

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: CC14/2021P

In the matter between:

THE STATE

and

SENZO MAGWANYANA

ACCUSED

Coram: Mossop J

Heard: 23, 24, 25, 26, 30, 31 October 2023, 1, 2, 3 November 2023

Delivered: 2, 3 November 2023

JUDGMENT

Mossop J:

[1] On Valentine's Day 2020, Mr Siyabongwa Mlotshwa (the deceased) was murdered. He was shot in the head with a firearm. He was also robbed of a substantial quantity of cash. He was on duty at the time of his death as a security guard, being employed by the security firm 'G4S' (G4S). He and a colleague had gone to the Caltex petrol station in Kranskop, KwaZulu-Natal (the petrol station) to pick up cash when they were set upon by a gang of men, who murdered the deceased and took off with the cash that he had uplifted from the petrol station and

which he was in the process of loading into his armoured vehicle. As they fled the scene, the gang fired randomly at members of the public, wounding several. The State alleges that the accused is one of the members of the gang. Indeed, he is the only alleged member of the gang on trial before me.

[2] The accused faced trial on 5 counts. The first is a count of robbery of the deceased with aggravating circumstances, the second is a count of murder of the deceased and the remaining counts are counts of attempted murder relating to the random firing at members of the public by the gang as they made their escape. The State relies upon the provisions of section 51 of Act 105 of 1997 in respect of all the counts. On count 1 that section is to be read with Part II of schedule 2, on count 2 it is to be read with Part I of schedule 2 and on the balance of the counts it is to be read with Part IV of schedule 2. Before he was called upon to plead to the charges, the court inquired from the accused whether he understood what this all meant. He indicated that he did. His legal representative, Mr Tengwa, also confirmed that he had informed his client of the minimum sentence legislation.

[3] Both Mr Tengwa and the State Advocate, Ms Sokhela, are thanked for their assistance to the court over the course of this trial. Mr Tengwa has represented the accused with admirable thought, vigour and passion.

[4] The accused pleaded not guilty to all the counts and elected not to disclose the basis of his defence. Certain admissions were, however, made by him. These related to the identity of the deceased, the fact that his body suffered no further injuries after his death and prior to its examination at a post-mortem conducted by Dr Elsabe Maria Combrink (Dr Combrink). The results of the post-mortem examination were also admitted and were handed in as an exhibit. The chief post-mortem finding of Dr Combrink was:

‘A hole in the top of the back of the neck and bleeding along the skull fracture to a fractured hole containing a bullet fragment at a small laceration in the upper right side of the head.’

The cause of death was, thus, a gunshot wound to the head.

The defence also admitted that photographs of the scene of the crime had been taken and a photographic album was consequently handed in by consent. Finally, it was admitted that the petrol station was fitted with surveillance cameras that were in a working condition on 14 February 2020.

[5] And so, to the evidence. Mr Florian Maome (Mr Maome) is employed by G4S and was a work colleague of the deceased. He testified that on 14 February 2020 he was on duty with the deceased and that they had gone to the petrol station to collect monies. The petrol station has a convenience store on its forecourt (the convenience store). He was the driver of their armoured vehicle and had reversed it virtually up to the doorway of the convenience store. The deceased alighted from the armoured vehicle and entered the convenience store pushing what was called a 'tribus' (tribus). This, judging from the photograph album and the description provided by certain of the witnesses, is a wheeled box into which money is put and then moved about. The box is electronically protected and requires a button on it to be depressed, and remain depressed, until it is connected to a further electrical device inside the armoured vehicle. If the button, once depressed, is not continuously depressed, there is the prospect that an explosive charge within the tribus will detonate and stain the money therein with ink.

[6] Mr Maome testified that he positioned the armoured vehicle so that he could look into the interior of the convenience shop by observing events therein through the rearward facing camera that the vehicle is equipped with. He observed three males busy at the refrigerators within the convenience store prior to the deceased entering. Having picked up the money being deposited from a drop safe located in an interior office within the convenience store, the deceased proceeded to leave. The three men in the convenience store approached the deceased quickly. Mr Maome saw the deceased raise his hands in a gesture of surrender. Realising that danger was present, the witness indicated that he momentarily took his eyes off the events playing out in front of the rear facing camera of his armoured vehicle to press a panic button within the armoured vehicle. At that precise moment, he heard a shot being fired. The deceased fell to the ground next to the armoured vehicle.

[7] According to the witness, there were apparently further members of the gang in attendance across the road from the petrol station in a white Ford Ranger bakkie (the Ranger). The witness estimated that there were three or four additional members of the gang at the Ranger. Those additional members then commenced firing in the direction of the petrol station and people in the general area thereof screamed and ran for cover. While the armoured vehicle was not struck by this gunfire, a white bakkie with a canopy was hit.

[8] Mr Maome saw the tribus containing the money being taken by one of the three males who had been in the convenience store, and it was placed in the load area of the Ranger across the road. The Ranger drove off and more shots were fired by its occupants. The witness later came to know that the tribus, as it was required to do, had exploded shortly afterwards, and emitted a spray of ink, staining the bank notes inside it, rendering them useless. The robbers consequently jettisoned the device and sped away.

[9] Mr Maome indicated that the three men inside the convenience store were each armed with firearms, which he testified were 9mm pistols.

[10] The witness stated that he would not be able to describe the members of the gang and he did not identify the accused as being present on the day in question.

[11] Under cross examination, Mr Maome indicated that after the South African Police Services (SAPS) arrived at the scene, he had been instructed to upload the detonated tribus and take it to the Kranskop Police Station, which he did. He indicated that he did not know how much money was inside the tribus. He confirmed that the three men were already in the convenience store when the deceased entered to pick up the money and that they did not follow him in. He explained further that he was unable to describe the three men because the quality of the image captured by the rear facing camera on his armoured vehicle was not of a high quality: he described the image as being 'blurry'.

[12] Mr Maome described the injury to the deceased as being a gunshot wound to his right cheek, below his right eye. He thought that what he saw was an exit wound.

The court then advised him that the post-mortem report did not describe such an injury to the deceased's body nor did the photograph album depict such an injury. The witness indicated that he may have been confused and misled by the blood that was on the deceased's face. As regards whether the three men were already in the convenience store when the deceased entered, the court asked whether G4S picked up cash each day from the petrol station at the same time. Mr Maome indicated that they did do a pickup every day but varied the time at which they called each day.

[13] Ms Nomcebo Shinga (Ms Shinga) is a cashier employed at the convenience store at the petrol station. She was on duty on Valentine's Day in 2020 and indicated that the G4S armoured vehicle had arrived at around 14h00 to pick up money. The deceased had entered the convenience store. After a few minutes she then saw three men enter the convenience store. One of them walked to a water fountain (which she described as a basin) inside the convenience store and drank some water. The other two men presented themselves to the witness at the till point and ordered a 1,5-litre bottle of water. She fetched it. It is necessary to point out at this stage that the convenience store is not a self-help store: all the products for sale are behind bars and behind the counter and the cashier must fetch the products for the customer. The man then said that he had asked for a smaller bottle. Ms Shinga went and fetched a smaller bottle. The man then said that he had ordered two small bottles of water, not one. She, dutifully, exchanged the water again. One of them then said that he wanted to purchase some airtime, but she was unable to give him change for the R20 that he tendered to her for the airtime.

[14] The person who had been drinking water at the water fountain then joined the other two men in front of Ms Shinga's till. Ms Shinga described him as wearing a red bucket hat, a white T-shirt, dark navy body warmer and khaki trousers. She was not able to describe the clothing of the other two men. At the moment that the man wearing the red hat joined the men before Ms Shinga, the deceased was about to leave the convenience store. As the deceased walked to the door of the convenience store, the man wearing the red bucket hat, grabbed him from behind and fired a shot from a firearm that he possessed.

[15] The witness said that she saw the man in the red hat's face: she described him as having a light complexion, a beard, traditional cuts on his face and teeth that she described as being 'on top of each other'. Later, the interpreter clarified that a better description of the precise word that the witness had used to describe the accused's teeth was 'crowded'.

[16] Ms Shinga indicated that her till point was about 8 metres from the place where the shooting occurred. She did not know the man in the red hat prior to the shooting but she testified that she did see him again after the terrible events of 14 February 2020. This was at an identification parade, which she said was conducted at Westville Prison.¹ She and another witness had been picked up by a Captain in the SAPS and conveyed to the prison. She identified the accused as being the person standing at position one in the line-up of men that she was asked to consider.

[17] Mr Tengwa then cross-examined Ms Shinga. She confirmed that the deceased was already in the convenience store when the three men entered. Her inability to identify anyone other than the accused was probed. She indicated that there was nothing remarkable about the other two men, who presented themselves as if they were just ordinary customers. She indicated that the three men did not converse with each other while in the convenience store.

[18] The witness confirmed that she had made a statement to the SAPS, and it was duly proved and she was ultimately shown it and cross examined on its contents. What was initially pointed out by Mr Tengwa was a different description of the accused's clothing: in her statement she described him as wearing a red hat, a navy striped T-shirt and 'normal blue jean'. He also carried a small black men's bag. She was asked by Mr Tengwa whether she had changed her description of what the accused was wearing because she had viewed the video footage of the events after deposing to her affidavit. She denied having ever seen the video footage. She asserted that the accused had been wearing khaki trousers and not denims. She indicated that she had been in shock at the time that she deposed to her affidavit and that could explain the difference in her description of the colour of the accused's

¹ As will later become apparent, the identification parade was actually held at Durban Central Police Station.

trousers that she gave. She conceded, further, that nowhere in her statement did she describe the person wearing the red hat as having traditional cuts on his face. The SAPS official who recorded her statement had erred in not including this.

[19] As regards the identification parade, the witness confirmed that she and her friend, Mbali, had attended it together. She stated that she and Mbali were kept in the same office before attending the identity parade and that Mbali had gone to the parade first. Mbali did not come back to the waiting room. Instead, the witness had been fetched by the same SAPS official who had taken Mbali to the identity parade. Mr Tengwa showed Ms Shinga certain photographs of the eleven men who constituted the identity parade. The accused, who appears in position one, clearly has a short beard. The photographs were generally of poor quality, but it was put to the witness that the only other person who may have had a beard might be the person standing at position eight. Ms Shinga agreed with this. As regards the lightness of his complexion, Ms Shinga also agreed, as far as could be determined from the poor quality photographs, that only the accused and the person standing at position two could be classified as having a light complexion.

[20] Mr Tengwa put it to Ms Shinga that the accused was not at the petrol station on 14 February 2020 and did not wear a red bucket hat. This was disputed by her. As to how she was able to describe the accused as having 'crowded teeth' if he did not communicate with his companions, Ms Shinga stated that he had opened his mouth as he ran to the door of the convenience store in pursuit of the deceased as he was leaving.

[21] The previous manager of the petrol station is Ms Amanda Mulder (Ms Mulder). She was on leave on 14 February 2020. However, immediately after the shooting of the deceased, she had been telephoned and the events reported to her, and she had gone to the petrol station. At the request of the SAPS, she made available for viewing the video footage from the 36 cameras installed at the petrol station. She also transferred selected video footage recorded by the cameras to a USB memory stick (the memory stick) which she then placed in a safe after she had compiled it. The memory stick was a new one that had been purchased from the next-door store for the express purpose of preserving the video footage identified by the members of

the SAPS. She confirmed that the amount of money uploaded from the petrol station's drop-safe was R100 440,00 being the precise amount mentioned in count one of the indictment.

[22] With the consent of the defence, the selected video footage preserved on the memory stick was then projected onto a screen placed in the court room and Ms Mulder provided a commentary when asked to do so during which she identified places and people. The robbery and murder were recorded by various cameras in situ at the petrol station. All the cameras were positioned at elevated positions and thus everything was observed, and recorded, looking downwards at events at an angle.

[23] It serves no purpose to try and describe what may be observed in the various video footage. But it may be helpful to record the time when significant events occurred, as depicted on the timer present in all the footage, irrespective of which camera footage is being observed. This may help give an idea of how quickly events occurred:

(a) 13:59:12: The G4S armoured vehicle arrives and backs up to the entrance door to the convenience store. At that moment there are no men inside the convenience store, only two women;

(b) 13:59:51: The back door of the armoured vehicle opens, and the deceased emerges from within the vehicle and comes out the rear door with the tribus;

(c) 13:59:59: The deceased takes one step from the back of the armoured vehicle and enters the convenience store pushing the tribus;

(d) 14:00:09: The deceased goes through an internal security door to the petrol station office and moves out of camera range. At this stage there are only two customers in the convenience store, both of whom are women. One is standing at an ATM and the other is at the pay point;

(e) 14:00:20: The one lady at the ATM finishes off there and the lady who was at the pay point moves over to the ATM. There are still no men in the convenience store;

(f) 14:01:05: The lady who had first been at the ATM exits the convenience store at the same time as a man enters the convenience store;

(g) 14:01:50: The lady at the ATM finishes there and the man who entered the convenience store moves to the ATM;

(h) 14:01:56: The lady at the ATM leaves the convenience store. The only customer that remains within is the man at the ATM;

(i) 14:02:44: Two men enter the convenience store and immediately go to the pay point. One of them has a black bag worn diagonally across his body;

(j) 14:02:57: The man at the ATM can be observed holding the money that he has withdrawn from the ATM;

(k) 14:03:05: A man wearing a red bucket hat, navy or black sleeveless body warmer, white vest and khaki trousers enters the convenience store. He moves to the stand in front of a display fridge/warmer. He has a prominent jawline that protrudes significantly;

(l) 14:03:15: The man at the ATM exits the convenience store;

(m) 14h03:26: The man in the red hat crosses to the other side of the convenience store and drinks water from a drinking fountain;

(n) 14:03:58: The man in the red hat joins the two men standing at the pay point;

(o) 14:04:14: The first petrol station employee reporting for the next shift arrives. Another employee arrives shortly thereafter;

(p) 14h04:39: The deceased exits the internal office pushing the tribus and proceeds through the burglar gate onto the floor of the convenience store;

(q) 14:04:45: The deceased is at the door of the convenience store. The three men at the pay point spring after him and the man in the red hat is seen producing a firearm from inside his trousers. The tribus is left standing at the entrance to the convenience store. The two men who first entered the convenience store have manhandled the deceased away from the convenience store. The man in the red hat appears to shoot the deceased. A fourth man, who had not been in the convenience store, suddenly appears and makes off with the tribus;

(r) 14h04:48: The deceased can be seen making small movements on the floor of the forecourt, lying close to the back rear wheel of the armoured vehicle.

The whole terrible event had run its course over a period of a mere five and a half minutes.

[24] Constable Mzothule Mazibuko (Cst Mazibuko) is a member of the SAPS who was stationed at SAPS Amatimatola on 14 February 2020. On that day he was on leave and, coincidentally, walked past the petrol station at the exact moment that the robbery was occurring, en route to a car wash where his motor vehicle was being cleaned. He testified that as he neared the car wash, he heard a gunshot. He proceeded to where he thought the gunshot had come from. He observed the parked G4S armoured vehicle and saw the deceased lying on the ground. He observed some men jump into a bakkie across the road from the petrol station. One of the men getting into the bakkie, whose make he could not recall, was a man wearing a red hat, and a sleeveless body warmer. He then took up a position next to the deceased, who he said was bleeding and still moving. He did so to secure the deceased's firearm, which had not been taken during the attack upon him, although Cst Mazibuko testified that he actually never touched the deceased, nor did he touch the deceased's firearm. He called 112 on his cellular telephone, summoning the SAPS.

[25] When the SAPS arrived at the petrol station, Cst Mazibuko insisted on observing the camera footage made available to the SAPS by Ms Mulder. Whilst viewing the footage, a telephone call was received by the SAPS, giving information on where the perpetrators of the murder and robbery could be found and directing them to proceed in the direction of a place called 'Mashayainyoni'. The SAPS and Cst Mazibuko departed from the petrol station and before getting to the road that would lead to that place, a further message was received that there had been crossfire between some persons and other members of the SAPS. They proceeded to the scene where the crossfire had occurred. A motor vehicle alleged to belong to the gang was observed. It appeared that the driver of that motor vehicle had lost control over it as it had capsized but there were no occupants to be seen. Cst Mazibuko stated that he had seen that vehicle, which was a bakkie, across the road from the petrol station at Kranskop. Information was received that the occupants of the bakkie had fled into the bush.

[26] Whilst Cst Mazibuko and the other SAPS members readied themselves to commence a search for the occupants of the bakkie in the adjacent bush, he observed that a crowd of onlookers had gathered, apparently curious about what was going on. Amongst the onlookers, Cst Mazibuko saw a man wearing a sleeveless body warmer and a bucket hat. The hat had had been reversed and the red coloured fabric that had previously been on the outside of the hat was now on the inside and the interior of the bucket hat, which was blue, was now on the outside. Cst Mazibuko went to the man, who was the accused, and placed him under arrest. He explained that he was being arrested for the offence of robbery with aggravating circumstances. When Cst Mazibuko had first observed him, the man had been talking on a cellular telephone. The left side of his body, particularly his left arm, was dirty and it appeared that he had fallen recently. Cst Mazibuko concluded that this had occurred because he had fallen from the bakkie when it capsized.

[27] The search proceeded in the bush for the other occupants of the bakkie, but they could not be found. The place at which the accused was arrested was described by Cst Mazibuko as being approximately 35 kilometres from the petrol station in Kranskop. When he had observed the person he believed to be the accused getting in the bakkie outside the petrol station, Cst Mazibuko estimated that

he had been about 15 metres from the accused. He further estimated that he and the other SAPS members had watched the video footage for less than 30 minutes when the tip off had been received, and that it took approximately 20 minutes to drive to the scene where the capsized bakkie was found.

[28] After the State finished leading him, but before cross examination commenced, the court asked Cst Mazibuko whether he appeared in any of the video footage recorded by the cameras at the petrol station. He said that, as a matter of fact, he did. Ms Sokhela was then permitted to lead him on this aspect of his evidence. Cst Mazibuko identified himself as appearing in certain footage at the time mark of 14h08.

[29] In cross examination, it was put to Cst Mazibuko that he could not have seen the person in the red hat cross the road to the bakkie as that occurred earlier in the chronology of events relative to the arrival of Cst Mazibuko on the scene: it happened 1 minute before the witness is observed arriving on the video footage. Cst Mazibuko stated that he had been at the scene much longer and had been part of the group of people that had initially run away when further gunshots were fired by the gang.

[30] Mr Tengwa proved a statement deposed to by Cst Mazibuko. He then put it to him that he had not mentioned in paragraph 3 thereof that one of the gang wore a red hat. This was conceded by the witness, but Cst Mazibuko pointed out that in paragraph 4 he had stated that one of the men was wearing:

‘a red-hat (sic), black/navy pull over and a T-shirt underneath.’

[31] It was denied by Mr Tengwa on behalf of the accused that the accused had been at the petrol station on the day in question. It was further asserted that he had been assaulted by Cst Mazibuko when arrested. It was also denied that the accused was dirty on his left side. It was put to the witness that the accused was arrested in a rural area near Maphumulo and not at the place described by Cst Mazibuko. Cst Mazibuko replied that he knew the area very well and was quite certain where he had arrested the accused. It was then put to him that the accused had been walking

along a path when Cst Mazibuko had arrested him. This was denied and Cst Mazibuko said there was no pathway where he arrested the accused. The version put was that the accused had seen Cst Mazibuko, who was looking at his cellular telephone, who then looked up at the accused and then arrested him. Cst Mazibuko stated that he did not have his cellular telephone with him on that day. This seems to contradict his earlier statement that he had called 112 to summon the SAPS to the scene of the shooting at the petrol station. The final piece of the version put to Cst Mazibuko was that the accused had been in the area where he was arrested as he was selling traditional herbs. Cst Mazibuko then stated that the accused had scratches on his left arm. Mr Tengwa indicated that this was as a consequence of Cst Mazibuko assaulting him with the butt of an R5 rifle. This was denied by Cst Mazibuko. It was also put to Cst Mazibuko that there was blood on the accused's trousers and that this had come from the accused's bleeding nose. Cst Mazibuko replied that he did not recall seeing any blood on the accused.

[32] Mbalenhle Nkosingiphile Bhengu is a petrol attendant at the petrol station. She was on duty on Valentine's Day 2020. She was due to knock off at 14h00 but the relief shift was late in arriving. She was on the forecourt of the petrol station when she saw three men enter the convenience store. She later heard someone say 'Voetsek' and looked around to see who had said this. She then heard a gunshot and saw a man shooting at the deceased. The deceased lay on the ground, and someone then grabbed his money box. The men then ran away firing shots, passing by the cashier's office. The witness took cover in a motor vehicle owned by a Mr S'bonga Sibiya.² She described the three men as having grabbed the deceased from behind, the accused had said 'Voetsek' and had then shot him. Of this she was certain. Prior to the men entering the convenience store, Ms Bhengu indicated that they had not been walking together, but had followed each other in. She indicated that she saw a man in a red hat when he entered the convenience store. She had an opportunity to view his face and described him as being light in complexion, with traditional marks cut into his face and with a beard. He was clad in a white vest, a red bucket hat, khaki trousers and a dark body warmer. She saw that man accost the deceased and he was the person who said 'Voetsek'. That man was the accused.

² This is confirmed in the video footage.

She also saw him as he fled the scene having shot the deceased, running past the cashier's window.

[33] Ms Bhengu said that nothing obstructed her view of the shooting and estimated that she was about two metres from the spot where the deceased was shot.

[34] She testified that she attended an identification parade with Ms Shinga, in Durban. She described how they had waited together in an office. Ms Shinga was taken to the identity parade first and then she was taken in. She did not see Ms Shinga again before going in and she did not know where she had gone to. At the identity parade she pointed out the person standing in position one in the line-up. That was the accused.

[35] Ms Sokhela then requested Ms Bhengu to explain why in her witness statement she had described two men and not three as being in the convenience store. Ms Bhengu indicated that the night before she was called to give evidence, she had thought about events that she would have to describe when giving her evidence and remembered that there had actually been three men and not two. She went on and stated that two of the men had held the deceased, pointing firearms at his head and the man who had said 'Voetsek' fired the shot that killed the deceased. The word was said 'loudly but not too loudly'.

[36] Ms Bhengu's recollection that there were actually three men and not just two was explored by Mr Tengwa in cross examination. She confirmed that the realisation had come to her after her attendance at court the day before, when she had not been called to give her evidence. She denied discussing her evidence with Ms Shinga who had testified the previous day, saying that she was not in court when Ms Shinga testified.

[37] The witness could not remember if all three men in the convenience store were armed. She had not seen them approach the deceased as they were inside the convenience store when they did that and she was outside on the forecourt of the petrol station, albeit close to the door to the convenience store. As regards events at

the identification parade, Ms Bhengu indicated that she had been 'pulled' to go into the viewing room. She insisted that Ms Shinga had first gone in, which contradicted what Ms Shinga had previously stated. She was certain that she had gone in after Ms Shinga and indicated that Ms Shinga must have forgotten what happened. While Ms Shinga entered the viewing room, Ms Bhengu stated that she had waited in the passage leading to the viewing room. She was unable to recall if any other person standing in the line-up had traditional cuts on his face. She, finally, stated that while she knew there were cameras installed at the petrol station, she did not know of the existence of video footage recorded by those cameras, nor had she ever watched such video footage.

[38] Mr Tengwa put it to Ms Bhengu that according to the accused only one person had identified him at the identity parade and that the person who had made the identification was not separated from the line-up by a pane of glass. Ms Bhengu said she had identified the accused but had not been in the same room as him when she did so.

[39] Detective Warrant Officer Thanasagren Naidoo (DWO Naidoo) is an experienced detective employed by the SAPS and testified that he conducted the identity parade in this matter on 21 February 2020. He had been requested to assist the Organized Crime Unit and was not linked to the investigation of the murder and robbery at the petrol station. He was advised by Warrant Officer T R Ngcobo on 18 February 2020 that there were two suspects and two eyewitnesses. He agreed to assist. He had also been advised that the suspects and their legal representatives had been informed on 17 February 2020 that the identity parade would be held on 21 February 2020.

[40] DWO Naidoo indicated that on the day of the identity parade he had first met with the witnesses at the tuck shop at the Durban Central Police Station where the parade was to be held. He explained the purpose of the parade and the procedure to be followed to them and asked if they preferred to attempt an identification face-to-face or preferred to stand behind a one-way glass. Both chose the latter. The two witnesses were then transferred to the witness waiting room.

[41] DWO Naidoo went next to the holding cells and spoke to the two suspects, one of whom was the accused. He informed them that he was not involved in the investigation of the crimes at Kranskop and also explained to them the procedure to be followed at the identification parade. He asked them if they had any people that they would like to have populate the identity parade and they replied in the negative. He then indicated that they should choose people who were in custody for this purpose and took them to the holding cells where they harvested nine people to join them in the identity parade. There were thus eleven people in the line-up, including the two suspects.

[42] The suspects indicated that they had a Legal Aid representative assigned to them. As a consequence, DWO Naidoo telephoned the Kranskop Magistrate's Court to ascertain where the legal representative was but there was no response from the court. He explained this to the two suspects who indicated that they were happy to proceed without the legal representative being present. If they were not prepared to proceed, DWO Naidoo indicated that he would have immediately stopped the identity parade.

[43] All eleven persons who were to stand at the identity parade were then given crime scene overalls to put on by DWO Naidoo. The crime scene overalls are an innovation thought up by DWO Naidoo, who estimates that he has conducted 60 to 70 such parades over the course of his 33 years' employment with the SAPS. The two suspects were then allowed to arrange the positions that each person would occupy in the line-up. Once final positions had been agreed upon by the two suspects, a photograph was taken and DWO Naidoo left the line-up room and proceeded to the viewing room.

[44] The viewing room is a room within the line-up room. The occupants within the viewing room look through one-way glass into the line-up room. The SAPS officer conducting the parade communicates with those in the line-up room through an intercom. Present in the line-up room was also a photographer and an interpreter.

[45] DWO Naidoo testified that the first witness called to the viewing room was Ms Shinga, validating Ms Bhengu's recollection of events. DWO Naidoo recorded that it

took her 10 seconds to identify the accused, who stood at position one in the line-up. She described the reason for her choice as being the person who had been shooting at the security guard. He noted in his records that the witness was confident but scared and had to be constantly reassured that she could not be seen. Ms Shinga was then taken out of the viewing room to another room and did not come into contact with the next witness, Ms Bhengu. Before Ms Bhengu entered the viewing room, the two suspects were asked if they would like to change the positions of anyone on the line-up, but both indicated that they were content to leave it unchanged.

[46] Ms Bhengu entered the viewing room and took 28 seconds to identify the accused, who continued to stand in position one. The witness described him to DWO Naidoo as being the person shooting at the G4S guard. DWO Naidoo went into the line-up room and told the participants that the parade was over. He recorded that the accused repeatedly protested that he knew nothing about the crime and said, 'you can look at the cameras by the petrol station.'

[47] DWO Naidoo indicated that if a positive identification is made by a person in the viewing room, the person identified is requested to step forward and the photographer in the line-up room takes a photograph of the person identified.

[48] To complete the formalities, DWO Naidoo testified that he made an entry in the Occurrence Book in the charge office recording the fact of the identity parade being held.

[49] In answer to a question from the court, DWO Naidoo indicated that the glass in the viewing room is a fixed panel and cannot be opened and closed: it is permanently in place. Including himself, there were seven SAPS officials engaged in the conducting of the identity parade, which included the photographer, the interpreter, a guard utilised before the witnesses entered the viewing room, an escort to the viewing room, an escort from the viewing room and a member who guarded the witnesses after they had left the viewing room.

[50] Cross examined by Mr Tengwa, DWO Naidoo agreed that an identity parade had to be conducted fairly. In his view, this identification parade was fairly conducted 'beyond a shadow of a doubt'. He confirmed that he had not selected any person to appear in the line-up: the choices of who stood on the parade were solely that of the accused and his fellow suspect. He agreed that not many persons had beards who stood in the line-up, but he did not notice the complexion of the accused or the other participants in the line-up. He vehemently disputed Ms Bhengu's evidence that she had been taken with Ms Shinga to the viewing room and had waited in the passage while Ms Shinga entered that room. Had that occurred, he stated that he would have immediately stopped the identity parade. He dismissed as a lie the assertion by the accused that the other persons in the line-up had not been selected by him and the other suspect but that they had been found by the accused in the line-up room when he entered that room. DWO Naidoo indicated that persons cannot be removed from holding cells without being booked out, the implication being that they could not wander into the line-up room of their own volition. He also fiercely disputed that Ms Shinga had performed a face-to-face pointing out of the accused. He testified that had that occurred, the photographer would have taken a photograph of her with her hand on the shoulder of the person that she had pointed out. No such photograph existed as it had never been taken.

[51] A[...] L[...] N[...] (Mr N[...]) was a scholar in grade 12 on 20 February 2020. After school on that day, at about 14h00, he was walking towards the petrol station when he saw people running away as a white Ford Ranger drove toward him along the road. He estimated that he was between 400 and 600 metres from the petrol station at that stage. He then heard shots. Seeing people running, he began to run as well and then he felt that he had been shot. He realised that he had been shot in his right-hand ring finger as it was bleeding. The school principal was running ahead of him, and the principal's shirt got splattered with Mr N[...]s blood. He was running towards his school but before he got there, he veered off into a scrap yard where he took cover. He was ultimately taken by ambulance to Ntamjambili Hospital with two other students who had also been shot.

[52] Mr N[...] was certain that the shot that had hit him had been fired from the approaching Ranger but could not describe anyone in that vehicle. He was treated at

the hospital and his injury bandaged. He has subsequently made a full recovery. He was not cross examined by Mr Tengwa.

[53] Mr T[...] P[...] M[...] (Mr M[...]) was also a grade 12 scholar at Sesekele High School at Kranskop on 14 February 2020. After the end of the school day, and at about 14h00, he had gone to a place which he described as being near Eskom in order to board his transport home. He heard gunshots coming from the direction of Aheer's store. That store features in the photograph album and appears to be located next to the petrol station.³ He saw people walking fast towards a bakkie and then jumping into it. He described the bakkie as being a white Ford. The bakkie then drove up the road towards him. The occupants of the load area of the bakkie were firing shots as the vehicle came closer. He was not able to say how many people were in the load area. Mr M[...] started running.

[54] In the subsequent confusion, a white VW Polo motor vehicle collided into a teacher who was a pedestrian, causing the teacher to fall to the ground. Mr M[...], too, fell to the ground. When he got to his feet he discovered, as he put it, that his right arm was 'moving on its own'. He had been shot, with the bullet entering his right upper bicep on the outside of his arm, causing a compound fracture of the humerus. He called out for help and was eventually taken off to hospital in an ambulance. There, his arm was placed in a plaster of Paris cast, which was subsequently changed on a regular basis in subsequent hospital visits. He has now fully recovered.

[55] The first investigating officer assigned to investigate the events at the petrol station on Valentine's Day 2022 was Warrant Officer Themba Richard Ngcobo (WO Ngcobo). He has since resigned from the SAPS, having previously been stationed at the Organized Crime Unit, Durban. The group on call at that Unit had done the initial work on the matter on the day of the murder and robbery and over the weekend and he had then been allocated the matter on Monday, 17 February 2020.

³ It is the store at which Ms Mulder purchased the memory stick onto which she saved the video footage requested by the SAPS.

[56] He met the accused on that morning and noted that he wore a black sleeveless windbreaker, a white vest and khaki trousers.

[57] He confirmed that he had requested DWO Pillay to assist him by conducting an identity parade on 21 February 2020. He indicated that he had informed the accused of the holding of the identity parade on that date and informed him of his rights. The accused said that he wanted to contact his attorney. WO Ngcobo took him to his office and permitted him the use of a telephone and waited outside while the accused used the telephone. The accused then informed WO Ngcobo that his attorney indicated that the identity parade could be held in his absence.

[58] The witness confirmed that the identity parade was held on 21 February 2020 at the Durban Central Police Station. The next day, he attended upon DWO Pillay to obtain the results and any statements made. WO Ngcobo then arranged for the upliftment of the memory stick containing the select video footage prepared by Ms Mulder from the petrol station. When he observed the video footage, he was satisfied that the accused was depicted in it. That, together with the fact that the accused had been pointed out at the identification parade by two eyewitnesses persuaded WO Ngcobo that the accused should be charged, and he was taken to court.

[59] WO Ngcobo disclosed that three other men had also been arrested. Charges against one of those men were withdrawn for lack of evidence and while there was fingerprint evidence that connected the other two men to the bakkie, charges were surprisingly not pursued against them because those fingerprints were on the outside, and not the inside, of the bakkie. WO Ngcobo also confirmed that two motor vehicles had actually been used in the robbery: a Ford Ranger bakkie and a blue Hyundai.⁴ The witness testified that he had gone on leave shortly after receiving the docket and did not investigate where the motor vehicles had come from, but he believed that one of them had been stolen.

[60] Mr Tengwa then cross-examined WO Ngcobo. WO Ngcobo immediately was forced to concede an error on his part. He had said that after the results of the

⁴ The latter motor vehicle may be observed in some of the video footage.

identity parade had been received by him and after he had viewed the video footage, he had charged the accused. It was put to him by Mr Tengwa that he had taken the accused to the Kranskop Magistrate's Court on 24 February 2020, a proposition with which WO Ngcobo agreed. Given that the accused had been arrested on 14 February 2020, that would have meant that he had only been brought before a court ten days after that arrest. WO Ngcobo referred to the docket and indicated that he had, in fact, first taken the accused to the Kranskop Magistrate's Court on 17 February 2020 and the matter had then been remanded to 24 February 2020. He conceded to having made a mistake when he said the accused had only been charged after the outcome of the identity parade had become known to him. He had, in fact, been charged earlier and had made his first appearance on 17 February 2020. He pointed out that 14 February 2020 was a Friday and he had taken the accused before a court on the following Monday. Mr Tengwa insisted, nonetheless, that the accused's first appearance had been on 24 February 2020, which was denied by WO Ngcobo.

[61] Mr Tengwa also denied on behalf of the accused that the accused had an attorney by the time that the identity parade had been held as he had not yet appeared in court. This was denied by WO Ngcobo. It was also denied by Mr Tengwa that the accused's constitutional rights had been explained to him, as WO Ngcobo stated had occurred. As regards his observations of the video footage, WO Ngcobo had to concede that the faces of the participants in the robbery were not clearly depicted. But he added that the accused was wearing identical clothing to a person depicted in the video footage. He also stated that the accused had a similar walk, or gait, to the person wearing the identical clothing in the video footage. He confirmed that the accused had been wearing the same clothing when he first encountered him.

[62] The court asked of WO Ngcobo if the charge sheet that was used for the disputed court appearance on 17 February 2020 would record the accused's presence that day before the court. WO Ngcobo said that it would.

[63] The final witness for the State was Warrant Officer Willem Abraham de Wit (WO de Wit). He is based at the Organised Crime Unit in Pietermaritzburg, known

now as the 'Hawks'. He was on duty on 14 February 2020 and proceeded to Kranskop on being informed of the events that had occurred there. He arrived there just after 16h00. He described what he found, including the positioning of the G4S armoured vehicle and the body of the deceased. Before investigating the scene, he donned a protective suit designed to minimize contamination of the crime scene. He found a 9mm spent cartridge near the deceased's body and other spent cartridges at the scene. A white bakkie with a canopy had been found near the petrol station that had been damaged by two gunshots. He identified this motor vehicle from photographs contained in the photograph album.

[64] WO de Wit confirmed that he had also attended a scene approximately 3 kilometres from the petrol station where the tribus had been found. Its timer was still operative and could be heard ticking, but it had already exploded. It appeared to have been thrown to the ground at some stage and he stated that all the money within it had been stained with ink. The tribus and its contents were handed in at the SAP 13 by him and was subsequently handed over to a representative of G4S, as was the firearm of the deceased. This witness was not cross examined by Mr Tengwa.

[65] The court asked WO De Wit to comment on the gunshot damage to a Toyota motor vehicle depicted in the photograph album. He indicated that he did not see that vehicle on that day and could not comment on where it was. As regards the damage to the vehicle depicted in the photograph, he noted that the bullet hole was extremely large and was unlikely to have been fired from a 9mm pistol. He believed it would more likely have been fired from a rifle, such as an R5. When preparing this judgment, I revisited the videos received by the court collectively as exhibit 1. There are eight different clips from eight different cameras. On video clip two, at time marker 14:05:07, a man is seen emerging from the other side of the street, firing a long firearm in the direction of the petrol station. The robbers thus did not only possess handguns and this may account for the damage to the Toyota motor vehicle.

[66] The State then closed its case subject to it being permitted to hand in the charge sheet from the Kranskop Magistrate's Court upon it coming to hand.

[67] Mr Tengwa sought an adjournment at this stage to permit the accused to consider whether he wished to testify or not. The court agreed to give the accused two hours to consider his position. When the court resumed, the State indicated that it had now received a copy of the charge sheet from the Kranskop Magistrate's Court and sought leave to reopen its case and hand it in. Mr Tengwa, fairly, did not object, noting that the State had closed its case subject to it handing in the charge sheet when it was received.

[68] The charge sheet revealed on the first page thereof that the accused's first appearance had been on 17 February 2020. However, the appearance pages made no reference to an actual appearance on that date. The first narration of an appearance commences on 24 February 2020, being the date upon which the accused alleged he was first taken before the court.⁵

[69] Mr Tengwa then indicated that the accused would testify in his defence, and he was consequently called to the witness box. Senzo Jeffrey Magwanyana stated under oath that he had not been at the petrol station in Kranskop on 14 February 2020. He insisted that he had been arrested in a rural area near Maphumulo at a place that was across the Hlimbithwa River. He was there selling traditional herbs. He had arrived at that place from Durban, having got a lift from Marianhill to Greytown in a truck. Having exited the truck in Greytown, he had got into another truck, whose destination he had not known, but from which he had alighted at a place known as Maphumulo. There he had sold his traditional herbs door-to-door until he was arrested by Cst Mazibuko. He had been assaulted by the constable, being hit with the butt of an R5 rifle, and had been injured in his nose, which had bled. He stated that he had not been dirty when he was initially found by Cst Mazibuko, as Cst Mazibuko had stated, but had become dirty through the assault perpetrated on him. Cst Mazibuko had also shown him photographs on his, Cst Mazibuko's, cellular telephone. This had never been put to that witness when he testified.

⁵ The issue was finally put to rest the next day when the original charge sheet was produced. The person making the photocopy previously handed in had not photocopied the rear of the first page of the charge sheet. The appearance of the accused on 17 February 2020 was recorded thereon.

[70] The accused indicated that all those who implicated him in the events at the petrol station were liars. He confidently stated that the only person who had identified him at the identification parade was Ms Shinga, who he referred to by her forename, Nomcebo. He stated that his rights had never been explained to him and that he did not have an attorney: he stated, in fact, that 'I have never had an attorney in my life'.

[71] As regards his clothing, he said he that he had been wearing a red hat and that it had not been reversed at the time of his arrest. He agreed that he had been wearing a body warmer that was sleeveless and navy. He also wore a white vest and while his clothing was the same as the person in the video footage, he, the accused, had not been involved in the events at the petrol station in Kranskop.

[72] Under cross examination by Ms Sokhela, the accused again confirmed he wore a navy body warmer and, after some toing and froing, that he wore a white vest as well as a red hat, as had the person in the video footage taken at the petrol station. He now asserted, for the first time, that he had not worn khaki trousers, but silver grey trousers. He agreed that he had worn tekkies, as had the man in the video footage, but insisted he had worn navy tekkies with a white sole while the man in the video footage wore black tekkies with a white sole.

[73] As regards his allegedly 'crowded' teeth, the accused denied that this was the case. The court eventually inspected his teeth. This is not a field in which the court claims to possess any expertise. The accused does have a rather pointy shaped mouth and it does appear that he has several teeth crammed into a small space that is slightly unusual. What is notable is that he has a rather prominent jaw that protrudes more than usual. That may account for his somewhat irregular looking teeth.

[74] The accused acknowledged that he had previously worked as a security guard and that he had training in the handling of firearms. He had, however, never done cash in transit work before. He confirmed that he had never set foot in the petrol station on 14 February 2020, or on any other date for that matter.

[75] After the original charge sheet relating to proceedings before the Kranskop Magistrate's Court was produced, the accused backed away from his original version that he had only been taken to court on 24 February 2020. He now sought refuge in the explanation that he did not have a calendar where he was detained. He ultimately withdrew the version entirely at the invitation of Ms Sokhela.

[76] The accused indicated that he had been arrested at approximately 15h00 at the Maphumulo area. He had been told the name of the area by the occupants of the Ngubane homestead, which was the last homestead that he had visited prior to being arrested. He had been to other homesteads in the area but had not asked where he was from the occupants of those homesteads. From this, it is apparent that the accused did not know where he was. He explained why he had not asked where he was from the occupants of other homesteads that he had visited that day in a general fashion, indicating that his ability to do so depended on how he was welcomed into a homestead. He, however, did not ever state that he had not been well received at any of the homesteads that he had previously visited. When it was asked of him whether he might have been arrested at the Amatimatola area, as testified to by Cst Mazibuko, and not the Maphumulo area, he resisted the notion saying that he had been told it was the Maphumulo area. He was, however, obliged to concede that Cst Mazibuko knew the area better than he did. Rather than concede that he might be wrong, he then contented himself with the proposition that the person who told him it was the Maphumulo area must then have been wrong. The likelihood of a resident of the area being wrong about where they personally live will obviously have to be considered.

[77] It was suggested to the accused by Ms Sokhela that he was seeking to avoid being associated with the Amatimatola area because that is where the two vehicles had been recovered that had allegedly been used in the robbery at the petrol station. To this the accused said that the vehicles had actually been recovered at the Maphumulo area and they had been parked on the road. The bakkie had therefore not capsized and was not damaged. This had never been put to any witness and certainly not to Cst Mazibuko. He described the vehicles as being a white bakkie and a greenish Honda or Hyundai. When it was pointed out that Cst Mazibuko had said the vehicles had been found at the Amatimatola area, the accused replied by saying

that a place can have two names. He did not say that this was the case with this particular area, but, again, rather spoke generally.

[78] The accused was also asked about the photographs that Cst Mazibuko had allegedly shown him on his cellular telephone. He described the photographs as comprising pictures of people standing. He could not recognise the background to those photographs. It was pointed out to him that Cst Mazibuko was not confronted with this version. He claimed that he informed his legal representative of this but conceded that he had forgotten to remind Mr Tengwa of this when Cst Mazibuko was being cross examined.

[79] As regards the holding of the identity parade, the accused commenced by denying that the line-up comprised of eleven men. This, too, was a new denial and had never been put to DWO Naidoo. The accused insisted that there were only eight men in the line-up. As to why this elementary evidence was not challenged when DWO Naidoo testified, the accused said that he did not want to unnecessarily delay the trial. He was placed in great difficulty when the photographs of the participants in the identity parade were mentioned by Ms Sokhela. The accused insisted that the photographs showed eight participants. He also said that there was a photograph showing four participants. He was wrong on both scores. After he finally concentrated and counted the participants in the photographs, he agreed that there were eleven men who had stood in the parade.

[80] The accused was asked about seeing Ms Shinga at the identity parade. He agreed that it had never been put to her that she had participated in a face-to-face pointing out.

[81] Ms Sokhela then asked the accused how, if he had never been to the petrol station, he knew that there were video cameras there. He responded by stating that the Hawks had told him of this. They had also told him that he appeared in the video footage. He was then asked if he had told DWO Naidoo at the identity parade that the video footage could be perused to confirm that he was not involved. He agreed that he had said this. Ms Sokhela asked him then why he would have mentioned this to DWO Naidoo: why would he urge DWO Naidoo to look at the footage if it allegedly

contained his image. His answer was not clear. He did, however, indicate, for the first time, that when he denied that he appeared on the video footage he was beaten by some Indian policemen who had kicked him and punched him.

[82] In response to a question from the court as to why he would go to a rural area to sell traditional herbs, which would in all probability be cultivated in a rural area, the accused indicated that he also sold other products, one of which he advised was 'crocodile fat'. He had some with him on the day in question. This was a new revelation. As to how he determined where to go to make his sales, his evidence was equally unclear. It also appeared from his answers that what he was peddling had an application both for humans and for animals, for he apparently asked a truck driver in Greytown where people with livestock lived. He was told people in the Maphumulo area had animals. He had then got into a truck. He did not, however, know where the truck was headed.

[83] The defence then closed its case and the court heard argument. Ms Sokhela called for the conviction of the accused on all the counts that he faces, and Mr Tengwa called for his acquittal on those counts.

[84] The key issue in this matter, obviously, is the issue of identity. That the robbery and murder occurred at the petrol station on Valentine's Day 2020 admits of no doubt and has never been in issue. The identity of the deceased and the mechanism that caused his death are also admitted by the defence.

[85] It is so that where identification is an issue, as in this case, the evidence adduced should be considered cautiously. As Holmes JA said in the much-quoted matter of *S v Mthetwa*:⁶

'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

⁶ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

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 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...'

[86] The State has presented the evidence of three eyewitnesses on the issue of identity. Two of those eyewitnesses participated in a formal identity parade and the State placed much reliance on the outcome of that identity parade. Evidence in the form of video footage was also relied upon to establish the presence of the gang and the identity of the accused. I have referred to the men as a gang previously in this judgment for that is, in truth, what they were. They were not a gaggle of rag-tag ne'er-do-wells, who randomly, and spontaneously, committed a series of crimes. They were a gang of individuals acting in unison in terms of a set plan in which each had a defined roll to play. The video footage reveals this to be so: three men set upon the deceased, a fourth man was responsible for removing the tribus from the scene and there was a sub-group of men waiting in two cars across the road from the petrol station who opened fire on anyone who was in the area at the time of the robbery.

[87] The principal eyewitnesses presented to the court by the State were Ms Shinga, Ms Bhengu and Cst Mazibuko. The former two are employees of the petrol station, Ms Shinga working inside in the convenience store and Ms Bhengu working outdoors on the forecourt. They thus both offer different perspectives on the events about which they told the court. They were both in close proximity to the events of 14 February 2020 and were in an excellent position to make observations on the issue of identity. Given the cautionary words of Holmes JA in *Mthethwa*, their evidence must, however, be carefully considered.

[88] In so doing, there is the fortunate fact that whatever the witnesses might say may be compared with what the video footage recorded, which is supremely objective in its muteness. Any doubts about the sequence of events narrated by the

eyewitnesses may profitably be measured against the video footage, the accuracy of which has not been challenged. That provides a degree of reassurance when assessing the observations of the principal eyewitnesses. That exercise, for example, reveals that the first State witness, Mr Maome, was entirely mistaken in what he claims to have observed. The robbers were not already in the convenience store when the deceased went in as they may be observed entering the convenience store after the deceased entered, nor could they have been standing at the refrigerators, as those were behind burglar bars and behind the counter.

[89] Ms Shinga was on the other side of the counter in the convenience store when she attended to two of the three men who had entered the convenience store. She indicated that the man, who she later identified as being the accused, entered the store and made use of a drinking fountain within the store. He then sauntered over to the other two men who were before her. It was then, so she testified, that she had the opportunity to observe him. She would have been at close range to him when she did so. As previously noted in this judgment, she had described the man in her written statement as wearing a red hat, a navy striped T-shirt and blue jeans. She did not mention a blue body warmer or khaki trousers. That was different to how she described him in her oral evidence. In her oral evidence, she described the man as wearing a red hat, white T-shirt, dark navy body warmer and khaki pants. There is a notable difference in the description of the clothing. Gone is the striped T-shirt and in its place is a white T-shirt and dark navy body warmer. Gone, too, are the blue jeans, replaced with khaki trousers. She went on to describe the facial features of the accused: he had a light complexion, traditional cuts to his face, a beard and teeth that were on top of each other. But for the teeth, the accused admits that he has all those features. But the description of the accused's facial features is not mentioned in this witnesses written statement. Notwithstanding this, the witness took a scant 10 seconds to identify the accused at the identity parade.

[90] I acknowledge that there may be a difference between the written statement of a witness and the later oral evidence of that witness. Statements are often taken in haste by SAPS officials who may not be properly equipped with the necessary skills to do this. Statements taken from witnesses by the SAPS are notoriously lacking in detail and are often inaccurate and incomplete and:

‘... not taken with the degree of care, accuracy and completeness which is desirable. . .’⁷

Comparing the oral evidence of a witness against an earlier extra-curial written statement made by that witness is a legitimate method of cross-examination and in this matter, it was fully employed by Mr Tengwa, as he was entitled to do. Where a difference is perceived to exist between the two versions, however slight that difference may be, it is seized upon and exploited to its maximum potential benefit.⁸ But in *S v Mahlangu and another*, the court noted that:

‘[t]here will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was unsatisfactory or untruthful’.⁹

[91] I agree with that statement. The court is required to consider the evidence as a whole to determine in what respects the witness's evidence may be accepted and in what respects it should be rejected. The test is whether the differences were material:¹⁰

‘always bearing in mind that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement’.¹¹

Deviations which are not material are not to be used to discredit the witness. In *S v Mafaladiso en Andere*,¹² the court held that the final task of the judge is to weigh up the previous statement against viva voce evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth has been told, despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.

⁷ *S v Xaba* 1983 (3) SA 717 (A) at 730B-C.

⁸ *S v Govender and others* 2006 (1) SACR 322 (E) at 326c-j.

⁹ *S v Mahlangu and another* [2012] ZAGPJHC 114.

¹⁰ *S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE) at 437E-F; *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593E.

¹¹ *S v Mahlangu and another*, *supra*.

¹² *S v Mafaladiso en andere* *supra*.

[92] The external wall of the convenience store holds its access door and the access door is accessed from the forecourt of the petrol station. Ms Shinga's till point is at right angles to the internal aspect of that external wall. Running from the doorway to the pay point is a window in the external wall that permits sight of the forecourt from inside the convenience store. Thus, Ms Shinga would be in a prime position to observe what occurred immediately outside the door to the convenience store.

[93] While I immediately acknowledge the difference in her descriptions of the clothing worn by the accused, I also acknowledge that her later identification of the accused was not based upon his clothing, but upon his facial features. Sight must not be lost of the fact that all the men on the identity parade wore identical crime scene overalls. I do not doubt for a minute that, given her position, she had an opportunity to view the facial features of the man: after all, he stood right in front of her, separated only by the counter. That she got the clothing description wrong initially is obvious when the video footage is considered. While nothing turns on that misdescription given her later identification of the accused by his facial features, her inaccuracy in this regard impacts upon her overall reliability as a witness.

[94] That inaccuracy further manifested itself when she appeared to be confused about what had happened at the identity parade. She incorrectly asserted that Ms Bhengu had first been called into the viewing room when, in truth, she was the first to go in. Nothing really turns on who went in first. But it again highlights the fact that she was not entirely reliable in her recall of events. I would thus seek corroboration of her evidence from someone else before I accepted her version of events. That corroboration could be in the form of the video footage.

[95] Ms Bhengu on the other hand appeared to be entirely reliable. Her narration of events was born out by the video footage, as were her movements and conduct. She testified that she was two metres from the deceased when he was shot. Having observed the video footage, it appears to me that she may have underestimated how far she was from the deceased: in my estimation, she was not two metres away but

was no further than four metres away. In any event, she was on anyone's version, not far from the spot where the deceased was gunned down.

[96] Mr Tengwa argued that while Ms Bhengu may have been very close to the action, the value of her evidence would depend on what direction she was looking in at the critical moment. If she was facing the street, then the events, though close to her, would have been happening behind her back. Ms Sokhela, very correctly though, pointed out that it had never been denied that the person who shot the deceased had exclaimed "Voetsek" before shooting him nor had it been denied that Ms Bhengu had testified that she had looked specifically to see who had uttered this word. That is how she came to see what occurred. I am satisfied this establishes that the witness was looking in the direction of the unfolding murder and that her close range observations can be relied upon. Her ability to identify the accused at the identity parade is also reassuring but will be considered in greater detail shortly.

[97] Cst Mazibuko was an impressive witness. He presented himself well and appeared to be diligent and to take his obligations as a member of the SAPS seriously. He involved himself in the events that he stumbled upon by chance notwithstanding that he was on leave on that day. As regards his observation of the accused, he indicated that he was approximately 15 metres from the accused when he saw him running across the road and getting into the white bakkie opposite the petrol station. While he was further away than Ms Shinga and Ms Bhengu, he was not vastly distant from the accused, being three quarters the length of a cricket pitch away, a cricket pitch being 20.12 metres long. His impressions of the accused could only have been reinforced when he almost immediately after the murder and robbery observed the video footage at the petrol station. That observation would have confirmed what the accused wore in no uncertain terms. He estimated a viewing time of the video footage of 30 minutes and a drive to the scene of the capsized bakkie of 20 minutes. He would therefore have been at the place of the capsized bakkie just before 15h00, less than an hour after the events at the petrol station. This conforms entirely with the accused's version of events: he stated that he was arrested shortly before 15h00. That is, relatively speaking, not long after the deceased was murdered.

[98] Cst Mazibuko clearly had a good idea of what the accused wore, because he picked the accused out from the crowd of onlookers at the scene of the capsized bakkie notwithstanding that his bucket hat had been reversed and was now blue. The accused admitted that he wore exactly what Cst Mazibuko had described him as wearing, save that he insisted that he continued to wear a red bucket hat and had not reversed its colours. Thus, Cst Mazibuko identified a person that was wearing precisely what the person in the video footage was wearing, save for the dispute over the colour of the hat. It was only much later, and without it ever being put to any of the State witnesses, that the accused advanced the version that he had not been wearing khaki trousers but had, instead, worn silver grey trousers.

[99] While Cst Mazibuko was generally an impressive witness, his evidence was not without flaw. He mentioned in his evidence in chief that he had used his cellular telephone at the petrol station to summon the SAPS but then denied that he had his cellular telephone with him when the accused's version was put to him concerning his arrest. The contradiction was stark, but it may have been more apparent than real: it is possible that Cst Mazibuko did not take his cellular telephone with him when he went in pursuit of the robbers. Despite this anomaly, I find him to be a reliable witness who was truthful and accurate in his evidence.

[100] As previously mentioned, the State has relied heavily upon the results of the identity parade conducted by DWO Naidoo. Mr Tengwa was entirely correct when he put it to DWO Naidoo that such a parade must be fair to the accused otherwise its value is questionable. DWO Naidoo testified with regards to the composition of the parade that he had asked the accused if he had any people that he wished to stand on the parade. This question was asked of a man in detention who had limited means of communication with the outside world. What answer could DWO Naidoo reasonably have expected from such a question? The obvious answer was 'no', and that is the answer that he received. As a consequence, the accused was invited to select persons from the holding cells at the police station to stand on the identity parade and apparently did so, although this is disputed by the accused.

[101] It appears that DWO Naidoo was content with this arrangement. I am not as reassured by it. DWO Naidoo would have known of the rules applicable to identity

parades (the rules), given his self-professed vast experience in arranging identity parades. The rules are not actually rules of law but are rules of SAPS practice based upon considerations of fairness to the person required to appear on the parade. Those rules serve as a guideline to the SAPS officials that are responsible for the conducting of identity parades. To have value, the identity parade must be conducted fairly. But, as was stated in *S v Bailey*:¹³

‘Just like the right to a fair trial is not violated every time when the evidence of a single witness or an accomplice is allowed, such right is, in my view, not violated where an identification parade is held that may be regarded as less than perfect. At worst, the weight to be attached to such parade identification may be affected.’

This approach was confirmed by Plasket J in *S v T*,¹⁴ where the learned judge stated that:

‘[n]on-compliance with a rule or rules is not fatal to the admissibility of identification evidence but will usually have an effect on the weight to be attached to the evidence of identification.’

[102] My difficulty with the identification parade in this matter is the appearance of the other persons standing on the parade with the accused. Rule 8 of the rules reads as follows:

‘The suspect and persons in the parade should be more or less of the same build, height, age and appearance and should have more or less the same occupation and be more or less similarly dressed.’

Where the suspect is known to have sported a beard at the time of commission of the offence, and had a beard at the time of the holding of the identity parade, it defies logic that the identity parade should only have one person standing on it who had a beard, namely the accused. In my view, the same applies to traditional face marks. And to complexion, for that matter. These issues appear not to have been

¹³ *S v Bailey* 2007 (2) SACR 1 (C) 44.

¹⁴ *S v T* 2005 (2) SACR 318 (E) para 16.

considered by DWO Naidoo and no attempt was made by him to comply with this rule.

[103] Rule 6 of the rules further stipulates that:

‘It is generally undesirable that there should be more than one suspect on the parade; and if a second is place on the parade, the two suspects should be more or less similar in general appearance and the persons on the parade should be increased to at least twelve to sixteen.’

The parade fell short in this regard as well: there were more than two suspects on the parade, those two suspects were not similar in general appearance and there were less than 12 men in the line-up.

[104] Rather than require the accused, who may have had no knowledge of the rules, to pick the people who stood with him, DWO Naidoo should have used his vast experience to assist him in this regard. Whether through ignorance, or whether, perhaps, even by design, the accused chose no one that looked like him to stand together with him on the parade in that they did not have light complexions, they had no tribal cuts on their faces and they had no beard. It is possible that there were no other people with such characteristics in custody at that time from which the accused could choose. But that does not mean that just any men could be roped in to stand on the identity parade.

[105] In my view, the SAPS cannot rely on the inexperience of an accused person and the difficult circumstances that he finds himself in after his arrest and then claim that the parade was fair because the accused chose the people who stood alongside him. In *R v Kola*,¹⁵ Schreiner JA warned of the dangers of not complying with the rules of an identification parade and concluded as follows:

‘But an identification parade though it ought to be a most important aid to the administration of justice may become a grave source of danger if it creates an

¹⁵ *R v Kola* 1949 (1) PH H100 (A); See also *S v Mohlanthe* 2000 (2) SACR 530 (SCA) and *Tanatu v S* [2004] JOL 13144 (E).

impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course an identification parade is not necessarily useless because it is imperfect. In some respects the quality of the parade must necessarily be a question of degree.'

[106] My view that DWO Naidoo should have done more to ensure that the people who stood with the accused appeared like him is reinforced by the fact that whilst the accused had, on the State's version, an attorney, that attorney was not present to advise the accused.

[107] I am accordingly not satisfied that the identity parade was 'without a shadow of a doubt' fair to the accused, as it was professed to be by DWO Naidoo. That the accused was identified by both witnesses is beyond doubt. But their task was made all the easier because of the composition of the identity parade. I must therefore attach far less, if any, weight to the identification than I would have if it was conducted in a more regular fashion.

[108] I turn now to consider the accused's evidence. He was a miserable witness. His version is, simply put, incredible. He appears to have randomly chosen to go to Greytown on the day in question and relied on the goodwill of truck drivers to get him there. I suppose that there is nothing inherently improbable about this: hitchhiking is a common enough method of getting around. But quite why he would find himself in the rural area surrounding Greytown is mystifying and unconvincing. His initial version was that he was proceeding door-to-door selling traditional herbs. That then changed that version when he indicated that he also sold, and had with him, 'crocodile fat'. He tried to press upon the court that this substance is also classified as a traditional herb. I remain unpersuaded of this. It is clearly not a herb, which is usually regarded as being a flowering plant whose stem above ground does not

become woody.¹⁶ He appeared to have felt pressured to include the 'crocodile fat' in his version when the court asked him why people in a rural, agricultural area would be interested in buying traditional herbs from him when those herbs are probably grown in that rural area and not in the city, from where the accused comes.

[109] The accused's movements in and around Greytown were also difficult to comprehend. He had no specific area that he intended to visit: indeed, on his own version, he had to ask someone in Greytown where he should go. That resulted in him leaving the town of Greytown in a truck whose destination was not known to him, on his own version. The court wanted to know from him why he had not simply alighted from the first truck before it arrived at Greytown, rather than go to Greytown and then leave for the outskirts. No satisfactory explanation was forthcoming from the accused.

[110] There is in any event, something strange and unconvincing about selling door-to-door in an unknown rural area, on foot. Why not concentrate on a township where there are streets and houses? Why choose a rural area where there may be an irregular sprinkling of homesteads over the countryside that may have great distances between them? This is all the more unlikely when it is acknowledged that the accused was to move about on foot.

[111] The accused was a witness who gave answers to questions that he was not asked and would not answer questions that he was asked. He had to be cautioned about being classified as an evasive witness because of his repeated attempts to avoid providing answers to pointed questions put to him.

[112] He was also a witness that advanced propositions through Mr Tengwa that were put as facts, but which clearly were not. Examples of such instances have already been mentioned: he was only identified by one witness at the identity parade because he saw her face-to-face, meaning that he did not see the second witness and could not therefore possibly have known whether she had identified him; and

¹⁶ Dictionary.com: <https://www.dictionary.com/browse/herb>.

that he had only been taken to Kranskop Magistrate's Court for the first time on 24 February 2020.

[113] I mentioned earlier that this case is about the identity of one the gang members. That is so. But, in reality, it is rendered much more simple by the fact that the accused admits that on the afternoon of 14 December 2020, he wore clothing identical to a man that appeared in video footage recorded in the petrol station at Kranskop. There is no dispute about what that robber wore, for it is evident from the video footage. And there is no dispute about what the accused wore. He has admitted that. In making that admission, he contradicted the version put by Mr Tengwa to Ms Shinga when it was specifically denied that he had worn a red hat. The accused attempted to dispute the evidence of Cst Mazibuko and insisted that he had continued to wear a red hat at the time of his arrest and had not reversed it so that it now appeared as blue. The accused's attempts to generate some disputes over what he wore were contrived and were not put to the State witnesses and were only aired when he testified. There were many instances where new facts were introduced by the accused that had never been put to the State witnesses.¹⁷

[114] But I digress. To revert to the issue, what I need to determine is whether the man shown in the video footage wearing a red bucket hat, white vest, black or navy body warmer and khaki trousers is the accused who also wore a red bucket hat, white vest, black or navy body warmer and khaki trousers.

[115] In seeking the answer to this issue, the probabilities must be considered. The first is how probable is it that two different men, both sporting beards with prominent jawbones, would be identically dressed in the small community of Greytown on the same day at approximately the same time of day? In my view it is improbable. The next probability is how probable is it that a white bakkie that was positively involved in the robbery in Kranskop would be found at the same remote rural area where the accused was found? Again, the answer must be that it is improbable.

¹⁷ Examples of this include the allegation that he wore silver grey trousers and not khaki trousers; the allegation that Cst Mazibuko had showed the accused photographs on his cellular telephone when arresting him; and the allegation that the white bakkie had not capsized but was parked on the road.

[116] After carefully, and anxiously, evaluating the evidence, I am satisfied that the accused is the man in the video footage recorded in the petrol station on 14 February 2020. I do not attach great weight to the identification of the accused on the identification parade for the reasons previously mentioned. But I accept the evidence of Cst Mazibuko that identifies the accused as part of the gang. Cst Mazibuko had the further advantage of seeing the accused both at the time of the robbery and almost immediately afterwards when he arrested him. The other witnesses did not see the accused again on the day of the robbery and murder. I find that the accused wore the same clothing as the man depicted in the video footage and that he has an identical, prominent jawline. I find that he was part of the gang that struck the G4S armoured vehicle at the petrol station. I also find that he is the man who cold bloodedly executed the deceased.

[117] The gang clearly acted with a common purpose in robbing the G4S armoured vehicle. This may be deduced from the roles that the members played as evidenced in the video footage. They all appear to have been armed and the video footage shows that they used their firearms in a random and indiscriminate way, firing wildly at members of the public. They must have foreseen that persons may have been killed by their violent conduct but proceeded, nonetheless. They were indifferent to the fact that they were firing on scholars. That none were killed, but merely wounded, is due more to providence than good planning.

[118] I accordingly find the accused guilty on counts one to five.

MOSSOP J

APPEARANCES

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Dates of trial : 23, 24, 25, 26, 30, 31 October 2023,
1, 2, 3 November 2023

Date of judgment : 2 and 3 November 2023