

IN THE HIGH COURT OF SOUTH AFRICA

(LOCAL CIRCUIT DIVISION FOR THE DELMAS CIRCUIT DISTRICT)

Case No. A5071/2006

Registrar Ref. No. CC 375/07

In the matter of:

THE STATE

versus

SITHEMBISO NKALANGA

Accused 2

JULY MONDLANE

Accused 3

---

JUDGMENT

[1] The two accused, Sithembiso Nkalanga, who is accused 2, and July Mondlane, who is accused 3, have been arraigned for trial on an indictment containing charges of the murder of the late Mr Mandla Ben Mkhize (“the deceased”), armed robbery of a hifi set with two loudspeakers, a television set, a computer, two cellular phones, an amplifier, a loudspeaker and a blanket (“the goods”), the unlawful possession of firearms, and the unlawful possession of ammunition.

[2] The indictment cites Victor Ramatie as accused one. He died of natural causes on 4 March 2008, which was before the commencement of this trial.

[3] Adv Cronjé appears for the State, and both accused are represented by Adv Manzini.

[4] At the commencement of the proceedings both accused pleaded not guilty and made plea explanations. Both accused also made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (*exhibit "A"*), relating *inter alia* to the identity of the deceased, his death on 7 December 2006 as a result of a gunshot wound to the head, the post-mortem report (*exhibit "B"*), and that the photo album and key thereto (*exhibit "C"*) correctly reflect the scene. During the course of the trial both accused made further admissions in terms of section 220 (*exhibit "D"*) admitting the regularity and correctness of an identity parade that was held on 29 March 2007, at Modderbee Prison and the correctness of the relevant SAP329 relating thereto (*exhibit "E"*).

[5] The state called as witnesses the deceased's wife, Mrs Charity Mkhize, their daughter Ms Makhosazana Mkhize, and their son Mr Fanyane Mkhize who turned 21 years of age the day after he testified. The State also called Inspector Samuel Mokwele relating to the regularity and correctness of the identity parade. He was not cross-examined and his evidence became irrelevant in the light of the admissions relating to the identity parade which were given after he had testified.

The State finally called the investigating officer, Inspector van Greunen. His evidence merely corroborates the evidence of Makhosazana on certain aspects relating to the arrest of accused 3. The state thereafter closed its case. Accused 2 testified and called Ms Evelyn Thlatlahedi as a witness. He thereafter closed his case. Accused 3 testified and closed his case without calling any witnesses in his defence.

[6] The undisputed evidence of Mrs Mkhize, Makhosazana and Fanyane is that during the early evening of 7 December 2006, the Mkhize family was present at their home at Plot 8, Well Street, Putfontein. At approximately 7:30 – 8:00 pm, while the deceased was lying down in his bedroom, Mrs Charity Mkhize attending to domestic duties in the kitchen and outside the home, Makhosazana's five year old son, Sibusiso, hanging about his grandmother, and Makhosazana with her three month old baby watching television with Fanyane in one of the bedrooms, three armed men arrived and made their way into the Mkhize house. They traumatized the Mkhize family, pointed fire-arms at them, threatened to kill them, shot and killed the deceased, kicked Makhosazana, tied up Mrs Mkhize and Fanyane on the television lounge floor, removed certain items from their home, and thereafter left.

[7] Mrs Mkhize, Makhosazana and Fanyane identified the three armed men who committed the crimes at their home as accused 2, accused 3 and the deceased accused. Both accused 2 and accused 3 raise defences of alibi and

deny the prosecution's case on the issue of identity and their involvement in the commission of any of the offences with which they are charged. It is accordingly necessary to deal with the evidence in some detail.

[8] Fanyane testified that while he and his sister Makhosazana, who also had her three month old baby with her, were watching the programme *Top Billing* on television in one of the bedrooms (sketch plan - D), he heard a noise and his mother shouting outside the house. Sibusiso went past in the passage, which, from the television lounge (sketch plan - G) leads to the bedroom in which Fanyane and Makhosazana were watching television (sketch plan - D) and to the main bedroom (sketch plan - E), saying there were people with firearms. Fanyane immediately went to investigate what was happening. When he arrived in the television lounge, he saw a person who was armed with a firearm at the door of the television lounge (sketch plan – point 1), which door or opening leads to the front door (sketch plan – A) through the dining room. He marked the position of this person as “1” on the sketch plan. He identified this person as accused 3. He also saw another armed man at the door of the kitchen (sketch plan – B), which door or opening leads from the kitchen into the dining room (sketch plan – point 2). This man was pointing a firearm at his mother who was in the kitchen behind the open fridge door. He marked the position of this person as “2” on the sketch plan. The kitchen (sketch plan – B) is next to the television lounge and they are divided in such a way that makes it possible to see from the one into the other.

[9] When Fanyane ran back towards the main bedroom, he noticed that his father, the deceased, was also going into the television lounge. Makhosazana handed her three month old baby to Fanyane and she asked him to hide Sibusiso in a cupboard. She left the bedroom and went in the direction of the television lounge. Fanyane put Sibusiso in a cupboard in the main bedroom (sketch plan – E) and he remained there with the baby. He tried to phone for help, but the telephone did not work. He heard a gunshot in the television lounge. The other man arrived in the main bedroom. He pointed a firearm at Fanyane, ordered him to lift his arms in the air and to leave that room, and he escorted Fanyane with the baby into the television lounge. Fanyane noticed his father on the floor and Makhosazana busy rendering aid to him. Accused 3 ordered him to give the child to his mother and to lie down on the floor. Fanyane lay close to his father. The other man tied Fanyane's arms and legs behind his back with an electric cable. Accused 3 pointed a firearm at Fanyane in his face and said he was going to shoot them.

[10] From where he was lying, Fanyane was able to see outside the house through the main door (sketch plan – A). Fanyane noticed a third person outside the house, whom he identified as accused 2. This person entered the house, fetched items – a Hifi radio, wallet and blankets - from Fanyane's bedroom, and took the items outside. Accused 2 came back into the house. The deceased accused went to the main bedroom and returned to the television lounge with a

computer. Accused 2 and the other man continued to carry items out of the house, including a television set, which they took from the television lounge. Accused 3 remained in the television lounge until all three assailants went into the dining room, which is immediately adjacent to the television lounge and the kitchen on the one side and to Fanyane's room on the other side. They were approximately three metres away from Fanyane and they spoke to each other in a language which Fanyane could not understand. After they had spoken they wanted to know where the safe was where the money was kept, and Mrs Mkhize told them that they had no money. Accused 2 said to the other: *"It looks as if the person outside was busy calling the police."* The reference to the person outside was, according to Fanyane, a reference to the Mkhizes tenant. The outside room (sketch plan – H) was rented to a tenant. Fanyane saw the tenant running away. The three assailants left the house immediately and followed the tenant. Makhosazana locked the main door, and untied Fanyane and Mrs Mkhize. Members of the SAPS and an ambulance service arrived later that evening.

[11] Makhosazana testified that while she and her brother Fanyane were watching *Top Billing* on television, she also heard a noise outside the house, but she did not take much notice thereof until she saw Sibusiso going past shouting. Both she and Fanyane jumped up and she asked Fanyane to go and look what was going on. Fanyane reported back to her that there were people with firearms. She told him to hide with her three month old baby and Sibusiso. She

went to the television lounge. She saw accused 2 standing in front of her mother in the kitchen and pointing a firearm at her while her mother was crouching behind the fridge door that was open. Inside the television lounge she noticed her father walking towards her mother in the kitchen. She also saw accused 3 entering the house through the main door (sketch plan – A) and something which she described as a *'flame'* coming from him, but at that stage she did not know what it was, and thought he had thrown something like a *'fire cracker'* at her. She called out *'father'* and saw how her father was collapsing to the floor in the television lounge. Accused 3 approached her father where he was lying and he placed his shoed foot on him and he kicked him as if he was trying to ascertain whether he was still alive. Accused 3 walked over his body and then approached Makhosazana where she was standing. He pointed in the direction of the passage (leading to bedrooms D and E) and told her to go back, but she refused, because she was trying to get to her father. She fell and accused 3 pulled her by the leg. She succeeded in getting to her father. She turned him around and noticed that he was shot between the eyes. She found a very weak pulse in his neck. She spoke to accused 2, who was still pointing a firearm at her mother in the kitchen, saying: *'Look what you have done now. Lower your weapon. Leave us one parent.'* Looking at him, she noticed accused 2 was smiling and acting as if nothing wrong had happened.

[12] The deceased accused then entered the television lounge from Fanyane's bedroom (sketch plan – F) and he went into the passage that leads to the other

bedrooms. He returned to the television lounge with Fanyane and the baby while pointing a firearm at Fanyane. At this time Makhosazana was still kneeling at her father, accused 3 was standing close by, and accused 2 was still pointing a firearm at her mother in the kitchen. Accused 3 said that Fanyane must also be shot or, as she stated under cross-examination, be killed. All three assailants, including accused 2 from the kitchen, came closer to Fanyane, and pointed firearms at his head. Makhosazana begged them not to shoot or kill Fanyane because he was still young and attending school. Accused 3 replied: *'Who said we are going to leave you alive'*. Makhosazana asked: *'Give us an opportunity to lie on the floor if you are going to kill us all. Give him also an opportunity to lie on the floor before you kill him.'* Accused 3 replied: *'Lie'*. Makhosazana then pulled Fanyane to the floor. He was lying close to the deceased and his legs were tied to his arms with electric cable. Makhosazana asked accused 2 to allow her mother, who was still in the kitchen, to join them in the television room. She was allowed to lie down, and also tied up. Makhosazana later noticed that her mother was holding and protecting the baby while she was lying on the floor. Makhosazana spoke to accused 2 and asked him to give them a chance to phone for an ambulance because her father's life could possibly be saved. According to Makhosazana accused 2 had a constant smile and that surprised her.

[13] Makhosazana testified that their assailants, including accused 3, carried items out of the house, but other than for accused 3 who kicked her and asked

her where the cellular phones were and enquiring about what turned out to be the deceased's cellular phone, and for saying that they took her cellular phone and her mother's one, she was unable to say which items were taken from the house and by whom they were taken. According to Makhosazana, all their assailants moved around and at a given time the one might be outside and the others not. Makhosazana relied on Fanyane to tell who went outside, where they were, and what they were doing. At a stage when Fanyane told her that they were all outside, she closed and locked the front door, and she put the lights off. Members of the SAPS and an ambulance service arrived later that evening. Makhosazana's leg was painful after the incident and she walked with a limp.

[14] On 19 December 2006, while Makhosazana was driving home from town with her mother and others, she recognized accused 2 walking next to the road and pushing a wheel barrow. He was, according to Makhosazana, walking ahead of the deceased accused who was also pushing a wheel barrow and who was in the company of a female. They immediately summoned the '*Plot Watch*'. Once accused 2 and the deceased accused had been identified by Makhosazana, and by her mother, they were arrested. On 14 February 2007, Makhosazana saw accused 3 on her way when she was taking her child to a nursery school in the morning. She called the police and she later accompanied the police searching for accused 3. She saw him leaving a certain Plot and she pointed him out to the police. They, Makhosazana and presumably her mother,

confirmed to the police that they were certain he was one of their assailants. He was then arrested.

[15] Mrs Mkhize testified that while she was busy in the kitchen, she heard a noise outside the house and she went outside to investigate the noise. Sibusiso was with her. Three armed men emerged. In front was accused 2 and he was pointing a firearm at Mrs Mkhize. He was followed by accused 3, who was also holding a fire-arm, and accused 3 was followed by the deceased accused who had a fire-arm tucked in at his back between his trousers and his body. Accused 2 said to Mrs Mkhize: *"We are going to kill you tonight"*. Mrs Mkhize retreated into the kitchen and she was followed by accused 2. The deceased accused went in the direction of Fanyane's bedroom inside the house and she did not see where accused 3 went to. Accused 2 remained with Mrs Mkhize in the kitchen while keeping his firearm pointed at her. She was holding onto the open fridge door. She constantly pleaded with him not to kill them and saying to him that they could take whatever they wished. Mrs Mkhize was very scared. She prayed and accused 2 told her to keep quiet.

[16] Mrs Mkhize testified that she was not able to see all the events in the television lounge clearly while she was in the kitchen, because of the distance, accused two was standing in front of her with a fire-arm pointed at her, and she was scared. She testified that she noticed the deceased walking through the television lounge, she heard the shot, she saw that it was accused 3 who shot

the deceased, she saw accused three kicking the deceased and saying he is already dead, and she was adamant under cross-examination that she saw this clearly and properly, particularly since their assailants did not look alike.

[17] After the deceased had been shot accused 2 joined the other two assailants in the television lounge. Mrs Mkhize initially remained in the kitchen, but then joined the others in the television lounge. Accused 3 tied Fanyane's arms and legs behind his back with electric cables. Mrs Mkhize was also told to lie on the floor and accused 3 tied her hands behind her back. Mrs Mkhize was begging their assailants all the time to leave saying that they would not call the police or lay charges against them. At some stage accused 2 replied: *"We are not here busy with games. We are here to kill you."* Mrs Mkhize said that accused 2 was not smiling in the kitchen, but she noticed that he was smiling when they were in the television lounge.

[18] Their assailants went to the bedrooms, returned to the television lounge with the items they had taken, took them outside, and returned into the house to fetch more. There was a lot of movement and it was therefore, according to Mrs Mkhize, not possible to say who was present in the television lounge at any given moment and who not. Mrs Mkhize specifically mentioned a television set, a computer, blankets, a blue and white comforter, and cellular phones as items which their assailants had taken from the house. None of the items stolen were ever recovered. Mrs Mkhize noticed their tenant walking outside the house

followed by accused 3 and the other two assailants. This is when Makhosazana closed and locked the door, put off the lights, and untied Mrs Mkhize and Fanyane. Mrs Mkhize incurred no injuries.

[19] Mrs Mkhize also testified about the events that occurred during the afternoon on 19 December 2006. The '*Plot Watch*' officers first took Makhosazana to accused 2 and to the deceased accused and she identified them. Mrs Mkhize was thereafter taken to them and she too identified them. They were then arrested. She further testified on the events when Makhosazana saw accused 3 on her way to a nursery school during the morning on 14 February 2007. Mrs Mkhize accompanied the investigating officer, Makhosazana, and certain '*Plot Watch*' officers when they searched the area for accused 3. According to Mrs Mkhize, they found accused 3 in a street which leads from accused 2's residence. He was arrested.

[20] Accused 2 denied that he was involved in the murder and robbery at the Mkhize residence on 7 December 2006, or that he ever possessed a firearm or ammunition. He denied that he knew accused 3 or the deceased accused before his arrest on 19 December 2006, and he testified that he only met them at Modderbee Prison afterwards.

[21] He testified that he had been residing at Plot 231 Durandt Road, Putfontein since 2001, which property is approximately 800 metres to a kilometre

away from the Mkhize residence. He was at his residence on the date and time when the incident occurred. He makes artificial flowers from steel and sells them around the plots and in Benoni. He worked during the day on 7 December 2006 until about 3:00 pm. Earlier in the day he went to Benoni. During the evening he played audio music cassettes, then he watched television from 7:30 pm until 9:30 pm until the programme '*Muvhango*' ended, whereafter he went to sleep.

[22] Ms Evelyn Thlatlahedi, who is the girlfriend of accused 2, testified in his defence. On Friday, 8 December 2006, she was informed that the deceased was killed and had died on the Thursday at about 8:00 in the evening. She did not know the deceased, Mr Mkhize, or the other people who resided at the Mkhize residence, although she knew where they resided. On 19 December 2006, she heard of the arrest of accused 2 while he was being arrested and she attended at the scene of his arrest where she spoke to him.

[23] Ms Thlatlahedi testified that accused 2 went to town on the 7<sup>th</sup> December 2006. He returned home before 4:00 pm. Both of them thereafter remained at the premises where they resided. She and accused 2 were together at their residence listening to music at the time when it is alleged Mr Mkhize was murdered between 7:30 – 8:00 pm. She testified that they all go to her mother's room to watch '*Muvhango*' on a daily basis, whereafter they go to their respective rooms to sleep. This was also what they did on the 7<sup>th</sup> December 2006.

[24] She further testified that accused 2 never owned a firearm, she had never seen him with a firearm or ammunition, and that she had never seen or known the deceased accused before his arrest on the 19<sup>th</sup> December 2006, or accused 3 before she was visiting accused 2 in Modderbee Prison.

[25] Accused 3 denied that he was involved in the murder and robbery at the Mkhize residence on 7 December 2006, or that he was the person who killed the deceased, or that he ever possessed a firearm or ammunition. He denied that he knew accused 2 or the deceased accused and he testified that he only met them at Modderbee Prison after his arrest.

[26] He testified that he resided near Putfontein, and that he was employed by Kilyn Enterprises at the time of the incident. The owner of this company is a certain Neville. Kilyn Enterprises, according to accused 3, received an order to install security doors and gates at a certain school in Pretoria. Neville sent accused 3 and a certain Patrick to the school in Pretoria to undertake the installation on the 17<sup>th</sup> November 2006. Accused 3 undertook the work from the 17<sup>th</sup> November 2006 until the 14<sup>th</sup> January 2007, when he returned home where his wife, Evelyn (a reference to his girlfriend), and three children resided. He and five other co-workers, whom he mentioned by name, stayed at the school premises and they slept inside the class rooms. They worked every day of the week since Neville informed them that the work had to be completed before the school re-opened on the 1<sup>st</sup> January 2007. They only worked daily until 5:00 pm

and not in the evenings. Accused 3 never once left the school premises during the entire period from the 17<sup>th</sup> November 2006 until the 14<sup>th</sup> January 2007.

[27] In S v Van der Meyden 1999 (1) SACR 447 (WLD), this was said at p 448 f–i:

‘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.’

[28] The approach to be followed was formulated as follows in S v Chabalala 2003 (1) SACR 134 (SCA), at pp 139 – 140, para 15:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths

and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.'

[29] The issue in this case is one of identification, and the question is therefore whether there is proof beyond a reasonable doubt that accused 2 and accused 3 were two of the three persons who committed the serious crimes at the Mkhize residence on the evening of 7 December 2006 for which they are charged.

[30] Relevant to the determination of the issue of identification is the following *dictum* by Holmes J.A. in S v Mthetwa 1972 (3) SA 766 (A), at p 768A – C:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.

These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities: see cases such as *R. v. Masemang*, 1950 (2) S.A. 488 (A.D.); *R. v. Dladla and Others*, 1962 (1) S.A. 307 (A.D.) at p. 310C; *S. v. Mehlahe*, 1963 (2) S.A. 29 (A.D.).”

[31] In *S v Mehlahe* 1963 (2) SA 29 (A), at p 32F – G, this was said:

‘The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence’

[32] The identification by a witness may be unreliable even if the witness is found to be a good witness, patently honest, intelligent, confident, coherent, and verbally expressive [see: *S v Charzen and Another* 2006 (2) SACR 143 (SCA).

[33] Also relevant is the following *dictum* at p 310 in *R v Dladla* 1962 (1) SA 307 (A):

‘In a case where the witness has known the person previously, questions of identifying marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.’

[Also: *S v Majiame en Andere* 1999 (1) SASV 204 (OPA), at pp 214 d – 215 e].

[34] Both accused raise defences of alibi and deny the prosecution's case on the issue of their identification by Mrs Mkhize, Makhosazana and Fanyane and their involvement in the commission of any offences with which they are charged.

[35] The legal position in respect of alibi defences was set out as follows by Holmes AJA in R v Hlongwane 1959 (3) SA 337 (A), at pp 340H – 341B:

'The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (A). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (A), Van den Heever JA had this in mind when he said at 494 and 495 that the trial Court had not rejected the accused's alibi evidence "independently". In my view he merely intended to point out that it is wrong for a trial Court to reason thus: "I believe the Crown witnesses. *Ergo*, the alibi must be rejected. See also *R v Tusini and Another* 1953 (4) SA 406 (A) at 414. 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. In *Biya's* case *supra*, Greenberg JA said at 521 (the italics being mine) "... *if on all the evidence* there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."

[36] Mrs Mkhize, Fanyane and particularly Makhosazana were honest, intelligent, and impressive witnesses. Each one's evidence corroborates the other in various respects. There are contradictions between their versions, particularly in respect of the sequence of events, but such contradictions, when

considered and evaluated holistically [see: S v Mafaladiso 2003 (1) SACR 583 (SCA)], are not material, do not affect their credibility, and are to be expected under circumstances where there were constant movement, various acts performed by the assailants, various things said, and where each of them was subjected to a most traumatic and life threatening experience, and they rather point to their honesty [see: S v Mkhohle 1990 (1) SACR 95 (SCA), at p 98 f – h].

[37] In giving his evidence, Fanyane was clearly confused about the actions and involvement of accused 2 and those of the person who is not before court. His evidence on their actions and involvement are contradicted by the evidence of Mrs Mkhize and that of Makhosazana. Fanyane marked the position of the armed man whom he initially saw at the door or opening of the television lounge on the sketch plan (exhibit “C”) as “1”, and that of the person who pointed the firearm at his mother in the kitchen as “2”. He also referred to a third person in his evidence. Later on in his evidence he identified the person whose position he marked “1” as accused 3, the person whose position he marked “2” as the person who is not before court, and the person to whom he referred to as the third person as accused 2. He testified that the person he marked “2” (the person who is not before court) pointed a firearm at his mother in the kitchen, escorted him and the baby from the bedroom into the television lounge, and tied his arms and legs when he was ordered to lie down on the floor in the television lounge. While Fanyane was lying tied up on the floor in the television lounge, he saw the third person (accused 2) standing outside the house, he entered the

house and proceeded to Fanyane's room, and he thereafter returned with items from Fanyane's room. Mrs Mkhize and Makhosazana testified that accused 2 was the person who pointed a firearm at Mrs Mkhize in the kitchen. Mrs Mkhize testified that when the three armed men initially entered the house, accused 2 remained in the kitchen with her and the deceased accused went into the direction of Fanyane's bedroom. Mrs Mkhize testified that it was accused 3 who tied Fanyane's arms and legs when he was lying on the floor. Makhosazana testified that the deceased accused entered the television lounge from Fanyane's room, he proceeded to the bedrooms section of the house and returned with Fanyane and the baby while pointing a firearm at Fanyane. The contradictions between Fanyane's evidence on the one hand, and that of Mrs Mkhize and Makhosazana on the other in respect of the actions and involvement of accused 2 and of the deceased accused do not, in my view, when assessed in the context of all the evidence, in any way affect Fanyane's credibility as a witness. Such is simply indicative of an error on his part.

[38] Makhosazana and Mrs Mkhize testified that all three assailants wore woollen caps covering their heads up to approximately one inch above their eyes at the time of the incident. Fanyane's evidence corroborates their evidence on this aspect insofar as accused 3 is concerned. Mrs Mkhize recalls that accused 2 was wearing jeans, but she does not remember what shirt he was wearing. Makhosazana does not appear to have any recollection of the clothes which accused 2 was wearing. Fanyane testified that he did not see what accused 2

was wearing. Mrs Mkhize does not remember the clothes which accused 3 was wearing. Makhosazana recognized accused 3 on 14 February 2007 *inter alia* by his clothes, which were a red t-shirt with black stripes and denim trousers. According to Fanyane, accused 3 was wearing a blue overall top, and in his police statement he also mentioned that accused 3 was wearing red trousers, although he could no longer recall which trousers accused 3 were wearing. Accused 3 testified that he does not wear a blue overall when he works, but a red one. Again, the contradiction between the evidence of Fanyane and of Makhosazana does not, in my view, affect their credibility, and no reliance will be placed on this aspect of their testimony.

[39] Factors relevant to the assessment of their observations and identification of accused 2 and of accused 3 include the following:

- (a) Fanyane testified that the house was well lit by electric lights and the illumination throughout the house was good. All the electric lights inside the house were on, except for the light in Fanyane's own bedroom (sketch plan – F). Also the outside area was illuminated by means of an electric light, which was on. Makhosazana also testified that the electric lights in the house were on. She confirmed that the house was fitted with an outside light, but she was unable to say whether it was on.

- (b) The incident - from beginning to end – took about an hour in Makhosazana's estimation. Mrs Mkhize testified that she concentrated on the face of accused 2 so that she could identify him at a later stage. She identified him at the identity parade, because she looked at his face throughout the time when he was pointing a fire-arm at her in the kitchen and she saw him clearly. Mrs Mkhize testified that she had a long opportunity to observe accused 3 clearly at the time when she was also present in the television lounge. Makhosazana was not tied and she was in the television lounge essentially throughout the ordeal. She at various stages of the ordeal observed accused 2 and accused 3. She testified that both accused 2 and 3 spoke to her and she to them. Fanyane testified that he was only able to observe accused 2 clearly for a few seconds when their three assailants were speaking to each other in the dining room, which was about three metres away from him. At the time of the incident it appeared to Fanyane as if it was not the first time on which he was seeing accused 2. Under cross-examination Fanyane testified that he thinks he had seen accused 2 once before when they both were passengers in a taxi from the small holdings where Fanyane stays to Lakeside in Randfield. Fanyane was on his way to a marching band practice of which he was a member. Accused 2 also testified that he once boarded a taxi in which Fanyane was travelling. Fanyane also testified that he was able to identify accused 3 at the identity parade, because

Fanyane looked at him when he ordered Fanyane to lie down on the floor, and when he pointed the firearm at Fanyane - in his face.

- (c) As I have already mentioned, Makhosazana and Mrs Mkhize testified that all three assailants wore woollen caps covering their heads up to approximately one inch above their eyes at the time of the incident, and Fanyane's evidence corroborates their evidence on this aspect insofar as accused 3 is concerned. The Mkhize's do not really seem to be able to identify their assailant's clothing, except Makhosazana who observed that accused 3 was wearing a red t-shirt with black stripes and denim trousers, but no reliance is placed on this part of her identification evidence.
- (d) An identity parade was held on 29 March 2007 at Modderbee Prison. Accused 2 was identified by Mrs Mkhize, Makhosazana, and Fanyane. Accused 3 was identified by Fanyane. Mrs Mkhize testified that she did not point out accused 3 at the identity parade, although he was present, because she did not see him '*clearly*' during the incident and she decided to leave him for her children to identify since they had seen him properly. Makhosazana testified that she did not identify accused 3 at the identity parade even though she saw him present, because he had the biggest physique of the three assailants at the time of the incident and at the time of his arrest on 14 February 2007 he still appeared '*tough*' to her, but at the identity parade he appeared more slender and she accordingly left his

identification to the others. She also testified that she was surprised and wondered what could have happened to him in the short period of time. Her evidence in this regard was not gainsaid by accused 3 when he testified.

- (e) On 19 December 2006, Mrs Mkhise and Makhosazana identified accused 2 after he had been recognized by Makhosazana when he was walking next to the road. Such recognition and identification resulted in his immediate arrest. This is common cause between the state and accused 2, although accused 2 denies that he was walking with the deceased accused. Accused 2 testified that after the Mkhize family '*...was finished with Ramatie (the deceased accused) they came to me. Upon their arrival they looked at me. They then said he is the one who entered our house and committed the crimes.*' On 14 February 2007, Mrs Mkhise and Makhosazana identified accused 3 after he had been seen by Makhosazana when she was on her way to a nursery school with her child. He too was then arrested.
- (f) Special characteristics by which Mrs Mkhize testified that she identified accused 2 at the identity parade were his long face, protruding cheek bones, a long nose, and a broad chin. Those by which Makhosazana testified she recognized and identified him on the 19<sup>th</sup> December and at the identity parade were his light complexion in comparison to the other

two, his constant smiling also at the identity parade, his prominent cheek bones, his face which is long but smaller than the other two, his slender physique, which is also smaller than those of the other two assailants. Those by which Fanyane testified that he identified him were his general appearance and his face. Accused 2 agreed under cross-examination that he has a light complexion in comparison to the other two and particularly in comparison to accused 3. Towards the end of her cross-examination of accused 2, Adv Cronje placed on record that it appears as if accused 2 is smiling when he speaks. My own observation throughout the giving of his testimony was also that his facial expression is such that it constantly appears as if he is smiling when he speaks. Both Adv Cronje and Adv Manzini agreed with my observation.

- (g) Special characteristics by which Mrs Mkhize testified that she identified accused 3 were his red eyes, a mark or scar below his eye although she could not say below which eye, his broad and big nose, and his big lips. When cross-examined, accused 3 said that the reason why his eyes are always red is because he has been a welder since 1988. The special features by which Makhosazana testified that she recognized accused 3 are his dark colour, his nose, his mouth, and the scar below his left eye. Makhosazana testified that she realized that accused 3 was not able to speak Zulu fluently since he was only able to say short words instead of proper sentences and it angered him when she could not understand him

and obey his instructions. She accordingly spoke to accused 2. Accused 3 conceded under cross-examination that he has a lot of difficulties in speaking Zulu. It was placed on record by Adv Manzini, and confirmed by accused 3, that he is Shangaan speaking, but that Adv Manzini consulted with him in Zulu and that he followed and understood the proceedings which were translated to him in Zulu. Adv Manzini also placed on record that the accused agreed to a Zulu interpreter. At the commencement of his testimony, the services of a Shangaan interpreter were obtained at the request of accused 3. At the time of the incident Fanyane, in terms of his testimony, too observed that accused 3 had a mark below his left eye. Accused 3 testified that he had a sore below his left eye, which left a mark. It was also common cause between the state and the defence that accused 3 has a mark below his left eye and that one has to be in very close proximity to accused 3, approximately half a metre, to see the mark.

- (h) Mrs Mkhize, Makhosazana, and Fanyane were scared during the ordeal, which must have been most traumatic.

[40] The evidence of accused 2, and that of his witness, Evelyn Thlatlahedi, is unsatisfactory in certain respects:

- (a) Accused 2 tried to convey the impression that he knew the Mkhizes well in order to support his version that the reason why all three Mkhizes pointed

him out at the identity parade was that he knew Mrs Mkhize, Makhosazana and Fanyane since 2005, and that they knew him. Mrs Mkhize, Makhosazana, and Fanyane denied that they had known him previously. Accused 2's version in this regard is improbable and self-contradictory.

- (i) That his version on this issue is improbable requires no elucidation.

On his own version, he never had any problems with anyone of the Mkhize's, and when he was asked under cross-examination why the three Mkhize's each individually identified him at the identity parade, he replied that he does not know and also that he has no answer.

- (ii) Accused 2 testified that he knows Mrs Mkhize, because he, since 2005, used to attend church services at a Mrs Sithole's house in Putfontein where he "*on many occasions*" had seen her.

(Mrs Mkhize admitted that she knows Mrs Sithole and she testified that Mrs Sithole is her neighbour and the two of them visits each other. She further testified that she had never seen any church service being held at Mrs Sithole's house; she denied ever having attended such church services; she denied ever having seen accused 2 prior to the incident; she testified that had she known accused 2 she would have pointed him out to the police at an earlier stage so that he could have been arrested; and she testified

that she would not have identified an innocent man simply because he was known to her.)

Under cross-examination accused 2 continuously contradicted and adjusted his version on this issue. He said that he found Mrs Mkhize at Mrs Sithole's house '*on most of the occasions*' when he visited Mrs Sithole's house, but later he said that he did not meet her there regularly and he was never introduced to her. He testified that he attended the church gatherings or meetings at Mrs Sithole's house during the week and on Sundays and that he went there for no other reason, but later he said he went there on Sundays to attend church and during the week only to visit, and that it was when he was visiting and not attending church services that he saw Mrs Mkhize there.

- (iii) Accused 2 was questioned as to how he knows that the Mkhize's knew him. His reply was that they all live in the same area, buy at the same shops and that the people who live on the plots in the area all know each other. His version that they knew him is improbable. Had the Mkhize's known where he resided, they could and probably would have taken the police to his residence and not waited until Makhosazana saw him walking in the street.
- (iv) Under cross-examination accused 2 admitted that he did not know the Mkhize's well and that he only knows them by sight.

- (b) The evidence of accused 2 and that of his girlfriend, Ms Evelyn Thlatlahedi, is contradictory on what they did on the evening in question:
- (i) Accused 2's evidence was that he listened to music cassettes, thereafter he watched television with his mother-in-law, brother-in-law, two sons, and his girl friend from 7:30 pm until 9:30 pm until the programme '*Muvhango*' ended, and whereafter he went to bed. At 7:30 they watched the Zulu news; then '*Generations*', which programme starts at 8:00 pm; they also watched other programmes; and then they switched to '*Muvhango*', which programme started at 8:00 pm and finished at 9:00 pm.
  - (ii) In giving her evidence in chief, Ms Thlatlahedi said that she and accused 2 were listening to music on a cassette player from just after 7:00 pm, and that the two of them were listening to music at the time when it is alleged that Mr Mkhize was murdered between 7:30 – 8:00 pm. Her version was also that when visiting accused 2 in Modderbee Prison and being told by him why he had been arrested, she reacted by saying to him: *'How can they say you killed him. At that time you were home listening to cassettes'*. She further testified that on the evening in question they as a family did what they do daily, and that is for them to go to her mother's room to watch '*Muvhango*', which in terms of her evidence under cross-examination starts at 9:00 and ends at 9:30 pm, whereafter they went to their respective rooms to sleep. Under cross-examination,

however, she said that they listened to the cassettes, watched the Zulu news at 7:30 pm., whereafter they as a family sat and talked while waiting for the programme '*Muvhango*' to start. The children were noisy and no-one watched television while they were waiting for the programme '*Muvhango*' to start. But when confronted with accused 2's version that they watched the news, then the programme '*Generations*', and then '*Muvhango*', she changed her evidence again by saying that the family members present watched the programme '*Generations*'.

- (c) The evidence of accused 2 and that of Thlatlahedi is also contradictory on the issue as to whether or not the police officers informed him of the reason for his arrest at the time of his arrest on the 19<sup>th</sup> December 2006.
  - (i) The significance of this evidence lies in the fact that it was put by accused 2's counsel to Mrs Mkhize, Makhosazana, and Fanyane that accused 2 remembers what he did on the evening in question since he was arrested a few days later when he could still remember.
  - (ii) Under cross-examination accused 2 said that he was never informed by the police officials that he was arrested in connection with crimes that were committed on the 7<sup>th</sup> December 2006, he was not asked where he was on that day, and the first time he heard that the crimes were committed on

the 7<sup>th</sup> December 2006 was when he appeared in the Benoni court on the 20<sup>th</sup> December 2006. Accused 2 was then cross-examined at length as to way he was able to pertinently remember what he did on the day in question, to which he gave various replies, such as: that he simply knows what he did on that day, but he conceded that he could not remember what day of the week it was and that nothing extraordinary happened on that day or evening in question; that he went to Benoni on the day, but he conceded that he also goes to Benoni on other days; that he remembers because the state advocate questioned him about the events of the day; that he remembers because he was arrested on these charges and it is alleged that the crime was committed on the 7<sup>th</sup> December 2006 and he felt very heart sore. When asked what he did on 5 December 2006, 6 December 2006, 9 December 2006, or 15 December 2006, accused 2 could not remember.

- (iii) In giving her evidence, Ms Thlatlahedi said that at the time that he was arrested on the 19<sup>th</sup> December 2006, accused 2 told her that the reason why he was arrested was because the police officials alleged that he killed Mr Mkhize. She knew since 8<sup>th</sup> December that Mr Mkhize was killed on Thursday, the 7<sup>th</sup> December 2006 at about 8:00 in the evening. When she visited accused 2 in Modderbee Prison he told her that it was alleged

that he killed Mr Mkhize on the 7<sup>th</sup> December 2006 at about 8:00 pm.

- (iv) In giving her evidence in chief, Ms Thlatlahedi said that a certain Esther told her on Friday, the 8<sup>th</sup> December 2006 of the death of Mr Mkhize the previous evening at 8:00 pm. When she was asked by Adv Cronjé why she remembers pertinently that she heard of the incident on the 8<sup>th</sup> December 2006, she replied that she remembers it since that was the day when her mother, who is accused 2's mother-in-law, returned from Nelspruit. She thereafter corrected herself by saying that she thinks her mother returned on the 7<sup>th</sup> December 2006. Her evidence that her mother returned on the 8<sup>th</sup> December 2006 of course conflicts with the evidence of accused 2 that his mother-in-law also watched television with him on the evening of the 7<sup>th</sup> December 2006, and also her own evidence that all the members of the family were present when they were watching television and waiting for the programme '*Muvhango*' to start. Her correction conflicts with her evidence why she pertinently remembers that she heard of the incident on the 8<sup>th</sup> December 2006.

[41] The evidence of accused 3 is also unsatisfactory in certain respects:

- (a) Accused 3 testified that Fanyane was at the police station at the time of his arrest and that the police official told accused 3 to look at Fanyane and to smile. The reason why Fanyane identified him at the identity parade, according to accused 3, was because Fanyane saw him at the police station at the time of his arrest. Accused 3 contradicted himself when he later testified that he saw the state witnesses for the first time at the identity parade. Accused 3's version in this regard was denied by Fanyane, who testified that, apart from the incident, the first time he saw accused 3 was at the identity parade. Makhosazana testified that Fanyane was at school at the time when accused 3 was arrested. Under cross-examination accused 3 testified that the Mkhize family was unknown to him and he never had any problems, disputes or arguments with them.
- (b) Accused 3's counsel put it to Fanyane that accused 3 left with his employer to work in Pretoria from 17 November 2006 until 14 January 2007; and to Makhosazana that accused 3 was working in Pretoria during that period *'with his employer Neville'*. Accused 3 testified that he never left the school premises during the entire period from 17 November 2006 until 14 January 2007. Under cross-examination he testified that the security officers at the school did not allow them to leave the school premises. When it was put to him that he was effectively imprisoned at the school because he was not allowed to leave, he replied that they were not allowed to leave the premises from 6:00 pm. He testified that Neville

would buy them food that they would cook. In reply to a statement by the state advocate that he could have gone home had he wanted to, accused 3 replied that he could only go with Neville, but that such was not possible since Neville went to Germany on the 24<sup>th</sup> December 2006, and he only came back to fetch them on the 14<sup>th</sup> January 2007. His evidence in this regard conflicts with part of his alibi defence which was put by his counsel on his behalf to Makhosazana as I have mentioned before.

[42] It is trite that lies in themselves or improbabilities in an accused's version do not establish the guilt of an accused [see: S v Steynberg 1983 (3) SA 140 (A); S v Mtsweni 1985 (1) SA 590 (A); S v Shackell 2001 (2) SACR 185 (SCA)].

[43] I have applied the required caution and considered the evidence of Mrs Mkhize, Makhosazana and Fanyane carefully in deciding whether or not it is possible that they were mistaken in their identification of accused 2 and of accused 3. I am satisfied that their positive identification of each accused is reliable. They corroborated each other in material respects. Fanyane had prior knowledge of accused 2 by sight on one previous occasion. Their opportunities for observation were not fleeting in nature, the house was well lit inside, and their assailants were at stages during the ordeal in sufficient close proximity to each one of them. Mrs Mkhize had reason to take particular notice of accused 2 and her attention was concentrated on him during the time that he pointed a fire-arm at her in the kitchen, and Fanyane had reason to take particular notice of

accused 3 when he pointed a fire-arm at him in the television lounge. Makhosazana was not tied up, and she had ample opportunity to observe accused 2 and accused 3 at the different stages throughout the ordeal, even though her attention was also directed at rendering assistance to the deceased. The facial expression of accused 2 is striking and it cannot easily be mistaken or forgotten. The facial features of accused 3 – his dark skin colour, red eyes, and big nose – are also distinct. Makhosazana's identification of accused 2 on 19 December 2006 and of accused 3 on 14 February 2007 appeared to have been spontaneous. All three Mkhizes identified accused 2 at the identity parade. Fanyane identified accused 3, and the reasons given by Makhosazana for not pointing out accused 3 at the identity parade are entirely plausible. Their observations of their assailants were accompanied by an unusual and traumatic incident. I do not consider that the emotional state of fear which Mrs Mkhize, Makhosazana and Fanyane experienced, in any way detracted from their abilities to identify their assailants reliably. Such is demonstrated by their actions: Mrs Mkhize pleaded with accused 2; Makhosazana spoke to both accused on several occasions during the ordeal; and she locked the front door and put the lights off when they were outside.

[44] Considering the alibi defences raised by each accused and the exculpatory evidence given by accused 2 and his girlfriend, and given by accused 3 in the light of all the evidence, including the overwhelmingly strong credible and reliable identification evidence presented by the State, I am satisfied

that the evidence as a whole establishes the guilt of each accused beyond a reasonable doubt. Their alibi defences are, when considered in the totality of the evidence and particularly the overwhelming weight of the identification evidence implicating each accused, not reasonably possibly true. Weighed in the light of the totality of the evidence, it is inconceivable that accused 2 or accused 3 was falsely or wrongly identified and implicated [see: S v Van Eck en 'n Ander 1996 (1) SA 469 (SCA) at p 145 D – E]. The state has proved beyond reasonable doubt that accused 2 and accused 3 performed the acts attributed to them by Mrs Mkhize, Makhosazana, and Fanyane.

[45] The acts of accused 3, who inflicted the fatal injury on the deceased, must be attributed to accused 2. He was armed; he and the other two assailants approached Mrs Mkhize together outside the house and he was the front man; he pointed a firearm at Mrs Mkhize outside the house saying to her *'We are going to kill you tonight'*; he pointed a firearm at Mrs Mkhize when he remained with her in the kitchen; he was acting as if nothing wrong had happened when the deceased was shot; he joined the other two assailants in the television lounge and also pointed his firearm at Fanyane when accused 3 said that Fanyane must also be shot or killed; he responded to Mrs Mkhize's pleas for them to leave saying *'We are not here busy with games. We are here to kill you.'*; he actively participated in the theft of items from the Mkhize house; and he and the other two assailants left the Mkhize house together. The only reasonable inference on the basis of the evidence of Mrs Mkhize, Makhosazana

and Fanyane is that he made common cause with accused 3 who inflicted the fatal injury on the deceased and that he is criminally responsible for the results thereof. He actively associated himself with the attack. The five prerequisites referred to in S v Mgedezi and Others 1989 (1) SA 687 (A) at p 705I – 706C for holding accused 2 liable on the basis of a common purpose between himself and accused 3 on both the murder and robbery charges are satisfied beyond reasonable doubt. He was present at the Mkhize house where the assault and theft were committed, he was aware accused 3 was armed, and he was aware of the assault on the deceased and he participated in the theft of household items from the Mkhize house. His active participation is clear. The only reasonable inference that can be drawn is that accused 2 had not only associated himself with the assault on the deceased and the theft, but also that he had the necessary *mens rea* to sustain convictions for murder and robbery. The inescapable inference is that accused 2 foresaw the possibility of the deceased being killed and performed his acts of association and participation with recklessness as to whether or not death would ensue.

[46] In the result:

- A. Accused 2 is found guilty as charged on count 1 (murder), on count 2 (robbery), on count 3 (unlawful possession of a firearm) and on count 4 (unlawful possession of ammunition).

- B. Accused 3 is found guilty as charged on count 1 (murder), on count 2 (robbery), on count 3 (unlawful possession of a firearm) and on count 4 (unlawful possession of ammunition).

---

P.A. MEYER  
JUDGE OF THE HIGH COURT  
5 June 2008