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

Case No.: A201/2017

In the matter between:-

MOHLALEFANG CYRIL MOKOENA (Accused 1)

1st Appellant

LEHLOHONOLO PHILLIP MOLOI (Accused 5)

2nd Appellant

MOEKETSI ELLIOT RADEBE (Accused 6)

3rd Appellant

and

THE STATE

Respondent

CORAM: MUSI, JP *et* LOUBSER, J *et* MOENG, AJ

HEARD ON: 03 MAY 2019

JUDGMENT BY: MUSI, JP

DELIVERED ON: 31 MAY 2019

[1] The three appellants were convicted on various counts and sentenced to lengthy terms of imprisonment [by a single Judge of this division]. The first appellant [accused number 1] was convicted of three counts of murder, three counts of robbery with aggravating circumstances and one count of attempted murder. He was sentenced to three terms of life imprisonment and 55 year's imprisonment. The court *a quo* ordered that 25 years of the 55 year's imprisonment should run concurrently with the life imprisonment.

[2] The second appellant [accused number 51 was convicted of murder, robbery with aggravating circumstances and attempted murder. He was sentenced to undergo an effective prison term of 21 years.

[3] The third appellant [accused number 6] was convicted of two counts of murder and two counts of robbery with aggravating circumstances. He was sentenced to an effective term of 24 year's imprisonment.

[4] All three appellants now appeal against their respective convictions and sentences. Leave to appeal was granted by the court *a quo*.

[5] I will for the sake of convenience refer to the appellants as accused 1, 5 and 6 respectively. I will not traverse all the evidence that was led in the court *a quo*. However, I will refer to all the evidence that implicated the accused or purported to do so.

[6] On 9 May 2009, at approximately 22H00, Mr Lehlohonolo David Ramaditse was at De Bult Qwa-Qwa. He was sitting in his car with his lady friend Tshepiso Radebe (Tshepiso). Two persons approached his car. The fat one knocked on the driver's side window of the car and asked him to take them to Phuthaditjhaba. He refused. The other person shot him thrice and Tsephiso once with a firearm. They entered the car and pushed him to sit between the two front seats. One of them

drove the motor vehicle.

[7] Tshepiso screamed and mentioned one of the two assailants' name. He could not clearly remember the name but it sounded something like "Shema". She also argued with the men and it was clear to him that she knew them. After driving a while, the driver stopped the vehicle. The assailants climbed out of the car and stood in front of it. He managed to escape through the left rear door and ran for dear life. A shot was fired at him while he was running. He hid in the bushes. Whilst there he heard another shot being fired. After a while he returned to the car and discovered that Tshepiso was shot dead.

[8] He went to a nearby house from where the police and an ambulance were called. His car radio, a JVC, was taken from the vehicle. On 21 July 2009, the police brought the radio to him and he identified it as his property.

[9] Mr Ramaditse identified accused 1 as the fat person who he saw at his car. He testified that he had ample time to identify accused 1. The light sources were the interior light of his car as well as a nearby mast light.

[10] The *post mortem* report confirmed that Tshepiso died due to a fractured skull caused by a gunshot.

[11] Constable Maleme testified that on 10 May 2009 at 02H30 he received a phone call as a result of which he went to a house at Elite residential area. He found Mr. Ramaditse who was injured at that house. He called the ambulance that took Mr. Ramaditse to hospital. He subsequently went to Mr. Ramaditse's car where he found a lady, Tshepiso, who was already dead.

[12] Mr. Chami Japhta Mokoena testified that on 12 June 2009 at 23H30 he and Lerato Kaloi went to De Bult Jazz Club to meet a friend. Lerato could not enter because she was not appropriately dressed. He went in and left her in the car, a Volkswagen Golf with registration numbers and letters [...] FS. Approximately five minutes after he entered the club he received a phone call from his vehicle tracking company and he was informed that somebody tampered with his vehicle's battery.

He went out and discovered that his vehicle was not there. He decided to report the incident to the police. En route to the police station he saw that his car was involved in a collision next to Riaholo school. The vehicle was damaged and it was later taken to the police station.

[13] On 14 June 2009, he went to the Phuthaditjhaba Organized Crime division's offices where he identified the keys that were in his car. It was his car's keys, a friend's flat's keys and his shop's keys.

[14] Constable Zwane testified that on 13 June 2009 at approximately 01H30, he was on his way home from the police station. He noticed a black Volkswagen Golf that was involved in a collision. It was standing against a pavement. There were other police officers on the scene. He investigated and saw the deceased, Lerato, in the vehicle.

[15] She presented a neck wound. A LG cellular phone that was in the car rang and he answered it. The person who called asked him where Mahlalefane is. A few days after this incident he heard that a person with the name Mahlalefane was arrested. It was accused 1.

[16] The *post mortem* report stated that the deceased, Lerato, died due to a cervical spine fracture caused by a gunshot. Her right external jugular vein was severed.

[17] Matshosane Ntsane testified that he worked for Mr. Isaac Mokoena at Bodibeng sports bar Phuthaditjhaba. On 12 June 2009 at approximately 22H00 he met his employer at a restaurant in Phuthaditjhaba. At approximately 23H00 they went to his place of employment with a lady, Lerato. When they arrived there, his employer sat in the car, a BMW, while he went to go and close the business. He went out and noticed that the BMW is not where it was parked. He called his employer and someone else answered the phone and informed him that his employer was asleep. He called again but the phone went unanswered. The next morning, he saw his employee's corpse at the Riaholo school.

[18] Sergeant Mthimkhulu testified that on the morning of 13 January 2009, whilst patrolling, he went to the Riaholo school where he saw a bumper of a BMW with registration numbers and letters [...] FS. He also saw the corpse of Mr. Mokoena and it had a gunshot wound through one eye. It is common cause that the BMW was later found, where it was burned.

[19] Inspector Sibeko testified that on 13 March 2009 he took his combi to his brother-in-law, Mr. Motloun. It did not have a radio installed in it. On 9 June 2009, he went to accused 2's house where he found his combi and noticed that it had a radio in it. Mr. Motloun confirmed that he gave the combi to accused 2 to convey passengers.

[20] Mr. Khuthatso Molefe testified that on 8 June 2009 at 20H30 he saw accused 1 and 2 at Makeneng Tavern, in Inspector Sibeko's combi.

[21] Ms Mokoena testified that she was the deceased, Isaac Mokoena's wife. On 7 October 2009 Captain Moshoadiba showed her keys and a cell phone which she identified as her husband's property. It was common cause that the cell phone was retrieved from accused 3's brother.

[22] Manana Kaloi testified that the deceased Lerato Kolo was her sister. Lerato left their parental home with her boyfriend. She had her cell phone with her. She knows accused 1, 4 and 6.

[23] Magiel Bierman is an Inspector stationed at the Phuthaditjhaba Organised Crime unit. He analysed calls made between some of the accused. The deceased's (Mokoena) cellular phone number ended with the numbers 4421, accused 1's with 6600, accused 3's with 7431, accused S's with 7264 and accused 6's with 6123.

[24] On 13 June 2009 the deceased phone called accused 3 at 4H45. At 4H46 and 5H23 deceased phone called accused 1's phone. On 4 May 2009 accused 1 called accused 5 at 21H08. On 5 May 2009 at 8H07, 11H19 and 14H45 accused 1 called accused 5. On 6 May 2009 accused 1 called accused 5 three times at 6H55. On 7 May 2009 at 08H11 accused 1 called accused 6. On 8 May 2009 at 16H06 and

17H38 accused 1 called accused 6.

[25] On 9 May 2009 accused 1 called accused 5 at 10H00, 17H18, 22H39, 22H40 and 22H41.

[26] On 10 May 2009 accused 5 called accused 1 at 00H31. Accused 1 called accused 5 at 00H34 and 03H08. Accused 1 called accused 6 at 12H19.

[27] On 31 May 2009 accused 6 called accused 1. On 5 June 2009 accused 5 called accused 1 at 9H41. Accused 1 called accused 6 at 14H07. On 11 June 2009 accused 1 called [...]8 at 17H15. This number was also called from the deceased phone after he was killed. Another number of interest is [...]5, which was called from the deceased phone on the day of the deceased's death. Accused 1 called the number ending with 1935 five times and the one ending with the numbers 9558 thirteen times. The owners of these two numbers could not be traced.

[28] He further testified that the LG phone that was found in the Volkswagen Golf was used with accused 1's simcard.

[29] Captain Kobane testified that on 17 June 2009 at 7H30 he reported for duty. He accompanied Col Sekupa to the Crime Intelligence offices where they saw accused 1 and 3. Accused 1 took them to accused 2's house where they met accused 2 and 5.

[30] Accused 2 made a report as a result of which they went to Inspector Sibeko's house and removed a JVC radio from a minibus. They went to accused 6's house, where they searched the main house and found nothing. Accused 1 told them something as a result of which they searched a second house, which is 3m from the main house, on the same premises with the permission of Radebe the owner of the main house. In the second house they found a BMW motor vehicle's key and a Citi Golfs key as well as an immobilizer for a Citi Golf. The Citi Golf's key was broken. There was a bunch of other keys as well. He received a call from Tseseng police station and was informed that accused 6 is there. He went there and found accused 6. They went to accused 4's house where he arrested accused 4.

[31] On 21 June 2009, he showed the radio to Mr. Ramoditse who identified it as his property.

[32] Captain Moshoadiba testified that he was the investigating officer of this case. On 18 June 2009 after the accused were arrested he spoke to accused 1 who informed him that the LG phone was his and that it fell when they ran from the accident scene. Accused 1 told him that his cellular phone number was [...]0. He realized that it is the same number as the SIM card in the LG phone that was found in the Volkswagen Citi Golf.

[33] On 19 June 2009 accused 6 indicated that he wanted to make a statement. He explained to accused 6 that he is a commissioned officer in the South African Police Service. At 14H00, on the same date he took a statement from accused number 6. In the statement he said:

"Op 2009-06-13 het ek Mohlalefang Mokoena en Mokejane Mahleke het na die bell toe gegaan om te gaan drink. Na ons klaar gedrink het, het Mohlalefang my meegedeel dat ek moet verder loop hulle sal my volg. Ek het nag by die pad gestap het 'n swart Golf by my gestop en Mahleke het my geroep. Toe ek in die voertuig inkom het ek vir Mahleke op die agter sitplek gevind. Mohlalefang het die voertuig bestuur.

En daar was 'n vrou wat by die passasier sitplek gel het en ek het gedink dat sy slaap. Mohlalefang het verder gery tot by BP vulstasie en hy het beheer van die voertuig verloor en die voertuig het die sypaadjie wal gestamp en beskadig. Dit is waar ek opgemerk het dat die vrou wat by die passasier sitplek was dood is. Toe het Mohlalefang ons meegedeel dat ons moet die voertuig daar los en weghardloop. Ons het toe weggehardsloop na die verskillende rigtings toe. Toe het ek na Manaung toe gehardloop. Later toe ek nog op die pad was het Mohlalefang Mokoena en Mokejane by my weer gekom met 'n silwer BMW wat voor beskadig is en hulle by my gestop om te klim. Toe ek in die voertuig kom het ek vir Jan Radebe daar binne gekry en daar was baie bloed in die voertuig. Ons het saam gery tot by Thabang waar ons die voertuig aan die brand gestee het. Toe ons daar staan en na die voertuig kyk het Mahleke Mokejane vuurwapen uitgehaal en die skoot op die

voertuig geskiet. Ons is toe weg na ons woning toe."

[34] Accused 1 testified that he stayed in Gauteng and that his parental home is in Qwa-Qwa. He borrowed his phone to his friend Madjadji during the Easter weekend of 2009. On 12 June 2009, Madjadji gave him his phone back. On the same day he travelled to Qwa-Qwa from Gauteng.

[35] He arrived at Qwa-Qwa and went to De Bult in the evening where he consumed alcohol. When he left the drinking place deceased (Lerato Koloi) called him while she was sitting in a motor vehicle. He went to her. She told him that her cellular phone's battery is flat. He borrowed her his cellular phone so that she could call her boyfriend. He then saw an acquaintance, Matikela. He went to the latter and they spoke for approximately 15 minutes. He forgot about his phone and took a lift home with Matikela. He arrived home at midnight and slept. He was arrested on 17 June 2009. He denied committing any of the crimes.

[36] Lucia Mokoena, accused 1's mother, testified that on the afternoon of 12 June 2009 accused 1 arrived home from Katlehong, Gauteng. He left in the evening and returned at midnight.

[37] Tsietsi Mokoena testified that he is accused 1's brother. He lives in Villa Lisa Gauteng. On 12 June 2009 he was living in Katlehong with accused 1. On that day accused 1 travelled to Qwa-Qwa.

[38] The trial court found that the version put up by accused 1 is not reasonably possible true. It comprehensively evaluated the evidence and found that accused 1 was correctly identified by Mr Ramoditse as one of the people who attacked him. The trial court was satisfied that the identification of accused 1 was indeed reliable and that there was sufficient light in order to identify accused 1.

[39] The trial court rejected the accused version that he borrowed his cell phone to the deceased, Lerato Kaloi. It found that accused 6 pointed out the house where the keys of the Golf and the BMW were found. It further accepted Constable Zwane's testimony that the LG phone which was in the Golf rang and the person on the other

side requested to speak to Mahlalefane, accused 1.

[40] It analysed the cellular phone data and found that the deceased phone was used to call accused number 1's phone. The deceased phone was also used to call the phones with the following numbers, [...]5 and [...]8. Prior to the death of the deceased accused 1 phoned these numbers regularly.

[41] With regard to accused 5, the trial court analysed the cellular phone data and found that the timing and frequency of the calls between accused 1 and 5 leads it to the only reasonable inference being that accused 5 was involved during the incidents involving Mr. Ramaditse and the deceased, Tshepiso.

[42] In respect of accused 6 the trial court found that the keys to the Golf and BMW were found at the premises where accused 6 stays. It further found that accused 6 made a statement to Capt. Moshoadiba wherein he put himself on the scene. It further utilized the cellular phone data to link accused 6 and accused 1, by pointing out that on 11 June 2009 and 13 June 2009 there where cellular phone communication between the two. Accused 6 did not testify. There was therefore no explanation from him with regard to the evidence that patently pointed to him being involved in the crimes.

[43] Ms Kruger, on behalf of the appellants, contended before us that the evidence against accused 5 is very thin. She argued that the trial court erred in finding that the evidence against him ineluctably supports the inference that he was guilty of any crime. She also contended that the court *a quo* erred in accepting the evidence of Capt. Moshoadiba with regard to accused 6 making the statement to him, because accused 6 denied making the statement. She further contended that the trial court erred in rejecting accused 1's version.

[44] Mr. Steyn, on behalf of the respondent, was constrained to concede that the link between conviction of accused 5 and the commission of the crimes is tenuous. He supported the convictions of accused 1 and 6.

[45] It is trite that the state must prove its case beyond a reasonable doubt against

the accused. The Court must be certain that the accused have committed the offenses. Certainty is reached after the Court has weighed the totality of the evidence and not only certain parts of the evidence against an accused person. If after analysing all the evidence there is doubt as to the guilt of the accused, the accused should be given the benefit of the doubt.

[46] If the State endeavors to prove the guilt of the accused by dint of circumstantial evidence, such evidence should be subjected to the two principles of logic as set out in **S v Blom**¹ where it was said that:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."²

[47] Circumstantial evidence therefore necessitates a finding of a fact or facts (base fact or facts). The base facts should be firmly established. Once the base facts have been established it is then used by way of inferential reasoning to establish another fact (main fact) in order to prove the guilt of an accused beyond reasonable doubt. The base facts should be consistent with the main fact. The one must lead logically to the other. The main fact should be the only reasonable inference that can be drawn from the base facts. In other words, the main fact must not be susceptible to other reasonable hypotheses or theories. If the main fact is not the only reasonable inference to be drawn from the base facts, then the inference of guilt cannot be drawn.

[48] The phone calls between accused 1 and 5 happened before, after and on 9 May 2009, the date of the incidents. On the evening of 9 May 2009, accused 1 called accused 5 at 22H39, 22H40 and 22H41. According to Mr. Ramaditse the incident, when they knocked on the car's window, happened at approximately 22H00. These are the base facts. Do they establish as the only reasonable inference that accused 5

¹ R v Blom 1939 AD 188 at 202-203.

² At 202- 203.

was involved in the commission of the offenses? I think not.

[49] I say so because, first why would accused 1 phone accused 5 when they were together at the scene? Second, the radio which was stolen from Mr. Ramaditse's vehicle was put in Sibeko's combi by accused 2. He did not explain how he came in possession of the radio. Third, accused 5 admitted that he and accused 1 called each other regularly and spoke about various subjects. Fourth, the records also include instances where the phoned went to voicemail. It was not determined how many of those calls were actual conversations. Fifth, the respondent ascertained that accused 1 was in Phuthaditjhaba when he made the calls, but it led no evidence as to where accused 5 was when he called or received calls from his phone.

[50] In my view the link between the base facts and the inference sought to be drawn in this case is too tenuous. The fact that accused 5 was involved in the commission of the crimes is not the only reasonable inference to be drawn from the calls between him and accused 5.

[51] In **Boesak**³ it was said:

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, the court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence..."⁴

[52] Accused 6 made a statement that puts him on the scene of the crimes and in the company of the perpetrators. Some of the stolen goods were found in the house where he stays. Faced with this evidence, he decided not to testify. He must face the consequences of his silence. I am satisfied that the trial court visited accused 6 with the correct and deserved consequences.

³ 2001(1) SACR 1 (CC).

⁴ Ibid para 24.

[53] The trial court's reasoning cannot be faulted when it comes to accused 1. He was positively identified by Mr. Ramaditse. He pointed out the house where the keys of the Golf and BMW were found. He patently lied about how his LG phone landed in the Golf. He was a pathetic witness who lied and contradicted himself. His evidence was dissonant with the probabilities and proven facts.

[54] Accused 1 was 21 years old when the crimes were committed. He passed grade 12 and he was unmarried with no children. He studied at Boston College to become a computer technician. He repaired cellular phones and earned between 4000 and 5000 rand per month.

[55] Accused 6 was 28 years old when the crimes were committed. He passed grade 12. He was married and has one child who was born on 29 September 2009. His wife, who lived at her maternal home after his arrest, was unemployed. He was in custody for almost two years awaiting the finalisation of the trial.

[56] It cannot be gainsaid that the appellants have been convicted of very serious offences. The deceased were murdered in cold blood probably because they knew the accused and would have identified them. That is certainly the case with Ms Kalo and Ms Radebe. These were harmless and defenceless women. Mr Ramaditse was shot four times in the abdomen and miraculously survived. The appellants showed scant regard for human life.

[57] The trial court found that accused 1 was centrally involved in the commission of the crimes and could be seen as a leader whilst accused 6 played a lesser role. I am not sure whether this finding is correct with regard to accused 6. That finding led the trial court to conclude that there are substantial and compelling circumstances present with regard to accused 6. There is no appeal, on sentence, by the respondent. In my view the finding that there are no substantial or compelling circumstances present with regard to accused 1 is beyond question. He deserves a sentence of life imprisonment for any and all the murder convictions.

[58] Ms Kruger conceded that there is no basis for the appeal on sentence. The trial court considered all the relevant factors, it did not commit an irregularity, it did

not misdirect itself and the sentence is not shockingly inappropriate. It is proportionate to the crimes that were committed.

[59] There remains one last thing to deal with. The trial court ordered that 25 year's imprisonment of the additional 55 years imprisonment imposed on accused 1 should be served concurrently with the life sentence. This in effect means that he must serve 20 years' imprisonment after serving the life imprisonment. To state the obvious, he only has one life. This issue is governed by the Correctional Services Act (Act).⁵ Section 39 thereof reads as follows:

"(1) Subject to the provisions of subsection (2) a sentence of incarceration takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the sentenced person is released on bail pending a decision of a higher court, in which case the sentence takes effect from the day on which he or she submits to or is taken into custody.

(2) (a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but-

- (i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal;
- (ii) one or more life sentences and one or more sentences to be served in consequence of a person being declared a dangerous criminal also run concurrently;..."⁶

[60] The order stating that a portion of the 55 year's imprisonment should run concurrently with the life imprisonment ought to be set aside because this issue is

⁵ Act 111 of 1998.

⁶ Sections 39(1), 39(2)(a)(i) and (ii).

definitively governed by the Act. The order is contrary to the prescripts of the Act and therefore incompetent.⁷ In **Mashava**⁸ it was said, with reference to section 39(2)(a)(i):

"The provision is clear. Any determinate sentence of incarceration, Imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical. A person only has one life and a sentence of life imprisonment is the ultimate penal provision"⁹.

[61] I accordingly make the following order:

1. The second appellant's (accused 5) appeal against his convictions and sentences is upheld.
2. The second appellant's (accused 5) convictions and sentences are set aside.
3. The first and third appellant's (accused 1 and 6) appeals against their respective convictions and sentences are dismissed.
4. The order of the court *a quo*, in respect of accused 1, with regard to the 25 (twenty five) year's imprisonment that must be served concurrently with the life sentence, is set aside.

C.J. MUSI, JP

I concur.

P.J. LOUBSER, J

I concur.

L.B.J. MOENG, AJ

Appearances:

⁷ S v Makhoka (2019] ZACC 19 at paras 16 to 18.

⁸ S v Mashava 2014 (1) SACR 541 (SCA).

⁹ Ibid para [7].

For the Appellants:	Ms S. Kruger Legal Aid South Africa Bloemfontein
For the Respondent:	Adv C.F. Steyn Director Public Prosecutions Bloemfontein