



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No: A443/15
Court a quo Case No: SS26/2012

ANATHI NGCUKANA

APPELLANT

And

THE STATE

RESPONDENT

Coram: ERASMUS, SAMELA & ROGERS JJ

Heard: 30 JANUARY 2017

Delivered: 18 AUGUST 2017

JUDGMENT

ROGERS J:

Introduction

[1] We heard this appeal on 30 January 2017. Since this judgment is being delivered more than six months later, the litigants are owed an explanation. Immediately after the hearing the presiding judges conferred and were in agreement as to the outcome of the appeal. Because the case lent itself to a three-way division of labour, it was agreed that each of the judges would prepare a portion of the judgment which would then become the judgment of the court. This arrangement did not come to fruition as a result of which I have prepared a judgment covering the whole appeal.

[2] The appellant and one Avile Tokota were charged in the court a quo with having committed various crimes in the Strand area over the period November 2006 to March 2007. The charges were as follows (Tokota being a co-accused only in respect of counts 4, 5, 9 and 10):

- count 1: murdering, by shooting, one Sonwabile on 11 November 2006 near Jango's Tavern in Nomzamo;
- counts 2 and 3: attempting to murder, by shooting, one Nkholise on 7 February 2007 near a container in Nomzamo and robbing him of a cellphone;
- counts 4 and 5: murdering one Mejeni and one Mgidi, both by shooting, on 25 February 2007 while they sat in a parked car in Pholile Park;
- count 6: murdering, by shooting, one Mrawshe on 17 March 2007 at Lwandle;
- count 7: attempting to murder, by shooting, one Mnguni on 24 March 2007 at Nomzamo;
- count 8: attempting to murder, by shooting, one Hans on 29 March 2007 at Nomzamo;
- counts 9 and 10: possession of the firearms and ammunition used in counts 1 - 8.

[3] The appellant was arrested in early April 2007. He was released on bail. In November 2011 he was taken into custody where he remained until sentenced in

the present case. The trial ran before MacRobert AJ over the period October 2012 - April 2013. There were two assessors for part of the trial but with the concurrence of the accused one of the assessors was excused on account of ill-health. The court a quo delivered judgment in late May 2013. Tokota was acquitted on all counts where he was a co-accused. The appellant was acquitted on count 6. He was found guilty on all the other counts, save that in respect of count 2 (the robbery charge associated with the attempted murder of Nkholise) he was convicted on the competent verdict of theft.

[4] The sentencing proceedings took place in June 2013. On 6 June 2013 the court a quo imposed the following sentences on the appellant:

- count 1: life imprisonment;
- counts 2 and 3: one year's imprisonment (theft) and five years' imprisonment (attempted murder);
- counts 4 and 5: eighteen years' imprisonment on each count;
- count 7: five years' imprisonment;
- count 8: five years' imprisonment;
- counts 9 and 10: three years' imprisonment (possession of a firearm) and 18 months' imprisonment (possession of ammunition).

[5] On 10 December 2013 MacRobert AJ granted the appellant leave to appeal to a full bench against all the convictions and sentences. The appeal was initially scheduled to be heard in January 2016. In the absence of heads of argument, the appeal was postponed and eventually heard on 30 January 2017. Mr du Preez, who was not involved in the trial, appeared for the appellant and Mr Moeketsi, who was the prosecutor in the court a quo, for the respondent.

[6] The appeal is essentially against the trial court's factual findings. There were no contentious legal issues. We can only interfere with the trial court's factual findings if they are vitiated by material misdirection or shown by the record to be wrong (*R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706; *S v Naidoo* 2003 (1) SA 347 (SCA) para 26). This approach applies equally to credibility findings and

the application of cautionary rules (*S v Prinsloo* 2016 (2) SACR 25 (SCA) para 187). Less deference is required where the question is one of drawing inferences from proved facts (*Director Of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) para 46).

[7] MacRobert AJ meticulously summarised the evidence in respect of each count. After dealing with a trial-within-a-trial conducted concerning an identity parade (not germane to this appeal), he proceeded to set out the legal principles relating to contradictions in witnesses' testimony, accomplice evidence, identificatory evidence, single witnesses, evaluation of evidence in general and adequacy of proof, common purpose, police statements, lying witnesses and alibi evidence. It has not been argued that he misstated any of the legal principles. He then evaluated the case against the accused in respect of each count.

[8] The learned judge's reasons for sentence were somewhat terse in comparison to his judgment on conviction. He did not provide reasons for granting leave to appeal.

[9] In his heads of argument and oral submissions Mr du Preez realistically and wisely acknowledged that there was little he could say in support of the appeal against the convictions on counts 2, 3 and 7 – 10. We thus do not intend to deal with them except to say that we are satisfied that there is no basis for us to interfere with the trial court's factual findings. The same is true for the sentences imposed on these counts.

[10] We thus concentrate, in what follows, on the convictions in respect of counts 1, 4 and 5 and on the sentences imposed for these convictions. For reasons which will become apparent, it is convenient to deal with counts 4 and 5 before addressing count 1.

[11] Because the court a quo did not give reasons for granting leave to appeal, we do not know, in respect of each count and each sentence, the ground or grounds which the trial judge thought had reasonable prospects of success. It is unfortunate that he did not assess the application for leave to appeal more critically. If leave to

appeal had been confined to the counts which Mr du Preez argued, the record would have been considerably shorter than the 39 volumes placed before us.

Conviction on counts 4 and 5

[12] Both of the accused were charged with the double murders constituting counts 4 and 5. In the event Tokota was acquitted on both counts while the appellant was convicted on both counts, on the basis that he had shot one of the deceased and had shared a common purpose with the perpetrator of the other shooting.

[13] A neighbour and family member discovered the bodies of the two deceased at around 03h00 – 04h00 on the morning of Sunday 25 February 2007 in the front and back seats of a car parked outside their dwellings in Pholile Park, an informal settlement. The car belonged to the deceased Mejeni. Both deceased died from single gunshot wounds, Mgidi to the head, Mejeni to the abdomen. Mgidi was in the front passenger seat. Mejeni was sprawled across the back seat with his legs protruding from the right door. It appears likely that they were drinking beer in the car when they were attacked.

[14] Mgidi was still alive when found but died at the scene shortly afterwards. The forensic pathologist, Dr Abrahams, said that the ‘snoring’ which the neighbour and family member heard from Mgidi was probably the respiration phenomenon known as Cheyne-Stokes breathing which is characteristic of a person’s dying breaths.

[15] Dr Abrahams testified that the wound suffered by Mgidi was such that he would not have survived for more than a few minutes. This would place the shooting well after midnight. She gave this evidence before the lay witnesses testified that Mgidi was still alive when they found him. Since the State’s case was that the shooting occurred before midnight, Dr Abrahams was recalled. She then said that it would have been possible for Mgidi to survive for much longer than a few minutes.

[16] The appellant’s right palm-print was found on the driver’s door just beneath the window. The appellant, who denied having been on the scene at all, testified that

he recalled seeing the car in question (as depicted in a photograph) in front of Lucky's Tavern in Sithunzi Street, Nomzamo (the appellant lived in Sithunzi Street). This was on the Saturday morning. He was sitting outside the tavern with friends on a beer crate. He thought he may at one stage have lent against the car. The appellant admitted that Tokota was a friend of his but said they were not together on the night of 24/25 February 2007.

[17] Tokota testified that he could not recall what he did on 24/25 February 2007 because there was nothing special about this night at the time. He testified that if he went out drinking he would normally be home before 22h00. He first heard of the double murders when he was arrested in November 2008.

[18] Tokota testified that his right arm was injured in 2003, leaving him with permanent weakness in his right hand. He does not have the strength to use his right hand to hold and fire a weapon. Because he is right-handed, he would not be able to wield a weapon with his left hand. Dr Theron of Victoria Hospital gave evidence which supported Tokota's evidence in this respect.

[19] The State's case against the two accused rested on the evidence of Bonginkosi Dase who goes by the nickname Novosh. As at February 2007 Dase was a student at the Cape Peninsula University of Technology. He testified in terms of s 204 of the Criminal Procedure Act.

[20] His evidence was in summary the following. On the evening of 24 February 2007 he was playing pool at Mangena's Tavern in Sithunzi Street. He was joined there by his friends Malibongwe and Vuyo and later by the appellant and Tokota whom he knew but who were not his friends. One Sabelo then arrived to say that his beers had been taken by two men from Pholile Park and that they should go there to retrieve them. After finishing their game of pool, the six of them set off for Pholile Park.

[21] Sabelo led them to a car parked outside a dwelling in Pholile Park. One man was sitting in the front passenger seat, another in the back seat. The appellant confronted the man in the front seat. After a brief and heated exchange, the

appellant drew a firearm from his waist and shot the man in the head. Shortly thereafter Tokota said there was another man in the back seat. Tokota drew a firearm and shot this man. The appellant walked around to the driver's side and searched inside the front of the car for beers. Malibongwe also looked inside the car. They retrieved two beers and gave one to Sabelo and one to Dase and Vuyo. The six men then went off in different directions.

[22] Dase testified that he did not know that the appellant and Tokota were carrying firearms. He was shocked when the shooting occurred. This notwithstanding, he did not report the matter to the police. He testified that about two weeks later he met Malibongwe and asked him what had transpired. Malibongwe said that he had gone to the police as a result of which the appellant and Tokota had been arrested. (Tokota was in fact only arrested in November 2008.)

[23] Sabelo, Vuyo and Malibongwe were not called as witnesses. By the time of the trial Sabelo had apparently died. The other two, according to the investigating officer, Constable Ntetha, could no longer be found. It seems likely that Malibongwe did indeed approach the police because there was a statement from him in the docket in which he named the six people who had been at the car at the time of the shooting. It was put to Dase that according to Malibongwe's statement the appellant supposedly shot the person in the back seat while Tokota shot the person in the front seat. Dase said that this was untrue.

[24] Ntetha interviewed Sabelo, who denied having been on the scene, and Vuyo. When the trial started on 8 October 2012, Dase's name was known to the police as one of the six men but he had not yet been interviewed. Ntetha said there was difficulty tracing him. The State at that stage thus had no eye-witnesses to support the double murder charges. Ntetha finally spoke with Dase in early February 2013 and arranged an interview with the prosecutor. Dase was called as a witness about two weeks later.

[25] The fact that Dase's nickname is Novosh led to some unexpected twists and turns in the conduct of the trial. This arose from the fact that the three eye-witnesses in respect of count 1 (to whom I shall refer as Thuliswa, Amanda and Asanda) had

already testified that the second perpetrator in count 1 – the man who was with the appellant at the time of the shooting outside Jango's Tavern on the evening of Saturday 11 November 2006 – was a person known to them as Novosh. This person had a light skin complexion and dreadlocks. Dase answers this description.

[26] Thuliswa testified that a few days after the shooting in count 1 she was at the police station to have a copy of her ID document certified. She saw another policeman in the presence of the man known to her as Novosh. She told the policeman who was dealing with her, Const Mzukwa, that this Novosh was the man involved in the shooting at Jango's Tavern. Const Mzukwa testified that he reported this information to Const Mbuqe who was at that time the investigating officer but who subsequently died.

[27] During Dase's cross-examination it was put to him by Tokota's attorney that Tokota would testify that he had a quarrel with Dase in 2006 when Dase was arrested for attempted murder. Dase responded that this was not true and asked what the quarrel was about. Strangely, Tokota's attorney said that it was a 'long story' and that 'we are not going to go into that now'.

[28] In the event, the reference to an attempted murder assumed greater significance in the light of subsequent evidence. It emerged that at around 12h00 on Monday 13 November 2006 Dase was arrested on a charge of attempting to murder one Sibusiso Peti in Simon Street, Nomzamo. This was not far from Jango's Tavern. The docket in respect of the Peti attempted murder was subsequently handed in as an exhibit. The investigating officer was Const (later W/O) Ndzingwe, who was called as a witness. According to the docket, the shooting in Simon Street took place at about 20h00 on Saturday 11 November 2016, around one hour before the shooting at Jango's Tavern. The complainant and witnesses in the Peti attempted murder identified Dase as one of the four men who accosted the family in their home. W/O Ndzingwe testified that he received information (he could not remember from whom) that the firearm used in the Peti shooting belonged to Tokota, as a result of which the police went to Tokota's house. This could well provide the basis for a quarrel between Dase and Tokota.

[29] Dase's warning statement in the Peti attempted murder was taken at around 18h00 on Wednesday 13 November 2016. He would have been in custody for several days before being released on bail. It is thus not unlikely that he was at the police station when Thuliswa claims to have seen Novosh there.

[30] Dase, having agreed to testify as a s 204 witness in respect of counts 4 and 5, thus found – no doubt to his surprise and dismay – that the finger of suspicion was pointing at him as a co-perpetrator of the murder in count 1. At the court's insistence, Dase, Thuliswa, Amanda, Asanda and Ntetha were recalled, sometimes more than once, to answer questions about the Novosh issue. Dase, who was the first to be recalled, said that there were in fact two persons living in Sithunzi Street with the nickname Novosh. The other Novosh was about his height and also wore dreadlocks. The other Novosh was, however, thinner and taller than he was.

[31] Thuliswa, when first called as a witness, testified that at the police station she told the policeman, 'This is the friend of Anathi [the appellant] who was with Anathi when Sonwabile [the deceased in count 1] was shot'. In the statement she made to the police on 12 November 2006, the day after the shooting, she described the second perpetrator as a man with dreadlocks but said she did not know his name. In oral evidence she testified that she had told the policeman that the other man was Novosh but that she did not know his proper name.

[32] Upon recall, she testified that she knew a Novosh whose proper name was Bonginkosi Dase and who lived in Sithunzi Street. She also knew of another Novosh but did not know where he lived. She now claimed that it was this other Novosh who was with the appellant at Jango's Tavern. She said the two Novoshes looked quite similar. Later in the course of the same evidence she admitted having thought that the Novosh at the police station was the one with the appellant at Jango's Tavern but she was not sure. Thuliswa's description of the other Novosh was that he was the same height as Dase, also with a light complexion and dreadlocks but thinner.

[33] During her initial evidence, Amanda said that the Novosh who was with the appellant lived in Sithunzi Street. She often saw them together. She said she used to buy clothes from Novosh's mother. In her first statement to the police she said

that she did not know the names of the perpetrators but described the one as having dreadlocks. In oral testimony she denied having told the police that she did not know the perpetrators' names.

[34] When Amanda was recalled, she testified that she knew a person called Bonginkosi (ie Dase) who lived in Sithunzi Street. His mother sold clothes. She said that this was not the person who was with the appellant at Jango's Tavern. This is directly at odds with her previous testimony where she identified the Novosh in question as being the son of a woman from whom she bought clothes. When this direct contradiction was put to her, she denied having given the evidence attributed to her. She now claimed that the appellant had been with another person, also with a light complexion and dreadlocks. She said the night at Jango's Tavern was the first time she saw this other person. She described him as thin and taller than Dase. She denied knowing of more than one person called Novosh. In other words, she now claimed that the person who was with the appellant at Jango's Tavern was not a person known to her as Novosh.

[35] When Asanda first testified, she described the Novosh who had been with the appellant outside Jango's Tavern as white-complexioned with dreadlocks. She did not mention any other person called Novosh. When recalled, Asanda said that the Novosh she saw with the appellant was a person with whom she had been at school. (It is common cause that she and Dase attended the same high school and that Dase was already then known as Novosh.) She testified that she did not know of any other Novosh. She described this Novosh as having a light complexion, slender build and dreadlocks. He was shorter than she.

[36] Not very much can be made of the conflicting descriptions of Dase and the person who was with the appellant at Jango's Tavern. Dase's height was subsequently measured at 1,73 m and Asanda's at 1,66. So if Asanda was correct in saying that the second perpetrator at Jango's Tavern was shorter than her, it could not have been Dase. However Dase, Thuliswa and Amanda all said that the other Novosh was the same height or taller than Dase.

[37] It is necessary to record a point made by the appellant's counsel in cross-examination, namely that it was the investigating officer, Ntetha, who brought Thuliswa and Amanda to court when they were recalled. He was alive to the problem which had arisen in regard to his key witness on counts 4 and 5. Ntetha was recalled on the Novosh issue before they testified again. Upon such recall, he confirmed having heard that Thuliswa had seen Novosh at the police station. He said that he understood there to be two Novoshes. The other Novosh was wanted in connection with several other cases. His information was that this other Novosh was slender and light-skinned. He said this person's real name was Malibongwe.

[38] When he was recalled yet again, he claimed that the other Novosh was not Malibongwe. He had now obtained that person's real name, Sithemnekosi Gungle, from his (Novosh's) brother, Wandile. He said that this other Novosh was taller than Dase. This person could not be found but used to stay in Sithunzi Street.

[39] Ntetha's evidence was, as the trial judge found, most unsatisfactory. The possible involvement of Dase in count 1 was not properly investigated by the police. The reason for the withdrawal of the Peti attempted murder charge is unclear. Unfortunately one cannot discount as a reasonable possibility that the about-turn which Thuliswa and Amanda (who are cousins) made regarding the identity of the second perpetrator in count 1 was the result of influence from the investigating officer with a view to protecting the credibility of the State's single witness on counts 4 and 5. The same may be true of the evidence that Dase gave concerning the existence of a second Novosh.

[40] The appellant testified before Ntetha, Dase and the other witnesses were recalled. He admitted knowing Dase and that the latter's nickname was Novosh. He said he was friends with Dase at an earlier time but not in 2006/2007. He testified that he did not know of any other Novosh. This evidence was not challenged nor was he recalled for further questioning.

[41] The appellant testified that he knew Malibongwe by sight. He denied knowing a person with the name Sabelo. He mentioned one Vuyo as being the person who was sitting with him outside Lucky's Tavern. Whether this was the Vuyo to whom

Dase was referring in connection with the events of 24/25 February 2007 was not explored.

[42] Tokota, like the appellant, testified before the recalling of the witnesses mentioned above. He confirmed that he knew Dase by the nickname Novosh. He testified that he fell out with Dase in 2006. The circumstances of the quarrel were that Dase was arrested for attempted murder. Tokota heard that Dase had told the police that he got the firearm from Tokota, as a result of which the police visited his place. When Tokota next met Dase, he told Dase he would 'get him' by telling their friends that Dase was gay – Tokota (so he claimed) had seen Dase kissing a man. Tokota did not mention a second person with the nickname Novosh nor was he asked about this.

[43] Tokota confirmed that he knew Sabelo. He said Sabelo lived in Pholile Park and that he (Tokota) had first met Dase at Sabelo's house. He also knew Malibongwe and Vuyo. He denied, however, having been with them on the night of 24/25 February 2007 or having any involvement in the double murders.

[44] I must emphasise that Dase was not on trial. However in assessing the State's case the trial court was obliged to take into account, in the appellant's favour, all facts which might reasonably possibly have been true. On the evidence before the trial court, it was reasonably possible that Dase was not a stranger to gun violence and that he had participated in the murder at Jango's Tavern and in the Peti attempted murder which took place about an hour earlier.

[45] The reason why these possibilities are relevant is that one only has Dase's word that the persons who committed the double murders at Pholile Park were the appellant and Tokota. The trial judge said that, although Dase's initial evidence was 'extremely impressive', his evidence on recall was 'shaky at best'. He was found to have been untruthful regarding his arrest for the Peti attempted murder. The judge found that Dase may have had a motive falsely to implicate Tokota, based on their falling out following the Peti attempted murder. The fact that the trial court acquitted Tokota of the double murders necessarily implies that the court found it to be

reasonably possible that Dase lied in identifying Tokota as one of the shooters at Pholile Park. (The judge correctly ruled out the possibility of mistaken identification.)

[46] In regard to the appellant, the trial court said that Dase had no motive falsely to implicate him. Dase's initial evidence had been 'impressive'. The subsequent evidence which was unsatisfactory and untruthful related to 'extraneous matters'. Because Dase had not been warned in terms of s 204 in relation to offences other than counts 4 and 5, he might have been untruthful out of fear of being implicated in count 1 and in the Peti attempted murder.

[47] The court said that the evidence of the other witnesses generally corroborated each other. This does not take the State's case further because these other witnesses could not give evidence on the crucial matter as to who the perpetrators were.

[48] The court rejected as untrue the evidence of Mejeni's wife that on the morning of Saturday 24 February 2007 they had washed the car at the Caltex garage near Shoprite. This finding was made in the light of evidence from W/O Mostert that the Caltex garage was only built several years after the murders and evidence from lay witnesses that the car had not been in working order on the Saturday. Again one has to question the integrity of the police investigation. The washing of the car was relevant to the fingerprint evidence. Mejeni's wife would not have been aware of the significance of this detail. One is left with the uncomfortable possibility that the idea of the car's having been washed was suggested to her.

[49] The trial court was critical of the appellant's evidence. The first ground of criticism was he initially appeared intent on challenging the palm-print evidence. This criticism is unfair. The appellant's counsel wanted Legal Aid to fund the cost of a fingerprint expert to assess the State's expert evidence. In the event this funding was not forthcoming and the appellant's counsel thus had no foundation on which to cross-examine the State's expert, W/O Berlyn. If the appellant was not at the scene of the shooting, he was within his rights to explore the correctness of the palm-print identification, since only if the palm-print identification were solid would he need to explore other possibilities as to how the print might have got onto the car innocently.

[50] The next point of criticism was that the car could not have been outside Lucky's Tavern on Saturday 24 February 2007 because it was not in working order. However a fair reading of the appellant's evidence shows that he himself never said that the Saturday in question was 24 February 2007. The assessor and the judge questioned him on the assumption that he was talking about 24 February 2007 but even then he qualified his responses by saying that he could not remember the date. He testified that he often visited Lucky's Tavern on Saturdays. The tavern was in his street. When W/O Berlyn was recalled, she was unable to say that the print could not have been left on the car a week or more earlier.

[51] The trial court also said that it was most unlikely that the palm-print got onto the driver's door in the way described by the appellant. The movement he demonstrated in court would have left the print towards the bottom of the door, not immediately beneath the window. The court found that the position of the print accorded with Dase's observations. We must defer to the trial judge's assessment of the movement described by Dase though I would hesitate to say that it was impossible, even if it was unlikely, for the print to have got onto the car in the way the appellant explained.

[52] As to the palm-print's according with Dase's observations, neither Dase nor W/O Berlyn demonstrated how the print might have been placed in the position where it was found. Dase said that the appellant opened the front passenger door immediately before shooting the occupant. Dase's prints were not found on the front passenger door. Dase testified that the appellant then went around to the driver's door and looked inside the car for beers. He did not say what part of the driver's door the appellant touched. The appellant testified that he was left-handed. It is not immediately obvious why a person opening the driver's door would place his right hand on the body of the door immediately beneath the window and facing downwards. W/O Berlyn was not asked to demonstrate how the print might have got into that position.

[53] I should mention that four other prints were lifted, one from the front passenger window, and three from the interior back windows of the car. There was no evidence as to whose prints these were.

[54] The presence of an accused's fingerprint where one would not expect it to be can be a damning piece of evidence. Even a single finger-print may, in appropriate circumstances, be sufficient to establish an accused person's guilt (cf *S v Legote & Another* [2001] ZASCA 64, where Harms JA was critical of the trial court's decision to discharge an accused person against whom the only evidence was a fingerprint on a vehicle). However vehicles are used in public places. The presence of a stranger's fingerprint on the outside of an ordinary sedan car is not necessarily surprising (see *R v Du Plessis* 1944 AD 314).

[55] However, and even if one accepts it as proved beyond reasonable doubt that the palm-print got onto the car at the time of the double murder, the trial court appears not to have considered the possibility that the appellant may nevertheless not have been one of the shooters. Sabelo was the person who took the others to Pholile Park to recover his beers. Dase's evidence was that Malibongwe was one of the persons who searched the car for beers. It is possible that the appellant, like Malibongwe, touched the vehicle while looking inside for beers, after two other people had shot the occupants. Neither the appellant nor Tokota appear to have had any motive to resort to such violent conduct in respect of beers apparently taken from Sabelo.

[56] It is here that Dase's evidence as a single witness becomes critical. The trial court found it reasonably possible that Dase was lying when he testified that the person who shot Mejeni in the back seat was Tokota. It must follow as a reasonable possibility that Dase was protecting one of the true killers. And if that is so in the case of Tokota, why not also in the appellant's case? And given the question marks over Dase's activities on 11 November 2006, one cannot rule out as a reasonable possibility that he himself was one of the shooters.

[57] The judge's statement that Dase had no motive falsely to implicate the appellant presupposes that the shooter was not Dase or someone whom Dase had reason to protect (such as his friend Malibongwe). One should bear in mind that Dase did not volunteer any information to the police. He was approached six years after the event when the trial was already underway. In all likelihood he was told about the information Malibongwe had supplied. Whether Malibongwe told the truth

in his statement we do not know. Either way, Dase was put on the spot to come up with a version, since Malibongwe placed him on the scene. Malibongwe and Vuyo in the meanwhile had disappeared and Sabelo was dead.

[58] There was in my view a double need for caution in relation to Dase's identification of the appellant as one of the shooters. Firstly, he was in that respect a single witness. Second, although one cannot say that he was a participant in the double murders, his presence on the scene as part of the group which confronted the car's occupants, and his subsequent failure to make any report to the police, bring into play the same considerations which call for caution in the case of an accomplice. He would have been able to give a vivid account of the events while changing crucial detail as to the perpetrators.

[59] Although the trial judge correctly identified the principles applicable to the evaluation of single witnesses and accomplices, he failed to apply them properly in assessing Dase's evidence. There were definite shortcomings and defects in his testimony. The trial judge found that he had lied on a major issue, namely the identity of the second shooter. His evidence was hardly 'clear and satisfactory in every material respect' (*S v Mokoena* 1932 OPD 79 at 80). Even if the appellant's palm-print provided corroboration for the appellant's presence at the scene (and I doubt whether in all the circumstances the palm-print proves this beyond reasonable doubt), the palm-print does not provide corroboration as to who the shooter was.

[60] It may be said that the appellant himself did not offer, as an explanation for his palm-print, that he had been on the scene but had only searched the car after others shot the occupants. However it is not unknown for an accused person to try to put as much daylight as possible between himself and the crime. After all, this is apparently what Sabelo did. In a sense, all six men in the group had reason to feel guilty about their conduct. As far as we know, Dase's cooperation required the offer of indemnification in terms of s 204.

[61] I thus think that the trial court misdirected itself in finding that the State proved the appellant's guilt on counts 4 and 5 beyond reasonable doubt. It is thus unnecessary to consider whether, if the appellant were guilty of shooting Mgidi (the

occupant in the front seat), he was also guilty of Mejeni's murder on the basis of the doctrine of common purpose. I simply observe that, since the trial judge did not find that the second shooter made common cause with the appellant in the murder of Mgidi, it does not appear logical to find that the appellant made common cause with the second shooter in the murder of Mejeni. There is no evidence that either of the shooters knew that the other was carrying a firearm. Nothing happened between the first shooting and the second shooting (a space of a few seconds) to draw the appellant into the second shooting.

Count 1

[62] The State's case was that the appellant and Tokota shot Sonwabile outside Jango's Tavern at around 21h00 on the night of Saturday 11 November 2006. The State's case rested on the evidence of Thuliswa, Amanda and Asanda. Thuliswa and Amanda are cousins. Asanda is a friend of theirs. Amanda resided in Sithunzi Street. At that time Thuliswa, Amanda and Asanda were aged 19, 23 and 17 respectively. All of them identified the appellant as one of the two perpetrators.

[63] The three ladies were in each other's company prior to arriving at Jango's Tavern. There were some differences between them as to when they first met up on that day and when they started drinking. Be that as it may, they arrived at Jango's Tavern between 19h00 and 20h00. They sat at a table and drank Hunter Drys. The shooting incident occurred about an hour later (their estimates of time are not likely to have been very accurate). There were differences between them as to precisely where they were sitting at the table immediately prior to the incident.

[64] Thuliswa testified that while sitting at the table she saw her friend Sonwabile standing outside. She went to greet him. She stood on the step chatting to him. She suddenly heard people screaming and heard Asanda shout that she should get away from Sonwabile. She looked back inside but could not see Asanda or Amanda. People in the tavern were running out. She heard three gunshots in rapid succession. She turned back to Sonwabile and saw him falling to the ground. He was barely a metre from her. At the same time she saw the appellant and a second person (X) with firearms. They were about six metres away. The appellant was

pointing his firearm at Sonwabile while X was pointing his skywards. Thuliswa sought refuge next to the dwelling of Amanda's boyfriend, Moses. While hiding there, she saw the appellant and X standing over the deceased. They walked away a short distance and then returned to Sonwabile. She saw them kicking his body and swearing at him.

[65] Thuliswa described the lighting inside and outside the tavern as good. This evidence was not challenged. She testified that she was familiar with the appellant's appearance because she had seen him on previous occasions at the tavern and in the area.

[66] Amanda in her evidence confirmed that Thuliswa went outside to talk with Sonwabile. From where she was sitting Amanda could see Sonwabile through the window but could not see Thuliswa. At this time Asanda was on the dancefloor. Amanda suddenly heard Asanda shouting that Thuliswa should get away from Sonwabile because the appellant and his friend were approaching with guns. Amanda got up and left the tavern. As she went outside she saw the appellant and X with firearms approaching the tavern. She crossed the street to take refuge in Moses' dwelling. As she was about to enter the dwelling she heard the first shot and once she was inside she heard a second and third shot.

[67] Amanda testified that she had known the appellant since he was about 12. He, like her, lived in Sithunzi Street.

[68] Asanda likewise fled the tavern and went to Moses' dwelling. She also saw the appellant and X with firearms outside the tavern.

[69] The post-mortem examination established that Sonwabile had been shot in the head and chest. The brain damage caused by the head wound would have been fatal. The chest shot went through the right ventricle of the heart and perforated the right diaphragm and large lobe of the liver. This shot could also have been fatal. The cause of death was thus one or two gunshot wounds.

[70] The appellant's evidence was that on the night of 11 November 2006 he was at home with his parents in Sithunzi Street. His father's uncle from the Eastern Cape was also there. They watched a video for several hours. He went to bed at around 21h00. The appellant's father confirmed this alibi, stating that he and his uncle went to bed about an hour later. The appellant's father locked the front door (the only entrance to the house) and kept the key with him. According to the appellant's father, the uncle passed away prior to the trial.

[71] As at 11 November 2006 the appellant had just turned 20 (his birthday was on 5 November). It is doubtful that the appellant would have been at home and gone to bed so early on a Saturday night. This does not seem to have been his pattern of behaviour in respect of counts 2, 3, 7 and 8 where his guilt was proved beyond reasonable doubt. On these occasions he was out on the streets and up to mischief on the evenings of Wednesday 7 February 2007, Saturday 24 March 2007 and Thursday 29 March 2007. Furthermore, and although his guilt on counts 4 and 5 has not been proved beyond reasonable doubt, it is probable that he was part of the group at Pholile Park late on the night of Saturday 24 February 2007.

[72] The evidence in relation to count 6 is also of some relevance, even though the appellant was acquitted on that count. The appellant's evidence was that on the evening of Saturday 17 March 2007 he was dropped off at home by one Mashicolo after attending several parties. The appellant and Mashicolo both testified that the appellant's girlfriend was with him and spent the night at the appellant's home. According to the appellant and Mashicolo, the appellant and his girlfriend were dropped off at the house between 20h00 and 21h00 though the appellant's father said it was sometime between 21h00 and 23h00. However the appellant's father testified that he did not know that the appellant was accompanied by his girlfriend or how they got into the house or how the girlfriend was able to leave the next morning without his knowledge. The trial judge observed that the appellant's father 'fell about' when questioned closely as to where the keys were or might have been. Although the judge found that the appellant's guilt had not been proved beyond reasonable doubt, he found the alibi defence to suffer from various implausibilities and rejected it.

[73] More generally, the appellant's correct convictions on counts 2, 3, 7 and 8 demonstrate that his evidence in respect of those counts was dishonest. His evidence in respect of counts 4 and 5 was probably also false. And one knows from the trial judge's findings in respect of count 6 that he found the appellant and his father to have been dishonest witnesses in relation to the alibi on that count. The trial judge and his assessor had the opportunity to observe the appellant and his father in the witness box. It is apparent that the trial court was not impressed with their evidence.

[74] The fact that the appellant and his father lied in respect of other counts does not in itself mean that they were lying in respect of count 1 but it does reflect negatively on their credibility. The alibi in respect of count 1 is not particularly strong. By virtue of the close blood relationship, the appellant's father had motive to protect his son. These circumstances are relevant in assessing whether the State proved its case beyond reasonable doubt. I should add that the trial court also drew attention to other inconsistencies and implausibilities in the evidence of the appellant's father but in fairness to the appellant I do not regard these as particularly significant.

[75] Although none of the three ladies actually saw the appellant and X firing shots, there can be no doubt, if their evidence is accepted, that the appellant and X were the perpetrators. They were seen with firearms immediately before and immediately after the firing of the shots. They were also seen kicking and swearing at Sonwabile (who would have been dead or dying by this stage).

[76] The trial court was alive to various circumstances calling for caution in the evaluation of the evidence of the three eye-witnesses. One of these was that all of them had consumed alcohol and were probably under the influence to some extent. However they were clearly not so drunk that they could not walk, run, dance and converse. The elapse of time (they testified about six years after the shooting) coupled with the consumption of alcohol would explain differences between them on matters of detail such as what and how much liquor they consumed, where they were sitting and so forth. I do not think that discrepancies of this kind show them to have been unreliable or dishonest witnesses on the crucial question, namely whether they saw the appellant with a firearm. What is of particular significance here

is that they were familiar with the appellant's appearance, the lighting was good, they had adequate opportunity for observation and – importantly – had no motive falsely to implicate him. There was no bad blood. Indeed although Thuliswa and Asanda knew the appellant by sight from the area, he did not know them. He confirmed knowing Amanda. He could not suggest any reason why she should have falsely identified him. Neither mistaken identity nor a conspiracy to commit perjury is at all plausible in the circumstances.

[77] A further need for caution identified by the judge related to the conflicting evidence concerning Novosh. This implicates Thuliswa and Amanda. I have already discussed this evidence at some length in relation to counts 4 and 5. Even if Thuliswa and Amanda received improper police encouragement to shield Dase from being implicated in count 1, the fact that they succumbed to such encouragement does not reflect well on their credibility. However on this particular issue there is an explanation for why Thuliswa and Amanda might, when they were recalled, have adjusted their earlier evidence. No similar explanation exists in relation to their identification of the appellant as one of the perpetrators. I cannot fault the trial court's conclusion that the unsatisfactory evidence given by these two witnesses in relation to Novosh does not detract from the reliability of their evidence in relation to the appellant. I should add that the trial court, which had the opportunity to observe them when they initially testified and when they were recalled, said that they made a favourable impression and gave compelling and convincing evidence, the main wrinkle being the Novosh issue.

[78] A third potential circumstance calling for caution related to the docket statements furnished by the eyewitnesses. In Thuliswa's statement, taken the day after the shooting, she named the appellant as one of the perpetrators but did not name the other person as Novosh. This omission does not assist the appellant. In so far as it might bear on Thuliswa's credibility more generally, her evidence was that she indeed named both suspects to the police. This seems inherently plausible, because only a few days later at the police station she pointed out a person as being the Novosh who was with the appellant at Jango's Tavern. She testified that she relayed her account in Xhosa. The written statement, however, was in English. She also testified that the statement was not read back to her and that she was not

required to take an oath. She did not even notice that her statement was in English. The judge with good justification criticised the lamentably poor police work in taking the statements which featured in the case. Although he provisionally allowed Thuliswa's statement to be used in cross-examination, in his judgment he concluded that her purported English statement had not been properly proved. I can find no fault with this conclusion.

[79] In Amanda's docket statement she supposedly named neither of the perpetrators. Like Thuliswa, she was adamant that she gave the police the appellant's first name – she did not know his surname. In her statement, while supposedly not naming the appellant, she described him and said she knew he lived in Sithunzi Street. It is most unlikely in the circumstances that she would not have given his name to the police. In her case, too, the statement was recorded in English whereas she spoke Xhosa to the policeman. The statement was not read back to her. The judge found that the purported statement was not properly proved. I agree.

[80] Since Asanda confirmed that her two docket statements were read back to her and that she thereafter affirmed them under oath, the trial judge found them to have been properly proved. However, he identified obvious police ineptitude in the taking of the statements and considered that the statements carried little weight in adversely affecting her credibility. In reaching this conclusion he inter alia had regard to cases such as *S v Govender & others* 2006 (1) SACR 322 (E) at 324-326 and *S v Mafaladiso & andere* 2003 (1) SACR 583 (SCA) concerning the care to be exercised when impugning a witness's credibility on the basis of a police statement. However the court considered that Asanda was heavily intoxicated and for this reason viewed her account of events with great circumspection. The court placed greater reliance on the evidence of Thuliswa and Amanda. In relation to Thuliswa, the judge said that her evidence was 'the most compelling and clear of the three, to the point that had she been a single witness the court would be satisfied that her evidence was satisfactory in all material respects'.

[81] In his written submissions the appellant's counsel submitted that the trial court misdirected itself in finding Thuliswa to have been a good and credible witness 'despite the fact that she presented a very poor demeanour in the witness box'.

Counsel did not refer to any part of the record in support of the submission and it is not apparent how he could know anything about Thuliswa's demeanour during the trial. Counsel was on firmer ground when he submitted that Thuliswa gave untruthful evidence when she was recalled but this was in relation to the Novosh issue and I have explained why this does not reflect adversely on her evidence implicating the appellant.

[82] In general, the appellant's counsel's submissions in respect of count 1 represented an attack on the cogency of the trial court's judgment on its own terms without reference to the transcript of the evidence or to the exhibits. Our attention was not directed to any evidence which the trial court had supposedly overlooked or incorrectly understood.

[83] In my view, the trial court was not guilty of any material misdirection and I am not satisfied that its conclusion in respect of count 1 was plainly wrong on the record. It follows that the appeal in respect of count 1 must fail.

Sentence on count 1

[84] Because the appellant and X were acting in furtherance of a common purpose, the trial court was obliged to impose life imprisonment unless there were substantial and compelling circumstances to depart from the prescribed sentence. On appeal this court is entitled to reach its own conclusion as to whether substantial and compelling circumstances existed; a finding on this question is not a matter of pure sentencing discretion (*S v GK* 2013 (2) SACR 505 (WCC) paras 5-7; *S v Tafeni* 2016 (2) SACR 720 (WCC) para 8).

[85] The appellant had just turned 20 at the time he committed the murder. He had no previous convictions. He is the oldest of eight children. According to his mother, a primary school teacher, he did well at school, always passing, but had to abandon grade 12 because of frequent epileptic attacks. He subsequently became a student at the Cape Peninsula University of Technology but his studies were interrupted by his arrest in this case. His mother described him as an obedient child

who assisted with housework and with looking after the younger children. He got on well with his family. His father transports schoolchildren for a living.

[86] The appellant has a son and a daughter from different mothers. As at June 2013, when he was sentenced, both children were five years old. Fairly soon after the children were born they were taken in by the appellant's family and have remained in the care of the appellant's mother. The children do not have contact with their biological mothers and do not receive maintenance from them.

[87] The crime was obviously heinous. There is no evidence regarding the motive for the killing though it is apparent from the fact that the appellant and X kicked Sonwabile and swore at him that there must have been some quarrel. Robbery does not seem to have been the motive. Intention was present in the form of *dolus directus* but there was no evidence of premeditation or planning.

[88] The appellant was in custody from April 2007 to October 2007 when he was released on bail. Following several non-appearances he was rearrested in November 2011 and remained in custody until sentenced in June 2013. He thus spent an initial period of seven months awaiting trial and then a further 18 months. It is unclear why the trial only started five and a half years after the appellant's arrest.

[89] According to the prosecutor's *ex parte* submissions the deceased, Sonwabile, was 21 years old. He was still at school and was due to go into grade 9. (This latter detail does not appear to be consistent with his age.)

[90] The approach to the question whether substantial and compelling circumstances exist is the one laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), which has been consistently followed. In terms of that case the factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the crime and the need for effective sanctions. If, after considering all relevant sentencing factors, the court has not merely a sense of unease but a conviction that injustice will be done if the

prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence.

[91] The Supreme Court of Appeal has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or hypotheses (see, eg *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10 and the passages there quoted). In *Malgas* it was said that the lawmaker has ordained that 'ordinarily and in the absence of weighty justification' the prescribed sentence should be imposed. Unless there are 'truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts' (para 25).

[92] In determining whether an injustice would arise from the imposition of the prescribed sentence, the customary sentencing considerations which come into play are the well-known triad comprising the offender, the offence and the interests of society. These three factors in turn require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation. Nevertheless, and in respect of crimes dealt with in the Act, the type of sentence to which these considerations point should not be assessed as if the Act had not been enacted. As was observed by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25 the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion', so that even where there are substantial and compelling circumstances one should expect discretionary sentences to be more severe than before.

[93] The trial judge noted the various circumstances put forward on the appellant's behalf as substantial and compelling circumstances but considered that he could not properly make such a finding. He reasoned thus. In a short space of four and a half months the appellant was instrumental in the murder of three people and the attempted murder of another three. He acted without provocation and with scant motive, conducting a reign of terror with apparent impunity. There was evidence from the complainants in counts 2, 3 and 8 that the appellant had a bad reputation,

something confirmed by the way in which patrons at Jango's Tavern fled in panic when the appellant and his associate were seen approaching with firearms. Sonwabile's post-mortem report showed that the shot to the head was fired from close range. The deceased in count 5 was also shot at point-blank range, whereafter the appellant saw fit to retrieve beers from the car and dish them out. The appellant showed no compassion or remorse. He had the benefits of a close family and a reasonable education. The appellant 'made choices and choices have consequences'. He was a 'very real danger to society and the community'. The murder in count 1 was not an isolated act but a 'relentless pattern'. There was no evidence that alcohol or drugs played any part. The appellant acted 'openly and with callous disregard for the consequences of his actions'.

[94] The appellant's criminal conduct subsequent to 11 November 2006 may bear on the question whether he was a candidate for rehabilitation and on the extent to which he posed a danger to society but it cannot render the murder itself more heinous. I do not think it is right to allow subsequent criminal behaviour to cast too large a shadow backwards over what was the appellant's first offence. More importantly, the sentiments expressed by the trial judge were based on his finding that the appellant was guilty on counts 4 and 5, a finding which will be reversed on appeal. Although the appellant's crime spree remains serious, he will in the event be convicted on only one count of murder.

[95] In my view the trial judge erred in not attaching greater weight to the prospect of rehabilitation. The appellant was a young man. In *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnar JA was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned judge of appeal said that while someone under the age of 18 years could be regarded as naturally immature, the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. In the present case, the appellant had just turned 20. His crime spree, as the trial judge said, lasted four and a half months. The crimes of which he was convicted were difficult for his mother to understand. They seemed so out of character. The appellant came from a stable family and had performed

satisfactorily at school. The fact that he was not able to complete matric due to frequent epileptic attacks would have been a disruptive feature of his life. The picture seems to be one of a young man with reasonable promise having gone badly off the rails for a short period (though it may have lasted longer but for his arrest).

[96] Life imprisonment is the ultimate sentence and should not be lightly imposed. It is the kind of sentence that should be imposed only after due consideration of all the facts and circumstances relevant to sentencing, in particular the life history of an accused, his upbringing, his career if any, his prospects of rehabilitation and, of course, the nature, impact and effect of the offence on the complainant (*S v Mashigo & another* [2015] ZASCA 65 para 26). In *S v Netshivhodza* [2014] ZASCA 145 the accused was convicted of raping a six-year-old girl. He had just turned 20 at the time of the offence. In finding that the trial court erred in concluding that there were no substantial and compelling circumstances, the court emphasised the real possibility of rehabilitation (para 16). Schoeman AJA concluded as follows (para 21, citation of authority omitted):

‘ However it is to be remembered that “... Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound”. I am of the view that a severe sentence is appropriate, taking into consideration all the circumstances of the offence. But the youthfulness of the appellant as a first offender, the time he has spent in custody prior to being sentenced and the possibility of rehabilitation are of paramount importance when assessing the proportionality of the sentence to the offence.’

[97] In *S v Dyantyi* 2011 (1) SACR 540 (ECG) it was said that rehabilitation was not possible in the absence of remorse (para 26). If this statement was intended to convey that a court cannot take the possibility of rehabilitation into account where the accused maintains his innocence, I disagree. In several cases the Supreme Court of Appeal has taken the prospect of rehabilitation into account despite the fact that the accused person pleaded not guilty and maintained his innocence (see eg *S v Nkomo* 2007 (2) SACR 198 (SCA) paras 13-14 and 22; *S v Sikhapha* [2006] ZASCA 73 para 19; *S v Mudau* 2013 (2) SACR 292 (SCA) para 24; *Netshivhodza* supra; *S v Kekana* [2015] ZASCA 194 para 11). Of course, an accused who does not plead guilty and take the court into his confidence is at a disadvantage in

advancing the prospect of rehabilitation as a mitigating circumstance but it would not be in keeping with our constitutional order to hold that the prospect of rehabilitation must be ignored just because the accused, as is his right, maintains his innocence.

[98] In the present case, for reasons I have explained, I think that the appellant's prospects of rehabilitation are not purely speculative even if he only truly comes to terms with his crimes once no further appeal is open to him. He is young and not without ability. He has family support.

[99] Additional factors tilting the balance in favour of a finding of substantial and compelling circumstances are that the appellant has two young children and that he spent a considerable period in custody awaiting trial. While an enforced separation from his children for some years is unavoidable in the light of his serious offences, a sentence of life imprisonment would seem to rule out any prospect of his forming a relationship with his children or caring for them financially.

[100] I consider that a sentence of 20 years' imprisonment would be fitting. Because the life sentence has fallen away, it is necessary to consider to what extent if any the other periods of imprisonment should be ordered to run concurrently with the sentence on the first count. Complete concurrence is out of the question; the crimes making up counts 2 and 3, count 7 and count 8 were unrelated to each other and to the crime in count 1. I consider that an effective imprisonment of 25 years would be appropriate.

[101] I would thus make the following order on the appeal:

(a) The appeal against the appellant's conviction on counts 4 and 5 is upheld. There is substituted for the said conviction an acquittal on those counts.

(b) Save as aforesaid, the appeal against conviction is dismissed.

(c) The appeal against the sentence of life imprisonment imposed in respect of count 1 is upheld. The said sentence is set aside and replaced with one of 20 years' imprisonment, antedated to 6 June 2013.

(d) In consequence of the order in (c), the sentences imposed by the trial court in respect of counts 2, 3, 7, 8, 9 and 10 are revised to the following extent:

- (i) The sentence of one year's imprisonment imposed on count 2, and three years out of the five years' imprisonment imposed on count 3, shall run concurrently with the sentence on count 1.
- (ii) Three years of the five years' imprisonment imposed in respect of count 7 shall run concurrently with the sentence on count 1.
- (iii) Four years of the five years' imprisonment imposed in respect of count 8 shall run concurrently with the sentence on count 1.
- (iv) The sentences imposed in respect of counts 9 and 10 shall run concurrently with the sentence on count 1.
- (v) For the avoidance of doubt, the intended effect of the aforesaid orders is that the appellant's effective period of imprisonment on all counts shall be 25 years.

ERASMUS J:

[102] I concur and it is so ordered.

SAMELA J:

[103] I concur.

ERASMUS J

SAMELA J

ROGERS J

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