

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 062/2020
DPP REF NO: 10/2/11/1-064/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES/NO
17 June 2021

In the matter between:

THE STATE

and

NDLOVU, SIPHIWE GEORGE

ACCUSED

JUDGMENT

MUDAU, J:

[1] The accused, George Sphiwe Ndlovu appears before this court charged in an indictment, which contains 11 counts. For the sake of brevity and clarity, the charges may be formulated and reproduced as follows: murder read with the provisions of section 51(1) and 51 (2) of Act 105 of 1997 (count 1); attempted murder read with the provisions of section 51 (2) (c) of Act 105 of 1997 (counts 2-9); unlawful

possession of a firearm as well as ammunition in contravention of the Firearms Control Act, 60 of 2000 (counts 10-11).

[2] The accused is legally represented. He pleaded not guilty to the charges but guilty to the competent verdict of culpable homicide in respect of count 1, which the state refused to accept. The state also indicated that the facts upon which the accused pleaded were not consistent with its own case. The accused presented a statement ("exhibit A"), in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 ("CPA") in respect of count 1, and a plea explanation in terms of section 115 in respect of the remaining counts through his legal representative, which he also confirmed. It is signed by the accused. Exhibit A reads thus:

"STATEMENT IN TERMS OF SECTION 112(2) OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT 51 OF 1977) IN RESPECT OF COUNT 1 AND PLEA EXPLANATION IN TERMS OF SECTION 115 OF THE CRIMINAL PROCEDURE ACT, 1977 IN RESPECT OF THE REMAINING COUNTS

I, the undersigned

SIPHIWE GEORGE NDLOVU

State as follows:

1) I admit that I am the Accused, and that I plead guilty to culpable homicide, on count 1 (the charge of murder). I deny that I committed murder. I emphasise that my plea of guilty on culpable homicide is advanced freely and voluntarily, without having been unduly influenced by any person whatsoever, to do so.

2) In respect of my plea of guilty of culpable homicide, I admit that on or about the 29th of March 2020, at or near [...] Gama Street, Vosloorus, Boksburg, in the district of Ekurhuleni North, I unlawfully and negligently caused the death of Sibusiso A[...], an adult male person. I interpolate to state that I will more comprehensively elucidate my plea of guilty on culpable homicide below.

3) Albeit that I plead guilty to culpable homicide in respect of count 1, it was explained to me that count 1 in respect of murder attracts a minimum sentence as prescribed in Section 51(1) and 51(2) of Act 105 of 1977. Counts 2 to 9, attempted murder attracts minimum sentences as prescribed in Section 51(2)(c) of Act 105 of 1977.

4) The said provisions of both Sections 51(1) and 51(2) of Act no 105 of 1977, as well as the minimum sentences which are attracted on competent verdicts were also explained to me by my counsel. I understand the Minimum Sentencing Regime as contemplated in the relevant sections referred to above, as explained to me by my Counsel.

AD COUNT 1:

5) I deny that I intentionally caused the death of Sibusiso A[....], on 29 March 2020, at [...] Gama Street, Vosloorus.

AD COUNTS 2 - 9:

6) I deny that on 29 March 2020, at [...] Gama Street, Vosloorus, I unlawfully and intentionally attempted to kill or injure any of the following persons mentioned in counts 2 - 9:

1.1 A[....]1 A[....];

1.2 A[....]2 A[....];

1.3 S[....] A[....]3 A[....];

1.4 U[....] A[....];

1.5 B[....] A[....];

1.6 N[....] A[....];

1.7 Jabulani Dominic Buthelezi; and

1.8 Nkosingiphile Maphumulo.

AD COUNT 10:

7) I deny that on 29 March 2020, and at [...] Gama Street, Vosloorus, I unlawfully possessed a firearm namely, a **Muzzler Shotgun with Serial Number AM34565**. Although I did not have a valid license, or permit, or any explicit authorisation to possess this firearm, my possession is based on the defence of necessity as a ground excluding any wrongfulness of my possession of the aforementioned firearm.

AD COUNT 11:

8) I deny that on 29 March 2020, and at [...] Gama Street, Vosloorus, I unlawfully possessed ammunition to wit one shotgun cartridge, as stated in the indictment.

9) I admit that I do not have a license to possess a shotgun capable of firing the ammunition as contemplated in the aforesaid paragraph. I thus admit that I am not the lawful owner of shotgun capable of firing shotgun ammunition as contemplated in the Firearms Control Act 60 of 2000, as I did not know that live shotgun ammunition had been loaded in the shotgun that I had used. I simply did not have the necessary intention to possess live ammunition. Moreover, I did not foresee that the firearm might have been loaded with shotgun ammunition.

FACTS ON WHICH I BASE MY PLEA OF GUILTY OF CULPABLE HOMICIDE IN RESPECT OF COUNT 1:

10) On 29 March 2020, I was employed by Magma Risk Solutions Pty Ltd. as an investigator. This company mainly renders security services, and engages in investigations, mostly with members of the South African Police Services, the Ekurhuleni Metropolitan Police Department, as well as other law enforcement agencies.

11) I beg the Courts indulgence to allow me to attempt to comprehensively advance the facts on which I base my plea of guilty, with a view to having the Court understand the reason that I attended the relevant scene on 29 March 2020, and how it came about that I fired shots with a shotgun referred to in this document.

12) I was part of a task team which worked hand-in-hand with senior police investigating units, to prevent cash-in-transit heist's, recover stolen vehicle's, firearm's, explosive's etc.

13) The President of South Africa announced a national lockdown between the period of 27 March 2020 - 16 April 2020, in an attempt to curb the spread of the Corona-Virus Pandemic. Several Regulations were issued in terms of the Disaster Management Act, whereby South Africans had to remain in their houses, except to perform or purchase essential services / products. These regulations included a ban on the sale of alcohol and prohibited all public gatherings.

14) Several support services, including the South African Army, Police Reservists and Metropolitan Police, were called up to assist the South African Police Services to enforce said Regulations.

15) It is alleged in the summary of substantial facts that the Ekurhuleni Metropolitan Police Department (EMPD) also provided support in the enforcement of the aforesaid Regulations. I accept that on 27 March 2020, each member of the EMPD Intervention SWAT Unit (ISU), was issued with two boxes of plastic shotgun rounds, a shotgun, a rifle and a 9mm pistol to use for crowd control in the execution of these duties.

16) On the 29th of March 2020, at about 07:00, I left my house to continue working on a case (Norwood Cas 137/03/2020) that was assigned to me, in order to obtain information following the killing of a business man who drove on the M1 on Friday the 13th of March 2020.

17) Having left my house, I drove to Michelle Avenue, near Meyersdal, and stopped at the Sasol garage. A few minutes later members of the SWAT team

arrived. This Sasol garage is a venue where EMPD members usually meet to discuss issues, buy food etc.

18) These EMPD members were known to me and asked me whether I had any information that I could give them. Following a brief discussion, we all proceeded to Woolworths Food Market to buy food. Having bought what we needed, members of the EMPD received instructions on their Whatsapp group that they needed to go to Katlehong and Vosloorus, regarding information received relating to drugs and operation of illegal shebeens.

19) I got into my car, as I had driven to the garage alone. Before I could drive off, I heard someone shouting that I should stop as I could not drive alone due to the other EMPD bakkie being packed with people. The members of the EMPD said that I should let one of their members' drive with me thereafter Constable Matyobeni got into the left front passenger seat of my vehicle.

20) Constable Matyobeni when getting into my car, inter alia, had a shotgun with him. I then told him that I need to drop food off at my house for my children and that we must drive via Thokoza. We all then left Michelle and drove in a convoy.

21) I proceeded to my house, along with Constable Matyobeni, to drop off the food.

22) Having left my house, Mr Matyobeni located the other members via phone. We went to Mavimbela section in Katlehong, where we joined the convoy.

23) Having eventually left Katlehong, we were crossing into Vosloorus and a marked bakkie was leading the convoy.

24) We went to a certain address where people were selling drugs. Upon arrival, people started running. A bag of dagga and other small packages of drugs were recovered. No one was arrested.

25) The convoy then proceeded to another house, not far from the one where the dagga was found. Members of the police jumped out of their vehicles and went to the

house where a large number of people were sitting. Matyobeni similarly got out of my vehicle, taking his shotgun with him.

26) I remained in the car as there was a lot of chaos and total mayhem. People were running away from the house and members of the police were shooting at them with rubber bullets. Some of the people that came out of the house started throwing cans, bottles and other objects at the police.

27) I then noticed one officer following someone to another house that was situated two houses from the house the police initially entered. An argument between one of the people at the premises of the third house ensued. I could, however, not hear what the argument was about. A few seconds later, the officer was dragged into the yard. I then got out of the vehicle in an attempt to alert the other officers who were still inside the first house. Other officers were chasing people around.

28) Another officer upon noticing what was happening, rushed to the house. People that were at the first house started gathering at the gate of the house where the two officers were present.

29) I saw one officer running towards the cars and then disappeared between the two bakkies that were parked next to the house. When I turned, I saw a shotgun lying between the cars and I saw that Mr Matyobeni had been injured on his elbow as he fell. I then took the shotgun that had been lying on the ground and proceeded towards the house where the two officers had been dragged in to render assistance.

30) As I was approaching the gate, I had fired a shot at the people that were at the gate. They scattered and I went inside and fired again towards the person, namely the deceased that was dragging the officer, Mr Maphumulo towards the house. The deceased did not let go of Mr Maphumulo. The deceased was assisted by an elderly lady who succeeded in dragging the deceased into what seemed like the veranda area and closed the trellidoor on the veranda. As the deceased was behind the trellidoor, he pushed his arm through the opening in the trellidoor and grabbed Mr Maphumulo. It seemed like he was relentless to relinquish his grip on Mr

Maphumulo. I was approximately three meters away from where Mr Maphumulo and the deceased were when I fired the last three shots. Pursuant to the last two shots being fired, the deceased eventually let go of Mr Maphumulo.

31) After the deceased relinquished his grip on Mr Maphumulo, Mr Maphumulo, Mr Buthelezi, and I left the yard. I am not able to state how many people were still present in the yard, at that stage. I later heard that the deceased, Mr Sibusiso A[....], demised.

32) I wish to state in the strongest terms that I was at no stage aware that the shotgun that I had picked up from the ground was loaded with live ammunition. I had my 9mm pistol fully loaded with sixteen cartridges on my side which I could have used instead of the shotgun, if I had the intention to kill a person. I picked up the shotgun solely and simply to use it should I come under attack in my attempt to assist Mr Maphumulo and concomitant hereto, to assist Mr Maphumulo whilst he was man-handled and pulled towards the veranda.

33) I admit that my picking up of the shotgun and using it to free Mr Maphumulo, at first blush, seems illegal. I do, however, respectfully submit, that due to the chaos and the mayhem that prevailed at the time, I regarded the using of the shotgun under these specific circumstances as being legally justified, as the only other defence mechanism I had was the 9mm pistol which would, under the circumstances, have resulted in excessive force. I reiterate that I simply did not want to kill anybody. I base my act of negligence on the fact that the bullets that were fired from the shotgun that I had used, which I believed were rubber bullets, was at a short range of approximately three meters. Although I did not foresee that firing such shots at that distance could kill the deceased, a reasonable man, under the same circumstances, would have foreseen that death may result if a rubber bullet is fired from such a distance, and would thus have refrained from firing the rubber bullets in the direction of the deceased at such a close range. I thus admit that my conduct, when I so fired the shots, was negligent.

AD FORMAL ADMISSIONS:

34) My council (sic) explained to me the provisions of Section 115(2)(b) and Section 220 of the Criminal Procedure Act 51 of 1977. I am aware that should I make a formal admission in terms of the sections referred to above, the State is relieved from proving such fact/facts that are admitted.

35) I attach to this document, formal admissions that I am prepared to make and I marked same as "Exhibit B".

[3] It is proper to set out by way of introduction to the evidence and issues raised in this matter, the essential factual allegations advanced by the prosecution in seeking to establish its case against the accused. The indictment is a good starting point. The state alleges in the summary of substantial facts that, on 29 March 2020, the accused, a private security officer employed at Magma Security, had information about an illegal gathering of people at a tavern in Vosloorus where alcohol was sold in contravention of the regulations issued in terms of the Disaster Management Act 57 of 2002. These regulations were enacted as a result of the Covid-19 outbreak whereby people had to remain in their houses except to perform essential services or to purchase essential products.

[4] These regulations included a ban on the sale of alcohol and prohibited all public gatherings. The accused met the members of the EMPD Intervention SWAT Unit (ISU) in Meyersdal where he relayed his information to them. The ISU thereafter travelled to Vosloorus in their official vehicles to follow up the information provided by the accused.

[5] It is alleged that, Cst H Matyobeni from ISU travelled with the accused to Vosloorus in the accused's private vehicle. He took the firearms issued to him into the accused's car when they travelled together. On ISU's arrival in Gama Street, Vosloorus, several officers approached the tavern on foot, whilst others remained in their vehicles. The ISU officers were armed with their shotguns, which were loaded with plastic bullets. Upon seeing the ISU's approach to the tavern, the patrons dispersed and ran into the streets. Several members of ISU fired shots with their shotguns at the people who were running away. Cst H Matyobeni was assisting his colleagues, but he had left his fully loaded shotgun in the accused's car.

[6] While tracing the dispersed suspects, Cst J Buthelezi met with the deceased, Sibusiso A[....], who was standing inside his yard behind a closed gate. The deceased and Constable J Buthelezi had an argument. When Cst N Maphumulo heard this argument, he went to the deceased's yard to intervene.

[7] It is alleged that an unknown person opened the gate and Csts J Buthelezi and N Maphumulo entered the deceased's yard. The three of them grabbed and pulled at each other. The deceased's mother, B[....] A[....], saw what was happening and also realised that the ISU members were armed. With the help of Ntombikhayise A[....], she pulled the deceased onto the veranda and they closed and locked the burglar gate behind them. Csts J Buthelezi and N Maphumulo were still holding on to the deceased.

[8] It is alleged that the accused came into the deceased's yard and walked to the veranda whilst in possession of Cst H Matyobeni's shotgun. He pointed the shotgun to the deceased and fired several shots at the deceased's body, whilst Csts J Buthelezi and N Maphumulo, B[....] A[....] and Ntombikhayise A[....] stood next to the deceased. The deceased fell down and died shortly thereafter as a result of a "shotgun injury to the chest".

[9] It is also alleged that the shotgun's pellets dispersed and struck and injured A[....]1 A[....] (11 years old), A[....]2 A[....] (11 years old), S[....] A[....] (6 years old) and U[....] A[....] (5 years old). They were inside the house in a room next to the veranda.

[10] The accused made a number of formal admissions in terms of section 220 of the CPA. The formal admissions ('exhibit B') comprise a large number of aspects such as photographs that were taken at the scene of the capital crimes, the key and sketch plan of the scene, as well as the deceased's identity and the results of the post-mortem examination report. The accused formally admitted that the deceased in count 1, Sibusiso A[....], died on 29 March 2020, the cause of death was determined to be a "shotgun injury to the chest" as per exhibit C. The post-mortem report, exhibit C, also recorded that "the shotgun injury to the chest associated with trauma to the left lung and heart hemopericardium and left hemothorax. A

representative number of small pellets and a wad were recovered from the chest. A part of the shotgun shell was found on the posterior chest with no underlying injury to the body”.

[11] The accused formally admitted the medico legal examination report, exhibit D, in relation to A[....]1 A[....], the complainant in respect of count 2. In this instance, the attendant, Dr Mutshekwane concluded that the 11-year-old male, post fall, sustained a soft tissue injury to the left hand and left wrist. The J88 report, exhibit E, in relation to the complainant in respect of count 3, A[....]2 A[....], also formally admitted and depicted that she sustained a soft tissue injury to the right foot. The J88 report, exhibit F, in relation to the complainant in count 4, S[....] A[....]3 A[....], depicted that the six-year-old child suffered soft tissue injury to his upper lip and dental trauma. The J88 report, exhibit G, in relation to U[....] A[....] depicted the five-year-old child with shot wounds on the scalp, neck and back.

[12] The forensic evidence presented by the prosecution consisted in the main of evidence relating to the crime scene in Gama Street. The photograph albums, exhibits J and N were submitted into evidence. These albums consisted of various photographs depicting the crime scene, Gama Street, the position of the deceased and photographs of spent cartridges and other evidential materials.

[13] Exhibit K, is the forensic report in terms of section 212(4)(a) and 212(8)(a) of the CPA by Captain Mlindazwe who is attached to the Ballistics Section of the Forensic Science Laboratory as a Forensic Analyst. After examining the damage on the burglar door where the deceased was shot dead, the ballistic expert concluded that the damaged metal of the burglar door was pushed and bent at an angle towards the right, possibly caused by pellets from a shot shell, not by a rubber bullet given the impact and the nature of the damage. Exhibit K confirmed that the wounds on the left side of the chest and left arm were caused by the pellets which were also visible under the skin on photo 10 and 11. The wounds on the heart, as shown on photo 14, are consistent with those caused by pellets. According to exhibit K, the deceased sustained injuries from pellet shots and not from rubber bullets.

[14] The position of the deceased after his fall was also admitted. The forensic evidence relating to the deceased formed the subject of the section 220 submissions made by the accused. It is accordingly not necessary to set out the nature of this forensic evidence and the particular evidential material found on the scene of the crime in any further detail. Where necessary this will be dealt with in the evaluation and assessment of the evidence presented by the prosecution and that presented by the defence.

[15] The state called the following witnesses to prove the charges against the accused: Ms B[....] M[....] A[....]; Ms N[....] A[....]; Chief Supt Nhlapo and Capt Mlindazwe. The accused was the sole witness to testify in his defence.

[16] Ms B[....] A[....], a 64-year-old senior citizen, testified that she is the deceased's aunt. He lived with her at [....] Gama Street, Vosloorus. On 29 March 2020 between 12h00 – 13h00, she was inside her house with her 4 grandchildren and niece, N[....]. She went to her front yard where she found the deceased and his friends, Charles and Thabo. The deceased was mumbling while picking up papers from the front yard lawn. She asked the deceased what the matter was. The main gate was closed, but not locked. Ms A[....] was referred to "EXHIBIT J PHOTO 32 AND 33" and she identified her house, the main gate and the front yard where the deceased was. The wall is high and one is unable to see outside, but the main gate has some open spaces which will allow one to see outside the property.

[17] Ms A[....] further testified that there was someone outside the gate who then said "this boy is disrespectful". It was a uniformed EMPD member. The deceased was arguing with the EMPD officer and said "I saw what you did". He also said words to the effect that "you fired shots at people in their houses" to the EMPD officer. The main gate was at that stage closed but not locked. Approximately 4 – 5 more EMPD officers came to the gate. Ms A[....] rushed to the gate and tried to hold it closed while the officers tried to pull it open. The officers who were aggressive however, overpowered her and opened the gate.

[18] About 3 or 4 EMPD officers who were armed with firearms entered the yard and at least one short officer carried a long-barrelled firearm. The EMPD officers and

the deceased were arguing whilst they advanced to each other. Ms A[...] rushed to the deceased and, whilst standing between him and the EMPD officers, pulled and pushed him onto the veranda through the slightly opened burglar gate. The EMPD officers were behind her.

[19] N[...] who stood on the veranda, slam locked the burglar gate once the deceased was pushed onto it. At that stage, the accused stood at the burglar gate and tried to pull it open. The EMPD officers stood by when the accused tried to open the burglar gate. When she was referred to “EXHIBIT N PHOTO 4”, Ms A[...] indicated she stood at marked position X3 after she pushed the deceased onto the veranda. The accused was at marked position X4 when he tried to open the burglar gate and the EMPD officers were at a position she marked as X5.

[20] Ms A[...] heard approximately 4 – 5 shots fired immediately after each other. The third shot she heard was louder and different to the others. She looked at the accused who was firing the shots. He was holding a big, long firearm with his arms in front of each other at a slight upward angle, whilst pulling the trigger repeatedly. The firearm was held in front of his stomach while he aimed at and shot the deceased. When referred to “EXHIBIT N PHOTO 4”, Ms A[...] indicated that the accused stood at marked position X6 after stepping back when he shot at the deceased. The EMPD officers were at that stage also in the vicinity of X6. The deceased stood at X7 when he was shot and, although he was close to the burglar gate, he did not touch it.

[21] Prior to shooting the deceased, the accused did not say anything to him. The deceased fell down and the accused left with the EMPD officers. They did not approach the deceased prior to leaving and she did not see anyone else in the yard. There was no crowd of people outside her yard before the deceased was shot.

[22] Ms A[...] went to the back of her house and entered through the kitchen door. She noticed her grandchildren, the complainants in counts 2 – 5, injured, and saw a blood trail from the sitting room, which she followed through the dining room and passages up to the bedroom where the grandchildren were hiding. Ms A[...] indicated that the front door next to the veranda lead to the sitting room. The burglar

gate was damaged as per “EXHIBIT N PHOTOS 7 AND 8” where the “bullet(s)” pierced through when the deceased was shot.

[23] During cross examination, she testified that the deceased offered no resistance when he was pushed behind the burglar door to the veranda. Furthermore, that the deceased was shot at 3 or 4 times. In the process, she did not see the accused load the firearm, but shooting repeatedly as if changing gears. She vehemently disputed a suggestion made to her that the accused shot the deceased for the latter to release EMPD member, Maphumulo, after which she dragged by the deceased behind the burglar gate. She called the accused a liar and was willing to forgive him but for his lies. On her version, the deceased was at all material times behind a locked burglar door and presented no danger to the officers nor touched them.

[24] N[....], a teacher by profession, is the deceased's cousin. She testified that on 29 March 2020, she was at home in Gama Street, Vosloorus, whilst preparing to dish up lunch when the incident occurred. Her two small children, U[....] and A[....]3, rushed in and reported a shooting outside. She enquired where her oldest children, A[....]2 and A[....]1, were and was informed that they were in the yard. N[....] went to the veranda to call them in. When she did not see them outside, she assumed that they used the passage to the back and entered the house through the kitchen.

[25] Whilst on the veranda, on her version, she witnessed an argument between the deceased and officers at the closed main gate. On her version, the deceased asked the officers “why are you shooting them if they are in their homes?”. One of the officers shouted “this guy is disrespectful”. An officer put his hand through an opening in the gate and tried to open the pedestrian gate from the inside. This pedestrian gate is part of the main gate. N[....]'s aunt, B[....] A[....], stood at the gate and kept asking what was happening. There was no crowd or gathering of people in the street.

[26] N[....] was referred to “EXHIBIT N PHOTO 5” and she indicated that she stood next to the front door on the veranda. The burglar gate on the veranda was partially

open. The deceased initially stood at the corner of the garage door near a pillar, visible on "EXHIBIT J PHOTO 33".

[27] At some stage, she saw a hand from outside opening the "shooter" (lock) of the gate and two officers entered, pushing their way further into the yard. She confirmed that Ms A[....], her aunt moved between the deceased and the officers and pushed the deceased backwards towards the veranda. The deceased did not offer any serious resistance. The deceased is bigger than Ms A[....] and thus would not have submitted to being pushed to the veranda had he wanted to resist. Her aunt initially had to pull the deceased away from the gate in order to push him onto the veranda. The deceased and the officers continued to argue whilst the officers approached the deceased. One of the officers was armed with a shotgun which he held against his body in a slightly upward angle, with both his hands apart from each other. N[....] had now moved further onto the veranda and was unable to see anyone else enter through the gate. The front door leading into the dining room was partially open.

[28] N[....] confirmed that Ms A[....] pushed the deceased onto the veranda through the partial opening. N[....] stepped in front of the deceased and closed the burglar gate. An officer in a dark uniform tried to open the burglar door, but was unable to as it was a slam-lock door. He had a shotgun with him. The deceased did not hold or grab anyone whilst he was pushed on the veranda. If he had done so, she testified that she would not have been able to close the burglar gate. N[....] moved behind the deceased, towards his right side. The officer who tried to open the gate stepped back, cocked the firearm and shot the deceased. There was another officer, dressed in a brown or khaki trouser and dark top, to the left of the shooter.

[29] N[....] testified that the shooter fired several shots to the middle of the deceased's body. The shots did not sound the same. The first few shots had a popping sound. There was a shot which was louder than the rest. After the loud shot, N[....] heard a sound similar to marbles falling on tiles. She looked around to see whether it was glass from a broken window.

[30] When referred to "EXHIBIT J PHOTO 30", N[...] explained that she was at marked position "Y" at the time of the shooting. The deceased stood at marked position "Y1" and was a step behind the burglar gate. The shooter stood at marked position "Y2" when he shot the deceased, which is less than 2 meters from the deceased. The other officer stood at marked position "Y3".

[31] After the shots were fired, the deceased looked down to his chest. N[...] heard her children scream that they were shot from inside the house. She ran past the deceased into the house. When she reached the front door, the deceased was sitting and bent over as if he was falling. Inside the house, N[...] noticed blood drops from the dining room, which is adjacent to the front door, up to her bedroom where she found her injured children.

[32] When she looked outside, N[...] saw the officer and the shooter turn around, enter their vehicles and drive off. N[...] rushed to the garage through an inter-leading door in the house and drove her children to the hospital for medical assistance. There was a group of people at their gate. Those people were trying to assist the family to get an ambulance. N[...] did not see any marked EMPD or police vehicles in the street when she drove off. She does not know whether the deceased was alive when she left, but when she earlier turned him over, he did not respond to her.

[33] Chief Supt Nhlapo ("Nhlapo") is head of the SWAT unit in the EMPD to which he has been attached for 6 years. He confirmed that several of his members, including Matyobeni, were present during the incident. Although he does not have personal knowledge thereof, it is possible that Matyobeni's officially issued firearm was used on that day.

[34] Nhlapo also testified that members of the SWAT unit are issued with shotguns and rubber bullets, which are to be used in the shotgun. According to the EMPD standing orders, members are not allowed to use any ammunition not issued by EMPD in any firearm, including the shotgun. EMPD has never issued live shotgun ammunition for official operations and according to his knowledge, it has never happened that the SWAT unit used live shotgun ammunition in operations.

[35] He knows the accused as someone who assisted SAPS and got to know him during operations where the SWAT unit provided back up to SAPS. He had never seen the accused in possession of a shotgun. After the incident of 29 March 2020, Nhlapo was informed that the accused was with his members during the incident.

[36] Matyobeni is currently suspended from the SWAT unit as a result of this incident. He is also currently facing disciplinary action. As the commander of the SWAT unit, he was supposed to be informed of the circumstances wherein the accused possessed and used Matyobeni's firearm, but his members failed to give him a report. The incident was, however, referred for an internal investigation. Matyobeni did not inform him of any injury he sustained on his elbow during the incident.

[37] Capt Mlindazwe ("Mlindazwe") is attached to the Ballistics Unit at the Forensic Science Laboratory in Pretoria. He confirmed his qualifications and experience as set out in "EXHIBITS K and L". He attended the crime scene *in casu* on 30 March 2020 for the purpose of reconstruction after the scene was already cleared. The lady who had pulled the deceased into the house pointed certain things out to him during his visit to the scene. He was informed that there was a possibility that SSG rounds were used during the shooting.

[38] Mlindazwe explained that rubber shotgun bullets have 2 rubber balls, which are held in a casing by a plastic wad. It has propellant which allows it to fire and all other components that live ammunition will have. Rubber bullets are not designed to kill a person, although they may cause death. A live shotgun bullet has steel pellets in the place of rubber balls. The steel pellets are small round balls and are designed to kill. Some steel pellets are bigger than others. The cartridge displayed to the court was emptied and on counting the individual steel pellets, there was a total of 220 steel pellets. A live shotgun bullet, although it might look the same as a rubber bullet, will feel heavier than a rubber bullet as he explained.

[39] In order for the burglar gate to be damaged as displayed in "EXHIBIT K PHOTOS 3 AND 4", the shooter would have been standing around 2 meters from the gate. Multiple pellets would have caused the damage.

[40] The shotgun used in the commission of the offences was displayed to the court. It is approximately 1-meter-long and can take 4 – 5 cartridges. When the shotgun is cocked, it makes a heavy, loud clicking noise as demonstrated. He explained that the cartridge will be inserted in a tube and the barrel will be empty. The tube will be pulled back to move a new cartridge into the barrel whilst ejecting the fired cartridge. The tube must then be pushed forward to enable the shooter to pull the trigger. This is the procedure to follow before firing each bullet from the shotgun. It is not a quick process for someone who is not experienced in the use of a shotgun.

[41] Mlindazwe testified that rubber bullets will travel to the direction where the shooter aims it. With live bullets, the pellets will also travel towards the target, upon leaving the muzzle, the pellets will start to spread and fall. The closer the target is to the firearm's muzzle, the more concentrated the pellets and injury on the target will be.

[42] He was referred to "EXHIBIT K PHOTOS 11 & 12". He testified that the pellets were starting to spread. It is not a contact shot, but the muzzle of the firearm would have been approximately 2 meters from it. Mlindazwe was also referred to "EXHIBIT K PHOTO 4" and "EXHIBIT N PHOTO 4" with reference to the children who were in the room next to the front door. He testified that, it is highly possible that people next to and around the burglar gate can be struck by a pellet(s) as it spreads after hitting an object or a target. The live bullet he demonstrated in court had 220 pellets and thus it would be probable that any of those pellets can hit anything in the vicinity of the target.

[43] A version was put to Mlindazwe for his comment, specifically with regard to expected injuries from being struck with pellets. He was asked what he would expect if the deceased's arms were through the burglar gate whilst holding onto a person in front of him. Mlindazwe's comment was that he would have expected the person in front of the deceased to be affected and be struck with the pellets. Further, he also would have expected the deceased to have injuries on his forearms. In cross-examination, Mlindazwe said that if the deceased stood sideways with his left arm through the gate, the injuries on the upper left arm could have been sustained in that

manner. However, those injuries also could have been sustained if his left arm were next to his side.

[44] Mlindazwe was asked to comment on the “sound of marbles on the tiles” as testified to by N[....] A[....]. He commented that it might be the pellets. When he considers the angle that the shots were fired from, its spreading at the deceased’s body and the damage to the burglar gate, Mlindazwe is of the opinion that the pellets could have travelled anywhere after it struck the burglar gate. Anyone in the vicinity of the burglar gate was at risk of being struck and injured by a pellet.

[45] The pellets found in the deceased during the post-mortem examination was of similar size as those shown in court and could possibly be shotgun ammunition. Mlindazwe confirmed that, all ammunition with propellant can kill whatever is in front of them.

[46] With reference to “EXHIBIT N PHOTO 4”, a person in position X3 would not be struck if he or she was leaning against the wall. A person standing to the right and behind the deceased would be in danger of being struck by shotgun pellets. The shooter himself was not at risk of being struck by a pellet as the pellets would not bounce back at the angle it struck the object. The burglar gate was a secondary object and the shots were not directed at it. A shooter would also not know where a rubber bullet might end up when it is shot as sometimes it will travel a few meters and other times it will travel further. He did not make notes with regard to the clothing worn by the deceased during the post-mortem examination and the court should rely on the notes made by the pathologist. He, however, remembers seeing the shell casing shown in “EXHIBIT K PHOTO 15” when the deceased was turned around.

[47] Mlindazwe was told that live ammunition was fired. He had requested the cartridge casing in order to calculate the distance the shooter stood when he fired the shots at the deceased. The cartridges he received were all from rubber bullets and none of them had the live ammunition. He never received the cartridge from the police.

[48] With regard to “EXHIBITS K” and “C” - a wad that was found in the inner chest of the deceased's body. When a shot is fired with live shotgun ammunition, Mlindazwe testified, the wad will travel with the pellets for 2- 3 meters, but it will be the first to drop as it is heavy. The fact that the wad was found inside the deceased's body is indicative of the short distance the shooter was from the deceased. The state thereafter closed its case.

[49] The accused, as indicated, testified as a sole witness in his own defence. At the time of the incident, he was employed as an Investigator at Magma Investigations. He worked with SAPS, EMPD, JMPD and other law enforcement agencies to fight crimes such as: ATM bombings, CIT robberies and other Alpha or high priority crimes.

[50] On 29 March 2020, the accused left his home in Thokoza in a white unmarked Golf 7 GTI, to the Sasol garage in Meyersdal. He was armed with a 9mm CZ pistol and a magazine with 16 rounds. He also carried an extra magazine with 16 rounds. His firearm was holstered on his waist. He intended to follow up information in a matter he was investigating, but first had to buy groceries at the Woolworths Food Store, which he later loaded in the trunk of his car.

[51] Whilst at the Sasol garage, several EMPD vehicles arrived. The accused knew several of the EMPD members, amongst others Constables Buthelezi, Maphumulo, Matyobeni, Monaheng, Sadike and Steenberg. The EMPD officers enquired whether the accused had any “jobs”, meaning information, for them. Whilst speaking with Csts, Buthelezi and a female officer, he was told that Nhlapo had instructed them to go to 2 addresses via Mavimbela section in Kandlehong. Buthelezi requested the accused to accompany them and he agreed.

[52] Matyobeni travelled with the accused as the EMPD bakkie was overloaded. Matyobeni got into the front passenger seat and placed his shotgun and rifle on the back seat. The accused and Matyobeni first stopped at the accused's house in Thokoza to drop off the groceries, where after, they joined the EMPD convoy.

[53] The accused testified that when in Monageng section, “we” went to a house with an outside tuck shop. On “our” arrival, there were a lot of people there. The people saw the police vehicles and ran away. The police, including Matyobeni, alighted and chased the people on foot whilst firing rubber bullets at them. No one was arrested, but “we” recovered drugs. The accused did not see whether Matyobeni fired his shotgun.

[54] Matyobeni returned to his vehicle and the convoy left to Gama Street where they parked on the right side of the street, facing the oncoming traffic. The cars stopped from the first to the fourth house. The police, including Matyobeni, alighted and ran into a house number 1081 with a huge zinc gate, visible on “EXHIBIT J PHOTO 5”. The accused remained in his vehicle. Matyobeni had left with his shotgun.

[55] The accused heard the sound of firearms and people ran away through the zinc gate while others jumped the wall. The police chased some of those who were running away. The people who ran away threw bottles, cans and stones at the police vehicles.

[56] Buthelezi followed someone to the third house and stood at the gate. The person he followed had entered the yard and closed the gate. The accused saw that Buthelezi and the person had a conversation. Although he could not hear it, it seemed like they had an argument. The people who had run away from house 1081 were now moving towards Buthelezi from a distance away. The gate opened and someone dragged and pulled Buthelezi into the yard. The accused alighted from his car and tried to scream to the police that Buthelezi was dragged into the yard.

[57] The accused saw Maphumulo run towards that yard. When the people at the side of that house saw Maphumulo enter into the yard, they moved closer to it. The accused closed the door of his car and tried to go to the vehicle behind his. He realized that there were still people coming out from house 1081. Matyobeni came from the corner between his car and a van. Matyobeni was injured on one of his elbows. The shotgun he had was on the ground at the left rear bumper of the

accused's vehicle. The accused took the shotgun from the ground and ran to where Buthelezi and Maphumulo were.

[58] As the accused approached the gate, the noise was louder and people were at the gate. He fired a shot at the people at the gate. The noise was from inside and outside the premises. The people from outside were unhappy about what was happening inside the premises.

[59] The accused explained that he used the shotgun and not his 9mm pistol as the 9mm pistol would kill people. He used the shotgun because he knew that it had rubber bullets which are used to disperse people. When he fired a shot at the people at the gate, they dispersed and ran away. He then entered the premises and saw a scuffle between the deceased and 2 police officers. They were dragging and insulting each other. He cocked the shotgun and aimed at the deceased who was pulling the police and fired a shot.

[60] There was an old lady who tried to intervene and separate them. She pulled the deceased from behind towards the house and shouted "what do you want from outside? Get inside the house" to him. The deceased was pulling Maphumulo's battle jacket at the corner of the collar near the shoulder. When they were about to reach the veranda, the old lady pushed the deceased inside.

[61] Maphumulo and Buthelezi were on the right side. The accused did not know whether the burglar gate was locked, but saw the deceased stretch his hand and grab Maphumulo. There was someone behind the deceased and that person was shouting. Maphumulo tried to drag the deceased and they were insulting each other. The accused realized that the deceased did not want to break loose from Maphumulo and he fired three continuous shots at the deceased from approximately 3 meters away. The deceased then released Maphumulo. The accused told Buthelezi and Maphumulo that they should leave the premises as many people had gathered and he did not know how many there were. They left in their cars.

[62] The accused could not remember seeing anyone else on the veranda when he fired at the deceased. When he shot, he aimed and looked only at the target.

When he was firing in succession, the accused focused on the way that the deceased and Maphumulo were grabbing each other. Maphumulo grabbed the deceased with both arms outstretched and his sidearm was open. There were a lot of people around and anyone could have grabbed Maphumulo's firearm. Although the accused does not know how many people there were, someone could have taken the firearm in the commotion. Had he known that there was a live round in the shotgun, he would not have used the shotgun. He did not use his 9mm firearm as it could have taken a life. He knew how to operate a shotgun as he had trained in the police.

[63] After the incident, the accused got into his vehicle with the shotgun. He found Matyobeni sitting on the passenger side. Matyobeni took the shotgun. They drove to a Sasol garage not far from the incident.

[64] During cross-examination, the accused testified that, he was a trained police officer between 1995 – 1999. Although he cannot remember everything about shotguns, he was trained in its use while at the police college. He was trained to use it with real and rubber ammunition. The accused was also trained on how to safely use a firearm, including how to fire a shot at his target. He was taught that the use of a firearm as a last resort will depend on the circumstances he would find himself in as one must look at the situation, identify the danger, and then decide whether to engage or not. He was taught that a firearm is a dangerous weapon that can cause death.

[65] The accused confirmed that a person's vital organs, like the heart, liver and lungs, are in the chest area where he would aim and he knows that when any of those organs are injured a person might die or be disabled. He agrees that irrespective of the type of firearm used, a shooter will be more accurate in hitting his target the closer he is to the target.

[66] He knows about cases where people have died when they were shot with rubber bullets, for e.g. recently in Braamfontein and also an incident in Lenasia. He knows that the police will shoot protesters with rubber bullets during strikes and has knowledge of people who have been injured or died as a result of these rubber

shots. He has heard about Andries Tatane, but did not know that he was killed with rubber bullets. The accused has seen people who were injured by rubber bullets. They were swollen and, in some cases, their skin was torn off by the impact of the rubber bullets. He agrees that rubber is volatile as the shooter will not know whether a bullet will travel 2 or 20 meters. Some rubber bullets will have no effect on a human target, others will cause injuries where the skin will tear and bruise, and others will cause death.

[67] The accused obtained a firearm license in 2013 for self-defence and knows that he should use his firearm when it is safe to do so. His firearm must be on his holster when he carries it or inside a safe when he is at home. Prior to using a firearm, he must ensure that the safety lock is on or off. When he has time, he will check to see whether it is loaded or not. He will also check his magazine to see whether it contains ammunition before putting it back in the firearm. Whenever he uses his firearm, he is responsible for whatever is inside it.

[68] He also did not see Matyobeni take any rubber rounds with him when he alighted at the tuck shop. Whilst travelling from the tuck shop, Matyobeni held the shotgun between his legs. He did not see Matyobeni put any rubber bullets in his pockets whilst on their way to Gama Street or when he alighted at Gama Street.

[69] When they reached Gama Street, the convoy parked next to the gate of house 1081 and the other cars parked in front of it. The accused parked in the street in "EXHIBIT J PHOTO 1" on the place marked "Z". After he parked, the EMPD members ran inside the yard of house 1081. Matyobeni took his shotgun with him. The accused heard several shots, although he is unable to say how many. The shots came from inside house 1081 and next to the gate. People ran out of the gate and they were shot from inside the yard. As there was a lot of confusion, he was unable to see who was shooting at who. Shots were also fired from outside the yard. Although he is unable to say who fired shots, the people who ran from house 1081 did not have firearms. Some people ran past the accused and others ran to the corner behind him. The people who were at the corner behind him threw empty glass bottles and beer cans at the EMPD cars. A glass bottle even broke in Gama Street.

[70] When Buthelezi went to the deceased's house, the accused did not see other EMPD officers. He heard noise and alighted from his vehicle in order to alert the members about a problem where Buthelezi was. When he alighted, the accused saw Maphumulo. The accused saw that Buthelezi and the person he argued with grab and pull each other. Buthelezi was grabbed at the collar of his jersey, but as there was a wall that obscured his view, the accused could not see how Buthelezi grabbed the other person. He accepts that Ms B[....] A[....] referred to Buthelezi as the short officer as Buthelezi is short and Maphumulo is of similar height as the accused. Although Ms B[....] A[....] saw a big, long firearm with Buthelezi, he did not see it.

[71] When the accused alighted from his car, he did not lock it. He was rushing and had no reason to lock it as he was going to alert members about the problem in front of him. He knew that house 1081 was close by and that he even could have gone in there to call police officers. There was thus no reason to lock his car. The accused accepts that when he left his car, Matyobeni's rifle was still on the back seat. He also agrees that he did not enter the yard of house 1081 to call for assistance.

[72] He never engaged Maphumulo nor informed him of the situation. The accused saw Matyobeni lean against the bonnet of the vehicle behind his. Matyobeni's shotgun was laying on the ground on the left passenger side. Although the accused saw that Matyobeni was injured, he did not engage him and did not speak to him. He took Matyobeni's firearm and did not follow or conduct any safety procedures. He did not check if the firearm was loaded or with what it was loaded. The accused also did not load the firearm and assumes that it was loaded by Matyobeni, although he never saw Matyobeni load it. The only person who had handled the shotgun was himself and Matyobeni and thus either one of them must have loaded the live ammunition in it. The accused also accepts Nhlapo's evidence that EMPD does not issue their members with live shotgun ammunition.

[73] The gate of house [....] was open. The people at the gate were not happy with what was happening inside and were swearing. He does not know why the people did not enter the yard through the open gate. After he fired the shot at the people at the gate, they dispersed and he did not see where they ended up.

[74] When the accused entered the yard, the deceased and Maphumulo pulled each other whilst facing each other. Maphumulo's back was towards the accused. Buthelezi was speaking or arguing with males inside the yard and was to the right of the accused. His focus was on Maphumulo and the deceased and as such, the accused did not see whether Buthelezi left, moved or went to assist Maphumulo.

[75] When he shot at the deceased, he had moved to the left in order to have a clear view of the deceased. The accused aimed at the deceased as he was the aggressor and he struck the deceased on the lower part of his body.

[76] The accused does not know what he would have done if the shotgun did not have any ammunition in it. He might have run away or he might have fought. He did not think about such a situation and he did not consider that a shot would not be fired. The accused never considered hitting the deceased with the butt of the firearm and never considered physically intervening between Maphumulo and the deceased. The accused thought that if he shot the deceased with the rubber, he would stop fighting and the EMPD members would arrest him. He continued using the rubber bullets despite it not having an effect on the deceased as he did not think about what else he could do. When the accused fired the shots after each other, he did not have a chance to think.

[77] When the accused was asked whether he had decided to use whatever was in the shotgun, he evaded answering the question directly. He responded by saying that he took the shotgun with the intention to disperse the people in front of the gate. He further said that if the shotgun had nothing inside it, nothing would have happened. He said that when he was in the yard, he shot a person in order to leave with the person who was attacked and that he did not intend to fire everything that was inside the shotgun.

[78] When shown "EXHIBIT N PHOTO 5", the accused indicated that the deceased stood on marked position "Z1" when he held Maphumulo who was at marked position "Z2". On "EXHIBIT N PHOTO 3", the accused stood at marked position "Z3" when he shot the deceased. He agrees that Maphumulo stood in front of the place where the burglar gate was hit. The deceased faced Maphumulo whilst

grabbing him and the accused was to his side. The accused insists that according to him, he stood about 3 meters from the deceased when he shot him.

[79] The accused shot the deceased because he wanted the deceased to release Maphumulo and he feared that the deceased could disarm Maphumulo. He thought that if the deceased felt pain, he would release and let go. He knows that the rubber would have injured and hurt the deceased when he fired the shot. The accused aimed all shots to the chest and stomach area of the deceased.

[80] When he found Matyobeni in his car, he explained to him what happened. When they were at the police station, he asked Matyobeni about the loud shot and whether they used different rubber bullets. At that stage, the accused did not know that a live round was fired. He did not ask Matyobeni about his injury. He also did not enquire about the possible arrest of the deceased from Buthelezi or Maphumulo.

[81] In response to clarifying questions by the court, the accused confirmed that the Andries Tatane matter was well publicised on television and media platforms, and that it was known that he was killed by police who used rubber bullets. However, when the accused took the shotgun, he did not think about that and that a person could be killed by a rubber bullet.

[82] He knows about the use of force, section 49 of the CPA, and that deadly force must be proportionate to the danger. He confirmed receiving training as per the police training manual, "Exhibit Q", and with the use of shotguns, "Exhibit R". He did not have any training in crowd control. He did not leave the situation at house [...] to the police as someone was pulled inside the yard. The accused believed that the group at the gate would accost the police inside, injure them and block them inside the yard.

[83] His intention was to assist and not to kill anyone. The accused admits that he was reckless in taking an object intended to kill without ascertaining what was inside it. He, however, just wanted to help. He did not ask Buthelezi to help as everything happened fast. He focused on Maphumulo and did not look at Buthelezi.

[84] The court exercised its discretion in terms of section 186 of the CPA and called Constable Matyobeni to testify. He confirmed that he attended the court proceedings *in casu*, but was not at court on the previous day. He was issued with a Glock pistol, a rifle and a shotgun at the time of the incident. As the owner of the shotgun, he is the person who loaded ammunition in it whilst travelling with the accused.

[85] Whilst in Vosloorus, they went to a house where liquor was sold. The house was full of occupants. The community ran in different directions as they were breaking lockdown regulations. Some of people in the house attacked the EMPD members with anything they could find, e.g. chairs. Matyobeni's objective was to arrest at least one person. He grabbed a person and went towards the gate with the person. He realized that there was a lot of community members and stones were thrown from different directions. He had to let go of the person he had. He fired shots to the ground. His objective in firing the shots was to get out and seek cover. Although he is unsure how many shots he fired, it could be two.

[86] He wanted to go to the accused's car, but was confronted by four males who kicked him. Matyobeni fell on his chest and his firearm slipped. He was also kicked on his knees and knelt down as he fell. That was the last time he saw his shotgun. He does not know where the accused was at that stage. Matyobeni does not know how the live ammunition got into his shotgun, but he loaded the shotgun with the ammunition that was given to him. His shotgun takes 6 – 7 bullets.

[87] Whilst inside the yard of house 1081, the EMPD members were attacked with empty liquor bottles, full bottles, bricks and anything the community could get their hands on. Although some of his colleagues were outside the yard of house 1081, he did not see them. He, however, thinks that if there were to look clearly, they would have seen him in the process of being attacked. Matyobeni was injured on his elbows, his hands and palms, his knee and his private parts. He made a report to Nhlapo, but he did not receive medical assistance.

[88] Matyobeni does not know how the accused got his shotgun. He knows that the accused rescued him and put him inside his vehicle after the incident. They left

thereafter. The accused helped him to pick up his items like ammunition and wallet. He can't remember what the accused told him when they left.

[89] It is trite that an accused person bears no onus whatsoever and he is accordingly not required to prove any aspect of his defence or to persuade the trial court of anything.¹ An accused person is entitled to be acquitted if, upon an assessment of the evidence considered as a whole, there is a reasonable possibility that the version put up in defence to a charge may be true. The court is obliged not decide the matter in a piecemeal fashion but all the evidence in its totality must be considered.

[90] As stated in *S v Chabalala*² the correct approach is:

“...to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

[91] In *casu*, it is common cause that the accused and several EMPD officers were in Gama Street, Vosloorus, on 29 March 2020 where EMPD officers shot at people with shotguns and rubber bullets. It is common cause that two EMPD officers entered the deceased's yard at [...] Gama Street, Vosloorus, and that there was a verbal argument between them. It is common cause that Ms B[...] A[...] intervened and pulled/pushed the deceased onto the veranda where N[...] A[...] slam locked the burglar gate with the deceased on the inside. It is common cause that the accused armed himself with Cst Matyobeni's shotgun and entered the deceased's yard at [...] Gama Street, Vosloorus. It is common cause that the accused fired at least 3 shots with the said shotgun at the deceased whilst he was behind the burglar gate. It is common cause that the deceased was unarmed for the entire duration of the incident. It is common cause that the said shotgun contained 1 round of live ammunition and that the deceased died as a result of being shot with that live round.

¹ *S v Jochems* 1991 (1) SACR 208 (A) at 211F.

² 2003 (1) SA SACR 134 (SCA) at 139I–140A.

[92] The following issues are in dispute:

92.1 Whether the accused loaded Cst Matyobeni's shotgun with live shotgun ammunition;

92.2 Whether the altercation between the deceased and the EMPD members was verbal or physical;

92.3 Whether the deceased held on to Cst Maphumulo at the time the deceased was shot and thus posed a danger to Cst Maphumulo;

92.4 Whether there was a crowd at or near the deceased house during the incident and whether that crowd posed any danger to anyone;

92.5 Whether the accused had *mens rea* in the form of *dolus* or *culpa*.

[93] Counsel for the state asked for a conviction in respect of count 1, the murder charge, on the base of *dolus eventualis* and in respect of certain of the remaining charges to which I deal with below in this judgment.

[94] Counsel for the accused contends that the evidence placed before the court does not show that the accused committed any of the offences preferred against him, except for the competent verdict charge of culpable homicide for which he tendered a plea of guilty.

[95] From the common cause evidence, the deceased challenged the police about shooting people in their houses albeit behind the confines of his gate. The independent evidence as per "EXHIBITS H" and "J" shows that shots were fired inside the premises of house 1081. The accused further confirmed that the EMPD officers fired at those inside the premises of house 1081. Ms A[...] testified that a short police officer who the accused identified as Buthelezi, responded that "this person is disrespectful". This is clearly the reason why the argument started between the deceased and the EMPD officers. They did not like being confronted and thus wanted entry to the premises. It is improbable that the unarmed deceased would

have pulled two armed EMPD officers into his yard. He was outnumbered and easily would have been overpowered.

[96] Ms A[...] is elderly, short and frail. According to “EXHIBIT C”, the deceased was 1,7 meters tall. Although he is slender, the photos in “EXHIBIT “J” depicts a well-built young man who does not appear to be weak and powerless. It is improbable that Ms A[...] would have been able to pull and drag the deceased to the veranda if he was resisting her. He appeared much younger and stronger than her, as N[...] also testified. It is thus more probable that the deceased was not aggressive, was not looking for a physical fight and that he was not holding onto Maphumulo. The fact that N[...] A[...] was able to close and slam lock the burglar gate is indicative of the fact that the deceased was not holding onto Maphumulo at the time. The accused’s version is that both Ms A[...] and the deceased were pulling Maphumulo onto the veranda. The version of the accused is thus clearly improbable and untenable.

[97] It is improbable that there would have been a crowd inside or outside the yard of house [...] as one would have expected them to intervene if the EMPD members were man-handling a civilian in his own yard. According to the accused, the crowd was not happy with what was happening inside the yard. Furthermore, the gate was open and nothing prevented them from entering the yard. The probabilities are that if there was such a crowd, they would have assisted the deceased and that they would have overpowered and attacked the EMPD officers.

[98] The probabilities on the forensic ballistic evidence thus favours the testimony of the eye witnesses (A[...]) and is contradictory to the accused’s version, especially as Maphumulo stood directly in front of the place where the burglar gate was damaged. On the accused’s own version and his knowledge about firearms and rubber ammunition, the accused consciously put Maphumulo in danger of being struck with the rubber bullets. His version is thus highly improbable.

[99] When Mlindazwe was cross-examined, it was proposed to him that the deceased could have sustained the injuries to his upper left arm if he stood sideways when he stretched his arm through the burglar gate. This proposition was excluded

by the accused who was adamant that the deceased faced Maphumulo. It is furthermore contradicted by the angle at which the deceased was shot and the fact that the injury on the deceased's chest has a track from right to left. The evidence and version of both Ms's A[...] is thus more probable.

[100] The accused, on his version, accompanied the EMPD members to gather information about a suspect, but yet he only spent time with Matyobeni, who travelled with him. Furthermore, on his version, the accused remained in his car and did not have any interaction with the EMPD members, apart from Matyobeni. His latter version is improbable. The accused joined the EMPD and actively participated as distilled from the objective facts.

[101] If the accused's version with regard to Matyobeni not loading the shotgun in his presence and not taking shotgun ammunition with him when he alighted on two occasions was true, it would mean that Matyobeni did not fire shots with his colleagues on two different scenes. The expert evidence from Mlindazwe is that the specific shotgun takes 4 – 5 bullets. Matyobeni was not sure and estimated it to take seven bullets. The expert evidence from Mlindazwe is to be preferred.

[102] The accused's testimony was that he thought that the deceased would release Maphumulo when he shot him with the rubber bullets and that the deceased would then be arrested. However, the accused fired continuously at the deceased and did not, on his version, give him an opportunity to release Maphumulo. Once the deceased released Maphumulo on the accused's version, the accused did nothing and left. He did not ask the deceased any questions. He did not speak to the EMPD members. He did not ascertain whether anyone was injured or whether Maphumulo lost his firearm. His version in this regard is thus improbable and his actions are contradictory to his intentions.

[103] The accused did not see Matyobeni being attacked by four males behind his vehicle. He could see that Matyobeni was injured and was aware of the fact that people were still coming out of the yard of house 1081. The accused was unable to ask any other EMPD officers to assist him or Matyobeni. Despite knowing that Maphumulo was giving back-up to Buthelezi, the accused disarmed an injured

Matyobeni and rushed to house [....]. This conduct of the accused is improbable as he literally chose to go to an unknown danger whereas he was in a position to assist Matyobeni who also was in danger.

[104] Both eye-witnesses to the incident, the A[....] ladies, were, I find, impressive witnesses who clearly bore no animosity or ill-will towards the accused. They were extremely good witnesses who had given evidence in an honest, straightforward and credible manner. Their respective statements to the police made shortly after the incident were introduced. In the case of the first state witness, she provided that her reasons for initially getting out of the house was because of her inner voice. In relation to Ms. A[....] Junior, the issue was whether the incident happened before or after she served lunch. These are not material inconsistencies. Accordingly, I find no material contradictions in any of the evidence tendered by both of them. Their respective evidence evidently corroborated each other in all material respects. I find that the evidence by the eyewitnesses is not only credible, but reliable. From their evidence it is clear that the accused and the police officers entered house number [....] forcefully and without justification. Furthermore, it is clear that the deceased was shot without justification.

[105] The version by the state witnesses that the accused and the police officers entered the premises without justification was not seriously challenged. From the evidence, it is clear that the deceased was confronted in the sanctity of his own home for no justifiable purpose other than that he voiced his unhappiness to the police who were out in the street shooting unarmed and innocent victims.

[106] The accused, on the other hand, was a poor witness. In his section 112(2) statement, it alleges the two police officers were dragged into house number [....]. Whilst explaining the events of the day, it turned out that the officers entered house number [....] in turn. He fails to explain in detail how constable Buthelezi was dragged into the yard of house number [....]. It is unfathomable that members of the community, or for that matter, the occupants of house number [....] would have dragged the police inside the yard. Not only is the accused's version in that regard his *ipse dixit*, a bare assertion, but contradicted by the state's eyewitnesses. At any rate, this is not supported by the objective facts. Neither was it suggested in

argument before this court. I have no doubt that the police, who were out in full force, would have countered such behaviour and responded with mightier force. The suggestion that there were lots of people at [...] is not supported by any objective evidence because on the version of the accused, the people who had gathered outside the gate dispersed after he fired the initial shot.

[107] Quite evidently and as one would expect, members of the community were running away from the police after 1081 was raided. From the objective evidence, the only people present inside the yard of [...] were family members of the deceased as well as two of his friends. That can hardly be described as a crowd. I find it highly improbable that there was any threat to the police present, their physical integrity, or firearms in their possession. The deceased was not suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm for purposes of section 49(2) of the CPA justifying a confrontation with the police and the accused.³ As indicated above, the accused's evidence in this regard was, in any event, seriously challenged by the state witnesses whose evidence I have already found to be more credible than that of the accused.

[108] There was criticism against parts of the summary of substantial facts which accompanied the above. By way of example, it was alleged in the summary that, "Cst Matyobeni was assisting his colleagues, but he had left his fully loaded shotgun inside the Accused's car" contrary to the testimony led during the trial. Also, that the accused "pointed the shotgun to the deceased and fired several shots at the deceased's body whilst Constable Buthulezi and N Maphumulo, B[...] A[...], and Ntombikhayise A[...] stood next to the deceased".

[109] But, as counsel for the accused rightly conceded, an indictment as envisaged in terms of section 144(3)(a) of the CPA and the evidence led as a summary of substantial facts, is not evidence and cannot be construed as admitted facts. It is nothing more than a statement of material facts to inform the accused of the allegations against him and the State is not required to set out exactly what evidence

³ See generally *S v Mathekga and Another* 2020 (2) SACR 559 (SCA) at para 16.

will be led to prove these allegations.⁴ To the extent that the summary is at odds with part of the evidence led to during the trial, this was clarified as the witnesses were subject to cross-examination. The accused suffered no prejudice in this regard. There was no suggestion made that he suffered any in that respect.

[110] As for the section 186 witness, Constable Matyobeni, his evidence is compromised as he sat through the trial in court but for one day towards the end of the accused's cross-examination. Constable Matyobeni, with the support of both counsel, was in the interest of justice called by this court to clarify how the shotgun ended up with the accused. He could not give a clear answer. His evidence is therefore not reliable. In any event, it has been contradicted by the version of the accused in crucial parts particularly with regard to how he ended up in the accused's car after the incident. I find it astonishing and therefore unbelievable that the alleged attack on him by four men would have gone unnoticed by his colleagues, including the accused. I also find it unbelievable that his own colleagues would have left him unattended and not refer him to hospital for medical attention had he suffered the kind of injuries complained of, including visible injuries. Constable Matyobeni has reasons to mislead. One primary reason is that he is facing misconduct charges and is yet to answer truthfully as to how he relinquished the possession of his shotgun to the accused.

[111] In our law *dolus eventualis* is generally defined as follows:

"...a person acts with *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but (a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and (b) he reconciles himself to this possibility."⁵

[112] Burchell and Hunt⁶ state that the "recklessness" required for *dolus eventualis*:

"...means the taking of a conscious risk. The accused foresees the consequence in question as a real possibility and yet persists in his conduct irrespective of whether it

⁴ *S v Van Vuuren* 1983 (1) SA 12 (A).

⁵ C R Snyman, *Criminal Law*, Sixth Edition, p 178.

⁶ *South African Criminal Law and Procedure*, Volume 1, p 152-4.

does result or not... It seems in every situation where the accused does foresee the consequence as at least a real possibility and nevertheless persists in his conduct irrespective of whether it results or not, he does consciously take the risk of it happening."

[113] The distinguishing feature of *dolus eventualis* is, as Jansen JA stated, "the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain".⁷

[114] In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. The perpetrator does not have to foresee death as a probable consequence of his or her actions – if the possibility of death is foreseen with a disregard of that consequence, the intention to murder is present.⁸

[115] In the instant case, the accused took Matyobeni's shotgun and, on his version, without knowing what was inside it. He did not know whether it had ammunition in it, what type of ammunition it had and how much ammunition it had. From the common cause evidence, the deceased whilst in his yard confronted the police about shooting people in their houses. From the common cause evidence, the accused shot the deceased with a Muzzler 12-gauge shotgun which can fire any 12-gauge shots in respect of which he had received training. According to "Exhibit R", the shotgun manual: "under no circumstances should the trigger be pressed unless you have checked the chamber and magazine of the weapon for any rounds". He did not perform any safety procedures nor did he ask Matyobeni anything about the firearm. The aim and purpose of these precautionary steps evidently are to prevent

⁷ *S v Ngubane* 1985 (3) SA 677 (A) at 685D.

⁸ See *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317 (SCA) at para 26.

an accidental death. The accused was aware of these steps, but recklessly, as he conceded, failed to follow any of them.

[116] The accused was trained in the use of firearms whilst at the police college. During his employ as a security investigator, he also obtained knowledge and experience in the use of firearms including shotguns. He also has knowledge as to when he is allowed to use his firearm.

[117] The accused did not seek help from any EMPD officer. He testified that he could have gone into the yard of house 1081 to ask for help as it was close to where he was. He however failed to do so, even though it was a consideration he had. He did not rush to Maphumulo in order for them to act together as a team to assist Buthelezi. Despite knowing that he has limited knowledge and practical training in the use and operation of shotguns, he persisted in his objectives. When his actions are considered, it is clear that the accused's intention was to take Matyobeni's shotgun and to use it, irrespective of what was inside it, he had reconciled himself with the use of the firearm and its contents to reach his objectives. On the facts *in casu*, the accused had no legal, lawful or legitimate reason to take and possess Matyobeni's shotgun.

[118] The accused conceded that he was aware of the well-publicized death of Andries Tatane who died when police officers shot him with rubber bullets. He also knew about other cases where people died as a result of rubber and personally saw injuries caused by rubber bullets, specifically where a person's skin was torn open. He is aware of the volatility of rubber – that some will travel further than others. Although he personally did not witness a person dying as a result of being shot with rubber, he knew that it could happen.

[119] The accused testified that when he took Matyobeni's firearm, his intention was to assist and not to kill. However, when he entered the deceased's yard and shot the deceased, his intention was, on his version, to hurt or injure him to the extent that the deceased must release Maphumulo, which version was dismissed. He continuously shot the deceased in the chest area where vital organs are situated, knowing that

injury to these vital organs may be lethal. The accused did not fire one shot at the deceased, but fired several shots one after the other without pausing.

[120] The accused did not think about or consider alternative ways to diffuse the situation. He also did not consider what he would have done if the shotgun did not have any ammunition in it. This is indicative of him reconciling himself to the use of whatever was inside the shotgun.

[121] As the accused is adamant that he did not take the shotgun with the intention to kill anyone, his subsequent actions must be considered to determine his intention at the time he shot and killed the deceased. In other words, did the accused subjectively foresee that he could have killed the deceased and did he, despite that foresight, reconcile himself with the possibility of the deceased's death.

[122] The accused had the subjective knowledge on his own admission that a person can be killed and injured as a result of the use of rubber bullets. When he took the shotgun, he knew what safety procedures he should have performed, but he failed to do any.

[123] Whilst inside the yard of house [...], the accused did not consider any other options apart from shooting the deceased with whatever was inside the shotgun. He did not shout for help from EMPD members. He did not call for back up at any stage. His focus and aim were directed at the use of the shotgun and at shooting the deceased.

[124] The deceased was behind the burglar gate and posed no danger to anyone. He did not have any weapon with him. Despite this, the accused, on his version, fired three shots at the deceased's chest area one after another where all his vital organs are. He did not stop after the first shot to give any further consideration to his actions. In some cases, the possibility of death will be a remote possibility and the perpetrator might think that death might not occur. Yet, he is aware that it is a remote possibility. If the perpetrator persists with his action, despite

awareness of the remote possibility of death, it will be proved that he acted with the intention to cause death.⁹

[125] The question which remain is whether the accused reconciled himself with the possibility of the deceased's death and acted with disregard to this possibility. In other words, did the accused subjectively think or foresee that death would not occur if he continued with his actions. The accused testified that he did not think about Andries Tatane when he acted and that he did not want to kill anyone when he started the sequence of events. Firearms by their nature are designed to kill. However, the accused reconciled himself with the use of the shotgun to achieve his goal without ascertaining the nature of the ammunition that was loaded. As it turned out, there was a live ammunition round that had been loaded. It had not been established beyond doubt that it was the accused who loaded the live ammunition. He did not consider any other option but shooting the deceased. Despite the specific knowledge he has, he disregarded all safety precautions and fired excessively at the deceased. The consequences of his actions were immaterial to him as is also evident in his conduct after shooting the deceased.

[126] He fired continuously at the deceased who was in a closed and confined space. The deceased was unarmed. He did not consider less invasive options to reach his objectives. It is fair to conclude that the accused thus reconciled himself with the possibility of the deceased's death. In firing with a shotgun at the deceased who was behind the burglar gate, the possibility of death was obvious. Furthermore, when firing at least three shots at the deceased at a distance of approximately 2 meters, the possibility of death is clearly obvious.

[127] In my view, the accused did not act out of necessity as suggested, but was at all times able to foresee, and did foresee, the consequences of his acts and did accordingly, form the intention to kill the deceased. He shot the deceased not once, but four times, and he then casually left from the scene with 2 other officers where he had killed him. In my view, the accused must have foreseen, and did foresee, that the shots which he was firing on the deceased would cause his death, and he nevertheless shot him, reckless whether death resulted or not. As indicated, the

⁹ *S v De Bruyn En 'n Ander* 1968 (4) SA 498 (A) at 501G – H.

shotgun injury to the chest, which proved fatal, left a gaping hole associated with trauma to the left lung and heart.

[128] On the vexed question whether the accused intended to cause death of the deceased, the law in this regard is settled and very clear. “If a person foresees the possibility of death resulting from his deed and nevertheless does it, reckless whether death ensues or not, he has in law the intention to cause death” per Holmes JA.¹⁰ I find that, at the time of shooting the deceased, the accused had the necessary intention in the form of *dolus eventualis*. I accordingly find that the State proved the commission of the offence of murder in respect of count 1.

[129] Despite that fact that the accused had the necessary intention to kill the deceased, it must be proved that he also had the intention to murder the complainants in counts 2 – 9. The state in closing argument, did not call for convictions in respect of counts, 2, 6, 8 and 9 due to lack of sufficient evidence to sustain the convictions. The evidence before this Honourable Court does not sustain the said conviction on all of the charges. However, with regard to counts 3 – 5, the four child complainants were injured as a result of the spread of the pellets fired by the shotgun. Their injuries are contained in “EXHIBITS D – G”. The complainants in counts 6 – 7 were in close proximity to the deceased but not affected when the accused fired these shots at him. The accused when he fired, knew that rubber bullets are volatile and that they could end up at any given place. He intended to hurt and injure in firing several shots. Accordingly, I find that he also foresaw the possibility of death and reconciled himself with it. I find that the guilt of the accused in respect of counts 3-5 were proved, but not 2,6, 7,8 and 9.

[130] It is common cause that the accused possessed a shotgun and at least one live shotgun bullet at the time of the commission of the offences. He however denies that his possession was unlawful. Despite subjectively thinking that he had lawful possession of the shotgun, the accused did not have justification for his possession

¹⁰ In *S v Mini* 1963 (3) 188 (AD) at 190F.

and use of the shotgun. There is no putative ground for the justification of the lawful possession of a firearm.¹¹

[131] The accused is unable to rely on self-defence or necessity as a ground of justification for his possession of the shotgun. On the facts as presented by the State, there was no unlawful attack on the accused nor on Maphumulo and Buthelezi. In fact, there was just a verbal argument that was escalating. Furthermore, the deceased was unarmed and behind a locked burglar gate. There was no imminent attack or danger to the accused and Maphumulo that was presented by the deceased. The use and possession of the shotgun was also not necessary to ward off any attack as there were, at any rate, other options available in the circumstances. The accused's possession of the shotgun and ammunition was unlawful and a conviction is justified.

[132] In all the circumstances, I conclude that the state proved beyond reasonable doubt that the following offences in respect of which the version by the accused, in turn, is not reasonably possibly true. The accused is convicted as charged for murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 in respect of count 1; and as charged in respect of counts 3-5; 10 and 11. The accused is acquitted in respect of counts 2,6,7, 8 and 9.

T P MUDAU
Judge of the High Court

Date of Judgment: 17 June 2021

APPEARANCES

For the State:	Adv R Barnard
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¹¹ CR Snyman, *Criminal Law*, 4th Edition, page 101.