

IN THE HIGH COURT OF SOUTH AFRICA
(CIRCUIT LOCAL DIVISION FOR THE EASTERN LOCAL DISTRICT)

Case No. CC 25/2010

In the matter of:

THE STATE

versus

JIKA ELVIS MLOMBO

JUDGMENT

MEYER, J

[1] The accused, Mr Jika Elvis Mlombo, has been arraigned for trial on an indictment containing charges of the murder of the late Mr Timothy Daklaas Mashego ('the deceased') (count 1), of the robbery of the deceased of a 9mm parabellum calibre CZ model 75 compact semi-automatic pistol with serial number A4754 (count 2), of the attempted murder of Mr Makhobeni Mkhosi Dlamini (count 3), of the unlawful possession of the deceased's pistol and also a 9 mm parabellum calibre vector model Z88 semi-automatic pistol with serial number obliterated (count 4), and the unlawful possession of eight 9mm parabellum and three 9mm bullets

(count 5). All the offences are alleged to have been committed on 3 September 2009 at or near Kabokweni in the district of Kabokweni.

[2] Adv Mnisi appears for the state and adv Mtshweni for the accused. The accused pleaded not guilty to all the charges. He was not asked to make a statement indicating the basis of his defence nor was one offered on his behalf.

[3] During the course of this trial the state wished to introduce in evidence certain pointings out and a warning statement that had allegedly been made by the accused. A trial-within-this-trial was held to determine the admissibility of the disputed pointings out and statement. When I gave the rulings on their admissibility at the conclusion of the trial-within-this-trial, I indicated that the reasons for the rulings would be given when judgment in the main trial is given. The reasons had been prepared before the rulings were made. Such reasons are first given in the paragraphs that follow, whereafter I return to the main trial.

[4] The trial-within-this-trial was held to determine the admissibility of: (a) a pointing out that had allegedly been made by the accused on 3 September 2009 to *inter alia* Capt BP Mdaka and to Cst JT Baloyi, which resulted in the alleged finding of two firearms, ammunition, a blue overall top, and a brown bag; (b) pointings out that had been made by the accused to Capt (presently Col) C Mabasa on 4 September 2009, from 09:45 am, of and at the scene where the incident had taken place; and (c) a warning statement that had been made by the accused to Supt TM Pule at Kabokweni SAPS on 5 September 2009, at about 12:30 pm. I should mention that the determination of the admissibility of the warning statement was added to the trial-within-this-trial during the course of the state case with the consent

of all the parties concerned and the accused was invited to have any state witness who had testified prior thereto, recalled.

[5] The state and defence counsel were *ad idem* that the disputed pointing out relating to the firearms and other items amounts to admissions and that the disputed warning statement to a confession. I accordingly accepted such labelling. I was informed by the state counsel that the disputed pointings out of and at the scene of the incident amount to admissions and the defence counsel submitted that they do not amount to admissions nor to a confession. I accepted for the purpose of this trial-within-the-trial that they amount to admissions.

[6] The state must accordingly discharge the *onus* of proving beyond reasonable doubt the requirements stipulated in s 219A of the Criminal Procedure Act 51 of 1977 for the admission in evidence of all the disputed pointings out and also that they had not been obtained in an unconstitutional manner. The disputed statement may not be admitted, unless it is proved beyond reasonable doubt to have been made by the accused freely and voluntarily, while he was in his sober senses, and without having been unduly influenced thereto (the requirements of s 217 of the Criminal Procedure Act). It must also, in terms of s 35 of the Constitution of the Republic of South Africa, be excluded if it was obtained in a manner that violates any right in the Bill of Rights and if its admission would render the trial unfair or otherwise be detrimental to the administration of justice.

[7] The defence counsel, on behalf of the accused, objected to the admissibility of the alleged pointing out relating to the firearms and other items on the grounds that the accused did not make such pointing out and that he had been tortured. The admissibility of the pointings out of and at the scene of the incident were objected to

on the grounds that they were not freely and voluntarily made, because the accused had been assaulted and tortured by the police. The admissibility of the warning statement was objected to on the grounds that the accused did not make it freely and voluntarily, because his making thereof had been preceded by assaults and torture upon him while he was in custody and he had been threatened that he would be killed and that he would end up dying in the cells if he did not cooperate. Such assaults, torture, and threat were alleged to have induced him into making the warning statement. The accused confirmed his grounds of objection.

[8] The state, upon whom the *onus* rests to establish the admissibility of the pointings out and of the statement, led the evidence of Cst JT Baloyi, Capt BP Mdaka, Cst HE Nyati, Cst. JJ Shongwe, Supt TM Pule, Col C Mabasa, Cst DD Sanderson, and Col TB Mambame. Cst Baloyi was recalled for further cross-examination at the request of the defence. The accused elected to testify.

[9] I interpolate to mention that information relating to what had allegedly been said and pointed out by the accused prior to and on the occasion when the firearms and other items were allegedly found had been testified about and disclosed before a determination of the admissibility thereof was made. Cst Baloyi was called as a witness in the main trial. He testified about alleged verbal admissions and a pointing out which the accused had made and which resulted in the finding of *inter alia* the firearm that had allegedly been used in the killing of the deceased. I was informed by the defence counsel that the requirements of s 219A of the Criminal Procedure Act and those of the Constitution relating to the admissibility of admissions by an accused person were not in dispute and that the accused had no objection to such evidence being led. I was informed that the accused denies that he was the person who accompanied the police when the alleged pointing out was made and that the

dispute between the parties was whether or not the accused was the person who had accompanied the police officers and who had made the alleged pointing out. I accordingly did not at that stage order that a trial-within-a-trial be held. But, when Cst Baloyi was cross-examined, it was put to him that he and other members of the SAPS assaulted and tortured the accused severely after he had been arrested and they insisted that he knew the whereabouts of the firearms. It was accordingly apparent that the requirement of voluntariness was in issue. The fact that an accused says that he was not the person who had made the pointing out does not mean that a trial-within-a-trial does not have to be held. I raised the matter with counsel and it was thereafter agreed that a trial-within-a-trial should be held *inter alia* in order to determine the admissibility of the disputed pointing out relating to the firearms and other items. It was also agreed that the evidence of Cst. Baloyi should form part of the evidence at the trial-within-this-trial. I will obviously disabuse my mind of the prejudicial evidence if it is held inadmissible.

[10] Cst Baloyi testified that, as a result of information received, he and other police officers had first gone to the scene of the incident and from there they went around in search of the suspect. They received information that Cst Shongwe and Cst Mkumbane had already arrested the suspect and had taken him to the Kabokweni SAPS. Cst Baloyi found the accused in his office and Cst Mkumbane was with him. Cst. Mkumbane left, because he needed to attend court. Cst. Baloyi testified that he was in the company of constables Mkonza, Ngumane and Nyati. This evidence of Cst Baloyi was not placed in issue when he was cross-examined on behalf of the accused. Cst Nyati testified that when he arrived, presumably at the place where the accused was found, he had already been arrested. Cst Nyati testified that he was also present in the vehicle in which the accused was thereafter

taken to the police station. It was put to Cst Nyati that the accused had been tortured and assaulted in that vehicle, which Cst Nyati denied. Cst Shongwe testified that a person who had been following the accused led him and Cst. Mkumbane to where the accused was found. Cst Shongwe arrested him. The three of them got into the front of the SAPS open pick-up vehicle that Cst Shongwe and Cst Mkumbane used at the time. They took the accused directly to the CID offices at the Kabokweni SAPS. He was taken to the office of Cst Baloyi. It was put to Cst Shongwe that the accused's version is that he had been taken to the police station in a Combi vehicle and that he was assaulted in that vehicle by police officers who took him to the police station. This was denied by Cst Shongwe and he also denied that Cst Nyati accompanied them. It was also put to Cst Sanderson that he had at all times been present when the accused was tortured since his arrest and that the accused was tortured inside a Combi vehicle after he had been arrested. Cst Sanderson denied that he was present when the accused was arrested.

[11] The accused testified that he was arrested between 8:00 – 9:00 am on 3 September 2009 by two police officers who got out of a white Combi vehicle. Immediately upon his arrest he was taken in that Combi to a place where he was told somebody was killed. There were a number of other police officers present in that vehicle. They were altogether about 7 – 10 persons. He was then taken to a certain place where he was told that somebody had been following him. From there he was taken to Cst Baloyi's office at the Kabokweni SAPS. The accused did not testify in chief about any assault upon him from the time of his arrest until the stage when he was at the Kabokweni SAPS in the office of Cst Baloyi. His counsel pertinently asked him whether it was his evidence that the assaults upon him had started at the police station, which he confirmed. Yet, it was put to some of the state witnesses

that the accused was tortured and assaulted by police officers in a Combi vehicle immediately after he had been arrested and before he was taken to the police station. The accused adjusted his evidence when he was cross-examined and again maintained that he was assaulted and that a tube was placed over his head immediately after he had been arrested and before he arrived at the police station.

[12] It is common cause that the accused was taken to Cst Baloyi's office at the Kabokweni SAPS. Cst Baloyi testified that he introduced himself and the other three constables in his company to the accused. Cst Baloyi asked the accused whether he knew anything about the incident. The accused did not reply. Cst Baloyi left the office for about 5 minutes. Upon his return, Cst Baloyi informed the accused that he was going to interview him and he informed him of his relevant constitutional rights. The accused expressed his willingness to cooperate and to show Cst Baloyi where the firearms that had been used in the incident were hidden. This was confirmed by Cst Nyati when he testified. Cst Baloyi's interview with the accused and that he informed him of his constitutional rights were not placed in issue when Cst Baloyi and Cst Nyati were cross-examined. It was put to Cst Baloyi that the accused denies that when he was questioned he agreed to take Cst Baloyi to where the firearms were hidden.

[13] Cst Baloyi testified that he told Capt Mdaka, who was not part of the 'interviewing team', that the accused wished to make a pointing out of the firearms, and he requested Capt Mdaka to 'accompany' them. This was confirmed by Capt Mdaka, who testified that he was not involved in the investigation of this case and he had not known the accused before. Capt Mdaka testified that Cst Baloyi informed him that the suspect wished to make a pointing out of firearms, and, because Capt Mdaka was a commissioned officer, was requested to accompany them to ensure

that the suspect was making the pointing out voluntarily. Capt Mdaka, Cst Baloyi, and Cst Nyati each testified that they and constables Mkonza and Ngumane and the accused travelled in a Combi vehicle to the place where the accused had wished to make the pointings out. Capt Mdaka testified that he informed the accused of his constitutional rights before they had left. The accused elected and expressed his willingness to proceed with the pointing out. Capt Mdaka informed him that he was a captain and that if anything untoward happened to him he should be at liberty to report such to him. Capt Mdaka did not use the customary *pro forma* for the purpose of the pointing out, he did not take notes at the pointing out, and he did not arrange for a photographer to take photographs of what had been pointed out. Capt Mdaka was clearly inexperienced in the conducting of pointings out. He has been a member of the SAPS for eighteen years and a captain for the past three years. He was not involved with crime investigations. He had not conducted any pointings out before. He only once observed a pointing out where a photographer was also not used. Capt Mdaka viewed his function as that of a commissioned officer who was required to accompany the police officers and the accused in order to ensure that the accused was making the pointing out voluntarily. Cst Baloyi testified that the services of a commissioned officer from a different station could not be obtained and that is why Capt Mdaka, who was also stationed at the Kabokweni SAPS but in a different unit, was requested to conduct the pointing out.

[14] Capt Mdaka testified that they travelled to Pola Park. Cst Ngumane was the driver of the vehicle. Capt Mdaka, Cst Baloyi, and Cst Nyati each testified and corroborated each other that the accused gave the directions to where they should travel. From a certain point the accused directed them on foot with Cst Baloyi and Cst Nyati walking next to him and Capt Mdaka following at a distance of about one

and a half metres (according to the evidence of Capt Mdaka). Capt Mdaka, Cst Baloyi and Cst Nyati each testified that the accused then pointed out a spot where Cst Baloyi should dig for the firearms. Cst Baloyi (according to Cst Nyati), or constables Baloyi and Nyati (according to Capt Mdaka and Cst Baloyi), then dug. Cst Baloyi testified that they dug about 20 centimetres deep in loose sand. They came across a blue overall top (according to Capt Mdaka and Cst Baloyi), or a greenish one (according to Cst Nyati). All three officers testified that wrapped inside the overall top was a brown bag and inside it two firearms. Cst Baloyi described the bag as similar to a toiletries bag. He testified that two 9 mm pistols were found inside the bag. Capt Mdaka described the firearms as a CZ with its serial number intact and a 9 mm with its serial numbers obliterated. Cst Baloyi could recall that one of the two firearms had a serial number, but he was unable to say whether or not the other pistol had one. The three officers each testified that they thereupon returned to the Kabokweni SAPS. Capt Mdaka went back to his office and had no further involvement in the matter. Cst Baloyi ascertained that there were bullets in the firearms. This was confirmed by Cst Nyati. Cst. Baloyi booked the firearms and ammunition into the SAPS 13. Cst Baloyi testified that the place where the firearms were found was about 1½ kilometres from the place where the deceased had been shot and about 20 – 30 metres from where the accused had been arrested.

[15] It was put to Capt Mdaka, to Cst Baloyi, and to Cst Nyati that the accused denied that he made a pointing out of or that he took them and the other police officers to the place where the firearms were found. Capt. Mdaka testified that he and the accused were in each other's presence for about three hours and he was adamant that he did not err in identifying the accused as the person who had made the pointing out which resulted in the finding of the firearms and ammunition. Cst.

Baloyi testified that he was in the presence of the accused altogether for about 5 – 6 hours, and he too was adamant that it was the accused who had made the pointing out. Cst Nyati also insisted that no one else but the accused accompanied them. It was put to Cst Baloyi that the accused's version is that Cst Baloyi took him to the place where the firearms had been found. The accused contradicted this version when he testified and denied this.

[16] The accused testified that Cst Baloyi told the other police officers who were present in his office that 'they' had found the firearms. Cst Baloyi and the other police officers left the office and returned with 'the firearm'. The accused testified that he did not see how many firearms were brought by them since he was handcuffed and made to lie on the floor. The accused's evidence in this regard contradicted his version that was put to the state witnesses. It was put to Cst Baloyi that the police officers showed the accused a bag with the firearms after they had found it and to Capt Mdaka also that the police officers showed him the firearms.

[17] The accused testified that Cst Baloyi told him that he had heard that there were two persons involved in the matter and he wanted to know from the accused where the other person was. Cst Baloyi took the accused's cell phone and scrolled it down. He called a person with the accused's cell phone and said to the accused that that was the other person. The accused's evidence in this regard, however, was not foreshadowed in the cross-examination of Cst Baloyi or of Cst Nyati. The accused also contradicted this evidence when he was cross-examined. He then testified that his cell phone was taken immediately after his arrest and he could not remember whether it was scrolled down on the way to or at the police station. He also said that this event had happened at the time when Cst Baloyi switched the cell phone off in order to book it into the SAP 13.

[18] In his evidence in chief the accused testified that after Cst Baloyi had called a person with the accused's cell phone, he and the other police officers tortured and assaulted him by kicking him, hitting him with open hands, and by placing a tube over his face to prevent him from breathing. I have mentioned that the evidence of Cst. Baloyi that he was in the company of constables Mkonza, Ngumane and Nyati were not placed in dispute when he was cross-examined. Cst Baloyi's evidence in this regard was also corroborated by that of Cst Nyati. It was further not suggested to either Cst Baloyi or to Cst Nyati that Cst Sanderson was also present in the office when the alleged assaults upon and torture of the accused occurred. Yet, when Cst Sanderson was cross-examined, it was put to him that he was present with Cst Baloyi and Cst Nyati at the police station when the accused was tortured. Such was subsequently also the evidence of the accused. The accused further testified that Col Mambame arrived and he asked the police officers to take the accused to the cells. It was not put to Col Mambame that he attended at the office where the accused was tortured. On the contrary, Col Mambame was not cross-examined.

[19] The accused further testified that he was taken to the cells and locked up in solitary confinement. He was again tortured in the cells. The police officers took a dust bin and filled it with water. He was handcuffed from behind and his head was placed inside the dust bin with water. But, under cross-examination, the accused said that this incident happened inside a garage outside the cells where the bin had already been in place and water had already been inside the bin. The accused testified that he was again taken to Cst Baloyi's office during the course of that evening for further torturing. His hands were placed together in an iron rod and his body was hanging from it and the police officers called this method of torture '*a braai stand*'. He was thereafter taken back to the cells and again locked in solitary

confinement. There he was again tortured by means of the tube which the police officers placed over his head. Constables Sanderson, Baloyi and Bongani told him never to tell any other police officer that he had been tortured and he was threatened to be taken in a Combi vehicle to an open veld and shot if he did. They warned him that they would return during the night. The accused testified that constables Sanderson and Baloyi had said to him that they wanted information as to why the deceased was killed during the torturing of him on 3 September 2009.

[20] The accused's evidence about these events on 3 September 2009 essentially emerged when he testified. Most of the material aspects of his evidence, such as the different occasions when he had allegedly been tortured and assaulted, the placing of his head in a dust bin filled with water, the 'braai stand' method of torturing used upon him, and the threats made to him, were not foreshadowed in the cross-examination of the State witnesses, and particularly that of Cst Sanderson, of Cst Baloyi, and of Cst Nyati. It was merely put to Cst Baloyi that he and other police officers tortured the accused severely after he had been arrested in order to compel him to tell them where the firearms were hidden and for him to confess to the killing of the deceased. Cst Nyati was only confronted with the alleged torturing of the accused in the Combi vehicle. It was put to Cst Sanderson that the accused had been tortured in the Combi vehicle by the placing of a tube over his head and that Cst Sanderson was present with Cst Baloyi and Cst Nyati when the accused had been tortured at the police station.

[21] The accused testified that the last thing that had happened to him on 3 September 2009, was that police officers who did not testify in the trial-within-this-trial arrived at his cell late that night and they took him to the court yard where they tortured him by placing a tube over his head. He testified that these officers smelt of

alcohol and they told him that he '*...was the one who killed the deceased.*' This evidence contradicted the accused's version that was put to Cst Sanderson that he was present whenever the accused was tortured.

[22] Cst Sanderson, who is the investigating officer, testified that he had no involvement in this matter until the case docket was handed to him at about 07h30 on 4 September 2009. The commanding officer, Capt Mnisi, informed Cst Sanderson that the accused had wished to make pointings out at the scene of the crime. Cst Sanderson booked the accused out of the cells and took him to an office where he introduced himself to the accused as the investigating officer. Cst Sanderson enquired from him whether he was still willing to make pointings out at the scene of the crime, which the accused confirmed. Cst Sanderson informed him that he was not compelled to make pointings out and he informed him of his relevant constitutional rights. Cst Sanderson informed Capt Mnisi of the accused's willingness to still make the pointings out. Capt Mnisi had already on 3 September 2009 made the necessary arrangements with Capt Mabasa to conduct the pointings out. Col C Mabasa, who was a captain at the time and stationed at Bushbuck Ridge SAPS, confirmed this. He testified that Capt Mnisi requested him on 3 September 2009 to conduct a pointing out as an independent commissioned officer. He agreed.

[23] It is common cause that Col Mabasa attended at the Kabokweni SAPS on 4 September 2009. Cst Sanderson testified that he signed the occurrence book entry relating to the booking out of the accused from the cells for the purpose of the pointings out that were to be undertaken by Col Mabasa. Cst Sanderson testified that he was informed that he was not permitted to be involved in the interview and pointings out. The accused testified that Cst Sanderson told him to co-operate with Col Mabasa and he agreed, because he had been assaulted and because the police

officers had shown him the scene where the pointings out were to be conducted before.

[24] Col Mabasa testified that he interviewed the accused in an office from 09h45. An interpreter, Cst ND Mduduzi, was arranged and present, but his services were not required since the accused informed Col Mabasa that he knew more than eleven South African languages and he was satisfied for the interview to be conducted without the aid of an interpreter. Col Mabasa testified that the accused was fluent in English, Shangaan, and Seswati. The accused's proficiency in Shangaan was, according to Col Mabasa, even better than his own. There were no communication problems between them. Col Mabasa testified that he asked the accused questions of a general nature, such as where he went to school, before he commenced with the interview in order to make the accused feel at ease. Col Mabasa used a *pro forma* for the purpose of the interview (exhibit 'G'). Col Mabasa introduced himself to the accused as a captain from the Bushbuck Ridge SAPS and he explained to him that he was not the investigating officer and that he knew nothing about the case. He showed the accused his appointment certificate. Col Mabasa worked through the *pro forma* with the accused. He read it in English and interpreted it for the accused into Seswati. Col Mabasa also spoke Shangaan. On occasion the accused responded in English. Col Mabasa ensured that the accused understood what had been read and explained to him. He recorded the accused's replies on the form in English. Before going over to a next page the accused signed the page that they had completed and his thumb print was also placed thereon. It appears from the form and from Col Mabasa's evidence that the accused's rights were read and explained to him, that he confirmed that he understood them, and that he elected not to exercise any of the rights. Col Mabasa recorded that the accused's clothing, his

appearance, and his demeanour were good, and that he was cooperative. Col Mabasa testified that he inspected the accused's body for injuries. There were none and the accused did not appear to him to be a person who had been assaulted. Col Mabasa also asked the accused whether he would like to be taken to a hospital and be examined by a medical doctor. He also showed the accused a J88 form. The accused informed him that he was fine and did not wish to be medically examined. Col Mabasa noted the accused's response on the *pro forma* that he declined the opportunity afforded to him to be medically examined and he indicated that he had no problem and wanted go ahead with the pointing out as soon as possible. Col Mabasa explained to the accused that he had nothing to do with the investigation of this case and that the accused had nothing to fear of him. If he had been forced, threatened or assaulted in any way to make a statement or point out anything, Col Mabasa was able to assist him and, if necessary, arrange protection for him against any harm. The accused's response as recorded by Col Mabasa was that he did not have any problems. It further appears from Col Mabasa's evidence and the replies of the accused as recorded on the form that he was willing to make pointings out, that he was not in any way assaulted or threatened or induced to make the pointings out, and that no promises were made to him that induced him to make the pointings out. It also appears that the accused informed Col Mabasa that he had no injuries, bruises, wounds or scars.

[25] Col Mabasa, Cst ND Mduduzi (who was assigned to be the interpreter), Cst Sigudla (the driver), Cst Shilowane (the photographer), and the accused travelled to the place where the pointings out were to be conducted after the initial interview had been completed. The photographer travelled in his own car. The accused gave the directions. They thereafter returned to the Kabokweni SAPS. Col Mabasa followed

the same methodology as during the initial interview. He again asked the accused whether he would like to be examined by a doctor. The accused again declined the opportunity afforded to him. Col Mabasa noted the accused's responses in Part 4 of the *pro forma*. In terms thereof the accused *inter alia* expressed his satisfaction that what he had pointed out and said had been noted correctly and that every word was from his own mouth. Photographs were *inter alia* taken of the accused at the time of the initial interview and upon his return after the pointings had been completed (exhibit 'I').

[26] It was pertinently put to Col Mabasa that the accused did not dispute that Col Mabasa explained to him his rights prior to the making of the pointings out and that the accused's reason for having agreed to make the pointings out was because he had prior thereto been assaulted, tortured, and threatened by Cst Sanderson and his colleagues and that he was afraid of them. A few aspects of the evidence of Col Mabasa was disputed when he was cross-examined. It was denied that the accused also responded in English and it was put to Col Mabasa that the accused only responded in Seswati. It was put to Col Mabasa that he completed the form and gave it to the accused to sign. Col Mabasa testified that certain answers that he noted on the form as '*no at all*' were the *verbatim* answers of the accused. It was put to him that the accused never answered '*no at all*' and my understanding of Col Mabasa's evidence is that he conceded that such was rather his own interpretation of the accused's answers.

[27] When he testified, the accused denied that he had told Col Mabasa that he understood English, Shangaan and Seswati or that he had told him that an interpreter was not needed. The accused testified that he did not know Shangaan nor did he have a proper command of English. He testified that Col Mabasa only

communicated to him in English and Shangaan and that he spoke only in Seswati to Col Mabasa. He testified that he and Col Mabasa did not always understand each other. He testified that he '*was concentrating on his injuries*' and did not care about what Col Mabasa was saying to him. Under cross-examination the accused testified that Col Mabasa was in a hurry. He denied that Col Mabasa afforded him the opportunity to be medically examined. He denied that he signed the document and placed his thumb prints thereon in the presence of Col Mabasa. He testified that Cst Sanderson subsequently gave him the documents to sign. The accused's evidence in this regard was not foreshadowed in the cross-examination of Col Mabasa and is irreconcilable with his unchallenged evidence. The accused's denial of particularly his proficiency in English is patently false with reference to the unchallenged evidence of Supt Pule about his proficiency.

[28] The accused testified that once the pointings out had been completed he was handed to Cst Sanderson, who enquired from him how it went and Cst Sanderson threatened him that if he had done 'anything wrong' at the pointings out another person would be conducting another one and he would continue to be tortured. He was thereafter taken back to the cells. This evidence of the accused was not foreshadowed in the cross-examination of Cst Sanderson.

[29] The unchallenged evidence of Cst Sanderson is that he again booked the accused out from the cells at about 13h00 after the pointings out had been completed in order to obtain his identity document for verification purposes and to confirm his residential address for the purpose of bail. Cst Sanderson and the accused, accompanied by W/O Duma and Cst Mhlombo, travelled in a SAPS Combi vehicle to Pienaar Trust, which is a residential area where the accused resided. Const Sanderson's unchallenged evidence is that the case was not discussed on

this occasion. The accused, however, testified that *en route* to his place of residence the Combi vehicle was stopped and Cst Sanderson ordered that he got out. Cst Sanderson demanded that he told the truth otherwise he would be shot, left there, and they would say that he attempted to escape. Cst Sanderson demanded that he told them whatever he knew about the case. Cst Sanderson then told him that they would not shoot him and that they would put him in the cells alive if he tells his family that he had shot the deceased. When they returned to the Kabokweni SAPS the accused was given a document containing his rights. He was told by Cst Sanderson and by Cst Baloyi that he was not going to say anything from that moment on. They were the ones who would do any talking. Cst Sanderson told him that he had received information that the accused was the one who had killed the deceased and that he had been hired to do so. Again, the accused's evidence was not foreshadowed in the cross-examination of Cst Sanderson or of Cst Baloyi and is irreconcilable with the unchallenged evidence of Cst Sanderson about this occasion.

[30] Cst Sanderson testified that once they had returned from the accused's residence he asked the accused whether he would be willing to make a confession to a magistrate. He was informed by the accused that he did not wish to make one to a magistrate, because he did not trust the Kabokweni magistrates. Cst Sanderson explained to him that he could also make one to a police officer with the rank of captain or higher. He thereupon informed the accused of his relevant constitutional rights. The accused confirmed to him that he understood his rights and he expressed his willingness and he agreed to make a statement to a police officer from another police station who did not know anything about the case. The evidence of Cst Sanderson relating to this occasion was not placed in issue.

[31] Cst Sanderson testified that he contacted Supt TM Pule, who was stationed at the SAPS Provincial Office in Nelspruit, and he requested her to assist in the taking of a statement from the accused. She agreed to assist and indicated that she would be available the next day, which was 5 September 2009. His evidence on this aspect is corroborated by that of Supt Pule. She testified that she had been a member of the SAPS since 1986 and a superintendent since 2005. She was not involved in the investigation of this case. Cst Sanderson testified that he revert to the accused and informed him of the arrangements which he had made.

[32] The accused testified that Cst Sanderson attended at the cells on 5 September 2009. He told the accused that Supt Pule would be taking his statement and he demanded that he cooperate, because he, Cst Sanderson, told him that he would also be present. The accused agreed to cooperate. The accused further testified that Cst Sanderson told him that if he would fail to give Supt Pule *'the right statement'* it would be torn and re-written as the police officers wished it to read. The accused testified that Cst Sanderson told him what he should say to Col Pule. Cst Sanderson, Cst Baloyi and another police officer assaulted him *'a little bit'* with their open hands before he was taken to Supt Pule, which assault served as a reminder to him of his obligation to comply in making a statement. The accused's evidence in this regard was not foreshadowed in the cross-examination of Cst Sanderson, of Cst Baloyi, or of Cst Nyati. What was put to Cst Sanderson is that prior to the accused having made the statement to Supt Pule, Cst Sanderson demanded that he confess to the commission of the offence in question by threatening him that he would be taken back to the cells where Cst Sanderson would torture and end up shooting him. It was not suggested to Cst Sanderson that he was the author of the statement which the accused was told to make to Supt Pule.

[33] Cst Sanderson testified that he showed Col Pule an office which she could use for the purpose of the interview. Supt Pule informed him that he was not permitted in the vicinity of the interview. Cst Sanderson booked the accused out for the purpose of the statement. He testified that by booking the accused out he accepted the responsibility for the accused. Most of the other police officers were not prepared to take this responsibility in fear that the accused might escape given the charges against him and that disciplinary action might be taken against the responsible officer if an accused person escapes. This explanation is plausible and it is to be noted that Cst Sanderson was also the officer who booked the accused out for the purpose of his interview with Col Mabasa. Cst Sanderson testified that he did not fetch the accused from the cells nor did he take him to Supt Pule. He left the police station. His evidence on this aspect is corroborated by that of Supt Pule. She testified that Cst Sanderson gave her the keys of an office which she should use for purposes of the interview. She told him that he was not needed at the interview. She testified that police officers on duty in the charge office brought the accused to her.

[34] The accused testified that Cst Sanderson and Cst Baloyi took him to the office that was used by Supt Pule for the purpose of the interview. They entered the office with the accused. Other police officers were waiting outside the office. Supt Pule told Cst Sanderson to remain in the office, because she did not trust the accused. The accused testified that Cst Sanderson was going in and out of the office during his interview with Supt Pule. It was, however, never suggested to Cst Baloyi when he was cross-examined on behalf of the accused that he was one of the officers who took the accused into the office which was used by Supt Pule. The accused's evidence is also in conflict with his version that was put to Supt Pule that Cst Sanderson and his colleagues stood outside the office while she interviewed the

accused. The accused's evidence in this regard is in conflict with Supt Pule's unchallenged evidence that Cst Sanderson did not enter the office prior to the interview and his evidence that Supt Pule requested Cst Sanderson to remain present because she did not trust the accused was also not put to her when she was cross-examined on behalf of the accused.

[35] Supt Pule testified that she did not know the accused. She used a prescribed *pro forma* for purposes of the interview (exhibit 'F'). She recorded on the *pro forma* that the interview commenced at 12h30 on 5 September 2009. Supt Pule introduced herself to the accused and showed him her appointment certificate. She explained to him the purpose of the interview. The accused agreed for the interview to be conducted in the Seswati language. Supt Pule worked through the *pro forma* with the accused. She read it to him in English and interpreted it for him into Seswati. She recorded his responses in English. She also gave the form to the accused to read, because he told her that he was educated and had passed matric. She read and explained his constitutional rights to him, which he confirmed he understood. He elected to make a statement and he informed her that he did not wish to consult with a legal practitioner before making the statement. The accused told her that he had no injuries, that he was not threatened, assaulted or influenced to make the statement. He appeared to her of sound mind and he did not seem to be under the influence of liquor or any other intoxicating substance or in a state of shock. She wrote down his statement. The statement was read by the accused and he confirmed that he understood everything and that the contents thereof was true and correct. She and the accused signed every page of the document. Upon completion of the interview, Supt Pule contacted Cst Sanderson, and when he arrived, handed the accused's statement to him. The accused was no longer

present. Cst Sanderson and Supt Pule corroborated each other's evidence on this aspect.

[36] Col Pule's evidence was essentially not challenged or disputed by the accused when he testified in the trial-within-this-trial. The accused confirmed that Col Pule explained his rights to him and that he understood them. The accused's version is that he had been assaulted, tortured and threatened prior to making the statement to Col Pule and such induced him into making it, which he otherwise would not have done. The accused's evidence that he was not the author of the statement that he made to Col Pule since its contents was dictated to him by and came from Cst Sanderson only emerged when the accused testified and was not foreshadowed during the cross-examination of Cst Sanderson or of Col Pule. The evidence of the accused on this aspect is an obvious afterthought and fabrication.

[37] Col TB Mambame testified that he personally attended at the Kabokweni SAPS cells at 07h00 on 4 September 2009. There were twenty two persons detained in the cells at the time. He personally enquired from the detainees whether they had any complaints. The accused was present. Not one of the detainees raised any complaint to him. Col TB Mambame also referred to various occurrence book entries wherein it was recorded that the accused raised no complaints to the police officers who visited the cells at the time when he was detained. The probative value of the information recorded in such entries, however, depends on the credibility of the police officers who visited the cells and no application that the hearsay evidence be admitted in the interests of justice in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 was made on behalf of the state. Such evidence is accordingly disregarded. The undisputed evidence of Cst Sanderson, however, is that the accused never laid any complaint or charge against any member

of the SAPS. The accused also conceded that he had until this day not laid any complaint or charge against any member of the SAPS. His reasons for not having requested the assistance of even his own counsel in pursuing the matter are not plausible.

[38] The accused was a most unimpressive witness and his evidence on the disputed issues untruthful and unreliable throughout. He was often evasive in answering questions during cross-examination or he adjusted his evidence when the shoe pinched. There were material contradictions in his evidence and between his evidence and what had been put by his counsel to State witnesses. The accused's evidence about the events that followed upon his arrest essentially emerged when he testified. Most of the material aspects of his evidence were not foreshadowed during the cross-examination of the State witnesses. The accused's evidence that he was induced to make the pointings out and the statement as a result of torture, assaults, and threats by and at the hands of members of the SAPS, and that the contents of the statement which he made to Col Pule had been dictated to him by and had come from Cst Sanderson, is on the totality of the evidence, I am quite satisfied, not reasonably possibly true.

[39] The State witnesses were on the totality of the evidence credible witnesses and their evidence reliable. Each one's evidence was coherent and satisfactory in all material respects. They corroborated each other on material aspects. There were a few unsatisfactory features to their evidence, *inter alia* relating to the issue whether or not the accused was taken to the police station in a Combi vehicle after he had been arrested, whether or not other police officers also accompanied them from the place where the accused had been arrested to the police station, whether or not the accused had first been taken to the scene of the incident before he was taken to the

police station, and relating to the attestation of the accused's statement that he had made to Supt Pule. Such unsatisfactory features on an assessment of the totality of the evidence turned out not to be material.

[40] The State, on the totality of the evidence, discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 219A of the Criminal Procedure Act for the admission in evidence of the disputed pointing out which had allegedly been made on 3 September 2009 and allegedly resulted in the finding of two firearms, ammunition, a blue overall top, and a brown bag as well as the disputed pointings out which had been made by the accused to Capt (presently Col) C Mabasa on 4 September 2009 of and at the scene where the incident had taken place, and that the disputed pointings out had not been obtained in an unconstitutional manner. The State, on the totality of the evidence, also discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the disputed confession that had been made by the accused on 5 September 2009 to Col Pule and that it had not been obtained in an unconstitutional manner.

[41] The ruling that was made on 28 October 2010, is that all the disputed pointings out and confession are admitted in evidence against the accused.

[42] I now return to the main criminal trial. The undisputed evidence of the state eyewitness, Mr MM Dlamini, was that he and the deceased were friends. The two of them intended to go to Nelspruit in the morning on 3 September 2009. Mr Dlamini was waiting for the deceased to fetch him at his house at Stand 220, Phola Park. At about 8:00 am he heard the deceased's vehicle. He greeted his wife and went

outside the house. He walked about 3 metres from the front door when he noticed that the deceased was reversing his Toyota HiLux pick-up vehicle into Mr Dlamini's yard towards his house. Mr Dlamini heard gunshots and saw a person walking slowly towards the front of the deceased's reversing vehicle. The person was repeatedly firing gunshots at the deceased while his vehicle was reversing. Mr Dlamini was surprised at what was happening. He looked at the person to see who he was. The person was about 10 – 14 metres away from him when Mr. Dlamini saw his face for the first time and he was getting closer to Mr. Dlamini as he continued to approach the deceased's reversing vehicle and shooting at the deceased. Mr Dlamini was unable to estimate how many shots were fired other than to say they were many.

[43] Mr Dlamini testified that upon realising that he was looking at him, the person pointed his firearm at Mr Dlamini and he fired a shot at him. This was at a point when the person was about 7 metres away from Mr Dlamini. Mr Dlamini believed that a second gunshot was also fired at him even though he did not see the firing thereof, because of the quick succession in which it followed the first one that was aimed at Mr Dlamini. Once the first gunshot was fired at Mr Dlamini, he turned around and ran away towards the back of his house and into the street.

[44] Mr Dlamini testified that once he was outside his premises, he called the SAPS with his cell phone on the number 10111 and reported the incident. Mr Dlamini believed that the police would take a long time before they attend at his house and he therefore took a taxi and went to a police station. Upon his arrival he was told that police vehicles had already been despatched to his house. Police officers took him home. He noticed the rear of the deceased's vehicle stationary

against his house. Other police officers arrived with the accused, who had already been arrested.

[45] Mr Dlamini's evidence is consistent with and corroborated by the admissions which the accused had made in terms of s 220 of the Criminal Procedure Act. The correctness of the contents of the sketch plan and photo-album of the scene of the incident is formally admitted. They depict the deceased's green Toyota Hilux pick-up stationary with its rear end at right angles against Mr Dlamini's house. Cartridges and spent bullets were spread over the area about which Mr Dlamini had testified. Eight 9 mm cartridges and two spent bullets were found at the scene. Four bullet holes appear in the driver's door of the deceased's vehicle, one in the right rear view mirror, another two in the windshield, and bullet holes also appear in the house of Mr Dlamini. The body of the deceased was found in the vehicle, bleeding, and his bullet wound injuries are visible.

[46] It is formally admitted that the deceased died on 3 September 2009 as a result of gunshot wounds which he had sustained on that date. It is admitted that the deceased sustained no further injuries from the time he had sustained the said injuries on 3 September 2009 until a post-mortem examination was conducted on his body by Dr MH Wadee on 8 September 2009. The facts and findings of the post-mortem examination recorded by Dr Wadee in the post-mortem report (exhibit 'B') are formally admitted to be correct. The cause of death is recorded as '*multiple bullet wounds*'. Entrance wounds were found: in the left upper arm with the corresponding exit wound in the superior shoulder area; in the left side of the face with the exit wound in the left occipital area; in the left side of the forehead and the bullet was found under the skin; in the right renal area and the bullet was found

under the skin; and through the left hand with the exit wound in the left wrist area. The deceased sustained a fracture of the occipital skull.

[47] Mr Dlamini was an honest witness and his identification evidence of Mr Dlamini, viewed in the context of all the evidence, is sufficiently trustworthy and reliable. The incident happened in the morning while the sun was shining. Mr Dlamini had no eyesight deficiency and did not wear spectacles. The person who shot at the deceased was in close proximity to Mr Dlamini. The person's face was not covered. Mr Dlamini was looking directly at the person from a distance of about 10 - 14 metres to a distance of about 7 metres away from him. Mr Dlamini had good reason to take good notice of the person who was firing continuously at the deceased. Mr Dlamini was surprised at what was happening and he wanted to see who was shooting at the deceased. Mr Dlamini's view of the person was not obstructed in any way. Mr Dlamini was able to observe the clothes which the person was wearing, which was a two piece blue overall. Mr Dlamini was not able to identify the accused by any facial characteristics. It is, however, often difficult to describe a person and the inability of a witness to do so is not necessarily fatal when considering the question whether the person has been properly identified by the witness. See: *S v Pretorius and Another* 1991 (2) SACR 601 (A), at p 607i. When the accused was brought back to the scene the image of the person who shot at the deceased was still fresh in the mind of Mr Dlamini. The accused was still wearing the same overall trousers, but no longer the overall top. He was wearing a t-shirt with '*black and white spots*'.

[48] The evidence of Mr Dlamini identifying the accused is also in certain respects corroborated by the evidence of Mr A Chauke. He heard the firing of gunshots at about 8:00 am on the morning in question and went to investigate what was

happening. He was accompanied by a person who earlier on had cut his hair. From a distance of more than 20 metres Mr Chauke saw a person armed with a firearm standing next to the passenger side of a Toyota pick-up vehicle. The person wore a two piece blue overall and a light brown cap, which did not hide his face. The person also wore white gloves. Mr Chauke noticed that the person was placing the firearm and gloves into a bag which he had with him. By the time the person had left the motor vehicle he was no longer wearing the blue overall top, but a white t-shirt with '*small black spots*'. Mr Chauke called the police with his cell phone. He followed the person and kept him within his eyesight while he was continuously in communication with the police. Police arrived and Mr Chauke pointed the person out to them. The accused was running away. Other police officers arrived and Mr Chauke got into their vehicle and directed them to where the person had gone. The person was still wearing the same clothes. He was arrested. Mr Chauke did not see the person's face. Mr Chauke was a credible witness and his evidence reliable. He was hardly cross-examined.

[49] The evidence of Mr Dlamini identifying the accused is corroborated by the confession, which the accused had made to Supt Pule on 5 September 2009. The accused's confession also corroborates the evidence of Mr Chauke. It became common cause during the evidence of the accused that Supt Pule accurately recorded in exhibit 'F.1' what the accused had told her. The first part of the accused's confession reads as follows:

'I make the statement out of my free will in front of the police. I did not need a lawyer and want to talk to the police not to the magistrate as explained to me because I am not hiding anything, as I have already shown the police where the incident of murder happened. I shot Timothy Mashego at about 08:00 to 09:00 on the 03.09.2009 at Phola Park and I ran away $\pm$ 2 km. While I was running I met police and I decided to hide the weapon which I was having in the bush. I hide the weapon and went to a certain house where there was

an old car standing pretending to buy it as I was misleading and hiding from the police. The police saw me and arrested me The police asked me where was the weapon. I took them where I hide it. ... I told them that I bought the weapon 2 – 3 weeks back at Pienaar Trust.'

[50] It appears from the accused's confession and from his evidence in court that he and the deceased's wife formed a love affair during 1997. The accused killed the deceased on 3 September 2009 to bring an end to the deceased's unrelenting revenge from which the accused tried in vain to flee. The accused told Supt Pule that he was traced wherever he attempted to hide from the deceased. He was once shot at by the deceased and threatened to be killed and fire-arms were pointed at him by the deceased and by those who acted for him. Once police officers arrived at his house and confronted him with the relationship he had with the deceased's wife. An assault upon him followed whereafter he remained in a coma for three days. He was taken by ambulance to the Rob Ferreira hospital. He laid a charge at the Nelspruit SAPS. The State, I should add, did not disprove these allegations of the accused. The concluding paragraph of the accused's confession reads:

'I decided to kill Mashego as I was tired of running away from him. He was having money and could do anything. I then shot him and I did not know how many times and I was arrested.'

[51] The evidence of Mr Dlamini identifying the accused and implicating him in the killing of the deceased is also corroborated by the evidence of the accused. He is a sophisticated businessman. He spoke at length directly to me and often made eye contact. He did not show any remorse. However, his bitterness and hardness towards the deceased and about what he said he had to endure as a result of his unrelenting revenge, was obvious to me. In giving evidence he confirmed and adopted most of what is written in his confession. He admitted to pointing out to

members of the SAPS the scene of the incident as well as the firearm with which he admitted he had shot the deceased several times.

[52] The accused testified that he realised he could no longer run away from the deceased, because he kept on finding him even after the affair between the accused and the deceased's wife had terminated for several years. The accused resolved to hunt for the deceased instead. He had bought a firearm without a serial number and ammunition on the streets about a week or two before he shot the deceased. In the morning on 3 September 2009, he noticed the deceased driving into Pola Park. The deceased did not notice him. The accused did not have his firearm with him. He fetched it, searched for the deceased, and found him sitting inside his vehicle outside Mr Dlamini's house. Upon seeing the deceased, the accused shot at him several times with the direct intention to kill him. The accused said: *'I went there to do what I wanted to do and I did it.'* This happened between 8:00 – 9:00 am.

[53] The accused also testified that he had acted in self-defence when he shot the deceased. He testified that the deceased was a dangerous man and he killed the deceased because of his perception that the deceased posed a threat to his life and limb. He bought the firearm in order to defend himself against any attack from the deceased or those acting for the deceased. The accused, however, admitted that his attack upon the deceased was a surprise attack and that the deceased did not pose any threat to him at the stage when he shot him. Private defence is justified against an attack already commenced or immediately imminent. "Defence" against an anticipated future attack or a completed attack is not justified.' See: LAWSA Vol 6 (First Reissue) para 43. Any future harm to the accused could effectively have been avoided by other means. The accused's use of force at the time when he shot

the deceased was clearly not necessary in all the circumstances. There is simply no question of self-defence.

[54] The totality of the evidence establishes the accused's guilt of the murder of the deceased (count 1) beyond any reasonable doubt. The murder was planned and the accused acted with direct intent.

[55] I now turn to the charge of robbery of the deceased's pistol (count 2). Cst Baloyi testified that the pointing out made by the accused resulted *inter alia* in the finding of two pistols, which he booked into the SAP 13. The investigating officer, Cst Sanderson, testified that he compared the serial number of one of the two firearms which he found in SAP13/11/76 with the number reflected on the deceased's licence to possess a firearm (exhibit 'J') and he ascertained that they matched. The state did not present evidence that Cst Baloyi booked the firearm, which Cst Sanderson compared with the deceased's firearm licence, into SAP13/11/76, nor did it present the firearm in evidence to establish that Cst Sanderson's comparison of the numbers was accurately performed. The accused denied the evidence of Cst Baloyi that two firearms were found as a result of his pointing out. He testified that only the firearm with which he had shot the deceased was found as a result of his pointing out. The accused's evidence on this issue finds resonance in the evidence of the state witness, Mr Chauke, who testified that he saw a person with a firearm standing next to the passenger side of a Toyota pick-up vehicle and he further noticed that person placing the firearm in a green bag. The evidence presented by the state is inadequate and the accused's guilt on this charge of robbery has in the light of all the evidence relevant to this charge not been proved beyond a reasonable doubt.

[56] Count 3 is the charge of the attempted murder of Mr Dlamini. The accused testified that he saw Mr Dlamini while he was shooting at the deceased, but that he did not look at him much, because he '*... did not go there for him.*' Mr Dlamini testified that his view of the accused was unobstructed. It must be accepted that the accused's view of Mr Dlamini was similarly unobstructed. The accused may very well have seen Mr Dlamini before Mr Dlamini had noticed that he was looking at him. The accused denied Mr Dlamini's evidence that he turned his firearm towards Mr Dlamini and that he fired at him. He testified that had he pointed his firearm at Mr Dlamini he could have shot him also. He insisted that he was firing at the deceased only. It is common cause that no bullet struck Mr Dlamini, not at the close range of 7 metres about which Mr Dlamini testified, or when he turned in very close proximity to the accused, or while he was running away. I have found Mr Dlamini to be a good and credible witness. The accused's evidence on this issue may, however, be reasonably possibly true. This does not mean that Mr Dlamini was untruthful on this aspect. It means that the accused must get the benefit of the doubt. The state, accordingly, has not proved the guilt of the accused on the charge of attempted murder beyond a reasonable doubt.

[57] Finally, counts 4 and 5. The evidence establishes the guilt of the accused of having been in unlawful possession of the firearm and ammunition with which he had shot the deceased beyond any reasonable doubt. Cst Baloyi testified that the firearm was found after the accused had pointed out the spot where he had hidden it. His evidence on this aspect is corroborated by the confession of the accused and by the accused's own evidence that he did not have a licence to possess a firearm and that he bought the firearm and ammunition on the streets.

[58] In the result the accused, Mr Jika Elvis Mlombo, is found:

1. guilty, as charged, of the murder of the late Mr Timothy Daklaas Mashego (count 1);
2. guilty of the unlawful possession of a 9 mm pistol (count 4);
3. guilty of the unlawful possession of 9 mm bullets (count 5); and
4. not guilty and discharged on count 2 (robbery) and on count 3 (attempted murder).

P.A. MEYER
JUDGE OF THE HIGH COURT

8 November 2010