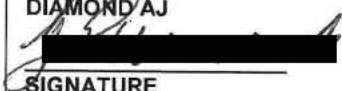


REPUBLIC OF SOUTH AFRICA



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

CASE No: AA02/2024
SCA CASE NO: 1314/2023
LP CASE NO: CC 121/2022

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED: YES/NO</u>
DIAMOND AJ	
	30/04/2025
SIGNATURE	DATE

In the matter between:

JOSHUA PHUTHI HLAKO

FIRST APPELLANT

MARCUS MAKGATO

SECOND APPELLANT

AMANDA MAKGATO

THIRD APPELLANT

KHUMBELO MABIRIMISA

FOURTH APPELLANT

and

THE STATE

REPODENT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to be on 2025/04/30

JUDGMENT

DIAMOND A J:

[1] The court *a quo* (Muller J) convicted the First, Second and Fourth Appellants on counts of murder, kidnapping and defeating the end of justice and the Third Appellant on a count of kidnapping. The court *a quo* convicted the Appellants on 19 September 2023. I will henceforth refer to the Appellants as the “accused.”

[2] The accused applied, on 11 November 2023, to the court *a quo*, for leave to appeal which was refused.

[3] In a noticeably short judgement, the court *a quo* held as follows:

“Taking into account all the facts and the grounds of appeal, I come to the conclusion that another court will not come to a different conclusion from the conclusion that this court has reached, nor any other reasons apart from that, for the court to grant. In the result, the application for leave to appeal is refused.”

[4] The accused subsequently applied for leave to appeal to the Supreme Court of Appeal, and leave was granted to lodge an appeal to the Limpopo Provincial Division.

[5] The accused lodged an appeal against both the convictions and sentences imposed.

[6] This appeal came before us on 22 November 2024.

[7] The sequence of events, which is the subject matter of this appeal, began on the 14th of January 2006, in the township of Soshanguve, near Pretoria. One Ronald Makgato (the “Deceased” and his sister, Gertrude Leboho (“Gertrude”), lived in Soshanguve, in different houses.

[8] On 14 January 2006, Gertrude expected a visit from the Deceased at her home. He never turned up. In fact, her testimony was that he had disappeared.

[9] Gertrude opened the docket of a missing person, at the Akasia police station which is a police station situated in Pretoria¹.

[10] The testimony continued as follows:

“After having reported or opening a docket of the missing person, that is when the help of extended family members we started searching for our missing brother. We went to the hospitals. We went to the mortuaries. We also went to the prophets wherein we were told about, wherein we were informed about Marcus Makgato.”

[11] Marcus Makgato is accused 2.

¹ P. 22 Record.

- [12] Gertrude further testified that the investigations led them to the two young men, viz Gabriel Matli ("*Gabriel*")² and Sibone Matome ("*Matome*")³.
- [13] In the year 2021 Warrant Officer Seroka ("*Seroka*"), was stationed at the Seshego police station.
- [14] It is a matter of public knowledge that the distance between Soshanguve and Seshego is approximately 250 kilometers.
- [15] Seroka started investigations at the end of 2021/beginning of 2022, in Seshego and vicinity, which led to the four accused being charged on 14 March 2023, in the Limpopo Division of the High Court, with the counts of kidnapping, murder and defeating the ends of justice.
- [16] The Deceased's body was never found.
- [17] The four accused pleaded not guilty and gave no explanation of plea in terms of Section 115 of the Criminal Procedure Act, 1977.
- [18] Both Gabriel and Matome gave statements to the police prior to commencement of the trial, and both testified at the trial.

² P. 23 of the record.

³ P. 24 of the record.

[19] Gabriel testified that in January 2006, accused 1 came to his home in Ga Matlala. Accused 1 requested Gabriel to drive with him to Seshego. He eventually instructed Gabriel to drive to Soshanguve. There, they met up with another motor vehicle, and it transpired later that the motor vehicle was driven by accused 2. They followed this motor vehicle to a certain house. They stopped at the house and accused 3, whom he recognised as being a person which is resident in Ga Matlala, and an unknown female person, appeared from the house with an unknown male person which was visibly dizzy.

[20] Accused 2 assisted the two ladies to drag the unknown person to his car, and accused 1 went and opened the door of the motor vehicle of the case number 2. They put the unknown male person in the motor vehicle of accused 2.

[21] The unknown male person later turned out to be the Deceased.

[22] Gabriel described how the two vehicles returned to the home of accused 1 in Seshego, Zone 4.

[23] He testified that when they approached the house of accused 1, he gave his phone to him (that is to Gabriel), instructing him to phone Matome, who was at his home and requested him to open the gates. Gabriel did do so.

- [24] In his statements and testimony, Matome confirmed having received the telephone call.
- [25] From thereon, the testimonies and statements of Matome and Gabriel both describe how the Deceased was horrifically murdered.
- [26] Both the testimonies and statements corroborate each other in all substantial aspects, even to the level of specific details.
- [27] The testimonies place themselves, and the first, second and fourth accused, amongst others on the scene of the murder. According to the statements, at least all five participated actively in the murder.
- [28] The content of paragraph [19] to [27] above, is a short and cursory summary of the sequence of events. I will, to the extent necessary, refer to further detail below.
- [29] The court *a quo* convicted the accused based entirely on the statements and testimonies of Gabriel and Matome.
- [30] The court *a quo* approached the assessment of the evidence as follows:

- It was established beyond reasonable doubt that the deceased disappeared on 14 January 2006 and that he had not been seen up until the date of the trial.⁴
- The defence of the First, the Second and the Fourth Accused was simply that the incident as described by Matome and Gabriel never took place. The court *a quo* remarked that the significance of this defence is that once it is found that the incident as described by Gabriel and Matome did take place, then the conviction must follow, since the defence of the accused does not leave room for interpretation that the incident did take place but that they were not involved in the incident.
- After having assessed the statements and evidence of both Matome and Gabriel with detailed caution regarding inaccuracies, contradictions, the fact that the statements and testimonies were given 14 to 16 years after the incident, and the fact that both Matome and Gabriel testified under section 204 of the criminal procedure act, the court *a quo* nonetheless came to the conclusion that the statement and testimonies were truthful.

⁴ P. 856 bundle.

- The accused were convicted since the court opined that the incident occurred as described by Gabriel and Matome.

[31] In the appeal, Mr *Mpshe* SC who appeared for the accused, listed several contradictions and inconsistencies in the evidence of various state witnesses. He submitted that the effect of these inconsistencies was that there was reasonable doubt as to the version of the state and that for that reason the appeal should be successful, and the convictions set aside.

[32] Mr *Mpshe* referred the appeal court to, amongst others, the case of *S v MAFALADISO EN ANDERE*⁵ ("*Mafaladiso*") in which the Supreme Court of Appeal had to assess the impact of contradictions in the testimony of witnesses and not only between witnesses but also between the testimony of witnesses and prior conflicting statements.

[33] The judgement of *S v PHK*⁶ ("*PHK*") provides, in my view, a handy summary and interpretation of the thrust of approach described by the Supreme Court of Appeal in *Mafaladiso*. In paragraph 20 of *PHK* the following is stated:

"In Mafaladiso it is summarised in the headnote that the juridical approach to contradictions between two witnesses

⁵ 2003 (1) SACR 583 (SCA).

⁶ 2023 (2) SACR 234 (FB).

and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement), is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement, which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness, and not every contradiction or deviation, affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made; the proven reasons for the contradictions; the actual effect of the contradictions with regard to the reliability and credibility of the witness; the question whether the witness was given a sufficient opportunity to explain the contradictions — and the quality of the explanations — and the connection between the contradictions and the rest of the witness's evidence, amongst other factors, are to be taken into consideration and weighed up. Lastly, there is the final task of the trial judge, namely, to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not, and to decide whether the truth has been told, despite any shortcomings. (At 593e – 594h.)”

[34] To balance all the above considerations requires that the court shall act with “judicial wisdom.”⁷

⁷ PHK, Par 21.

[35] Mr Mpshe further referred the court to the judgement of S v VAN DER MEYDEN ("van der Meyden") 1999 (1) SACR 447 (W):

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H-341B, which applies equally to any other defence which might present itself: 'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation . . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses' exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H341B, which applies equally to any other defence which might present itself: 'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

[36] In *S v Mahlangu and another*⁸ the court restated the principles relating to written statement by witnesses, and in my view, the following statement of the court carries particular meaning within the context of the current case:

“By reason of the criticism levelled at police witness statements, I find it necessary to restate the principles relating to written statements by witnesses. In order to discredit a witness who made a previously inconsistent statement it must be shown that the deviation was material (S v Bruiners en 'n ander 1998 (2) SACR 432 (SE) at 437e; S v Mafaladiso en andere 2003 (1) SACR 583 (SCA) at 593e). Deviations which are not material will not discredit the witness. Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was unsatisfactory or untruthful.

There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail. Should a witness through a lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness's evidence may be accepted and in what respects it should be rejected. Counsel who act on behalf of accused persons, are wont to pounce on any differences, no matter how insignificant, which may arise between an extra-curial statement of a witness and the witness's testimony in court (see S v Govender and others 2006 (1) SACR 322 (E) from 326c, where Nepgen J gives an insightful discourse on this topic). The witness is often lambasted where his testimony in court gives more detail than what appears in his written

⁸ [2012] JOL 29277 (WC) on P. 41.

statement. The more differences that can be found between the statement and the testimony in court, the more successful counsel feels his cross-examination has been. However, as has been pointed out, that is not the correct approach. The test is: were the differences material, always bearing in mind that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement.

It is so that there were differences between the police witnesses' statements and their testimony, that was to be expected, but the underlying theme remained the same, namely, a report was received that the deceased was killed in his house and the accused took the police to the scene. There, the body of the deceased was found and the accused, particularly accused 1, admitted that he killed the deceased. Any differences there might have been in the witnesses' statements could not change or influence these crucial facts. In material respects, therefore, the witnesses were consistent and only deviated from their statements in respect of non-essential issues. "

[37] Both Mr Jacobs, who appeared for the state and Mr Mpshe referred this court to a litany of judgments, all of which articulate the approach that a court should take when evaluating contradictions in the evidence of witnesses. Each of these judgements articulates the principles involved seen from different perspectives and in different ways. It will serve no purpose to repeat those judgements here.

[38] Furthermore, it is clear that this appeal revolves entirely around how discrepancies and contradictions in evidence should be reviewed and assessed.

[39] In order to create some structure for a court's approach when assessing the effect of contradictions in the statements and evidence of witnesses, one can explicate a basic typology of considerations, based on the above judgements and other judgements to which the legal representatives referred us to:

- All evidence, including the contradictions, must be taken into account, and no evidence may simply be ignored.
- The mere existence of a contradiction does not lead to the automatic rejection of the evidence.
- The court must make a materiality assessment of the contradiction. There is a difference between material inconsistencies and minor discrepancies that do not impact on the substance of the evidence.
- The court must take an integrated approach to the inconsistencies. In this regard, the considerations enumerated by *Mafaladiso* are particularly important. Cultural differences, possible in the inaccurate translation of testimonies and misunderstandings should all be considered and properly weighed.

- The court must assess very carefully whether a contradiction is the result of a mere collapse of memory as opposed to an intended and possibly coordinated falsehood.
- The court must ask itself the question whether there is an underlying cogent and coherent theme appearing from the evidence, and if so assess carefully whether the contradictions and inconsistencies disturb this underlying theme.

[40] In my view, the following statement from *DIE DROS (PTY) LTD AND ANOTHER v TELEFON BEVERAGES CC AND OTHERS*⁹ , provides a sensible point of departure to evaluate evidence in general:

"Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."

[41] Once a body of primary facts (all primary evidence), is found by the court to exist then it becomes a question of

⁹ 2003 (4) SA 207 (C).

inference to draw probable logical inferences as to the existence of secondary facts, and not only secondary facts but also conclusions as to legal principles applicable in a particular case.

- [42] Questions of relevance, probative value, the assessment of probabilities and the nature of inferences to be drawn, have received judicial and scholarly attention over the years.¹⁰ In assessing these issues the following well-known remark of Schreiner JA, when it comes to the duty of the judge in this regarding which it was said that a judge must apply a

*“blend of common sense, judicial experience and logic, lying outside the law.”*¹¹

- [43] The following question can be posed against the above backdrop: what exactly is the essence of a primary fact, or primary evidence. In this regard the remark in *S v Mehlape*¹², where the Supreme Court of Appeal made the following statement with regard to the identification of an accused by an eyewitness:

“(t)he nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility,

¹⁰ Constantine Theophilopoulos and Adrian Bellengère, ‘Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective’ (2022) 25 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad <<https://www.ajol.info/index.php/pelj/article/view/236851>> accessed 7 April 2025.

¹¹ *R v Mathews* 1960 1 SA 752 (A) 758.

¹² 1963 (2) SA 29 (A) at 33 A -B.

or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bag, etc., connected with the person observed, and so on

[44] It is, in my view, clear from the above that primary facts or evidence are facts established by direct sensory observation and awareness¹³ of some kind by the witness. The reliability of observation logically revolves around factors like the opportunity to make such observation, the length thereof, the visibility, the angle of observation, etc.

[45] Once a court has concluded, given the opportunity to make the sensory observation, and the overall quality of the observation, that the observation was indeed made an accurate, such a testimony by witness becomes primary evidence from which inferences can be drawn, factual inferences drawn from such primary sensory observations/awarenesses then become the basis for secondary inferences.

[46] The following example illustrates the difference between the two: if a witness one evening walks in from the street in front of his house into his house, while it is raining such a witness

¹³See *Mong v Director of Public Prosecutions and Another* (17593/2018) [2019] ZAWCHC 116 (23 August 2019) in which the faculty of smell was the reason why two policemen started to investigate a situation. See also *S v Tai-Tai and Others* (CC21/2020) [2023] ZAECMHC 16 (29 March 2023)

sees, feels, and smells the rain. Consequently, the fact that it was raining is established by way of primary evidence. Contrast that with a situation where a witness sleeps through the night and wakes up the following morning only to observe that as far as he can see outside his house all the soil is wet and he smells wet soil, he can draw the conclusion that it has rained overnight. Such a fact is concluded by inference, in other words, by observing his entire wet garden in the absence of any other reasonable factor, the only reasonable inference is that it was raining during the night. In this instance the fact that it was raining is secondary evidence, and its probative value is dependent on the primary facts on which it is based, in the example the wet soil in the garden and the distinct all over smell of the wet soil.

[47] Now if one returns with this scheme of thinking to the set of facts in this case, it is immediately clear that the case of the state is in its entirety based on primary evidence.

[48] There is one common cause fact, and that is the deceased disappeared on 14 January 2006 and was never seen again. Secondly, Gabriel described in detail how he, accused 1, 2 and 3 kidnapped the deceased in Soshanguve, drove him to Seshego, and how he, Matome, and accused 1, 2 and 4 murdered the Deceased. In other words, in their testimony and earlier statements they directly describe their own

observations, even to the extent of their own participation in the horrific murder. None of that is based on any inferential evidential facts (secondary facts).

[49] Against this, the four accused did not place any exculpatory evidence before court that can be assessed against the backdrop of the totality of evidence. Accused 1, 2 and 4 simply made the bald statement that the incident did not occur and accused 3, who was implicated by Gabriel to be on the scene of the initial kidnap and to initiate and assist with the kidnap, simply had the defence of an alibi.

[50] The court *a quo* can consequently not be faulted with having stated the following:

"It bears mentioning that the defence of Mr, Hlako, Mr Makgatho and Mr Mabirimisa is that the incident described by the state witnesses which includes driving from Polokwane to Soshanguve and back as well as the incident at the home of Mr Hlako where Ronnie was allegedly killed, never happened. Put differently, the version by the three witnesses is nothing but a fairy tale conjured up by them. There is therefore no room in their defence that what was described actually happened, but that they were not involved. The defence therefore stands and falls on the acceptability and credibility of the state witnesses' accounts of the events."

[51] To put the statement of the court in other words: the state witnesses' testimonies consist entirely of direct, primary, evidence, in other words none of the facts that needed to be proved for a conviction had to be proved by way of secondary inferences, in which errors of logic and a misinterpretation of

the probative value of such inferred facts can complicate the assessment. Once it is determined that the state witnesses were reliable and accurate, the conclusion is overwhelming: a conviction must follow.

[52] Mr Mpshe submitted on behalf of the accused that the list of discrepancies and contradictions by the state witnesses destroy the state testimonies in their entirety, and that for that reason the state failed to prove its case.

[53] I will now turn to one aspect which forms part of the attack of the accused on the conclusion drawn by the court *a quo*.

[54] With regard to the testimony relating to the prophet, referred to in paragraph 10 above, the Heads of Argument of the accused states the following:

- The court *a quo* erred by accepting the evidence of Gertrude in which the prophet pointed accused 2 out, as the person that murdered the deceased. Mr Mpshe argues that in the absence of testimony by the prophet itself, this evidence is hearsay and should not have been allowed.
- Gertrude was very reluctant to reveal the name of the prophet, although she eventually revealed the name of

the prophet to the court. This behaviour should have caused doubt on her credibility.

[55] It is not exactly clear where Mr Mpshe aimed with the interaction between Gertrude and the prophet, on appeal. One can pick up some indication from remarks made by Mr Mpshe, during the trial during cross examination of Gertrude:

"To sum it up, you were told, sorry, the Accused are before court because what you were told by a prophet, am I correct?"

and

"Yes, now I am going to say to you, the prophet or information from the prophet kickstarted everything, am I correct?"

and Gertrude then confirmed that the statement was correct.

[56] One must concede that the following situation is strange: a person disappears in January 2006. Shortly thereafter, a prophet identifies accused 2, who was living in Seshego, 250 km from Soshanguve where the disappearance took place, as the person who killed the disappeared person.

[57] This communication of the prophet kickstarted the entire investigation. Surely, is this the basis for starting an investigation against accused 2 not highly suspect?

[58] In my view, if one assesses the entire record, the value of the cautionary approaches described in *Mafaladiso* and *van der Meyden*, becomes clear.

[59] Firstly, the term “prophet” is not consistently translated in the record. It is sometimes during interpretation interpreted as “pastor.” The two terms are used interchangeably during the translation.

[60] Now the perception is that the basis on which a “prophet” would point out a person as being the person who murdered the deceased, more often than not, would be based on superstition, and such a superstitious pointing out would have no evidential value. On the other hand, a pastor’s knowledge of the crime perpetrated by another very often emanates from a confession by such other person - and such a confession can be highly relevant, and be the sole basis for a conviction against an accused – See the case of *Rethea Bierman v State*¹⁴(“*Bierman*”). In fact, the case of *Bierman* is a vivid illustration of an accused that tries to argue that the confession made to a religious functionary, such as a reverend (or in this case a pastor), should be privileged in terms of South African law.

[61] Now this question of the identification of accused 2 by the prophet/pastor, is not taken any further by either the state or

¹⁴ [2002] JOL 9860 (CC).

the accused. That the state did not take it any further is understandable in the light of what follows.

[62] Gertrude testified as follows, after having been asked by Mr Mpshe, what she made of the communication of the prophet:

*"I believed him and on the other hand I did not believe him because right here we are talking of clashes of you can take it as easy as like that being customaries, of customs. On the one hand, in African Customs, you can take it as easy as like that being evidence fully like that. But when we come to Court's of law the expectation they differ from what normally we accept as being fully evidence as Africans."*¹⁵

[63] Mr Mpshe then asked: "After this revelation you were ready to go now to strengthen your evidence?."

[64] Gertrude then stated that the family members "secretly" continued with their investigation, and she stated that her search led them to her sister-in-law, one Sophie Mokwena. She explained in cross examination"

"What happened was that my sister's motor vehicle was stolen. I called her. Sympathising with her and I called her frequently so she divulged to this information that Marcus sent Gabriel Malti to come and steal a motor vehicle. I wanted to enquire from her who exactly is this Gabriel Malti"

and she continued

"Then I wanted to know as to who Gabriel Malti is since when has he been working together with this Marcus and that is when she said that he has been with this Marcus for quite a

¹⁵ P. 30 record.

*while together with Joshua Hlako and others. Then I took it as the breakthrough that we have been looking for.”*¹⁶

[65] Gertrude also testified that she, the deceased, and accused 2 and 3, were relatives, and were at the time of the incident actually very close to one another. They are the children of her paternal aunt.¹⁷

[66] Following on the question by the court she explained that the entire family originates from *“This province, that is after you have passed Matlala towards Steilloop that is where their family originates from.”*

[67] On the question of the court *“How was your relationship with Marcus and Amanda prior to your brother’s disappearance?”*, Gertrude answered *“We were very close”*.

[68] The court then asked the question *“Do you know Mr Hlako”* to which she answered, *“I just know that Hlako is a friend of Marcus I just know him from the village.”*

[69] In my view, it is abundantly clear from the record that the identities of Gertrude, the Deceased, and accused 1,2 and 3 are tightly woven together in a tapestry of evidence involving familial ties and known acquaintances.

¹⁶ P. 31, record.

¹⁷ P. 38, record.

- [70] Given the aforesaid, there is no room to conclude that the investigation and eventual court case were the result of a superstitious pointing out of a prophet. To explore the interactions Gertrude and the prophet, with a view to discredit the state case, is to bark up the wrong tree.
- [71] The first person that gave a statement confirming the murder of the Deceased, in a way that implicates the four accused as well as himself and one Matome, was Gabriel Matli.
- [72] As indicated above, Gertrude's investigation led her to Gabriel Matli. She located him and took him to the police station called Vlag, a police station which is situated in Ga Matlala in order to make a statement. That police station sent them to the police station in Gilead, who in turn told them that the statement should be reported in Pretoria. Gertrude and her family then took Gabriel out of the province to Pretoria for his own safety.¹⁸
- [73] Seroka testified that he was called during December 2021 by the commander of the detectives, and the commander indicated to him that he had an "enquiry file", and it transpired eventually that this file came from the SAPS head office.

¹⁸ P. 24 record.

- [74] Seroka testified that he started to investigate the incident, that he had an interview with Gertrude.
- [75] Seroka testified that shortly after the interview, he received instruction to proceed with the investigation of the incident . He explained that eventually¹⁹ he phoned SAP members at Akasia, and requested contact numbers of Gabriel, and they provided the contact numbers to him.
- [76] He eventually linked up with Gabriel in Pretoria, who told him that he was hiding in Pretoria. Seroka then warned Gabriel in terms of section 204 of the Criminal Procedure Act, to make a statement, and explained the implications of Section 204 to him. Gabriel made a statement, and in the statement implicated Matome. This statement was made on 20 January 2022. Seroka also arranged for Gabriel to be taken up in a witness protection program.
- [77] Matome was also warned in terms of section 204 of the criminal procedure act to make a statement regarding the incident, by a certain officer Chauke at the Modimolle correctional service facility. He also gave a statement implicating Gabriel, accused 1,2 and 4 and himself in the

¹⁹ P. 429 record.

murder of the Deceased. This statement was made on 12 April 2022.

[78] In my view, the totality of evidence establishes in a clear, logical and cogent way where and how the investigation was started and on what basis the four accused were eventually arrested. The suggestion by Mr Mpshe during the trial that the trial proceeded based on the pointing out by a “prophet” can simply not be sustained.

[79] Since the entire state case revolved around the content of Gabriel and Matome, the court had to pay particular attention to statements of Gabriel and Matome.

[80] The court a quo made the following statement, with regard to the remarkable corroboration between the two statements of Gabriel and Matome regarding the entire incident:²⁰

“ For Matome to be able to corroborate Gabriel’s version that he went to Soshanguve with Mr Hlaoko, he must have obtained knowledge of Gabriel’s version to that effect. He could only have obtained this information from either Gabriel already had first-hand knowledge of the event.”

[81] In my view, this remark of the court a quo is applicable to the entire testimonies of Gabriel and Matome.

[82] The court a quo stated as follows:

²⁰ P. 874 record.

*"This court must next determine if Matome and Gabriel had the opportunity of comparing their versions."*²¹

[83] The court remarked that the defence did not even suggest that there was such a possibility and proceeded further to do a thorough analysis of the question as to whether Gabriel and Matome could have colluded with one another regarding the content of their statements and testimonies. The court concluded that it would have been highly improbable, even impossible.

[84] The court *a quo* referred to the fact that Gertrude had a discussion with Gabriel regarding the murder that took place. Gertrude, however, did not have any discussion with Matome (she did not even know him) and consequently Gertrude could not have influenced Matome to tailor his testimony to the content of Gabriel's testimony.

[85] It is clear from the sequence of events described above that at the time that the two statements were made to Seroka and officer Chauke, Gabriel and Matome could not have colluded with one another regarding the content of their statements, since the statements were taken four months apart and Gabriel's statement was taken in Pretoria while the statement of Matome was taken by officer Chauke in Modimolle.

²¹ P. 873.

- [86] Regarding the possibility that Gabriel and Matome could have colluded with one another at an earlier stage, the court *a quo* remarked as follows:

"It is in my view improbable that Gabriel and Matome conspired in 2006, or thereafter, that if they were arrested in future, they will implicate Mr Hlako, Mr Makgatho and Mr Mabirimisa, the latter two, that is now Mr Makgatho and Mr. Mabirimisa who were unknown to Matome.

Matome and Gabriel also corroborated each other's evidence with regard to the notebook which Matome was required to write the particulars of Ronnie. They also corroborated each other as to the person who actually killed Ronnie. Matome identified Mr Mabirimisa in court as the person who killed Ronnie. Importantly, Mr Mabirimisa's defence was that he never met Matome."

- [87] In my view, the conclusion of the court *a quo*, viz that it is highly improbable that Gabriel and Matome could either have colluded with one another at the stage that their statements were made or at any stage prior to that, cannot be faulted.

- [88] I will now turn to some of the inconsistencies pointed out by the accused in their heads of argument.

- [89] Regarding that portion of the events when Gabriel and accused 2 were on their way to Soshanguve, the Heads of Argument states the following:

"On the issue of following the vehicle allegedly driven by appellant 2. The initial evidence is that second appellant's car came from the right and he, witness followed it. Later it changed that the car (2nd appellant) came from behind."

[90] Mr Mpshe does not explain what to make of this contradiction. Does this contradiction destroy the basic narrative that the vehicle in which he was driving and the vehicle of the second appellant were together on the way to a house in Soshanguve? And if this is Mr. Mpshe's submission, why does he submit so? It should be borne in mind that this incident took place 16 years prior to the testimony of Gabriel in court, and this contradiction (even if it is found to be a contradiction of the proper scrutiny of the record), is in my view nothing more than an inaccuracy with no effect on the credibility of the version of Gabriel.

[91] The heads also pointed to the following statement contradiction:

"He testified that the appellant 2 got into his car but he does not know who was the driver. In the same breath he testified that appellant was the driver.

Record vol 2pp 181 lines 14 – 21."

[92] I am unable to pick up from that portion of the record referred to that Gabriel testified in the same breath that accused was the driver and also not the driver. What Gabriel said was that he did make an earlier statement in which he stated that accused 2 got into the car but he did not see who the driver was and he could not remember well.

[93] Once again, does this lapse of memory by Gabriel, 16 years after the incident to destroy the basic theme that there were two vehicles involved in the kidnap of the deceased, the one vehicle which he, Gabriel was driving, and the other vehicle which accused no 2 was driving, alternatively in which he was a passenger. The important factor is that Gabriel identifies accused 2 as a person that was on the scene and was actively involved in the kidnapping. I do not think that this inaccuracy is material.

[94] Another example of an alleged inconsistency is this:

"Gabriel told the court in his evidence at the beginning that the alleged unknown woman who allegedly helped put Ronnie (deceased) into the car did not come with him to Seshego. However, later on the cross examination he testifies that the unknown woman was present in the shack where in the alleged killing took place."

[95] A proper reading of the record casts doubt as to whether there was indeed an inconsistency in the testimony of Gabriel. Gabriel testified that when they arrived at the tin house in Soshanguve, one Amanda (accused 3), who he recognised as the mother of one Rico (and apparently he knew both of them since they were local residents of ga Matlala where he comes from) and an unknown lady emerged from the tin shack while they were dragging an unstable and dizzy unknown male person which later turned out to be the deceased. Accused 2 assisted the two ladies and put the deceased person in

accused 2's car. Accused 2 thereafter indicated, that they (that is Gabriel and accused 1) should proceed to Polokwane while he was going to drop off accused 3. There is no mention in the record that accused 2 was going to drop the unknown lady off.

[96] Gabriel's testimony that he later saw that very same unknown lady which he saw at Soshanguve being present at the scene where they killed the Deceased cannot be said to contradict any earlier testimony by him.

[97] It would serve no purpose to deal with each and every instance of alleged contradiction in the testimonies of Gabriel and Matome.

[98] In my view the general approach taken by the Appellants in this case is untenable. What they did, was to generate a long list of alleged inconsistencies and contradictions, and then rely on the following generalised statements:

"The court misdirected itself by failing to attach consequences to the contradictions and discrepancies improbabilities (sic) in the state case"

and

"It is discomfoting that the trial judge was aware of the existence of discrepancies in the state's case but ignored the same and convicted the appellants."

[99] There is no question of the court *a quo* having ignored discrepancies in the evidence. The appellants complained that the court *a quo* failed to attach consequences to contradictions and discrepancies, yet the accused himself failed to indicate in any accurate or credible manner what type consequences should have been attached to which contradictions and further to indicate that these contradictions were material, destroying some of the essential primary evidence before the court, or in some way destroying the central theme of the testimony of both Gabriel and Matome.

[100] In my view, the court *a quo* correctly found, beyond reasonable doubt, that the four accused were guilty of the charges is judgement correctly convicted them.

[101] The notice of appeal states that appeal is noted against the “conviction and orders” of the court *a quo* and it is not clear whether the appeal is also noted against sentences.

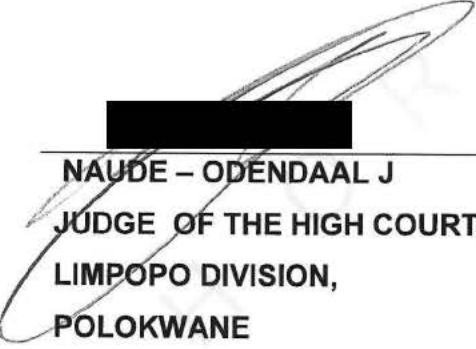
[102] Be that as it may, the appellants did not make out any case either the notice of appeal or their Heads of Argument to interfere with the sentences.

[103] In my view therefore the appeal should be dismissed and that on following order should be made”

“The Appeal is dismissed.”


[REDACTED]
G DIAMOND AJ
ACTING JUDGE OF THE HIGH
COURT,
LIMPOPO DIVISION,
POLOKWANE

I concur,


[REDACTED]
NAUDE – ODENDAAL J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I concur,


[REDACTED]
PILLAY AJ
ACTING JUDGE OF THE HIGH
COURT,
LIMPOPO DIVISION,
POLOKWANE

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Instructed by:

**DIRECTOR OF PUBLIC
PROSECUTIONS**

Date heard:

22 November 2024

Electronically circulated on:

30 April 2025

PLOWN HG CUT