THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 358/2019

In the matter between:

MPHO ROBINSON TSHIKI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tshiki v The State* (358/2019) [2020] ZASCA 92 (18. August 2020)

Coram: PETSE DP and MOCUMIE, MOKGOHLOA, DLODLO and MBATHA JJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 August 2020.

Summary: Criminal law and procedure – evidence of single witness who was an accomplice – whether the trial court correctly applied the cautionary rule – whether appellant's alibi and his denial of complicity are reasonably possibly true.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Kgoele J, Gutta and Djaje JJ concurring, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Mbatha JA (Mocumie JA concurring):

[1] The appellant, Mr Mpho Robinson Tshiki, and his co-accused, Mr Thomas Maluleke (Maluleke), were arraigned in the North West Division of the High Court, sitting at Garankuwa on a charge of murder (count one), robbery with aggravating circumstances (count two), unlawful possession of a firearm (count three) and unlawful possession of ammunition (count four). The provisions of s 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) applied to counts one and two, respectively. Despite his plea of not guilty to all counts, the appellant was convicted as charged. The trial court found no substantial and compelling circumstances that warranted a deviation from the minimum sentences than the ones prescribed in terms of the CLAA. He was accordingly sentenced to life imprisonment on count one, 15 years' imprisonment on count two, three years' imprisonment and two years' imprisonment on counts three and four respectively.

[2] Aggrieved by this result, the appellant applied for leave to appeal against both his convictions and resultant sentences. The trial court granted him leave to appeal to the full court against the convictions only refusing him leave against the sentences. His appeal to the full court failed. Subsequently, the appellant was granted special leave to appeal by this Court against the dismissal of his appeal by the full court, hence the present appeal.

[3] A brief summary of the relevant evidence adduced at the trial now follows. On the night of 31 August 2006, Mr Motsepe (the deceased), enjoyed a social evening in the company of Ms Moses Lydia Motsumi and Ms Pinkie Mngubeni, at the house of the former in Odinburg, Garankuwa. Later, he left to buy cigarettes and cold drink at a nearby shop. The deceased had been gone for quite a while when the two ladies heard the sound of a gunshot. Concerned about this development and the safety of the deceased, they called the deceased on his mobile phone which remained unanswered. This prompted Ms Motsumi to rush to the house of her neighbour Mr Sipho Makinita, a police officer, to alert him of their concerns about the safety of the deceased after they heard the gunshot. After arming himself with his service firearm, Mr Makinita proceeded by car in the direction that the deceased had been headed. As Mr Makinita got onto the road, and within a distance of about six metres, he saw a human body lying on the side of the road. As he cast the headlights of his motor vehicle towards the body, he identified the body as that of the deceased. He then enlisted the assistance of the police from the Klipgat Police Station. Upon their arrival, the police took over the scene of the crime.

[4] It is common cause that the deceased died as a result of a gunshot wound in the head, and that his cash and grey-coloured Motorola mobile phone were missing. Due to the lack of eye witnesses, the docket lay fallow at the Klipgat Police Station for several months, until Captain Tlhapi (Capt. Tlhapi) from the Haartbeespoort Dam detective services took over the investigation. Capt. Tlhapi's investigative instincts spurred a realisation that he could trace the perpetrators through the records of the stolen mobile phone. Vodacom provided Capt. Tlhapi with the relevant records, sought in terms of s 205 of the Criminal Procedure Act 51 of 1977 (the CPA). The records were then forensically analysed by the Technical Support Unit of the South African Police Service. The results thereof enabled Capt. Tlhapi to follow the trail of the mobile phone to the then possessor, Ms Mary Shilenge. Although the phone had exchanged hands from Maluleke to Mr Tebogo Mngubeni (Tebogo), then to Ms Mngubeni (Tebogo's sister), thereafter to a taxi driver and finally to Ms Shilenge, it became common cause that it was the same mobile phone of which the deceased was robbed. That the cell phone recovered from Ms Shilenge belonged to the deceased was also confirmed by the deceased's son, also called Thomas, and Ms Gumede. The recovery of the mobile phone ultimately led to the arrest of Maluleke.

[5] Capt. Tlhapi testified that when he interviewed Maluleke, the latter informed him that he gave the deceased's phone to Tebogo, his friend and neighbour, as a gift. Maluleke related to Capt. Tlhapi that on the night of the robbery the appellant, being his friend, requested him to accompany the appellant to Odinburg, Mabopane, to look for money. The appellant was armed with a firearm. En route to Odinburg they first came across two women, whom the appellant said must be ignored as they had no money. Shortly thereafter, they came across a man carrying two bottles of beer and cold drink, whereupon the appellant, without uttering a word, fired a shot in the head of that man. They searched the man and robbed him of cash and a grey Motorola mobile phone. Maluleke informed Capt. Tlhapi that he did not like the phone that was given to him by the appellant hence he gave it to Tebogo.

[6] Pursuant to this interview Capt. Tlhapi arrested Maluleke, but later decided to release him so as to assist in tracking down the appellant, based on the allegations by Maluleke that it was the appellant who had shot and killed the deceased. Maluleke, instead, vanished into thin air. Capt. Tlhapi finally arrested the appellant and Maluleke in Groblersdal, albeit at different times. The cross-examination of the appellant by counsel for Maluleke elicited that the appellant, at the time of his arrest, was living in Grobelaarsdal whilst Maluleke lived in Leeufontein, about 40 kilometers away from Groberlaarsdal.

[7] The State also led the evidence of Warrant Officer Hezekiel Seforolwane (W/O Seforolwane) who was investigating an unrelated robbery. W/O Seforolwane's investigation led him to one Thabiso who took him to the home of his friend, Maluleke. Maluleke was alleged to be the person who was in possession of the firearm used in the robbery that was investigated by W/O Seforolwane. W/O Seforolwane testified that upon his arrival at Maluleke's home, an unknown man ran out of the shack. They gave chase to apprehend the fleeing man but he outran them. An elderly man found at the premises identified himself as Maluleke's father. He informed them that it was Maluleke who ran away upon their arrival. Having been given permission by Maluleke's father to search the shack, W/O Seforolwane found a firearm between the mattress and the base of the bed. In a strange twist of fate, this firearm was positively linked by forensic evidence to the firearm that was used to kill the deceased.

[8] The State called other witnesses whose evidence is not necessary to canvas in this judgment. At the end of the State's case the appellant brought an application for his discharge in terms of s 174 of the CPA. The trial court refused the appellant's application. The appellant testified as the sole witness in his defence. Maluleke also testified in his own defence and called his girlfriend, Ms Dimakatso Mokoka, as his witness.

[9] Maluleke's evidence in court, which is different to what he told Capt. Tlhapi, was briefly the following. On 31 August 2006, the appellant requested that he accompany him to Odinburg to collect his money from a certain gentleman. En route, they came across a man whom the appellant identified as the man he was looking for. The appellant proceeded towards that man, and Maluleke remained behind at a distance of about seven paces away from them. The man and the appellant strolled away together, but a few minutes later Maluleke sensed that there was some kind of a misunderstanding between them. When the appellant and that man were at a distance of about 11 paces away from him he heard a gunshot coming from their direction but could not figure out as to who had fired the shot.

[10] This unexpected turn of events shocked Maluleke and he ran back home where he sat on the porch of his parents' home. Whilst seated there, the appellant arrived and told him to stop acting like a fool. The appellant showed him money and a mobile phone, which he alleged he had robbed the deceased of. The appellant offered him the phone, which he reluctantly accepted after the appellant threatened him by firing a shot in the air. Maluleke testified that they thereafter entered his shack. Maluleke felt uncomfortable in the presence of the appellant and, as a result, he went outside under the pretext that he was going to the toilet. Once outside, he jumped over the fence to the neighbouring yard where he met Tebogo to whom he related the events of that night. He handed the mobile phone to Tebogo and then left. After some weeks he returned home to find that the appellant was no longer at his home. Maluleke called his then girlfriend, Ms Mokoka, as a witness. Ms Mokoka's testimony was that one night, in 2007, the appellant unexpectedly came to where she and Maluleke were sleeping and assaulted Maluleke, whilst demanding his firearm from Maluleke.

[11] During his testimony, the appellant maintained that he was not involved in the commission of the offences as he was at work at Morula Sun. When it was put to him during cross-examination that the records of his erstwhile employer confirmed that he was not at work on the night in question, the appellant testified that if that was the case, he could only have been with his then girlfriend, Ms Molebogeng Gumbu, who was called as a State witness to corroborate his alibi. The State could hardly disavow her evidence.

[12] The appellant's challenge of his conviction is two-pronged. Firstly, he argued that he ought to have been discharged at the end of the State's case in terms of s 174 of the CPA, as there was no evidence which linked him to the commission of the offences. Secondly, he argued that he was convicted on the evidence of a single witness who was an accomplice. It was submitted that the trial court paid lip service to the cautionary rules in dealing with the evidence of a single witness, and an accomplice, whose evidence was fraught with material contradictions and inconsistencies, tailored to exculpate himself.

[13] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.[1] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.

[14] Section 208 of the CPA provides that 'an accused may be convicted of any offence on the single evidence of any competent witness.' The litmus test of a single witness was laid down in *R v Mokoena*[2] and succinctly set out in *S v Sauls and Others*[3] as follows:

'The absence of the word "credible" is of no significance; the single witness must still be credible, but there are. . . "indefinite degrees in this character we call credibility. . . There is

[1] *S v V* 2000 (1) SACR 453 (SCA) at 455B.
[2] [1956] 3 All SA 208 (A) at 212-213.
[3] *S v Sauls and Others* [1981] 4 All SA 182 (AD); 1981 (3) SA 172 (A) at 180E-F.

no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

The trial court should have been mindful that it can only convict on such evidence if it is satisfactory in all respects. At the same time this Court, as a court of appeal, is reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral evidence, unless there is a material misdirection.

[15] The cautionary rule applicable to the evidence of an accomplice was explained as follows in S v *Hlapezula and Others* 1965 (4) SA 439 (A) at 440 D-H:

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly. . . there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at 405-6; *R v Gumede*, 1949 (3) SA 749 (AD) at 758; *R v Nqamtweni and Another*, 1959 (1) SA 849 (A) at 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned.'

[16] The objective evidence given by the State witnesses is, at best for the State, neutral or at worst exculpatory. The appellant was convicted solely on the evidence of Maluleke, his erstwhile co-accused in the trial, thus an accomplice, who was also a single witness. An assessment of Maluleke's evidence suggests that his evidence was not clear and satisfactory. On his version, it is very difficult to ascertain how the deceased was killed and robbed of his possessions. There were two different

versions before the trial court. Capt. Tlhapi testified that Maluleke informed him that he was fetched by the appellant to go and look for money and that they came across a man carrying beer and cold drink bottles. The appellant shot the man without having said a word to him. The version given by Maluleke at the trial and put to the State witnesses, was that he was fetched by the appellant to collect money from someone known to the appellant. They came across this person on the road, the appellant advanced towards him, conversed with him and that led to the killing of the deceased. The first version suggests that they were to commit the robbery and the second one that Maluleke was merely accompanying the appellant.

[17] The version given by Maluleke, who portrayed himself as an innocent bystander, does not make sense. When he was asked what he was shown by the appellant when the appellant found him at his home after the appellant had purportedly shot the deceased, this interaction followed:

'[Thomas' counsel:] What did he show you?

[Appellant:] He showed me money and a phone.

Court: How much money?

[Appellant:] He did not show me how much it was, and that is the practice. One will never reveal that to you.'

Those words could not have been uttered by an innocent bystander.

[18] Maluleke's evidence was also in direct conflict with that of Tebogo, who testified that Maluleke sought accommodation from his place because at Maluleke's home they were not opening for him due to his late arrival. Tebogo remained steadfast on this issue even under cross-examination. This was in conflict with Maluleke's evidence that he sought cover at Tebogo's place after running away from the appellant and that he told Tebogo what had happened.

[19] Maluleke's evidence was that he left the appellant in his own shack after the appellant had fired a shot. The appellant must have been left in possession of his own firearm. Maluleke testified that the appellant came back one night in 2007 and assaulted him looking for his firearm, but the firearm had already been recovered from his shack by W/O Seforolwane in 2006. The trial court accepted that the appellant handed a firearm to Maluleke one morning, despite the fact that Maluleke

had denied this favourable fact when he was cross-examined by the prosecutor as follows:

'[Prosecutor:] According to you, never in 2006 [did] accused 2 [give] you a firearm?

[Appellant:] There was no need for him to give me a firearm. I did not need a firearm.'

Further than that, the trial court accepted the evidence of Ms Gumbu that the appellant told her that he gave a firearm to Malueke, without Ms Gumbu having seen what the wrapping contained. Even if it had been a firearm there was no evidence to suggest that it was the firearm linked to the killing of the deceased. It was suggested to W/O Seforolwane by counsel for Maluleke that Maluleke would dispute that he was at home on W/O Seforolwane's arrival. This shows that Maluleke is a liar who kept on tailoring his evidence to exculpate himself.

[20] The following extract shows the inconsistencies in the evidence of Maluleke:

'[Thomas' counsel:] So I just [need] to understand from you. 2006, at the time of the incident where was he staying?

[Thomas:] Well he was staying at the place where he had rented either a room or a house, and where he stayed with a certain girl.'

In the same breath, when he was asked by his counsel what he meant by saying that between 2005 and 2010 the appellant lived at his place, Maluleke responded by stating that 'well he used to come to my home where he would even sleep over while renting this room in question, and at times he would come with his girlfriend, and they would put up at my home.' This was denied by the appellant's then girlfriend, Ms Gumbu, who testified that the appellant lived with a relative and later on they moved in together. This was also said against the backdrop of the undisputed evidence of the appellant that he left Garankuwa in December 2006.

[21] To show that Maluleke was an unmitigated liar, counsel for the appellant posed the following questions to him:

'[Appellant's counsel:] I mean sir, at the time you did not know who fired the shot. Whether it was accused 2 or it was the old man, he was standing…. [incomplete]. You did not know what happened, whether he is alive or he is not. You did not know….

[Thomas:] But that is what I said. And what is it that I was supposed to tell my parents?'

The cross examination of Maluleke continued:

'[Appellant's counsel:] You keep on asking the question as to what were you going to tell your parents

[Thomas:] I repeat what I said that, I did not know who fired a shot or who was shot under the circumstances or at the time.'

This was against the backdrop of a person who ran off because of being overwhelmed and terrified about what had suddenly happened in his presence. The version given by Maluleke to Capt. Tlhapi was that the deceased was shot in the head but when he testified, his version was that he was unable to see who had a firearm or who fired the shot as it was dark and he was some distance away from where the shooting occurred. He said emphatically 'I repeat what I said that, I did not know who fired a shot or who was shot under the circumstances or at the time.' This again touches on the improbability of his version.

[22] It is very difficult to get a clear picture of the chronological sequence of events from Maluleke's evidence. The evidence vacillates between the incidents occurring in 2006 and one or two years later. Maluleke's evidence should have given some kind of certainty as to the time frames of the incidents, from the time of the commission of the offences up to the time of the finding of the firearm at his place of residence. This was exacerbated by the lack of a written statement given by Maluleke to Capt. Tlhapi. Maluleke took advantage of Capt. Tlhapi, shifted the blame to the appellant, was released from custody and disappeared. Maluleke could not explain why he ran away having informed Capt. Tlhapi that the deceased was killed by the appellant.

[23] In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their 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 (*S v Chabalala* 2003 (1) SACR 134 (SCA) para 15).

[24] Given the many improbabilities in Maluleke's account, coupled with contradictions in his own evidence and the objective facts, the trial court erred in relying on his evidence as proof of the commission of offences beyond a reasonable doubt. The deficiencies in Maluleke's evidence, considered holistically, revealed a wanting version. This is apparent from the fact that at the plea explanation stage or

anytime thereafter, Maluleke did not disclose to the court that it was the appellant who killed the deceased. Maluleke also preferred to remain silent and not disclose the basis of his defence. It was also never suggested to any of the state witnesses who testified prior to Capt. Tlhapi that he was going to implicate the appellant in the commission of the offences. This aspect of the evidence was introduced for the first time by Capt. Tlhapi in his evidence in chief. It is clear that Maluleke tried to challenge the version allegedly given by him to Capt. Tlhapi as his counsel challenged the admissibility of the alleged confession by Maluleke which was not reduced in writing. It was only at this stage that it was suggested to Capt. Tlhapi that Maluleke was to testify that it was the appellant who shot the deceased. The trial court accepted that it was the appellant who shot the deceased only on the say-so of Maluleke. In this regard the trial court failed to heed what is now trite, that admissions made by an accused are admissible against that particular accused and misdirected itself in this regard.

[25] To use the words of Petse JA in *S v Mulaudzi* [2016] ZASCA 70, in the circumstances of this case, it was not appropriate for the trial court to accept the evidence of Maluleke and reject that of the appellant. In *S v Dladla* 1980 (1) SA 526 (A) at 530A-B, this Court stated:

'Where a witness who is also an accused on trial not only makes a very poor impression on the Court and gives evidence which is singularly lacking in consistency and quality, but also appears to be a witness prone to exonerating himself or minimising his own responsibility at the expense of his co-accused to whom he assigns a progressively greater part in the crime . . .'

A trial court should be more cautious.

[26] Apart from the fact that Maluleke's evidence was contradictory on material aspects, it was solicited illegally. It is on record that Capt. Tlhapi did not explain his constitutional rights before he made any such exculpatory statement to him, i.e that he had the right to remain silent and not incriminate himself. That if he chose to incriminate himself such evidence shall be used against him in a court of law. What he allegedly told Capt. Tlhapi was also not reduced to writing as a warrant officer of so many years ought to have known. He proffered no reason why he did not reduce

what Maluleke purportedly confessed to him into writing to avoid loss of memory that he clearly suffered from, which the trial court took note of.

[27] In addition, there was no corroboration of Maluleke's evidence. And in the absence thereof the available evidence does not justify a finding that the appellant shot and killed the deceased. The ultimate test was whether the State had proof beyond a reasonable doubt, which was not the case in this matter. A conviction cannot arise from a mendaciousness of the evidence of an accomplice.

[28] The trial court also misdirected itself in finding that the appellant and Maluleke acted in furtherance of a common purpose as Maluleke exonerated himself. It cannot be said, on Maluleke's version in court, that there was a prior arrangement or an active association by Maluleke, which could have triggered liability based on the doctrine of common purpose. Also reliance on Capt. Tlhapi's statement for a conviction on the doctrine of common purpose lends itself to the dangers of fabrication. A previous consistent statement is never evidence of facts but can only be invoked to impair the credibility of the witness.

[29] In considering whether the appellant's version was reasonably possibly true, the following is noteworthy. The appellant acknowledged that Maluleke was an acquaintance whom he trained in martial arts. The appellant testified that he arrived in Mabopane in mid-2006, where he initially sojourned at his aunt's place for a while. He found work at Morula Sun where he worked from June 2006 to 31 December 2006. The appellant later moved in with his girlfriend, who also worked at Morula Sun. The appellant denied having been in the company of Maluleke on the night the deceased was killed and denied that he committed the offences with which he was charged. He testified that on the night of 31 August 2006 he was on duty from 16h00 till 02h00 the following morning. He denied having visited Maluleke in 2007 to demand a firearm from him nor having met Maluleke's girlfriend.

[30] Under cross-examination, the appellant confirmed that a clock system was used at his place of employment. The prosecutor produced a document recording the appellant's shift on the day in question. The cross-examination of the appellant followed this sequence regarding this aspect of the evidence:

‘Court: And who produced this document?
[Prosecutor:] It is the head of security for Morula Sun, who I believe as indicated that I am provisionally dealing with this evidence whilst the accused is still on the stand, and if he needs to introduce it later, that head of security indicated that he is available to assist us in that regard.
Court: I see.
[Prosecutor:] And just to bring it to the attention of the Court, this particular information was requested by previous counsel that I must request the IO to go and get this information for them.
Court: I see. The previous counsel for accused 2.
[Prosecutor:] That is correct M’Lord.’

From the interaction, it can therefore not be said that the appellant deliberately tried to mislead the court when he stated that he was at work. The trial court should have taken cognisance that he was a shift worker, whose shift hours were not static and the incident took place seven years before the commencement of the trial. It was also not in dispute that he was employed at Morula Sun untill December 2006. The document showed that he knocked off at 18h06 on the day when the deceased was killed. The appellant, when confronted with this conclusive proof regarding his whereabouts on the night in question, testified that due to the lapse of time he believed that he could only have been at work. The only alternative that he proffered for his whereabouts was that he could have been with his girlfriend as it was at night. It tallies with Ms Gumbu’s evidence as a State witness that she was mostly in the company of the appellant at night as she was scared of being left alone in their rented accommodation. The evidence of his girlfriend corroborated that of the appellant in that he initially lived with a relative and that later on they shared accommodation.

[31] This fact was acknowledged by the trial judge in the judgment where he found that the evidence of the appellant was consistent throughout:
‘This case started in February this year, and at the time when trial started, the defence of accused 2 it was clear it was an alibi, and he maintained this defence throughout the trial. To every witness for the State who purported to implicate him, his defence was, I was at work that night. I could not have been at the scene of the crime. This is what he repeated under oath when he gave evidence.’
The court went on further to state that:

‘Towards the end of his cross-examination by counsel for the State he was shown a document which proved him wrong. He conceded that he was wrong, but ascribed it to lack of memory not to deliberately telling lies.’

The trial court still went on to find that as a brilliant educated person, the appellant could have long checked whether the defence he wanted to place before the court would have been correct. I do not agree with this conclusion. The unrefuted fact is that the appellant through his former counsel initiated the move to have the clocking records obtained from Morula Sun. The appellant could not have been expected to put the defence of an alibi to the rest of the state witnesses, but it was raised appropriately during the cross-examination of Capt. Tlhapi.

[32] It is trite that there is no onus on the accused person to establish their alibi. If it might be reasonably true they must be acquitted and it does not have to be considered in isolation from other evidence. The correct approach is to consider it in the light of the totality of the evidence presented before court. In evaluating the defence of an alibi, in *R v Hlongwane* [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D (see also *R v Biya* [1952] 4 All SA 304 (A); 1952 (4) SA 514 (AD) at 521), where the accused denied complicity, Holmes JA stated as follows:

‘At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.’

The phrase ‘might reasonably be true’ clearly refers to both denial of complicity and alibi. If the version of the accused is reasonably possibly true they must be acquitted. For the court to convict the accused, their version or alibi must be false beyond a reasonable doubt (see *Shusha v S* [2011] ZASCA 171 para 10).

[33] The appellant’s alibi should have been weighed against the totality of the evidence. The State should have led evidence linking the appellant to the crime, which evidence must be sufficient and credible. As stated by this Court in *S v Combrinck* [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) para 15:

‘It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on the accused person to prove his innocence. The standard of proof on the State and the approach of a trier of fact to the explanation proffered by an accused person has been

discussed in various decisions of this Court and of the high court (see *R v Difford* 1937 AD 370 at 373; *S v Van der Meyden* 1999 (1) SA 447 (w) at 448F-I). It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically.'

The trial court failed to heed this judicial injunction and therefore committed a material misdirection.

[34] This Court in *S v Musiker* 2013 (1) SACR 517 (SCA) para 15-16 held that once an alibi has been raised, the alibi has to be accepted; unless it can be proven that it is false beyond a reasonable doubt. *S v Burger and others* 2010 (2) SACR 1 (SCA) para 30 held that it is worth noting that mere lies for an alibi defence or for alibi evidence does not warrant 'punishment for untruthful evidence.' However, where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie (or falsehood), the lie together with the other evidence of the accused as a whole may point towards his or her guilt in certain cases. In summary, the above authorities regarding the defence of an alibi show that the trial court failed to look at the totality of the evidence presented before it when it considered the alibi evidence and whether it may be reasonably possibly true.

[35] The application for discharge at the end of the State's case was correctly dismissed by the trial court, as it became very clear during the trial that the appellant's co-accused wanted to implicate the appellant in the commission of the offences. The refusal of a discharge entails the exercise of discretion and cannot be a subject of an appeal. In this regard *E Du Toit et al*[4] opine as follows:

'The decision to refuse a discharge is a matter of solely within the discretion of the presiding officer and may not be questioned on appeal (*R v Lakatula & Others* 1919 AD 362 at 363 - 364. The section gives the court a discretion in deciding whether to discharge an accused at the conclusion of the State case. This discretion must be exercised judicially and it is wrong to prescribe to the court how and when it should be exercised in favour of an accused.'

In *S v Lubaxa* [2001] ZASCA 100; [2002] 2 All SA 107 (A) para 21 this Court held that whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by their co-accused, is a question that cannot be answered in the abstract as the circumstances in which the question arises are varied. The

[4] E Du Toit et al *Commentary on the Criminal Procedure Act* (2020) at RS 64. See also *S v Manekwane* 1996 (2) SACR 262.

Court went on to state that while there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. More recently in *S v Aggliotti* [2010] ZAGPJHC 129; 2011 (2) SACR 437 (GSJ) para 257 the court held that where more than one accused are charged with the same offence the court may refuse to discharge one of them if it is in the interest of justice to do so.

[36] For all the aforegoing reasons, I would have allowed the appeal and set aside the convictions and resultant sentences.

Y T MBATHA
JUDGE OF APPEAL

Petse DP (Mokgohloa and Dlodlo JJA concurring):

[37] I have had the benefit of reading the judgment (the first judgment) of my colleague Mbatha JA with which Mocumie JA agrees. The question to be determined in this appeal is whether the appellant was rightly convicted of the charges on which he was indicted. The appeal turns, in essence, on two aspects. The first is whether the appellant's application for his discharge in terms of s 174 of the CPA should have been granted. My colleague concludes that the appellant's application for discharge was rightly refused by the trial court.

[38] With that conclusion, I am in respectful agreement. The following are my brief reasons for agreeing with my colleague in that regard. During his first encounter with Capt. Tlhapi, Mr Thomas Maluleke (the appellant's co–accused at the trial) admitted to having been at or in the near vicinity of the crime scene. He also made certain admissions in the course of which he, amongst others, seemingly implicated the

appellant. Moreover, the line of cross-examination of the State witnesses adopted by Maluleke's counsel sought to downplay or minimise his role in the murder and shift the blame to the appellant. And further, according to Capt. Tlhapi's testimony the appellant himself admitted that the firearm used in killing the deceased belonged to him and that he did not have a licence to possess it. There was also the evidence from Gumbu (the appellant's former girlfriend) to the effect that during 2007 she accompanied the appellant to Maluleke's parental home in order for the appellant to retrieve his firearm from Maluleke.

[39] The second aspect is whether the appellant should have been acquitted on all counts at the conclusion of the trial. My colleague answers this question in the affirmative. With respect, I hold a different view. The divergence of views between us on this score is what has bred this judgment.

[40] I accept, as my colleague has pointed out in her judgment, that the fate of this appeal hinges in large measure on the evidence of Maluleke who was a single witness in respect of the events leading up to and including the commission of the murder and its aftermaths. Accordingly, it behoves a court in evaluating such evidence to determine whether, having regard to its shortcomings, defects or contradictions, the truth has been told. (See in this regard: *R v Mokoena* [1956] 3 All SA 208 (A) at 212-213; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E-F.)

[41] Moreover, as Maluleke was an accomplice, the trial court was enjoined to satisfy itself upon an appraisal of all the evidence – not just the evidence of the accomplice – that the State proved its case beyond a reasonable doubt. My colleague has already dealt with the state of the law relative to the caution that a court must exercise when evaluating the evidence of an accomplice. And, in particular, that such evidence calls for special scrutiny. I therefore do not propose to traverse the same ground in this judgment. Suffice it to reiterate that ultimately the question whether there has been proof beyond reasonable doubt 'depends upon an appraisal of all the evidence' and the degree to which the requisite safeguards have been satisfied.

[42] As to corroboration, it is necessary to stress that by 'corroboration' is meant evidence that shows or tends to show that an accomplice's account of what took

place, that may in its essential features be truthful, does not falsely implicate the accused. (Compare: *R v Brewis* 1945 AD 261 at 270; *R v Kristusamy* 1945 AD 549 at 558.) The extent of corroboration required will depend on the nature and quality of the evidence elicited from the accomplice. And this will in turn depend on the facts of each case. Where the testimony of the accomplice is untrustworthy or inherently improbable a greater degree of corroboration would be required than would be in a case where it is cogent. (See: *R v Swani* 1946 NPD 158 at 168.) But the risk of a wrong conviction will be reduced where the accused turns out to be a lying witness as has happened in this case. (See: *R v Ncanana* 1948(4) SA 399(A) at 405-406.)

[43] Whilst still on the subject of the proper approach to evaluating evidence in a criminal trial, it is al well to bear in mind what this Court said in *S v Shackell* 2001 (4) SA 1 (SCA) (para 30):

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[44] Previously, in *S v van der Meyden* 1991 (1) SACR 447 (W) Nugent J had occasion to say the following (at 449):

'[A] court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion which is arrived at must account for all the evidence. Although the dictum of Van der Spuy AJ was cited without comment in *S v Jaffer* 1988 (2) SA 84 (C), it is apparent from the reasoning in that case that the Court did not weigh the "defence case" in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J-90B) that the Court was able to conclude that the accused's evidence might be true.

I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond

reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence.
Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[45] Accordingly, all said and done, it is the duty of the trier of fact to weigh up all the elements of the evidence which point to 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. Thereafter, the court must decide whether the balance weighs so heavily in favour of the State so as to exclude any reasonable doubt about the accused's guilt. (See in this regard: *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.)

[46] Indeed, our courts have for more than a century recognised the fact that there is only one test in a criminal trial, namely whether the State has proved the guilt of the accused beyond reasonable doubt. In *S v Sithole and Others* 1999 (1) SACR 585 (W) the test applicable to criminal trials was explained thus (at 590 g-i):
'There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.'

[47] It is apposite at this juncture to mention that in denying complicity in the commission of the offences to which this appeal relates, the appellant relied on an alibi. On this score, *R v Biya* 1952 (4) SA 514 (A) at 521E-D tells us that:

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

What this Court said in *S v Liebenberg* 2005 (2) SACR 355 (SCA), more than 50 years after *Biya*, is instructive. There, this Court said (para 14):

'Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, *when considered in its totality*, of the nature that proved the alibi evidence to be false.'(Emphasis added.)

It is as well to remember, as this Court made plain in *R v Hlongwane* 1959 (3) SA 337 (A) at 340H, that the alibi 'does not have to be considered in isolation'.

[48] What emerges from the passage quoted from *Liebenberg* in the preceding paragraph is that once it is found that on the face thereof an alibi defence cannot be rejected as false, something more is required to prove that the alibi is false. This then pertinently raises the question whether in the context of the facts of this case the appellant's alibi can properly and safely be rejected as false beyond reasonable doubt. To my mind the answer must be in the affirmative. I shall elaborate on this aspect later.

[49] In reaching her conclusions, relative to Maluleke's perceived mendacity, my colleague has relied on the evidence of the witnesses Tebogo[5] and her sister Pinkie who were at the time of the trial Maluleke's neighbours. My colleague has, in addition, found that the appellant's alibi defence finds support in what she says is the corroborative evidence of his erstwhile girlfriend, Ms Molebogeng Gumbu. But I do not, with respect, think that the passages in the record relied upon and her

[5] I have referred to these witnesses by their first names because they share a common surname. No disrespect is intended.

understanding of their import and the evidence of the three witnesses referred to herein, read in proper context, bear out those conclusions. Thus, it will be necessary to make reference to crucial aspect of these witnesses' evidence to demonstrate why I hold a different view.

[50] In *S v Mathebula* 2010 (1) SACR 55 (SCA)[6] this Court rightly observed that '[T]he vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony'. In this case the odds are heavily stacked against the appellant so far as the vulnerability of his alibi defence is concerned. This is so because his was raised not only for the first time at the trial but also after his primary alibi defence – that he was at work – turned out to be utterly contrived.

[51] In *S v Thebus and Another* 2003 (2) SACR 319 (CC) the Constitutional Court recognised that it would not be a legitimate basis for a court to draw an adverse inference against an accused for failing to raise his alibi timeously. The Court nevertheless made plain that a failure to raise an alibi timeously is not a neutral factor. It said that such a failure can legitimately be taken into account in evaluating the evidence as a whole to determine the truthfulness of the alibi. The Court said (paras 64 - 68):

'As pointed out earlier, an arrested person has the right to remain silent. This, indeed, is part of the warning given to the person including that if he or she chooses to say anything it may be used in evidence against him or her. Drawing an inference on credibility in these circumstances has the effect of compelling the arrested person to break his or her silence, contrary to the right to remain silent guaranteed by section 35(1)(a) of the Constitution. To this extent, drawing an adverse inference on credibility limits the right to remain silent.

The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law. As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution. Where it limits any of the rights guaranteed in the Constitution, such limitation must be justifiable under section 36(1). Whether this rule is justifiable in terms of section 36(1) is a question to which I now turn.

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[6] Para 11.

I have already alluded to the importance of the right to remain silent. What is also important is that the accused receives no prior warning that his or her failure to disclose an alibi to the police might be used against him or her in evaluating the alibi defence. On the contrary, the accused is warned of his or her right to remain silent and that anything that he or she says might be used against him or her. The absence of a warning that his or her constitutional right to remain silent might be limited is a relevant consideration in the justification analysis. However what weighs heavily with me is the extent of the limitation.

Firstly, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances, and in particular, having regard to the limited use to which the late disclosure of the alibi is put, I am satisfied that the rule is justifiable under section 36(1).

The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.'

[52] It continued in paras 90 – 97:

' One further point needs to be made. It should be clear from what we have said, that we do not see that a valid distinction can be drawn in this context between adverse inferences going to guilt, and adverse inferences going to credit. There is of course a conceptual difference between inferences going to credit and inferences going to guilt. But in the context of an alibi, the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty. We disagree therefore with the distinction drawn by Moseneke J between an adverse inference to credit on the one hand

and an adverse inference to guilt. Whether an adverse inference is drawn going to guilt or credit, in our view, the accused has been treated unfairly in the light of the warning given.

Moseneke J comes to the related conclusion that it is permissible for an accused person to be cross-examined "on why she or he opted to remain silent on an alibi or indeed any other defence . . .". We do not agree. In the first place, we are of the opinion that no accused person should have to account for the exercise of a right entrenched in the Constitution. This is especially so where that account may be used against the accused. Secondly, it would be unfair to allow such cross-examination in the light of the accused person having been informed of the right to silence without at the same time being informed that she or he might be requested to account for the positive exercise of the right at the trial. We must emphasise that we are concerned only with cross-examination relating to the pre-trial silence of the accused. Nothing we have said should be understood as precluding other lines of cross-examination designed to test the veracity of the alibi.

The foregoing should make it plain that the constitutional position would be different were there to be a law of general application permitting the drawing of an adverse inference in circumstances where the accused has been properly informed of the consequences of a failure to raise an alibi timeously. No such rule presently exists at common law in South Africa. In our view, such a rule if properly tailored and, in particular, if accompanied by an appropriate revision to the warning issued to arrested persons would still limit the right to silence, but would pass constitutional muster under section 36 of the Constitution. In this case, were the first appellant to have been duly warned that his failure to disclose an alibi timeously could result in an adverse inference being drawn, the common law could have been developed to permit the drawing of an adverse inference by the Supreme Court of Appeal and such development would have been a justifiable limitation of his right to silence and to a fair trial. It should be noted that a rule requiring timeous disclosure of an alibi defence has existed at common law in Canada for many years and according to a majority of the Supreme Court of Canada it "has been adapted to conform to Charter norms." Limits on the right to silence have also recently been adopted in the United Kingdom. The European Court of Human Rights has also held that an adverse inference from silence is not necessarily incompatible with article 6 of the European Convention on Human Rights. It appears that rules of this nature are proposed by the SA Law Reform Commission.

We conclude, however, that the right to silence was breached in this case, because an adverse inference was drawn from the failure of the first appellant to disclose an alibi after being informed of his right to remain silent. Nevertheless we are persuaded that the appeal

of the first appellant should be dismissed for the record establishes his guilt beyond a reasonable doubt without reliance upon any adverse inference from his silence. The High Court found Kiel's evidence cogent and persuasive, while rejecting that of the two alibi witnesses as false. There is no basis for rejecting these findings. Moreover, the first appellant, when initially questioned by the police, said that his family had been at Hanover Park at the time of the offence, which is inconsistent with the alibi he subsequently raised. At best for the accused, his statement that "the family was at Hanover Park" is ambiguous and evasive. It is not consistent with the alibi tendered later to the effect the he was with his second wife at Parkwood Estate which is nowhere near Hanover Park. In the light of the rejection of the evidence of the two defence witnesses and the prior inconsistent statement made by the first appellant, the alibi evidence does not in the context of all the evidence in the case (particularly the strong evidence of Kiel) raise a reasonable doubt as to the innocence of the first appellant.

I have read the judgment of Moseneke J (the main judgment) and the concurring judgment of Goldstone J and O'Regan J (the concurrence). I agree with the conclusion in both judgments that the appeal must fail. Like the concurrence I agree with the reasoning and conclusion in the main judgment concerned with common purpose. I cannot however fully agree with the reasoning or conclusion in either judgment on the right to silence. Hence this separate concurrence.

In the process of arriving at the conclusion that the alibi had to be rejected as a fabrication the majority judgment of the Supreme Court of Appeal (SCA) on the alibi defence delivered by Lewis AJA relied on the first appellant's failure to disclose his alibi to the police or to the prosecution. The first appellant contended that this approach infringed his right to remain silent conferred by section 35(1)(a) of the Constitution. The main judgment and the concurrence hold, each on a different basis, that the reasoning of the majority in the SCA did infringe the first appellant's right to silence but conclude that the first appellant's conviction was nevertheless justified.

Briefly stated the differences between the two judgments are these. The concurrence takes the view that any cross-examination of an accused person on the reasons for the failure to disclose an alibi to the police before the trial, and any reliance on the accused's silence in the process of judicial reasoning that results in the rejection of that alibi is a breach of the right to silence. The main judgment holds that: (a) it is not an infringement of the right to silence to cross examine an accused person concerning the reason why an alibi was not disclosed provided that the cross-examination is fair in the circumstances; (b) it is a justifiable

limitation of the right to silence for a judicial officer to take into account the responses thus obtained in conjunction with the failure to disclose an alibi as factors in the process of making an inference as to the credibility of the accused; (c) it is an infringement of the right to silence to infer the guilt of the accused from the failure to disclose an alibi and (d) the majority in the SCA wrongly did this.

This judgment favours an approach that:

(a) The right to silence properly interpreted in its context has an impact on the way in which a criminal trial should be conducted.

(b) The appropriate protection of the right does not require the cross-examination of an accused person about the reasons for the failure to disclose an alibi to be absolutely protected. Nor does it prohibit a judicial officer from drawing any legitimate inference from the evidence revealed by the cross-examination, the silence of the accused and all the relevant surrounding circumstances.

(c) The over-arching and abiding obligation of a judicial officer in a criminal trial is to ensure a fair trial within the meaning of section 35(3).

(d) It is this obligation that governs the way in which a criminal trial is conducted; dictates answers to complex questions concerning the circumstances and the extent to which cross-examination on the reasons for silence are permissible; and settles whether any inference may be drawn from the silence of the accused and the facts and circumstances related to it as revealed in the trial.

(e) The need to ensure a fair criminal trial is key to determining whether a right has been infringed. The right is infringed only if it is implicated in a way that renders the trial unfair.

(f) Cross-examination of witnesses concerning the reason why an alibi was not disclosed infringes the right to silence only if it renders the trial unfair.

(g) The responses thus obtained may be taken into account by a judicial officer in conjunction with the failure to disclose an alibi in the process of making an inference provided that the way in which the inference is made and the drawing of the inference itself does not render the trial unfair.

(h) Drawing an inference as to guilt or credibility solely from the silence of the accused would render a trial unfair.

(i) The inference drawn by the SCA was entirely fair.'

[53] It bears mentioning that Capt. Tlhapi who was the officer charged with the investigation in this case expressed surprise when it was put to him under cross-examination that the appellant could not have been party to the crimes because he

was at work. He said that he would 'be surprised to hear that, because [during] the interview that [he] had with [the appellant], [the appellant] had ample chance to inform [Tlhapi] about that and [he] (ie Tlhapi) would have followed up the alibi, if he could have informed [Tlhapi] immediately'.

[54] Coming to the evidence of Tebogo, there is nothing remarkable about this witness' evidence or adverse to Maluleke. In broad terms, and in its essential features, it ties up with the overall tenor of Maluleke's evidence. Any differences or inconsistencies between their respective versions are not material or indicative of the fact that Maluleke was untruthful. On the core aspects, their respective versions are to the same effect. Nowhere in his evidence did Tebogo say that Maluleke 'sought accommodation from his place because at Maluleke's home they were not opening for him due to his late arrival' as the first judgment states.[7]

[55] With respect to the evidence of Tebogo's sister (Ms Pinkie Mngubeni), she confirmed one significant and material aspect in Maluleke's evidence. She testified that whilst inside the house, in the dead of night, she heard a gunshot that rang out outside. She went out to investigate after hearing human voices immediately after the gunshot which was when she met her brother, Tebogo outside. She then enquired of Tebogo if he had heard the gunshot. The latter answered in the negative. According to Pinkie, Tebogo was at that stage engaged in a 'discussion' with Maluleke.

[56] It is timely at this juncture to say something about the witness, Gumbu. Her evidence was, in broad terms, to the effect that whenever she was 'around' she and the appellant would spend the night together. Under cross-examination she said that her love relationship with the appellant started in 2006. At that time they were both employed at Morula Sun although as at July 2006 they were not on the same shift. When it was put to her that she 'would not even remember whether on 21 August 2006, [she was] working the same shift or different shift[s]' with the appellant her response was that she could not remember. Neither could she tell as to when they were allowed to work together during the same shift. When counsel for the appellant put to her that she was 'adamant that [she] never slept at [Maluleke's] place' her

[7] Para 18 of the first judgment.

answer was that she was not sure. Thus, Gumbu's evidence was of no real value to both the State and the appellant. Nowhere in the record is there evidence by Gumbu that throughout the night of 31 August 2006 she was with the appellant in the room which they shared. It is therefore a bridge too far to cross to then say, as my colleague does,[8] that Gumbu corroborated – in the sense explained above – the appellant's alibi that they spent the night of 31 August 2006 together. Far from it.

[57] The trial court found that the appellant lied in relation to the crux of his alibi. Accordingly, this appeal falls to be considered on that footing.

[58] The crucial question must then be: where does all of this leave the State's case? It is not in dispute that the offences upon which the appellant and his confederate were indicted were committed on 31 August 2006. Thus, when the appellant testified in his defence he was testifying as to events which took place some five years before the trial commenced. The same naturally applies to the State witnesses.

[59] I readily accept, as my colleague does, that in those circumstances a court ought to make allowances for human memory lapses. But in the context of the facts of this case, I do not believe that this is the type of situation for which allowances must and can properly be made for the long passage of time. This is not a case where one could conceivably say that the appellant suffered from memory lapses going to the details of his alibi. To my mind, this is rather a case where the appellant must have thought that he had an unassailable defence when he confidently asserted that he was at work at the time of the commission of the offences. When this defence, upon which he pinned his faith, was debunked, he was quick to seek refuge in another alibi defence, namely that he was with his girlfriend at the time.

[60] This is quite telling. The appellant's conduct in this regard reveals the extent to which he was prepared to perjure himself in order to escape from the clutches of justice. And the fact that this defence was raised for the first time at the trial is not a factor that redounds to the appellant's benefit. This is particularly so given that upon

[8] First judgment para 11.

his arrest the appellant admitted to Capt. Tlhapi that the firearm used in the murder belonged to him. However, the question as to how it came about that his firearm was used in the murder, given the appellant's denial of complicity, remains unexplained. Despite the fact that the appellant testified in his defence he did not seize upon this opportunity to do so. Instead, he persisted in his false denials. Therefore, there can be no denying that the cumulative effect of these factors cast a shadow on the truthfulness of his alibi.

[61] To underscore the appellant's dismal performance in the witness stand, the following bears mentioning. During his cross-examination by counsel for the State, the appellant was asked as to where he was on 31 August 2006 at around 22h00. His response was that he was at work at Morula Sun, having reported for duty at 16h00 until 02h00 the next morning. The appellant obstinately maintained this stance throughout until towards the tail end of his cross-examination when he was constrained to accept, upon being confronted with irrefutable evidence that he had signed off from work at 18h05, that his initial alibi defence did not avail him. With his first alibi defence having been jettisoned, the appellant wasted no time to conjure up another alibi defence, namely that he was with Gumbu the whole evening of 31 August 2006. To bolster this claim, he further asserted that the next day they reported for duty together.

[62] It is a fact that Maluleke's evidence is not entirely without blemish. This is, however, hardly surprising given that we are here dealing with someone who is an accomplice. Accordingly, it should be remembered, as this Court emphasised in *S v Francis* 1991 (1) SACR 198 (A) at 205c-e, that it is not expected that the evidence of an accomplice should be wholly consistent and wholly reliable, or even wholly truthful. It is sufficient that in its essential features it has a ring of truth.

[63] Moreover, what this Court said about accomplices more than seven decades ago in *R v Kristusamy* 1945 (A) 549 at 556 is instructive. It said the following:

'[A]fter all, one cannot expect a witness of that class to be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. If one had to wait for an accomplice who turned out to be a witness of that kind – or indeed anything like it – one would, I think, have

to wait for a very long time, members of the criminal classes do not usually come nearly up to so high a standard.'

This Court nonetheless stressed that it was still 'necessary that the Court should be satisfied beyond reasonable doubt that in its essential features the story which he tells is a true one'.

[64] Thus, although the evidence of Maluleke has been criticised in some respects by the appellant the fact remains that it cannot be validly challenged as totally devoid of truth. I therefore, respectfully find myself unable to share my colleague's characterisation of Maluleke's evidence as not only utterly devoid of credence but also nonsensical. Nor, as already indicated, does a fair reading of the record manifest any material conflict or inconsistency between Maluleke's evidence and that of the witness Tebogo.

[65] It is as well to remember that contradictions in themselves, if they be such, do not inevitably lead to the rejection of a witness' evidence. As Nicholas J observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. At 576G-H of the same judgment, the learned Judge stated that 'it is not every error made by a witness that affects their credibility; in each case the trier of fact has to make an evaluation, taking into account such factors as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence'. In these circumstances, can one justifiably criticise Maluleke for having said that in the year 2007 the appellant arrived at his shack looking for his firearm simply because Warrant Officer Seforolwane had in 2006 already recovered the firearm? I think not. Viewed in context and understood from his perspective it can only mean that the appellant demanded his firearm unaware that at that stage it was not available as the police had, in the interim, taken possession of it. Indeed, that the appellant had come to Maluleke's shack and demanded a firearm from the latter, turning the bed upside down was confirmed by Ms Dimakatso Maria Mokoka who testified at the instance of Maluleke. According to this witness it was on this occasion that Maluleke informed the appellant that the firearm was 'seized by the police'. Even Gumbu too, testified to the fact that during 2007 she and the appellant visited Maluleke in the latter's room.

[66] My colleague says that on the evidence it is apparent that the appellant had faith in his initial alibi defence. Hence he instructed his counsel to procure his erstwhile employer's records, confident that such records would bear out his defence. It is then said that it was therefore understandable that when this turned out not to be the case the appellant fell back on his second alibi defence. The implication of this statement is that whenever an accused raises a defence of an alibi – that turns out to be utterly false or unfounded – it is open to that self-same accused to raise an alternative alibi defence, which is what happened in this case. Such a proposition, in my view, would have far-reaching consequences for the administration of justice. That the appellant was able to instantaneously conjure up another alibi to fall back on upon his realisation that he was being pushed into a tight corner from which he would find it difficult to extricate himself, demonstrates without a shadow of doubt his quick-wittedness and mastery in improvisation. Thus, I regret to say that my colleague is overly charitable to the appellant.

[67] My conclusion therefore is that the appellant's alibi defence was rightly rejected by the trial court as being false beyond reasonable doubt. In the light of the evidence led at the trial, viewed in its totality, I am satisfied that the appellant's conviction is supportable. In sum, all of the pieces of the evidence from the various witnesses, when sewn together, create an impregnable mosaic of proof against the appellant. There is no appeal against the sentences. In the result the following order is made:

The appeal is dismissed.

X M PETSE

DEPUTY PRESIDENT

APPEARANCES

For appellant:	R J Nkahle
Instructed by:	TN Ramollo Attorneys, Germiston
	Masina Attorneys, Bloemfontein
For respondent:	M D Moeketsi
Instructed by:	Director of Public Prosecutions, Mmabatho
	Director of Public Prosecutions, Bloemfontein