

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

REPORTABLE

CASE NO. CCD 43/2022

In the matter between:

THE STATE

and

MXOLISI GCABASHE

ACCUSED 1

NTOKOZO NDLELA

ACCUSED 2

JUDGMENT

HLATSHWAYO AJ

Background

[1] The day of joy when Mr Minenhle Mkhize (the deceased) from the African National Congress (“ANC”) was elected as a councilor during the local government elections of November 2021 quickly turned to sorrow when he was murdered in execution style in January 2022. Mr Gcabashe and Mr Ndlela are together facing one count of conspiracy to commit murder and one count of murder arising out of his gruesome death. They are also jointly facing one count of contravention of s 3 read with various sections of the Firearms Control Act¹ (“FCA”) being unlawful and intentional

¹ Act 60 of 2000.

possession of a firearm and one count of contravention of s 90 read with various sections of the FCA being unlawful and intentional possession of ammunition.

[2] Mr Gcabashe alone is, in addition, facing one count of theft, one count of contravention of s 3 of FCA and one count of contravention of s 90 read with various sections of the FCA. Section 51(1) of the Criminal Law Amendment Act² ("CLAA") is applicable to the charge of murder and conspiracy to commit murder whereas s 51(2) of CLAA finds application to the charge of theft and the two counts of unlawful possession of firearms. Both the accused were duly advised of the effect of the above minimum sentence provisions and the sentences they face should they be found guilty.

[3] Both accused pleaded not guilty to all the charges and elected not to disclose his basis of defence. It must be mentioned that both parties agreed on undisputed evidence which greatly assisted in shortening the trial. Consequently, s 220³ admissions were placed on record at the commencement of this trial. This therefore is a unanimous decision of the court sitting with the assessor.

Summary of evidence

[4] The case for the prosecution is that on the 9th March 2021 Sergeant Sihle Ngidi received information about a person who is in possession of drugs and firearms at Kwa-Nyuswa area. He quickly put together a team which proceeded to accused 1's house. Whilst approaching accused 1's home, a Toyota Legend 45 van reversed out of the yard at high speed. Since this was a one way road this van proceeded forward and stopped at the dead end. That is when a male alighted and started running to the mountain. Sergeant Ngidi gave chase together with Sergeant Pedro Rodrigues who was also handling a dog. When the male entered a bush in the said mountain, the dog in question apprehended him and viciously bit him on his legs in the process.

² Act 105 of 1997.

³ Act 51 of 1977.

[5] When the dog was removed, Sergeant Ngidi introduced himself to him and informed him that he is suspected of possessing drugs. After he carried out the search on accused 1, he found a firearm in his groin area. On inspecting the said firearm he noticed it's a 9mm and had 16 ammunition. This discovery was taking place in the presence of Sergeant Pedro Rodrigues who was holding his dog. The accused was assisted back to his car and when Sergeant Ngidi opened it, he was struck by a strange smell similar to paraffin. On further inspection of the passenger seat there were small plastics containing brown powder and from his experience they contained heroin. There was also a green plastic bag where a 9mm revolver with two ammunition were found.

[6] Sergeant Ngidi also found accused 1's wallet which had a firearm license and when asked about the firearm, he informed them it was taken by police. When the said van was further checked, it transpired that it was stolen and it is common cause the said van belongs to Mr Logan. The accused was placed under arrest and later taken to hospital for treatment in respect of the injuries sustained when he was bitten by the dog. It appears the accused was subsequently released on bail.

[7] Turning to the events that led to the deceased's death, it is common cause that it was the early evening of 22 January 2022 after 19h00 when the deceased's van had pulled into his yard in Cliffdale that he was shot multiple times and died on the scene. His daughter, Ms. Nomthandazo Malinga, bravely peeped through a window but could only see a shadow. She decided to go and peep through the window facing the gate. It is then that she observed a male who was slender in built moving backwards to the gate. This male wore a black mask and was wearing a t-shirt with stripes. He proceeded towards Mahlubini Shisanyama.

[8] On the other hand, Mr Vumani Dlamini ("Dlamini") had spent the better part of this day with both accused and accused 2's brother travelling in accused 1's Golf 6 car which was black in colour. This motor vehicle was at all material times driven by accused 2. It is also common cause that Dlamini was seeing accused 1 for the first time that day but knew accused 2 and his brother Siyabonga because they came from the

same area. From Mahlubini Shisanyama this car travelled to Hammersdale mall where alcohol was bought and they returned to Mahlubini to braai some meat. They again left to buy alcohol at Mdlalose tavern and returned to Mahlubini Shisanyama.

[9] Accused 1 told them to leave and they travelled to Kwa-Nyuswa. There, accused 1 alighted and spoke to a certain person and on his return he instructed them to go and they returned to Cliffdale. On their return a different route was used and they passed by Nxele's tavern to buy alcohol but could not find a particular brand they were looking for. They then proceeded down towards the deceased's residence and before reaching the said residence they saw the deceased's van turning into the deceased's driveway. After passing his residence, accused 1 asked to alight and told them he will meet them at Mahlubini Shisanyama. However, before Dlamini, accused 2 and his brother could reach Mahlubini Shisanyama, they heard gunshots and they were all shocked.

[10] Moments later accused 1 arrived and before jumping into the car, a firearm fell down. He picked it up and placed it in his groin area. Before dropping off Dlamini and Siyabonga, accused 1 told them not to say anything about what happened. It will suffice to state that Mr. Dlamini went back to reside in the rural area of Mpendle where there was an attempt on his life and a wrong person was killed.

[11] Having obtained CCTV footage showing accused 1's motor vehicle around the scene, Sergeant Chamane, who was part of the task team investigating political killings, approached the accused's premises in Kwa-Nyuswa on 22 February 2022. Whilst still outside the accused's premises he saw the same motor vehicle he was looking for parked in the accused's garage which was not closed. When he was inside the premises near the veranda, they saw two old spent cartridges. When he enquired from the accused, he informed them that they were fired by his relatives, Ndoda and Nala Ngwane, during New Year's celebration. Sergeant Blose later collected the exhibits and took photographs. The accused was arrested for unlawful possession of television sets. Sergeant Chamane followed up the accused's explanation and one of his cousin's firearm was tested and did not match with those cartridges. However, it is common

cause that the cartridges uplifted from the scene where the deceased was killed were fired from the same firearm that fired the two spent cartridges uplifted from the accused's premises.

[12] This court was favoured with various exhibits forming part of the record by agreement between the parties. They included the s 220 admissions by both accused, the post-mortem report regarding the death of the deceased, ballistic reports regarding firearms alleged to be recovered by Sergeant Ngidi, ballistic reports on the ammunitions recovered from the scene where the deceased was killed and another regarding ammunitions uplifted from accused 1's premises, comparison reports between the above ammunitions, various photographs, maps and cellphone records of both accused and the deceased. The State then closed its case.

Application for a discharge in terms of Section 174

[13] At the close of the State's case an application for a discharge of accused 2 on all charges and accused 1 on count 4 was made. This application was granted and accused 2 was discharged on all counts. Accused 1 was discharged on count 4 only. The reasons for the discharge were reserved. The grounds relied upon by both accused for the said application was briefly that there was no evidence linking both accused to any political party and there was no agreement, discussion or any plan to kill anyone. Bearing in mind that Vumani Dlamini was in the accused company for some time before the deceased was killed, the said Vumani Dlamini would have known if anything was brewing pertaining the killing of the deceased. Put differently, there was no prior agreement or conspiracy to kill the deceased whatsoever and there is no evidence to sustain count 4.

[14] The defence further relied on the evidence of Vumani Dlamini that accused 1 requested to alight from accused 2 near the deceased's premises. It was argued accused 1 was thus on a frolic of his own. It was further argued that when they heard gunshots, all the occupants including accused 2 were shocked. No evidence was led

implicating accused 2 to sharing common purpose in the killing of the deceased in count 4 and 5.

[15] In as far as counts 6 and 7, it flows directly from the finding whether accused 1 shot and killed the deceased. There is no evidence to suggest that accused 2 possessed the said firearm and ammunition. On that basis, it was submitted that the State failed to make a case for the accused to answer.

[16] Section 174 of Act 51 of the Criminal Procedure Act provides that if at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any other offence of which he may be convicted on the charge, it may return a verdict of not guilty. Nugent AJA as he then was observed the following in *S v Lubaxa*:⁴

‘I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence...’

[17] At the outset it must be pointed out that the prosecution, in my view, correctly conceded that there is no case for accused 2 to answer regarding counts 6 and 7. Clearly the allegations before court is that the firearm and ammunition that killed the deceased was in accused 1’s possession. There is no basis whatsoever to impute liability on accused 2 for the conduct of accused 1 where no evidence was presented that they acted together.

⁴ *S v Lubaxa* 2001 (2) SACR 703 (SCA).

[18] In respect of count 4 and 5 the prosecution submitted that there exists a prima facie case to commit murder and conspiracy to commit murder. It relied heavily on the principle of common purpose and argued that accused 2 shared the same goal with accused 1 to commit the above offences. It was accused 2, so it was argued, who drove the getaway car and after dropping off Dlamini and Siyabonga he was, together with accused 1 driving to Kwamashu. In addition, the cellphone records as reflected in exhibit “J” places him with accused 1 in the vicinity of the deceased.

[19] Clearly the State has misconstrued the well-established principle of common purpose which allows the court to impute liability for the conduct of one person to another. The following was stated in *S v Mgedezi* :⁵

‘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 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 the 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. (As to the first four requirements, see Whiting 1986 SALj 38 at 39. In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt.’

⁵ *S v Mgedezi* 1989 (1) SA 687 (A) at 705I to 706C.

[20] This principle has been widely endorsed by our courts.⁶ It is clear that the State failed to prove an agreement existed between accused 1 and accused 2 to kill the deceased. Its attempt to introduce the evidence of Mr. Phewa to testify about the possible political motive of committing this crime and the possible participation of accused 2 in this grand scheme was a fruitless exercise. His evidence lacked relevance and shed no light how the deceased was killed. The cellphone records which were strangely limited only to the date the deceased was killed do not support the State's contention of an agreement between the two accused and reliance on these records is misplaced.

[21] There is also no substance to the State's submission that accused 2 used accused 1's motor vehicle as a getaway car. It is common cause that accused 2 was driving accused 1's motor vehicle the entire day in the presence of the State witness Mr. Vumani Dlamini and accused 2's brother. There were no discussions of killing the deceased during this time. In addition, accused 2 did not wait on the scene for accused 1 to finish whatever business he was conducting at the deceased's premises. Importantly, according to the State's own witness Mr Vumani Dlamini, they parked at Mahlubini Shisanyama where they heard gunshots. His evidence was that they were all shocked, including accused 2 when they heard these gunshots. This defeats the State's argument that accused 2 was aware of what accused 1 was doing at the deceased's premises and that accused 2 was driving a getaway car. The State has failed to establish that accused 2 acted together or shared common purpose with accused 1. In any event accused 2 was not even present on the scene. The State's reliance on the common purpose principle is misplaced.

[22] Mr Gweka's submission that the accused must take a stand and explain why he told Dlamini he wanted to tell the truth flies in the face of accused 2's rights to remain silent and against self-incrimination as protected by the Constitution. It also unfairly

⁶ *S v Thebus and another* 2003 (6) SA 505 (CC).

reverses the onus of proof to the accused where the duty rests on the State to prove the allegations against an accused person.⁷ There is thus no ounce of evidence upon which the court acting carefully can convict accused 2. Accused 2 was then found not guilty on all counts and accused 1 was discharged on count 4 only.

[23] Mr. Gcabashe, was the only accused remaining. He denied all the remaining counts he faces. In particular he denied the theft of Mr. Logan's motor vehicle but admits that the vehicle was found in his possession. He alleged that he purchased it from Sbu Gasa, for the sum of R150 000. He paid a deposit of R45 000 and the first installment of R10 000 with the rest to be paid monthly. On the day of his arrest by Sergeant Ngidi he was awaiting the delivery of the logbook.

[24] He denied being in possession of the two firearms and ammunitions as alleged by Sergeant Ngidi. He alleged that on the day he was arrested he was filling up water at a community tank. He then noticed three double cab unmarked motor vehicles approaching him and saw ten people alighting from the said motor vehicles. On their arrival they asked about the firearms belonging to his late cousin Makhehla Msomi. When he denied knowledge, he was told they will assault him until he tells the truth. He was then taken up the mountain to the bush where he was made to lie down facing up. The said males who had identified themselves as police officials, started placing a plastic over his head suffocating him whilst another was punching his tummy and another sitting on his legs. In the middle of this assault he saw a police officer known as Pedro Rodrigues arriving and exiting with his dog. Upon arrival at the said bush he released the dog on him which bit him on both of his legs. He then noticed one of the police officers on the phone who subsequently instructed Rodrigues to remove the dog as they have found the firearms.

[25] Subsequently another police officer arrived at the mountain with a green bag and when he opened this bag he took out two firearms and a sock containing ammunition.

⁷ See *S v Zuma and others* 1995 (2) SA 642 (CC).

When he was asked if he knows the firearms he denied knowledge thereof. He also denied Sergeant Ngidi's allegations that a firearm, ammunition and drugs were found in his Legend 45.

[26] Regarding the murder count, he denied killing the deceased. He admitted he was at Cliffdale on the day in question. He alleged that he does not know the premises of the deceased. He denied Dlamini's allegations that he alighted near the deceased's premises and disputed that he carried a firearm which had fallen down when he was about to board his vehicle. The defence closed its case.

Issues for determination

[27] From the evidence led and from the admitted facts, the following issues are common cause:

1. The deceased was a serving Councilor and was shot and killed on 22 January 2022.
2. The Post Mortem and chain of evidence is not in dispute.
3. It is also not disputed that the motor vehicle, Toyota Legend 45, belonging to Mr Logan was found in the accused's possession.
4. It is also common cause that a Black Golf 6 with registration number: N[...] 6[...] belonged to Mr Gcabashe.
5. It is also not disputed that Sergeant Chamane found two spent cartridges from the accused's premises. The said ammunition matched the ammunition found where the deceased was killed.

What falls to be decided is therefore crystalized, this court is to decide:

1. Whether the accused stole a motor vehicle referred to in count 1.

2. Whether he was found in possession of firearms and ammunitions which are subject to count 2 and 3.
3. The identity of the assailant who killed the deceased.
4. Whether the State has proved that the accused was at any stage in possession of a firearm and ammunition that killed the deceased referred in count 6 and 7

The Law

[28] The onus always rests upon the State to prove that the accused is guilty of the offences charged beyond reasonable doubt. When it comes to firearms and ammunitions charges, the State must still show the same standard of proof that the accused possessed the alleged firearm and ammunition in compliance with the Act. In evaluating whether the State has achieved the onus resting upon it, the case of *S v Sithole and others* 1999 (1) SACR 585 (W) succinctly sets out what must be considered. It was held that:

‘There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt...In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is true. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true; there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.’

Evaluation

[29] It must be pointed out that Sergeant Ngidi’s evidence regarding how the accused was apprehended was given in a clear and straightforward manner. His evidence was that upon seeing the motor vehicles the accused reversed his motor vehicle at high

speed. With no way out, he abandoned his motor vehicle at the dead end. His further testimony on how the accused was chased up the mountain into the bush where the dog viciously bit him cannot be faulted. The same can be said regarding his evidence of how he recovered the firearm from the accused and the subsequent recovery of another firearm and ammunition when the accused's motor vehicle was subsequently opened. Sergeant Ngidi's version of events were given in a probable and uncontradictory manner.

[30] It must however be borne in mind that Sergeant Ngidi was a single witness, the State's planned second witness Sergeant Rodrigues could not testify and the explanation for this was given by the State on record. It is trite that a court can convict on the evidence of a single witness provided that evidence is clear in all material respects. Our courts however have always subjected the evidence of a single witness to caution and this court is alive to this rule of practice. The approach of our courts to this type of evidence is well enunciated in the case of *S v Sauls and others*⁸ where the court held that:

'There is no rule of thumb, test or formula to apply when considering the credibility of a single witness. (See the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 at 758) The trial judge will weigh his evidence, will consider its merits and the demerits and having done so, will decide whether it is trustworthy, despite the fact that there are shortcomings or defects or contradictions in the testimony if he is satisfied that the truth has been told.'

[31] Mr *Barnard*, appearing for the accused, criticized Sergeant Ngidi's failure to take fingerprints as proof of recovery of the firearms from the accused. He also criticized his failure to take photographs and make reference to the photographs taken by Sergeant Chamane on a different occasion as an excellent example of what Sergeant Ngidi should have done. These criticisms are unfounded. The circumstance under which he

⁸ *S v Sauls and others* 1981 (3) SA 172 (A).

arrested the accused were completely different to Sergeant Chamane. The common cause evidence is that the accused was viciously bitten by the dog upon his arrest. He was injured and was bleeding. It is thus completely unreasonable to expect Sergeant Ngidi to wait long periods of time and perhaps similar to Sergeant Chamane who waited for over an hour for a relevant person to uplift fingerprints and take photographs. In doing so he would be risking the health of the accused who was bleeding at that time.

[32] The defence also argued that Sergeant Ngidi's explanation that only two police officers chased after an armed accused to the mountain when there were sixteen other police officers available, is improbable. From the evidence of Sergeant Ngidi, he and Sergeant Rodrigues were in front. In addition, Sergeant Rodrigues had a trained dog with him. It is clear that with the presence of a trained dog there were sufficient police officers to deal with one accused. This does not in any way negate Sergeant Ngidi's evidence, which was given in an impressive manner.

[33] Having regard to the totality of Sergeant Ngidi's evidence as supported by various exhibits regarding the recovered firearms and ammunitions, this court is satisfied that his evidence was credible and therefore accepted.

[34] It must also be noted that Sergeant Ngidi also found in the accused's possession a Toyota Legend 45 van. Upon inspecting this van it became clear that it was stolen. Mr Logan elaborated into details as to how his Toyota Legend 45 was stolen and how he identified the motor vehicle in question is his. The State's case in this regard is undisputed and this court shall deal with the issue of whether the accused is guilty or not on this charge of theft when evaluating his version of events.

[35] Turning to the charge of murder, again it must be stated that the evidence of Dlamini regarding how he spent the better part of the day with Mr Gcabashe, the former accused 2 and the latter's brother was straightforward and uncontested by Mr Gcabashe. Crucially, his evidence was that at Kwa-Nyuswa, Mr Gcabashe met a certain person and on his return, he gave instruction to go. They drove back to Cliffdale

and after noticing the deceased's van turning to his yard, Mr Gcabashe instructed his former accused 2 to drop him and that he will meet them at Mahlubini Shisanyama. They then heard gunshots and Mr Gcabashe then rejoined them but his firearm fell on the floor. The entire sequence of events was rendered by Dlamini in a clear and uncontradictory manner despite the lengthy cross-examination by the defence.

[36] Mr Gcabashe's warning that nobody must say anything about what happened taken together with gunshots that reverberated the area and his firearm falling on the floor is clear evidence that links him to the shooting. Just as Sergeant Ngidi, Mr Dlamini was a single witness on the events that places Mr Gcabashe on the scene and linking him to the shooting of the deceased. Accordingly, the cautionary rule of practice as set out above finds application to his evidence.

[37] Mr *Barnard* could only base his criticism of Dlamini to the statement he made to the police and his explanation that he omitted certain crucial aspects about the accused out of fear for his life and that it was difficult to say no to the police. It is common cause that the first statement by Dlamini dated 6 February 2022 marked exhibit "H" makes no mention of the crucial aspects of Dlamini's evidence. It makes no mention that they passed by the deceased's house where Mr Gcabashe alighted followed by gunshots and the latter later joining them when his firearm fell on the floor. The explanation by Dlamini is that he was scared for his life and only revealed Mr Gcabashe's involvement in the second statement when he was in hiding. In evaluating these inconsistencies, it is important to have regard to the approach of our courts in a plethora of cases regarding the inconsistencies between the *viva voce* evidence and statements made to the police.⁹ In *S v Nkabinde*¹⁰ Combrink J commenting on contradictory statements stated that:

'Again consonant with the adage that there is nothing new under the sun, such a duplicity of statement is not unknown and does not necessarily follow that the court will

⁹ See *S v Mafaladiso* 2003 (1) SACR 583 (SCA); *S v Govender* 2006 (1) SACR 322 (E).

¹⁰ *S v Nkabinde* 1998 (8) BCLR 996 (N) at 1005A-B.

rule that the deponent to two contradictory statements is necessarily lying. When a good reason is furnished for the dichotomy, then a witness will be believed provided the other tests for credibility are passed. But when no adequate reason is furnished it is difficult to find that the truth has prevailed.'

[38] I have no hesitation in accepting Dlamini's explanation for omitting the involvement of Gcabashe in his first statement. Whilst the omission is material, the explanation that he feared for his life is more than adequate in the circumstances. He had just witnessed Gcabashe's firearm fall on the floor right after he heard gunshots which was followed by a stern warning not to tell anyone about what occurred. These events, including what definitely would have come to his knowledge that the councilor had been killed in that shooting, would have led to an inescapable conclusion to his mind that the accused killed him and this terrified him as per his evidence. It is clear that his omission of the accused's involvement was to protect himself and the accused as well. His fears were not misplaced because an innocent man was subsequently killed instead of him. This then prompted him to tell all in his second statement whilst in hiding. These events themselves strengthen his credibility. The conflict about accused shirt is immaterial as far as Dlamini is concerned. There are no issues of him mistakenly identifying the accused.

[39] What also renders his version very strong are other crucial pieces of evidence implicating Mr Gcabashe which in turn materially corroborates Mr Dlamini's version and is damning against Mr Gcabashe. For starters when Sergeant Chamane visited the accused's premises, he stumbled upon two spent cartridges. It is undisputed that those cartridges were fired from the same firearm that killed the deceased after they were compared with 15 spent cartridges recovered where the deceased was killed. This, taken with Dlamini's testimony and other evidence, strongly points all fingers at Mr Gcabashe. It does not end there, the deceased's daughter, Ms Noluthando's evidence that she saw a male slender in built and wearing a striped top and this male ran towards Mahlubini Shisanyama ties in with Dlamini that indeed what Gcabashe had on as his top was striped. In addition, the phone records of the accused and photographs extracted

from the CCTV footages depicting his golf 6 car near the scene at the time again ties in with all the evidence which leads to an inescapable conclusion that he killed the deceased. The evidence against Mr Gcabashe is indeed solid and overwhelming.

[40] The defence however contended that the evidence of the State has gaps and do not establish the accused's guilt. It was submitted that after the accused gave an explanation that the cartridges recovered from his yard were fired by his cousin during a New Year's celebration, it was insufficient that Sergeant Chamane verify that his cousin lawfully possessed the firearm. The defence argued that in light of illegal firearms in South Africa, he should have investigated if the cartridges in question were fired from any illegal firearm of his cousin. It also submitted that the evidence of the deceased's daughter Ms Noluthando, was that the assailant was wearing a striped shirt. This is in conflict with Dlamini who testified that it was a jacket. The defence argued that the very same jacket was shown in court and marked exhibit "N" and when viewed can hardly be regarded as striped.

[41] It must be mentioned that Noluthando did not refer to other items of his clothing such as his trousers, socks or shoes as striped. She referred to what the accused had as his top as striped which is in line with the evidence of Dlamini that the accused wore a striped jacket. Whether it was a jacket or shirt is immaterial. The fact that the defence does not perceive the accused's jacket as striped does not raise doubt regarding the evidence. What is important is that both witnesses in their perception of the accused's jacket which had many colours is regarded by them as striped. When it comes to the contention of gaps in the State's case our courts have consistently reiterated that there is no duty on the State to close every avenue of escape imagined by the defence counsel. In *S v Phallo and others*¹¹ Oliver JA remarked that:

'An accused's claim to the benefit of doubt, when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created

¹¹ *S v Phallo and others* 1999 (2) SACR 558 (SCA).

either by positive evidence or gathered from reasonable inferences which are not in conflict with or outweighed by proven facts of the case.'

[42] The defence submission that the spent cartridges recovered from the accused's yard were possibly fired from the accused's cousin's illegal firearm is flawed and a complete speculation. It is not even the accused's evidence for that matter. Where were his cousins in Cliffdale in his golf 6 where Dlamini implicates him in the shooting? The defence hypothesis also ignores all the damning evidence set out above that points to nobody else but the accused as the deceased's assailant.

[43] The accused's version on the other hand was completely poor. He told the court that when the police approached him on the 9th of March 2021 they demanded firearms belonging to his late cousin Makhehla Msomi and he denied knowledge of these firearms. He was then taken straight to the mountain and the bush to be tortured and assaulted. It is inconceivable and highly improbable that on his mere denial, police would not search the car he was using let alone his home but take him to the bush. If he was taken to the bush that would have occurred as a last resort and would have occurred if the search on his home and the car yielded no result. It defies logic that his car is only searched on their return from the bush. It is clear that the accused ran away to the bush as explained by Sergeant Ngidi and his explanation was concocted to render an explanation of what he was doing in the bush.

[44] In addition, the accused's evidence was that he was made to lie facing up, assaulted and suffocated with a plastic over his head. At a later stage the dog was set on him. What is bizarre is that when all this was taking place inside the bush he was able to see police officers alighting from their cars down the mountain. His evidence was that one of these officers came with a firearm and ammunition. This version must be rejected as false beyond reasonable doubt. There is no way he would be able to see police officers coming from down the mountain whilst being held facing up and to make matters worse he was being assaulted, suffocated and viciously attacked by a dog. Clearly the accused's version regarding how he was apprehended in respect of the

firearm charges is a fabrication. I find that the two firearms and ammunitions were indeed found in his possession as testified to by Sergeant Ngidi.

[45] Regarding the allegations that he killed the deceased, the version put on his behalf is that they did not drive past the deceased's house. When the accused was cross-examined on this he contradicted this version and claimed he does not know the deceased's house. This conflict in his evidence goes to the heart of this matter especially because Dlamini's evidence was that when they passed the deceased's house and when they saw the deceased's car, the accused alighted and this was followed by gunshots and the evidence overwhelmingly proves that is when he was killed. The accused further denied hearing gunshots. His evidence in this regard was bad. The undisputed evidence of Dlamini was that immediately after the accused had alighted next to the deceased's house, they heard gunshots and they, including the former accused 2, were all shocked. With as much as 15 spent cartridges recovered when the deceased was killed, it is unlikely if not impossible that anyone would not have heard these gunshots. His evidence of loud music was another fabrication on his part which was never put to Dlamini when he testified. Mr Gcabashe's evidence was clearly contrived and the only reason he claims not to have heard the gunshots was because he was himself the shooter as demonstrated by the voluminous evidence presented by the State. He must be found guilty of killing the deceased.

[46] Following the shooting of the deceased and 15 spent cartridges uplifted on the scene, they were tested and exhibit 'F' shows that they were fired from the same 9mm firearm that discharged the two cartridges recovered from the accused's yard. This prompted the State to proffer charges against the accused for unlawful possession of that firearm and those 15 ammunitions. It must be stated that it is rare that liability for unlawful possession of a firearm and ammunition, where the firearm was not recovered and the accused person was not found in physical possession, is ascribed in this manner. It is clear that the State is reliant on process of inferential reasoning to conclude that the accused had possessed the said firearm and ammunitions. Our courts have adopted a purposive approach when interpreting the Firearms Control Act in order

to give substance to basic rights as protected by the Constitution such as a right to life. In *S v Sehoole*¹² the Supreme Court of Appeal dealing with whether it had been proved that it is an ammunition without a ballistic report adopted the following approach:

‘Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the state to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence, be deduced to be ammunition related to the firearm.’

[47] Adopting the similar inferential process of reasoning it is inescapable that when the accused shot and killed the deceased he was in possession of a firearm for the purposes of the Act and that the 15 spent recovered cartridges represents an ammunition as envisaged in the Act. In *S v Jordan and others*¹³ Binns-Ward J remarked as follows:

‘It would make something of an ass of the state of the law if the court were to find the accused guilty of the common law offence of attempted murder committed with the use of a firearm, but be unable to hold that he had possessed the firearm without a licence on the basis that the weapons muzzles energy had not been imperially proved. Such result would be especially anomalous in the context of the expressly stated objects of the Firearms control Act.’

[48] In this matter the technical requirements as contained in the definition of both firearm and ammunitions have more than been complied with. After all, there can be no better proof of the technical requirements than the catastrophic consequences of death flowing directly from the use of that firearm and ammunition. In this case, I have found the accused caused that death and must accordingly be also found guilty on counts 6 and 7. The State must be commended for correctly relying on the law to ensure justice

¹² *S v Sehoole* 2015 (2) SACR 196 (SCA).

¹³ *S v Jordaan and others* [2017] ZAWCHC 132.

is done. The only requirement that the State has not proven is that the firearm in question is a semi-automatic firearm which does not affect the finding of guilt on the offence charged.

[49] Lastly on count 1 being theft, I have mentioned above that there is no dispute that the motor vehicle in question was found in the accused's possession. The only issue that falls to be determined is whether the accused is guilty of theft and whether the accused has given a reasonable explanation for his possession. The accused's explanation was that he purchased the said motor vehicle from a certain gentleman that he knew as Sbu Gasu. His explanation in this regard is however poor and totally improbable. The accused had little knowledge of this Gasu person and had no reasonable satisfaction that the motor vehicle belonged to Gasu. He did not know whether Gasu was employed or not nor did he bother enquiring where Gasu obtained the vehicle from. As a result he did not have any documentary proof that he was legally entitled to receive transfer of the motor vehicle. His explanation that he was due to receive the log book of the said motor vehicle on the date of his arrest is unsound and convenient. The accused had already paid a deposit of R45 000 and a first instalment of R10 000 without satisfying himself that Gasu was entitled to sell the motor vehicle in the first place. What is clear is that the accused was not purchasing the motor vehicle for the first time. Having bought a Golf 6 from We Buy Cars, the likelihood of him not receiving the purchase documents for his Golf 6 are zero. His explanation for possessing the motor vehicle in question is clearly contrived and must be rejected as false beyond reasonable doubt.

[50] The State submitted that the accused should be convicted of theft of that motor vehicle on the basis of that the motor vehicle was stolen on the 06th February 2021 and recovered on the 09th March 2021 when the accused was arrested. The argument by the State was that theft is a continuing offence and that the doctrine of recent possession applies. Reliance was placed on *S v Matola*¹⁴ where it was held that

¹⁴ *S v Matola* 1997 (1) SACR 321 (B).

possession of a stolen motor vehicle a month after theft together with further facts was held to sufficiently prove theft. The facts of this matter are distinguishable to *Matola* in light of the fact that there exist no other facts that leads to a conclusion that the accused participated in the theft. I align myself with the views expressed in *Madonsela*¹⁵ that the nature of the goods involved of course needs to be considered. In the present day and age, stolen vehicles do change hands with amazing speed and disingenuousness. In itself possession of the stolen vehicle a month after the robbery is not so closely connected to warrant an inference of involvement. There is absolutely no evidence that the accused in this matter participated in the theft of Mr Logan's van. I have however found that his explanation for possessing the said car is unreasonable. He was thus in unlawful possession of the said motor vehicle in contravention of a competent verdict under s 36 of Act 62 of 1955.

Conclusion

[50] Having considered all the evidence presented I have no hesitation the accused is guilty of the premeditated murder of the deceased, he is also guilty of the various counts of unlawful possession of firearms and ammunition and unlawful possession of a motor vehicle.

In the result the accused is found guilty of:

1. Count 5: Murder read with the provisions of Section 51(1) of Act 105 of 1997.
2. Count 6: Contravention of Section 3, read with various Sections of Firearms Control Act 60 of 2000.
3. Count 7: Contravention of Section 90 read with various Sections of Firearms Control Act 60 of 2000.

¹⁵ *S v Madonsela* 2012 (2) SACR 456 (GSJ).

4. Count 2: Contravention of Section 3 read with Section 51 (2) of act 105 of 1997 and read with various Sections of the Firearms Control Act 60 of 2000.
5. Count 3: Contravention of Section 90 read with various Sections of Firearms Control Act 60 of 2000.
6. Count 1: Contravention of Section 36 of the General Law Amendment Act of Act 62 of 1955.

Dated at Durban on 1 August 2023

Hlatshwayo AJ

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Date of Judgment : 1 August 2023