

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

|                                            |                                              |
|--------------------------------------------|----------------------------------------------|
| (1)                                        | REPORTABLE: YES/NO <i>yes</i>                |
| (2)                                        | OF INTEREST TO THE JUDGES: YES/NO <i>yes</i> |
| (3)                                        | REVISED                                      |
| .....                                      |                                              |
| DATE: <i>10/03/17</i> SIGNATURE: <i>PA</i> |                                              |

**CASE NO: CC107/2014**

In the matter between:

**THE STATE**

**And**

**KATISHI STOFFEL MORABA**

**ACCUSED**

---

## JUDGMENT

---

**CHIDI A.J**

### **INTRODUCTION**

[1] The accused a 30 year old (at the time of the commission of the offence) male person and a South African citizen of GA-MASHAMOTHANE, ZONE 2, BURGERSFORT, (hereinafter to as the accused) is charged with four counts; **Count 1:-** murder read with the provisions Section 51 (1) of the Criminal Law Amendment Act<sup>1</sup> ("the Minimum Sentences Act); it is alleged that upon or about 8 January 2013 and or near GA-MASHISHI VILLAGE, in the district of PRAKTISEER, the accused did unlawfully and intentionally kill HANKEBO SOLOMON SENKEBO an adult male person.

**Count 2:-** robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act<sup>2</sup> (CPA), read with Section 51 (2) of the Minimum Sentences Act; in that upon or about 8 January 2013 and at or near GA-MASHISHI VILLAGE, in the district of PRAKTISEER, the

---

<sup>1</sup> Act 105 of 1997, as amended.

<sup>2</sup> Act 51 of 1977, as amended.

accused did unlawfully and intentionally and with force assault HANKEBO SOLOMON SENKEBO, and did then and with force and violence take the following properties, to wit:

- (a) Three MTN airtime vouchers
- (b) Three Vodacom airtime vouchers

the property or property in his possession, aggravating circumstances being present in that the accused used the firearm to commit the said crime.

**Count 3:-** Contravention of Section 3 of the Firearms Control Act , read with the provisions of Sections 1, 103, 117, 120 (1) (a), 121, read with Schedule 4 and Section 151 of the Firearms Control Act<sup>3</sup> and further read with Section 250 of the CPA- Unlawful possession of a firearm; in that upon or about 8 January 2013 and or near GA-MASHISHI VILLAGE, in the district of PRAKTISEER, the accused did unlawfully have in his possession a 9mm Norinco Pistol firearm, further particulars of which are unknown to the State without holding a licence to possess same.

---

<sup>3</sup> Act 60 of 2000, as amended.

**Count 4:-** Contravention of Section 90 of the Firearms Control Act read with Sections 1, 103, 117, 120 (1) (a), 121, read with Schedule 4 and Section 151 of the Firearms Control Act and further read with Section 250 of the CPA- Unlawful possession of ammunition; in that upon or about 8 January 2013 and or near GA-MASHISHI VILLAGE, in the District of PRAKTISEER, the accused did unlawfully have in his possession three live rounds of ammunition, the particulars of which are unknown to the State, without being the holder of:

- (a) A licence in respect of a firearm capable of discharging that ammunition.
- (b) A permit to possess ammunition,
- (c) A dealer's licence, manufacture's licence, gunsmith's licence, import, export, or cash in transit permit or transporter's permit issued in terms of this Act,
- (d) Or otherwise authorised to do so.

Before accused could plead to the charges I informed him about the provisions of Section 51 (1) of the Minimum Sentences Act and the competent verdicts thereof.



[2] The accused pleaded not guilty on all counts and elected not to disclose the basis of his defence by exercising his right to remain silent.

[3] The following were recorded as formal admissions in terms of Section 220 of the CPA, **Exhibit "A"**:

(a) THAT the deceased is the person mentioned in the indictment namely:

**HANKEBO SOLOMON SENKEBO**

(b) THAT DR. BHANWAR LAL BHOOTRA conducted post-mortem examination on the body of the deceased on 09 January 2013 and recorded his findings on the form marked (**GW7/15**) hereby handed in as **Exhibit "B"**

(c) THAT the deceased sustained no further injuries from the time he sustained the said injuries on 08 January 2013 until the post-mortem examination was conducted on his body as per paragraph 3 above.

(d) THAT the facts and findings of post-mortem examination as recorded by DR BHANWAR LAL BHOOTRA as per **Exhibit "B"** are both true and correct.

(e) THAT the cause of death was correctly recorded as:

## **"GUNSHOT WOUND OF ABDOMEN"**

- (f) THAT the affidavit in terms of section 212 (7) of Act 51 of 1977, by **Madimetja P Maja** of the Forensic Pathology Services, Lebowakgomo, who received the deceased body from **Constable LT Ramoroka** on the scene of crime and transported the deceased body from the scene of crime to the Forensic Pathology Services, Lebowakgomo, **Exhibit C**"
- (g) THAT the authenticity and correctness of the contents of the following documents are not in dispute and are hereby handed in by agreement:
- (i) THAT **Constable M.C Mokgotho** took swab on the scene and on the mountain, as **Exhibit "D"**
- (ii) Photo album, photos 1-14 key to the photos of the scene, compiled by **Constable M.C Mokgotho**, as **Exhibit "E"**.

### **[4] THE EVIDENCE**

Save for the exhibits, "A", "B", "C", "D" and "E" mentioned in paragraph 3 above, there are other exhibits which were tendered during the evidence of both the State and defence. I shall deal with those exhibits during the evidence hereunder.

### **[5] The State Case:**

The first witness for the State was **Mohube Judith Lekwadu**, who testified briefly as follows: she was born at Ga-Mashishi where she resides. On 08 January 2013 at about 07:30 she was outside her

homestead washing clothes when she saw two young male persons; one "white" and another black passing by. These two male persons passed her homestead for about four times. The men went to the shop which is about 50meters from her homestead and sat on the verandah of the shop. Later she entered the house; when she looked at the shop those two young male persons were no longer there. She saw one of them go around the counter of the shop and a gunshot was fired. After the gunshot was fired the two young male persons searched "Sekeyo" (the deceased), who was the shopkeeper. Then two young males ran towards the mountain.

[6] "Sekeyo" ran out of the shop holding his stomach to her homestead but she had locked herself inside house. He then ran to the donga where he fell down. She then sent text message to the owner of the shop to tell him that Sekeyo was shot at. She did not attend the identification parade at the police station but she can identify the two male persons. She then pointed at the accused as one of the two young males. She could identify the accused as "**slender and white**".

[7] Under cross-examination it was put to her that she did not tell the police in her statement that one of the young males was "white". That she did not tell the police officer who took down her statement that she was



frightened. Further that she did mention the clothes of the young males in her statement but not in her evidence before court. She stated that one of the young males was dressed in a black T-shirt and khaki pair of trousers and another one she just saw a red T-shirt; but she cannot say who was dressed in what. She could identify the young males because of their clothes. ***The young males did not look at her and she did not focus on them.*** It was put to her that according to Tshepo Mashabela who made a statement to the police one of the young males had sunglasses and a hat. Tshepo Mashabela also said that one of the men was wearing a brown T-shirt with stripes. That those young men when they were running towards the mountain they were facing a different direction, hence she could not see their faces. It was also put to her that she has eyesight problem. Her statement was handed in as **Exhibit "F"**.

- [8] The second State witness was **Reading Mafereka Selala**, who testified briefly that: he is the Sergeant in the SAPS, Mecklenburg. He was the initial I/O in this case until 2014. He was instructed by the Mecklenburg Court to take the two accused to the Mecklenburg Hospital for their blood to be drawn. One of the accused has since passed on. He took the accused to Dr. Lehoko, who is attached to Mecklenburg Hospital, who drew their blood and sealed the bottles in his presence. He took the



blood samples to the laboratory in Pretoria the same day. He registered the bottles in the SAPS 13 register under **448/2013**. The bottles were signed by W/O Makgata. The bottles had numbers: (1): **05D4BB1499MX** and (2): **05D4BB0470MX**.

[9] Under cross-examination it was put to him that the first statement differs from the one he has made recently. That the numbers on the bottles in the SAPS 13 register as well in the statements he made do not refer to any names of a person whose blood was drawn. That according to his first statement (A24) he sent the blood samples to the laboratory in Pretoria on **17 October 2013** and in terms of the new statement (A34) he took the blood samples to the laboratory on **23 October 2013**. That the collection kit does not have the names of the person from whom the blood was drawn.

[10] A letter dated 20 January 2014 Exhibit "H"; A24 Exhibit "J" and A34 Exhibit "J1". Collection kit Exhibit L1 and L2.

[11] The third witness for the State was **Moshukutjwane Abednico Thobejane**, whose evidence is briefly that: He is a constable stationed at Lephalale SAPS. He has 9 years' service in the SAPS. On 23 January 2013 he handled a Norinco firearm as per SAPS 13/31; while he was still working at Mecklenburg SAPS. He received the Norinco firearm

from the CSC and kept it in another safe. The Norinco was in the exhibit bag seal number **PA400048533R**. On 25 February 2013 W/O Lesufi took the **exhibit 31** firearm and **exhibit n012 projectile**. W/O Lesufi said he was taking the evidence bag to Pretoria. There are two numbers: (1): projectile- **FSCC-366782** and (2) **PA4000485338I** firearm.

[12] Under cross-examination it was put to him that in his statement to the police the firearm did not have the serial number. That it was not the only firearm that did not have the serial number. That another witness stated in the statement that it was a pistol Norinco. That there is a statement to the effect that in the evidence bag there was a **Norinco and live rounds**. That he does not know the circumstances under which the Norinco came to the CSC. He was not given the Norinco immediately after discovery. That he is not the only one who kept the keys and had access to the exhibits.

[13] The fourth State witness was **Safira Mpho Mnisi**, whose evidence was that: she is a Constable in the SAPS with 9years experience attached to Mecklenburg Police Station. On 11 January 2013 while on duty she received a projectile exhibit from the CSC Commander Captain Lesufi. She signed for it from the **SAP13 12/2013**. She took the exhibit to the

strong room where firearms are kept. When she received the exhibit it was in the seal bag. The seal bag number was **FSCC-366782**.

[14] Under cross-examination it was put to her that the incident occurred in 2013 but she only made her statement on 29 November 2016. That she only received the projectile. The last time she saw the exhibit was when she put it in the strong room. That she did not indicate in her statement what happened to the exhibit later. She does not know how long the exhibit stayed in the strong room and if other people had contact with that exhibit. She did not mention it in her statement that she received the exhibit from Captain Lesufi. She does not know how the exhibit got into the CSC. The exhibit exchanged many hands. The Captain who gave it to her must have registered it in the CSC register.

[15] The fifth State witness was **Makuduele Simon Lesufi**, who testified briefly that: he is the W/O with 25 years' experience attached to Mecklenburg Police Station. On 09 January 2013 he was on duty and he attended the postmortem at Lebowakgomo which was conducted by Dr. Bootra. This Dr. Bootra removed a "deformed" bullet from the body of the deceased, **L152013 of CAS 81/1/2013**. He received the projectile and sealed it in the evidence bag. He took the exhibit and handed it in at the CSC and was registered in the SAP 13 book as **12/2013**.



[16] On 25 February 2013 he received the exhibits from Constable Thobejane which were registered under **SAP13 12/2013** and **SAP 13 31/2013**. He sealed them inside a seal bag. On 26 February 2013 he took the exhibits to Pretoria. The seal numbers are: (1): **SAP 13 12/2013:-FSC-366782** and (2) **SAP 13 31/2013:- PA4000485338R**.

When he received the exhibits they were in the seal bag which was tagged. The exhibit that he received from Dr. Bootra was also sealed inside the seal bag. The projectile that he received from Dr. Bootra showed that it had damage; it struck something. He requested the seal bag from the LCRC Lebowakgomo to put the projectile.

[17] Under cross-examination it was put to him that the body which he observed at the postmortem had a gunshot wound. That Dr. Bootra removed the projectile from the body and gave it to him. That Dr. Bootra did not remove that projectile but the deformed bullet which is different from the projectile. That he was not trained about how to handle exhibits; if was he could have gone to the postmortem with the evidence bag for any eventualities. That the postmortem report does not mention which exhibit was packaged and the evidence bag number. He made *the statement on 28 November 2016. The postmortem report does not even reflect how the deformed bullet was packaged. That Dr. Bootra did*

not mention it in the postmortem report how the deformed bullet was packaged and also the CAS number was not reflected on the postmortem report. That there is no evidence before court to the effect that there is a difference between the bullet and projectile. He maintained that a deformed bullet and projectile are one and the same thing.

[18] The sixth State witness was **Mareologo Israel Morena**, who testified concisely that: he is the W/O of 26 years' experience attached to Mecklenburg Police Station. On 09 January 2013 while on duty he received an exhibit which was a projectile from Capt. Lesufi. This projectile was in a plastic bag; which had a number that he wrote in his statement. He recorded the exhibit in the SAP13 book 12/2013 CAS 81/1/2013. The seal bag number is FSCC-366782. After signing for it he put the exhibit in the shelves of the safe in the Charge Office. He does not know what happened to it later.

[19] Under cross-examination it was put to that he made his statement on 28 November 2013. The trial was previously scheduled for 30 May 2016. He got the FSC-366782 number from his personal diary where he recorded the FSC number on the date when he received the exhibits. *The Relief Commander is always in possession of the keys to the safe.*

The last time he saw the exhibits were in the safe. W/O Lesufi did not tell him who packaged the exhibit.

[20] The seventh State witness was **Makoti Samuel Mampa**, whose evidence was that: he was working for the SAPS as Captain attached to Mecklenburg Police Station. On 13 January 2013 while on duty he received an exhibit from Captain Ngele. This Captain Ngele came to the CSC with the Norinco firearm and three bullets (ammunition) which were kept in a brown envelope. He, Makoti Samule Mampa, registered the exhibit in the SAP 13 book as 31/2013. He tagged and locked it in the safe; that was the last time he saw the exhibit. The envelope that contained the exhibit did not have the seal number, but it was written CAS 81/1/2013.

[21] In cross-examination: it was put to him that Abednico Thobejane testified to the effect that he removed the firearm from the CSC safe on the 25 February 2013. This Thobejane found only the Norinco firearm which did not have a serial number. That the firearm was in the safe for a period of a month. That Thobejane did not mention the ammunition in his evidence. That there were no identification marks on the bullets. **However, he said the bullets and the firearm were together in the same bag and number (this is according to his knowledge). That he**



put the bullets in the plastic bag; tie it to the firearm which is already tagged. **The three bullets were not collected from the safe to be sent to the ballistics.** His response: Thobejane can sign for the firearm but not the bullets. He was not telling the truth when he said he registered the exhibits in the SAP 13 book.

- [22] The eighth witness for the State was **France Ramoroka**, who testified concisely that: he is a Constable with 10 years' experience attached to Westenburg Police Station. On 08 January 2013 he was attached to Mecklenburg Police Station. He received a report that there was a shooting incident at Ga-Mashishi village which he attended. At the scene he found Judith, the first state witness, who explained to him that two boys entered the shop and later she heard a sound of a firearm. She saw the shopkeeper, Solomon, running out but he fell down. The two boys who entered the shop got out running towards the mountain. She phoned the owner to report about the incident who came and transported the injured person to hospital. He saw blood in the shop and rushed to the hospital but upon arrival he was informed that the person was certified dead. He decided to go back to the scene where his colleague was busy looking for the suspects in the mountain. *He did not go to the mountain as he was busy writing the docket.*

[23] There was no cross-examination on this witness.

[24] The ninth State witness was **Reckson Rantlagwe**, whose testimony was briefly that: he is a Constable with 10 years' experience attached to Mecklenburg police station. On 8 January 2013 while on duty at about 7h30am he attended a shop robbery at Bolebu shop Ga-Mashishi. He was the driver of the Police car BST 228BB and his crew was Constable Ramoroka. At the shop he found that the doors were open and the counter was turned upside-down and there was blood on the floor. He saw Judith who stays next to the shop. He asked her what has happened. She told him that there were people at the shop but they ran to the mountain. That a certain Somalian national who was the shopkeeper, was taken to the hospital. Ramoroka searched for the people in the mountain. He saw the print of All-star shoe and blood on the mountain, which information he gave to Ramoroka. He contacted the CSC to call Constable Mokgotho of the LCRC. This Constable Mokgotho took the blood swabs on the mountain and at the shop. He went to the hospital unfortunately the shop attendant had died. The CSC contacted Mr Maja to remove the corpse to the government mortuary. He made the *statement on 3 June 2013.*

[25] Under cross-examination: it was put to him that he did not include the issue of All-star shoe print in his statement. He has consulted with the State advocate otherwise she would not have known that part of his evidence is not included in his statement. That if he pointed the All-star shoe print to Constable Mokgotho and Constable Ramoroka they would have included such in their statements. That Constable Mokgotho did not take the photo of the shoe print. That photo 5 and 6 are one; photo 5 was taken at distance whereas photo 6 was a close-up. That he was denying the obvious things. **That according to Constable Mokgotho it is Ramoroka who pointed out the scene to him.** It was put to him that he saw blood on the rocks and the All-star shoe print. His response was in the positive. He was not telling the truth in his evidence because he is unable to see the difference between photo 5 and 6. That photos 5 and 6 show the blood not the All-star shoe print. That photo 7 and 8 are one.

[26] That the place which is shown in the photo album on the mountain is one being photo 7. It was put to him also that Constable Mokgotho took the photos as shown by Ramoroka. He did not show Constable Mokgotho the shoe print. The only reason the State called him was show how he found the scene. He went to the hospital after he was informed that the deceased has been taken there. That Ramoroka



stated in his evidence that he is the one who went to the hospital. When he was pointing the marks Ramoroka was at the shop. The counter was not turned upside-down but goods were just shifted. That he was exaggerating his evidence. The blood on point "C" is not linked to anywhere with the scene. That the scene of the crime is the shop. That in his statement he did not mention that the scene start at the shop and end in the mountain. His statement was handed in and marked **Exhibit "M"**.

- [27] The tenth State witness was **Alfred Molemo Lehoko**, who testified to the effect that: he is medical practitioner working at a public hospital at Mecklenburg Hospital. He has 19years experience as a medical practitioner. He recognises **Exhibits L1 and L2**. They are the forms used when drawing blood from the patient. He signed the form with **Reference 05D4BB0470**. The procedure is that: - the police bring a patient to the hospital with a seal box. Inside the seal box there is a vacutainer with a needle. There is a test-tube attached to it. There is also a paper where the doctor writes his details and the details of the police officer who brought the patient to the hospital. There are other seals to close the box after the blood has been drawn from the patient. They start the process by requesting permission from the patient to draw

his/her blood; the patient grants permission by signing the form. If permission is granted they proceed to draw blood. They then return the test-tube after filling it with blood. Then he would write his details, also the police officer writes his details. They then return the test-tube to the container. The broken seals are put back in the container and they use the new one to close the specimen. Everything is done in the presence of the patient. After completing the forms brought by the police the seals are handed over to the police.

- [28] The patient in this case did not show any discomfort. On the second form his initials appear; the number is 05D4BB1499 and his practice number MP04885542. The other form is very faint. The seal number is pre-printed.
- [29] In cross-examination: it was put to him that he does not have the hospital file with him nor does he have the hand written notes. That he handles many forms of this nature every day. That the only thing that can help him remember the case is when he looks at the documents. That the only thing visible in Exhibit L2 is the signature. **He cannot say who the patient was from whom the blood was drawn is, (he admitted).** He did not testify as to what he did with those forms. That if

the person did not sign the form it means he did not give permission. L2 form does not show the date on which it was completed.

[30] The eleventh witness for the State was **Reginah Makhura**, who testified to the effect that: she is a Captain in the SAPS attached to the Forensic Science Laboratory with 10 years' experience. She is the Senior Forensic Analyst and Reporting Officer. She holds BSC in Medical Science; Honours in Human Molecular Genetics from MEDUNSA. She analyses biological samples with the evidential material. She also analyses the registered evidence. She obtained training for 17 years in biological sciences. She analysed exhibits under CAS 81/1/2013 from Mecklenburg SAPS. She made a report which is contained in her Section 212 (4) affidavit. She received the exhibits from the I/O sealed. If the exhibits are not sealed they return them back. They do not accept tempered exhibits. They compare the crime scene exhibits with reference samples.

[31] In this case it was murder; so the crime exhibits were from the swabs with suspected blood; that is the DNA from the swabs of the suspected person. The crime exhibits were tested for presumptive blood to check if there is blood or not first. The reference samples are not tested but they



go through the DNA. If they test positive the presumptive blood go through the DNA system.

[32] In this case before court they received the exhibits as follows: control samples with the number:- **05D4BB1499MX** from inventory of **L Nkune**; and another inventory :- **05D4BB0470MX** from **K.S. Moraba**. There was another crime exhibit bag which had three swabs. They tested two swabs and swabs A and C were taken to the DNA analysis system; also the swabs of the individuals were taken to the DNA. Table 1 on page 4 of the Section 212 (4) affidavit shows the 16 locations. The STR will communicate whether the profile is male or female. XY is male and XX is female. **She analysed the swab "C" which was contained in PA5000394953U.** She compared the profile to reference samples S.L Nkune and K.S. Moraba. She compared the samples to each other. The swabs "C" and reference samples of S.L.Nkune XY is a male and XY K.S.Moraba is also male. All the 16 locations make the profile to check if the profile of S.L Nkune is excluded from the crime samples.

[33] The DNA swab "C" is 14:16 has 15:15; the location of crime sample does not have the 15. The person is excluded from the crime sample. K.S. Moraba was compared to swab "C" it has XY 15:15 which means

the donor is male. The location DNA of swab "C", the reference sample has 14:16 and location is 14:16 in all the locations. K.S. Moraba in all the locations match. She then made her findings in the Section 212 (4) affidavit to confirm that the DNA result of the swab "C" matches the DNA result of the reference sample. According to her information swab "C" matches that of K.S. Moraba and the reference sample from the scene and from the person. The DNA was handed as **Exhibit "N"**. On 20 January 2014 she wrote a letter **Exhibit "H"** wherein she referred the I/O that the covering letter 21 October 2013 was wrong. It must be noted that in the letter dated 20-01-2014 she remarked that ***"be advised that the information concerning exhibit identification as stated on the covering letter dated 21-10-2013 is incorrect. The covering letter refers to 05D4BB0470M and 05D4BB1499M; whereas the exhibit received are 05D4BB470MX and 05D4BB1499MX respectively"***. The covering letter serial numbers were incomplete. According to her it was a **"typing error"** because the only difference is the letter **"X"**. The other numbers were the same. The omission of **"X"** has no negative impact.

- [35] Under cross-examination: she was questioned about the numbers being 16 in relation to the gender. It was put to her that she did not do the

presumptive test. That she found the samples opened and she is not the one who opened the exhibits. That the Forensic Laboratory has the Standard Operating Procedure which states, *inter alia*, that if there is an error they have to return the exhibits or notify the I/O in a letter. That the I/O must rectify the error through an affidavit. **(Her response: they compare them to the exhibits bag and everything has to correspond.)** That according to the Standard Operating Procedure it does not make provision for the analyst to use his/her discretion but to return the exhibits or notify the I/O before she can proceed with the analysis. (Her response was that she realised that it was just one alphabet which was missing hence she used her discretion to proceed with the analysis). That she did not receive the affidavit of Constable Selala the I/O because she did the analysis before the error was rectified. That the reference blood collection kit L2 did not have the same numbers as the once she had.

- [36] The Standard Operating Procedure was handed in and marked **Exhibit "P"**. That according to her swab "C" was taken from the crime scene. However, the according evidence before court it was taken from the mountain which is not the crime scene. That she compared the exhibits with the swabs not from the crime scene. That the blood on L2 did not



have the names of the patient; according to her the profiles are very important to them and the names do not really mean anything. It was put to her that without the name the results will be without the owner.

- [37] The twelfth witness for the State was **Lazarus Mahlathini Ngele** who testified briefly that: he is a Lt-Col with 25years experience stationed at Tubatse Cluster. On 18 January 2013 he was on duty when he received a call from his informer who told him that the suspect in the murder and business robbery was around Steelpoort. The informer told him that the suspect was light in complexion and dressed in blue work suit of Tubatse Ferrochrome. He went to Steelpoort whereupon the informer showed him the accused. He introduced himself to the accused and produced his appointment card. The accused introduced himself as Stoffel Moraba. Lazarus Mahlathini Ngele informed the accused that he was looking for him in connection with the case. He read out to the accused the Constitutional rights; i.e (a) the right to remain silent; (b) the right to his own lawyer and if he cannot afford one he may be assisted with the lawyer at the State's expense. (c) He is not compelled to make any admission or confess anything which he might say will be used against him in court; (d) the right to have family visitors after arrest; (e) the right to be taken to court that day; (f) the right to be released on bail

or warning; and (g) not to be compelled to make any pointing outs. He was communicating with the accused in Sepedi.

[38] He asked the accused if there was something which he wanted to tell him. He received the call Ranny Sonjica who is the relative of the accused. This Ranny Sonjica informed him that the firearm was at his grandmother's garden. On the 19-01-2013 he went with W/O Mokoena to the homestead of Ranny Sonjica's grandmother where they dug the firearm out in the garden. They found a firearm Norinco with no serial numbers and 3 live rounds. He took the firearm together with the three live rounds and put them in a brown envelope and went to Mecklenburg SAPS where he requested the SAP 13 book to register the exhibits. He tagged the exhibits SAP 13 31/2013 under CAS 81/1/2013.

[39] Under cross-examination: it was put to him that the information from Ranny Sonjica that the firearm was brought by the accused was not in his statement. That even in the statement of Ranny Sonjica which was obtained by him did not contain that information. That it is improbable that he could forget to write that important information and three years later remember it. That according to Ranny Sonjica he is the one who retrieved the firearm and gave it to the police. That accused denies that he spoke or made any admission to him that he knew about the firearm.

That any admission or confession must be in writing. That he should have charged Ranny Sonjica for illegal possession of a firearm. That at the scene there was no one who was arrested.

**Ballistic Report of Lt.Col Nel was accepted in the record and marked Exhibit "R".**

[40] The thirteenth State witness was **Molebeledi Frank Makgata**, who testified in short that: he is the W/O with 25years experience stationed at Mecklenburg Police station. On 17 October 2013 he was on duty when he received exhibits from Constable Selala. The exhibits were two blood kits. They were registered in the SAP 13 448/2013. They were packaged; each had its own blood kit. He made a statement in which he wrote the reference numbers: (1) **05D4BB1499MX** and (2) **05D4BB0470MX**.

[41] Under cross-examination: he was asked if the two exhibits are comparable to the numbers he has read out. Whether he sees them for first time. That he was called to give evidence to the effect that he did not register the exhibits. That the exhibits were not accompanied by the forms, (L1 and L2). That it is for the first time he sees the forms. **(His response is that when he received the two boxes from Constable Selala he did not know what was inside the boxes).** He was asked



as to why he registered the blood samples if he did not know what was inside. (He stated that it is how they do it in the SAP 13 book). That if there was an error in the SAP 13 book he would continue with that error. **(He said that he verified the numbers before he signed for them)**. It was put to him that the numbers he has read out are different from the L1 and L2.

[42] In re-examination: he stated that the only difference is the letter MX on both L1 and L2.

[43] The fourteenth State witness was **Obed Mokwane Nkwane**, who testified to the effect that: he knows the accused by sight as he used to see him around Burgersfort town. He knows the accused as Maboti. On 8-01-2013 he received a call from his mother to the effect that the police were at his homestead looking for him. At that time he was at his girlfriend's house at Ga-Motodi. He went home to find out why the police were looking for him. He then went to Mecklenburg Police station to follow up on the message. He told the police that he was at Ga-Motodi asleep. They brought Kune to identify him and he told them that he was his cousin. He told the police that he resides at Ga-Mashishi. He made a statement to the police in which he stated what happened since

morning. He was shown the statement and he recognised the signature on page 3. But he does not remember when he signed it.

- [44] It was put to him that the statement was shown to him by the State counsel before he testified. He said he read the statement himself. He was satisfied with that statement. However, he stated that the police did not write the statement in his presence. According to him the police asked him what he knew has happened at Ga-Mashishi to which he responded that he knew nothing. He stated that the person who wrote the information in his statement did not obtain it from him. It was put to him that in his statement he referred to the accused as Maboti Stoffel Moraba and he confirmed that. But he does not know why the police wrote that in his statement. He confirms that he met with Maboti on 8-01-2013; and he told the police that he met Maboti at Burgersfort. But he denies having told the police about the injury of Maboti.

**The application by the state to hand it in was postponed to the 9-12-2016.** He continued to testify under oath: He admit that he made the statement freely and voluntarily while in his sober senses.

- [45] He stated that the police asked him where he was staying and how they will contact him. But he stated that what is contained in his statement was not from him. He said that he read the statement on Tuesday and

Wednesday. He confirmed that he signed the statement on 8-01-2013. That he was not threatened but they only showed him the last page to sign.

[46] The State successfully applied that the witness be declared hostile in terms of Section 190 (2) of the CPA.

[47] Cross-examination by the State counsel following the order in terms of Section 190 (2): he was asked what he told the police and he stated that he said to them that he was in Burgersfort. That if he did not tell the police that he was in Burgersfort they would not have known. He responded by saying he works there. He was asked if it was for the first time that he saw the police officer. It was put to him that it was him who told the police that Maboti was his friend. It was put to him that in the statement it is written that he was at his girlfriend's place at Ga-Motodi. It was put to him that he gave the police officer his cellphone number. But he does not have the number of Maboti neither does Maboti have his number. It was put to him that Maboti asked him to help in relation to the robbery of the Ethiopian guy. That he saw the finger of Maboti being injured. It was put to him that the police chose to write that he saw the finger of Maboti being injured. It was put to him that he was protecting his friend Maboti.



[48] Under cross-examination by defence on his main evidence: he was asked if he signed all the pages. Why he did not sign all the pages. (**His response was that he was shown only the last page to sign**). He stated that he did not give the police the information contained in his statement. Whether he told the police that he met with Maboti who told him about the robbery of the Ethiopian guy, but he denied that. It was put to him that the accused cannot cross-examine him because he was not the person who gave the police that information. It was put to him that the last page did not have the contents of the statement. It was put to him that the accused denies that he phoned the witness on 8-01-2013. That he denies having told him about the robbery. That he did not meet with him on 8-01-2013. He denies that he was injured on his finger. He denies that he shaved on 8-01-2013.

[49] The fifteenth State witness was **Mashakeng Steven Senong**, he testified briefly that: he is Constable with 10 years' experience attached to Mecklenburg SAPS. He knows the witness Obed Nkwane. On Tuesday the 8-01-2013 he attended a scene of robbery at Ga-Mashishi with other police officers. While there he received information that Obed Nkwane was a suspect. He then drove to Obed Nkwane's homestead

but he did not find him. He left a message with the mother that he was looking for him. Later in the evening he went to Obed Nkwane's place where he found him. He questioned him about the robbery. He obtained the statement of Obed Nkwane and wrote what Obed Nkwane told him. He also signed the statement in the presence of Obed Nkwane. He gave the statement to Obed Nkwane who read it himself and explained to Constable Senong what is contained in that statement. Everything that he wrote in that statement was from the said Obed Nkwane. He did not threaten him but perhaps Obed Nkwane got threatened when he was told that the people were suspecting him as one of the robbers. He would go to the police station where his finger prints would be taken.

[50] He did not promise him anything. He did not know that Obed Nkwane and the accused were friends. He does not have any reason to implicate Obed Nkwane. He wrote down the statement on Tuesday 8-01-2013.

The statement of Obed Mokwane Nkwane was handed as exhibit i.t.o section 3 (1) (c).

[51] Under cross-examination it was put to him that he spoke to Obed Nkwane in Sepedi. That but according to the statement of Obed Nkwane he spoke in English. In the statement of Obed Nkwane it is not written the he spoke to Obed Nkwane in Sepedi and translated that into

English. That he was wrong to say he spoke to Obed Nkwane in Sepedi. If it is not like that then the first paragraph of the statement is wrong. He cannot expect somebody to understand the first paragraph of the statement if he cannot understand it whereas he is the author. It was put to him that he was converting Sepedi into English. That the fact remains certain parts of the statement are problematic in the manner they were written because he was converting Sepedi into English. It was put to him that his evidence is to the effect that he gave Obed the statement to read for himself; though he was aware Obed speaks Sepedi and not English.

- [52] That Obed gave him a certain version in Sepedi and he converted it into English. That he expected Obed to mention where he was not satisfied. It was further put to him that Obed did not inform him that he did not understand anything. That Obed testified before court in Sepedi. That the State counsel insisted that Obed gave him certain information though Obed denied that. It was put to him that he was giving new evidence to the effect that Obed read statement and translated it into English. He had the information that Obed was a suspect in this matter. He was asked about the residence of Obed; the time he reached Ga-



Selala where Obed resides. That according to Obed at 10h00am he was still asleep at Ga-Motodi.

[53] It was put to him that Obed gave him a suspicious face. That Obed changed his face as he was afraid. That Obed was not a person who was innocent. He was told that Obed denies that he gave him certain information which is contained in the statement. That Obed testified to the effect that he was given the last page. It was put to him that every page was not initialed. That the content of the statement ended on page 2. That Obed denies that he received a call from his "friend Maboti". That he denies that Maboti Stoffel Moraba was shot by Ethiopian man at a shop at Ga-Mashishi. He denies that his friend Maboti hang-up when Obed told him that he will not help him. He can see that Obed is someone who could not be trusted; because he denies that he made a statement to him. That if Obed can come to court and deny that he gave the police information it means he cannot be trusted with the contents of his statement. (His response was that he can be trusted because what he was saying was the truth). It was put to him that he went to a suspect but he pointed a finger somewhere so that he should be left alone. If Obed had not told him that accused was involved he would have

arrested Obed. It was put to him that accused denies any involvement in the commission of the offences.

[54] It was put to this witness that accused will say that during 2013 he used to stay at Ga-Mashishi at his uncle Enos Magale. During his stay at Ga-Mashishi he would fetch firewood at several places including the mountain. He does not remember that when he went to the mountain he got injured on his body. But he stopped staying at Magale's homestead during 2010 but in 2013 he would occasionally visit Ga-Mashishi.

[55] The State and defence by consent handed in the following documents as Exhibits:

1. Affidavit i.t.o Section 212 CPA of Molefo Tshepo Motaung Exhibit "T";
2. Reference collection kit of K.S. Moraba Exhibit "T1";
3. Reference blood collection kit of Sydney Nkune "Exhibit "T2";
4. Affidavit i.t.o Section 212 of Tshepiso Nabo Mashilo Exhibit "U".

### **STATE CASE CLOSED.**

[56] The defence applied for the discharge of the accused in terms of Section 174 CPA which was refused. The reasons for the refusal of the discharge at the end of the State case will be shown in this judgment.

[58] The case was then remanded to 13<sup>th</sup> to 17 January 2017 for continuation of the trial.

[59] On 13 January 2017 accused was absent before court and the Warrant of arrest was authorised but stayed in abeyance until 14 January 2017.

On 14 January 2017 accused testified in his defence and called one witness.

### **Defence case**

[60] Accused testified in his defence briefly that: he stays at Ga-Mashamothane. On 8 January 2013 he was at home sleeping. He knows Ga-Mashishi village which is about 35-36 kilometers away from Ga-Mashamothane. On 7 January 2013 he reported for duty at Booyseendal Mine at 10pm and knocked off the following day on 8 January 2013 at 06h00. He arrived home at 8h00am and slept. He was arrested on 18/01/2013 at Steelpoort by Ngele who took him to where Mr Selala and Mr Manyake where. He was put in the police van driven by Mr Selala. He was not told why he was arrested. He was only told about the offence he allegedly committed at Mecklenburg Police station. At Booyseendal Mine he was employed as a dump-truck operator. At Ga-Mashishi village he has a friend there in the name of Enos Magale. In 2010 Enos Magale gave him the keys to his shack to look after it. So, when he was off-duty he would go to Ga-Mashishi at that shack and sometimes even sleep there. He cannot remember the dates on which



he visited and slept at that shack of Enos Magale. At that shack there was no electricity; consequently he would at times fetch firewood on the mountain to cook.

[61] The mountain is about 500 meters from the shack of Enos Magale. He went several times at the mountain to fetch firewood; so he cannot remember the dates on which he went to the mountain. He does not dispute that his blood was found on the rocks of the mountain in terms of the DNA results. According to him he was once injured by a jigsaw while cutting firewood, but the injury was not serious. He did bleed but did not pay attention where the blood was dripping. However, he does not remember the date on which he was injured.

[62] He does not know Judith Lekwadu, the first state witness. He denies that Judith Lekwadu saw him running towards the mountain on 8 January 2013. His wife and family members saw him when he arrived home on 8 January 2013. He knows the shop where the deceased was shot as he used to pass it when he was going to Enos Magale's place. He denies ever entering the shop where the offences were committed. He admits that the reddish substance on photos 9-10 was blood which was on the rocks. He remembers the area where the DNA profile was found

because he used to fetch firewood there. He did not cover the injured body part as the pain was not serious.

[63] He denies that he is a friend of Obed Nkwane. But he used to meet with him at Burgersfort where they played dice. He does not remember meeting with Obed Nkwane on 8 January 2013 at Burgersfort. He did not even phone Obed Nkwane as he does not have that person's numbers. At the time Lt-Col Ngele arrested him at Steelpoort his rights were not explained to him. The police vans were parked behind the shops of Steelpoort. He boarded the police van to Mecklenburg police station and was kept in the holding cells. While in the holding cells the police read to him his rights; that is the time he knew what he was arrested for. However, nobody explained to him the notice of rights document.

[64] He does not know anything about the firearm that was used to commit the offences. He attended the identification parade whereupon Judith and Tshepo Mashabela attended. Photos were also taken of the identification parade. However, no one pointed him out at the parade. The identification parade form was handed in as **Exhibit "U"**.

- [65] Under cross-examination: he was asked the whether he was staying at Ga-Mashishi or that he was just checking on the shack of Enos Magale. His response was that he would sleep there sometimes for a day when he was off-duty. He was asked about the person who was using the firewood while at Ga-Mashishi. He was asked about the relationship with Enos Magale. According to him he knew Enos Magale as they used to play football together. Enos Magale was from Mabocha whereas he, the accused, was from Ga-Mashamothane. It was put to him that the version that was put to the State witnesses was that Enos Magale was his uncle. He was asked about the last time he went to Ga-Mashishi; his response was that he does not remember; but he remembers that he was injured. It was put to him that he saw the blood coming out of his injured body.
- [66] It was put to him that the State witness Senong testified to the effect that the accused's blood was seen on the mountain. It was put to him that Judith saw him passing the scene of crime. It was put to him that Judith pointed him out in court during her testimony. It was put to him that he cannot confirm that his family members saw him asleep. He was asked about his relationship with Obed. It was put to him that Obed made a statement to the police to the effect that the accused called him on 8



January 2013 and he requested assistance from Obed because he, the accused, shot a certain Indian man.( he disputed this version).

[67] It was put to him that Obed saw him at Burgersfort on 8 January 2013 and that he phoned Obed. He was asked about the length of service at Steelpoort; he indicated that it was 2 months. It was put to him that Obed Nkwane confirmed the incident at Ga-Mashishi. That Obed Nkwane would not have known about the incident if he was not told by the accused. It was put to him that Ngele testified to the effect that he explained the rights of the accused at the time of his arrest. It was put to him that he led the police to Ranny Sonjica's homestead where the firearm was found. It was put to him that on 8 January 2013 he committed the offences at Ga-Mashishi. It was also put to him that his blood was found on the rocks after he was seen running in the direction of the mountain. **(His response was that he does not deny that because he used to go to the mountain).**

[68] He was asked about the identification parade and the persons who attended same. According to him there were about five (05) witnesses. It was put to him that according to Judith, she did not attend the identification parade. It was put to him that he did not put a version to Judith that she did not attend the identification parade. It was put to him

that Tshepo Mashabela did not point out anybody at the identification parade. It was put to him that the rights were explained to him.

[69] Accused called a witness, **Tshepo Mamadia Mashabela**; the sketch of his evidence is that: he resides at Ga-Mashishi village. He was on the list of the State witnesses regarding this case, though the State did not call him as such. He made a statement to the police station regarding the happenings of 8 January 2013 at Ga-Mashishi.

[70] On 8 January 2013 in the morning he was at Ga-Mashishi. He was walking in the street with Kagiso passing behind the shop of the deceased. While walking he heard the gunshot; immediately thereafter he saw the shopkeeper running out of the shop holding his stomach. Two male persons emerged from the shop running. These two male persons passed him in the street at a distance of about two (02) meters, running towards the mountain. However, he did not spot their faces. One of the male persons was wearing a hat and sunglasses; whereas another one was wearing brown pair of trousers and a striped T-shirt. Their complexion was light and black. The one who was light in complexion was slender and the other one was of a medium size. His statement was handed in as **Exhibit "V"**.

- [71] He attended the identification parade at Mecklenburg Police station; however he did not point out any person at that identification parade because he did not see the male persons' faces. He saw Judith at the police station on the date of the identification parade but he does not know why she was there. Accused was one of the persons who were on the line-up for identification nonetheless he did not identify him.
- [72] Under cross-examination: he was asked if he knew Judith and for how long he knew her. His response was that they schooled together. He was asked if he knew the accused. He denied that he knew the accused. He stated that he started to know the accused at court. He was asked how far he was when he first saw the two persons who ran passed him. He stated that he saw them for the first time at a distance of about 40 meters. He confirmed that he saw the deceased holding his stomach. It was put to him that when he heard the gunshot he got scared. He was asked if he saw the faces of the two men; **his answer was that he was afraid to look at their faces.** He was asked as to what was Judith doing at the time; his answer was that Judith was unable to enter her house as she was trembling. He was asked about Obed Mokwana and he stated that Obed was his uncle. He was asked whether he attended the identification parade and what was Judith doing



at the police station. It was put to him that the blood of the accused was obtained at the rocks of the mountain. He denied knowing Enos Magale.

[73] **Questions by Court**

Q. Where were you specifically at the police station when you saw Judith?

A. In the offices

Q. What was Judith doing at the police station?

A. I do not know.

Q. Did you see her do anything?

A. No.

**DEFENCE CASE CLOSED**

**COUNSEL'S ARGUMENTS AND SUBMISSIONS**

[74] Both counsel submitted written heads of arguments and supplemented same with oral submissions. The State submitted that the first State witness, Judith Lekwadu, was a single witness in relation to the identification of the accused and that her evidence should be treated with caution. That the court should invoke the provisions of Section 208 of the CPA.

[75] On the issue of identification the State argued that the accused was properly identified by Judith Lekwadu at the scene and also in court. That her evidence that the accused is light in complexion should be

accepted because it is corroborated by the accused's witness, Tshepo Mashabela.

[76] That the accused was connected to the offences through: (a) the firearm; (b) the DNA results; and (c) the evidence of Obed Nkwane. The court was referred to the several authorities, *inter alia*, S v Mthetwa 1972 (3) SA 766; S v Mehlahe 1963 (2) SA 29 (A) at 32; S v Mlimo 2008 (2) SACR 48 (SCA) para 13; S v W 1975 (3) SA 288 (N) Principles of Evidence at 477; S v Thebus And Another 2003.

[77] The defence on the other hand submitted that on the issue of a firearm; there is no evidence before court that the accused took Lt-Col Ngele to the homestead of Ranny Sonjica. That if such evidence exists, it would have amounted to pointing out which was inadmissible, unless it was properly tendered. That if the police went with the accused to Ranny Sonjica's homestead they would have looked for the firearm. The court should consider Exhibit "Q" which is the statement of Ranny Sonjica. In that statement it is not stated that the accused brought the firearm to that homestead. The statement does not even mention that the accused and the police were at that homestead to look for the firearm. Instead Ranny Sonjica states in Exhibit "Q" that he is the one who dug underneath the tree to find the firearm and gave it to the police.

- [78] That the court should take into account that Judith Lekwadu could not have properly seen the perpetrators regard being had to the distance she was from the shop, which is about 50 meters. That the person who would have been able to identify the attackers was Tshepo Mashabela as the two young males passed closed to him at a distance of about 2-3 meters. Moreover, it was submitted, that Judith stated that she had eyesight problem and without the assistance of glasses she does not see clearly. That Judith was exaggerating her evidence, because the deceased who was shot at, sustained the injuries stated in the postmortem report would not have ran the distance mentioned by Judith.
- [79] That Judith contradicted her own statement to the police regarding the clothes of the perpetrators. It means she did not see the perpetrators in front but their backs only. That Judith was scared after hearing a gunshot and locked herself in the house.
- [80] Reference was made of **S v Mahlalela** (396/16) [2016 ZASCA 181 (28 November 2016) para 23 which deals with suspicion.
- [81] That it is common cause the people who committed the offence ran towards the mountain. However, there is no evidence as to where in the mountain did they run to. That the mountain is a public place and everyone is allowed to go there. There is no evidence of blood trail from



the shop to the mountain. In other words, there is no evidence linking the blood found on the mountain and the blood at the scene of crime, the shop.

- [82] The court was referred to **R v Blom 1939 AD**, with regard to inferential reasoning and circumstantial evidence.
- [83] That the accused offered an explanation about his blood being found on the mountain. That the State did not cross-examine the accused on this aspect. There is no evidence before court as to whether the blood was fresh or not.
- [84] With regard to DNA, it was argued that the blood was not linked to the scene of crime. That Captain Makhura did not follow the Standard Operating Procedures, Exhibit "P" which did not give her discretion where there were discrepancies on the exhibits.
- [85] That there was contradiction on the covering letter and the exhibits submitted to her. The court was referred to **S v Phiri 2008 (2) SACR 21 (T)** dealing with irregularities on the labelling and packaging of exhibits. It was argued that the seal numbers do not correspond. Furthermore, the swabs taken by Constable Mokgotho and the blood drawn from the accused were not transported together to the laboratory. The court was referred to **S v Bamba (2008/14) [2014] ZASCA 219 (11 December**

**2014).** The firearm was not properly tagged but kept in an envelope at the police station. It is not known who sent the firearm to the ballistics and same applies to the projectile.

[86] That evidence of Obed Nkwane should not be considered as he disavowed his own statement under oath.

[87] The court is grateful to the participation and submissions of both counsel.

### **COMMON CAUSE ISSUES**

[88] Now I deal with the matter as a whole. The following issues are common cause:

88.1 The deceased died as a result of gunshot wound.

88.2. The projectile was extracted from the body of the deceased.

88.3. The firearm Norinco was found at the homestead of Ranny Sonjica, as per Exhibit "Q".

88.4. This firearm was linked to the projectile that was extracted from the body of the deceased, as per the postmortem report and the ballistic report, affidavit of Lt-Col Nel, Exhibit "R".

88.5. Accused's blood was found on the mountain as per the DNA results, Exhibit "N" and the oral evidence of Regina Makhura.

88.6. Nobody saw who shot and killed the deceased.

88.7. The firearm as well as the projectile were properly packed, numbered, sealed and transported by W/O Lesufi to Pretoria for forensic analysis.

88.4. The crime scene is the shop, as per the affidavit of Mokgotho.

### **ISSUES FOR DETERMINATION**

[89] Whether the accused was identified by the State witnesses as one of the persons who committed the offences at the shop of the deceased.

[90] Whether the evidence of the State links the accused to:

90.1. the firearm that was used to shoot and kill the deceased;

[91] Whether there was blood trail from the shop to the mountain;

[92] Whether the Exhibits, L1 and L2, and the blood swabs (i.e. blood from the mountain) were properly packaged, labelled and sealed when they were transported to the laboratory;

[93] The effect of incorrect labelling and packaging of exhibits.

### **LEGAL PRINCIPLES**

[94] Identification entails the act of identifying a person or object. It is therefore imperative that an innocent person is not held liable for an incident he/she has not committed and equally to ensure that the



perpetrator is identified. The court in **S v Charzen And Another**<sup>4</sup> found that:

*“But, as our courts have emphasised again and again, in matters of identification honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness’s recollection of a person’s appearance can be ‘dangerously unreliable’, and must be approached with caution.”*

[95] In order for the person to be prosecuted for an offence, he /she must be linked to the offence through evidence proven beyond reasonable doubt.

**Snyman**<sup>5</sup> in his work states that:

*“In materially defined crimes, the question must always be answered whether X’s act caused the prohibited situation or state of affairs or, to put it differently, whether there was a causal link (nexus) between X’s conduct and the prohibited situation (eg Y’s death).”*

[96] Lirieka Meintjies-Van Der Walt<sup>6</sup> states that:

*“Each article should be collected and packaged in such a way as to avoid cross-contamination. The bags should be sealed with evidence tape and labeled with the brief description of what it purports to be, the date, time, and signature of the person responsible for collecting and securing the evidence.”*

<sup>4</sup> [2006] 2 All SA 371 (SCA), par 11.

<sup>5</sup> CR Snyman “Criminal Law” 6ed LexisNexis (2014) at 80.

<sup>6</sup> Lirieka Meintjies-Van Der Walt “The chain of custody and formal admissions” South African Journal of Criminal Justice (2010) 3 at 373.

## **APPLICATION OF THE LAW TO THE FACTS**

[97] Was the accused identified as the perpetrator of the offences?

The State witness Judith's evidence was to the effect that she saw the perpetrators; that one of them is the accused. It is indeed correct that she was the only witness for the State who could be said to be the eyewitness, in so far as the direct identification of the accused was concerned. It is common cause that she did not attend the identification parade as confirmed by the SAPS 329 form Exhibit "U".

[98] According to Judith her homestead is about 50 meters from the shop of the deceased. She saw the male persons passing by her homestead for about three to four times. At that time she was busy with her washing; hence she did not pay much attention to them. She became concerned when she saw the two male persons seated on the verandah of the shop. She conceded under cross-examination that she did not see their faces; she could also not give a clear account of their facial appearances. She admitted that she has eyesight problem; thus she uses glasses. Judith also stated that she was scared after hearing the gunshot; which made her to lock herself in the house.

[99] She pointed out the accused in the dock while she was testifying as the person who was light in complexion and slender. In contrast with the

testimony of Tshepo Mashabela whose unchallenged evidence was to the effect that the two male persons passed him at a distance of about 2-3 meters. Tshepo Mashabela testified to the effect that he did not look at the faces of those two men.

[100] The cautionary rules must be applied to Judith's testimony. In **R v Mokoena**<sup>7</sup> the court said that the provision should only apply when the single witness is clear and satisfactory in every material respect, has no interest or prejudice, did not contradict himself or herself, does not have previous convictions for dishonesty, had proper opportunity for observation, and so on. It is indeed so that accused is light in complexion. But as to him being slender that is very questionable, because slender, refers to a person with a lean body built; more so that conclusion involves comparison with another person. It is my considered view that the identification of the accused by Judith vis-a-vis that of Tshepo Mashabela cannot be relied upon.

[101] Tshepo Mashabela gave a fair account of the events of 8 January 2013. He did not commit himself to anything and with worthy reasons. The two persons were running and he did not see their faces. The principles of identification as enunciated in **Charzen's** case are settled. I therefore

---

<sup>7</sup> 1932 OPD 79.



find that the accused was not identified by Judith as one of the persons who were at the shop of the deceased on 8 January 2013.

[102] Did the accused possess the firearm that was used to commit the offences?

The State argues that the accused took the police officer Lt-Col Ngele to Ranny Sonjica's homestead where the firearm was hidden in the garden underneath the pawpaw tree. Exhibit "Q" being Ranny Sonjica's statement which was handed does not contain any allegations that accused is the person who brought the firearm at that homestead. Parenthetically, Lt-Col Ngele is the officer who obtained the statement of Ranny Sonjica. Lt-Col Ngele did not state that he booked the accused out from the holding cells to Ranny Sonjica's homestead to show him the firearm or where was the accused at that time. It was the evidence of Lt-Col Ngele that he went with W/O Mokoena to dig for the firearm and they found it. This firearm was clearly not found in the possession of the accused. Ranny Sonjica, like a reasonable citizen took the firearm to the police. I must state that the State's evidence on this aspect is standing on shaky ground. The court in **S v Litako And Others**<sup>8</sup> found that:

---

<sup>8</sup> 2014 (2) SACR 431 (SCA) at 437 par 22.

*“Inspector Olebile Sereo, a ballistics specialist, testified about a Norinco firearm which had been handed to him for investigation. It appears that all he had concluded was that the firearm operated normally without any obvious defects. Captain Zachariah Makola, also a ballistics expert, testified concerning firearms and bullets that he had received for ballistics testing. All of the evidence that I have just sketched was intended to link one or more of the accused to the crime scene. But the chain evidence which sought to link the firearms and ammunition recovered to the ballistic tests conducted on them was woefully inadequate. The evidence concerning the ballistics testing is conspicuously unhelpful. There is thus no acceptable ballistics evidence linking any of the appellants to the robbery in respect of which they were charged. Before us, the State was constrained to concede as much.”*

[103] Was there was blood trail from the shop to the mountain which links the perpetrators to the crimes?

The State evidence as contained in the affidavit of Mokgotho, at the risk of repeating, was to the effect that he took the blood swab from the floor, Exhibit “A”; blood from the deceased as control sample, Exhibit “B”; and blood from the rock at the mountain, Exhibit “C”. However, Regina Makhura, the laboratory analyst only analysed swab “C” and the reference sample, being the blood drawn from the accused. This means the analysis was on the blood found on the mountain and the

blood of the accused. That comparison obviously excluded the blood from the floor which might have been from the shop.

[104] The swab "C" has been accepted as the blood of the accused; but does that mean it was the same blood which trailed dripping from the shop to the mountain? Expert evidence to that effect is lacking in this case. In **Forensic Investigation: Legislative Principles And Investigative Practice**<sup>9</sup> it is stated that:

*"The method of indirect identification concerns physical evidence and phenomena by which the identity of the offender and their part in the incident may be determined. Examples include physical evidence left behind at the scene of incident by the offender (eg fingerprints, footprints, handwriting, tool impressions) and physical evidence connecting the offender with the victim or the scene of incident (eg blood, semen, hair, fibers)."*

105] The accused accepted that his blood was found on the mountain as per the evidence of Regina Makhura and her affidavit. But the issue is whether that blood is linked to the scene of crime. There is no evidence adduced by the State during this trial to the effect that the blood in the shop, found on the floor and that found on the rock was the blood of the same person. It is indeed correct that the

<sup>9</sup> Rudolph Zinn et al "Forensic Investigation Legislative Principles and Investigative Practice" ed (2015) at 63.



State witness Rantlakwe testified to he saw some blood stains tracking to the mountain. However, he is not an expert witness to sufficiently show that the same blood was found on the mountain. I will deal with the explanation of the accused below. In **Hiemstra Criminal Procedure**<sup>10</sup> it is stated that:

*“Chain- So-called “chain evidence explains what happened to the exhibit from the time it was despatched to the time the report was received. It is important that the chain be properly proved if it is not admitted by the accused”*

[106] In **Forensic Investigation: Legislative Principles And Investigative Practice**<sup>11</sup> it is stated that: s

*“The investigator must always consider the DNA evidence in the context of a case. In order to prosecute a case, the DNA evidence must be supported by other evidence.”*

[107] Whether the exhibits i.e. L1 and L2 together with the blood swabs were properly packaged, labelled and sealed?

It was the evidence of expert witness Regina Makhura that she received the exhibits from Constable Selala as per the covering letter dated 21 October 2013 labelled as 05D4BB0470M and 05D4BB149M. However, according to her that labelling was

<sup>10</sup> A Kruger “Hiemstra’s Criminal Procedure” LexisNexis ed (2016) at 24-31.

<sup>11</sup> Ibid 118.

incorrect; it was supposed to be 05D4BB0470MX and 05D4BB1499MX. It is also common cause that Exhibit "P" which is policy document of the Forensic Laboratory Biology Section where Regina Makhura is employed details the procedure to be followed when analysing the exhibits. The relevant part of this Exhibit "P" is at 11.1 "**Discrepancies**"

*NOTE: No analyst is allowed to change any details on exhibits or information received (example; covering letter) by striking out and initialing next to it. Discrepancies must be highlighted and explained in the case file diary of a case. If you open a case with discrepancy, that case should be handed over to case review."*

[108] The spirit of this document, Exhibit "P" is instructive. There is no way it can be said to be permissive. I cannot accept the evidence of Regina Makhura that the discretion she exercised was within her scope of practice.

[109] The court in **S v Bernard**<sup>12</sup> as per Gibson, J found that:

*"The major question, that is whether the blood sample contained in kit box HG/555/355 was that of the accused? The question is whether the kit box containing the blood drawn from the accused was or was not tempered with? And whether the contents drawn by Doctor Shiwedha from the accused were*

<sup>12</sup> (CC 07/2002) [2005] NAHC 48 (19 August 2005).

<sup>11</sup> Ibid at 376-377.

*still the same sample that was submitted to the Forensic Science Laboratory by Constable Coetzee who had taken it from the safe at the police station? In laymen's language, has the chain been proved to have been meticulously safeguarded between the drawing of the accused's blood sample and the submission of the accused's blood sample to the Forensic Laboratory at the Institute?"*

[109] Lirieka Meintjies- Van Der Walt<sup>13</sup> states that:

*"The sealing, tagging, labelling and marking of the evidence add credibility and control to the ability to identify the item. In sum, the chain of custody is used to prove who had contact with the evidence; the date and time the evidence was handled; the circumstances for the evidence being handled; what changes, if any, were made to the evidence, and that the evidence has not been tampered with or contaminated."*

[110] It is my considered view that the correct and efficient labelling and packaging of exhibits is crucial to the chain evidence. Where there are gaps as in this case the court cannot brush that incongruity.

[111] Did the accused give a reasonable and probable explanation?

It is trite that there is no duty on the accused to prove a case in a criminal trial. The accused should just give a version that is reasonably and probably true.

---

<sup>13</sup> L M Van Der Van Der Walt "The chain of custody and formal admissions" (2010) SACJ 3, 376.



[112] In this case the accused had to explain the presence of his blood on the rock of the mountain which was extracted by Constable Mokgotho. He had to explain to the court how his blood came to be on that mountain and what has caused that blood. In his own evidence the accused stated that he used to stay at the shack of Enos Magale at Ga-Mashishi village. Furthermore, that the shack of Enos Magale was not electrified. Therefore he had to go to the mountain to fetch firewood to cook. This part of evidence is not gainsaid by the State. He also mentioned that on a day which he cannot remember he injured himself with a jigsaw while cutting wood. This evidence of the accused must be refuted by the State with contrary facts and through cross-examination. The accused went further to state that on 8 January 2013 he knocked off duty at 6h00am and arrived home to sleep at about 8h00am. The court is not required to be convinced that the explanation of the accused is improbable. Rather the court must find that the explanation of the accused is false beyond reasonable doubt.

[113] The accused is from a village at Ga-Mashamothane. Ga-Mashishi is a rural area; villagers do go to mountains to fetch firewood even in this day and age. Can it be said that the accused's explanation is false? There must be facts supported by evidence under oath to enable the court to

reject the accused's explanation as false. The State further submitted that the court should consider the evidence of Obed Nkwane. It is true that Obed Nkwane testified as a State witness, but he disavowed his own statement. After he was declared a hostile witness by the court he still stood firm to his evidence despite vigorous cross-examination by the State counsel.

[114] The court in **R v Biya**<sup>14</sup> Greenberg JA (as he then was) found that:

*"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi is true it means that there is the same possibility that he has not committed the crime."*

[115] Did the State prove the case against the accused beyond reasonable doubt?

It is trite that the onus of proof in a criminal trial rests on the State. In **S v Ambros**<sup>15</sup> Dlodlo J held that:

*"I am of the view that the issue of shifting onus is no longer constitutionally permissible. My view is simply that the State bears the onus of proof beyond reasonable doubt. Even if the accused did bear the onus to prove prima facie that his presence in the farm camp was not coupled with intention to steal, his*

<sup>14</sup> 1952 (4) SA 514 (A) at 521c-d

<sup>15</sup> 2005 (2) SACR 211 (C) at 215 par 6.

*explanation that he went there for purposes of firewood should have been enough in my view."*

[115] The State relied on the evidence of identification, circumstantial evidence of the DNA results. I have already found that the identification of the accused by Judith Lekwadu is doubtful. Though Judith Lekwadu was convinced that the accused was the person who she saw passing next to her homestead, at the verandah of the shop and later running towards the mountain. It is not only that the identifying witness has to be convinced and honest but the facts must support her assertions. When comparing the evidence of Judith and that of Tshepo Mashabela with regard to probabilities; the scales favour Tshepo Mashabela. This Tshepo Mashabela's evidence was not controverted by the State in cross-examination. The court in **S v Nnasolu And Another**<sup>16</sup> restated the importance of cross-examination and quoted with approval the judgment of Claassen J in **Small v Smith**<sup>17</sup>, albeit in relation to a civil case:

*"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof,*

<sup>16</sup> 2010 (1) SACR 561 (KZP), para

<sup>17</sup> 1954 (3) SA 434 (SWA) at 438E-F.



*that other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has deliberately been left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever."*

[116] Other than that Judith on her own evidence admitted that she did not look at the two male persons at their faces and that she has eyesight problems. She did not have an opportunity of properly observing the assailants. On the other hand the two male persons passed closer to Tshepo Mashabela but he could not identify the accused at the identification parade. Dock identification carries little weight unless the witness has previously independently identified the accused<sup>18</sup>.

---

<sup>18</sup> S v Tandwa 2008 (1) SACR 613 (SCA) at 652.

[116] It is so that circumstantial evidence may be stronger than direct evidence. The court in **S v Nkuna**<sup>19</sup> found that:

*"There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. Sometimes these other facts can be inferred with considerable certainty. If there are no positive proven facts from which the inference can be made, the method of inferential reasoning fails and what is left is mere speculation or conjecture. Of course, the strength of circumstantial evidence will tend to vary depending on the cogency and character of the circumstances. What needs to be pointed out however, is that when the evidence is abundant, such as in this case, it may be equal to or even superior to direct evidence."*

[117] However, in this case before me the proved facts which are the DNA results have a difficulty in connecting the accused to the scene of crime. The blood swab which was removed by Mokgotho from the floor was never compared with the blood of the accused that was found on the mountain. This is the serious problem the State case is facing. For reasons I cannot fathom, the blood exhibits that were analysed are drawn from the accused and the blood that was found on the mountain.

[118] At the closure of the State case I refused the application for the discharge of the accused in terms of Section 174 CPA and I reserved my reasons. The State had produced a *prima facie* case that the

---

<sup>19</sup> 2012 (1) SACR 167 (B) at 171 pars 124-125.

accused appeared to be one of the two male persons who attacked the deceased and that his blood was found on the mountain. The accused then had to give an explanation pursuant to that evidence. During cross-examination it was not clear as to what was the version of the accused who was faced with that evidence. For instance, the accused did not clearly state where he was on the 8 January 2013, whether he was injured while at Ga-Mashishi or not. Therefore I had to refuse the application for his discharge.

[119] It is the duty of the State to prove the track of blood from the shop to the mountain where the assailants ran to. Absent that blood trail evidence it is my considered view that the DNA results do not assist the State case.

[120] The incorrect labelling of the exhibits that were sent to the laboratory for examination add salt to the wound of the State. As I have already stated above the State is under the duty to prove the chain evidence.

[121] I align myself with the decision of the court in **S v Mafiri**<sup>20</sup> where Mthiyane JA (as he then was) stated that:

*“Before dealing with the above grounds it is necessary to re-iterate the test to be applied when assessing the explanation given by an accused in a case such as this. The following has been said in this Court that:*

---

<sup>20</sup> 2003 (2) SACR 121 (SCA) at 125 para 9.



*“There is no obligation upon an accused person, where the State bears the onus, “to convince the court”. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgements of this Court and other courts the test is whether there is a reasonable possibility that the accused’s evidence may be true.”*

## **CONCLUSION**

[119] It is my considered view that though several witnesses were called by the State in an attempt to prove the case against the accused, the efforts were thwarted by the manner in which the evidence was adduced. Consequently, the State failed to prove the case against the accused beyond reasonable doubt.

## **ORDER**

The accused is not found guilty and discharged on all counts.



M.P.CHIDI A.J

ACTING JUDGE OF THE HIGH COURT

On behalf of the State :

Adv N.C. MOLEPO

Instructed by : DPP, Polokwane  
On behalf of the Accused : Adv M.P.LEGODI  
Instructed by : Polokwane Justice Centre  
Date of judgment : 17 January 2017.