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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 66/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STATE

and

NTSANE TOGOWE

HEARD ON: 10, 11,16,17,18 and 19 OCTOBER 2017

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 19 APRIL 2022

AMENDED JUDGMENT IN TERMS OF RULE 42

[1] On 19 October 2017 at 11h00 after listening to the address by both Counsels of the parties, I directed that this matter should stand down until 14h15 that same afternoon, in order to consider the verdict. When the court resumed at 14h15 the accused had vanished into thin air and this necessitated that a warrant for his arrest should be authorised for immediate issue and execution. His bail was provisionally forfeited to state. He was never arrested nor did he appear until his bail was finally

forfeited to the state. The warrant for his arrest remained in circulation. He has since been arrested about four years later, apparently in Lesotho and formally handed to the authorities in this country. I now hand down the judgment which stood down on 19 October 2017.

[2] The late L[....] A[....] H[....], hereinafter referred to as the deceased, had during his lifetime conducted a business of a tavern and a bottle store at his residential place in Mangaung. On the premises he stayed in a permanent life partnership with one M[....] C[....] M[....]1, an educator by profession. The deceased had in his employment one D[....] M[....]2 and one M[....]3.

[3] The deceased was fatally shot in his house on the 29 March 2016, a Tuesday immediately after the long Easter weekend. Certain items, namely, money, a wrist watch, motor vehicle keys, a firearm and cell phones were unlawfully taken from his house and from the said M[....] M[....]1 and D[....] M[....]2 by three unknown people. Of the said people one was unarmed while the remaining ones were armed with a knife and a firearm respectively.

[4] Five people including the accused before court were subsequently arrested for these offences. Charges were later withdrawn in the lower court against all the accused including those against the accused before court after numerous remands. The charges have since been reinstated against the accused before court, Mr Ntsane Togowe, and he has since been indicted for murder and robbery where aggravating circumstances are present, read with, inter alia, the provisions of sections 51 (1) and 51(2) (a) respectively of the Criminal Law and Related Matters Amendment Act 105 of 1997. The State is represented by Adv. Bontes while the accused was, before he vanished and during the entire trial until the address by both Counsel represented by Adv. Tshabalala on instructions of the Legal Aid Board South Africa. Adv. Tshabalala is no longer with the Legal Aid Board of South Africa and Ms Abrahams from the same institution now appears for the accused.

[5] The accused pleaded not guilty on both counts and essentially denied that he was one of the people who murdered and /or robbed the complainants herein. He

specifically denied being at the place of the scene of this incident on the alleged date and time.

[6] State led the evidence of Ms M[....]1. She testified that on 29 March 2016 she was in the sitting room busy marking scripts of her learners. The deceased was in the bedroom resting. At some stage she went into the bedroom where the deceased was and she found the latter busy counting money she and the deceased were to bank later that day. She went back to her work in the sitting room and continued with her work.

[7] At about 11h35 she heard the deceased running water for a bath in their bathroom. Later she heard a door of the kitchen opening but she did not turn to look as she thought it was the employees going on, in their business. She then heard people breathing heavily and when she lifted her head she saw three men, Ms M[....]2 and M[....]3 with the three men behind them. Of the three men the tallest of them approached her with a knife lifted in the air. She screamed and the deceased asked what was happening. The other two men with Ms M[....]2 and M[....]3 in front of them went to the bedroom. She fell to the ground. She does not know why she fell. She then heard when the deceased asked what those men wanted but there was no response. She heard a shots being fired from the bedroom.

[8] The two men who were in the bedroom exited. One still had a firearm and the other was unarmed. The man with the firearm instructed her to stand up and he also demanded keys to the safe. At that stage she did not take a good look at the said person with a firearm. She went to the bedroom with the man of the firearm. She saw the deceased lying on the floor at the door leading from the bathroom to the bedroom. They were forced to jump over the body of the deceased in order to get into the bathroom where the safe was.

[9] She found the keys and handed them to the man with a firearm. That man tried to open the safe but he could not open it as his hands were shaking or shivering. That man gave her the keys and demanded that she open the safe. She took those keys and opened the safe. Inside the safe was a small firearm. That man demanded money and when she could not produce it he took the small firearm. That man left

the bedroom and later she heard the deceased's Colt bakkie driving away outside. When she went outside the bakkie was not there. She did not know who drove with it. She was neither assaulted nor did she see anyone being assaulted.

[10] She testified that the man with a firearm was dark in complexion and that his eyes were full of anger. She further indicated that the said man had a mark which looked like a discolouration on one of his cheeks. She described the said discolouration by saying that it looked like a skin which was burnt by lightening creams or what she described as an irritated skin. She further testified that the said man of the firearm was wearing black clothes and that he wore a hat which covered his ears. She managed to observe that man for about four minutes while in the bathroom and at the time when the said man was trying to open the safe.

[11] On 06 April 2016 she and Ms M[...]2 attended an identification parade and she managed to identify the person who was holding the firearm in the house on 29 March 2016 as the accused before court. She testified that after the events of the 29 March 2016 until the 06 April 2016 when an identification parade was held, she never saw the accused anywhere.

[12] According to this witness the following items went missing on that fateful day, namely, keys of four motor vehicles, a brown wallet, a gold Pierre Cardin wrist watch, bank cards and receipts. She testified that on 31 March 2016 she went to the office of Captain Skota to read her statement. While in that office, it so happened that she should look around the boxes which were in the said office. She saw a Pierre Cardin gold wrist watch which she identified as the watch of the deceased. She also went home and brought the container of the said watch and both the watch and the container were handed in as exhibits.

[13] State then called D[...] M[...] M[...]2. She had been in the employment of the deceased. She was responsible for banking of money but at times the deceased banked the money. On 29 March 2016 she was on duty. She testified that sometime that morning she, the first state witness and the deceased were in the bedroom preparing orders for liquor. When she finished she went to the tavern to go and work.

[14] While in the bottle store she saw M[....]3 and other people passing next to the window towards the entrance which is restricted to employees only. A tall dark man armed with a knife then entered the bottle store and closed her mouth with a hand. That man put a knife on her head. He then pushed her to the tavern. It is at that stage that other man with a knife appeared and another one cocked a firearm. That man pointed the firearm at her. The said man of the firearm was about 800cm from her. She was able to see him then.

[15] She described the man of the firearm as being short, light in colour and wearing all black clothing. According to her he was wearing something on his head which was part of the clothing he was wearing. He had 'bigger eyes' according to her.

[16] She testified that those men opened tills and took money. When those men finished taking the money they searched her and they took her Samsung cell phone valued at R200.

[17] Those men then directed her and M[....]3 to the house and upon entering, the tall one rushed to Ms M[....]1 with a knife. Ms M[....]1 screamed after which the deceased asked what was happening. No one responded. She and M[....]3 were then ordered to lie down on their stomachs in the sitting room. According to her the man with the firearm and the one who was unarmed went to the bedroom. After those two men entered the bedroom, she heard two shots being fired. The man with the firearm came and demanded keys from her but she told him she did not have them. He then demanded them from Ms M[....]1. They were then ordered to go to the bedroom of the deceased. When they entered she saw the deceased lying naked on the floor.

[18] They were made to lie further on the ground. Those people left. She stood up and went to cover the naked body of the deceased with a blanket. She testified that keys of the cars, and a Colt bakkie were taken. After the incident she checked the stock sheet and according to her calculations an amount of R40 000 had gone missing.

[19] She testified that on the 6 April 2016 she attended an identification parade at Mangaung Police station. At the parade aforesaid she pointed the accused as the person who had a firearm in his possession on the day of this incident. She testified that she had never seen the accused between the 29 March 2016 and 06 April 2016 when an identification parade was held. She further confirmed that she was never assaulted or saw anyone being assaulted.

[20] In cross examination it was put to her that pictures of other co-accused had appeared in the newspapers. She testified that she did not know if deceased had a firearm. She confirmed that she ones attended court in the lower court when the matter was on the roll.

[21] State then led the evidence of Zolile Didi. On the 30 March 2016 he was at his home in Bloemfontein. A person known to whom as Tall, who is renting from his neighbours passed and greeted him. Before Tall could pass him completely police appeared on the scene. When Tall saw the police he(Tall) threw away a black cell phone.

[22] The police stopped but before they could alight, Tall took out a white cell phone and a watch and he threw them away. The cell phone landed in the neighbour's yard and the watch landed on the roof of the house of this witness. Tall ran away but he was apprehended by the police. The watch was recovered by the police on the roof of the house of the witness. It was a gold wrist watch. He identified Exhibit 1, a Pierre Cardin gold wrist watch which was recovered on his roof.

[23] State then led the evidence of Captains Tshabalala, Skota and Mfazwe. The three Captains are all employed by the South African Police Services and all three are attached to a unit called Directorate for Priority Crime Investigation (DPCI), commonly known as the Hawks. They were part of a team which arrested the accused before court on 30 March 2017. Capt Tshabalala testified that they had certain information as a result of which they placed themselves at certain strategic places in waiting. They were with a certain Dira who had called the accused in their presence for a meeting. It appears from testimony that the accused and this Dira had a prior arrangement to meet on that day.

[24] While so waiting they saw a Toyota Tazz motor vehicle coming along the street but it took a turn into another street. They gave chase and the said motor vehicle was apprehended and the accused, and his passenger were arrested. That passenger was later released. Their investigation led them to Phase 5. At Phase 5 they saw someone known as Banningi Gxamza, also known as Tall running away. While so running away the said Gxamza threw away some items on the roof. They gave chase and the said Gxamza was arrested. Nothing much turns around the evidence of both Captain Skota and Captain Mfazwe as in essence it confirms the evidence of Captain Tshabalala. The evidence of Mfazwe is only further relevant in so far as the arrest and detention of the accused is concerned. I deal with it in so far as it relates to the relevance of the allegations of assault against the accused.

[25] Accused through his Counsel made certain admissions in terms of section 220 of the Criminal Procedure Act pertaining to the chain evidence as well as the identification parade. Thereafter the charge sheet of the lower court in which the accused and his former co-accused appeared in the lower court was handed in, in terms of section 235 of the CPA. The state then closed its case.

[26] The accused, Mr Ntsane Togowe, then testified in his defence and he did not call witnesses. He originally wanted to call Mr M[....]⁴ as a witness but later chose to close his case without calling him. He testified that on the 30 March 2016 he was with one Banningi Gxamza, also known as Tall and one Tebogo Mokgothu when he received a call on his cell phone. The said call was from the cell phone of one Dira. When he answered a certain person introduced himself as a Captain of the Hawks and that person asked the accused if he was Smith. Smith is the nickname of the accused. He answered in the affirmative. That person then asked him to come to the place of Dira.

[27] He obliged but before he could go he dropped Banningi Gxamza at his place. He together with Tebogo Mokgothu then drove to Dira's place. Upon arrival at the house of Dira before he could alight the doors of his motor vehicle were opened. He and Tebogo were pulled outside and were assaulted by the police who demanded that they took out the firearm he used to shoot the deceased with. Police took him to

his house where they conducted a search but nothing was found. Police confiscated some of his clothing.

[28] The essence of his defence is that on 29 March 2016 at about 9h00 he and one of his friends went to town to buy some physiotherapy articles he used for his hands. After that they went to eat and he only returned home after 14h00. He denied ever being at the deceased's house on that day.

[29] The main issue to be determined is whether the accused killed or was one of the people who killed the deceased and whether he was one of the people who robbed M[...] M[...]1 and D[...] M[...]2. The essence of the adjudication of these issues turns on the reliability of the evidence of identification.

[30] I must comment at the onset that much time was spent on the events of the 30th March 2016, the day after the incident, relating to the alleged assault of the accused upon his arrest and later detention and further subsequent hospitalisation at National Hospital. This matter could not even start on the first day as the accused wanted certain information at the lower court to prove, so I am told, that he was indeed assaulted.

[31] It is not the contention of the accused that any of his constitutional rights were violated. It is not his case that as a result of the alleged assault on him by the police he made certain adverse admissions, or a confession or pointing out. It is in fact his case that he did not even point out any of his former co-accused. The accused is in fact not asking this court to rule out any kind of evidence as inadmissible. I am also of the considered view that no evidence whatsoever was led in violation of any rights of the accused as contemplated in section 35(5) of the Constitution in respect of the charges he faces. The right of the accused to a fair trial was not tainted.

[32] Section 210 of the CPA provides that:

‘No evidence as to any fact, matter or thing shall be admissible which is irrelevant, immaterial and which cannot conduce to prove or disprove any point or

fact in criminal proceedings.’ (See also the corresponding provision in section 2 of the Civil Proceedings Evidence Act, 25 of 1965.)

[33] In this case, this court is not sitting in adjudication of the alleged assault of the accused which apparently took place the day following the date of this incident. That would be the function of another forum. Proof of the facts that have no bearing to the issues before court cannot assist this court in adjudicating the matter and issues before it and those facts are accordingly irrelevant and thus inadmissible. Although Mr Tshabalala cross examined at length on the assault of the accused upon his arrest, he also conceded that the cross examination was irrelevant but pleaded with this court to allow him to put the questions relating to the assault purely because he was so instructed.

[34] He was even at pains to ask the court to allow him to explain the irrelevancy of the evidence to the accused in the presence of Mr Bontes when the accused was already in the witness stand and Mr Tshabalala precluded from consulting with him. With the same token, the evidence of the detention of the accused as also testified by Captain Mfazwe remains irrelevant and thus inadmissible.

[35] State bears the onus to prove its case beyond a reasonable doubt. What is expected of an accused person is to give a version which is reasonably possibly true. When adjudicating the question of identification this court is called upon to approach that evidence with caution. Our courts have emphasised that in matters of identification, honesty and sincerity and subjective assurance are simply not enough. In addition, there must be certainty beyond a reasonable doubt that the identification is reliable, and it is generally recognised that the evidence of identification based upon a witness’s recollection or a person’s appearance can be ‘dangerously unreliable’ and must be approached with caution.¹

[36] The state relied largely on the evidence of Mesdames M[....]1 and M[....]2. These are the people who were present when the incident happened. Both the state and the defence are in agreement that both were honest witnesses. On the issue of

¹ D Zeffert AP Paizes and A St Q Skeen - The South African Law of Evidence (2003) page 142.

identification, the confidence and sincerity of the witness are not sufficient. The court in *S v Mthetwa*² cautioned as follows:

‘Because of the fallibility of human observation, the evidence of identification is approached with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.’

[37] The evidence of identification thus calls for close examination and greater scrutiny. In *R v Shekelele*³ the court said the following:

“In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistakes.”

[38] This incident happened in broad daylight. According to Ms M[....]1 it was after 11h00 in the morning. From the evidence of both. Ms M[....]1 and Ms M[....]2 there doesn't seem to have been any impediment to visibility. Ms M[....]1 testified that after two shots were fired from the bedroom the accused and another person exited the bedroom. The accused asked her for the keys to the safe. According to her, at that stage she did not have a good look at the accused. It is her testimony that after she handed the accused the keys to the safe the latter struggled to open the safe. According to her the accused was shaking visibly and was unable to open the safe. It is at that stage that she observed the face of the accused. She was less than a metre from him when she made this observation. The face of the accused was not covered although the accused had a hat which covered her ears.

[39] Her testimony is that she observed the facial features of the accused on two occasions. Firstly, when the accused was in the bathroom and secondly, when he tried to open the safe. She described the discoloration on the cheek of the accused.

² 1972 (3) SA766 (A) page 768 A-B.

³ 1953 (1) SA 636 (TPD) at 63 G-H.

During the identification parade, the SAP329 form, depicting the proceedings which was admitted by agreement, the accused when asked if he was satisfied with the parade, including the persons on the parade raised, inter alia, a concern which was noted that he had a mark on his left cheek. During the trial Ms M[....]1 also referred to the said discoloration which was still visible during the trial about a year later. She further referred to her particular type of eyes in order to assert that she was not making a mistake.

[40] Speculations were put to her that it was likely that she saw the accused in court when he appeared in the lower court during proceedings in that court but she denied that vehemently. In my view her observation was reliable credible and nothing could be pointed to any deficiency in that regard.

[41] Ms M[....]2 corroborates the evidence of Ms M[....]1 in material respect with regard to the evidence of identification. According to her she was in the bottle store when the accused entered with another person. The accused was armed with the firearm. The accused, cocked the firearm and pointed same to her. She was at that stage about 800 metres from her. It is clear that the accused was within a visible distance from her. She described the accused as having 'bigger eyes' while Ms M[....]1 described the accused as having what she called 'angry eyes'. From the description by both the witnesses it certainly shows that his eyes stood out as some kind of a feature that could not escape attention.

[42] She further described his clothing and this corroborated the evidence of Ms M[....]1 that the accused was dressed in black clothing. I must however point out the discrepancy in what the accused wore on his head. According to Ms M[....]1 the accused had a hat on which covered the ears. On the other hand, Ms M[....]2 testified that the accused had a hoody on his head and not a hat. This contradiction is in my view irrelevant as both witnesses are adamant that the accused's face was not covered and both could see his face clearly. Like Ms M[....]1 this witness was sincere and honest. Over and above, her observation was credible and reliable. Nothing can be pointed to discredit her observation. She also attended and pointed the accused during the scheduled identification parade.

[43] She confirmed that at some stage she attended the proceedings of the accused and his former co-accused in the lower court. She, however, of importance testified that from the date of the incident, 29 March 2016 to 6 April 2016 when the identification parade was held, she never saw the accused before court. It follows therefore, and this she confirmed in evidence, that her attendance of the proceedings in the lower court was post the identification parade. Her identification of the accused at the identification parade was therefore not influenced in any way by any attendance at court. Her attendance at court after the identification parade is a non-factor. She conceded further that she saw the accused in the newspapers. This factor is also a neutral factor in that she also saw the accused in the newspaper after the identification parade. Even if it could be said that the witness saw the accused in the newspaper before the identification parade, that factor would still require to be weighed with the conspectus of all the evidence. Such a factor is not necessarily ipso facto fatal.

[44] Notwithstanding the fact that the court finds that the identification of the accused by Ms M[....]1 and Ms M[....]2 is reliable this court is still obliged to evaluate the defence of alibi of the accused.

[45] The accused denies being on the scene of this crime. He thus raises the defence of alibi. The court in *Thebus and Another v S*⁴ quoted with approval the peculiarity of the defence of alibi as explained in *R v Cleghorn*⁵ as follows:

‘... there is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the corpus delicti, as it rests upon extraneous facts, not arising from the res gestae. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi defence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance.’

⁴ (CCT36/02) [2003] ZACC 12.

⁵ 100 CCC (3d) 193.

[46] It is settled law that there is no onus on the accused person to establish his alibi. The fact that he did not call M[....]4 as his alibi witness as indicated above cannot be held against him. If his alibi is reasonably possibly true, the accused must be acquitted. The alibi of the accused must be weighed against the totality of the evidence. The approach in the evaluation of defence of alibi was stated as follows in *Rv Hlongwane*⁶:

‘At the conclusion of the whole case the issues were: (a) whether the alibi might be reasonably true and (b) whether denial of complicity might be reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.’

It thus stands to reason that if the defence of alibi raised by the accused is reasonably possibly true, he is entitled to an acquittal.

[47] The state attacked the credibility of the accused during cross examination. With regard to why the two witnesses for the state identified the accused at the identification parade he testified that Ms M[....]1 might have seen him during the parade. What is puzzling is that the accused who had at all relevant times throughout the proceedings gave instructions to his Counsel conveniently did not inform his Counsel that Ms M[....]1 might have seen him outside before she entered the identification parade. It became clear that he was only speculating without any factual basis.

[48] He further asserted that Ms M[....]1 might have seen his mark on the face during the identification parade, that is why she pointed him. He however conceded later that M[....] was far and could not have seen the mark on his cheek. Of importance he testified that Ms M[....]1 was told by the police that she must point at the person who had a mark. This version was never put to any of the state witnesses. Despite this assertion that the police told Ms M[....]1 to point him at the parade, he was unable to say or describe the police official who might have given such instructions to the said witness. In re-examination by his Counsel he insisted

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that the police told Ms M[...]1 to point him. This was false as it had no basis. He also conceded that he was not present when the police allegedly told Ms M[...]1 to point her.

[49] In my view the totality of the evidence and the probabilities favour the version of the state. If one were to have regard to the testimony of the two ladies as to the identity of the accused; the three Captains who went to arrest Mr Banningi Gxamza as well as the finding of the Pierre Cardin watch of the deceased; the fact that according to the police the accused led them to Mr Gxamza, it is my considered view that the accused's alibi is false beyond any reasonable doubt and ought to be rejected. I accordingly find that the accused was one of the robbers who were at the premises of the late Mr Helepi on 29 March 2016.

[50] It is undisputed that the deceased was shot two times and died of a *'gunshot wound of the chest'* according to the post mortem report admitted in evidence. The evidence reveal that the accused was the only one holding the firearm when he entered the bedroom of the deceased. Two shots were fired almost immediately after entering the bedroom of the deceased and at almost equally the same time he exited still holding the firearm demanding the keys from the two ladies' who testified in these proceedings. In my view the only reasonable inference to be drawn in these set of facts is that the accused is the person who shot and killed the deceased.

[51] It is further undisputed that certain items like money, car keys, cell phones, a firearm and a motor vehicle were unlawfully appropriated during this incident. Except a firearm which was taken by the accused it is unclear as to who took what. What is however important to bear in mind is that the accused and two others entered the premises of the deceased with the intent to rob him.

[52] The evidence reveal that when they entered the premises they were armed with a firearm and a knife. In my view it cannot be argued otherwise that the said three people did appreciate the possibility that anyone offering resistance in the robbery could be met with violence and even death. The conduct of the three brought them within the realm of the doctrine of common purpose.

[53] *Burchell and Milton*⁷ defines common purpose as follows:

‘Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.’

[54] The accused participated in the activities of the group willingly and thus signified his acceptance of the eventuality which later ensued. The eventuality became real when the deceased was fatally wounded. The accused thus associated himself with the killing of the deceased as well as the forceful unlawful appropriation of the property of the deceased and of Ms M[...]¹ and Ms M[...]². He thus made himself guilty of the offences preferred against him. I am satisfied that the state succeeded in proving its case beyond a reasonable doubt and his version ought to be rejected. I accordingly make the following order:

ORDER

1. The accused is found guilty of murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997;
2. The accused is found guilty of robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

P MOLITSOANE, J

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Instructed by:

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⁷ Principles of Criminal law, Juta 3rd ed at 574.

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