REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: JPV 2010/0046

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

17 MAY 2013 **FHD VAN OOSTEN**

In the matter between

THE STATE

and

NOMSHADO JODI MDLULI **ACCUSED 1**

SYDNEY MONYANE RAMOHALADI **ACCUSED 2**

J U D G M E N T

VAN OOSTEN J

[1] The accused are charged on an indictment consisting of altogether 12 counts, as follows: count 1 (arson), counts 2, 3 and 4 (murder), and counts 5 to 12 (attempted murder). They pleaded not guilty on all counts. Accused 1 elected not to tender a plea explanation. Counsel for accused 2 disclosed the defence of accused 2 as an alibi in respect of which certain particulars were put on record.

[2] A number of admissions were by consent recorded in terms of section 220 of the Criminal Code. The admissions comprise the usual admissions in respect of the three deceased persons, referred to in counts 2, 3 and 4, *ie* their identity, the injuries they sustained and the correctness of the facts and findings contained in the post-mortem reports. Lastly, an album containing photographs of the scene of the incident, all taken shortly after the occurrence thereof, was admitted.

[3] Altogether 11 witnesses testified for the state. As part of the state's case counsel for the State applied, in terms of s 235 of the Criminal Procedure Act 51 of 1977, for the admission into the evidence of the record of the bail proceedings in respect of both the accused. The application was opposed by both counsel for the defence. Having heard and considered argument I granted the application in respect of a limited portion of accused 1's evidence given at the bail proceedings and dismissed the application in respect of accused 2's evidence. Both accused testified and no witnesses were called for the defence. At the end of the evidence I directed that argument be presented in respect of accused 2. Having heard argument accused 2 was acquitted on all charges and the case against accused 1 postponed for argument and judgment. I indicated that reasons for the order in respect of accused 2 would form part of this judgement.

[4] The sole issue for determination by this Court is the reliability and acceptability of the identificatory evidence adduced by the state concerning the presence of the accused at the scene of the crimes. The fact of the crimes having been committed is not in dispute.

[5] Before I deal any further with the disputes in this matter it is necessary to briefly summarise the salient facts of this matter. Some background facts first need to be stated: The *dramatis personae* at the time of the incident were: Sophy Sekoati (the complainant mentioned in counts 1 and 7), her 14 year old son TS (the complainant referred to in count 12), and daughter MGS (the deceased referred to in count 3) and her 4 months old child S (the deceased referred to in count 2); Tshepiso Sekoati and her 18 months old child, L (the deceased referred to in count 4); Lerato Sekoati (the complainant referred to in count 8 and the daughter of MGS); SS (the complainant referred to in count 10 and 14 years old brother of L). I shall refer to them as the Sekoati household. They were all living at what in short was referred to in the evidence as Mapetla, which is the house situate at no 1554 Neeleng street, Mapetla, Soweto (Mapetla). Situated on the same premises were a number of shacks rented out to the occupants. Amongst the tenants were Mohlalefi Lekgoloane (the complainant referred to in count 5), his brother Teboho Legoloane (the complainant referred to in count 9) and his daughter Dineo Legoloane (the complainant referred to in count 11), as well as Sello Mhlabane (the complainant referred to in count 6). I shall in accordance with the evidence adduced before me refer to the witnesses by their first names.

[6] Accused 1 is married to Ndumiso Mbatha. Three children were born from the marriage. Ndumiso is also the father of two children born out of wedlock. Their marriage relationship broke down and for a period of two years they were separated. During the separation, and between approximately 2004 and 2008 a relationship developed and existed between Ndumiso and Tshepiso. The child, L, was born from the relationship. Four months after the birth of L, in 2008, their relationship terminated. This led to the revival of the erstwhile marriage relationship between accused 1 and Ndumiso. Accused 1, although she was aware of her husband’s extra marital affair and the birth of L, only met Tshepiso during the latter part of 2009. It is necessary to summarise the events following upon the meeting which were extensively dealt with in the evidence of the state witnesses Tshepiso, Sophy and Lerato as they are not only relevant but also of crucial importance in the adjudication of this case.

[7] Tshepiso testified that it was Ndumiso's failure to properly maintain and care for their child, L, which coincidentally led her coming into contact with accused 1: during September/October 2009, her telephone call to Ndumiso's cell phone, in order to inform him of L's illness, was instead answered by accused 1. In the conversation that followed they introduced themselves to each other and they agreed to meet. Tshepiso said that accused 1 explained that she was in possession of Ndumiso's cell phone as she had taken it from him during a fight the previous evening "over Tshepiso". They eventually met at Mapetla in the presence of other members of the Sekoati household. Introductions followed and the ensuing conversation involved topics such as Tshepiso's concerns about Ndumiso's neglect of L and accused 1 (who was pregnant at the time) in turn lamenting why her husband had cheated on her. Accused 1 thereafter again visited Mapetla but on this occasion Tshepiso was absent. In further telephone conversations between Tshepiso and accused 1, accused 1 told her to leave Ndumiso alone and to get out of his life and that she and Ndumiso "were making a fool of" her. Tshepiso's response was that L was her concern and nothing else. In yet another telephone conversation while accused 1 was still in possession of Ndumiso's cell phone, Tshepiso gave her the assurance that she would only phone that number again if L's interests were at stake. During December 2009 L again fell ill. Tshepiso phoned Ndumiso who promised to come to them. Instead, she received a *sms* from Ndumiso prompting why she was not taking the child to the doctor and pay for it with her own money and that Ndumiso was using Tshepiso as a "spare dish".

[8] The next meeting between them took place in January 2010, again in response to a telephone call by Tshepiso to Ndumiso concerning L's illness. This time he answered and kept his promise to come. They had a discussion at Mapetla in the evening. Sometime between 20h00 and 21h00 someone opened the kitchen door. Tshepiso heard a female voice saying "Give this to Tshepiso". Lerato, who was present, remarked that it was Nomshado (*ie* accused 1) whom she had seen throwing down a black plastic bag with contents in the kitchen. The plastic bag was later opened and the contents thereof consisted of, what the witnesses referred to as, snipped

rags/*doek*/clothing/torn rags. Tshepiso, Lerato and Sophy ran outside and observed accused 1 who was at the gate leaving the premises. Sophy asked the accused what her problem was. The response consisted of insults of all kinds, aimed primarily against Tshepiso and warning her to leave Ndumiso alone. Sophy suggested that they all go to Ndumiso's parent's house to discuss the issue. Accused 1 refused and drove off in her vehicle. Tshepiso and Sophy then hired a taxi and proceeded to Ndumiso's parent's house taking the black bag with them. Lerato remained behind. There they encountered Ndumiso, his mother and two sisters as well as accused 1, who was having dinner. Ndumiso promptly departed from the gathering. Sophy related to Ndumiso's family what had earlier happened at Mapetla. Accused 1 denied ever having said anything to Sophy or having been at Mapetla. Sophy showed the bag and the contents thereof to all who were present thereby attempting to prove that accused 1 in fact had been at Mapetla. Sophy testified that accused 1 threatened to kill both Tshepiso and L. Ndumiso's mother remarked that if she is going to kill them, L was her grandchild and Sophy, Tshepiso's mother. Accused 1 became aggressive and uttered threats. I shall revert to this incident (the bag incident) later in the judgment.

[9] The last telephone conversation between Tsephiso and accused 1 occurred in January 2010. Again L's illness caused her to phone the cell phone number of Ndumiso. Accused 1 told her, in English, to stay away from her husband to which she added, referring to L: "I wish the bastard was dead". That was the last contact they had with each other.

[10] The State called Mr Pillay, the Manager: Law Enforcement Agencies at MTN to testify concerning the MTN cell phone records in respect of cell phone calls made from and received at accused 1's cell phone from 18h44 on the day of the incident until 21h29 the next day. His evidence was not challenged. The significance thereof is that the record shows that accused 1, at the time of the incident, was in the vicinity of Soweto and surrounds and that she later that evening, sometime after 22h00, proceeded to Lichtenburg *via* Carletonville, Ventersdorp and Coligny and that she remained there until the next day. The trail of accused 1's movements proved by the cell phone

records, except for certain times which I shall revert to, broadly accord with her evidence in this court.

[11] On 2 May 2013, I granted the following order:

'The application by the state in terms of s 235 of the Criminal Procedure Act 51 of 1977, for the admission of the transcript of the record of the bail proceedings,

1. In respect of accused 1, is granted to the extent that only the record of the evidence of accused 1 at the said bail proceedings, after the warning in terms of s 60 (11B) (c) of the CPA had been given, is allowed.
2. In respect of accused 2, is dismissed.'

What follows are the reasons for the order. First, the application in respect of accused 1. She testified in the bail application before the Regional Magistrate, in Protea, Soweto, on 31 March 2010. Counsel now appearing on her behalf also did so at the bail proceedings. Accused 1 was called to testify. Having stated her personal particulars (so I have been informed by counsel) the Regional Magistrate interrupted her evidence and enquired from counsel whether he had explained to the accused the warning provided for in s 60(11B)(c) of the Criminal Procedure Act 51 of 1977. Counsel for the accused informed the court that he "was still coming to that" whereupon the Regional Magistrate *mero motu* proceeded, "on your [counsel's] behalf", to warn the accused in terms of the section. The accused, in response to a question by the Regional Magistrate, confirmed that she understood the warning. The Regional Magistrate then informed her as follows:

'Now you may proceed and inform us about your defence in the matter as your legal representative asked you to disclose the same *if you so wish*.'
[emphasis added]

Counsel for the accused's first question directed at the accused, following the warning, was the following:

'Madam, my question was as you have indicated to this court that you are intending to plead not guilty is there any defence *that you would like this court to know about?*'
[emphasis added]

The objection against the admission of the bail proceedings record of the evidence raised by counsel for accused 1, is this: although the contents of the warning accords with the section, it was improperly given, as it should have

been given at the commencement of the evidence of the accused and not, as it happened, during her evidence, and further, that there was duty on the Regional Magistrate, as part of the warning, to advise the accused that she was entitled to, had she wanted to do so, decline to proceed with her evidence or to abandon the application for bail. The argument is untenable. It is true that in the judgment of Kgomo J in *S v Agliotti* 2012 (1) SACR 559 (GSJ) it was specifically stated that the warning must be given "right at the beginning of the proceedings" (at p 566). I do not think that the learned Judge intended by this to lay down a rule of thumb. All that the section requires is that "the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial…". It therefore doesn't matter at exactly what stage of the proceedings the warning was given, as long as it was before the incriminating evidence was given. This is exactly what happened here: as the emphasised portions of the record indicate accused 1 was warned before she commenced with disclosing her defence. That the warning was given after she had stated her personal particulars is of no moment: she disclosed her defence after the warning had been given and, moreover, after she had been given the opportunity by both her counsel and the court the reconsider her position in the light of the warning. I accordingly find that there was no duty on the Regional Magistrate, after she had been warned, to advise her of the options then available to her, which her counsel could have advised her of. Accused 1, in any event, clearly intended to proceed with the disclosure of her defence. It follows that fairness prevailed. I accordingly, in the exercise of my discretion, allowed the evidence of accused 1, from after the warning had been given (see *S v Basson* 2004 (6) BCLR 620 (CC) para [26]-[27] and *S v Basson* 2005 (12) BCLR 1192 (CC) para [107]-[123]).

[12] As for the application in respect of accused 2 it was common cause that no warning had been given. For that reason alone, the record of his evidence is inadmissible (see *S v Snyman en 'n ander* 1999 (2) SACR 169 (C)).

[13] This brings me to the incident at Mapetla, which occurred on 16 March 2010. During the early evening altogether 11 persons (referred to above with the exception of Tshepiso, who was at work at the time) were seated in the

lounge/dining room of the house, watching the serial, or *soapie* as it was referred to, “Generations”, on television. It ended at 20h30. Just then an unknown male person entered the house through the kitchen. He was described in the evidence of Lerato, Sophy and Tebeho as the man with the dreadlocks, which is a hair style consisting of matted coils of hair tightly woven into locks at approximately shoulder length. He was armed with a firearm and accompanied by a second man immediately behind him, also unknown, who was wearing a beanie or woollen hat covering his head but not his face. He had a black plastic bag in his possession and was also armed with a firearm. The second man was identified by Lerato as accused 2.

[14] The man with the dreadlocks instructed Sophy, Mohlalefi and others to go into one of the two bedrooms, which was facing the street (the first bedroom). Accused 2 handed the plastic bag to the man with the deadlocks who removed a 2 liter plastic bottle from the bag and started spraying the contents thereof, smelling of and probably being petrol, on Lerato, Sello and others. They then also went into the first bedroom. The man with the dreadlocks ordered M and the two children into the other bedroom (the second bedroom). He then poured the contents of the bottle into the second bedroom. At that stage a woman entered the house, also through the kitchen, into the dining room. She was wearing a balaclava which covered her face except for her mouth and eyes. This person was identified by Lerato and Sophy as accused 1.

[15] Both Lerato and Sophy testified that M, from where she was in the second bedroom, asked whether she could be allowed to take the children out of the room. Accused 2, according to Lerato, in response, shook her head from side to side, thereby indicating a definite “no”. The man with the dreadlocks threw a blanket at the doorway separating the two bedrooms and flames erupted. Those in the first bedroom opened the windows, drew the curtains and Mohahlefi forcefully removed the burglar bar. Lerato looked outside and saw accused 1 leaving the premises through the front gate and then turning left away from the house and removing the balaclava. She mentioned this to Sophy who confirmed that she had also seen accused 1,

after she had jumped out through the window. She called for help. She returned to the inside of the house through the door. She met M, who was on fire, outside the house. Sophy entered and was carrying L, who was also on fire, to the outside water tap where she held him under running water. The paramedics, fire brigade and members of the community arrived on the scene.

[16] It is not in dispute that the most of the interior of the house was extensively damaged by the fire and that the three deceased died as a result of burns sustained during the incident. The complainants referred to in counts 5 to 12, although present in the house, escaped and were not burnt. The extent of the damage caused by the fire to the bedrooms and dining room of the house as well as to part of the adjacent shack is depicted on the photographs in the album.

[17] The events I have thus far referred to were described in evidence by Lerato, Sophy and Teboho. Tebeho, although materially corroborating the events as described by Lerato and Sophy, and himself being doused in petrol, was unable to identify any of the assailants. His evidence was not challenged in cross-examination.

[18] Lerato identified one of the male assailants, who had followed the man with the dreadlocks into the house, as accused 2. Sophy made a “dock identification” in identifying accused 2 in court as the assailant with the dreadlocks. They both identified accused 1 as the woman intruder and added that she was well-known to them. The evidence of these witnesses must accordingly be subjected to careful examination and evaluation in the light of the alibi raised by both accused. I shall revert to the evaluation of their evidence later in the judgment.

[19] Tsephiso gave evidence in which she described the events between her and accused 1 since they their first meeting in approximately September 2009. Her evidence must be considered in conjunction with and against that of accused 1. There are material differences in their versions which I shall revert to in the consideration of accused 1’s version.

[20] I turn now to the identification of accused 2 by Lerato. It is at the outset necessary to state that no other evidence of complicity in the commission of the crimes exists against accused 2. The credibility on the one hand and the reliability of Lerato's evidence identifying accused 2 on the other must accordingly be considered. Of crucial importance and providing a strong indication as to the correctness of her identification of accused 2 is that she pointed him out at an identification parade that was conducted at Diepkloof police station, on 6 October 2010. It is well-entrenched that evidence of identification must be carefully examined as to credibility generally and reliability of observation in particular (*S v Mthetwa* 1972 (3) SA 766 (A) 768). In the consideration of these aspects the evidence as a whole will be considered in order to determine whether the state has proved its case against accused 2 beyond reasonable doubt.

[21] In her evidence Lerato provided a number of identifying features which she said enabled her to identify him. In this regard she mentioned slender built, medium height, a chubby face and, very importantly to her, that he had so-called "chinese eyes". In cross-examination she experienced considerable difficulty in explaining what exactly she tried to convey by "chinese eyes". Eventually she resorted to the meaning thereof in "street language". But even that was of little assistance in establishing the real meaning of the expression. Except for the "chinese eyes" none of the identifying features mentioned by her is of any particular significance. Compounding the difficulty of course is that accused 2 was wearing a "beanie" which covered his head and must have made identification at least more difficult.

[22] The identification parade was held some 7 months after the incident. The police officials who were involved in conducting the parade all testified. I do not consider it necessary to traverse their evidence. Suffice to say that no irregularities were committed. One single difficulty however arose when Lerato testified that she was accompanied, after arrival at the Diepkloof police station with her handler (under the witness protection programme) from the waiting room by a police official whom she knew from having seen him in the company of other policemen at the scene. Her description of the man, it is

common cause, fits Warrant Officer Tsotetsi, who also testified. Whether or not it was really him, for purposes of deciding this issue, does not matter. Fact is that the police official she described was neither Const Sithole, who testified that she escorted Lerato from the vehicle in which she and her handler had arrived at the police station, to the guard room inside the police station; or Sergeant Mhlongo who testified that she had escorted Lerato from the guard room to the identification room, or Detective Warrant Officer Mngoma who was in control of the identification parade. I am unable to reconcile the evidence of Lerato on this aspect with the evidence of the three police officials. In addition, assuming her description of the police official fits Warrant Officer Tsotetsi, his evidence likewise contradicts her in denying that he was at all involved in the identification parade.

[23] I have come to the conclusion that Lerato's evidence on this aspect was unsatisfactory. I am unable to find a reason for the unsatisfactory portion of her evidence. As I will presently deal with I am unable to find that she was dishonest in any way. She therefore must have been mistaken. Whichever way one describes the unsatisfactory portion of her evidence, some weight must be attached to it. That portion of her evidence concerns her observations at the identification parade. She is a single witness on the identification of accused 2. There is not the slightest shred of evidence corroborating her identification of accused 2. A reasonable doubt accordingly exists and accused 2 is entitled to the benefit thereof. For these reasons I, at the end of argument, acquitted accused 2 on all charges.

[24] In her evidence accused 1 (the accused) dealt extensively with both her relationship with the Sekoati household and the alibi relied upon. She testified that she had just on the previous Friday relocated from Orange Farm to Lichtenburg where her 2 children (presently 9 and 6 years old) were enrolled at school. While in Lichtenburg a meeting was arranged on the Monday with the teacher of her children to facilitate their transfer from Johannesburg to Lichtenburg, for Wednesday 17 March, in the afternoon. She however needed certain documents which were required by the teacher. The documents were still at her erstwhile home in Orange Farm and she decided to go and fetch

them. She left for Johannesburg on Monday evening at 20h00 and was accompanied by her mother and two children. She described her movements on the evening of the incident, being the Tuesday, as the following: Until 19h00 she was at home in Orange Farm. She had to meet with friends at Maponya Mall in Soweto, at “eightish” that evening. She left Orange Farm at 19h00 and met her friends at Maponya Mall at 20h20. At approximately 21h00 she received a *please call me* message from her mother and on phoning her, she enquired when the accused would be leaving. She eventually picked her mother and children up at 21h30 and immediately proceeded back to Lichtenburg.

[25] Along the way to Lichtenburg she received a cell phone call from her sister-in-law enquiring about the whereabouts of her husband and informing her that there had been an accident or fire at Mapetla. She phoned her husband who told her that he was aware of the incident and that he was planning to go there. Half an hour later her husband phoned her and informed her that the community had been at his parental home and that they had broken into the house, because, so they informed him, the accused had been involved. He also told her that they were looking for her. He further told her that he was on his way to Mapetla and that his mother was on her way to the police station to open a case of housebreaking. In a further conversation, sometime later, he informed her that the situation at Mapetla was out of hand and that somebody at the house had claimed that they had seen her (the accused) outside the house during the incident. She decided to turn back to Johannesburg immediately but was persuaded by her husband to rather proceed to Lichtenburg which she did.

[26] Outside Ventersdorp her vehicle broke down. She phoned her cousin in Ventersdorp and asked them to assist. In the meanwhile she decided to hitch-hike. A truck arrived and the driver gave her a lift to Lichtenburg. He dropped her off at the police station in Lichtenburg. There she spoke to a police captain and handed him her cell phone for him to speak to her husband. The captain took down her cell phone number as well as contact details and she was allowed to go. She was eventually arrested on the Thursday and taken to

the holding cells at the Lichtenburg police station. The next day she transferred to Moroka police station.

[27] Before proceeding with the evidence of the accused, it is necessary to assess certain aspects of her evidence I have thus far alluded to. There can be no doubt that she, on her initial version, at the time of the incident, was at Maponya Mall with her friends. In cross-examination she changed her version on this aspect and said that she must have been at a filling station on the Old Potch Road at the time. Whichever one accepts, this vital aspect is directly contradicted by her evidence given at the bail hearing. There she testified that at that time she had been at her “home in Northwest” which of course was Lichtenburg. When the accused was cross-examined on this aspect she maintained that her reference to “Northwest” was a mistake which had arisen from the confusion resulting from the recent re-location to Lichtenburg on the pre-ceding Friday. The explanation is seemingly unsatisfactory: neither she nor her counsel at any stage corrected the “mistake”. It should also be remembered that the cell phone records of the accused were not available at the stage of the bail proceedings which may well afford an explanation for the contradiction. I am however, prepared to accept that the reference was to the Orange Farm house because the Johannesburg house fits in with the rest of her evidence at the bail hearing as well as the cell phone records concerning her movements on that evening. But, is does not end there: the assumption that she actually referred to her Johannesburg house, does not remedy the contradiction. Her version now, as I have alluded to, was that she was at Maponya Mall or, if her evidence in cross-examination is accepted, at a filling station on the Old Potch Road, neither of which was referred to in her evidence at the bail hearing. It must be accepted that she was acutely aware of being implicated in the incident when informed thereof by her husband during the cell phone conversation I have referred to, which according to the MTN cell phone records, must have been sometime after 23h00, while on her way to Lichtenburg. Notwithstanding her knowledge and the events that led to her arrest later that week, she, with transparent falseness, testified in cross-examination that she only, on the day before being cross-examined on this

aspect, turned her mind to the issue exactly where she had been at the time of the incident.

[28] The accused moreover experienced considerable difficulty in reconciling the times and distances which she had stated in her earlier evidence with remarkable exactitude. These times, notably concerned the crucial time of the occurrence of the incident. A few examples of the contradictions will suffice: In cross-examination when the times and distances were debated with her, she said that she had met her friends at Maponya Mall at 21h00 and “definitely not” at 20h00 as she had earlier testified. Further in cross-examination she testified that she had left Orange Farm at 20h00 that evening and not 19h00 as originally testified. She eventually hatched onto the difficulty to estimate times and distances which is inconceivable in the face of the exactitude in giving times in her evidence in chief. To this she added that she had only the day before really given thought to exactly where she was at the time of the incident. I formed the impression that the accused, on this aspect, improvised as she went along.

[29] The reasons proffered by the accused for her sojourn to Johannesburg on the Monday evening, in my view, are improbable. She had ample time to return to Northwest on the Tuesday but instead stayed on. Then, she attended a social gathering with friends at Maponya Mall, when it was already late in the evening. She then only, after having been reminded thereof by her mother, at 21h30 returned home in Lichtenburg with two young children who were to attend school the very next day. Her reasons for not calling in help and assistance from family members in Lichtenburg, where she has grown up, of whom there were many, to care for the children while she was away in Johannesburg, were transparently fabricated.

[30] A second apparent unsatisfactory aspect arising from the accused’s evidence is this: she testified that on the day of the incident she was wearing a long curly hair piece or weave which reached down to her buttocks. Her evidence on this aspect is contradicted by the statement put by her counsel to Lerato. Lerato, in response to a question put to her in cross-examination by counsel for the accused, concerning the accused’s hairstyle on the day of the

incident, explained that her hairstyle was short, and demonstrating approximately shoulder length. In response thereto, counsel put to her the accused's version which was that she did not have long hair. The implication of that statement leaves one in no doubt: accused 1's hair was shorter as indicated by Lerato. The accused's explanation for the apparent contradiction was that women ordinarily would never refer to a hairpiece/weave as "hair". But, disingenuousness aside, it remains that it was not put to Lerato that the accused was wearing a hairpiece/weave.

[31] Reverting to the accused's version concerning the events since having met Tshepiso and the Sekoati's until the last contact between them in early January 2010., she confirmed that Tshepiso, at all times, in attempting to get into contact with Ndumiso, raised her concerns about the welfare or sickness of her child, L. The accused was adamant that she had no problem with L and that she would never have interfered. The first meeting between her and the Sekoati's, as I have alluded to, except for minor insignificant differences, was not disputed. One area of dispute concerned the accused's allegations that the Sekoati's insisted on certain rituals that had to be performed on L, which were not mentioned by the Sekoati's. I do not think that the dispute is of any real significance. Of crucial relevance and importance, however, is the bag incident, which I now turn to deal with.

[32] The accused, in her evidence, vehemently denied having been at the Sekoati house or having dropped the bag there, as testified by the state witnesses. She however, admitted that she was with her in-laws when the Sekoati's arrived there with the bag, later that evening. She said a blouse was taken out and she was accused of having been at Mapetla in a white car. Her mother-in-law asked for more details concerning the discovery of the bag and spoke on her behalf, alleging that the accused could not have done it as she had been with them at the time (19h00). The accused rejected the allegations concerning the threats she is alleged to have made although she admitted that a heated argument developed during which she threatened to hit Tshepiso.

[33] The dropping of the bag at Mapetla allows for one single inference only: the motive behind it was to convey some kind of sinister message to Tshepiso. The Sekoati's were unable to ascribe any particular meaning to it. The accused likewise professed ignorance as to the motive for doing that. I am unable on the facts before me to find what the true motive was. The question, however, is whether the Sekoati's should be believed for implicating the accused as the person who had done so. In my view the answer is in the affirmative. I am unable to accept, on the probabilities, that the Sekoati's would have gone through all the trouble, at night, to go to Ndumiso's parental home, with the bag, only to falsely implicate the accused for having dropped the bag at their house. It was suggested by the accused and this was echoed in counsel's argument, that the Sekoati's must have had some kind of a grudge against the accused which would explain why false allegations were made against her. The contention fails for a lack of factual foundation. Assuming they had a grudge to falsely implicate the accused, the place and time they selected to deal with it, simply make no sense. Nor is it possible to find the reason for them acting in this way: they were blissfully unaware of the possible motive for the accused's conduct. The notion of a grudge further, in my view, can best be discarded as illusory if regard is had to the fact that it is common cause that the contact between the two sides came to an end after this incident. The accused on the other hand, had ample reason for denying her conduct: an admission thereof might well have required an explanation which in turn might have exposed her true motive towards Tshepiso. For these reasons I do not hesitate for a single moment to reject the accused's denial as false.

[34] The accused presented as a sophisticated, intelligent and articulate woman. She testified in fluent, impeccable English. Her evidence however, was unconvincing, contradictory and improbable in material respects. I accordingly reject her alibi as being not reasonably possibly true and accordingly false.

[35] This brings me to the identification of the accused at Mapetla on the night of the incident. The dangers generally attendant upon identification are self-

evident (see *S v Tandwa and others* 2008 (1) SACR 613 (SCA) para [129]-[131]). The identification that was made forms part of the evidential matter upon which the case must be decided (see *Matwa v S* [2002] 3 ALL SA 715 (E) 721*f*). I have given careful consideration to the lighting in and around the house, which the witnesses testified was good as there was a light near the front door of the house, an Apollo light nearby as well as lighting from surrounding houses, the relative short time available to the witnesses to observe the accused, the distance she was away from them and, of course, the horrific experience they were exposed to of the house burning down and their lives being in danger. I accept, as counsel for the accused emphasised, that the bedroom in which the witnesses were, was probably filled with smoke. That however, in my view, did not, as counsel submitted, negatively affected their ability of observation: the windows were immediately opened and the burglar bars broken for them to get out, which they succeeded in doing. It is only when the windows were opened and the curtains drawn that Lerato observed the accused. Having jumped out of the window she mentioned this to Sophy who confirmed that she had also seen the accused. The accused, as I have mentioned, was known to them. Although the accused was walking away from them, towards the gate, Lerato testified that she did see her face. Sophy, on the other hand, testified that she had not seen her face but immediately recognised her as the accused. It is important to bear in mind that the accused when she was seen, was removing the balaclava. That of course directed the attention to her as she had been seen in the house shortly before. Facial identification, in these circumstances, where the person is well-known to the identifying witness, is of secondary importance. Other factors such as general physical appearance, gender, gait, and clothing should also be considered. An identification of a person on these aspects without specifically looking at his or her face can be just as reliable as a facial identification. The possibility of a mistaken identification, on the facts of this matter, does not arise. Even if it does arise, I am satisfied that there was no mistaken identification of the accused. But, the enquiry does not end there.

[36] The identification of the accused must further be considered, not in isolation, but in the context of the totality of the facts of this matter. In *S v*

Liebenberg 2005 (2) SACR 355 (SCA) the Supreme Court of Appeal held:
'[15] Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:
'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.'
(see also *S v Trainor* 2003 (1) SACR 35 (SCA) para [8]–[9]; *Crossberg v S* [2008] 3 ALL SA 329 (SCA) para [121]).

[37] An aspect that was dealt with extensively in the evidence and in argument is the possibility of the state witnesses bearing a grudge against the accused and therefore falsely implicating her. It is at the outset necessary to state that there is no onus on the accused to explain the reason why the state witnesses are implicating her. But this aspect was not only dealt with as I have mentioned, it also deserves consideration as the facts of this matter require careful consideration to find an acceptable explanation for the bizarre conduct of the assailants. As for a possible grudge I have after careful consideration of all the evidence come to the conclusion that none existed. Nor was the accused or counsel for the defence, able to point to any *possible* grudge. In this regard the evidence and more in particular the conduct of Tshepiso during the period from September 2009, is of decisive importance. Tshepiso impressed me as an honest and objective witness. Counsel for the accused was unable to point to any unsatisfactory aspects in her evidence. As Tshepiso was at pains to emphasise, she was at all times furthering the interests of her child, L, in her attempts to contact Ndumiso and wanting to hold him accountable. Instead she came head on with the accused. In the three months that followed the relationship between the two women was anything but amicable. And this is where the conduct of Tshepiso shows its true worth: she never at any stage, as is also borne out by the accused's

version, acted unreasonably or aggressive or hostile towards the accused. She constantly sought Ndumiso's assistance and involvement. As against this the same cannot be said of the accused. The accused appeared to have harboured a suspicion that Tshepiso was still involved in a relationship with her husband, who has not testified. This undeniably resulted in immense jealousy. As much appears from the various remarks she had made during this period as well as the threats, some of which, significantly, involved L. The accused, as I have alluded to, admitted having uttered at least one threat which was to hit Tshepiso during the bag incident argument. I am unable to find that the evidence of the state witnesses concerning the threats and general conduct of the accused was either imaginary or false. When considered on the facts as a whole, their evidence accords with the probabilities and in fact sensibly and logically piece together in making up the completed mosaic of events.

[38] A number of inferences, in my view, can and should be drawn from the totality of the facts: the attack was carefully pre-planned, the two male assailants were strangers to the Sekoati household, they must have been contracted by a third person to execute a carefully planned attack, and the architect of the attack was a woman, who, at a critical stage during the attack, made an unannounced appearance in the house, with a balaclava to hide her identity, undoubtedly to satisfy herself that the attack went according to plan.

[39] This brings to the fore a crucially important aspect of this case which is the possible motive which can be attributed to the female intruder. The presence of the female intruder was alluded to in the evidence of Lerato, Sophy and Teboho. Teboho added that that the female intruder attempted to drag him into the bedroom which he was able to resist. He stood at the doorway to the kitchen when a match was struck by one of the male assailants and thrown into the second bedroom where M and the children were. The female intruder ran away followed by one of the assailants. Lerato and Sophy testified that M, after she and the children had carefully been separated from the others and ushered into the second bedroom by the assailants, probably by then realising what was to happen to them, asked that

the children be released. The request was obviously directed at the two male assailants. Both Lerato and Sophy testified that they had heard the request. Teboho was being assaulted by one of the attackers at that stage and he, not surprisingly, did not hear “any conversation”. It was only Lerato who witnessed her signalling a “no”. The refusal by the accused happens to be in keeping with her earlier threat towards L, who had always during that period re-appeared as the connecting factor between Tshepiso and her husband, as well as the unequivocal intention of the male assailants to ensure that the children were in one of the bedrooms and then setting that particular room alight. Based on these considerations I have come to the conclusion that the accused pre-planned the attack for which she had obtained the assistance of the two male assailants driven by the motive to kill L and possibly others.

[40] Counsel for the accused referred to a number of contradictions between the state witnesses. One thereof is Lerato’s evidence that petrol was poured on her head as opposed to her later evidence that petrol was poured on the back of her head running down her spine, while she was bending down. The difference, if any, is semantic and needs no further consideration. Another, concerns who exactly was present in the first bedroom, during the incident. This is of little relevance as it is not disputed that 11 people were in the house. Finally, reference was made to Lerato’s evidence that Tshepiso had admitted at one of the meetings that she was still in a relationship with Ndumiso, which Tshepiso denied having said. I am inclined to believe Tshepiso when she said that she, in any event, did not discuss her private affairs with Lerato. Be that as it may, it is clear from the totality of the evidence that there was no longer any kind of love relationship between the two. It is important to consider the nature of the contradictions and effect thereof on the evidence as a whole (*S v van Aswegen* 2001 (2) SACR 97 (SCA); *S v Radebe* 1991 (2) SACR 166 (T) 167j-168h, *S v Mafaladiso* 2003 (1) SACR 583 (SCA) 593-594). The differences relied on are all minor in nature and show nothing more than what is to be expected from observations made from different vantage points by different persons in different situations. The fact that there are discrepancies between the versions put forward by various witnesses does not mean that the evidence of such witnesses should be rejected *in toto***.** The court is obliged

to consider any factors which might account for such discrepancies. The factors to be taken into account would include the circumstances in which the various eyewitnesses viewed the events to which they testified and the opportunities they had to observe such events, the rapidity with which such events took place, and any other factors which may account for differences in their testimony. I am mindful of the finding I have made concerning the unsatisfactory portion of Lerato's evidence: it does of course not necessarily follow that her evidence as a whole must therefore be rejected (see *S v Oosthuizen* 1982 (3) SA 571 (T) 577A-B). Her evidence concerning the identification of the accused as well as the other events, in any event, is materially corroborated by other state witnesses.

[41] Counsel for the defence sought to criticise the state for not calling all the available witnesses on the witness list. He submitted that the failure justifies a negative inference against the state. There is no merit in the contention. At the closure of the state's case counsel for the state made all other witnesses available to the defence. None of the remaining witnesses were called by the defence. It is not for the state to call witnesses in order to provide the defence with possible ammunition in its quest to fish for possible contradictions. I am satisfied that counsel for the state has properly and objectively exercised his discretion in calling all necessary witnesses and that no negative inference is called for.

[42] In conclusion, it is my finding that on the totality of the evidence, the state has succeeded in proving beyond reasonable doubt that the accused acted in accordance with a pre-meditated plan and therefore with *dolus directus* and that she is guilty on all 12 counts.

[43] In the result accused 1 is found guilty on counts 1 to 12, as charged.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE ***ADV P NEL***

COUNSEL FOR ACCUSED 1	***ADV R MUFAMADI***
COUNSEL FOR ACCUSED 2	***ADV (MS) M MZAMANE***
DATE OF JUDGMENT	***17 MAY 2013***