

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

Case No: CC 20/2020

In the matter between:

THE STATE

and

SIMTHEMBILE NTLOKWANA

ACCUSED NO.1

SIYABULELA MRAJI

ACCUSED NO.2

JUDGMENT ON CONVICTION

MAKAULA J:

[1] The deceased Peter Sample lived at No 10 Higa Street. He operated a business from his house garage styled Peter Sounds and Alarm. He installed car radios and alarm systems. He had two employees, Thabiso Jekeqa (Thabiso) and one referred to as Peanuts. At his home, the deceased lived with his brother Patrick Sample (Patrick) and certain children. The deceased was shot and killed at his home on 24 December 2019.

[2] On 24 December 2019, the deceased was at work as usual. He was with Patrick, Peanuts and Thabiso. They were working on a car. Two men arrived. According to

Patrick, one of them had an injury on the head. They spoke to the deceased and thereafter left. After some time they returned in the company of another man whom he described as having an average body build and asked from the deceased whether he was giving them their radio. The deceased denied knowledge of it. One of them drew a firearm cocked it, placed it on the deceased head, and fire a shot. The deceased fell down. Patrick ran towards the house. As he was running, he heard a second gunshot, which he assumed was aimed at him. He ran into the house and while he was inside, he heard a third gunshot. He ran out the back door to a neighbour's house.

[3] Patrick returned after a while and found the deceased lying in front of the garage. He pulled him to the garage. Many people had gathered at his home. The police arrived. He could not identify the person who shot the deceased. It is worth mentioning at this stage that I acquitted the accused at the close of the State's case of the charge of attempted murder (i.e. Count 2) relating to the attempted murder of Patrick. The latter was running away from the incident at the time he heard a gunshot and could not vouch that it was aimed at him.

[4] Thabiso testified that on 24 December 2019, he was working on a motor vehicle fitting speakers with Peanuts. He was working on the driver's side under the steering wheel. Peanuts was busy on the passenger's side which was closer to the garage which they used as a workshop. Peanuts alerted him saying "here are these guys coming". Thabiso did not see them. A short while thereafter, he heard a gunshot and

people screaming. A second shot rang and Peanuts got out of the passenger's side and ran away. Another shot went off and it was then that he got out from under the steering wheel to see what was actually happening. Initially he thought what he heard were crickets (i.e. firecrackers). When he looked through the passenger side, he saw a man carrying a black 9mm pistol which looked "like those that are carried by the police". That man swore at him saying "msunu kanyoko don't look at me".

[5] Thabiso testified that that man, who he later identified to be Accused 2, became aware of Thabiso's presence after sometime. At the time, Thabiso had a good look at him. Accused 2 did not see him initially because of the position Thabiso was in. At that juncture, Thabiso was in the process of getting out of the car. Thabiso said he had been looking at him from the time Accused 2 came from the garage towards the car he was working on. He saw him for more than ten seconds. They locked eyes when he was instructing him to get out of the motor vehicle. At the time, Thabiso was sitting on the edge of the driver's seat watching him.

[6] Accused 2 ordered Thabiso to get out of the car. He was pointing the firearm downwards at the time. Thabiso complied and moved from the driver's side, walked to the front of the car and towards the garage as ordered. At all material times Thabiso was looking at him. Accused 2 then pointed the firearm at him and escorted him towards the garage. He saw the deceased lying on the ground in front of the garage. Accused 2, when closer to the deceased, fired a shot at the deceased. As they were walking

towards the garage, Thabiso saw another man coming out of the garage carrying a firearm and a Plasma Television set (TV). Accused 2 said “look down Msunukayoko, let us kill this one as well because he has seen us”. The one carrying the Plasma instructed Thabiso to go away. He walked past him and went to the deceased room through an interlinking door in the garage. Whilst inside the house, he heard another gunshot.

[7] Thabiso could not identify the one who was coming out from the house carrying the TV. On 15 January 2015 an identification parade was held at St Albans prison by Captain JG Mackay at 10h00. Thabiso pointed out Accused 2 as the person who took him out of the motor vehicle and shot at the deceased while he was lying on the ground. He did so within 10 seconds. Thabiso again pointed at Mr Windvogel as the second person who was carrying the TV. He took 5 minutes to do so. He admitted under cross-examination that his identification of Mr Windvogel was wrong because he did not have a good opportunity to see the person who was carrying the TV set at the scene of crime. He testified that immediately after the identification parade, he told the Investigating Officer that he made an error when he identified Mr Windvogel as the second suspect.

[8] Thabiso further testified that the people who formed part of the identification parade were almost of the same height, built and complexion. Only two of them were wearing prison trousers and they were not amongst those he pointed out. He disagreed with the defence counsel that he could have made a mistake in identifying Accused 2.

He denied further that he had initially saw Accused 2 in New Brighton Magistrate Court when the accused appeared there for the second time after their arrest as put to him. He stated that Accused 2 would be lying if he denied his involvement in the killing of the deceased intimating that he is the one who ordered him out of the motor vehicle he was working on. He was cross-examined at length about the statement he made to the Investigating Officer. He confirmed that he made the statement and signed it. He testified that there was a language barrier between him and the Investigating Officer. He left school in Grade 11. He is not well conversant in English and that created a communication problem between them. He battled with translating some Xhosa words to English. He denied the part in his statement that said he saw Accused 2 pointing a firearm at the deceased. He repeated his evidence that the deceased was already on the ground when he saw Accused 2 firing a shot at him. He ascribed that contradiction to the communication problem he experienced when he made the statement. Thabiso was an honest witness who easily conceded if he made a mistake. His demeanour was excellent in court and gave credible evidence. He would concede any aspect of the matter that favoured the accused.

[9] Ms Nombulelo Totyi (Nombulelo) was a passenger in a motor vehicle which was driven and owned by Mr Dumile Maxwell Mrwebo (Dumile). Nombulelo worked for Dumile as a domestic worker. Dumile, on 24 December 2019 was taking her home after work. They drove down Higa Street. That street has speed humps. As they were slowly driving down the street, a dark male person approached Dumile and demanded that he should give him the motor vehicle. Dumile stopped the motor vehicle. That

person produced a firearm and demanded that he should give him the key. Suddenly, he fired two shots inside the motor vehicle. The bullets struck her on her left leg. The medical certificate reveals that she sustained the following injuries.

- “1-4 cm laceration noted on the sole of left foot.
- Bullet wound noted on the right calf”.

[10] Nombulelo testified that they both alighted from the motor vehicle and sat on the side of the road waiting for an ambulance. The person drove away in the motor vehicle. She was unable to identify the person who shot at her. She was taken to Dora Nginza Hospital where she was treated for the injuries.

[11] Dumile confirmed the evidence of Nombulelo regarding how the incident occurred. He testified that he was 72 years old. As he was driving down Higa Street at about 5pm, he was stopped by a certain young man. He did so by standing in front of the motor vehicle. He stopped the motor vehicle as he was not driving fast because of traffic and the speed humps. The young man came to the driver’s side and demanded that he should give him the car. The young man was carrying a firearm. He tried to get out of the motor vehicle. He was struggling to get out because of his age. The young man started to fire gunshots at him. He struck him on the left hand between the little and the ring fingers. He bled profusely. Eventually he struggled out of the vehicle and went to sit on the pavement. The young man got into the driver’s seat and called out saying “Nantsika yiza nalonto gou” translated to me “hey guy come with that thing

quick”. It is then that Dumile looked down the street. He saw a person coming from the deceased house and approaching the motor vehicle carrying a Plasma TV and a firearm with the other hand. He watched that person throughout until he reached his motor vehicle. He attempted to place the Plasma TV inside the cab but it would not fit. He then took it to the back of the van and placed it there. He entered at the passenger’s side and they drove off. He said he had a good opportunity to identify the person as Accused 1. I should mention upfront that at a photo identification parade, Dumile pointed at a wrong person claiming him to be Accused 1. I shall deal with that later on in the judgment.

[12] Dumile confirmed that Nombulelo was injured. She was taken to hospital by an ambulance. The paramedics treated him at the scene and he thereafter went to his home. He stated that he saw the body of the deceased lying in the garage and a lot of people had gathered at the deceased’s house. He testified that in subsequent days he made a statement to the police, attended the photo identification parade and also received his motor vehicle as it had been recovered by the police.

[13] Dumile was quizzed about his mistake regarding his identification of wrong persons at the photo identification parade. He was adamant that he was certain about the identity of Accused 1 even on the day and subsequently thereafter. He conceded that he could have made a mistake about Accused 2 as the person who shot him. He ascribed that mistake on the fact that he was shocked when he demanded the motor

vehicle and it was worse after he shot at him. He, however, said that he was now able to recognise Accused 2 as he was in the witness box as the person who shot at him. He recalled that it was him. I should state that the evidence of Dumile is not convincing as to how he identified Accused 2. In his evidence in chief he stated that he was unable to identify the person who shot at him. But as the cross-examination unfolded, he gradually became more confident that it was Accused 2 who shot at him. I do not accept his identification of Accused 2 as reliable for purposes of positive identification of him.

[14] Regarding the photo identification parade, I enquired from both counsel as to whether the photos of the accused were amongst those which were in the identification photo album i.e. Exhibit "F". It turned out that their photos were not amongst them. This should be viewed in the light of Dumile's evidence that he identified the photo that was marked 11 as that of Accused 1. He was unable to pick a photo that resembled that of Accused 2. To me that he pointed somebody who is not Accused 1 casts some doubt as to whether he clearly saw Accused 1 to an extent of him being able to identify him later. The identification of Accused 1 by Dumile is not reliable especially because of his identification of a wrong person in the photo identification parade. If he was so certain about his identity, he could have easily said Accused 1's photo is not amongst those.

[15] Warrant Officer Xolile Ngqambuza testified that he visited the crime scene and picked up three cartridge cases. One was across the street opposite the premises of the deceased next to the speed hump and the other two cartridge cases were in front of the garage. He took photographs of the scene and the cartridge cases.

[16] Warrant Officer Sherwin Ashley Walsh is a member of the SAPS attached to Mount Road Police Station Vehicle Booth. He took photographs of the motor vehicle of Dumile. He found possible blood stains and a bullet inside the vehicle. Warrant Officer Schoeman who is a ballistic expert testified that the cartridge cases found at the scene (whose chain evidence is not in dispute) were fired from two different firearms.

[17] Captain Jerome Gerald Mackay is stationed at Kwazakhele Police Station. He conducted an identification parade at St Albans Correctional facilities. He testified that he complied with all the processes which are necessary for an identification parade stipulated in the Criminal Procedure Act¹, (the CPA) and their Standing Orders. The accused were legally represented at the parade by the Legal Aid Attorney Mr Mbekwana. He confirmed that within the time stated above Thabiso pointed out Accused 2 and Mr Windvogel who was not a suspect in this matter. The cross-examination of this witness did not advance the case of the accused in any meaningful manner.

[18] Sergeant Leon Matthys Lotter arrested Accused 2 on 30 December 2019 at Saba Street in Kwazakhele. It was after they had arrested Accused 1 at the corner of Saba Street. As they were arresting Accused 1, he saw Accused 2 at Accused 1's home. Accused 2 was watching as they were effecting the arrest on Accused 1. On realising that, Accused 2 ran away. He chased after him. Accused 2 jumped over a boundary

¹ 51 of 1977.

wall to a neighbouring house. He did likewise. Having jumped over the wall, Sergeant Lotter noticed people coming rushing out of a flat. He got inside the flat and found Accused 2 inside. Accused 2 had taken off his clothes and was busy wrapping a towel around his waist. Accused 2 was out of breath. Accused 2 resisted to be arrested. He summoned their motor vehicle to come closer. They eventually arrested him. He phoned the Investigating Officer and notified her accordingly.

[19] The Investigating Officer Warrant Officer Yolandi Mynhardt testified in respect of two issues. She testified about how she obtained the statement of Lubabalo Fumananenzi (Lubabalo) who has since passed away, and who according to her was a key witness in this matter. She testified that Lubabalo was murdered on 3 December 2020 a few weeks before the matter started. Lubabalo, according to her, gave the statement freely and voluntarily. They communicated in English and Lubabalo read the statement, initialled each page and signed it. The import of her evidence in this regard was for the admission of the statement of Lubabalo in terms of section 3(1)(c) of the Law of Evidence Amendment Act² (the Act). The section deals with the admission of hearsay evidence, as in this instance, the affidavit of Lubabalo amounts to hearsay evidence because he was not available to testify in court because he is deceased.

[20] Mr Makasana brought a substantive application in this regard. In the application Mr Makasana submitted that it was in the interests of justice that the sworn statements

² 45 of 1988.

made to the Investigating Officer and to Sergeant Erasmus made to the Investigating Officer be admitted as evidence. Lubabalo stated in his statement amongst other things, that during the second week of December his motor vehicle was broken into and a sub-woofer and an amplifier were stolen. His investigations led to Kuhle who informed him that he sold the items to the deceased. He and Kuhle visited the deceased who denied knowledge of the allegation by Kuhle. They left and on their way, Kuhle told him to stop next to four males who were in the street. He stopped and Kuhle went to them. Kuhle came back with two of them and they told him to drive to the deceased home. At the house, the deceased was called and whilst still talking to them one of the males took out a firearm and shot at the deceased. Lubabalo was shocked and he ran to his motor vehicle and drove to the Zwide Police Station to report the incident. He was told to go to Kwazakhele Police Station which he did. At Kwazakhele Police Station he was informed that the police were already at the scene of crime and that they will call him. They told him he must come to the police station on the 26th December. No one phoned him. On 29 December 2019, he saw Kuhle and took him to the police detectives to inform them of what they know. He intimated that he could identify the two males. He noted that he heard rumours that they wanted to kill Kuhle.

[21] Lubabalo again made an identification statement to Warrant Officer Erasmus on 29 December 2019 at 10h03. He states in the statement that he was shown a photo album and asked to identify the two males. He states as follows:

“3. He showed me a photo album by signing underneath the photos pointed out photo number 2 and photo number 12 as the suspects in the above mentioned case. (*Sic*)

4. The suspect pointed out in photo 2 was inside the house when I heard the shots and the suspect in photo number 12 was standing outside the garage. I also like to state that I immediately drove off when hearing the shots go off. I heard shots at the time". (*Sic*).

[22] There has been no dispute that photo 2 depicts Accused 1 and photo 12 Accused 2. What has to be noted is that Lubabalo did not see any of the accused shooting the deceased. He ran away on hearing the shots; of importance is that he was able to place the accused at the scene of crime especially when the shooting started.

[23] The second reason why Warrant Officer Mynhardt was called is because the State applied for the declaration of Kuhle Nobebe (Kuhle) as a hostile witness. In this regard, she testified that she was phoned while doing her detective duties to come to the police station because there were two gentlemen who wanted to meet with her. She obliged. On arrival she met with Lubabalo and Kuhle. She took them to her office and enquired from them the purpose of their visit. They told her that they witnessed the death of the deceased and wanted to give their account of what had happened. She asked Kuhle to wait at a place which is provided for visitors. It is far away from her office in a passage which is about 30 metres away.

[24] She obtained a statement from Lubabalo. They spoke in English. There was no language barrier between them. Having finished, Lubabalo signed and she commissioned the statement. Thereafter, she told him to wait outside. She then called

Kuhle in and did the same thing with him. She asked if he wanted to make the statement freely and voluntarily to which he confirmed. Kuhle spoke to her in English. They understood each other very well. It was only the two of them in the office. Had there been a communication problem, she would have easily asked for a Xhosa speaking colleague to come and serve as an interpreter. After finishing, she went through the statement with him and thereafter administered oath and Kuhle signed it.

[25] Warrant Officer Mynhardt denied that she used Lubabalo to interpret on behalf of Kuhle. She said she would not have done so because that is not allowed. On 30 December 2019 she fetched Lubabalo from his home for purposes of an identification parade. The person in charge of that identification parade was Captain v d Berg. The outcome was that he pointed out the accused as the perpetrators. She denied that she showed Kuhle the photos of the accused prior to the photo identification parade nor at any stage thereafter. She again saw Kuhle at the police station. Kuhle had come to report to her that he was scared because he heard that Accused 2's friends were looking for him (this confirms the statement of Lubabalo). She testified that Kuhle never at any stage told her that he was coerced to write a false statement which implicated the accused.

[26] Under cross-examination, Warrant Officer Mynhardt stated that she was informed by Lubabalo that he had been looking for Kuhle since the day of the incident.

He did so because he wanted Kuhle to make a statement to the police because he witnessed the killing of the deceased.

[27] She testified that Lubabalo was a willing witness who approached the police immediately after the incident at Zwide Police Station. He was, however, told to go to Kwazakhele Police Station. At Kwazakhele he was told to wait for the detectives who were at the scene of crime. Seemingly, he did not meet with the detectives on that day hence he came in with Kuhle to make the statement, so she testified.

[28] The State called the evidence of Kuhle Nobebe (Kuhle). Kuhle was declared a hostile witness in terms of section 190(1) of the CPA. Kuhle gave a statement to the police and consulted on numerous occasions with the Investigating Officer and the Public Prosecutor. In the statement and during consultation, he claimed that the people who killed the deceased are the accused. However, at the time he testified he changed to say that the accused were not involved in the murder of the deceased. Hence the application to declare him a hostile witness was granted after the State had established and proved the statement. Kuhle conceded that, during consultation, before the court started, he misled the Public Prosecutor to believe that it was the accused who killed the deceased. He further confirmed that the contents of the statement reflected what she told Warrant Officer Mynhardt. However, he was coerced by Lubabalo to say that to her.

[29] In court, Kuhle testified that he knew both accused very well. He knew Accused 1 as Simthembile. He used to buy clothes from him several months before the incident. He even knew where he lived. He knew Accused 2 as Siya because the latter used to visit his place of work at Big Daddy in Struandale. They were not friends but acquaintances. They would greet each other when they met. However, he did not know where he lived.

[30] Kuhle testified further that on 24 December 2019, Lubabalo picked him up next to a certain shop and took him to Grahams' tavern. When they got there, he enquired about his music system. He told him he sold it to the deceased. Lubabalo assaulted him to an extent that he sustained two lacerations on his head. Lubabalo took him to the deceased's home. On arrival, Lubabalo enquired from the deceased whether he knew Kuhle. The deceased denied knowing him and having bought a music system from him. Kuhle pointed at the music system because it was displayed or lying in his workshop. Lubabalo took him away and they drove in the direction of Graham's tavern. At the tavern, they left the delivery van because it had liquor and took another motor vehicle and went to buy liquor at an area called Soweto. They took the liquor to Magaleni and offloaded it. They came across four young men who were standing on the side of the road. Kuhle knew them by sight. Lubabalo stopped to meet them. One of them enquired whether Lubabalo found his music system to which he responded in the negative. Two of them got in the motor vehicle and they all proceeded to the deceased's house. One of the two men enquired from the deceased where the music system was. The deceased denied knowledge of the music system. Without a word

further, that man took out a firearm and shot the deceased in the face (left eye). He described the killer as a tall slender guy. The second man remained next to Lubabalo's motor vehicle. At the deceased house, he said there was an elderly person who was in the garage and another one who was working on a motor vehicle "fixing music". He ran away. Whilst running, he heard another gunshot. He ran through the deceased yard and jumped the boundary wall to an adjacent property and proceeded to his home. On arrival at home, he told his mother about what had happened. His mother said he must go and report the matter to the police, something which he did not do because he was still shocked and scared at the time.

[31] Kuhle testified that Lubabalo arrived at his home on 29 December 2019 and instructed him that they must go to the police station. They went to Lubabalo's home and thereafter proceeded to the police station. On the way, still closer to Lubabalo's home, the latter took out an iron rod (used to jack motor vehicles) and assaulted him with it, saying he must implicate Accused 1 and 2 as the killers. He showed him their photos on his cellphone and said he must tell the police that Accused 1 is the one who shot at the deceased. Kuhle sustained a swollen left kidney as a result of the assault which was "still not working". Lubabalo thereafter, took him to the police station to make a statement. It was still painful when he made the statement but decided not to tell the police about the assault on him. Indeed, in his statement he implicated Accused 1 and 2. Even at the photo identification parade, he pointed out the accused as the people who killed the deceased. He intimated that when the Investigating Officer was taking the statement, she used Lubabalo as an interpreter. She further stated that during the

photo identity parade, he was asked to sign next to the photos of the accused persons. The statement was not read back to him and he did not know its contents. All he was told by the Investigating Officer was to sign the statement.

[32] Apart from what he testified to as having happened, it is worth highlighting the relevant portions which he omitted in his evidence that appear from his statement to Warrant Officer Mynhardt. The relevant portions read:

“2. I am the one who broke into Lubabalo’s bakkie. I took out his sub and amplifier the following day. I took it to Peter. He gave me R300.00 cash for them. Then a week later Lubabalo got hold of me and told him that I broke into his bakkie and sold the sub and amplifier to Peter. (Sic)

4. . . . On our way to Graham’s tavern in Magaleni, I saw four guys standing at the corner. I said to Lubabalo he must stop, I am going to ask those guys to give me money to pay him back for the sub and amplifier. He stopped and I went to them.

5. I asked them to borrow me money as I wanted to pay Lubabalo back. They asked for what. I explained to them that I broke into the bakkie and sold the sub and amplifier to Peter. Then two of them just said ok, let’s go to Peter. The one is known to me as Simthembile and he is well built. The other one is Siya, he is shorter and fat. I got at the back of the bakkie with Siya and Simthembile got into the front with Lubabalo. (Sic)

6. When we got to Peter’s house, I went into the garage with Simthembile. Siya stood outside. Simthembile asked the old man inside where is Peter and he said at the other side. Then Peter came into the garage. Simthembile asked Peter where is the music. Peter said he knew fokkol about the music and if he knows he would have given it to Lubabalo already as he knew him. (Sic)

7. Simthembile did not say anything further. He just pulled out a firearm from his side. He pointed it next to Peter's head and shot him in the head. I turned around and ran out of the garage and then I heard another shot. I know nothing further as I ran away scared of my life. I did not know that Simthembile had a firearm, but I saw him he shot Peter. ..." (Sic)

[33] Kuhle further confirmed that he made a statement to Captain v d Berg. Kuhle gave the latter information which he wrote down. He spoke through a Xhosa Detective who was interpreting on his behalf. That statement was in relation to the photo identity parade which was concluded by Captain v d Berg. He signed it and it was handed in as Exhibit "C". In the photo identity parade he pointed the accused as the people who committed the offences.

[34] The statement he made to Captain v d Berg is to the following effect.

"On Monday 2019/12/30 at 9:00 I was at Kwazakhele SAPS where I was shown a photo album by Captain v d Berg. There were 17 photo's that was shown to me. I pointed out number 9 and 13 on the album. Number 9 I known as Siya and number 13 as Simthembile. Number 9 was standing inside the garage while number 13 Simthembile was inside the garage shooting with the firearm. (Sic)

I was not coerced or influence to point out any of the suspects on the album. The album that was shown to me only had number. No names was with the photos.

I also signed next to numbers 9 and 13 as the persons I pointed out". (Sic)

[35] The statement was signed and attested to before Captain v d Berg on 30/12/2019 at 09h25. Captain v d Berg was not called. However, the statement and the photo album were handed in by agreement between the State and the defence.

[36] Immediately, Mr Makasana, for the State, realised that Kuhle was deviating from his statements and what he said during the consultations he held with him, applied in terms of section 190 (1) of the CPA as aforesaid. Kuhle did not dispute what is contained in his statements made to the Investigating Officer and Captain v d Berg. He admits having given the information contained therein as well as his signature. He further did not dispute that when he consulted with the Public Prosecutor, he stuck to what he had written and confirmed that the people who killed the deceased are the accused.

[37] Mr Makasana's cross-examination revealed the lies that Kuhle wanted this court to believe. It transpired that everything, he said in his statement to the Investigating Officer (Exhibit "D") was correct except for that he substituted the real culprits for the accused. In Exhibit "D", Kuhle confirms that he is the person referred to by Patrick that had been injured and was in the company of the persons who killed the deceased. He was present through the ordeal, up to the stage when the deceased was shot in the face. The circumstances of this matter give credence to the submission by the State that Kuhle's statement reflected the truth and should be accepted as such and his *viva*

voce evidence in relation to the accused should be rejected. The issue at hand is whether the written statement by Kuhle, who was called as a witness, which in his evidence before me disavowed should nevertheless be accepted as evidence against the accused. Most of the pockets in his statement have been confirmed by Patrick, Thabiso and the statement of Lubabalo which I have accepted in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988.

[38] Section 190(1) of the CPA provides as follows:

“Impeachment or support of credibility witness.

Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party”.

[39] Section 190 refers to the situation where a party is left in a lurch by its own witness. A party may not attack the credibility of its own witness unless the court has declared the witness hostile as I have done in this instance.³ In *S v Rathumbu*⁴ the court had to determine whether the trial court had properly admitted as evidence a written, sworn statement made by the appellant’s sister. The facts were that she had initially made a sworn statement to the police to the effect that she had seen the appellant (her brother) stab the deceased (her brother’s wife) with a knife. At the trial she denied having seen him do that. The State, having realised that her evidence was

³ Hiemstra’s Criminal Procedure: A Kruger pages 23-22 to 23-23.

⁴ 2012(2) SACR 219 SCA.

in stark contrast to the statement, applied for her to be declared a hostile witness. The State conceded on appeal that without the statement, which was essentially hearsay evidence, the appeal should succeed.

[40] The court in *Rathumbu* referred to section 3(1) of the Act, and found that the statement of the sister of the appellant was correctly admitted in terms thereof. In paragraph 10 and 11 (which I find to be applicable hereof) the court said the following:

“10. Section 3 enjoins a court, in determining whether it is in the interests of justice to admit hearsay evidence, to have regard to every factor that should be taken into account and, more specifically, to have regard to the factors mentioned in s 3(1)(c). This court in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760) considered the provision of s 3 and at para 31 held that:

‘The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness’s disavowal of or inability to affirm the prior statement may bear on the question of the statement’s reliability at the time it was made, it does not change the nature of the essential enquiry, which is whether the interests of justice require its admission’.

In amplification, in para 33, it was stated that:

‘The “probative value” of the accused’s statements to the police did not depend on their credibility at the time of the trial – which the Court rightly found totally lacking – but on their credibility at the time of their arrest. And the admissibility of those statements

depended not on the happenstance of whether they chose to testify on the interests of justice’.

[11] In the present appeal, following the approach set out in *Ndhlovu*, and considering the totality of the circumstances under which the statement was made, one is driven to the conclusion that the court below was correct in admitting Ms Rathumbu’s statement. Substantial corroboration for the truthfulness of the statement is to be found in other evidence tendered by the state.

...

[12] Applying the principles set out in the *Ndhlovu* case, all of the above factors clearly demonstrate that when she made the statement Ms Rathumbu was telling the truth. Her inconsistent evidence at the trial can be easily explained on the basis that she wished to protect her brother. Her statement, therefore, was correctly admitted into evidence”.

[41] Similarly herein, in the statements made to the Investigating Officer and to Captain v d Berg, Kuhle was telling the truth. The change of heart which led him in court to substitute the accused as the real culprits, speaks to his dishonesty. He did so merely to protect the accused.

[42] He testified that he wanted to reveal the true facts in court hence he misled the Investigating Officer and the Public Prosecutor to believe that it was the accused who were involved in the killing of the deceased. This is a blatant lie because nothing prevented him from doing so at an earlier stage. He did not advance any reason why he misled them. This further gives credence to the evidence of Lubabalo and the Investigating Officer that he approached them saying he had received death threats presumably because of his involvement as a witness in this matter.

[43] The accused elected to testify in their defence. The evidence of the accused overlaps. Accused 1 got to see Accused 2 frequently because the latter lived not far away from where his girlfriend and their 2 year old child lived. They were not friends. He further knows that Accused 2 worked at Big Daddy's in Struandale. Accused 1 would meet Accused 2 at Big Daddy's. They further would meet at times in Graham's tavern when they went there to drink and socialise. They would just greet each other. Accused 2 told him that he was no longer working at Big Daddy's but was operating a jikeleza taxi. Accused 2 used to give him a lift at times when he was going to Shoprite.

[44] Accused 1 testified that he knew Kuhle as a person who worked at Graham tavern. Kuhle used to purchase clothes from him on occasions. They met frequently because they were neighbours in the sense that Kuhle stayed at Graham's tavern.

[45] Accused 1 knows Lubabalo very well. They had known each other from Magaleni even before that place became Graham's tavern. When the house converted to being a tavern, Lubabalo worked there and they regarded each other as neighbours. They used to be together mostly at the tavern. Lubabalo was his customer as he bought clothes from him. Lubabalo paid him well and he regarded him as a good customer.

[46] The accused testified that a week before Christmas they met at Graham's tavern and drank together. They enjoyed each other's company very well to an extent that they decided to be together again on 24, 25, 31 December 2019 and 1 January 2020. They were to meet at Accused 1's house. The plan was that they were to buy liquor and meat for those days. Accused 1 said they were going to contribute a sum of R 300.00 per person for those days. Indeed, they met on 24 December 2019 from the late afternoon. They drank until the middle of the night. They drank a bottle of viceroy and Heineken. They decided to go to Graham's tavern to look for women. Accused 1 testified that he became so drunk that he fell asleep on the table. He was woken up by Siyabulela who worked at the tavern. He proceeded to his home and slept until 11am on the Christmas day. He does not know how he parted ways with Accused 2. However, they met again on the Christmas day and continued to drink.

[47] Accused 1 was extensively cross-examined by Mr Makasana. I should mention that he bungled under questioning. He at times did not know answers to straight forward questions and in others he would not recall pertinent things about the two man party and would refuse to answer questions. Accused 1 portrayed and elaborated on the plan for the 24th. I even gained an impression that he was preparing for quite a number of people. He testified that he woke-up early on that day, cleaned the yard until 14h00 or shortly thereafter. He cleaned the house. That took him about an hour. Having finished, he started preparing food. Upon realising that he was running late, he rushed to Shoprite to buy a few groceries because the shop was due to close at 17h00. He

returned home at about 18h00. He had bought three bottles of viceroy and Heineken beer. He cooked and prepared salads. Accused 2 arrived shortly before 20h00.

[48] Accused 1 testified that he did not see how Accused 2 got to his place. He did not see what he was driving. This is contrary to Accused 2's evidence. Accused 2 testified that he arrived at accused 1's place after 7pm. Accused 1 was standing outside (topless) drinking beer. He alighted, went to him, took the beer from him and had a sip. After that, he got inside the house and had something to drink. They sat outside and had braaied meat. They continued drinking until midnight according to Accused 2. They decided to go to Graham's tavern to look for women and listen to music. After a while he managed to get a woman and took her home leaving Accused 1 having passed out inside the tavern.

[49] Accused 1 on the other hand stated that upon the arrival of Accused 2, they sat inside the house and drank liquor until they decided to go to the tavern. Other than the braaied meat, they partook in the food and salads which were prepared by him. Accused 1 was questioned about the details of their "two men party" which was well planned and arranged. He stuttered when it came to that. He did not know how much he spent on the groceries at Shoptire and on alcohol. He contradicted Accused 2 on how much they each contributed. Accused 1 said they were the only two at his house but in the same breath he was not sure whether there was/were people/person who joined them on the 25th. On the 25th he did not know when they met, what alcohol they

drank and assuming that they finished off what was left the previous day. When asked why he could not remember what happened on the 25th, his answer was:

"I don't have an answer".

When told that it was strange that he could remember clearly the events of the 24th and nothing of the 25th, his answer was again:

"I don't have an answer".

He was further asked whether he did not find it strange that he remembered clearly the events of the day that he was put on the scene of crime and not the other days e.g. the following day, he stated that he did not have an answer to that.

[50] Accused 1 denied that he was involved in the killing of the deceased. He further denied that he met with Accused 2 on the day of their arrest. He stated that he was arrested at the corner of his street not far away from his home. He was placed at the back of the police van. He became surprised when Accused 2 joined him at the back of the police van. He was meeting Accused 2 for the first time that day.

[51] Accused 2 testified that he knew Accused 1, Lubabalo and Kuhle having seen them whilst he was working at Big Daddy. He worked there from 2011 to 2016. They would buy alcohol from Big Daddy on regular basis. He saw Accused 1 regularly because his girlfriend with whom he had a child lived not far from his home. He also knew that Accused 1 was selling t-shirts and he bought some from him. On his second

appearance in court, he saw Thabiso as they were leaving the dock. Thabiso pointed at him. At the time Thabiso was in the second row of seat behind the dock. That is how he knew Thabiso. He did not know Nombulelo and Dumile before this matter started.

[52] Accused 2 confirmed the plan he had with Accused 1 for the 24th. Indeed, on that day after he came back from work he went to Accused 1's house. He found him standing outside as stated above. They ate meat and bread. They drank alcohol. They went to the tavern as alluded. On the 25th he met with Accused 1 and they drank alcohol until late. He did not meet him on the 26th. They could not get together on the 31st as arranged because they got arrested before that day.

[53] On the 30th, he proceeded to drop people next to Accused 2's home. He saw the door opened and decided to get in and greet Accused 1. He found that there was no one inside the house. He called out for him but there was no response. He decided to wait for someone to arrive because he had fears that if anything would go missing, people would say he (Accused 2) had been to the house and he would be a suspect. Whilst he was still waiting, police arrived and arrested him. He was taken to the police van. He was surprised to find Accused 1 at the back of the police van having been arrested. He denied that he saw when the latter was arrested. He further denied that when he saw the police he ran away and was arrested at a neighbour's house.

[54] He suggested that Thabiso must have seen him in court that day hence he was able to identify him in the identification parade. He confirmed that he told his legal representative about this. I believe, that if it was so, Mr Thysse, as a competent and an experienced Advocate would have put that version to Thabiso. Mr Thysse would not have failed to put that to Thabiso especially that he cross-examined him at length on the issue of identification.

[55] The defence called Sergeant Mzoxolo Mkalipi who visited the scene immediately after the commission of the offence. He made a statement pertaining to what he saw and did at the scene. In his statement, amongst other issues he stated that he interviewed Thabiso. He took short notes during their interview and wrote on a piece of paper. When he got to the police station, he wrote out a comprehensive statement based on the skeleton notes he made. In his statement he wrote that Thabiso did not manage to see the people who killed the deceased clearly though he used to see one of them at Javu Street.

[56] Sergeant Mkalipi was cross-examined by Mr Makasana. In sum, he conceded that it was not advisable to obtain a statement from witnesses at the scene of crime due to various reasons like, they are still shocked, they are reluctant to give information to the police for fear of their lives (because witnesses get killed like what happened to Lubabalo), etc. He confirmed that there were many people who had gathered at and around the house of the deceased. He could not remember the detail as to where they

were when he interviewed with Thabiso. He stated that Thabiso appeared not to want to talk to him. He was not free. He agreed that the interview was informal because the environment was not favourable for him to have had a proper interview with him. He justifiably could not comment on the evidence of Thabiso that he was able to identify one of the accused at an identification parade and in court. He testified that it could be that Thabiso did not want to tell him the truth because of the circumstances under which the interview occurred.

Analysis:

[57] I found that Kuhle and Lubabalo's sworn statements were admissible in terms of section 3(1) of the Act. What can be gleaned from Kuhle's sworn statements is that he identifies Accused 1 as the person who shot the deceased at close range. In those statements he indicated that at the time of the shooting Accused 2 was also present. . The provisions of section 3(1) have been dealt with above. Lubabalo in his sworn statement clearly states that Accused 1 is the one who shot first at the deceased at close range in the head. He did not implicate Accused 2 in any way to the shooting because he ran away after the deceased fell to the ground. The import of his evidence in relation to Accused 2 is that he was present when the deceased was first shot by Accused 1. Kuhle and Lubabalo place the accused at the crime scene at the time the deceased was murdered. Thabiso places Accused 2 at the scene as well. Thabiso's evidence is corroborated by the evidence of Kuhle and Lubabalo regarding this aspect. Thabiso takes the issue of Accused 2 further by saying that Accused 2 shot at the deceased while he was lying on the ground. It is not clear whether the deceased was

still alive or not. To me that is irrelevant if one has regard to the circumstances of the matter. Kuhle and Lubabalo as stated say Accused 1 shot the deceased first. Thabiso says he saw Accused 2 shooting the deceased, so the matter of whether he was alive at the time Accused 2 shot him is a non-issue.

[58] Thabiso witnessed that, the second person who I find to be Accused 1 was not around the garage at the time Accused 2 shot at the deceased. Accused 1 only emerged from the house when they were approaching the garage. Accused 1 was carrying a TV and a firearm. That means they were both carrying firearms at the same time. Warrant Officer Yolandi Schoeman (in her sworn statement that was admitted) found that two firearms were used at the scene.

[59] There is no evidence of prior agreement between the accused to kill the deceased. However, that they were acting in common purpose when the deceased was killed cannot be doubted. The manner in which the killing occurred spells that out. They were both armed when they got to the deceased home, both shot the deceased and they left the scene together. In *S v Mgedezi and Others*⁵. Botha JA had this to say above common purpose.

“In the absence of proof of a prior agreement, accused no 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in ***S v Safatsa and Others 1988 (1) SA 868 (A)***, only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on

⁵ 1989 (2) All SA 13 (A) at para 67.

the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue”.

[60] The five requirements which were enunciated in the *Mgedezi* matter were held to have passed the constitutional muster in *S v Thebus*⁶. In paragraph 49 of *S v Thebus*, the court held as follows:

“If the prosecution relies on common purpose, it must prove beyond reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was ensue”.

[61] There is no direct evidence of identification which deals with the people who robbed the motor vehicle of Dumile. I say so because I have found that the evidence of Dumile is not reliable. Therefore, I have to rely on the circumstantial evidence available. Circumstantial evidence provides facts from which the fact in dispute can be inferred⁷. In *R v Blom*⁸ Watermeyer JA said:

⁶ 2003 (6) SA 505 (CC).

⁷ Hiemstra *supra* at 22-5.

⁸ 1939 AD 180 at 202.

“(2) 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”.

That is the position in this matter. Having regard to the facts, the only reasonable inference is that the car was hijacked by the accused and they, in the process, shot and injured Dumile and Nombulelo as alluded to. The State does not have to close every avenue of escape which is open to the accused suffice for it to produce evidence by means of which a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused have committed the crimes charged⁹. What the evidence of Dumile clearly establishes is that the people who robbed his motor vehicle and shot at him and Nombulelo are the same people who killed the deceased. His evidence is that the second person who came towards the motor vehicle was carry a TV and a firearm and was coming out of the deceased house. He came to join the one who was dark and who had shot at them and took possession of the motor vehicle. At the time, Dumile saw the deceased lying in front of the garage. Patrick said that when he came back to the scene, he found the deceased lying in front of the garage and dragged him. Thabiso saw a person coming from the house carrying a TV and had a firearm in one hand. This evidence is in line with Dumile’s evidence. The only reasonable inference one can draw is that the same person is the one seen by Dumile. It is therefore clear that the people who robbed Dumile are the same people who killed the deceased and needed a motor vehicle to get away from the scene. This should be viewed in the backdrop of the

⁹ *R v Mlambo* 1957 (4) SA 727 (A) at 738 A.

statement of Lubabalo, who transported the accused to the scene. His testimony is that he drove off immediately after Accused 1 shot the deceased. Therefore, after the killing the deceased, the accused had no transport hence they decided to hijack and rob a motor vehicle.

[62] The evidence of the accused regarding the events of 24 December 2019 is not convincing and therefore not reasonably probably true in the circumstances of the case. I have highlighted the contradictions in their evidence above. Their evidence as to why they decided to come together for the first time on the day in question is not true. They were not friends nor acquaintances before that day. They met at the streets and never drank together even though, according to them, they would meet at Graham's tavern. I say not acquaintances because their relationship was based on them merely greeting each other when they met and initially it was at Big Daddy where Accused 2 worked. They know the details of what led to the appointment and what occurred on 24 December. But they knew nothing or little of what occurred in the days before or after 24th. Accused 1 became confused, and stressed (according to him) when asked of simple things that flow from their meeting. He went to lengths cleaning the yard, house and cooking specifically to accommodate Accused 2 who merely arrived late and did not even partake of the food that Accused 1 prepare for him. It must be appreciated that the cleaning of the house and yard and cooking was done in the name of the visitor. It is both their evidence that they fortuitously met on all the occasions they have known each other. They never visited each other before this day but what is strange is that on the day of their arrest, Accused 2 decided to enter the house of Accused 1 and that is

how he got arrested together with Accused 1. Accused 2 denied that he ran away on seeing Accused 1 being arrested. Sergeant Lotter gave a straight forward evidence in this regard. He testified that on noticing them, Accused 2 ran away and he had to chase after him. I believe Sergeant Lotter and reject the evidence of Accused 2 as a lie.

[63] Both accused are placed on the scene by different witnesses (in the form of the sworn statement) who did not know each other and who neither knew the accused before. They were arrested at the same time in the same vicinity on a different date all together. It is therefore a lie that they only met and drank together for the first time a week before 24 December. They were not good witnesses at all especially Accused 1. He at times, refused to answer straight forward and relevant questions. I therefore, reject their evidence as false.

[64] The approach that a court has to adopt when dealing with identification by a witness was spelt out in the *locus classicus* case of *S v Mthetwa*¹⁰ per Holmes JA as follows:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of

¹⁰ 1972 (3) SA 766 (A) at page 768.

identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities”.

[65] The reason why I rejected the evidence of Dumile is exactly as a result of what is said by Holmes JA above. I found him to be an honest witness who gave out his evidence truthfully. However, I cannot rely on his identification for the reasons dealt with above. Such reasons call to question the reliability of his observation even though it was under the same conditions as Thabiso. Dumile had just been robbed at gunpoint, he had been shot at and was injured in his fingers and the pointing of wrong persons at the photo identification parade crowns it all. I have a different view when it comes to the identification of Accused 2 by Thabiso. The same principles of identification apply to him as well. The offence was committed during the day. The issues of lighting, visibility and eyesight are not applicable and could not be said to have affected Thabiso when he looked and identified Accused 2. Accused 2 was close to him at the time of the identification. The scene at the time was not mobile. He was not shocked at the time he first saw Accused 2. His evidence is that when he saw him, he was still trying to establish what was actually happening. The shots he heard, he mistook them to be fireworks. He looked up, while sitting at the edge of the driver’s seat, and saw Accused 2 carrying a firearm. He looked at him closely as he says and at that time Accused 2 was not aware of his presence in the motor vehicle. Accused 2 noticed him and ordered him out of the motor vehicle pointing him with the firearm he was carrying. His testimony is that he continued to look at him throughout as he was coming out and going round to

the front of the car towards Accused 2. His evidence in this regard find corroboration from the statement of Kuhle and Lubabalo who place Accused 2 at the scene of crime. Unlike Dumile, he was able to point him out at the identification parade within 10 seconds. That he pointed Mr Windvogel as the second person is of no consequence to the reliability of his evidence in pointing Accused 2. He confessed immediately to the Investigating Officer that he made a mistake in pointing him. That on its own (in the absence of anything to the contrary) is telling about his honesty. I accept his evidence about Accused 2.

[66] Consequently, I make the following findings.

1. Both accused are found guilty of counts 1, 3, 5, 6, 7, 8 and 9.
2. Accused 1 found not guilty in count 4.

M MAKAULA
Judge of the High Court

Counsel for the State:

Adv V Makasana
National Director of Public Prosecution
Port Elizabeth

Counsel for Accused 1 and 2:

Adv J Thyse
Port Elizabeth

Instructed by:

NE Mbewana Attorneys
Mr K Nobuzana and Mr N Vusani
Port Elizabeth

Date of judgment on conviction: 18 June 2021