

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Reportable/Not Reportable

Case No: CC 06/2020

In the matter between:

THE STATE

and

SIPHELELE GXASHEKA

ACCUSED

JUDGMENT ON CONVICTION

MAKAULA J:

[1] The accused is charged with housebreaking with intent to murder, murder, two counts of attempted murder, unlawful possession of a firearm and ammunition. The offences were committed on 15 August 2018 at 2[...] R[...] Street, K [...], Port Elizabeth. The deceased is Adrian Kammies. The attempted murder charges relate to D[...] B[...] B[...] W[...] (D[...]) and her seven year old daughter A[...] W[...]. The

three of them were inside the house when a person(s) fired shots at them killing the deceased instantly. Fortunately D[...] and A[...] escaped unharmed.

[2] D[...] testified that on 15 August 2018, she woke up at about 5h50 and boiled water to wash with. The deceased woke up and washed first and prepared to leave as he said he was going to work. The deceased left the house after 6h00. He went out and left the door half opened. D[...] was at the dining room undressing A[...]. She told the deceased to shut the door as cold wind was coming in. The deceased at the time was standing at the gate. Suddenly the deceased came back running. Upon entering he immediately shut the door and locked it. He was simultaneously shouting at D[...] to call the police. She was puzzled. As that was happening, a person from outside started to kick the door. They all ran to the bedroom. The front door eventually opened. Having entered the bedroom the deceased shut the door and tried to lock it. The key fell to the floor.

[3] The deceased pushed against the door trying to prevent the person from entering. At the time she was standing behind the deceased. As the pushing continued, she heard a gunshot. The deceased ordered her to lie flat on the floor. The deceased was screaming at her to call the police. She went to the window opened it and shouted for help. She saw someone approaching from outside with a gun in hand. She went away from the window and lay flat on the floor. That person put the gun through the window burglar guards and shot several times at the deceased. The deceased was still pushing against the door preventing the other person from entering. After a while the shooting stopped. She jumped up, took her

child and ran out to her mother's house. She came back to the house after the police had arrived.

[4] She testified that she made a statement to the police immediately after the incident. She was still shaken at the time. Shock had the better of her to an extent that she did not reflect properly in the statement the events of the occurrence.

[5] She testified under cross-examination about her daily living and the love relationship she had with the deceased. She further testified that there is a security door at the front door of her house which was clearly depicted on the photographs which formed part of the exhibits. She would lock the door using its key and also the security gate using a padlock. She is the only one who kept the keys. The deceased had no access to the house. He would only gain access when she was around. The house belonged to her grandparent and she lived with Ava only. The deceased was not staying with them. He would come for a week and would be away for days especially if there was a quarrel between them.

[6] The deceased informed her that he was working at Norwish Taxi rank repairing watches. Whenever he slept at her place, the deceased would leave at 6h00 saying he was going to Rustin's house so that they may go together to work since Rustin was working with Taxis. The deceased, if he was to sleep at her house, would come back between 20h00 and 20h30. Her evidence was that there is no way, the deceased would have sold drugs from her house because whenever she was at work, the house would be locked. The deceased did not have a duplicate key for the padlock even if he would have bought the door key.

[7] She testified further that her house was not a dagga or drug post. No drugs were sold in her house. Furthermore, there was a church house at the back of the main house in the same yard. She therefore denied that the accused previously bought dagga from her house. She disputed the version of the accused that was put to her about the purchase of drugs at her house. She stated that if the accused argued with people at the front door, she would have heard them.

[8] Sergeant George Rustler testified that on 15 August 2018, at about 6h30, he received a report that a crime had committed at 2[...] R[...] Street, K[...]. He attended to the complaint. He found the premises vacant. The security gate and the front door were opened. He saw blood stains on the stoep. He entered the house and saw the deceased lying in one of the rooms. He called upon his partner to cordon off the crime scene immediately. He met with D[...] who appeared shaken and could not speak. She told him that the deceased was her boyfriend.

[9] He called on the relevant units of the SAPS to come to the scene. He handed the scene over to Sergeant Peta. At that stage he was working at the crime prevention section and attended to complaints. He knew most of the Drug Posts (that is houses where drugs were sold). There were about nine drug posts in the Zinyoka area. The house in R[...] Street, where the crime was committed, was not one of the drug posts. On arrival at the house and upon looking around, he did not find any drugs. They use informers and he would have known if the house was a drug post.

[10] Sergeant Xolani Owen Peta is the investigator of this matter. He was appointed to the SAPS on 1 August 2007. He is attached to the anti-gang unit which is Provisional Organised Crime Unit.

[11] Sergeant Peta confirmed that on the day of the incident, he received a call from Captain Swartbooi to attend to the crime scene. On arrival he took it over. Captain Swartbooi informed him that the accused was a suspect because of his finger prints which he lifted from the crime scene. Captain Swartbooi furnished him with the address of the accused.

[12] On 12 September 2018 he visited the house of the accused. He could not find him. He left a message with Asavela who is the sister of the accused. He informed her that the accused was a suspect in a murder case. He obtained her particulars and in turn he left his. He left a message with her that the accused should contact him. He was never contacted by the accused.

[13] Again on 2 October 2018 he visited the accused's homestead. He found Asavela. On 29 November 2018 he went to the accused's home again. He found Asavela and their mother. He informed his mother of the reason why the accused was wanted. He further asked the accused's mother to inform the accused to contact him. He received no communication from the accused. On 3 April 2019 at 24h00 he went to the accused home. The accused was not at home and he left a similar message. He eventually arrested the accused on 5 April 2019. That was after he had recruited an informer from the area where the accused lived. The

informer phoned him and alerted him to the presence of the accused. He arrested him at Goniwe Street not far from the accused's home.

[14] He approached the accused, introduced himself and informed him that he was implicated in a crime of murder that occurred at Reconciliation Street through his finger prints. He informed him that he was under arrest and took him to the police station for further processing. That was after he had informed the accused of his constitutional rights to remain silent, access to legal representation and the right to apply for bail. The accused informed him that he was 19 years old. It was at the time he was taking his particulars and filling in the 14A detention form. He asked him if he had injuries on his body. The accused showed him old injuries that were on his right leg and left leg below the ankle. The accused told him that he was shot at in 2018 by one "Marcy". The accused did not remember how he sustained the second old wound to his right leg. He reflected the injuries in his pocket book and other relevant documents.

[15] There was an issue about the accused age under cross-examination. Sergeant Peta remained steadfast that the accused gave out his age as 19 years at the time and he believed him to be so. Sergeant Peta also confirmed the age from the case profile of the accused. He denied that the accused showed him his identity document. Be that as it may, it turned out that the accused was 16 years at the time of the commission of the offence. That necessitated the charge sheet to be amended to reflect the applicable legislation. He arrested the accused and obtained his warning statement. The accused elected to make a statement to his lawyer.

[16] Captain Kelvin Cecil Swartbooi is a Criminal Expert, Fingerprint Expert, Crime Scene Investigator, Laboratory Technician, Official Police Photographer, Video Camera Operator, Draughtsman and Forensic Fieldworker in the employ of the SAPS. He testified that he had been a Finger Print Expert for the past 22 years and has testified in countless cases involving fingerprints. His expertise in this regard is not in dispute.

[17] He testified that on 29 August 2018, during the period of operation lockdown, he visited the scene of crime. On arrival he inspected the crime scene. He took photos and marked all the points of interest like a palm print which he found on the security gate in the front door, blood stains, cartridge cases and bullets found at the scene. The photo album and key to plan he completed were handed up as exhibits and as stated above were not disputed by the accused.

[18] For purposes of completion, I shall refer in a summary way how Captain Swartbooi handled the crime scene and the swabs he collected from the blood stains. He collected and sealed the following exhibits:

- “2 wet swabs (Exhibits “X” and “W”) with possible Blood sealed them in a swab guard box 13DCAD3233 collected from the gravel road in front of the houses 22993 and 22994 Barberry Street and sealed them in an evidence bag PA4001864862.
- 2 wet swabs (Exhibits “V” and “U”) with possible Blood sealed in swab guard box 13DCAD3232 collected from the gravel road in front of houses 22996 Barberry Street and 23011 Reconciliation Street and sealed them in evidence bag PA4001864861.
- 2 wet swabs (Exhibits “T” and “S”) with possible Blood sealed them in swab guard box 13DCAD3235 collected from the gravel road in front of houses 23133 Reconciliation Street and sealed them in evidence bag PA4001864864.

- 2 wet swabs (Exhibits “R” and “B”) with possible Blood sealed in swab guard box 13DCAD3234 collected from the gravel road in front of house 23135 Reconciliation Street and from a cement slab near the front door on the outside of the same house and sealed them in evidence bag PA4001864863.
- 2 wet swabs (Exhibits “C” and “E”) with possible Blood sealed them in swab guard box 13DCAD3236 collected from stoep and the lounge floor at house 23135 Reconciliation Street and sealed them in evidence bag PA4001864865.
- 2 swabs (wet and dry) being Exhibits “F1” and “F2” with possible touch DNA sealed in swab guard box 13DCAD3238 collected from outside of the main bedroom door handle at house 23135 Reconciliation Street and sealed them in evidence bag PA4001864867.
- 2 swabs (wet and dry) being Exhibits “M1” and “M2” with possible DNA sealed in guard box 13DCAD3237 collected from the cartridge case found on floor underneath the window of the main bedroom and sealed in evidence bag PA4001864866”.

[19] Captain Swartbooi further collected cartridge cases and bullets inside the house where the deceased was killed. In the main bedroom where the deceased was found lying, underneath the window, he found five cartridge cases. He also found one bullet in the same room. In the spare bedroom, he found one bullet. When the deceased was turned over, one bullet and one cartridge case fell from his body. In the toilet, he found a cartridge case inside a plastic bowl containing water which was placed on top of the toilet seat. All the cartridge cases and the bullets were sealed in evidence bag PA6001861101.

[20] Upon further investigations, he found a palm print on the burglar gate as stated above. He developed the palm print with an orange fluorescent powder and enhanced it with a polilight flare blue. On 2018-08-16 he compiled a giant arch with the photographic fingerprint images to be scanned on AFIS and forwarded the giant

arch on the same day to AFIS. On 2018-08-21 the giant arch was forwarded back to him for verification. He verified it and linked the left palm print found on the security gate to Luncin Gxasheka *alias* Spesh. He informed the investigator accordingly. His evidence is not disputed in this regard.

[21] In his *viva voce* evidence, Captain Swartbooie testified that the palm print left by the accused on the security gate was very clear. The ridges on the palm print were wide and clear. He could see the start and end points. There was no sweat on the palm print because if the hand was wet with sweat, it would have been visible on the image. He further testified that the grip of the accused was firm on the security gate because the palm print was clear. He opined that it is either that the accused opened the gate with a tight grip or found it open. He stated that if the security gate was closed, the palm print would not be in that position. Furthermore, Captain Swartbooie said it is impossible for the accused to have left such a print if he merely leaned and held the gate while knocking. It should be noted that all that Captain Swartbooie did at the scene and elsewhere is compiled in the photo album that was handed in by consent and its correctness admitted by the accused.

[22] The next witness who was called was Rebecca Kimberley Francis-Pope who is a Warrant Officer in the SAPS and attached to the Biological Section of the Forensic Science Laboratory as a Forensic Analyst and a Reporting Officer. Her qualifications in the field were not in dispute. She has 11 years' experience in biological sciences. Her analysis of the blood samples, and the results she arrived at were not disputed by the accused. For that reason, I shall not delve much in the processes she undertook which culminated in her findings. Suffice it to state that in

her execution of her duties on 21/08/19, she received the case file pertaining to Bethelsdorp CAS 189/08/2018, LAB 309796/18, LAB 297372/18 and LAB 108765/19 and Kwazakele CAS 346/12/2016, LAB 158551/17 [Cluster ZD25/18/3/R] from the access control location E1–30 WR which is located at the Biology Section of the Forensic Science Laboratory. The samples she received were subjected by her to DNA analysis by a process requiring skill in biology. The results, she obtained were captured as follows:

“The DNA result obtained from the reference samples 16DBAG0410 (PA4002787870) [BETHELSDORP CAS 189/08/2018] and 16DBCD9258 (PA4003409740) [KWAZAKELE CAS 346/12/2016] are the same. Please refer to the above mentioned supplementary affidavit dated 2018-11-22, for interpretation”.

[23] She further received on 2018-11-19 the case file pertaining to Bethelsdorp CAS 189/08/2018, LAB 309796/18; LAB 297372/18 and Kwazakele CAS 346/12/2016 from the access control location E1–30 WR which is located at the Biology Section of the Forensic Science Laboratory. She also conducted a DNA analysis by a process requiring skill Biology and obtained the following results:

“4.1 The DNA result from the Swab 13DCAD3233 [“W”] [“22994 Barberry Drive ground”] [BETHELSDORP CAS 189/08/2018, Swab 13DCAD3232 [“U”] [“23011 Reconciliation Str ground”] [BETHELSDORP CAS 189/08/2018] and Swab 13DCAD3234 [“B”] [“Cement slab foot path between gate and front door 23135 Reconciliation”] [BETHELSDORP CAS 189/08/2018] matches the DNA result from the reference sample 16DBCD9258 [KWAZAKELE CAS 346/12/2016]. The most conservative for this DNA result is 1 in 3.4×10^9 trillion people”.

[24] In the same process, she received the case file pertaining to Bethelsdorp CAS 189/08/2018, LAB 309796/18 and LAB 108765/19. She also conducted a DNA

analysis by a process requiring skill in biology the outcome of which was the following:

- 4.1 The DNA result from the Swab 13DCAD3236 ["C"] ["Stoep front door"] (PA4001864865) and Swab 13DCAD3236 ["E"] [Lounge floor near door"] (PA4001864865) matches the DNA result from the reference sample 16DBAG0410 (PA4002787870). The most conservative occurrence for this DNA result is 1 in 3.4×10^9 trillion people".

[25] The upshot of the DNA results is that the blood samples obtained at the scene of crime on the stoep of the front door, lounge floor area near the door, on the ground, cement slab foot path between the gate and the front door and the gravel road in front of the neighbouring corner pink house at no 23133 Reconciliation Street matched the blood sample or DNA of the accused person.

[26] Captain Luzuko Mathews Mdineka testified that he is in the SAPS attached to the Ballistic Unit of the Forensic Science Laboratory. Amongst his qualifications and expertise, he is a Crime Scene Reconstruction Expert having received training on Advance Shooting Incident Reconstruction in the United States of America. He testified that he reconstructed the crime scene in this matter and produced Exhibits "M" and "N" which were handed up by agreement and admitted by the accused. His expertise as a Crime Reconstruction Expert and Ballistic Expert are common cause between the parties.

[27] Before, while doing his duties as a Ballistic expert at the forensic science laboratory and as contained in his ballistic report admitted as Exhibit "F" in terms of

section 212 of the Criminal Procedure Act 51 of 1977 (the CPA) Captain Mdineka records thus:

“On 2018/09/05 during the performance of my official duties I received two intact sealed bags with number PA6001861101 and PA5001118306 marked inter alia BETHELSDORP CAS 189/08/2018 from Case Administration of the Ballistics Section. I opened the bag and found the following exhibits:

3.1 Sealed evidence bag number PA6001861101 containing:

3.1.1 Six 9mm parabellum calibre fired cartridge cases marked by me 294141/18 G, N, M, O, P and K2.

3.1.2 Three 9mm calibre bullets marked by me 294141/18 J, K3 and Q.

3.2 Sealed evidence bag number PA5001118306 containing:

3.2.1 Five pieces of bullet fragments marked by me 294141/18 AA, BB, CC, DD and EE”.

[28] He examined the fired cartridge cases, bullets and bullet fragments mentioned in 3.1.1 and 3.2.1 and compared the individual and class characteristics marking transferred to them by firearm components during the firing process using a comparison microscope and found that:

“6.1 The cartridge cases mentioned in 3.1.1 marked 294141/18 N, M, O, P, K2 were fired in the same firearm. (1st Firearm)

6.2 The cartridge case mentioned in 3.1.1 marked 294141/18 G was fired in another firearm (2nd Firearm)

6.3 It cannot be determined if the bullets mentioned in 3.1.2 marked 294141/18 J, K3 and Q were fired or were not fired from the same firearm.

6.4 The bullet fragments mentioned in 3.2.1 are unsuitable for microscopic comparison due to damage”.

[29] In sum, he concluded that two firearms were used.

[30] On 15 August 2018 at about 10h20 he attended the crime scene. The intention was to compile a crime scene reconstruction, trajectory and terminal ballistics. He produced Exhibits "M" and "N" as stated above. The scene was pointed out to him by Constable Yali of the Port Elizabeth Gang Unit. On 16 August 2018 he also attended the post-mortem examination of the deceased body at Gelvandale mortuary. At the scene his intention and scope of the forensic examination were to do:

- Crime scene reconstruction and scene photography.
- Bullet trajectory examination.
- Terminal ballistics.

[31] During the crime scene examination he made the following observations:

- "7.1 A bullet holes marked by me "A", "A1" in the exterior and interior of main bedroom door. (Sic)
- 7.2 A bullet holes marked by me "B", "B1" in the interior and exterior of main bedroom door. (Sic)
- 7.3 A bullet hole marked by me "B2" in the exterior of second bedroom door.
- 7.4 A bullet defect marked by me "A2" in the wall just below the window inside main bedroom.
- 7.5 A bullet defect marked by me "C" in the wall next to the door inside the main bedroom.
- 7.6 A bullet defect marked by me "B3" in the wall behind the door inside the second bedroom.
- 7.7 Four cartridge cases on the floor below the window inside the main bedroom.
- 7.8 One cartridge case on the floor underneath the deceased inside the main bedroom.
- 7.9 One cartridge case inside the washing basin on top of toilet seat inside bathroom.
- 7.10 One bullet found underneath the bed inside the main bedroom.

- 7.11 One bullet found on the floor below the window inside the main bedroom.
- 7.12 One bullet found on the floor inside the second bedroom”.

[32] Having reviewed all that, Captain Mdineka concluded and made the following possible scenarios:

- “8.1 The bullet hole marked “A”, “A1” and bullet defect marked “A2” were caused by one bullet perforating the main bedroom door and hitting the wall below the window. The bullet was found on the floor next to the cartridge cases. The door was most probably closed when this shot was fired.
- 8.2 The bullet hole marked “B”, bullet hole marked “B1”, “B2” and bullet defect marked “B3” were caused by one bullet perforating the main bedroom door, second bedroom door and hitting the wall behind the door of the second bedroom. This bullet was found on the floor in the second/spare bedroom. The trajectory conducted indicates the main bedroom door was closed and second bedroom door was opened when this shot was fired. . . .”

[33] On 30 April 2020 at about 11h15, Captain Mdineka attended the crime scene again now at the request of Sergeant Peta of the Port Elizabeth Gang Unit with the same purpose as stated above. He established during the scene re-enactment the following scenarios:

- “5.1 There were minimum of two shooters involved at this scene and one was positioned inside the house shooting through a closed main bedroom door while the second shooter was positioned outside the house shooting through an open main bedroom window.
- 5.2 The shooter inside the house fired the shot that perforated the bedroom door as per bullet hole marked “A” at the deceased who was most probably blocking the door and bullet trajectory can be followed till it hit wall just below the window.
- 5.3 The shooter positioned outside the house fired minimum of six shots towards the deceased who was inside the bedroom and deceased sustained several wounds to

his upper body and head. One of these shots perforated the main bedroom door as well as the second bedroom door. The bullet was found lying on the floor of the second or spare bedroom. The trajectory of this bullet indicates that it may have struck leg/legs of the shooter positioned inside the house”.

[34] He testified that the injuring sustained by the accused is commensurate with his findings as depicted in Exhibit “N” in particular photo 6 of 9 which indicated the trajectory of the bullet. He measured in court the healed wound on the right leg of the accused and found that it was 43cm in the front and 40cm at the back from the ground. He opined that from the window to the last wall in the spare bedroom, the trajectory of the bullet indicates that it was going down because of the force of gravity. He testified that the position of the healed marks on the right leg of the accused clearly establish that fact.

[35] The accused testified that he woke up early on 15 August 2018 from Zinyoka area and walked for about 30 minutes to buy dagga at the house of Ms Witbooi. He bought dagga from the house before. The dagga he bought from there was of good quality and was affordable or cheaper. He arrived at the house. He found the door closed and also the security gate. He opened the security gate as it was not padlocked. As he was about to knock four men accosted him. One of the men came to stand in front of him. Simultaneously the others were kicking the door. At the time he was still holding onto the security gate with his left hand. Two of them searched him and took his cellphone and R150.00 from his pocket. He was pushed to the side and he leaned against the wall with his left shoulder while still holding the security gate.

[36] The door eventually opened. He was forcefully taken inside the house. It was a combined kitchen and a lounge (hall like) and there were two doors to the left. One was opened and the other was shut. The doors were opposite each other. He stood just before he could get to the doors. As he stood there, he heard a gunshot and felt like someone was kicking him from behind. He realised that two of his assailants were no longer with them. He got an opportunity to run away. He could not run properly. It was at that juncture that he realised that he had been shot. He walked between Desira's house and a pink corner house which was to his right. Behind the pink house (which is depicted in photos 25 and 26), he turned to the right and walked to the tar road where he hitched a hike to Dora Nginza hospital. He was treated and told to go home because the injury was not serious as his bone was not fractured.

[37] When he got home he lied to his mother by telling her that he was shot at while being robbed. He did not know who robbed him. He lied because he knew that it would come out that he smoked dagga something which he did not want them to know about because he was young. He got information from his sister one day that the police were looking for him because he was a witness in a matter. She also gave him the business card which bore the particulars of Sergeant Peta. He decided not to phone Sergeant Peta because he knew that witnesses get killed.

[38] He was later arrested while he was walking from a shop with his friend not far away from his home. He produced his identity document and gave it to Sergeant Peta. He was asked about his age. He told them that he was born in 2001. Sergeant Peta also looked at his identity document. The police told him that it was

late for them to take him to Narina House, which is a juvenile centre, because they were rushing to knock off duty and worse because it was a Friday.

[39] Sergeant Peta asked him whether he had injuries. He told him he had a healed gunshot wound on his left leg. He was shot at by one Marcy in 2018. He did not recall talking about the injury on his right leg which he sustained on the day of the killing of the deceased. He denied ever been to Reconciliation Street because he did not know that area well. He denied having broken to that house nor shooting at the deceased. He did not know that there were people in that house because he did not see anybody other than the four men who robbed him.

A. Analysis:

[40] The state in this matter is relying on circumstantial evidence. There is no direct evidence. Ms Witbooi did not see who shot at the deceased and them. She would only relate to what occurred while the attack took place. The other evidence that was led by the State was that of the police who arrived after the fact. They made observations, took photos of the crime scene, lifted fingerprints and reconstructed the crime scene as reflected above. Even the accused who arrived at the scene was of no assistance to the court. He testified that a lot took place inside the house. However, he was unable to tell the court even the slightest detail of what he saw and observed during the period he was with the assailants. He does not even know how he got injured and who did what amongst the four people he found himself with when the attack took place. The court has to rely on the possibilities and probabilities of the matter. It is now for me to engage in inferential reasoning.

Inferential reasoning was developed “in two well-reasoned cardinal rules” of logic which were referred to in *R v Blom* 1939 AD 188 at 202-203 as follows:

- The reference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[41] At the commencement of the proceedings, section 220 admission were made by the accused. Essentially he admitted the following:

- 41.1 The cause of death which was found by Dr Prudent Lulamile Mgobo to be “Head and chest injuries due to gunshots”.
- 41.2 The bullet point fragments that were collected by Dr Lulamile Mgobo during the post-examination in respect of counts 5 and 6.
- 41.3 The section 212 statement, photo album, plan and key attached thereto of the crime scene that correctly depicts and explains what it purports to depict and explain as observed and photographed by Captain Kelvin Cecil Swartbooi on 15 August 2018 have been untampered with. Collection of spent cartridges and bullet points from the scene.
- 41.4 That the spent cartridges and bullet points were untampered with when opened and examined by Captain Luzuko Mathews Mdineka.
- 41.5 That the DNA reference samples buccal swaps of the accused and the blood samples collected by Captain Swartbooi from the scene were not tampered with.
- 41.6 That the DNA profile from reference sample Gxasheka S/16DBCD9258 in Kwazakele CAS 346/12/2018) (LAB158551/17 is the same as the forensic DNA profile in Exhibits in Bethelsdorp CAS 189/08/2018 (LAB297372/18) which was analysed by Warrant Officer Morare Getrude Morare on 05 October 2018 and that her findings are true and correct.

- 41.7 That the findings of Warrant Officer Rebecca Kimberley Francis-Pope are true and correct in all its contents, including observations, findings and conclusion. Further that at the time of analysing the blood samples had not been tempered with.
- 41.8 That the DNA samples of the accused matched with those found at the crime scene as analysed by Warrant Officer Francis-Pope.
- 41.9 That the section 212 statement and the trajectory photo album and key thereto correctly depict and explain what the purport to depict and explain, as observed and photographed by captain Mdineka on 15 and 16 August 2018 and his report is true and correct in all its contents, including.
- 41.10 The section 212 statement and trajectory reconstruction photo album and key correctly depict and explain what they purport to depict and explain as observed and photographed by Captain Mdineka on 30 April 2020 and his report is true and correct in all its contents including observation, findings and conclusion.
- 41.11 The fingerprint (palm print) retrieved from the security gate by Captain Swartbooi correctly depicts and explains what it purports to depict and explain as observed and photographed by him and his report is true and correct in all its contents including his observations, findings and conclusions and that the accused admits that to be his palm print.

[42] The effect of these admissions is that all the evidence tendered by the State was not in dispute. The uncontroverted state evidence is that the deceased died of gunshot wounds. Further that there were two firearms by two different shooters that were used when the deceased was killed. It is further so that the evidence of Captain Mdineka that only one gunshot was fired from inside the house should be accepted as a fact. Captain Mdineka says the shooter was standing in front of the bedroom door with the toilet to his right hand side. The cartridge case was ejected on the right side of the firearm hence it ended up where it was found in the plastic bowl. The only bullet is the one that was shot through the door and ended up below

the window of the main bedroom. His second uncontroverted evidence is the trajectory of a gunshot which came from the window of the main bedroom through its door, second bedroom door and hitting the wall behind the door and the bullet being found on its floor. The trajectory indicates that the main bedroom door was closed and the second bedroom door was opened when the shot was fired. Photo 6 of 9 of Exhibit "N" depicts the position of the shooter standing behind the door of the second bedroom. It further depicts the trajectory of the shot which was fired from the window hitting the right leg below the knee. The position of where the bullet struck the person depicted as the shooter is in line with and is in a similar position to the healed gunshot wound which was sustained by the accused that day.

[43] There is nothing to gainsay the manner in which Captain Mdineka reconstructed the scene. It is the only possible scenario in the circumstances of how the injury was sustained by the accused on that day. The accused's evidence is to the effect that he does not know how he sustained the injury and at what spot he was standing at in the lounge area of the house.

[44] The accused's evidence is full of inconsistencies and contradictions. It is confusing as he also appeared to be. He says a lot happened inside that house as intimated above. But when asked to state a few things that occurred there, he is unable to mention even one. He virtually knows nothing about what occurred in the house. He does not know what his assailants did after entering the house. He did not see them push the main bedroom door. He did not see them shooting through the door. This is even though he claimed to have left the house after sustaining the injury. Ms Witbooi testified that the attempt by the assailants to gain entry in the

main bedroom stopped after shots were fired through the main bedroom window towards the door which the deceased barricaded by using his body. Having regard to the evidence that the only shot that went through from the window is the only one that struck the person in that room, it is inevitable not conclude that that person was the accused. He is the only person who was injured in that house other than the deceased in the absence of any evidence to the contrary.

[45] The front door which the accused and others, according to him, went through to gain access to the house is located almost a metre from the bedroom window through which the shots were fired. The accused says he went out on realising that two of the assailants were not with them. It was after he had been shot and the firing had started. Surprisingly enough he did not see the person who was firing through the window. That is impossible in the circumstances. He was not accosted and was allowed to leave the scene despite the fact that he was forcibly taken into the house.

[46] The accused as alluded to said that when he left he walked between the two houses and turned behind the corner house or the pink house. When asked about his blood spots in front of the pink house on the gravel road as dealt with in the evidence of Captain Swartbooi, he was unable to answer how his blood got there. It meant that he was lying.

[47] The accused even lied about the fact that he was pushed whilst holding the security gate to a point that he remained holding the security gate while his left shoulder was against the wall with him facing the right side of the house. Photo 51

clearly establishes that would have been impossible. If his shoulder was against the wall, he certainly would be facing the inside of the house. Furthermore, considering that the gate protruded against the wall it would have been impossible for his left palm print to have been in that position because essentially the frame of the security gate would have been right towards his back away from the shoulder as he would be facing the inside of the house.

[48] Ms Witbooi and Sergeant Peta testified that there is a church building in that yard. It is incorrect therefore that the house may be a drug post as suggested by the accused. Sergeant Rustler testified that the house was not a drug post because as police officers they know the drug posts in the area.

[49] There are numerous other improbabilities in the evidence of the accused which leave his evidence to be less cogent. I need not exhaust all of them for purposes of establishing that the evidence of the accused is not reasonable and probably true. With all that has been dealt with above, his evidence stands to be rejected as false. He is one of the people who shot at the deceased and was unfortunately injured by his co-perpetrator. He was a poor witness whose credibility left much to be desired. I therefore find that based on the circumstances of this matter, the State has established the guilt of the accused beyond reasonable doubt. As alluded to two firearms were used in the commission of the offences. It is only reasonable to infer that the accused was in possession of the firearm and ammunition at the time.

[50] The deceased, according to Ms Witbooi came back to the house running. Upon entering he closed and locked the front door and shouted at her to call the police. They all got into the main bedroom and the deceased closed the door and attempted to lock it. At the time the assailants had kicked opened the front door and were inside the house. They were struggling to open the bedroom door when the deceased screamed at her to call the police and lie down on the floor. She ignored him and went to the window, opened it and called for help. It is at that stage that she saw a person approaching carrying a firearm. With all the shouting, surely the accused must have realised that there were other people in the house other than the deceased. Despite that they continued to fire several shots into that bedroom. It was foreseeable that those people could be killed in the process. Regardless, the accused and his co-perpetrator carried on with firing through the closed door. Therefore, the accused did attempt to kill Ms Witbooi and her seven year old child. They were fortunate to come out unharmed. I therefore find the accused guilty as follows:

- Count 1: Housebreaking with the intent to murder.
- Count 2: Murder.
- Count 3: Attempted Murder.
- Count 4: Attempted Murder.
- Count 5: Unlawful possession of a firearm.
- Count 6: Unlawful possession of ammunition.

M MAKAULA
Judge of the High Court

Appearances:

Counsel for the State:

Adv R Ahmed
Director of Public Prosecutions
Port Elizabeth

Legal Representative for the Accused:

HMA Bence Attorneys
Mr H Bence
Port Elizabeth

Date conviction delivered:

18 September 2020