

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: CC115/2019

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DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 11.6.2020

SIGNATURE

A handwritten signature in blue ink, appearing to read "S. M. M. M.", is written over the signature line and extends into the date field.

In the matter between

THE STATE

And

TF MAPOULO AND OTHERS : ACCUSED

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JUDGMENT

BEFORE MADAM JUSTICE SEMENYA:

[1].The six accused persons are appearing before this court or are indicted on two charges. The first count is one of attempted murder and the second count is one of murder read with the provisions of Section 51 (1) and Part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997. The accused pleaded not guilty to the charges and raised a defence of alibi. It was placed as early as the plea stage that the contents of the
10 post mortem report will be placed in dispute. As well as the allegation that they acted in common purpose. However, the identity of the deceased person in count 2, being Kwenaithe Ronald, the date of death being the 29th day of January 2018 and the place of death were not placed in dispute.

[2].They were admitted in terms of Section 220 of the Criminal Procedure Act 51 of 1977. The evidence that was presented by the state in an endeavour to discharge its onus of proving the guilt of the accused beyond reasonable doubt is summarised as
20 follows.

[3].Thabang Clifford Mojapelo, who shall be referred to as Thabang for the purposes of this judgement as he has been referred to as such during the presentation of the evidence testified that on the date of the incident he was in the company of the deceased in count 2.

[4].They boarded a taxi at Blood river in the evening with the

intention of proceeding to their homes. Their place of residence is at Ga-Mabilwane. They had to alight this taxi at a village called Ditengteng so that they can proceed on foot to their home. Immediately after they alighted this taxi at about 20:00 they came across a group of people. He estimated the number thereof as being about 18. The group accosted them and told them that they do not like boys who walk around within their villages during the night. They told them that the reason
10 why they do not want boys to be loitering around is because those boys steal their plasmas. He and the deceased tried to explain to them that they are not part of the boys who steal plasmas and that they had just alighted a taxi and that they are on their way home.

[5].Despite this explanation that group of people started to attack them with an assortment of weapons. They were chopped with pangas and slashers. They were batons up with battens and pieces of wire. They were also assaulted with
20 bricks. The two sustained multiple injuries because of this attack. Immediately after they were so assaulted the group of boys then took them to the bush where they threw them into a well.

[6].The said well was full of water which covered their bodies up to their necks. After they were thrown into that pit their attackers lit a tyre and put it on the mouth of the pit. They used the water from the well to throw it at the fire, so that it should not burn them. They remained in that pit throughout the night.
30 From **01:00** in the early hours until they were rescued in the afternoon at about **14:00**. They were transported to Knoble Hospital, where they were hospitalised for a period of a week. They were thereafter transferred to Polokwane provincial hospital, where he Mojapelo or Thabang, was hospitalised for a

period of about six weeks. The deceased died at the hospital. Thabang testified that he was able to identify some members of the group, because there were electrical lights that were illuminating the streets through which they were walking.

10 [7].That those lights were very close to the street, as the houses too were close to the street. There was also light from one of the vehicles which was at the scene. That the six accused arraigned before me are part of the group that were attacking them. He testified that the accused were known to him prior the date of the incident. Accused 1 is known to him as a taxi driver and that he used to also board his taxi. He also used to see him at soccer matches in villages. Accused 2 is also a taxi driver. That he used to board his taxis coming from town. He played soccer with accused 3 on a number of occasions. He was once friends with accused 4. They used to spend time together consuming liquor. He also used to see accused 5 at soccer matches.

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[8].Even though accused no.5 was not one of the players he used to come and spectate. He also knows accused 6 because he also used to play soccer with him. He also used to consume liquor together with accused 6. He further testified that he lost consciousness immediately after he was rescued from the pit and regained it at the hospital. He stated the manner in which each of the six accused participated in the attack on him and the deceased, meaning that they were not mere spectators.

30 [9].That police officers came to the hospital to obtain their statements. That as they were in the process of giving information to the police he saw, he and the deceased saw accused 2 in this matter and they alerted the police to his presence. They told the police officers that accused 2 is one of

those who attacked them the previous night. That when accused 2 became aware that he and the deceased were pointing at him alerting the police of his presence, he ran out of the hospital.

10 [10].He could not tell the police the names of all people who attacked him. But that sometime after, some months after the incident or during those months he kept on visualising the incident in his sleep. He will have some flashbacks regarding the scene and during those flashbacks he could see the accused before court. He testified, sorry. He testified that he was unable to give the police officers a detailed statement when he was in hospital, because he was in pain. He was traumatised by what happened to him.

20 [11]. Also because they came up whilst he was fast asleep and he was woken up so that they can talk to him. He admitted during cross-examination that he had to leave the place, and went to Gauteng because he was not feeling safe. He, it was put to him that the, or rather the version of the six accused was put to him during cross-examination and he maintained his stance.

30 [12].He was asked as to whether there were women amongst the group that attacked them and he answered in the affirmative. Saying that part of the group consisted of women. When asked as to why there is no women among the accused he stated that he does not know those women. He only knows those who he play soccer with and those whom he spent some time with. He maintained that all the six accused were present and that they were part of the group that attacked them on the date of the incident.

The attack left them with multiple injuries. Malasela Charles Kwenaithe, the deceased's father, testified that on the **20th of January 2018** he received information from a person who told him about the whereabouts of his son who is the deceased in this matter.

10 [13].Acting on the information he proceeded to the veld where he found a well as well as ashes of a burned tire next to it. He called out the names of his son and the son responded. He could also sense that the son was not alone as the other person also responded. He looked inside the pit and could see the head of the deceased and Thabang. He contacted the police. Assistance was sought and the deceased and the accused were eventually removed from the pit during the day. They were injured and bleeding from their injuries. He testified that the deceased died on the **29th day of January 2018** at Polokwane Hospital. Nare Robert Moloto testified that he is employed at Knoble hospital as emergency care officer. He is part of the
20 team that rescued the deceased and Thabang from the pit. He transported the deceased to Knoble Hospital where he handed him over to the nurses.

[14].The deceased was still alive and did not sustain any injuries during transportation. The accused and the deceased in this matter were attended to by Lesetja Lesley Nong who is a doctor who was stationed at Knoble Hospital as at the date of the incident. As well as by Dr Makwela Mashole Aphanisious. Dr Makwela testified that he observed multiple legions on the
30 head, the eye and multiple abrasions and bruises on the body of the deceased in this matter. Dr Nong testified that when the deceased was hospitalised at Knoble Hospital he complicated, he developed cellulitis, which he said is an infection of the skin on his leg. He also developed renal failure and because it was

worsening they decided to transfer him to Polokwane provincial hospital.

[15].Thuli Monica Semetla testified that she is employed at Knoble Hospital as part of the emergency services. That on the **26th day of January 2018** she transported the deceased to Polokwane Provincial Hospital. She was informed that the deceased has been assaulted. She observed a swelling on his right leg and ankle. She testified that the deceased did not sustain any further injuries during transportation until she handed him over to the medical staff at Polokwane Provincial Hospital. Sergeant Florence Concelia Hlahla testified that she was the investigating officer in this matter and that on the date on which the deceased and Thabang were admitted at hospital, she and Warrant officer Mampa proceeded there in order to obtain their statements. She confirmed that during the process of obtaining the statements the deceased and Thabang pointed at accused 2 and informed them that he is part of the people who attacked them. She further confirmed that as the deceased and Thabang were pointing to accused 2 he became aware of that and he ran out of the hospital.

[16].The statement of the deceased which was obtained by Warrant Officer Mampa was admitted by consent. It is stated in the statement that he was with Thabang and that they were accosted by a group of people who accused them of stealing plasmas. It is further stated in the same statement that the said group attacked them with stones, pangas and sjamboks. Among the group he identified Justice Makgotho, being accused 2 in this matter. He also identified Mamashomo who is accused 3. Lucky, who is accused 4 and one Makwena. I need to state at this stage that Thabang also mentioned the name of Makwena in his statement. It is further stated that after they

were so attacked they were taken to the field where they were thrown into a pit of water.

[17].He was rescued by paramedics. The post mortem examination on the body of the deceased was conducted by Dr Matlala. Dr Malegopo Molegadi Matlala. She is employed as a forensic medical pathologist. She confirmed the contents of the post mortem report that was handed in as EXHIBIT. She confirmed that the cause of death is "Septic Shock due to septicaemia due to left leg cellulitis following multiple injuries due to alleged assault." She also noted on the post mortem report the multiple injuries that she observed on the body of the deceased.

[18]. There were multiple bags on left groin. Bandages on left knee, right knee and on forearm. There were intravenous lines on right and left groin. Intervenious lines on right arm. Lacerations on right front of the right ear. Abrasions on right frontal area on side above right eyebrow. Abrasion on right eyebrow. Laceration on right temporal area above the right eye. Abrasion below left eye. Open wound on back of the head. Healed wound on left shoulder. On left nipple extending to left subcostal area. Abrasion on back of litexcilla. Timeline bruises with rearing directionary across the back. Bruising on tip of left shoulder. Outer aspect of left chest. Purple blue bruising on outer aspect of the right arm. Abrasion on outer aspect of the left hip. Sinus on left, on front of left knee. Green yellowish flued oozing. Multiple abrasions on the front of left leg. Multiple abrasions on front right leg. The skull was Edo Thomas. Edo Multiuse on the scalp and contusions and haematomas were observed. The brain was Edo Multiuse. (Edo Multiuse?)

[19].On the abdomen the doctor observed the following injuries. Peritoneal cavity. Rather, not injuries. However the doctor observed the following on the abdomen. Peritoneal cavity there blood stained fluid. The stomach and contents, the stomach had green fluid. The mucosal surface was smooth with no ulceration.Focal area of gastritis. The intestines were intact and unremarkable. The liver, gallbladder and biliary passages
10 were enlarged and there was a yellow, rather it was enlarge, soft, yellow with nutmeg appearance. The pancreas were hemothorax. The spleen was enlarged and soft. The kidneys capsule striped of easily and [indistinct] junction was congested. Urinary bladder and urethra were normal. The pelvic wall was intact and unremarkable and the genital organs as well were intact and unremarkable.

[20].The doctor further testified that the septic shock was the end product following inflectional lack of enough oxygen. He
20 further testified that the bacteria that originated from the injuries that he sustained went to other parts of the body. She clarified the term septicaemia as infection of the blood. She testified that cellulitis is an infection of the skin underlying the tissue of the leg. She further testified that the multiple injuries that were inflicted on the deceased resulted in complications that resulted in bacteria that in turn caused septicaemia and septic shock. During cross-examination she was asked as to what vasopressors are and she indicated that she does not know where the question is leading to and that it is related to
30 drugs, but that she is not prepared to elaborate on that at that stage, as it is not relevant to what she was testifying about.

[21].The accused before court also elected to testify. Accused 1 in this matter confirmed that he has been staying at

Ditengteng for some time. He confirmed that he is a taxi driver of a taxi that belongs to his family. He stated that on the date of the incident he was at work and returned home, from Polokwane to Ditengteng at about **18:30**. Rather he left Polokwane at about **18:30** with passengers and arrived at his home at **19:30**. He did what he normally does. That is to hand over the money to the family. He never left his home thereafter.

10 [22].He was cross-examined at length about his alibi. He also called his sister, Portia Tansa Hlabi to come and testify on his behalf. Portia confirmed that the accused arrived at home in the evening on the date of the incident. That he returned home at **20:00**. That he went to bed at **21:30** after watching Muvhango. She maintained that she could clearly remember what happened and that she is relying on her good memory. Accused 2 also testified.

20 [23].He also confirmed that he is staying at Ditengteng and that he is a taxi driver. He stated that he was on duty on the date of the incident and arrived home late. At about **19:45** he parked the taxi. He stated that he did not hear any Sebata Kgomo. Sebata Kgomo being a call for help by the community. So that people can gather for a common purpose. He only heard about it from the police when he was arrested. He stated that accused 5 is his neighbour. That he saw him offloading a tyre from his home at around **20:20**.

30 [24].He denied that he was at the scene of the incident when the assault on the deceased and Thabang took place. It was put to him during cross-examination that his name was not mentioned by Thabang alone, but that it does appear there in the statement that was obtained from the deceased in this matter.He confirmed that he was at the hospital when Thabang

and the deceased were admitted and that he saw that they were in the company of the police officers. He denied however that he ran out of the hospital when he realised that the deceased and Thabang were pointing at him. Pointing in a manner in which they wanted to bring the attention of the police to him. He testified that he and his mother went to the hospital to see his uncle. That he went out of the hospital when his mother asked him to leave her alone with the uncle. Phuti Raymond
10 Mokgotho also testified. He is accused 2's witness. He stated that accused 2 was with them at home on the night of the incident.

[25].Accused 3 also testified. He, like accused 1 and 2 denied the allegations levelled against him. He stated that he was a student at Wits University as at the date of the incident and he had left his home earlier and went to Johannesburg in order to arrange accommodation. He returned after he was informed that
20 the police were looking for him. He was cross-examined about the reasons why he had left earlier, as, he stated in his testimony that the university had not yet opened when he proceeded there.

[26].Accused 4 also testified. He confirmed the version of Thabang that he is staying at Ditengteng. He denied that he was at the scene of the incident. He also denied that he hit the deceased and Thabang with a piece of wire. He stated that he spent the night with his girlfriend at his girlfriend's home. The
30 girlfriend being Refilwe Matsemela. He denied that he has been friends with Thabang. But that they used to play soccer together. He admitted that he knows Thabang from the soccer field. He stated that he is not the Makwena that the deceased referred to in the statement. Matsemela being accused 4's

girlfriend also testified. She stated that indeed she was with accused 4 on the night of the incident and that he never left until **05:00**. It was put to her that her version is a regurgitation of the testimony of accused 4.

[27]. Accused 5 also testified. He confirmed that his nick name is Twenty which is the name that Thabang referred him by in his testimony. He stated that he is employed and was employed as
10 at the date of the incident. He denied that he was at the scene of the incident and further that he stated that he did not commit the offences that he is charged with. He proceeded to his place of employment on the date of the incident. Leaving his home at **08:00**. He knocked off at **17:50**. He slept before **20:00**. He did not go to the street. He did not participate in the alleged commission of the offences. He is from Ditengteng and that as far as he knows there is another person known as Twenty at Ga-Manamela. He is not acquainted to Thabang. He denied that he chopped Thabang with a slasher as Thabang has
20 testified and he also denied that he assaulted the deceased. He testified that there is bad blood between him and Thabang, as Thabang had once stabbed his brother with a knife. He was part of the members of his family who were sent to Thabang's place in order to resolve the issues.

[28]. Accused 6 also testified. He confirmed that he knows Thabang from where they normally play football. He however testified that he did not see Thabang on the date of the incident. He was at a shop watching a soccer match at the time
30 that the offence was allegedly committed. He only left the place at closing time which was at about **24:00** midnight. He testified that he is a soccer lover and he is fond of watching soccer matches. I need to state at this stage that all the accused, except accused 5 who said that there were squabbles between

them because Thabang once stabbed his brother stated, all of them stated that they did not have grudges with Thabang. The defence then closed its case.

[29]. This is a criminal case and the duty is on the state to prove the guilt of the accused persons beyond a reasonable doubt. It was stated in **S versus Chabalala 2003 (1)** South African Criminal Law Reports, 134, Supreme Court of Appeal that:

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"In the evaluation of the evidence before it the court must weigh the elements that points to his guilt against the elements that points to his innocence. That the court must evaluate the strength and the weaknesses of the case as well as the probabilities and improbabilities. It must decide at the end whether the balance weighs heavily in favour of the state as to the accused. If there is a reasonable doubt in the mind of the court with regard to the guilt of the accused the court must acquit him."

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[30]. These sentiments were raised earlier on in the case of **S versus Van Der Meyden 1999 (2) South African Law Reports, 79, (W)** and all other cases that followed it.

In short the guilt of the accused must be determined according to the totality of the evidence that has been presented before court by the parties. This is how the standard is determined in a criminal case. On this basis I am therefore not prepared or inclined to reduce the standard of proof to minor instances such as whether the injury was on the left leg or on the right leg, on the ear or on the mouth, on the lower lip or on the upper lip. I am not inclined to develop the standard of proof to that level.

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[31].The reason why I do not want to reduce that standard of proof to that level is because of the argument that was raised by the defence with regard to the disputed cause of death. It was stated that there is evidence from other state witnesses who stated that it is the right leg that was injured. That if that is the case then the cause of death as noted by the pathologist does not link the accused to the offence. This emanate from the cause of death where the pathologist noted that the cause of death is septic shock due to septicaemia due to left leg cellulitis. Following multiple injuries due to alleged assault. It is for that reason that the state decided to call the doctor, the pathologist who performed the post mortem report, examination, so that she can come and clarify what it means by what is stated as the cause of death.

[32].She summed up what she has recorded and what she has observed on the post mortem as being that the deceased died as a result of complications that resulted from the injuries that he sustained on the date of the incident. She stated that the body had multiple bags of, rather multiple bags on left groin and that there were bandages on the left knee, right leg and on the forearm. This in itself does not rule out the evidence of the other witnesses to the effect that the right leg was injured as well.

[33].The observations made by Dr Matlala as per the post mortem report is further in line with the evidence of Thabang. He testified that they were assaulted by a group of people with an assortment of weapons. That they were attacked all over their bodies.

[34].I therefore find the argument with regard to the cause of death to be frivolous and I reject it on that basis. I am further

rejecting this argument because, despite the fact that the accused stated from the onset that they are disputing the cause of death, they failed to come up with any expert evidence.

Evidence in the form of another doctor or pathologist who would testify to the effect that the observations and the findings of Dr Matlala should be rejected. I am of the view that I will be neglecting my duties as a judicial officer if I do not state the following:

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Our health system is overburdened. It is common knowledge that there are shortages of medical practitioners in our public health system. That shortage must not be exacerbated by frivolous defences. I am saying this because three doctors had to be taken away from their duties to come and testify in this case. I find that this was unnecessary. Both the state and the defence addressed the court at the closure of the state case. The prosecutor prepared a detailed heads of arguments to which I am indebted.

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I however do not agree with the prosecutor with regard to the form of intention in this matter. He submitted that the court must find that there is intention in the form of *dollis eventualis*. I am however of the view that the form of intention on the part of the perpetrators of the offences in this matter is that of *dollis directus*.

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Direct intention. This direct intention is manifested by the conduct of the perpetrators. The deceased was assaulted over a long period with dangerous weapons, including pangas, slashers, batons and bricks by a group of people. As if that was not enough the deceased and Thabang were removed from the village to the veld.

[35]. Upon their arrival in the veld they were pushed into a well which was filled with water. As if that too was not enough a tyre was burned and they closed the well with that burning tyre. The nature of the weapons used and the nature of the injuries that were inflicted on the deceased in itself shows that whoever did that to him wanted to kill him. The perpetrators further decided that if he does not die because of the injuries that we have inflicted on you then you will drown inside a pit.

- 10 The tyre which was placed on top of the well was placed there to make sure that the deceased and Thabang would not be able to escape from the pit. Intention is determined subjectively. It is further determined by the conduct of the perpetrator as at the time of the perpetration of that offence.

- [36]. The prosecutor submitted that the reason why he is saying that it is *dollis eventualis* is because the deceased did not die immediately. He died later on at the hospital as a result of septicaemia. There is sufficient evidence that proves that that
20 septicaemia is a result of the injuries that were inflicted on the deceased on the date of the incident.

- [37]. I therefore find that the date of death is irrelevant with regard to the determination of the intention of an accused person. I conclude that the intention that is applicable in this matter is that of *dollis directus*. Direct intention to kill. Apart from denying that they have caused the death of the deceased in this matter the accused also raised a defence of alibi. An accused person who raises the defence of alibi in
30 essence puts the identity in dispute.

[38]. It is trite that evidence of identity must be approached by the courts with caution. This was well enunciated in the case of **S versus Motetwa 1972 (3) SA 766 (A)**. It is evident that the

State in this matter is relying on single evidence in the form of Thabang Mojapelo.

[39].An accused person in terms of Section 208 of the Criminal Procedure Act 51 of 1977 can be convicted on single evidence. It is however trite that the evidence of a single witness must also be approached by the courts with caution. Cautionary rule therefore applies because of two instances in this case. It cannot be denied that the events of the date of the incident were very traumatic. The injuries that were inflicted on the deceased and Thabang also must have been a very painful.

[40].The deceased died and Thabang came very, very close to death. Thabang and the deceased spend quite a considerable time inside the water which came up to their neck during the night from **01:00** to **14:00** about 12 hours. They kept each other afloat at the same time having to throw the water at the fire so that it should not burn them.

[41].It is actually in my view a miracle that they survived the ordeal up to that stage. The water was also cold according to Thabang. The reason why I am stating this is because the defence argued that I should reject the version of Thabang mainly on the part of the identity of the accused because he only mentioned a few at the hospital and mentioned other later, long after the incident. I gave that background to have a clear picture of what must have been going on in the mind of Thabang when he made the first statement to the Investigating Officer. I also want to put, in a proper perspective Thabang's explanation that he spends sleepless nights long after the incident and that during those sleepless nights he will have flashbacks of the events of the **20 January 2018**.

[42].It cannot be denied that anyone who has gone through that kind of trauma will have flashbacks. I cannot even say at this stage that I believe that he has overcome the trauma. The ordeal that he went through on that day is something that no one will ever overcome.

I therefore accept the explanation that Thabang has given regarding the circumstances under which he identified the accused persons and told the police officer about them. I
10 am unable to reject that explanation. I accept it as a reasonable explanation. That explanation is further supported by the version of the Investigating Officer who testified that: not only did he come to her to tell her about the identity of his attackers he went further to take her to their homes. Some of them were found and in other homes, messages were left and as a result of those messages some of the accused handed themselves over to the police.

[43].I also accept this version on the basis that to a certain
20 extent it is consistent with what the deceased has stated in his statement. Accused 1, 3 and 4's names appear in that statement which was admitted by consent. Thabang is a single witness however in **S v Sauls & Others 1981 (3) SA 172 (A) 180 (f) to (g)** the court stressed the need to avoid rejecting the evidence of a single witness simply because he is a single witness. The court further stated that:

30 *"Courts must avoid doing away with the application of common sense in its application of cautionary rule; it must not do away with applying common sense."*

I further accept the version of Thabang on the basis that the accused admitted that: they are known to each other. Some

admitted that they are part of the soccer either as players or spectators.

[44].It was stated in **S v Mthethwa 1972 (2) SA 766 (A)** the Judge in that case warns that the

“courts must approach the evidence of identity with caution mainly because of the fallibility of human observation”.

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The court gave certain guidelines in the application of that caution. However, those guidelines are not meant to be exhaustive. The Court were guided to look at the ability of the witness identifying witness to observe the perpetrators. That, that observation will be guided by how visible the place is.

[45].The proximity between the identifying witness and the accused being identified. This proximity refers to the distance between the identifying witness and the person that he is identifying. Another fact that the court is warned to look at in Mthethwa is the period of time that the identifying witness spend with a person that he or she will be identified.

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[46].The evidence of Thabang is to the effect that: he alighted the taxi at the periphery of the village. That they intended to walk through the village of Ditengteng in order to go to their village. That as a result of the confrontation with the accused, the accused walked with them through that village up until they reached the edge of that village and they joined the field.

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[47].His ability to identify the attackers was challenged during cross-examination mainly on the reason that it was during the night. It was put to him that: there was no sufficient visibility through which he could see his attackers. He responded by saying that: the streets are narrow and the houses are on the edge of the street and that electric lights emanating from those houses illuminated the streets. The version regarding the position of the houses
10 in relation to the street was disputed during cross-examination. There was even a suggestion at some stage that the court must go for an inspection *in loco*. However, after an adjournment the defence conceded that: the version is true that the houses are very close to the street and that there are lights which illuminate the streets.

[48].I am therefore satisfied that there was sufficient illumination and that that illumination enabled the witness to identify some of his attackers. Thabang testified that: they
20 were in the village with the attackers from 21:00 up to 01:00 when they left the village and entered into the field. That will constitute four hours, four hours according to me is sufficient time. He could therefore see the attackers for a long period.

[49].It is further the evidence of a witness who is not a stranger to the accused before court. He was not seeing them for the first time and when I look at the totality of those circumstances, I find that Thabang as well as the
30 deceased were able to identify the accused persons before me as their attackers.

[50].The defence is one of alibi as I have already stated. It is already settled as early as 1952 in **R v Bea 1952 (4) SA 514 (A)** that:

10 *"It remains the State's duty to establish the guilt of the accused beyond a reasonable doubt and to disprove his alibi to prove to the court that his alibi cannot be accepted. It is not the duty of the accused to prove that his alibi defence is, rather he is not, an accused person has no duty to prove his alibi.*

[51].In reliance to **S v Thebus & Another 2003 (2) SACR 319 (CC)** the State contended that:

20 *"The alibi rest by the accused persons must be rejected by this court solely because it was disclosed very late. Very late referring to the fact that it was disclosed in court when the trial started".*

When a witness reports an accused to the police, it can be accepted is that he is saying I know him and he is the one who offended me.

[52].The rationality behind Thebus is that the State which has a duty to prove the guilt of the accused beyond reasonable doubt must be given sufficient opportunity to investigate the alibi that an accused person intends to raise

as his defence. The accused person who is confronted with allegations that he has committed an offence, if he was in Pretoria and it is said that he committed that offence in Polokwane is expected to immediately tell the police that: I was in Pretoria, I could not have been at the scene at the

time of the commission of the offence because I could not have been in different places at the same time.

- 10 [53]. It was decided in this Thebus and other cases that followed it that the accused cannot hide behind his rights to remain silent. In Boesak it was, in **S v Boesak 2001(1) SACR 1 (CC)**:

20 *“An accused person was found guilty for failing to challenge the evidence of the State by electing to remain silent in the face of overwhelming evidence which amount to a face of prima facie evidence against him”.*

The constitutional court is the apex court and its rulings bind all other courts in this country therefore it means that the position with regard to the disclosure of the defence of alibi as soon as possible is sealed it is settled.

[54].With regard with accused 2 both Thabang and the deceased pointed him to the police as soon as rather soon after the offence was committed. The witnesses, Thabang and Sergeant Hlahla testified to the effect that as soon as he realised that they were pointing at him he ran out of the hospital. He denies that he ran out of the hospital however, he admitted that he went away. Whether he ran out of the hospital or whether he simply walked out of the hospital is
10 neither here nor there. What remains is that at the stage when the deceased and Thabang pointed at him to the police he left the hospital and went out of the picture. I arrive at the conclusion that he went out of the hospital because he knew why Thabang and the deceased were pointing at him to the police. It is simply a case of the guilty are afraid.

[55].I am satisfied that the State has proved beyond reasonable doubt that the deceased Ronald Kwenaithe died
20 as a result of the injuries that were inflicted on him on the **20 January 2018** at Ditengteng as well as in the field where he was thrown into the water. I am satisfied that the complainant in count 1 Thabang Clifford Mojapelo was severely attacked, assaulted, injured with an assortment of weapons.

[56]. I am further satisfied that the deceased and Thabang were dealt with in that manner on that date with the intention to murder them. I am further satisfied that the evidence that has been presented before this court in its totality proves that the accused are the persons who perpetrated the offences in count 1 and count 2.

[57]. I reject their defences of alibi on the basis that it is a
10 resent fabrication and that the evidence that they are the perpetrators is overwhelming against them. I am further satisfied that the group that attacked the deceased and Thabang in this matter acted in common purpose with each other and with other members of the community who were present there but who were not identified by Thabang. I am further satisfied that the evidence that has been presented proves that the accused and the other people with whom they were pre-planned the commission of these offences.

20 [58]. There was a call that members of the community must gather and because of that call, the accused and others gathered. The accused armed themselves with an assortment of weapons. Their intention was to deal with whoever they suspect is the person who steals their plasmas.

[59].I am therefore satisfied that the jurisdictional facts which are required to establish the offence of murder which is read with Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 exist in this matter and that the State has proved it.

[60].And as I have already stated that Thabang is alive
10 because of what I deem to be a miracle, I am therefore satisfied that the evidence in its totality prove that the accused, committed the offence of attempted murder in count 1 and of murder in count 2.

[61].You are convicted on attempted murder in count 1 as charged. You are further convicted of murder read with the provisions of Section 51 (1) of Act 105 of 1997 as charged in count 2.

20 [62].The accused are convicted of attempted murder in count 1 and murder read with Section 51 (1) of Act 105 of 1997 in respect of count 2. Before the accused pleaded to the charges I explained to them that what Section 51 (1) entails is that: after conviction I shall have to impose a sentence of life imprisonment unless I find, in terms of

section 51 (3) that there are substantial and compelling circumstances that justify imposition of a lesser sentence.

[63].Mr Tema has correctly submitted that the Act itself does not define what will constitute substantial and compelling circumstances and that the legislature has decided to deliberately leave it to the courts to decide to whether the circumstances that have been presented before it do amount to substantial and compelling circumstances.

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[64].I am of the view that the legislature was influenced by the long established principle that sentencing is in the discretion of the court. I have noted that all six accused are first offenders despite the fact that they are well beyond of the teenage age. It means that accused 1 who is 41-years of age managed to live his life up to this age without coming into loggerheads with the law. As well as accused 4 he is 48-years old and accused 5 is 25, accused 6 and 22 is accused 3, accused 2 is 34 and I must say that in this age
20 where crime is committed willy-nilly their behaviour up to this stage is commendable.

[65].The offences of murder and attempted murder are prevalent not only within this Division but in the entire country. I agree with the Prosecutor that what makes this

case to stand out is because they were committed with cruelty. It is cruelty which should not even be extended to animals. Animals too deserve to be treated better than the manner in which the accused treated the complainant in count 1 and the deceased in count 2. It is so that accused accused 1, accused 5 and accused 2 are parents however, there is no prove that they are the primary caregivers of the children.

- 10 [66].I know that there are many judicial officers who would say that, sentencing is a very difficult job. I normally avoid phrase but today with regards to accused 4 it is difficult for me to sentence him in this case he is a student at WITS University he is doing a degree which is not done by many students and I am saying this because I know that, we know that the Government is complaining that many students are shying away from doing maths and science. He is doing maths and science, it means that he falls under the rare breed, if I may say so. I was not told as to which level he is
- 20 but from the evidence that was presented before this was not his first year. I say it is difficult simply because it is not the only factor that I must take into consideration I must weigh it against all other factors.

[67].In **S v Malgas 2001 (2) SACR 469** it was stated that:

“Even if the factors that have been presented before court cannot amount to substantial and compelling circumstances when taken in isolation the court cannot disregard what it referred to as traditional mitigation factors in its determination of whether a suitable sentence would be a sentence as prescribed in Section 51 (1) or 51 (2) of the Act.”

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[68].I am aware further of the principle that states that:

First offenders must be treated, if possible, differently from hardened criminals.

I am aware of the prevalence of the offences which are similar to the offence that the accused have been convicted. They amount to mob justice

20 [69].The dangers of these types of offences is that in most cases they are meted out against innocent people. People become victims simply because they are at the wrong place at the wrong time, people become victims of this offence simply because members of the community do not like them.

[70].I am certain that the accused persons as they are sitting before me the six as they are, they cannot State with certainty that the victims of the commission of their offences are the ones who stole their plasmas. Thabang is lucky to be alive because he may get another opportunity to prove to them that he was never ever involved in theft of anyone's plasma.

10 [71].Ronald was unfortunately, with him. It is done it cannot be undone. He is gone. His family has lost him for good. What worries this court is that there is no time where we are not dealing with offences of this nature. We deal two, three or four of them in one term. What exacerbate this position is that they do not emanate from one community. They come from all corners of Limpopo province

[72].I have dealt with cases that come from Dan somewhere in Tzaneen. I have dealt with cases that emanate from
20 Sekhukhune, Jane Furse. There are cases that come from Bochum. I am saying this because I have a duty as a judicial officer to deter members of the community from engaging in these type of activities. And one way of doing that is by imposing suitable sentences.

[73].The circumstances of this case calls for a lengthily prison term although I cannot impose life imprisonment because I am satisfied that there are substantial and compelling circumstances that justify deviation from imposing a sentence in terms of the Act. One of them being that you were not alone when you committed this offence, it was a group of about eighty people as deposed to by Thabang.

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[74].Secondly because you are not hardened criminals, you are first offenders. And that there is a possibility that you may refrain from committing similar offences. However, because of the cruelty in which you committed this offence, the cruel manner in which you committed these offences, I agree with the State that a lengthy term of imprisonment is the only suitable sentence. It is a case where I should not only deter you but I should deter also members of the entire community.

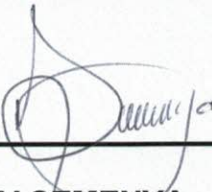
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[75].On count 1 you are each sentenced to ten year imprisonment.

Count 2 you are each sentenced to twenty-two years imprisonment. In terms of Section 280 (2) of the Criminal Procedure Act 51 of 1977.

I order that the sentences in both count 1 and count 2 shall run concurrently.

10



M.V SEMENYA

JUDGE OF THE HIGH COURT; LIMPOPO

APPEARANCES

ATTORNEYS FOR THE ACCUSED

: MILANZI AT

COUNSEL FOR THE ACCUSED

: ADV. TEMA W

ATTORNEY FOR THE STATE

: DPP

COUNSEL FOR THE RESPONDENT

: ADV. CHAUKE C

DATE OF THE JUDGMENT AND

20 **SENTENCE**

: 06 JUNE 2020