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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: CC13/2021

DATE: 12-09-2023

In the matter between

THE STATE

and

10 THANDOLWETHU FAKU

Accused

J U D G M E N T

NZIWENI, J:

[1] Ms W[...] P[...] [the deceased], resided in her house with her 8-year-old daughter, O[...] and her 2- to 3-month-old daughter.

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[2] The deceased and her two children were backyard tenants at House R1[...]6, N[...] Street in Khayelitsha. The backyard of R1[...]6 had two separate dwellings made of corrugated iron. The deceased resided in one of the

dwellings and a person referred to as 'Boet Archie' occupied the other.

[3] The deceased was shot in her house in the presence of her two sleeping minor children. The murder of the deceased arose from an incident that happened around midnight on 10 January 2018. She died in hospital due to a gunshot wound to the head. The deceased's 8-year-old daughter found her mother laying non-responsive on the
10 couch located in the living room of her dwelling.

[4] When the deceased got shot inside her dwelling, she and her two children had just moved into their house a few days earlier. The deceased and Thandolwethu Faku, ("the accused"), who was a police constable with the South African Police Service at the time, had one child together, the one who was 2- to 3- months old.

[5] The accused is indicted on three charges namely,
20 assault, murder, and defeating or obstructing the ends of justice.

The State alleges in count one that the accused, during the period 2015 to 2018, unlawfully and intentionally assaulted the deceased by hitting her with his hands.

In count two, the State alleges that the accused unlawfully and intentionally killed W[...] P[...], the deceased by shooting her with a firearm.

Lastly, in count three, it is alleged by the State that the accused on the day in question, with intent to defeat or obstruct the course of justice, removed evidence from the crime scene and supplied false information to the police as
10 to the true identity of the perpetrator, which acts defeated or obstructed the administration of justice.

[6] In respect of count two, [the murder charge], the State seeks this Court to exercise its inherent jurisdiction and impose a sentence of life imprisonment upon the accused.

[7] The accused was represented by Mr Nogemane throughout these proceedings, pleaded not guilty to all the charges preferred against him and elected to exercise his
20 constitutional right not to proffer any plea explanation. In so doing the accused puts in issue every element of the crimes he is charged with.

[8] The State in its endeavours to prove its case against the accused, presented multiple witnesses. Certain formal

admissions were also made by the accused. Several exhibits were also admitted by this Court. Turning to the State witnesses:

[9] Unathi Bunzi testified that the deceased was his tenant at House R1[...]6, N[...] Street. He lived in the main house situated in front of the deceased dwelling. He knew the deceased very well. The yard of the main house is fenced. His backyard is adjacent to the neighbouring homes.

10 It was also his testimony that House R1[...]7, Moosa Barend's [next State witness] house is his immediate adjoining neighbour. His bedroom was 1.64 metres away from the entrance of the deceased's dwelling. The only thing between his bedroom and the deceased's entrance, was his bedroom wall.

[10] It was also his testimony that normally when something happens on his yard, he would hear. On 10 January 2018, at approximately 12 A.M, whilst sleeping in his
20 bedroom, he was awakened by a knock. He then listened and realised that the knock was at the dwelling of the deceased, which was beside his bedroom.

[11] There was no noise at the time. The knock was not loud, but a normal knock at the door. He heard the deceased

saying: "who are you?" The deceased was asking from inside. He then heard a person who was outside respond: "it's me, Thando". He then heard a sound of keys and a person opening and then heard two people speaking inside the deceased's dwelling.

[12] He specifically heard the deceased talking with the person who knocked. He could only hear the voices of two people talking but could not hear the contents of their
10 conversation.

[13] Barely a few minutes after that, he heard only one sound like a chair hitting a corrugated iron structure. Because it was that time of the night, he could hear the sound and it was loud. He then fell asleep. During midnight he woke up to the sound of crying children, but he continued to sleep. Again, in the early hours of the morning, he heard the children crying again. He then heard one of the children talking to her mother, waking her up.

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[14] In the morning around 7 A.M, he heard people speaking English and speaking over a radio in his yard. He went out and discovered the police. The child came to him and told him that her mother was on the sofa. The police told him that the lady was shot and when he went to look, he saw

the deceased on the chair and brains on top of her head and on the wall.

[15] He also testified that where N[...] Street ends, there is a passage which leads to B[...] Drive, the main road. The length of the passage is about 14.8 metres. The distance between his house and B[...] Drive is 7.18 metres. Shortly that was his testimony.

10 [16] Moosa Barends testified that on 9 January 2018 around 11 P.M. he heard a sound as he was preparing to sleep. He thought that the sound was from an electric wire as there is an electrical box on his yard. He went out but could not see any fault on the electrical box. He then stood outside and looked where the sound came from. Whilst he was looking, a male came from behind and passed behind him.

[17] His yard and that of Mr Bunzi, [the previous Sate
20 witness], have adjacent backyards with a shared gate. The gate leads to both yards. In other words, it is an interlinking gate between the two yards.

[18] This particular gate is only known by the people who stay on Mr Bunzi's yard and his yard. The male person whom

he saw was coming from the direction of the passage which is normally used by his family and the people who live at Mr Bunzi's house.

[19] Therefore, if a person comes from the area where he spotted the male coming from, it means he was coming from Mr Bunzi's yard. He did not take note of the male person. As the male person was passing him, he looked at him and they looked at each other. The male was about 2.5 metres
10 away from him. He did see the male's face but could not see it clearly. They looked at each other for seconds. He also testified that he looked at him for one second. He noticed that he was not wearing a hat, did not have a lot of hair, but there was hair. The male was slender and did not have a big head. He had a small head, had a small bony face and did not have a full moustache, but a little bit of beard; and he had big eyes.

[20] Due to the lighting in the veranda, to him the person
20 appeared dark in complexion. The male then put his hoody over his head. There were streetlights on and they illuminated well around his house. Because of the veranda, there was a shade where he was standing, which made him not to see clearly.

[21] This male then proceeded to a black Polo vehicle that was parked 5.4 metres away with its warning lights on. The vehicle was a small black vehicle with round lights similar to a Polo. The next day, he saw the male person again at Mr Bunzi's place. He noticed that he looks like the person he saw the previous night. He also told his mother that the person looks like the person he saw the previous night. The body structure, the side of the face and the complexion were the same.

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[22] It was further his testimony that in 2019, the following year, he attended a photographic identity parade. During the identity parade, he picked photo seven. He then told the police that the person depicted on photo seven resembles the person he saw that night. He pointed him out because he looked identical to the person he saw. The side of the forehead was also similar. He also testified he also recognised the vehicle which was placed by the police before him. Briefly that was his testimony.

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[23] Sergeant Kondile, testified that on 6 November 2019, he was asked by Sergeant Mbovane to assist with a photographic identity parade. The witness pointed a person and a vehicle. The photograph which was pointed out by the witness was photo 'seven' and the vehicle was photo 'N'.

According to him, the identity parade was positive, because the investigating officer told him who the suspect was and which car was involved. The entire process was recorded.

[24] Warrant Officer Nyovane, also testified that he was asked to assist with the identity parade. Shortly that was his testimony.

[25] Constable Andiswa Mathebula testified that she is a
10 member of the Metro Police in Philippi South. On 10 January 2018 she was on duty when she received information that there was a black VW Polo with registration number CA 4[...] that was abandoned in Strandfontein Dunes. When she got to the vehicle, she noticed that nothing was taken from it. In the boot of the vehicle, there was a cooler box. There was no damage on the vehicle. They then received a report that the vehicle was linked to a hijacking complaint. Briefly that was her testimony.

20 [26] Constable Nogwane testified that whilst he was on duty at Mfuleni police station the accused, who was known to him, arrived and told him that he was dropped by a car at the bushes near the station. The accused told him he was accosted when he went to his girlfriend's place. The accused related to him that he was put in the boot and whilst in the

boot, he heard a gunshot at his girlfriend's place. The first thing that the accused mentioned to him, was that he was hijacked and his service pistol was taken from him. That is also a brief summary of the testimony of the witness.

[27] Warrant Officer Gcobani Tyaliti, briefly testified that he took the accused from Mfuleni police station to Khayelitsha police station.

10 [28] Sergeant Hombiswa Khoza testified that she is a Sergeant at Khayelitsha police station. On 10 January 2018 around 17:45, she was on duty doing crime prevention as an investigating officer. She was called by Constable Mlonyeni to the Community Service Centre to come and interview a male person. Upon her arrival, she met the accused who told her that he was hijacked by three to four males. The accused also told her that the people that hijacked him also shot the mother of his child, W[...]. The accused took them to the crime scene. He showed them where the victim was.

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[29] When they arrived at the dwelling in question, they knocked, and they were received by a child. The child struggled to open the door and the child handed over the keys to them. According to her, the child did not want the accused to come and she kept saying, no, no.

[30] Inside the dwelling they found a lady in a pool of blood and a small baby in the bedroom. There were valuables inside the house. The accused also told her that whilst parking his vehicle, they [accuse attackers] pointed him with a firearm and told him to show them where he was coming from. He took them to the place he was coming from. At the dwelling they knocked and W[...] opened the door. The males just shot at her. After that they took him back to his vehicle
10 and put him in the boot. They took him to a bush in Kleinvlei and beat him up there. They tore his red golf t-shirt. The accused colleagues from Flying Squad contacted him. She is not sure whether it was his colleagues that contacted the accused or him who contacted them. His colleagues took him to a police station. She is not sure whether it was Kleinvlei or Mfuleni. As stated above that was the account that the accused gave to her.

[31] Warrant Officer Hendricks testified that on 10
20 January 2018, he was on duty at Khayelitsha police station. The accused who was the complainant at the time, was waiting at the Service Centre. He asked him why he was there and the accused told him that he was hijacked at R Section, Khayelitsha and the suspects forced him into the boot of his vehicle.

[32] The accused told him that the assailants dropped him near the army base in Spine Road. The accused told him that after he walked from the army base towards Mfuleni. The accused also told him that the police from Mfuleni took him to Khayelitsha.

He found it strange that the accused left behind close police station that could help him and went to Mfuleni.

- 10 [33] After 15 minutes the accused informed him that there was a shooting at his girlfriend's place in R Section. Besides that, the accused did not give him any more information. After the accused told him about the shooting at the girlfriend's place, he told the accused that they needed to rush to the scene. The accused pointed the house they were supposed to go to. They arrived at the scene at the same time with Constable Ntoyake. They went to the dwelling at the back. A child carrying a baby came to the door and was crying. The security gate of the dwelling was still locked.
- 20 When they entered the house, he could see a woman lying on the couch with her head backwards. The accused did not show any emotions on the scene.

[35] Sergeant Theko Ntoyakhe testified that he was on duty on 10 October 2018 at Site B, Khayelitsha police station.

On the day in question, he received an urgent call from Sergeant Hendricks and Xhosa telling him to come. Sergeant Xhosa and Hendricks told him that they have a complainant who told them that he was hijacked and dumped somewhere at Mfuleni. They also informed him that the complainant told them that the hijackers before they hijacked him, they shot at the house of his girlfriend. He then escorted Hendricks and Xhosa to the scene of the shooting. The complainant of the hijacking was also present and the complainant knew
10 where the incident was.

[36] They then got to the house showed to them by the complainant. They found the door open, but the security gate was locked. A 7- to 8-year-old child was calling the accused. The accused was normal and just said it is the lady that got shot.

[37] He was the one who was going to write the statement of the accused. The accused also told him that whilst he was
20 going to his girlfriend's place, he was stopped by three males who asked him where he was going. The accused then pointed where he was going and when they got there, the males shot the deceased. Briefly that was his testimony.

[38] O[...] P[...], testified that currently she is 12 years

old and staying with her maternal grandmother. In 2018, she was staying with her mother, the deceased. On the night of the incident, she was sleeping in the bedroom with her baby sister. During the night she was awoken by cries of her sister. When the baby was crying, she would call her mother, but her mother did not respond.

[39] The deceased was sleeping on the couch. She saw her sleeping on the couch in the morning. She also explained
10 that she says that she was sleeping because she appeared as if she was sleeping. Her eyes were swollen.

[40] She then heard a knock at the door and it was the accused together with two other people. The two people took them to her grandmother's house.

[41] The deceased birthday was on the 18th of November. On 18 November 2016, her mother said they should take food to the accused. Indeed, the deceased brought food to the
20 accused and told him [the accused] that she was going out with friends. The accused did not agree to that. The accused told her [O[...]], to leave.

[42] While she was with her sister's aunt, she heard someone crying. She went out running and when she got to

the room where her mom was, she found the accused beating her mother. The accused was on top of her mother and the deceased was laying on her back. She pushed the accused and told him not to beat her mother.

[43] She only told about the incident after the passing away of her mother[the deceased]. She told her grandmother. Briefly that was her testimony.

10 [44] N[...] P[...], mother of the deceased, also testified that two police officers came to her house to tell her that the deceased was shot and brought her two grandchildren. In 2016 she saw the deceased with a scratch. O[...] told her that the deceased sustained the scratch on her birthday, 18 November 2016.

[45] T[...] P[...], testified that the deceased was her sister. The deceased, before she lived at R1[...]⁶, she rented a house in Kuyasa, Khayelitsha. On 10 January 2018 he
20 receive a call from his mother telling him that the deceased was shot. From his mother's house he went to hospital where the doctor told him that there is nothing that they could do for his sister. Briefly that was his testimony.

[46] Colonel Pretorius, testified that he is currently

attached to the Provincial Serious and Violent Crimes. He has been a member of the South Africa Police Service for some 35 years. He is the commander of the hijacking and he is the investigating officer of this case.

[47] This case was registered as a murder and hijacking case. At the time the docket of this case was handed to him, there were no suspects in this case. He then referred the docket to the Director of Public Prosecutions ("DPP"), for
10 guidance and instructions.

[48] Late in 2019 or 2020 he received an instruction from the DPP that he should charge the accused. The accused was arrested on 6 January.

[49] It was also his testimony that during the initial stages of this case, the accused was a complainant. He also testified that the investigation of the case was done in two ways in order to confirm the accused's version. The accused
20 told him what had happened to him. According to him, what made the version of the accused to be suspicious was the claim that his assailants wanted his vehicle. They asked him where he was going. It was his testimony that in his experience the hijackers would threaten motorists and take a vehicle. He also testified that it was also suspicious that no

valuables of the deceased were taken away. Notwithstanding the suspicions, the accused was treated as a victim.

[50] Eventually the hijacking case was regarded as false and investigations were closed. The accused was charged in 2021. A photographic identity parade was held because at that time the accused was not arrested yet.

[51] Warrant Officer Meiring, testified that she is
10 attached to the Ballistic Section as an examiner of forensic ballistic cases. She also gave testimony regarding her experience and qualifications. On 15 January 2018, she conducted a crime scene reconstruction at R1[...]6 and at R836 Site B, Khayelitsha. At the crime scene she observed the following: one possible bullet hole through the western wall. At R836, she observed one bullet hole through the eastern wall and possible ricochet mark on the bedroom ceiling. She then concluded that the shot was fired from R1[...]6, Site B, Khayelitsha at a slight upward angle.

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[52] She also attended a postmortem examination of the deceased. During the examination of the deceased body, she noted a bullet entrance hole above the left ear of the victim and one exit hole in the right side of the head, almost midway between right ear and top of the head of the victim.

[53] She concluded that the bullet was fired from the left side to the right side of the victim. She also concluded that the deceased was sitting or lying when she was shot. According to her, it was impossible that the deceased could have been standing at the time she was shot. She concluded this because the bullet hole was 1.3 metres from the floor and the deceased was 1.6 metres tall. It was also her conclusion that the shooter, when he fired the shot, he was
10 in the vicinity of the couch. It is also her opinion that the shooter had the firearm at an upper angle in the couch next to the victim or very close to the victim in the couch.

[54] She also testified that it is impossible that the shot was fired from the door of the deceased place. It was also her testimony that the sound of a gun can be muffled even with a cushion. That is a brief synopsis of the State's case.

[55] At the close of the prosecution's case, Mr Faku took
20 the witness stand in his own defence and did not call any witnesses. He unequivocally denied that he committed the offences. He testified that he became a police officer from 3 March 2016. The deceased was the mother of his child. They were no longer in a relationship. However, they still had a good relationship.

[56] He went to the place of the deceased to give her money for their child. He was not familiar with the place where the deceased stayed. It was his first time to go to the place of the deceased. He parked his vehicle in N[...] Street and walked to the place of the deceased. As he was about to enter the gate, he heard footsteps of people walking behind him. Someone grabbed him on the back. When he looked, he saw someone pointing him with a firearm. One
10 grabbed him on the waist and took his firearm.

[57] During cross-examination he also testified that the one holding him on the waist also searched him and took his wallet and firearm. He also testified that they also took his phone and car keys. It was also his testimony during cross-examination that one of his assailants punched him on his nose as he was struggling and he bled. His assailants asked him where he was going and he told them.

20 [58] They then told him to proceed and go to where he was heading for. They went into the yard. They pulled his sweater over his face. They walked towards the backyard and one of the assailants was covering him with his sweater and another one was leading him, telling him where to go. It did not cross his mind that he should take the assailants to a

wrong place.

[59] He testified that he led the assailants to the deceased dwelling because they pointed him with a firearm. According to him, he did not have a choice. He also thought that they were going to release him. It was also his testimony that he had to protect himself. He responded to the assailants the way he thought he should respond.

10 [60] At the deceased's place, one assailant told him to knock. He testified that after he had knocked, the deceased asked who it was and he said, "it's me, Thando." The deceased opened the door and the security gate. He stood inside the house next to the door. As his face was closed, he could not see whether the assailants pointed the deceased with a firearm. One of the assailants gave an instruction that he should be taken to the car. He was taken to his car and put in the boot.

20 [61] About two to three minutes later, whilst he was in the boot, he heard a gunshot. Because he was not there, he did not know whether a person was shot. He had mixed thoughts. He thought that they were shooting at someone or in the air. He was worried about his child waking up. In a short while he heard footsteps and the vehicle was then driven away with

him in the boot.

[62] When he made the report to the police, he did not tell them about the gunshot. This is so because the police questioned him and he responded to the questions which were posed. Later on, he testified that he related the events in the sequence of their happening. He wanted to put it clear the way it happened. The way he put it was the way he thought he would get assistance. He also testified that he
10 told Monyakhe to go to the crime scene to go and check if anyone was shot because he heard gunshots.

[63] Back to his carjacking, he further testified that the car stopped after driving for a while and then he was thrown out of the boot. Whilst being pointed with a firearm, they demanded that he take off his shoes. His assailants then drove away and left him in a bushy area. He walked and accidentally ended up at Mfuleni police station. He then told the police that he was hijacked in Khayelitsha.

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[64] After being at Mfuleni police station for a while, he was then taken to Khayelitsha police station. At Khayelitsha he told Constable Mlonyeni what had happened and she Mlonyeni, took his statement. He narrated to her that he was hijacked when he went to give the mother of his child money.

He also told Mlonyeni that the hijackers put him in the boot and asked him to take him back to the place as he was worried about the safety of his child and the mother. He did not see Mlonyeni testifying in this trial. He was then taken to Khayelitsha.

[65] Upon arrival on the crime scene, they knocked and the child came to him. He hugged the child. After the child had opened the door, two police officers came and stood at
10 the door. He took charge. The child was crying and she told him that her mother was laying on the couch bleeding and her younger sister was sleeping in the room. As he was about to enter the police said he should stand aside, they want to get the baby.

[66] His mind was not working well. He was shocked. It was also his testimony that when he got his vehicle that was hijacked back, he noticed that there was a dent on the left side and on the car radio. The left side of the front bumper was also loose. He was arrested on 6 January 2021. He also disputes that Hendricks was on the crime scene with him. That is a brief summary of Mr Faku's evidence.

Evaluation

[67] In this matter, there is no direct evidence that the

accused shot the deceased. Therefore, the State relies on circumstantial evidence to prove the guilt of the accused. It is trite that the accused person's guilt can only be secured if the case against him is proven beyond reasonable doubt. Thus, the guilt of the accused can never be vindicated upon speculation or a mere suspicion or baseless inferences. The State has a burden of proving each element of the offences preferred against the accused beyond reasonable doubt.

[68] Importantly, there is no burden upon the accused person to prove his innocence. In order for the accused person to be afforded the benefit of the doubt his version needs only to be reasonably possibly true. If his version is reasonably possibly true, the Court does not even need to believe him.

[69] In this matter the following are common cause or not seriously disputed that:

- the accused was at the place of the deceased before she was shot at.
- the vehicle of the accused was around the vicinity of the deceased around midnight on the night the deceased was shot at.

- the accused was driving a black VW Polo on the night in question.
- on the night in question the accused knocked at the door of the deceased around midnight.
- on the night in question, before the deceased got shot, the accused identified himself as Thando, aloud, in the yard of Bunzi [where the deceased lived?]
- a gunshot was fired in the vicinity at the relevant time.
- the accused when he alighted his motor vehicle on route to the deceased's place, he had his service pistol in his possession.
- there is an interlinking gate between the yard of Bunzi and Barends.

[70] It is so that in this case both Bunzi and Barends were single witnesses as far as their respective testimonies are concerned. Therefore their evidence needs to be approached with caution.

[71] Additionally, as far as Barends's testimony is concerned, there is another cautionary rule applicable to his testimony. This is so, because his testimony also involves evidence of identification.

[72] Bunzi's [the landlord] evidence establishes the accused's presence inside the deceased's house. In this regard, Bunzi's testimony even finds support in the testimony of the accused. This I say because the accused amongst others agrees with Bunzi that he knocked at the deceased's door and after he had identified himself to the deceased; the deceased opened her doors and he did go inside her [the deceased's] house.

[73] However, the version of the accused reveals that he was coerced to do the abovementioned factors. Moreover, it is worth noting that Bunzi's testimony goes further and states that he could hear the person who identified himself as Thando talking with the deceased inside the house of the deceased. More specifically, Bunzi was adamant in his testimony that he heard a conversation between the two people. What is significant about the testimony of Bunzi is the fact that there is a sequence of events that took place within a comparatively short period of time.

[74] The several pieces of evidence tendered by the State through the testimonies of Bunzi and Barends are corresponding with each other. In my mind, these pieces of evidence, in cumulation point to one direction. According to Bunzi, the series of events begins with a knock. Then the deceased enquires as to who was knocking. The person identifies himself. The deceased opens the door. A conversation of two people ensues, then he [Bunzi] hears a sound.

[75] Importantly, Barends also heard a sound around the same time and went to investigate immediately where the sound came from. As he was investigating the source of the sound, Barends saw a male person walking in his yard from the direction of Bunzi's yard. In the testimony of Barends, there is also a sequence of events that took place, the sound he heard and the sighting of the man coming from the side of Bunzi's house.

[76] In the context of this matter, it is not farfetched to conclude that the sound that was heard by Barends is the same sound that was heard by Bunzi. In the circumstances of this case, it seems to me too much of a coincidence that they would hear a sound around the same time.

[76] It is significant to note that Bunzi pertinently mentions that, that particular night in question was a quiet one. Bunzi testimony also reveals that normally when something happens on his yard, he would hear it. He also testified that if there was a commotion on his yard, he would have heard it. This in my view, is demonstrated even by the fact that his evidence reveals that he could even hear a sound of keys, a person opening a door and he could even tell that two people were speaking inside the deceased's dwelling. This is also not farfetched if regard is had to the proximity of his bedroom compared to the location of the deceased's dwelling.

[77] Importantly, the circumstances of this case do not suggest that Bunzi's testimony is a fabrication. Bunzi had no reason or motive to fabricate his testimony. Surely, had he wanted to fabricate or had a vested interest in the outcome of this case. He could have easily said that he saw the accused in his yard. I did not get the impression that he was biased against the accused or that he had improper motives in testifying.

[78] In addition, Bunzi testified that he was awakened by a knock. The question that arises is, if Bunzi was awoken by a knock at the door of the deceased what would prevent him to hear a commotion of people robbing a person right in front

of his gate and walking in his yard?

[79] Particularly, if regard is had to the version of the accused that reveals that his assailants were talking to him[the accused].

In contrast to the accused's testimony, Bunzi testified that he heard the deceased talking with the person who knocked at her door. The only thing he could not hear was the contents of the conversation.

This Court gets the distinct impression that whilst awake Bunzi paid full attention to what was happening at the deceased's house, that was not far from his bedroom.

[80] It is so that the evidence of Bunzi does not mention as to when the person who knocked at the door of the deceased left the place of the deceased. In my mind this shows honesty on the part of Bunzi. This in my mind clearly indicates to this Court that Bunzi only testified about what he heard and he did not embellish his testimony. The fact that he did not hear the person who identified himself as Thando leave the deceased's house, does not necessarily detract from his ability to hear what was happening at the deceased's house. For that matter he did not even hear the sound of a gunshot.

Yet the evidence reveals that the deceased was shot at the critical time.

[81] Furthermore, the version that there was only one person in the yard of Bunzi in a way is supported circumstantially by the fact that Barends testified that on the night in question around 11P.M. whilst he was investigating the source of the noise he heard. He saw a male person coming from Bunzi's yard going through his yard.

[82] It is the testimony of O[...], the daughter of the deceased that on the night of the incident she was awoken by her baby sister crying. She called her mother, but she did not respond. Remarkably, Bunzi also heard the baby crying. It is also notable that O[...] who was in the house where the deceased was shot at, did not hear any gunshot but was awoken from her sleep by cries of her sister. The gunshot that killed the deceased was also not heard by Barends who does not stay far away from where the deceased was shot at.

However, strangely enough the accused, who was according to his version in the boot of a car which was not parked in the immediate vicinity of the deceased's house, compared to the houses of Bunzi and Barends was able to hear a gunshot. Although according to him he heard the gunshot, he could not

see to whom or who fired the gunshot as he was in the boot of the car. What is baffling is that people who were nearer than him to the deceased's house did not testify that they heard any gunshot. Instead, they testified they heard a sound. Surely if the accused who was in the boot heard a gunshot in the area, Bunzi and Barends should also have heard a gunshot. As mentioned previously the deceased's child was only awoken by the cry of her baby sister and not a gunshot.

[83] The question which begs is why is it that only the accused heard the gunshot that night? It really boggles one's mind that the accused managed to hear a gun shot. Certainly, in the context of this case, the gunshot ostensibly heard by the accused is not a random gunshot. This I say because even on his own version, after he had heard the gunshot a few minutes later his attackers came to the car.

[84] In my view, it is impossible that the accused could have heard the gunshot if he was at a distance further compared to O[...], Bunzi and Barends. The inference is inescapable that the accused did not hear the gunshot in the boot of any car.

The evidence in this matter leads to the only conclusion that

something was used to muffle the firing sound of the gun. Hence, people who were in close proximity to the deceased, compared to where the accused was, said they could not hear the gunshot.

[85] Warrant Officer Meiring, the ballistics expert called by the State. When questioned by the Court she testified that the sound of a weapon can be muffled with an item like a cushion.

In my view, it is inherently unlikely that a random criminal would muzzle the sound of a gun. Yet, he or them were brazen enough to take a stranger, the accused, into a yard and conned the deceased to open her doors and then shot the deceased. It is also highly improbable that people who manage to rob their first victim, the accused, would simply go and shoot someone and leave without taking anything of value from her house. Surely, it is not farfetched to think that a person who muffled the firearm knew that there were children in the house and he did not want to wake the children up.

[86] An inference is also inescapable that the shooter also did not want to draw attention in order to invite the public to himself. In my mind the muffling of the weapon was a

calculated move. Clearly, in this matter the shooter did not act rashly. This is also evident by the fact that it is common cause in this matter that the house of the deceased was locked when the police and the accused came to the crime scene. There was also no evidence that indicated that there were signs of a struggle. Evidently, the door was not locked by the deceased or O[...] [the child of the deceased].

[89] The evidence of O[...] was full of details. I got the distinct impression that she was testifying about everything she experienced that morning. I say that she did not lock the door because she never testified that when she woke up in the middle of the night due to the cries of her sister she went to lock the door.

[90] It was also her testimony that whilst she was attempting to wake her mother, she heard a knock at the door and she then saw it was the accused together with the police.

The police testified that they are the ones who opened the door as O[...] could not open the burglar door. The police also corroborated each other that they were the ones who opened the burglar door. This evidence was never challenged by the accused.

The question which aptly arises here is which hardened criminal would take time to lock an injured victim inside her house after shooting her?

[91] If regard is had to Exhibit "R," photos 4 and 13 as well as Exhibit "5", it is clear that the doors of the deceased's house are not the type of doors that can be closed and locked simultaneously.

It is my view that it would be a totally bizarre thing, even for a random criminal to lock his victim in after shooting her. In my mind the locking of the house of the deceased suggests a person who had a particular intent or wanted to achieve a certain result. It also suggests the person was confident that he got away with what he did. I do not, of course, suggest that at times criminals never act bizarre. However, in the circumstances of this matter, the fact that the door of the house of the deceased was found locked by the police is quite illuminating. It is another significant piece of the jigsaw puzzle.

[92] According to Meiring it was impossible that the deceased stood at the time she was shot. It is her testimony that the deceased had sat or lay on the sofa when she was shot at. She also testified that the shot that struck the

deceased did not come from the direction of her door.

If regard is had to the testimony of the accused that the deceased opened for him and his attackers, it then boggles one's mind as to what under those circumstances would make the deceased to go lie or sit down. Particularly, if regard is had to the testimony of the accused that at that juncture his face was closed. Surely, that was a very suspicious circumstance, Moreso, when the accused according to his own version was taken away. That would have made the deceased very scared and nervous. For that matter, why would the shooter or shooters make her to lie or sit on the sofa before they shoot her.

[93] In my mind, the evidence that the deceased was sitting or lying down before she was shot at, suggests that at that critical time she was with someone she knew.

[94] Significantly, the testimony of Barends reveals the person whom he saw went to a black Polo vehicle. As previously mentioned, it is common cause in this matter that the accused at the relevant time drove a black VW Polo. It is so that the conditions of observation at the time Barends saw the male that came from the side of Bunzi's place were not favourable. However, sight should not be lost of the fact

that Barend also saw in the following morning a male in the yard of Bunzi talking to the police. And according to him that male person looked like the person he saw the previous night. Barends during his testimony never verbalised it that the person he saw was the accused. Nonetheless, it is common cause in this matter that the person Barends pointed out during the photographic identity parade was the accused.

[95] This Court admits that if the evidence of Barends was the only evidence linking the accused, it would not have been sufficient. This Court is also mindful of the fact that when it considers evidence it should do so holistically. In this matter, the identification of the accused by Barends is also supported by other objective facts.

For instance, the accused places himself at the crime scene at a very crucial time, and the accused also admits to hearing a gun shot. Bunzi's testimony is also another objective fact that supports the testimony of Barends. This is so because Bunzi's states that he only heard one person knocking and talking to the deceased. And it so happens that Barends also spotted one person who he later identified as the accused coming from Bunzi's side through a gate which is not used by other people who do not stay in his or Bunzi's yard.

[96] Another objective fact is that the person also goes to a vehicle which is the same make and colour as that of the accused. Hence, in the context of this case it seems more probable that the person seen by Barends was the same person who was heard by Bunzi, identifying himself as Thando.

[91] The logical conclusion is that these factors I have just mentioned cannot be simply attributed to just a terrible coincidence. This I say because Barends says he identified the accused. What are the chances that he pointed out someone who says he was on his own version, on the crime scene?

[92] I do not have any reason why I should not believe the State witnesses. They made a good impression to this Court. I did not get the impression that they wanted to falsely implicate the accused. It is so that there is a contradiction between Xhosa[?] and Ntoyakhe regarding the reaction of O[...] to the accused when the accused arrived at the place of the deceased with the police. In my view this is not a material contradiction as it only affects details. This contradiction between the two witnesses does not affect their credibility. The reaction of O[...] at that juncture is neither here nor there as the child was asleep during the critical time.

[93] It is so that the evidence of the different police officials reveals that when they dealt with the accused after the shooting, the accused according to them, the accused gave different versions as to what the accused related to them. Obviously, they cannot be faulted for this as they related second-hand information. Hence, they have got different accounts as to what the accused told them.

[94] I am also satisfied that the testimony of the State witnesses was reliable. Particularly, if their testimony is given regard holistically.

[95] Turning to the accused as a witness, the accused did not make a good impression to this Court. His version regarding what happened to him when he was accosted is really not clear.

During his evidence-in-chief he said as he was approaching the gate, he felt someone grabbing him on his back. Yet during cross-examination he testified that after he heard footsteps and as he was about to turn he saw someone touching him on his waist. When he turned, they touched his firearm.

[96] He also contradicted what was put to Bunzi. It was put to Bunzi that whilst he was closed with the T-shirt against his head he was kept down. Pinned. It was also put to Bunzi that just after he had knocked on the deceased's door, he was pulled towards the car immediately. Yet he testified in cross examination that he entered the house. During his evidence-in-chief he never mentioned that he stood inside the house. This in my mind was very significant. When he was confronted with this discrepancy, he maintained that in his evidence-in-chief he mentioned that they stood at the door inside. It was put to him by the counsel on behalf of the State that he never mentioned this in his evidence-in-chief that he went inside. He then answered that he thinks he did.

[97] Because of his insistence that he mentioned this aspect in his evidence-in-chief, the Court had to adjourn so that the parties could listen to the recording. It was then established that he never mentioned this aspect in his evidence in chief. This Court is not surprised that he insisted that he mentioned it. I suspect that the accused was of the view that this was a very significant piece of evidence to forget to mention in evidence in chief.

This turn of events gave me a distinct impression that the accused was adapting his testimony as he was going.

[98] It was also put to Bunzi that the accused, after he had knocked at the deceased's door, he was taken to his car and told that he must kneel at the backseat while his face was covered with a T-shirt. We know however that when the accused testified, he testified that he was put in the boot.

During his cross-examination the accused also came up with new evidence. That he was punched on his nose during the struggle with his assailants and this led him to bleed. It is also strange that this does not feature in his evidence-in-chief. I do not even know where to place this piece of evidence in his evidence, whether it happened at the beginning, at the door, or once he was taken to the vehicle. As I have already mentioned it is difficult to fit this new version. It was the testimony of the accused that as his face was closed, he could not see whether the assailants pointed the deceased with a firearm. When he was asked by Mr Uys, counsel for the State, during cross-examination as to how he could then tell that they were inside the deceased's house. He testified that as they went in he could see that they were going in. This explanation as to how the accused could tell that they were inside is rather strange in the face of the evidence that it was his first visit at the deceased's place. In my view it is so convenient that the accused could suddenly see that they were inside. And he could tell exactly where he

stood inside, notwithstanding the fact his face was supposedly covered.

[99] Furthermore, albeit the accused's face was covered, he testified that he could also tell that the deceased opened the wooden door first, then the burglar door. What is strange is when he was asked during cross-examination if the deceased could see when she opened the door if he was in company of two males. He answered that because his face was covered, he could not see that she saw. Clearly, the answer of the accused in this regard is entirely unsatisfactory and rather odd. This is so because it is his own version that the deceased opened the two doors and at that juncture he was being held by his assailants. It is also strange that his [the accused'] evidence does not reveal that the deceased said anything when she opened the door and saw him with a covered face and held by unknown man.

[100] Furthermore, when the accused was confronted about the fact that there was no commotion, he answered that he did not hear the exchange between the deceased and the suspect. This is strange, particularly if regard is had to his testimony which does not reveal that the deceased said anything to him when she opened the door.

[101] I also got the distinct impression that the accused suffered a selective amnesia. At times he could give detailed testimony without any problems. And when he was confronted with difficult cross-examination he would rely on amnesia. According to him, he could not remember certain thing because of the shock at the time.

[102] Furthermore, when it comes to what the accused told the police. The way the accused alleges that he acted on the night in question is bizarre, even for a rookie police official. It is very strange for someone who says he heard gunshots which led him to be worried about his child. Yet when he meets the police, the first thing that he talks about is his car being hijacked and him being robbed. In my mind the accused came up with the version of his attack only deflect suspicion from him.

[103] It is also rather strange that the first person who was accosted by the “assailants” assaulted in Bunzi’s yard, kidnapped, robbed of his vehicle and belongings, assaulted when he was abandoned in a bushy area; escaped his[accused] ordeal with no serious or visible injury. This also begs the question as to why in the first place did his assailants take him to the boot of the car, if the only thing they did at the house of the deceased was to shoot the

deceased.

[104] It is rather odd that the primary target of the attack survives the ordeal without even a scratch on him and yet the incidental victim of the attack dies from a gunshot that was clearly aimed at killing her.

[105] All the abovementioned factors undermine the accused's credibility. It is not without significance that the accused did not tell the police first about the gunshots. His explanation as to why he related things the way he did is not sustainable, particularly for a policeman.

[106] Likewise, it is unfathomable that the deceased would open both the burglar door and the wooden door. Notwithstanding the fact that the accused identified himself before she opened the door and yet when she opened the wooden door there was a person who had his face covered and who was physically restrained in company of other males.

[107] It was also late hours of the evening. She was the only adult with small children in her house. There is no evidence from the version of the accused that anything was said by the deceased or the assailants before the burglar door was opened by the deceased. The evidence of the accused

regarding what happened in front of the deceased's door and when the deceased opened her doors lacks significant details.

The undisputed evidence that the deceased before she opened the door after the knock, she wanted to make sure who was behind the door. To me, this evinces that she [the deceased] had conscious awareness of safety. In other word, she [deceased] was alert to dangers.

[108] Hence, I hold the view that the fact that the deceased opened both the doors, fortifies the evidence that the deceased opened the doors solely for the accused, the person who identified himself as Thando.

I am convinced beyond any doubt that the version of the accused is a concocted story. I totally disbelieve the accused's account. It is clear as daylight that he deliberately fabricated his evidence. The accused's version is not reasonable possibly true and stands to be rejected. I am accepting the evidence given by the state witnesses.

[109] In light of the evidence presented at this trial by the State, I can safely conclude that the only reasonable inference which can be drawn is that the accused is the one who killed the deceased that night. The circumstantial

evidence, in this matter reveals and proves beyond reasonable doubt the identity of the person who killed the deceased.

[110] I am also satisfied about the testimony of O[...] as far the charge of assault is concerned. Her evidence in this aspect was clear and satisfactory. It is so that the indictment drafted by the State stipulates the date of the commission of the assault as being the period between 2015 and 2018. O[...] testified that the assault she witnessed was in 2016. I am satisfied that the accused did assault the deceased in 2016.

[111] Turning to the last count, which is defeating or obstructing the administration of justice.

The State vehemently submitted that they succeeded in proving this particular offence. It is my view that this offence was not completed.

The evidence of the State shows that the docket of defeating or obstructing the administration of justice was closed and the accused was charged with the current charges. It is my view that the state succeeded to prove attempt of this offence.

Consequently, the accused is convicted as follows:

COUNT 1, GUILTY OF ASSAULT THAT HAPPENED IN 2016.

COUNT 2, FOUND GUILTY OF MURDER.

COUNT 3, YOU ARE FOUND GUILTY OF ATTEMPT TO
DEFEAT OR OBSTRUCT THE ENDS AND ADMINISTRATION
OF JUSTICE.

NZIWENI,J

JUDGE OF THE HIGH COURT