she would want to falsely implicate the accused in this regard. The accused's version of being assaulted at the clinic is equally rejected as false and not reasonably possibly true as there is no reason for Nonhlanhla Kekae and Lesiba Andrew Kekae to say the accused was not assaulted. If he was indeed assaulted he would have received medical attention at the clinic, yet the accused never said he received medical attention at the clinic.

[29] The accused's version that he and the deceased did not have a quarrel on the day of the incident is rejected as false and not reasonably possibly true. The pattern of drinking was clearly present on the day of the incident as the accused admits he was drunk and as stated by Charmaine, this is exactly when the accused would start quarrelling with the deceased. Unfortunately for the deceased this time the accused went too far. The version of the accused leaving to go and buy airtime is also rejected as false. In addition, Tebogo Nelson Monyelo, who has known the accused for 15 or 16 years saw them quarrelling. There is no reason for this witness to state they were quarrelling. No reason was put to him why he would want to falsely incriminate the accused.

[30] The accused's version that it was someone else who had killed the deceased is rejected as false. The version of this alleged suspect having assaulted the accused's child on a previous occasion and that this alleged suspect was possibly watching the house on the day was never put to any of the State witnesses. The accused did not even have this man's name. This is all a recent fabrication and not reasonably possibly true. If the accused had told the police about this man they would have done certain investigations in this regard, yet nothing was done. The reason why nothing was done is because the accused never told the police or his counsel about this other alleged suspect.

[31] There is no direct evidence linking the accused to the crime committed, accordingly the State is solely relying on circumstantial evidence. In the matter of *R v Blom*¹ the Supreme Court of Appeal established two cardinal rules. The first rule is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Secondly, 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 doubt whether the inference sought to be drawn is correct. The learned authors Zeffert DT, Paizes AP and St. Q Skeen A in *The South African Law of Evidence* state that circumstantial evidence is no less cogent than direct evidence. It can in many instances be more compelling.² Each case must be determined on the facts presented as there are cases where the inferences will be less compelling and direct evidence more trustworthy.

[32] The circumstantial evidence is to a large extent based on the medical findings made by doctor Apatu. Doctor Apatu stated that she observed a deep scalp subdural haemorrhage with an underlying intracranial haemorrhage to the deceased's deeper part of the scalp which would have been caused by considerable force being applied to the brain which was caused by a blunt object. The evidence of Phaladi Nonyana corroborates the medical findings of doctor Apatu in that he saw the accused striking the deceased on the head with a broomstick which is a blunt object and this would cause lacerations to the scalp as testified by doctor Apatu. The blunt force is also attributable to the subdural haemorrhage noticed by doctor Apatu. The injuries depicted on the top of the scalp must have been caused by an injury inflicted from the top. Even though there are broken bottles seen in the toilet, there is no way the deceased could have sustained these injuries to the top of her scalp noted at (c), (d) and (e) in paragraph [14] *supra*, from bottles that were below her. It is more likely that they were inflicted from being hit on her from above. The injuries depicted at (i), (j) and (k) paragraph [14] *supra* also could not have been caused from the bottles underneath as it is a penetrating incised wound to the right shoulder, the upper chest and left breast, respectively. In fact, doctor Apatu stated that it was not likely that the big injuries would be caused by small broken glass lying on the floor. It is this Court's finding that it is more likely these injuries were inflicted from someone assaulting the deceased with a sharp instrument which could be a broken bottle.

[33] Doctor Apatu was of the opinion that the majority of the injuries sustained by the deceased were consistent with an attack on the deceased. The only injuries which could have

¹ *R v Blom* 1939 AD 188 at 202 and 203.

² *The South African Law of Evidence*, Zeffert DT, Paizes AP, St. Q Skeen A, Lexis Nexis Butterworths, 2003 at page 94.

been sustained by the deceased sitting on broken bottles would be the incised wounds to the left and right buttock which are depicted at (n) and (o) at paragraph [14] *supra*.

[34] The accused's version of not stabbing the deceased in the neck with a sharp object is rejected as false. In addition, his version that someone else killed the deceased is equally rejected as false and not reasonably possibly true. The Court's reasons are as follows:

- (a) the accused was in the bathroom when Nosipho Ngcobo entered and examined the deceased. This evidence was not disputed in cross-examination. One question was posed to the Nosipho Ngcobo by the defence counsel and that was '*After you introduced yourself the accused allowed you to inspect the deceased*' to which Nosipho Ngcobo stated '*Yes, even though initially he did not want me to*'. No questions were asked pertaining to the condition of the deceased's neck and whether there was any bleeding to the neck.
- (b) Nosipho Ngcobo did not see a stab wound to the neck when she examined the deceased, which means that it must have been inflicted after she left. The accused according to Nosipho Ngcobo was still in the bathroom after she examined the deceased. The accused never gave instructions to his counsel to give any version of what may have transpired after Nosipho Ngcobo left the bathroom, which means, the accused agreed with the version of Nosipho Ngcobo that she left the accused in the bathroom whilst the deceased was still alive, which means the fatal stab wound was inflicted by the accused and no one else after Nosipho Ngcobo left the bathroom.

[35] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others*³ the Supreme Court of Appeal held that:

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on (a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

- (i) The witness's candour and demeanour in the witness box,
- (ii) His bias, latent and blatant,
- (iii) Internal contradictions in his evidence,
- (iv) External contradictions with what was pleaded on his behalf or with established fact or with his own statements or actions,
- (v) The probability or improbability of particular aspects of his own version,

³ *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA) paragraph 5.

- (vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it'.⁴

[36] The witnesses for the State impressed the Court. This Court is accordingly satisfied that the State had proven the guilt of the accused beyond reasonable doubt. He is accordingly found guilty of murder in terms of s51 of Act 105 of 1997, in that he had the intention in the form of *dolus directus* to kill the deceased on 13 July 2021 and he is found guilty as charged.



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JUDGE OF THE HIGH COURT
JOHANNESBURG

⁴ Ibid paragraph 5.

Date Heard:
Judgment handed down:

28 July 2023
2 August 2023

Appearances:

On behalf of the State:
On behalf of the Accused:

Adv A. Deoraj
Adv L. Qoqo