

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

Case No: CCD6/2023

In the matter between:

THE STATE

Vs

ZITHEMBE HALALISANI DUMISA

JUDGMENT

Delivered on: 27 November 2023

STEYN J

[1] The accused: **ZITHEMBE HALALISANI DUMISA** is charged with six offences as per the amended indictment before court. The offences that the state alleged he had committed originate from an incident on the N2 Highway near Empangeni on 27 March 2022. Two police officers, Sergeant Ndlazi and Cst Zondi were executing their official duties, that is patrolling the Highway and preventing crime. Only one of the two officers survived the attack on them to tell what happened to them on the fateful morning. I shall now deal with the offences as defined in the amended indictment.

[2] At the onset it is necessary to state that the accused and the deceased mentioned in Counts 2 and 3 as well as one Sanele Sizwe (“Dlamini”) formed a common purpose to commit a crime unknown to the State and in pursuance of the aforesaid common purpose, it is alleged by the state that the accused, and the

aforementioned persons, armed themselves with firearms. It has been alleged that the accused and his erstwhile accomplices foresaw the possibility that in the execution of their common purpose, they would use the firearms to achieve their objective, and if needed would use the firearms, if met with any resistance.

[3] The charges are:

COUNT 1: MURDER

In that upon or about **27 March 2022** and at or near N2 Highway, Empangeni in the district of King Cetshwayo, the accused unlawfully and intentionally killed **Mbongeni Wilson Ndlazi**, an adult male.

The provisions of section 51(1) and Part I of Schedule 2 of Act 105 of 1997 are applicable in that: The victim was a law enforcement officer, performing his duties and was on duty.

COUNT 2: MURDER

In that upon or about **27 March 2022** and at or near N2 Highway, Empangeni in the district of King Cetshwayo, the accused unlawfully and intentionally killed **Njabulo Sihle Ngidi**, an adult male.

COUNT 3: MURDER

In that upon or about **27 March 2022** and at or near N2 Highway, Empangeni in the district of King Cetshwayo, the accused unlawfully and intentionally killed **Peter Hlabisa**, an adult male.

The provisions of section 51(1), Part I of Schedule 2 of Act 105 of 1997 are applicable to counts 2 and 3, in that:

The murder was committed by a group of people acting in furtherance of a common purpose.

COUNT 4: ATTEMPTED MURDER

In that upon or about **27 March 2022** and at or near N2 Highway, Empangeni in the district of King Cetshwayo, the accused unlawfully and intentionally attempted to kill **Sandiso Zondi**, an adult male.

COUNT 5: UNLAWFUL POSSESSION OF A PROHIBITED FIREARM

In that upon or about **28 March 2022** and at or near Enseleni area, in the district of King Cetshwayo the accused unlawfully possessed a prohibited firearm, to wit a Pietro Beretta pistol, the serial number or any identifying mark of which has been changed or removed without the written authority of the Registrar of Firearms, being the National Commissioner of the South African Police Service.

The provisions of section 52(2), Part II of Schedule 2 of Act 105 of 1997, are applicable.

COUNT 6: UNLAWFUL POSSESSION OF AMMUNITION

In that upon or about **28 March 2022** and at or near Enseleni area, in the district of King Cetshwayo, the accused unlawfully and intentionally possessed ammunition to wit, three (3) live rounds of a 9mm without being the holder of licence in respect of the firearm capable of discharging the said ammunition or permit or other authorization to possess the said ammunition.

[4] On 2 October 2023 before the accused pleaded to the said charges, he confirmed that he was aware of the provisions of the Criminal law Amendment Act and understood its application. The accused then pleaded to the amended indictment and tendered a plea of not guilty to all 6 counts and gave a plea explanation in terms of Section 115 of the Criminal Procedure Act, No 51 of 1977(the Act), marked Exhibit "A".

It reads as follows:

'I plead not guilty to all the counts levelled against me by the State.

2.

2.1 My concise plea explanation is that on the 27th March 2022, I was at Enseleni Township;

2.2 I never left Enseleni Township on the 27th March 2022;

2.3 Accordingly, I was never at the crime scene;

- 2.4 I knew the deceased persons in counts 2 and 3. I also knew the Toyota Corolla, white in colour, depicted in photo 5 of the photo album;
- 2.5 I last boarded this Toyota Corolla (white) on the 26th March 2022;
- 2.6 My left thumb print uplifted by the fingerprint experts must have been left or affixed there when I had boarded this white Toyota Corolla on the 26th March 2022.
- 2.7 No firearm and ammunition was ever found with me.'

The accused elected to make formal admissions in terms of section 220 of the Criminal Procedure Act. The formal admissions are a matter of record and I do not intend repeating them. See Exh. "C" with the attached exhibits D – N. At a later stage of the trial, he made further formal admissions as per Exh. "X".

[5] The accused was throughout the trial legally represented. At first by Mr *Masondo* and later by Mr *Hardeo*. I shall return to the issue of legal representation when I summarise the evidence of Sergeant Mthethwa. Mr *Buthelezi* acted on behalf of the State in this trial. Various exhibits have been handed in. See Exhibits "A" to "BB". Two physical exhibits, marked 1 and 2 were also presented and handed in. that is No. 1: a purple, blue Samsung cell phone and No. 2: a semi-automatic Pietro Beretta firearm.

[6] This Court has been in session over 19 days in hearing evidence. Some Court days, no evidence could be led because the Circuit Court in Mtunzini was without any electricity. In fact, arrangements were made to proceed with this matter to be finalised at Durban. I am indebted to those who assisted in making the necessary arrangements to move the matter to Durban High Court.

[7] I shall now turn to the evidence adduced in this matter. The State called Warrant Office Zincume from the Richards Bay LCRC. He has 13 years of experience at the LCRC.

[8] On the morning of 27 March 2022, he was on standby duty when he received a call to attend a crime scene near Empangeni. He arrived at the scene at 08h30 and met Sergeant A. M. Mthembu from the Empangeni Police Station there. He started to take photos, collected the marked exhibits and once all of it was collected, he took the exhibits to Empangeni, booked them into the SAP13 and thereafter took the exhibits to the safe at his office. He compiled a photo album, which was handed in and marked as Exhibit "O". During his testimony, he explained some of the photos. Attached to the photographs was a key explaining the photos. According to him he collected from the crime scene, 18 spent cartridges and 29 live rounds of ammunition. A copy of the SAP 13 Register number 456/22 was handed in and marked "P". The firearms and the cartridges collected were sent to the exhibit desk, where the clerk in charge was Sergeant Mariah. The primary residue collection was sent to the chemistry unit and the swabs and kits were sent to the biology unit. The vehicle allegedly driven by the suspects was also seized, booked into the SAP13 Register and then taken to the LCRC boot for investigation by W/O Van der Merwe.

[9] In cross-examination, he was asked whether he had found any survivor at the scene and he said, "no". He also confirmed that on the scene, he had found 3 firearms. He did not want to commit himself to the calibre of the spent cartridges since he is not a ballistic expert. He was asked to distinguish between the spent cartridges of a rifle and/or handgun. His response was that he did not differentiate between the spent cartridges.

He was asked whether he could give the position of the shotist in light of the cartridges found. He was not prepared to speculate about the position of the shotist. He acknowledged during cross-examination that he did not take a picture of what was found under the body of Sergeant Ndlazi. He, however collected everything and had placed it in an exhibit bag. He was asked to read into the record what was placed in the exhibit bag as depicted at photo 127. What is written on the bag is: 2 X b/f; 4 live rounds and 5 cartridge cases.

He conceded that he also found 4 live rounds underneath Sergeant Ndlazi's body.

[10] Warrant Officer Van der Merwe, who works at the Richards Bay LCRC was called. He has 17 years of experience at the LCRC and is presently employed at the centre as the exhibit manager. On 28 March 2022 he, as part of his duties, investigated a White Toyota Corolla with Registration number HY5[...]. He checked the vehicle for any identifiable fingerprints inside and outside the vehicle.

The vehicle was investigated at their vehicle boot which is a specialised garage for vehicle investigations. He started the process from the outside, using various powders. When prints are found, they are marked with stickers, either alphabetical or numerical numbers. During his investigations, he uplifted 6 prints which were all from the inside of the vehicle. The prints that were found on the left rear window of the Toyota were:

Print 1	Which was a print on the left rear passenger door window and to the quarter of the glass.
Print 3	Which was lifted from the same window near the middle of the top of the window ledge
Prints 2,5 and 6	Could not be identified

He marked the prints he could identify and uplifted them from the window with either black foline or adhesive tape. He made a small sketch from where it was uplifted, see Exhibit "R". The day before his testimony, he received a set of fingerprints from W/O Ngubane which were taken from the accused, Halalisani Z. Dumisa.

He compared Print 3 with the left thumb print of the set (marked Exhibit "R1"). He then prepared a court chart which was marked as Exhibit "R2".

Photo 1 is of the impression listed, No. 3. Photo 2 is the enlarged image of the left thumbprint of the accused. He marked 7 identifiable features which are sufficient to prove identification. Before he testified, he took a left thumbprint of the accused and compared it with the print on the lifter and he concluded that it corresponded with the impression on the lifter, No. 3.

In his opinion, the print that was uplifted was a fresh print because as soon as he applied powder to the window, it was visible immediately. In his view, the print could have been there for a day or two but he could not say exactly when it was left. For the purposes of comparison, he compared it to the AFIS System (Automated-Fingerprint-Identification-System). The system contains scanned fingerprints on the criminal data base. He uplifted the fingerprints of the two deceased suspects but they could not be linked to the fingerprints inside the vehicle. In the vehicle, there was also clothing and two false number plates, the registration was NU 8[...]. He could not uplift a fingerprint from the items left inside the vehicle. In cross-examination, he was asked whether he would consider a print left on 26 March 2022 as fresh and he said, "yes".

[11] Constable Zondi the one officer who survived the attack on the police on the N2 Highway testified. He is employed by SAPS for the past 7 years, stationed at the flying squad, situated at the offices in Empangeni. On 27 March 2022, he was on duty since 05h45 and worked with Sergeant Ndlazi. This morning, the two of them used a white VW GTI. It was an unmarked vehicle, fitted with blue lights and a siren. Ndlazi and him were dressed in their police uniform. The duties assigned to them included highway patrol, stopping and searching of suspicious vehicles and conducting crime prevention. They booked out all the equipment needed for their operations and commenced with their duties.

At approximately 07h00, they were travelling on the N2 direction Mtubathuba. They then received a call from their colleague, Sergeant Mbatha that a vehicle was travelling at high speed and it was coming in their direction. The report was that the vehicle was white in colour, had tinted windows and the plate was GP. They then continued travelling on the N2 when they noticed the said vehicle, they gave chase, but the vehicle was driving at high speed.

They switched on the siren and the blue lights of their vehicle. They could not see the inside of the Toyota due to the tinted windows. The Toyota eventually came to a halt on the left-hand side of the N2. Both Sergeant Ndlazi and he, alighted from their vehicle and approached this car tactically with their firearms in their hands. When they were close to the vehicle, they told the occupants to get out. Despite their command, only the driver got out of the vehicle and Sergeant Ndlazi asked the driver to open the

boot. It was opened and Sergeant Ndlazi looked into the boot but did not notice anything strange. Sergeant Ndlazi then asked the male driver for his driver's licence, whereupon the driver said he is going to fetch it in the car.

Sergeant Ndlazi followed the driver but when the driver turned towards them he had a firearm in his hand and started shooting at both of them. The other occupants then alighted from the car and also fired shots. All the occupants were male and there were approximately three or four in the car. He noticed that they had pistols and then decided to turn back to their police vehicle to fetch the R5 rifle. He then used the rifle to protect him and Ndlazi. The occupants kept on firing, one of them was wearing red shorts and moved to the front of the vehicle and fired a number of shots at Sergeant Ndlazi. Some shots were directed at the head of Sergeant Ndlazi and at a point, he fell to the ground. One of the other occupants of the car was at the side of the vehicle and ran towards the bush and fell down there. The other two suspects ran towards the bush.

After he noticed that one had fallen down near the bush, he realised that he was also injured, so he sought assistance from his colleagues. He informed them that both he and Sergeant Ndlazi were injured and that they should send an ambulance. He was hit by a bullet entering at his buttock and exiting near his abdomen. His colleagues, Mkhwanazi and Mbatha, arrived at the scene. An ambulance also arrived and he was treated and taken to Melomed Private Hospital. By the time he got into the ambulance, he was confused and shocked. He told his colleagues that they were shot at and some of the suspects ran towards the bush. He was in hospital for 3 weeks, where he was treated at ICU and had to undergo an operation whilst in hospital.

He has returned to his work with the flying squad members. He identified the deceased depicted in photos 131 and 132 of Exhibit "O" as the driver of the Toyota.

In cross-examination, he was asked whether he is certain that all of the occupants of the Corolla fired at the police and he answered affirmatively. He also stated that he did not regard the event as a horror movie, rather than something unbelievable that had happened.

[12] The State called Sergeant Antoinette Nontubeko Mthembu. She is employed by SAPS, attached to the Empangeni Visible Police Unit, Empangeni. She has 17 years of experience in the police service. On 27 March 2022, she was on duty and commenced working at 06h00. She was a crew member in a marked police van driven by Sergeant Mthembu. Whilst on patrol, they received information from radio control that there was a shootout in progress on the N2. According to her, when they arrived at the scene there was a marked police vehicle with its blue lights still on. It was a white VW. Behind the vehicle was a Toyota Corolla, HY5[...].

Sergeant Ndlazi was lying in front of the VW GTI and it appeared that he was no longer alive. There was also an ambulance and Cst. Zondi was treated in the ambulance. Sergeant Mkhwanazi was on the scene and informed them about the incident. The scene was cordoned off and the LCRC was called out to the scene. The officer that arrived from LCRC was W/O Zincume. The officer did his duties and after he was finished she returned with him to the scene. There were 3 dead bodies. Two near the vehicles and a third body was approximately 10 metres away from them. W/O Zincume checked the bodies for injuries in her presence.

Sergeant Ndlazi had multiple wounds all over his body. Near Sergeant Ndlazi was a Pietro Beretta firearm with 9 live rounds of ammunition. Near the unknown male lying close to him was a silver firearm, a CZ with the serial number filed away. In the magazine were 13 live rounds. At the third body there was a black firearm identified as a Norinco pistol with the serial number filed off. This firearm had 6 live rounds of ammunition. They then searched this deceased. Sergeant Mabaso, identified this deceased as Peter Hlabisa.

The unknown deceased nearest to Sergeant Ndlazi was dressed in red shorts. They searched him and in one of his pockets they retrieved 23 live rounds of ammunition. It was in a Snapper Chips packet. They counted the live rounds. In his right-hand pocket, he had a Style cellphone. The male deceased identified as Peter Hlabisa had R990 of cash in his left pocket of his pants and in his right pocket, he had a Capitec Bank card and a Blue Samsung cellphone.

Ms Nconco of the ambulance services arrived and confirmed that all 3 males were deceased. Thereafter, the state mortuary vehicle was called. The three bodies were all taken to Richards Bay Mortuary.

Since she seized the items in Hlabisa's possession, she placed the items in an exhibit bag and booked it into the SAP 13 register. The entries of all of the items were made under entries 461 and 462 of the register. A copy of the SAP 13 entries was handed in and marked as Exhibit "S".

When the body of Sergeant Ndlazi was turned over there were 4 live ammunition rounds underneath him. In total, there were:

- (i) 4 live rounds;
- (ii) 5 cartridges; and
- (iii) 2 bullet fragments.

[13] Lt/Col. Mlungisi Cyril Sibisi testified that he has been employed by SAPS as a forensic investigator for the last 5 years. He has been in the police services however, for the past 29 years. He received in house training as a forensic investigator and has forensic digital experience to extract data from phones. He has attended various courses in how to extract data from cell phones.

In relation to this matter he received a request from W/O Ngubane to assist with information on a cell phone on 30 March 2022. W/O Ngubane brought a request form to extract the data and Ngubane also had in his possession a consent form that was signed by the accused. The consent is required by their unit to investigate data. The form was handed in and marked Exhibit "T".

The phone was in a sealed evidence bag: PA 45000 42682. Inside the bag was a Samsung phone with IME 3565541102507. The phone was then registered into their control register and then allocated to him. He took pictures and opened the cell bag and the MTN Sim Card. He worked on it and started to investigate. After that he made an assessment and sealed it in a new exhibit bag PA 60034782928. He then returned the item to the registration clerk whose duty it is to contact the investigation officer to come and collect the exhibit.

In his investigation, he followed the following modus operandi: he charged the phone and put it on airplane mode. He used software, i.e. XRY in obtaining data on the phone. The data obtained was in relation to WhatsApp texts. The software or the process cannot change the data on the phone. He then identified the document with WhatsApp messages written in isiZulu. He made a screenshot of the messages as they appear on Exh. "T1". A translation of the messages appears as per Exh. "T2". The translation of Exhibit "T2" reads as follows:

Sender:	There you go
Sender:	Do not record my brother there is someone whom I do not want to hear.
Recipient:	Ok Dumisaa
Sender:	I heard rumours that Skwii has been hit
Recipient:	Yes, my brother we were together I am the only one survived Pita is no more
Sender:	How was the situation my brother was it job or
Recipient:	Yes, my brother we just completed the job and there was a shootout between us and the police
Sender:	Were you not injured my brother
Sender:	Brother'

The investigation officer also requested photos that was on the phone. He was asked to extract from 27 March 2022 and 28 March 2022.

In cross-examination, he was asked which Act empowered him to extract data. His response was, the Cyber Crime Act. He confirmed that he did not interfere with any data at any given time. Moreover, the phone was on aeroplane mode also referred to as flight mode which means that no messages or calls could be received. The software used by their unit gets updated regularly. When he performed his analysis, the licence for the software was valid and not expired.

[14] The State also called Nelli Zamaswazi Dlamini as a witness. She knows the accused and used to date his brother, Muzwakhele Dumisa, with whom she has a child. She last saw the accused in 2009 when he was much younger. She used to visit their homestead until the relationship with his brother soured. She knows the accused as Zithembe. She last had a conversation with the accused in March 2022 when he

had sent her a message with her brother Skwii. The accused sent her a message via Facebook and thereafter her brother, Skwii called her.

She was having her Umkhelo, a pre-wedding ceremony, and was not allowed to leave the home. Skwii asked her whether she had received the gift that he had bought. She told him that he had left early in the morning but that the family informed her that he bought gifts so she thanked him. This happened in the beginning of March. Then two weeks later she received a call from the accused on Sunday, 27 March 2022. He asked her whether she had heard anything and she said, "no". He informed her that he had a problem and there was a shooting on the N2 between them and the police officers. It was him, Hlabisa, Maphumulo, and Skwii Dlamini. He informed her that Hlabisa, Maphumulo and Skwii had been shot. He fled with Skwii and tried to carry him but he could not carry him for a long time. He left Skwii in the bush and when he did so Skwii was still alive. After he left him, he walked a long distance to a place where they left a motor vehicle. He then informed her that he received a call that her brother had passed on. He then informed her that he had contacted her brother, Vusi, who is also Skwii's brother. Hereafter, they communicated further on WhatsApp. She asked him where he was and he said at Ntselene. He also informed her not to contact him since he is going to switch off his phone. She, however told him not to switch off the phone, but rather switch off the location of the phone.

For the WhatsApp messages, see Exhibit "U". She asked him where the vehicle of Skwii was and he said it is still there. He also told her that he will attend the funeral. She offered a place at their home for him, when he attends the funeral. He never attended the funeral. After the funeral, she received a message from his sister, Londi, who asked her for her number. She gave it to Londi.

She received a call from him when he was in custody at prison and he told her to switch off her phone or change the sim card, since SAPS is looking for her. She told him she is not going to change her sim card. After this call, she blocked the number that he called from.

Her cell number is: 06[...]. She knew she was communicating with him on WhatsApp since he was a contact on her phone. She identified the messages as per Exhibit "U"

as the messages between them. In cross-examination it was put to her, that there was no communication between the accused and her from 2009 till March 2022. She confirmed this. It was then put to her that the accused will say that he would communicate with her on Facebook. She denied it, and stated that she only received an invite from him on Facebook in March 2022.

It was then put to her that the accused will say that he had called her on 27 March 2022 but he denies the content of the conversation. She insisted that he told her that there was a shootout between themselves and the police on the N2. It was also put to her that he will deny that he said it was himself, Hlabisa, Maphumulo and Skwii. She did not waver in her answer and spontaneously said that it was him who gave her all the details.

It was put to her that the accused he will deny that he left Skwii alive. Again, she responded that he was the source of the information.

It was also denied in cross-examination that the accused left Skwii at a bush. Her response was that that is what he told her and that her family even discussed it at Skwii's funeral that the accused carried him whilst injured.

[15] The next witness that was called was Sergeant Duncan Mthethwa, an officer with 17-18 years' experience with the police force. On 27 March 2022, whilst off duty he received information regarding the shootout and then reported on duty. He rushed to the N2 and when he arrived on the scene there were people as well as police officers already there. He noticed his colleague, Sergeant Ndlazi that already passed on. He received a report that some suspects had run into the bush. He, Miya, Ndlovu and Sergeant Mhlongo then went into the bush. They walked next to each other through the sugarcane bush and saw footprints going towards the gumtree. Near the gumtree, there is a forest and Sergeant Miya kept on shouting, 'If there is someone, come out?' They all held their firearms in combat mode ready to fire a shot. Inside the forest, a male person appeared with green shorts on and he had a 9 mm firearm in his hand.

Sergeant Miya then shouted, *'put your hands up, we are the police!'* The male fired a shot at them and they retaliated. The male fell down and when they approached him, they noticed that he had passed on. Miya searched him and found ammunition on him. The officers that were at the first crime scene also came to observe.

Later that evening he received a call regarding a suspect that was involved in the shootout. He contacted his colleagues, Miya, Ndlovu, Mthembu and Sergeant Mhlongo from the task team. They met at a certain spot on the N2. The TRT police members also joined. They had a short briefing and then went to Ntseleni area. It was after midnight when they arrived at a Tuckshop/Tavern. There was a two-room house and attached to it a shack. The front door of the shack was slightly ajar. He entered first and Miya followed him. It was dark inside so they used their torches. A male was on the bed facing down. He woke him up and informed him that they are police officers from Empangeni. It was the accused. He informed him that he wanted to search him and was given permission. He then recovered a firearm on the accused. It was found in front of his pants at the groin area. It was a Pietro Beretta, black in colour and contained three live rounds of ammunition.

He also found a Samsung phone, purple in colour in the pocket of the accused, which he seized. The accused could not produce a licence for the firearm and ammunition. He then explained the accused's rights and handcuffed him and placed him in the motor vehicle.

They then proceeded to Empangeni Police Station. At the police station, the accused was formally charged. The firearm and ammunition were handed into the SAP 13 register as per the entry on Exhibit "V". The entry confirmed by Sergeant Mthethwa is 466 where the following items were handed in:

1. One 9 mm pistol Pietro Beretta, black in colour, with an obliterated serial number;
2. One black magazine;
3. Three live rounds of ammunition;
4. One purple Samsung Cell phone, working condition.

The firearm was placed in a sealed bag with number PA 45 000 42 683; the ammunition in a sealed bag with number PA 45 000 426 63: The cell phone was placed in a bag PA 45 000 426 82.

He also confirmed that another suspect was arrested on the premises, Mr Qwabe but he was at a different place on the property.

[16] In cross-examination, it was put to him that the accused would deny that there are two doors at these premises or that one door was left ajar. He insisted that there was. It was then put to him that the police kicked the door open. He denied this. It was then put to him that he and the other officers assaulted the accused, the witness denied this. It was put to him that the other suspect, Qwabe, was assaulted with a stick. He stated that he did not see it. It was also put to him that the accused was further assaulted at the police station. This was denied.

On the next morning of the hearing, Mr *Masondo* informed the Court that the accused wanted to bring photos to the Court. However, as his counsel, he was re-assured that questions were already put to this witness on the issue of the assault. Accordingly, that line of cross-examination would be abandoned.

Sergeant Mthethwa, during cross-examination, stated that they arrived with the accused at Empangeni Police Station between 02h00 and 03h00. It was put to this witness that the SAMSUNG phone was not on the accused but found in the room. He insisted that it was found in the accused's pocket. It was then stated to this witness that the accused only learned of the firearm at the police station. This was denied. He was questioned on the assault of Qwabe whereby he made it clear that he did not arrest Mr Qwabe, nor did he assault him.

He was then questioned about the need to have seized the accused's phone and rationale for it. He answered and explained that the phone would be seized if they are of the view that it may be of assistance in the investigation of the crime.

The accused then raised his hand and after a consultation with his counsel, he informed the Court that he no longer required the services of Mr *Masondo* but that he would appoint his own private attorney. Mr *Masondo* was excused and the matter was adjourned until 9 October 2023.

On Monday, 9 October 2023, he informed his Court that he and his family could not afford a private attorney. He elected not to represent himself but requested to obtain legal aid. Reasons were then given by him for terminating the mandate of Mr *Masondo*. It is a matter of record. The matter was adjourned on various court days until Mr *Hardeo* was appointed. He placed himself on record on 18 October 2023 and requested time to obtain all documents and to consult with the accused. On 23 October 2023, Mr *Hardeo* requested more time to finalise his consultations with the accused. The matter stood down for further consultation and proceeded at 14h30.

[17] Sergeant Mthethwa was recalled for further cross-examination. He was asked to explain in what respect the firearm was unlicensed. His short answer was that the accused failed to produce any licence for the firearm when he was asked to do so. He also made it clear that at the time he charged the accused at the police station, he charged him for the known offences, not the offences of the murders that were still being investigated. He denied that they travelled in a grey panel van and that the police owned such a vehicle.

When Mr *Hardeo* asked the officer about the firearms that were shown to the accused at the police station, the accused raised his hand and was given an opportunity to clarify the instruction. The officer denied that six firearms were shown to the accused at the police station. In fact, his testimony was that there were no firearms shown to the accused at the police station. He also denied that any pictures were taken of the accused and Mr Qwabe, in his presence.

At the conclusion of his cross-examination, Mr *Hardeo* approached the accused again for instructions.

[18] The matter then proceeded on 25 October 2023. The State called Sergeant Miya, who accompanied Sergeant Mthethwa when the accused was arrested,

corroborated the events as described by Mthethwa in Court regarding the body of Sergeant Ndlazi that was found together with two other males on the scene of the crime. He confirmed that colleagues at the scene showed them the direction in which the other suspects ran from the scene. The direction led them to the sugarcane farm. They followed the bloodstains and footprints in the sugarcane. They eventually reached a gumtree. They walked further and a male person then appeared from the bushes wearing green shorts and no shirt. He shouted at the person to raise his hands and informed the male that they are the police. The man had a firearm in his hand which he pointed in their direction and then fired a shot. They then also fired at him and he fell down. They found ammunition and a firearm near Dlamini where he was laying. There was no serial number on the firearm, it was removed. They called the patrol van and the other role players since he had passed on. He booked the firearm and the ammunition, found on the deceased Mr Dlamini into the SAP 13 register. At this scene, Sergeant Magwaza took charge of it. They searched for the other suspect but could not find him.

His evidence had been that they as a group got together at 21h00 after receiving information from Sergeant Mthethwa, who had information regarding the suspect that fled the scene. Together with the TRT members, they proceeded to Enseleni. They arrived at the area by 24h00 but reached the two houses at 24h30 where the alleged suspect was. There was a two-roomed house and a shack attached to the two-roomed house. He and Mthethwa entered the shack. The door was ajar so when Mthethwa knocked, it flung open. The suspect was lying on his stomach fully clothed on the bed. The shack was dark so they illuminated the shack with their torches. Sergeant Mthethwa woke the accused up and introduced themselves as police officers. He said he was Halalisani Dumisa. It was explained to the accused that they are investigating the N2 incident where police officers were shot.

Sergeant Mthethwa asked for permission to search the accused and once permission was given, he was searched. He observed the search and saw that a firearm was seized. It was kept in front near the accused's private part. It was a 9 mm. After it was seized, the accused was asked for a licence but he could not produce one. A cell phone was also seized which was in the right pocket of the accused's pants. It was purple in colour. In the magazine was 3 rounds of ammunition. The accused was

informed that it was a crime to possess a firearm and ammunition without any licence. They searched the shack and other colleagues searched the yard and the other house. He confirmed that another arrest was made at the premises of the person that also possessed ammunition. The accused was taken to the police station at 03h00 where he was handed over to Constable Sibiya who was on duty.

After they charged and processed the accused, he, personally, had no further dealings with him.

Before Mr *Hardeo* commenced his cross-examination, he approached the accused. Sergeant Miya was then asked to estimate how far the shooting on the N2 was from the homestead where they executed arrest. In his view, it is a few kilometres but considered it as a walkable distance. He clarified the reference in his affidavit where he referred to two more suspects after the one was killed in the bush. His explanation was that at the time when he deposed to his affidavit there was no consultation with the eye witness, Constable Zondi. Once they had consulted with Zondi, it became clear that only two suspects fled from the N2 scene.

He was also asked about a police vehicle, that is a Hyundai H1 vehicle. He denied that they own such a vehicle or that TRT owns such a vehicle. He explained that he, Constable Ndlovu and Sergeant Mthethwa worked together as a team and that they would share duties. At the time however of the accused's arrest it was only him and Mthethwa in the shack where the accused slept.

Later in the proceedings, the witness was asked to confirm a statement deposed to marked Exhibit "W". Counsel for the defence did not persist in asking a question that related to an issue that was omitted in evidence in-chief by this witness. Mr *Hardeo* was cautioned by the Court on the admissibility of an explanation given by the accused that appears in this affidavit and to consider that such questioning may adversely impact on the accused's trial. Wisely, Mr *Hardeo* did not persist with this line of questioning. The exhibit is before Court and it is clear that the statement that was made by the accused in paragraph 5 to Sergeant Mthethwa is not admissible.

In cross-examination, it was put to this witness that the accused intends calling his brother Muhle to say that the police was at his house. The witness again stated that he did not go to the house in Enseleni.

[19] The next witness that was called was Constable Ntombi Sibiya. She is attached to the Flying Squad Unit with five years' experience. She at times works as the CSC Commander at Empangeni Police Station. She explained in detail her duties. She explained the purpose of the Occurrence Book and what gets documented in the book. She explained that as part of her duties, she would inspect an arrestee when brought to the cells. On the day of Sergeant Ndlazi's killing, she commenced her shift at 17h45 the evening and it ended the next day at 06h00. She was shown Exhibit "V" and she confirmed that in Column 4, especially 4.5, appears her signature which was penned there on 28 March 2022. The exhibits listed were handed over to the Station Commander, Warrant Officer Maphanga, who would then placed it in the safe for safe keeping.

She confirmed that the accused was an arrestee as well as the OB Book's entry at 4205 which reads:

'At 03h45: Arrest Sergeant D K Mthethwa brought in Halalisani Zethebe Dumisa. SAP 14/337/03/2022 for possession of unlicensed firearm and ammunition on CAS 613/02/2022. His Constitutional Rights explained and understood. Signed: Sibiya Cst.'

This register also contains relevant occurrences at 4255, 4260 and 4288. All of these entries show that the accused was free from injuries and without any complaint.' (See Exhibit "Z")

In cross-examination, she was asked whether she wrote the entries into the OB Book. She confirmed the entries that were made by her. Mr *Hardeo* then consulted again with the accused and asked to hand in a photo that was taken at the police station provisionally. It was marked as Exhibit "AA".

Despite the defence claiming that the photo shows that the accused suffered injuries, she remained adamant that he was free of injuries.

[20] The State called Warrant Officer Qaphelani Xolani Mdluli, who is attached to the Hawks and has 20 years' experience. He was part of a team investigating this case, assisted by Warrant Officer, B. P. Ngubane.

On 28 March 2022, he approached the accused at Empangeni Court. A warning statement was obtained from him in relation to the murder of Sergeant Ndlazi. He explained the accused's rights and the accused elected to remain silent. His election was noted on the warning statement. The accused did not proffer any alibi when he was warned. Mdluli's evidence was, if the accused did, he would have gone to his home to confirm that he was there. In relation to the extracts from the OB Book, he confirmed that entry 4255 was made by him and 4288. (See Exhibit "Z").

He informed the Court that they had to confirm the accused's address for purposes of the bail application. He could not remember the house number but confirmed that they went to the house where the accused's brother resides. He was then questioned in-chief on the handwriting in Exhibit "T". He confirmed that it is in part the accused's handwriting and in part his. The accused wrote his names and surname, the type of cell phone and the cell phone number and signed the form. The SAMSUNG was placed before Court as Exhibit "1".

He also confirmed that the accused was free from injuries. If injuries were detected they are obliged to note it and explain how it occurred.

Again, this witness was confronted with Exhibit "AA" in cross-examination and it was put to him that the accused had an injury to the left eye. His response was that he can notice that the eye is closed but that he cannot confirm any injury. It was his response that the accused could have been blinking.

It was then put to him that this injury was visible at Court. This witness remained steadfast in his response that he never saw an injury.

It was then put to this witness in cross-examination that the phone was used after the accused was arrested. He vehemently denied this statement.

The defence then took issue with the following that appears on 28 March 2022 as “Ba4 5:16”. (See Exhibit “T1”)

His explanation relates to the fact that a distinction should be made to a message that was sent or received.

[21] The State finally called Warrant Officer Bhekwezi Patrick Ngubane as their last witness. He has 31 years’ experience in SAPS and is attached to the Hawks at the Richards Bay Office. He is the investigating officer of the murder docket - CAS 602/03/22 which was assigned to him to investigate.

He confirmed that they were informed that a suspect was arrested and detained at Empangeni Police Station. He, together with Warrant Officer Mdluli went to Empangeni Police Station. On their arrival they were informed that the suspect was taken to Court so they proceeded to the Empangeni Court where they found the suspect. After his appearance in Court, they spoke to him and they went with him to Empangeni Police Station where he was then charged. The exhibits were obtained from the SAP13 clerk. What was handed to him were the Beretta firearm, three live rounds of ammunition and the SAMSUNG phone. On the same day, Warrant Officer Mdluli also obtained the accused’s consent to extract information from his phone. There was another suspect, Qwabe, who was also booked out. This suspect was charged with a separate case, not investigated by them. They did receive information that the accused and Qwabe were arrested at the same homestead.

They obtained a witness statement from Qwabe. However when the trial commenced they could not trace this witness at the given addresses. He moved away from the homestead.

He also confirmed that they verified the accused’s address. They went to Enseleni where he said he stayed. The house they visited was near Tolokuhle High School, the number of the house escaped him. After verifying his address, the accused was booked back to the cells and had no injuries when they left him at the police station.

As part of the investigation into the case he took the phone to DFI to extract relevant information from the phone. He made an urgent application to Colonel Sibisi to get the information.

He was referred to Exhibit "T1" which shows that the accused was conversing with a person on number 072 [...]. During his investigations, he called the number but it was switched off and he could not get hold of the person. When he was asked whether he could establish more about the identity he could confirm that the surname of the person and the accused are related.

He also collected the accused's phone after DFI finalised their report. When the accused was detained, he switched the phone on and noticed through the exhibit bag that there was a profile picture of the accused. He also perused the WhatsApp messages and noticed that the accused had conversations with other people like Nellie Dlamini. He confirmed that Exhibit "U" is a conversation with Dlamini. He then took a screenshot of the conversation and then printed it from his computer. At no time did he interfere with the WhatsApp text. He collected the screenshots that served before Court before he consulted Ms Dlamini. Ms Dlamini later became a State witness. Both physical Exhibits "1" and "2" were confirmed as seized items and were handed in as exhibits.

The matter was then adjourned and at the next hearing, Warrant Officer Ngubane confirmed that the cell phone was charged and when switched on at Mtunzini Circuit Court, still had the same profile picture of the accused. The phone was switched on in court and the picture was displayed of the accused. The screenshots were taken on 9 May 2022. The WhatsApp application was not updated since the seizure and no longer displayed all the chats. The screenshots had been saved and were still on the phone.

In relation to the content of Exhibit "T2" his evidence was that their investigations show that on 27 March 2022 that there was no other shootout between the police and suspects on the N2, other than the incident that Constable Zondi testified about.

He was surprised to hear the accused had an alibi for what happened on 27 March 2022 since the accused never mentioned it to him. The first time he heard of the alibi was at court.

He confirmed that he and officer Mdluli went to two homesteads in Enseleni next to each other. The accused pointed these places out as his residences. They also went to Ntjidi which falls under Mtunzini where they found the father and brother of the accused. The homestead the accused was arrested was not one of the residences pointed out to them by the accused.

In cross-examination this witness was told that Exhibit "AA" was taken on the day of the accused's arrest, his response was that he could not confirm since he was not present. He explained that when he interviewed the accused, he booked the SAMSUNG phone out for investigation. It was however, in a sealed bag. He confirmed with the accused, his number. Secondly, he perused the phone through the bag, since the bag is transparent one could still read what was on the phone. This was all done without breaking any seal. Questions were then directed to the meaning of the IsiZulu word '*bekumsebenz*'. The witness agreed that the context in which it was stated would inform the meaning.

The witness was then taken on a long line of cross-examination of the application of s 205 of the Act. He then responded by saying it is known to him and he applied for a s 205 subpoena but it was established that at the time of the crimes being committed, the phones were switched off and that he has such a report.

Warrant Officer Ngubane was then informed that on the day of the accused's interview, he had visible injuries due to being assaulted. Officer Ngubane stated that the accused never complained of any assault at court where he appeared on 28 March 2022, further to that the accused had a private attorney in court to raise the complaint. No such complaint was ever forthcoming from him either at court or at the police station. He accordingly denied the statement that the accused had visible injuries.

He remained adamant that had the accused informed him of his alibi then he would have investigated it to confirm that the accused was there.

This concluded the evidence on behalf of the State.

Defence

[22] The accused testified on behalf of the defence that at the time of his arrest he was employed as a casual worker at an upholstery in Enseleni. He denied knowing Sergeant Ndlazi, Mr Ngidi or Constable Zondi. The deceased, Peter Hlabisa is known to him since he is related to him.

Regarding the fingerprint evidence adduced by the State, he responded as follows: *“I heard about that but I don’t know the truth about it”*. Regarding the Toyota in which his fingerprints were found, he admitted that he took a ride in the vehicle on 26 March 2022 and was seated at the left rear seat of the car. In the vehicle was Mdu Mtshali, Peter Hlabisa, Mdu Muhle Dumisa and him on that day.

He acknowledged that the cell phone before Court is his and conceded that the witness, Nellie Zamaswazi Dlamini, is known to him. He was asked by his counsel whether he confirms the communication between him and her as per Exhibit “U”. He did not want to comment on the messages between him and her. After a number of questions asked by Mr *Hardeo* to him in evidence-in-chief, he persisted in his attitude not to comment on it. When asked to comment on the messages as per Exhibit “T1”, he again did not want to comment.

When asked about the consent form that he had signed in order for the police to get the information from his phone, he responded in saying that he thought he was signing a form to reflect that his phone was kept in the possession of the police.

When asked about his arrest he stated that the place belonged to his cousin. On the day he arrived at Nkululeko’s Tavern, it was between 10h30 to 11h00. He went there after leaving house no.2[...] at Ntseleni. At the house of Nkuleleko, he met with Mpiliseni Qwabe.

According to him he was arrested at night whilst he was sleeping. He was woken up by a violent kick against the door. Someone came in and said, *“voetsek, voetsek!”*

Lights were shone in his face. He could not flee since he was grabbed and taken outside. He was assaulted and it was said, *“you know what happened during the day.”* There were other people on the premises. Later Qwabe was brought and made to lie down next to him outside. They were then transported in separate motor vehicles to the police station. He was placed in a cell and asked for his address which he gave as nr.2[...] Ntseleni. When they went there Dumisa was there and confirmed that he stays there. In fact, the police asked Dumisa where his home was and thereafter they returned to the police station. At the police station he was informed that he would be charged with the possession of a firearm.

He was then taken to a building where there was no administration papers and he was severely beaten. The most painful part was the handcuffs that were so tightly bound around his wrists that it pulled off his skin. He was also placed in leg irons which were joined with the handcuffs. He was bleeding from the handcuffs that sliced his skin. The assault was executed by officers in uniform. He was given six firearms by the police who told him to show them how to hold these firearms when shooting. He was still in a state of shock so he did what they told him to do. He was then taken back to the small cell where Qwabe was.

He then went on to give a long explanation as to why he never laid any charges against the police from being so severely assaulted. He then explained that Skwii is known to him and that he heard of Skwii's death when another Hlabisa brother informed Skwii's brother of his death.

He stated that he simply relayed the message to Nellie Dlamini. He called her and then they used WhatsApp. He could not say how Exhibit “AA” came into existence or who the person was that took the picture of him. What he could say was that it could be seen from the picture that he was trying to force his left eye open.

He also stated that he initially thought that he would call his brother, Muhla Muhle Dumisa, but due to the duration of the trial he no longer wished to do so. He concluded his testimony with stating that his cell phone was not on him but on top of a table with numerous other phones belonging to the neighbours. The police had seized all of the phones when they arrested him.

In cross-examination, the State advocate asked him whether his injuries were not visible when he appeared in Court on 28 March 2022 and whether the magistrate would not have noticed it. His response was that his eye was already opening up, and never informed the magistrate of his injuries.

On various occasions during the accused's cross-examination, he answered the questions put by Mr *Buthelezi* in English without it being translated into IsiZulu. The record speaks for itself. When questioned on how he obtained Exhibit "AA", he explained that it was printed by his cousin and brought to him. He conceded that his cousin did not know who took the picture of him. He says that the picture was distributed on social media and there was a reference to "*Culprit who lives on criminal activities had been apprehended as the one who shot and killed the police.*" He denied having personal knowledge of the social media postings. According to him he was merely informed of it. No one was called to testify on the authenticity of the picture.

He was questioned on his alibi and asked to explain where he was on 27 March 2022 at 07h30 in the morning. His version was that he was at house nr.2[...] Enseleni. He was with his older brother, Nzamo Muhle Dumisa. The house is the property of Mkulekelwa Hlabisa. He explained that his home is at Ntsjidi that falls under Mtunzini. He conceded that his father and his brother, Siphamandla Dumisa, attended his trial in the first week of the hearings.

In cross-examination when asked as to how he knew of Skwii's death, he responded by saying it was not reported to him. He was with one Vusi when Mkulekelwa approached them and said that he had heard that Peter Hlabisa and Skwii had been injured and he is rushing to the spot.

He was shown Exhibit "O" and asked to explain who owned the Toyota with GP number plates. He knew it belonged to Peter Hlabisa.

He was asked to explain how and when he was in this vehicle. He then explained that they were off duty and sat and consumed liquor until they wanted food. His brother, Sibongiseni, had sent them to go and get food. Three of them boarded the vehicle;

Peter Hlabisa, Mdu Mtshali and him. They drove from his brother's place to the garage in Ntseleni. This was the only time he boarded the vehicle.

When asked as to how his fingerprint got to the rear window, he said that he cannot say how it happened. He was then asked whether he was in the vehicle the day before his arrest, which he confirmed. It was then put to him that he was arrested on 28 March 2022, so he would have been in the vehicle on 27 March 2022. When confronted with his own answers, he said he wanted to correct his earlier statement. When it was stated that he is not honest with the Court, he gave a long answer of how this topic is leading him down a path where he does not want to go.

He was then confronted with the discrepancy in his evidence as to who were in the vehicle. He then was asked to explain the difference. He then said that he did not understand the question. He also doubted the fingerprint results because of the spelling of his name on the system. He then disputed the content of his own section 115 Statement signed by him at the onset of the trial. According to him he had never seen the statement. Again, the process followed when the plea explanation was handed in is a matter of record.

When questioned on his alibi and why it was not disclosed to the investigating officer, he insisted that he informed officer Ngubane of his alibi when he was interviewed. He was then referred to his warning statement, Exhibit "BB" and the fact that he elected to remain silent and not proffer an explanation.

When questioned on the messages between him and Ms Dlamini, the accused became unco-operative and on more than one occasion stated that he no longer wish to be in the witness stand. Questions had to be repeated several times by the State before any answer was forthcoming.

When squeezed into a corner with the questions, he blamed his erstwhile attorney, Mr *Masondo* and went as far as stating the Mr *Masondo* would make gestures to the State witnesses and tell them what to say in evidence. When it was put to him that Mr *Hardeo*, his current attorney was the one who cross-examined Warrant Officer Mdluli, he had no further excuse.

The State questioned him on information that was within his personal knowledge, yet he refused to answer those very questions. I shall return to his answers during the evaluation of the evidence before Court. At this stage it is important to note that the accused stated very little information regarding his whereabouts on the morning of the murders. In fact, his evidence in chief does not give any detail regarding his alibi, except to say he was at Entseleni. Again, the record speaks for itself. No witnesses were called and this concluded the evidence of the defence.

[23] Mr *Buthelezi* called for a conviction on all of the charges. In his submission he recognised that the state's case in main is dependent on circumstantial evidence and that the state also relied on common purpose. He placed reliance on *S v Nkosi* 1998 (1) SACR 284 (W) which had been re-affirmed in the Supreme Court of Appeal in a number of judgments. See *S v Mbuli* 2003 (1) SACR 97 (SCA) and *S v Molimi and another* 2006 (2) SACR 8 (SCA). Mr Hardeo has asked that the accused be acquitted on all the charges, he however albeit reluctantly conceded that the accused was not a good witness.

Evaluation

[24]

- [a] In the evaluation of the evidence before me I shall be mindful of what the Court has stated in *S v Van der Meyden* 1999 (1) SACR 447 (W):

“A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. What must be borne in mind, however, is that the conclusion which is reached (whether it be to

convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.” (at 449 – 450b)

The correct approach, therefore, is to consider the evidence before me in its totality. The State’s evidence must be weighed against the defence evidence, the probabilities as well as the merits and demerits of the State and defence witnesses must be considered. Having so evaluated the evidence the State’s evidence may only be accepted and the defence evidence rejected, if, on the evidence, reviewed as a whole, it can safely be said that the State’s evidence so outweighs the defence evidence, that there is no reasonable possibility that the defence evidence may be true. (See *S v Singh* 1975 (1) SA 227 (N) at 228F-H.)

In the same vein, it should be borne in mind that not every contradiction or mistake by a witness affects his credibility. Ms Dlamini’s evidence when considered against the objective facts, i.e. the phone records and the fingerprint evidence, is strengthened by that and corroborated. The fact that the police stated that they followed bloodstains re-inforces the truth of what had been said to her by the accused, namely that her brother was injured. Notwithstanding the cross-examination, she remained assertive, confident and consistent when testifying.

In the light of the defence, raised by the accused, it would be expected from this court to irresistibly draw the inference that officers Mthethwa, Miya, Mdluli and Ngubane to name a few would have had to conspire to give false evidence against the accused in relation to the possession of the fire-arm and the 3 live rounds of ammunition. The witness Ms Dlamini would have had to conspire with the police too to implicate the accused as the person who had informed her that he carried her brother Skwii after being injured and that he had left him because it became too difficult. It was clear that the accused could not think of any possible reason why she would implicate him in these offences.

- [b] The state witnesses were all good and credible. They independently implicated the accused by detailing the circumstances. Holistically viewed, their evidence overwhelmingly shows the participation of the accused to the point that his alibi cannot be accepted as true and can safely be rejected as not reasonably possibly true.
- [c] The State adduced credible objective evidence, that is the fingerprint of the accused found in the Toyota Corolla driven by the group and the WhatsApp messages found on the phone of the accused.
- [d] From the evidence before court it is evident that the State was not in a position to offer any direct evidence implicating the accused in the murders or the attempted murder. The State's case rests on

circumstantial evidence. An inference should therefore be drawn that accord with the proven facts. Inferences, however, should be distinguished from speculation. The comments of Lord Wright as approved of in *S v Essack and Another* 1974 (1) SA 1 (A) at 16D is still apposite:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.” (Also see *S v Mtsweni* 1985 (1) 590 (A)).”

- [e] In my view, the SCA stated the value of circumstantial evidence most eloquently in *S v Lachman* 2010 (2) SACR 52 (SCA) at para. 46 and I repeat:

‘[46] The following well-known observations from *Best on Evidence* are particularly apposite in the present scenario:
 ‘A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . .’

Circumstantial evidence must be evaluated in accordance with the fundamental principles relating to inferential reasoning set out in the *locus classicus* *R v Blom*.1939 AD 188. The two most important principles are that any inference sought to be drawn must accord with all the proven facts and, secondly the inference must be the only reasonable inference which may be drawn from the proved facts. In evaluating the guilt or the innocence of the accused and in determining whether the State has

discharged the *onus* of proving the accused's guilt beyond a reasonable doubt this court must look at the evidence as a whole and not merely the evidence for the State or on behalf of the accused in isolation. (See *Isaacs v S* (2010) 4 All SA 481 (SCA) at paras 61-62.)

[25] What needs to be determined is whether, in light of the evidence as a whole adduced during the trial the guilt of the accused had been established beyond reasonable doubt. This court should therefore guard against a tendency to focus too intently on different parts of the evidence being adduced without evaluating the evidence as a whole. In dealing with circumstantial evidence this court will not approach the evidence upon a piecemeal basis but subject each individual piece of evidence to a consideration of, whether it excludes the possibility that the explanation given by the accused, is reasonable possibly true. (See *S v Reddy and Others* 1996 (1) SACR 1 (A)). The cumulative effect of all the circumstances must be weighed together and only after this has been done, the accused is entitled to the benefit of any reasonable doubt which the court may have as to whether the inference of guilt is the only reasonable inference to be drawn.

It is also trite law that the accused is not burdened with an onus to prove his innocence or his alibi. However, the accused during the cross-examination alluded to the fact that he would be calling a witness, he never did. The *onus* in this trial remained with the State to prove beyond a reasonable doubt that the accused's version is not only improbable but that it is false beyond all reasonable doubt. Fingerprint and forensic evidence constitute the real evidence before this court and will be analysed and

considered in conjunction with the other evidential material such as the *viva voce* evidence given by the witnesses who testified.

[26] The accused was not an impressive witness. His demeanour in the witness stand showed that he persisted to whisper in the witness stand when he was confronted with questions that became uncomfortable to answer. This court had to remind him constantly to stop speaking so softly. The record speaks for itself. He tried, but could not persuasively explain the cell phone communications as per Exh T and U. In truth he point-blank refused to give an explanation for the content of the messages. He was not honest when he tried to explain his fingerprint in the vehicle driven by Peter Hlabisa and the reason for it to be recognised as a fresh print. What I find wholly unreliable is that he shifted blame to Mr *Masondo* who defended him as the one who had made gestures to the state witnesses as to what they have to say. This is something that would have been clearly visible to everyone in court including the presiding officer and no complaint was ever raised by the accused. It is clear that he first blamed his erstwhile legal representative to be in cahoots with the state witnesses and later he blamed his present representative to not understand isiZulu. This despite the fact that he demonstrated during the proceedings to have a good understanding of the English language. In the light of his so-called ignorance of the incident itself, this explanation is not only far-fetched, but improbable. Ms Dlamini's evidence destroyed any ignorance of the shootout on the N2 between him, his accomplices and the officers. His evidence-in-chief is not consistent with his earlier plea explanation. His innocent explanation of the fingerprint in the Toyota cannot be accepted as truthful. He contradicted himself on who was with him in the car on the 26 March 2022. This brings me to the fact that the improbabilities of the versions

tendered by the accused were fully canvassed by Mr *Buthelezi* for the State in cross-examination and in his address and I do not consider repeating each one of them. He was evasive in his answers and gave long winded answers without relevance to the questions posed, suffice to say that large parts of the testimony of the accused are highly improbable and unconvincing. On a conspectus of all of the evidence before this court and in what the accused require to be true for a defence of an alibi, I simply cannot accept his version as reasonably possibly true and accordingly his evidence can be rejected as false and not true. I need to add that accused's silence and refusal to comment on the content of the messages before court fortifies the conclusion that the accused had no innocent explanation for the words said.

The reliability and credibility of the evidence of the State witnesses *in casu* far outweighs the evidence of the defence. I find the state witnesses to be trustworthy despite the fact that their evidence was not perfect. For example, Sergeant Mthembu confused the two vehicles on the scene and how they were parked. Where there is objective evidence like photographs of how the vehicles were positioned the discrepancy fades in the face of the objective evidence before this court. The accused's version that he was never part of the group that attacked the officers on the N2, once compared with the substantive objective evidence, like the cell phone communications, the fingerprint of his which was found in the vehicle in which the group of attackers travelled, cannot be accepted as being reasonably possibly true.

[27] The State succeeded in proving the following proved facts:

(a) All of the individuals in the Toyota Corolla, knew each other;

- (b) All of them were armed with firearms that are semi-automatic, the serial numbers of the firearms were obliterated and they had live rounds of ammunition in their possession;
- (c) The accused was arrested with a 9 mm Pietro Beretta with the serial number obliterated and 3 live rounds in the magazine;
- (d) The mobile phone with most incriminating evidence embedded in the device was found in his possession. The messages place him at the scene with the group that attacked the police.
- (e) The fingerprint lifted by W/O van der Merwe belonging to the accused was found inside the vehicle driven by the deceased in Count 3. The fingerprint places him the vehicle with Hlabisa, Ngidi and also Skwii Dlamini;
- (f) The witness, Ms Dlamini was told information that could only have been within the personal knowledge of the accused, i.e. that he carried her injured brother to the bush. Skwii Dlamini was one of the suspects injured.
- (g) When the police searched for the suspects, they found Skwii Dlamini by tracking blood stains in the bush to the spot where he was killed. He too had a firearm on him with the serial number obliterated.
- (h) All of the group participated in the shootout to eliminate the police officers;
- (i) The accused did not sleep at his own home but went to sleep at a tavern. He slept with his shoes and clothes on, an unusual way of dressing;
- (j) The accused informed one of his friends that he was the sole survivor on the day in question;
- (k) No other incident of police shooting on 27 March 2022 in the area took place on the day of the murders being committed.

[28] All of the above proved facts lead to only one reasonable inference to be drawn from it and that is that the accused was part of the group that killed Sergeant Ndlazi and attempted to kill Constable Zondi and foresaw and reconciled himself with the deaths of his two accomplices that died on the scene after the shootout with the police commenced.

[29] Moreover, I am satisfied that in the light of the facts proved that the only reasonable inference to be drawn from the proved facts is that the group acted in

common purpose when they shot at Sergeant Ndlazi and Constable Zondi. Once they foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by the cross-fire the group by all firing shots with fire-arms reconciled themselves with the fatal consequences and had the necessary *mens rea* in the form of *dolus eventualis* to commit murder. The conduct of each member of the group, with the accused, in executing their common purpose on the counts is also imputed to him.

[30] In relation to the attempt on the life of Cst Zondi it is evident that he was merely fortunate to survive the ordeal and that there can be no doubt that the intention was to try and also kill him. The state evidence shows beyond a reasonable doubt the culpability of the accused in all the crimes that were committed.

[31] Insofar as counts 1-3, the murder charges of Sergeant Ndlazi, Njabulo Ngidi and Peter Hlabisa, I am satisfied beyond reasonable doubt that it falls squarely within the ambit of Part 1, Schedule 2 of the Criminal Law Amendment Act, since it was executed in the pursuance of a common purpose. (See *S v Mgedezi and Others* 1989 (1) SA 687 (A)) It should be added in relation to count one that there could have been no doubt at the time when the group all fired at Sergeant Ndlazi that he was a police officer performing his duties when he was killed. Sergeant Ndlazi in the pictures Exhibit "O" is dressed in full uniform and when the vehicle was stopped to be searched he was exercising his duties.

[32] **Verdict**

Accordingly, the accused is convicted on counts 1 to 6 as charged.

Case Information

Date of Hearing : 2 October 2023 – 27 November 2023
Date of Judgment : 27 November 2023

Appearances

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Counsel for the Defence : Mr P Hardeo
Instructed by : Durban Justice Centre