

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 8/2023

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 20 October 2023

In the matter between:

THE STATE

and

KHUMALO, NQOBILE

FIRST ACCUSED

NCUBE, WELLINGTON

SECOND ACCUSED

JUDGMENT

DU PLESSIS AJ

[1] Mr Khumalo and Mr Ncube faced trial on 16 counts. These counts emanated from 4 events. Counts 1 – 4 deal with an incident on 10 June 2022 in Israel Street, counts 5 – 8 with an incident shortly after in Afghanistan Street, counts 9 – 15 with an incident on 15 June 2022 at the Christ Embassy Church and count 16, unlawful possession of ammunition (Mr Khumalo only) which lead to Mr Khumalo's arrest.

[2] Count 1, 9 and 13 are robbery with aggravating circumstances, read with the provisions of s 51(2) of the Criminal Law Amendment Act.¹ Counts 2 and 5 are attempted murder. Count 3, 7, 11 and 14 are unlawful possession of an arm² and counts 4, 8, 15 and 16 (Mr Khumalo only), are unlawful possession of ammunition.³ Count 6 relates to the discharge of a firearm in a built-up area of any public place,⁴ and count 10 is murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act.⁵

[3] After the charges were read into the record, Mr Khumalo and Mr Ncube's legal representative⁶ assured the court that she explained that section 51 of the Criminal Law Amendment Act⁷ is applicable and what it entails with regard to minimum sentences. The court then asked Mr Khumalo and Mr Ncube whether they understood the charges and how they pleaded. Both understood all the charges against them and pleaded not guilty. They did not give a plea explanation.

The State's case

[4] The State's case, as well as the points in dispute, can be summarised as follows:

- i. Count 1 – 4: On 10 June 2022, an unknown person wielding a firearm demanded that Constable Leketi hand over his cell phone in Israel Street, Cosmo City. Constable Leketi threw his phone on the ground and ran to the

¹ 105 of 1997.

² S 3, read with ss 1, 103, 117, 120(1)(a) and s 121 read with schedule 4, and s 151 of the Firearm Control Act 60 of 2000, read with s 250 of the Criminal Procedure Act 51 of 1977.

³ S 90, read with ss 1, 103, 117, 120(1)(a) and s 121 read with schedule 4, and s 151 of the Firearm Control Act 60 of 2000, read with s 250 of the Criminal Procedure Act 51 of 1977.

⁴ S 120(7), read with ss 1, 103, 117, 120(1)(a) and s 121 read with schedule 4, and s 151 of the Firearm Control Act 60 of 2000, read with s 250 of the Criminal Procedure Act 51 of 1977.

⁵ 105 of 1997.

⁶ Ms Bovu from Legal Aid was their representative, and the court appreciate the work of Ms Bovu in ensuring that they could exercise their right to legal representation. I furthermore wish to thank both Ms Bovu and Ms de Klerk for their collegiality and professionalism in conducting the trial, which led to a smooth hearing. There were days where, from the interpreters to the stenographers, to the registrar, all the court officials were women. It did not go without notice.

⁷ 108 of 1997.

back of his house, and he was shot in his back. The perpetrators fled in the direction of Afghanistan Street. Constable Leketi then went to the hospital, where he was treated in the ICU and a general ward for his injuries.

The incident's date and the fact that it happened are not disputed. It is not in dispute that Constable Leketi was shot and that he went to the hospital. What is in dispute is whether Mr Khumalo and Mr Ncube were at the scene, possessed a firearm and ammunition, robbed Constable Leketi and attempted to kill him.

- ii. Counts 5 – 8: After robbing and attempting to kill Constable Leketi, Mr Khumalo and Mr Ncube ran to Afghanistan Street, Cosmo City, and started shooting at members of the public in an attempt to flee the scene. Mr Ngwenya was shot in the face by Mr Khumalo, while Mr Ncube procured a vehicle in which both fled the scene.

The incident's date and the fact that it happened are not disputed. It is also not in dispute that Mr Ngwenya was shot in the cheek, sustained injuries, and had to be taken to the hospital and that he was in the company of Mr Mokoena and Khanyi when this happened. It is accepted that Mr Ngwenya and Mr Mokoena attended the identification parade and that Mr Ngwenya pointed to Mr Khumalo and Mr Ncube, while Mr Mokoena pointed out Mr Khumalo only. What is in dispute is whether Mr Khumalo and Mr Ncube were at the scene, possessed a firearm and ammunition, attempted to murder Mr Ngwenya with a firearm and discharged a firearm in a build-up area or any public place.

- iii. Counts 9 – 12: On 15 June 2022, Mr Khumalo and Mr Ncube, acting in concert with a third co-perpetrator, whilst wielding firearms, entered the Christ Embassy Church and robbed the members of the congregation of their cell phones and cash. They also assaulted members of the Church with firearms.

It is not in dispute that the incident occurred on the date. It is also not in dispute that Ms Mpofu is a church member who was assaulted and robbed of her handbag and its contents. It is accepted that she attended the

identification parade and pointed to Mr Ncube. It is likewise accepted that Ms Banda is a church member and sustained injuries for which she was treated at the hospital. It is not disputed that she attended the identity parade and pointed to Mr Khumalo and Mr Ncube, as well as a third person, which was a negative identification. It is disputed that Ms Mpofu and Ms Banda could identify the suspects, whether Mr Khumalo and Mr Ncube were at the scene, possessed a firearm and ammunition, robbed the members of the Church, while armed, and whether they assaulted Ms Mpofu and Ms Banda.

- iv. Count 10: As part of the robbery, either Mr Ncube or a third unknown co-perpetrator shot and killed the deceased, Mr Unathi Ngceke.

It is not in dispute that Mr Ngceke was shot and died because of a perforating gunshot wound. It is in dispute whether Mr Khumalo and Mr Ncube were at the scene, killed Mr Ngceke, and that it was premeditated.

- v. Count 16: Mr Khumalo was arrested in his shop by Constables Moloi and Mosito on 21 June 2022 after a tip-off from an informer. Twelve rounds of live ammunition were found in his front right trouser pocket. After searching the premises, another 28 rounds were found under a brick just outside the shop. Mr Khumalo was then taken to the Honeydew Police Station without any detours. There were no other police officers on the scene, and neither was Mr Ncube. Mr Khumalo was informed of his constitutional rights, and the ammunition was counted in front of him at the station and sealed in a bag in his presence. He was then detained. The calibre found on Mr Khumalo matches the calibre used to kill the deceased in count 10.

It is not in dispute that Mr Khumalo was arrested at his shop on 21 June 2022 and that there was live ammunition in a plastic bag; booked into SAP13 and sent for analysis. What is in dispute is that the ammunition was found on him and the manner of the arrest.

- vi. It is not in dispute that Constable Lebepe arrested Mr Ncube on 21 June 2022. However, it is in dispute how the arrest was affected.

- vii. The possession of a firearm and ammunition in counts 3, 4, 6, 7, 8, 11, 12, 14 and 15, as well as Mr Khumalo's unlawful possession of ammunition in count 16 is denied.
- viii. It is in dispute that the identification parade was conducted correctly, but not that Captain Ngcobo was in charge of the parade.
- ix. It is in dispute that Mr Khumalo and Mr Ncube acted in common purpose in furtherance of the offences.

Evidence

(i) Exhibits

[5] The following exhibits were handed up:

- i. Formal admissions made by the accused in terms of s 220 of the Criminal Procedure Act,⁸ marked as "A";⁹
- ii. A postmortem report, marked as "B";
- iii. The ballistic report of w/o Lekgothoane marked as "C";
- iv. Crime scene photographs, marked as "D";
- v. The SAPS329 report of the identity parade marked as "E".
- vi. The ballistic report of w/o Randitsheni marked as "F";

[6] The State called nine witnesses, and Mr Khumalo and Mr Ncube testified in their defence. What follows is a summary of the testimony given by each witness with a specific focus on the facts in dispute in order to evaluate the evidence.

⁸ 51 of 1977.

⁹ Relating to the identity and the cause of death of the deceased in count 10.

(ii) Count 1 – 4

Constable Lesedi Leketi

[7] Constable Leketi is a member of the South African Police Services (SAPS) at the rank of constable. He testified that on Friday, 10 June 2022, he and his girlfriend returned home around 7:00 p.m. He was driving a white BMW vehicle. He drove the car into the yard with his girlfriend in the passenger seat. He then got out of the car closed the gate and locked it. As he approached the gate, a man with a firearm in his hand approached him, pointing the firearm at him. The person swore at him and demanded his cell phone and other possessions from him. He threw the phone on the floor, turned around and ran to the house. As he was running to the house, he was shot in the back. He continued running to the back of the house. Only then did he look at the gate, and he no longer saw the person at the gate.

[8] He ran back to the car. People pointed down the street to the fleeing suspects as he drove out of the driveway. He drove the other way because he wanted to go to the hospital. His house is about 20 meters from Afghanistan Street.

[9] He went to the hospital, where he was treated. He testified that the bullet entered around the centre of his spine and exited at the ribs on his left. He was in ICU for two to three days and then was moved to another ward for two days. He could not attend the identity parade because he was still in recovery.

(iii) Count 5 – 8

Ndumiso Ngwenya

[10] Mr Ngwenya testified that on 10 June 2022, around 7:00 p.m., he and two friends walked to a shop. They were then approached by two people coming down the road. He testified that they were walking on the right side of the street while the two other people came from the left side of the street from the front. The streetlights were on, and the visibility was good. The road that they were walking on was called Afghanistan Street. When asked how far Israel Street is from Afghanistan Street, he said it was about a 3 to 5-minute walk away.

[11] The two people did not say anything to them but merely started firing shots at them. The first bullet struck him in the face. He estimated the distance between him and the person shooting was about 10 metres. He did not fall. The person continued to fire shots.

[12] When asked whether he remembered the two, he said that he saw them. After they fired the shots, they turned and ran. He testified that the picture was still clear in his mind. He received medical care and had surgery.

[13] He attended the identification parade on 23 June 2022. When he entered the parade room, he could see the suspects and pointed at them. He testified that he has not been influenced to select a particular person, and nobody talked to him in the parade room. He is 100% sure that they were the two people. He knows this because he still has trauma and he sees their faces when he closes his eyes. He did not know them before this incident.

[14] During cross-examination, he was asked about the visibility in the street. He was also questioned about where the gunshots he heard came from and he testified that they came from Israel street. When asked whether these two people just came out of nowhere and shot at them without saying anything he said no, they said "voetsek!" and then started firing at them. It was put to him that he did not say they insulted them during his evidence-in-chief. He answered that he did not mention it but that is what happened.

[15] He repeated that they were approached by two suspects and that he also does not know why they would just approach him and shoot at him. He testified that only one person had a gun and pointed at Mr Khumalo. He did not know the make of the gun because he was not close by. The whole routine took about 3 minutes.

[16] He testified that Mr Khumalo was wearing a dark jacket and blue jeans. Mr Ncube had a short-sleeved T-shirt but did not notice the colour and cannot remember the trousers. As for the facial descriptions he said that the one person was tall and one was a bit shorter. The tall one had a scar or something on his forehead. He repeated that he saw them and cannot get rid of what is in his mind. He pointed to Mr Khumalo as the tall one and Mr Ncube as the short one. When they stood up in court this was so. He could not describe Mr Ncube other than that he was short.

[17] It was put to him during cross-examination that he could not identify the suspects who approached him on 10 June; he said it was impossible, he saw their faces. When asked how busy Afghanistan street was, he said there were other people but not many people. It was then put to him that it was very busy at night, and he said yes, there were people.

[18] Mr Khumalo and Mr Ncube's version was then put to him, to which he replied that he did not see any photos of them before the parade, he saw them on the day when they fired the firearm.

Mpho Mokoena

[19] Mr Mokoena said they played a game at around 6:30 p.m. at a friend's place. They then got a call from the friend's mother to go and buy bread, and they walked to the Indian tuckshop to buy the bread.

[20] On the way there, they met Khanyi regarding a laptop. She accompanied them to the shop. While they were walking to the shops, he heard two gunshots and a male and a female screaming. As it sounded far, he did not take it seriously. He does not know where these sounds came from.

[21] Just before they reached the shop, a person with a firearm in their hands insulted them and then shot at them. After the first shot, he saw that Mr Ngwenya was shot, and they all ran away. As they ran away, they were chased, and about three more shots were fired.

[22] The visibility was good as there were streetlights and tuck shop lights that lit the street. When asked if there was anyone else, he said no, the shooter was alone. When asked why Mr Ngwenya saw two people, he stated that Mr Ngwenya was in the front and in a better position to see if there was another person. When asked who he saw, he pointed to accused number one. He said he was about 10 metres away. He remembered he was wearing a dark jersey and dark jeans.

[23] He testified attending the identity parade on 23 June 2022. At the police station, he was taken to a room. He was alone, and nobody told him who to point out. He was also not

shown photographs or pictures to influence him. Inside the identity parade room, the police came and informed him that this was a parade room and told him of the process to follow. He pointed out the person who committed the crime, Mr Khumalo. He is 100% sure that this is the person.

[24] During cross-examination he was asked how busy the street was, and he answered that it was only them on the street. When it was put to him, Mr Ngwenya said that there were people, he repeated that Mr Ngwenya was walking in the front and saw more. He did not see a second suspect as he talked to Khanyi about the laptop.

[25] He was then asked how he could see the person who fired the shots, if he was following Mr Ngwenya. He stated that he managed to see him when he came down the street with a firearm and that the lights of the tuck shop and the streetlights were clear enough. This all took about two to three minutes.

[26] During cross-examination he also testified that he turned left towards a boundary wall where he hid. He then saw a person with firearm. A car stopped, and he got in. When it was said that this was not in his evidence in chief, he stated that he only testified what happened during the incident and not what happened *after* the incident. He is also unsure why Mr Ngwenya did not attest to the screaming- maybe he did not hear it. He confirmed that he was not shown pictures at the identity parade. It was then put to him that he did not observe the suspect who approached him and his friends, to which he replied he did - the person almost killed them. When Mr Khumalo's version was put to him, he replied that he is lying; he was at the scene where he almost killed them. He will never forget his face.

(iv) Counts 9 – 15:

Sipthembiso Mpofu

[27] Ms Mpofu testified that she was at the Christ Embassy Church on 15 June 2022. As the pastor, Unathi Ngceke, was preaching, two men entered from the side door with firearms and pointed them at the people in the church, demanding their phones. She did not give them her phone.

[28] There were only four congregants in the church. The pastor then started praying as the suspects entered, after which he went outside with the two suspects still inside the church. She followed the pastor just outside the door of the church. The two men were inside the church, walking up and down slowly. When she came to the door one of them followed her. The pastor was two to three metres away from where she was standing when he was shot. She did not see who shot him. She was very emotional when she started testifying about the pastor being shot. The person who followed her outside assaulted her with a firearm on the left side of her head just above the eye and took her bag. After they took her bag, they ran away.

[29] At the identity parade she pointed out the person she saw inside the church and who assaulted her, Mr Ncube. While pointing at Mr Ncube in court, she was very angry and sure. She stated that Mr Ncube was the person who hit her with the firearm. Nobody showed her photos at the identity parade or told her who to point out. When she entered the parade room, the police informed her that the persons on the other side of the glass could not see her. She then pointed to the person, and it was Mr Ncube.

[30] As she testified she seemed very sure that Mr Ncube was the person. During cross-examination she confirmed that she did not see the accused before the parade. She is 100% sure she pointed to the right person. When it was put to her that she could not identify the person who hit her because it was dark outside, she stated that she is very sure. The light from inside provided light outside. It took 2 to 3 minutes to identify the person as she was scared - many people were in the line-up. It was put to her that Mr Ncube would come and testify that he was not at the church and that he did not do what she said. She remained, however, resolute, that "even if he come and dispute it I am 100% sure".

[31] She could not remember well what Mr Ncube was wearing, but she think it was a blue top. She remembers the identity parade where she pointed him out because she recognised him from his ears as she saw him well on the night of the incident. She said she saw him about a minute before he hit her. She also saw him inside.

[32] Inside her bag that was stolen were two cell phones, money, house keys and church documents. She never got any of this back.

Koko Banda

[33] Miss Banda went to church on 15 June 2022. She was late, and as she parked her car about 5 meters from the church, there was another car that looked like an Uber. Where she parked it was "like a car wash" with many lights.

[34] She then saw people come from the church. She was still in the car when the people came to her, one with a firearm shouting "open! open!" in isiZulu. She was confused by the knocking on the windows and the firearms. She thought it was demons.

[35] Then one came to her side, pointed the firearm at the window, and while pointing said in isiZulu, "Puma! Puma! Or I will shoot you", so she got out. He then hit her with a firearm on the right side of her head. As she fell, there was blood, and she passed out for a few seconds. She prayed, gained strength, and ran to the open veld, leaving her car with the keys in it. She then called her child for help.

[36] She testified that her car, a BMW, uses a start / stop button to switch on and off. She switched the car off when she stopped. The car lights do not switch off unless she takes out the key, and she did not take out the key, so the lights remained on.

[37] There were three people, two with firearms. She saw their faces when they were banging on the car's windows. She was sitting in the car for quite a while. As for the visibility, it was very clear and visible.

[38] She needed to get stitches for her head injury, and when she went back to the doctor a few days later because of headaches, it was swollen inside.

[39] When asked if she could see the persons who banged on the windows in the court, she pointed at Mr Khumalo and Mr Ncube. She stated that Mr Khumalo hit her with the firearm - he is taller than her. Mr Ncube was on the passenger side, banging on the window with a firearm. During cross-examination she confirmed that she could see the faces of the people who banged the car windows during the ordeal. She stated that she remembered being in the car for about 3 minutes. Even seated, she could see their faces as it was very light outside. She stated that for the whole time, she was looking at them. She cannot recall what they were wearing - she focused on their faces, not what they were wearing.

[40] She attended the identity parade on 23 June 2022. No photos were shown to her. She was also not influenced by anybody. She was escorted by the police into the parade room, where she was informed that she could see them, but they could not see her. It took 3 to 5 minutes to point out Mr Khumalo and Mr Ncube. She is 100% sure that she is correct.

[41] She does not know why they did not take the car and speculated that it might be because it is a two-door car and that they did not know how to put the seat down to get three people into the vehicle.

[42] Regarding the identity parade, during cross-examination, she agreed that she pointed out a third person who was a negative. She explained it was because she saw three people that night but was only very sure about two. Even if it took 5 minutes to point out the people, she was very confident about two people.

(v) Count 16

Constable Petros Moloi

[43] Constable Moloi testified that he arrested Mr Khumalo on 21 June 2022. After receiving information from an informant that a person was selling live ammunition, he went to the specific address. It was a shop where appliances are fixed on Brazil Avenue.

[44] At this address he found two people, a shop owner and a customer. He testified that he introduced himself to the two men and explained to them that he got information about live ammunition. He asked them permission to search the premises. With him was Constable Mosito.

[45] The owner had 12 9mm bullets in the right front pocket of his pants. He did not have a permit to possess the ammunition, and stated that it belonged to a friend.

[46] Constable Moloi continued to search the premises and went outside, where he found a blue container under a brick with more live ammunition wrapped in a black plastic bag close to the wall. There were between 25 and 30 bullets. The shop owner stated that these also belonged to his friend. When he could not give his friend's address, he was arrested.

[47] Constable Moloi told him that he was arresting him for possessing ammunition without a permit and informed him of his constitutional rights. He was then taken to the station, where Constable Moloi booked the ammunition in a SAP13 forensic bag, sealing it in front of Mr Khumalo.

[48] Constable Moloi did not see anyone taking pictures of Mr Khumalo in his presence. During the arrest, he was unaware that Mr Khumalo was linked to the other crimes.

[49] He largely repeated his testimony during cross-examination. He detailed the search – the shop owner's hands were in the air, and he used his hands to search him. While searching the premises, he held the shop owner by the belt.

[50] Constable Moloi testified that he does not know Mr Ncube. When the version of Mr Khumalo and Mr Ncube was put to him, he kept to his version: there were only two police officers, no one demanded a firearm, he did not lift a finger when arresting Mr Khumalo, Mr Ncube was not present, no police officer took a TV, and they did not go anywhere else but to the police station. He remained adamant that he told him of his rights and that he sealed the forensic bag in the presence of Mr Khumalo.

[51] When asked about the community and the police who took pictures of the accused, he stated that he did not see any of the community members taking pictures. Neither he nor his crew took pictures. He cannot comment on Mr Ncube's version as he has no knowledge of it.

Constable Mosito

[52] Constable Mosito testified as the crew member who was with Constable Moloi during the arrest of Mr Khumalo. On 21 June 2022 they received information about live ammunition. They went to the address where the informant directed them.

[53] They found two men at this address and introduced themselves as police members. They requested to search the men. They also gave the reasons why they were there. As a crew member, his duty was to carry the rifle and to guard the premises. At the same time, constable Moloi searched the suspects and the premises.

[54] It was Constable Moloi who started searching the men. He found 12 live ammunition on the one person. He did not answer Constable Moloi whose ammunition it was, or if there were more. Constable Moloi then continued to search the shop. He went to the back of the shop and said more ammunition was under a brick behind the shop. First Constable Mosito stated that when Constable Moloi searched at the back, the person with 12 bullets was in the shop with him. However, during re-examination, he remembered that Constable Moloi was holding the person by the belt and took him to the back to search for the bullets.

[55] He testified that the person with the bullets said it was his brother's bullets. The bullets were for a 9mm gun.

[56] When they found the second batch of bullets, they handcuffed the suspects as they could not give a reasonable explanation for having the ammunition. The information they received was positive, and they made an arrest. They went straight to the police station. At the police station, they booked the ammunition by sealing it in a forensic bag in front of the suspects. He was there, and so was Mr Khumalo. Constable Moloi explained their rights to them. When asked whether police officers carry forensic bags, he stated no, these bags are only at the station.

[57] They did not have time to take any pictures of the suspects while arresting them. There were no community members taking pictures. Mr Ncube was also not at the shop. No television set was taken. No one was assaulted.

[58] During cross-examination, he explained that the "they" he referred to was Mr Khumalo and a customer. At that stage, they did not know it was only a customer. The person who was searched was Mr Khumalo, the shop owner. He pointed out Mr Khumalo. During the questioning about the "they", he appeared mildly irritated, stating that only two people were in the shop. When told that he said both were searched, and Constable Moloi only said one person was searched, he said that was Constable Moloi's testimony. As for Constable Moloi stating that Mr Khumalo said it was a friend's bullets, and him saying Mr Khumalo said it was his brother's, he stuck with his version. He stuck to his version of events when Mr Khumalo's version was put to him.

(vi) Identity parade: Captain Bongani Ngcobo

[59] Captain Ncgobo was instructed on 22 June 2022 to conduct an identity parade, and he is confident that the procedures were correct. The various constables involved in the different stages of the parade were carefully recorded on the SAPS329 that were handed up. Mr Khumalo and Mr Ncube were informed that they were part of an identity parade and of their right to legal representation. They informed him that they did not have legal representation at the time but did not have a problem proceeding.

[60] During cross-examination it was put to him that Mr Khumalo and Mr Ncube were not informed that they were going to a parade when booked out of the holding cells. He stated that he could not testify on that as he was not there. By the time he was interacting with them, they were aware. It is also not unusual for someone to be arrested and a day or two later go to an identity parade.

[61] He explained that legal aid is not on standby. Usually, the parade goes ahead when a person does not object to proceeding without legal representation. This is what happened in this instance and why he stated N/A on the form – there is simply no space to write a detailed explanation. With his 18-year experience, he would not throw people under the bus if it was their first parade.

[62] There were 11 men in the line-up. He did not record each person's height, but he testified that they were more or less of the same height and were all African males. The other people in the parade were people arrested in other cases.

[63] He made a list of the people in the line-up, then told them they could choose a number and change their positions between witnesses. They did not make any specific requests. He called the witnesses in reverse into the parade room and told the witnesses to tell them the number of the person. The witnesses pointed out Mr Khumalo and Mr Ncube as described above. One person (from the church) could not point out anyone, and Ms Banda pointed out a third "negative".

[64] During cross-examination he clarified that he sometimes had to open the door between the rooms to inform the photographer who to photograph as there was no

microphone. At some stage, Mr Khumalo attempted to change a number, but he explained that they could not change the numbers or the clothes once the picture was taken.

[65] He stated that the witnesses were not influenced, were not shown photographs and that they do not know the suspects.

(vii) Mr Ncube's arrest: Constable Lebepe

[66] On 21 June 2023, at 4:00 p.m., he started his shift. At around 10:00 or 11:00 p.m., an informant told him that there was a suspect with a firearm on Sierra Leone Street. The person was alone standing in the street when he did his patrols. He was in a fully marked police van. When he stopped, the suspect began to run. He chased him, and after he fell, he caught him. He asked him why he ran and why he stood on the street. The person told him that he was afraid of the police, but when he was asked, he could not answer why. Constable Lebepe introduced himself and asked permission to search him as part of crime prevention.

[67] He searched the person, and then, on his right, he found a pistol. He asked him where his licence was, but he could not provide a licence. The serial number was filed off the pistol, which raised suspicion. Thinking that the suspect was in possession of an unlicensed firearm, he informed him that he was arresting him for possessing an unlicensed firearm. He then took him to Honeydew police station for detention. When he booked the suspect, he placed the firearm in a bag and sealed it in front of the suspect.

[68] Mr Ncube was taken directly to the police station after the arrest. Constable Lebepe and his crew did not take a picture of Mr Ncube, nor was he assaulted.

[69] During cross-examination he confirmed that the Mr Ncube was apprehended between 10:00 and 11:00 p.m. and not 9:00 a.m. as is Mr Ncube's version. He denied Mr Ncube's version as was put to him.

[70] After this witness, the State closed its case.

(viii) Mr Nqobile Khumalo

[71] Before his arrest, he was residing in Cosmo City. He does not know the address from his head, as he stayed there for nine months with his wife and child. The address on the indictment is the address of his shop where he fixes fridges, TVs, and microwaves.

[72] On 21 June 2022, he was approached by a lot of police at his shop. He did not count the number of police, but there were many cars, maybe 6. Some were in uniform, others were not. Some entered the shop, and others remained outside. They greeted him by saying, "how are you Nqobile", to which he replied, "I am fine".

[73] He testified that a customer and another person were visiting him in his shop. The police asked him not to give them problems and only give them what they were looking for, namely a firearm. He told them that he does not have a firearm and he does not know anyone who has a firearm. They then replied "do you want to give us problems?" after which they handcuffed him.

[74] He does not know why they were looking for a firearm from him. The other police searched the shop. When asked which one of the two police searched the shop, he stated that the two witnesses who testified were not at the shop and did not search for anything.

[75] He was then handcuffed behind his back while the police searched the shop. More police officers came, with Mr Ncube. When they could not find anything in the shop, they asked again where the firearm is. He did not know what they were talking about.

[76] They then took him to his house. There they found his wife. They went inside the house, and searched the whole house but could not find anything. When they could not find a receipt for the TV, they took it, placed it in the car, and then went back to the shop.

[77] Back at the shop, the police made him sit in front of the shop. Because of an operation, he struggled to sit. He was told to sit next to Mr Ncube. The police officers, as well as some people passing, then started to take pictures of them. The people shouted to him that he is a thief. This all happened around 4:00 p.m. They were then taken to Honeydew Police Station. He did not know why. He was only told that he is a thief.

[78] When asked about the Constables' testimony, he stated that the police officers who testified were not the ones who apprehended him. He denies that anything was found on him. He denied knowing anything about the ammunition, what would he do with it?

[79] He was only shown the live ammunition at the police station, and it was inside a transparent bag. After that, they told him that they were charging him with possession of ammunition. He was not informed of his constitutional rights.

[80] He was assaulted when he was handcuffed, and someone stomped on his back, so he agreed to everything they told him. There were scratches on his hands from being handcuffed, and the interpreter confirmed scratches. Mr Ncube was arrested with him.

[81] They were part of an identity parade on 23 June 2022. They were taken from the police cells where they were held, and were not told where they were being taken. When they arrived at the parade, they asked what was happening. After it was explained to him, he was not too concerned because he knew he did nothing, so no one will point at him.

[82] He could choose a number but could not choose who is in the line-up with him. He did not speak to Captain Ncgobo, because the other suspects were brought in. He was not informed about his right to legal representation. He would not have proceeded if he knew. The procedure was not fair – he wanted to pick number 14, but was not allowed to.

[83] He did not see the person who pointed him out, but he was pointed out after a police officer came into the room and spoke to the captain. They were lined up four times.

[84] As for the other occurrences, he does not remember where he was on 10 June 2022. He could also not remember where he was on 15 June 2022. He said he is always either at his shop from Mondays to Saturdays or at home. On Sundays he goes to church. He does not know the Christ Embassy church; he has never been there. He does not know why people pointed him out, he does not know them. He was pointed out because of the police. He does not know Afghanistan Street. He has never shot anyone, he does not own a gun. He will never be outside that time of the night.

[85] He saw Mr Ncube at the shop about three weeks before the arrest. He only knows him as a person whose TV he repairs.

[86] During cross-examination, he denied the State's version that was put to him. He got agitated when asked again why is it that the witnesses could identify him, and he again stated he was only being pointed out after a policeman entered the room, and the Captain chased him out. He knew the policeman by sight as someone who sometimes came to his shop. When asked why he did not put this version to the witnesses, he stated it was because he thought he would come and testify to tell his version. It was then put to him that he is making this up.

[87] When the State's version was put to him, he repeated that he was always in his shop and did not shoot anyone.

[88] When asked about the probability that an innocent person can be linked to four different scenes by several witnesses who do not know one another, he stated that he has never done anything that is bad and criminal. He does not know why he was charged or what he has done.

(ix) Mr Wellington Ncube

[89] Mr Ncube testified that he stayed in Cosmo before he was arrested but did not know the place very well, although he has been staying there for three years. He stated that he was employed by his brother who fixes cars. His brother would call him occasionally if he had a lot of work, but he would not go on a Sunday as Sunday he goes to church.

[90] When asked where he was on 10 June 2022, he said he could not remember because he usually wakes up early and spends the day fixing cars with his brother. He does not know where Afghanistan Street is. He does not know Mr Ngwenya. He was not with Mr Khumalo when he shot someone in the face.

[91] People could identify him on the parade because the police took pictures of him on the day of the arrest.

[92] He does not recall where he was on 15 June 2022. He repeated that he is normally with his brother fixing cars. He does not know the Christ Embassy church. He does not know the witnesses, he has not been in the company of Mr Khumalo, other than when he

was in his shop when his appliances got fixed. The people could identify him on the pictures, and the fact that the police kept on opening the door during the parade.

[93] He was arrested on 21 June 2022 as he was on his way to buy bread for his child at the Indian Spaza shop around 9:00 a.m – 10:00 a.m. The police pointed a firearm at him and told him to lie on the ground. There were 7 or 8 police vehicles. They asked him where the firearm is, and he said he did not have one. They then started assaulting him. They searched his yard but could not find anything.

[94] People came from their homes and started taking pictures. The police then instructed him to unlock his phone and found pictures of Mr Khumalo on the phone. He has him on his WhatsApp status often. He explained that he advertised his services as he is a good repair person.

[95] They then went to Mr Khumalo's shop, where Mr Ncube had to point out Mr Khumalo from the car. They eventually stopped in front of the shop, and he was ordered to lie down. He saw them assaulting Mr Khumalo, and then they assaulted him. They took Mr Khumalo to his house while he was left at the shop. When they returned from his house, they were taken to Honeydew Police Station together.

[96] Constable Lebede was amongst the police who arrested him. He was arrested during the day, and not at night, and by many police officers.

[97] He was in an identity parade on 23 June 2022. They fetched them from where they were held. They could not choose the people in the line-up. They were not informed of their rights and were not told why they were there. They were only told to choose a number.

[98] During cross-examination he confirmed that he knows Mr Khumalo as the person who fixes his TV and fridge. They are not friends. He was questioned about advertising the services of Mr Khumalo on the WhatsApp status, but not his brother's business. He evaded answering the question, settling that this brother has his own clients. He stated that the way Mr Khumalo fixed his appliances gave him so much joy in his spirit.

[99] Asked what happened between the police arresting him around 10 a.m. and being taken to the police station only around 4 p.m., he stated that he was assaulted. They

sprayed him with pepper spray after putting a plastic over his head. Even now his eyes are still bad from the assault. His hands were tied behind his back, he was punched in the abdomen.

[100] The prosecutor showed him the picture of the identity parade that was taken two days later, she told him that he would not look like this if he were pepper sprayed under a balloon. He replied that he was sprayed. She told him he was arrested as the police testified, which he denied.

[101] He repeated that he was made to sit outside the shop, and not inside, as Mr Khumalo testified. He does not know any community members who took pictures or why an arrest with about 14 police officers did not make it onto social media.

[102] When the State's version was put to him, he stated that the identity parade was not conducted well. The witnesses from different scenes could point them out because of the pictures that were taken. He did not know when asked why some witnesses could not point them out. He denied being on the scene of the other crimes and possessing a firearm and ammunition.

Evaluation of the evidence

[103] A person is presumed innocent until proven guilty. This plays into the burden of proof that rests on the State to prove its case. The burden of proof is on the State to prove that a person is guilty of the charges on the indictment. The standard is "beyond reasonable doubt", meaning that the assessment of guilt, or not, is based on the strength of the State's case. If there is reasonable doubt, the accused must be acquitted.¹⁰

[104] *S v Mavinini*¹¹ sets out that

[E]ven if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights

¹⁰ *S v Mokoena* 2006 (1) SACR 29 (W) 49e–g.

¹¹ 2009 (1) SACR 523 (SCA) para 14.

– remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.

[105] In *Monageng v S*¹² the court defined proof beyond a reasonable doubt as

'evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot reasonably be true.'

[106] The evidence must be evaluated against this standard.

[107] For the court to apply the law, it must first determine the factual basis of the case, by evaluating the evidence. Thus, the court must assess the weight or cogency of the material to determine whether the State has proven its case beyond reasonable doubt.

[108] It is the court's role to evaluate evidence and assess its weight. Certain fundamental principles are important in the evaluation process, namely that a court must weigh up all the evidence as a whole rather than on a piece-by-piece basis.¹³ The court must draw proper conclusions based on the proven facts (inferences) and must avoid assumptions and speculation.¹⁴

[109] In this case, the court must mostly rely on the oral testimonies to determine whether the State has proven its case beyond reasonable doubt, which requires a credibility assessment of the witnesses in line with the principles laid out in caselaw.

[110] I make the following findings about the State's witnesses in this regard:

- i. Mr Leketi was a calm and thorough witness. He was credible and only testified to the facts within his knowledge. He did not speculate about what happened afterwards, and he did not contradict himself during cross-examination. I

¹² [2009] 1 All SA 237 (SCA).

¹³ *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

¹⁴ *S v Ndlovu* 1987 (1) PH H37 (A) at 68.

accept his testimony. He did not identify Mr Khumalo or Mr Ncube as the perpetrator who asked for his phone or who shot him.

- ii. At the start of his testimony, Mr Ngwenya was understandably emotional, testifying about being shot in the face. He had to take a deep breath before he could continue. At times during cross-examination, he started to speak softer and seemed unsure. However, none of this detracts from the fact that, although nervous, the witness seemed confident and truthful. He did not contradict himself during cross-examination. He remembered some details, such as what the suspects were wearing, and this largely correlates with the testimony of Mr Mokoena. He could testify about their heights relative to one another, and Mr Khumalo, the taller one, indeed has a mark on his forehead, as confirmed by the interpreter and the identity parade photos. All this makes him a credible witness.
- iii. Mr Mokoena was confident and gave plausible explanations for the questions for the slight difference in his and Mr Ngwenya's version regarding how busy the street was. This is also not material. His testimony on what Mr Khumalo wore correlates with Mr Ngwenya's description. There was nothing that raised suspicion that the witness should not be believed.
- iv. Constable Moloi gave a detailed testimony. He could describe what he found in detail and did not contradict himself during cross-examination, nor did he falter. Exhibit "E", the forensic report, indicates that Constable Moloi booked in the ammunition that he found on Mr Khumalo. No reason was proffered for why he would lie, as he testified he did not know Mr Khumalo was linked to the other crimes. The detail about holding Mr Khumalo by the belt when searching for the ammunition was confirmed by Constable Mosito. All this makes him a credible witness.
- v. Constable Mosito's testimony corroborated that of Constable Moloi on the material aspects. Although at times slightly irritated as he could not remember the details of a case of last year, he came across as being sure of what he

could remember. His testimony is important corroboration for Constable Moloi's testimony regarding the ammunition, and the arrest.

- vi. Ms Mpofu was visibly angry, still mourning the loss of the pastor and processing the events of the night as she was testifying. She was resolute that Mr Ncube was the person in the church who hit her with the firearm. She was coherent, and she did not contradict herself during cross-examination. She was a credible witness.
- vii. Ms Banda described what she saw in animated detail. She did not change her story during cross-examination, and her observation of three people correlates with the testimony of Ms Mpofu that there were three people. The fact that she pointed out a negative third person does not detract from the fact that she pointed out the two suspects and that one of them (Mr Ncube) was also pointed out by Ms Mpofu. She is a credible witness.
- viii. Captain Ncgobo testimony correlates and explains the SAPS329 forms (exhibit "E"). I got the impression that he understands the requirements for a valid identity parade, maybe from learning the hard way over the years, and that he made an effort to ensure compliance. At times, he was perhaps too sure that everything was in order, but this does not take away that, in general, he was a credible witness who had an explanation for every question.
- ix. Constable Lebepe was a very confident witness who gave straight short answers. He spoke coherently and kept to his version during cross-examination.

[111] Before making a finding on the credibility of Mr Khumalo and Mr Ncube, the following needs to be noted about their alibi defence. Raising an alibi defence is the other side of the coin of identification issues, in that it is a denial of the prosecution's case on identification.¹⁵ In this case, Mr Khumalo and Mr Ncube provided explanations in their testimony, in most

¹⁵ *S v Ntsele* 1998 (2) SACR 178 (SCA) 187.

instances amounting to bare denials, other than the arrest, where they provided a different account of what happened on the day. This leaves the question what the court is to do, as it is not for the accused to prove its alibi.

[112] Five principles are important when assessing an alibi defence raised by the accused:¹⁶

- i. There is no burden of proof on the accused to prove his alibi;
- ii. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution did not discharge its burden of proof and the accused must be given the benefit of a doubt;
- iii. An alibi must be considered in the totality of the evidence, and the court's impression of the witnesses;
- iv. If there are identifying witnesses, the court must be satisfied that they are honest, but also, importantly, that their identification of the accused is reliable;
- v. Ultimately, the question is if the prosecution has furnished proof beyond reasonable doubt, and if the court can take into account the fact that the accused had raised a false alibi.

[113] Thus, once the State has made its case, and the accused elected to testify, it is for the court to determine whether the accused's version is reasonably possibly true. The court tests the accused's evidence against the probabilities.¹⁷ This does not mean that the court considers an accused's guilt against probabilities, but merely if his version is reasonably possibly true. Should the court find that it is not true, it must still consider whether the case made out by the State is a case beyond reasonable doubt.

¹⁶ See in this regard *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Ngcina* 2007 (1) SACR 19 (SCA) at para 18.

¹⁷ *S v McLaggan* [2013] ZASCA 92.

[114] If the accused's version, regarded in isolation, seems reasonably possibly true, it does not mean that its evidence cannot be rejected. This is because the evidence of the State may be so persuasive that the accused's version could not be true. The test is whether the evidence establishes the guilt of the accused beyond reasonable doubt (and not beyond a shadow of a doubt).¹⁸

[115] Implied in this test is that the accused should be acquitted if there is a reasonable chance that the explanation they provided to claim their innocence is true. They are different parts of the same test. For a conviction, there must be no reasonable doubt that the evidence incriminates the accused. This can only be so if, at the same time, there is no reasonable possibility that the evidence that supports their innocence is not true. The conclusions operate together, the one affecting the other.

[116] Determining this requires a comprehensive evaluation of *all* the evidence, not a piecemeal analysis. The evidence of the State, and that of the accused must be evaluated together. In other words, once the State has made its case, and the accused elected to testify, the court must determine whether the accused's version is reasonably possibly true *in the face of all the evidence*.

[117] In this case, the court is faced with evidence that Mr Khumalo and Mr Ncube committed specific crimes, while they claim that they were not there at the time of the acts. Both cannot be reasonably possibly true. Mr Khumalo and Mr Ncube's versions can only be valid, if, at the same time, it is reasonably possible that the State's evidence is false.¹⁹ With this, I evaluate the evidence based on the counts in the indictment.

Count 1 – 4 and 5 - 8

[118] Constable Leketi was the only State witness who testified about what happened at his home. As stated above, he was a credible witness. His evidence, however, did not place Mr Khumalo and Mr Ncube at the scene, as he did not testify as to the identity. With no

¹⁸ S v Ntsele 1998 (2) SACR 178 (SCA).

¹⁹ S v Sithole & others 1999 (1) SACR 585 (W) at 590.

direct evidence in place, the State must rely on inference to be drawn to prove its case. This must be in line with the dicta in *R v Blom*²⁰ that stated that inferences drawn must be consistent with all the proved facts, and these facts should be such that they exclude any other reasonable inference to be drawn.

[119] Based on the proven facts (also those in count 5 – 8 as set out below), on the testimony of Constable Leketi, Mr Ngwenya and Mr Mokoena considered together, the screams and gunshots heard came from Israel Street. Two armed suspects shortly after approached Mr Ngwenya and Mr Mokoena and shot at them in Afghanistan Street. The inference that is drawn is that these are the same two suspects that moments before, around the corner, shot Constable Leketi. What cannot be inferred from the facts, however, is who shot the firearm that hit Constable Leketi.

[120] As to the identity of the suspects, there is the evidence of the identity parade and Mr Ngwenya and Mr Mokoena who testified. This places Mr Khumalo and Mr Ncube on the scene of the incident.

[121] In terms of *S v Mthetwa*,²¹ evidence of identity must be evaluated considering various factors, including the lighting, visibility, eyesight, the proximity of the witness, the opportunity for observation and so forth. All these factors must be considered together and weighed in light of the totality of the evidence. Mr Ngwenya testified about the visibility in the street and the streetlights and that he was 10 meters from the person who shot. Mr Mokoena had time to observe Mr Khumalo as he was hiding behind a wall. This enabled them to identify the them at an identity parade as testified.

[122] An identification parade can be accepted as evidence if it has been properly conducted²² (i.e. without material irregularities) and if there is evidence before the court as to how the parade was conducted. The absence of a legal representative is not *per se* an

²⁰ 1939 AD 188.

²¹ 1972 (3) SA 766 (A).

²² *S v Mohlathe* 2000 (2) SACR 530 (SCA).

infringement of the accused's fundamental rights.²³ Irregularities that does not justify excluding the evidence impact the weight of the evidence.²⁴ It was Mr Khumalo's testimony that he was not concerned about the parade after it was explained to him, as he knew his was innocent and will not be pointed out, and later testified that he would not have proceeded if he knew that he had a right to legal representation. It makes his version improbable.

[123] I am satisfied that, apart from perhaps smaller irregularities such as a malfunctioning microphone that forced the captain to, from time to time, open the door to communicate, the irregularities were not material. It was further bolstered by the testimony of the people who identified Mr Khumalo and Mr Ncube. They all testified that they were not shown pictures, and that they were not influenced as to who to point out. Captain Ncgobo did not show them any pictures, and Constables Moloi, Mosito and Leketi did not see anyone take pictures.

[124] Considering the bare denials of Mr Khumalo and Mr Ncube in light of all the evidence of the State leads to the conclusion that their version is not reasonably possibly true.

Count 9 – 15

[125] It is accepted that the paster was shot and killed, and that Mr Mpofu was robbed and assaulted, and Ms Banda was assaulted and her car almost highjacked. Ms Mpofu was a single witness for count 9 – 12, and Ms Banda for counts 13 – 15. However, their evidence corroborates one another on material aspects and identification of the accused.

[126] S 208 of the Criminal Procedure Act²⁵ further states that an accused may be convicted of any offence on the single evidence of any competent witness. While such evidence must be cautiously approached, it ought not to be rejected.²⁶ Instead, the court

²³ *S v Thapedi* 2002 (1) SASV 598 (T).

²⁴ *S v Bailey* 2007 (2) SACR 1 (C) para 44.

²⁵ *S v Mokoena* 1932 CPD 79.

²⁶ *S v Webber* 1971 (3) SA 754 (A).

should weigh the evidence of the single witness, consider its merits and demerits, and decide whether it is satisfied that the truth has been told, despite any shortcomings or defects.²⁷

[127] Ms Mpofu testified that she was near the perpetrator, that she had time to observe him, and that there was light coming from the church. Ms Banda also had time to observe the perpetrators and was near them. She admitted to pointing out a third person who was negative due to the expectation that the third perpetrator was in the lineup.

[128] In contrast, Mr Khumalo and Mr Ncube stated that they were not there on the day, and that they do not know where the church is. Again, assessing their version in light of the totality of the evidence, I find their version to not be reasonably possibly true.

[129] The state argued that they acted in common purpose. Of specific focus here are counts 1, 2, 5 and 10. At the core of the doctrine of common purpose lies the idea that when two or more people engage in a criminal enterprise together, then the responsibility in law for the act that is performed by one in the group (the immediate party) may, in some instances, be attributed to each of the other members (the remote parties) of that group.²⁸ In other words, the conduct of the immediate party is fictionally deemed to be the conduct of the remote party.

[130] There are two forms of common purpose: one that rests on a prior actual or implied agreement between the parties and the other based on active association with the act.²⁹ The court needs to determine whether it was proven beyond a reasonable doubt that there was an actual express or implied agreement between the parties to commit the crimes, and that the parties could reasonably foresee the consequences that ensued.

[131] The State argues that all that the State needs to prove to secure a conviction is that, based on a common purpose, the accused must foresee the possibility that the acts of the

²⁷ *S v Sauls* 1981 (3) SA 172 (A).

²⁸ *Thebus v S* [2003] ZACC 12.

²⁹ *Thebus v S* [2003] ZACC 12 para 19.

participants may have a particular consequence. They argue that this they did, in that in the execution of the robberies on 10 June 2022 and 15 June 2022, and during the flight of the accused and their fellow robber from the various scenes, the foreseen that firearms may be used, and death may occur to overcome any resistance, and they reconciled them with such.

[132] The court needs to determine whether it was proven beyond a reasonable doubt that there was an actual express or implied agreement between the parties to firstly commit the crimes, and that the parties could reasonably foresee the consequences that ensued. Can it be inferred from the carrying of weapons that there is an implied agreement to use force during the robbery, and that by so using force, there was a reasonable possibility that the deceased could be killed?

[133] The defence argued, based on *S v Mgedezi*³⁰ and *S v Nooroordien*,³¹ that there was no evidence that the person who shot the deceased was in the company of the suspects and that they were in his company when the third person shot the deceased. The argument is based on the second form of common purpose, namely active association. This form usually is applicable in the case of mob justice, where the parties do not necessarily know each other or act in terms of a prior agreement.³²

[134] In *Leshilo v S*³³ the court stated the following regarding the interaction between the two:

"[i]n the absence of proof of a prior agreement, what has to be shown is that the accused was present together with other persons at the scene of the crime; aware that a crime would take place; and intended to make common purpose with those committing the crime as evidenced by some act of association with the conduct of the others."

[135] In most instances prior agreement will be inferred from the facts. In this case, from the facts, Mr Khumalo and Mr Ncube acted together, and accepted that they were together.

³⁰ [1988] ZASCA 135.

³¹ 1998 (2) SACR 510 (NC).

³² A Paize *Why do we so often get common purpose wrong?* CJR 2017(2)(A).

³³ [2020] ZASCA 98 para 10.

It is unsure who fired the shot in count 2, but in terms of the doctrine of the common purpose, they did not only embrace the robbery, but must have foreseen and thus did foresee, the possibility that the firearm would be used in case of resistance with potentially fatal or near fatal consequences.

[136] As for count 5, it was Mr Khumalo who shot Mr Ngewnya. On the same principles set out above, such conduct can also be attributed to Mr Ncube.

[137] In count 10 witnesses testified that both had a firearm. The pastor was killed by either Mr Khumalo or a third unidentified person. Despite the identity of the person not being known, it can be inferred from the testimony of Ms Mpofu and Ms Banda that there were, indeed, three people involved. It can thus be implied from the evidence, including carrying out an armed robbery, that Mr Khumalo and Mr Ncube could foresee that the firearm can be used in case of resistance, and that in so using a firearm, that someone can be killed, and reconciled themselves with it.

Count 16

[138] The testimony of Constables Moloi and Mosito corroborated one another in all material aspects. In this case Mr Khumalo and Mr Ncube did not offer a bare denial, but a different version of what transpired all together.

[139] Mr Ncube's answers were often evasive. His version seems implausible. It is implausible that about 14 police officers would be busy with one arrest for six hours. It is implausible that he was assaulted in the manner described, considering the identity parade photos taken two days later. His version of the arrest that happened after his daughter woke him up around 9:00 a.m. also contradicts his testimony. It stands in contrast with the State's persuasive case of how the ammunition was found, and the testimony that it was booked in in the presence of Mr Khumalo.

Counts 3, 4, 7 and 8

[140] *S v Nkosi*³⁴ laid down the test for joint possession of firearms as follows:

"The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

[141] The State argued that to flee the scene, Mr Ncube had the intention to exercise possession of the firearm and ammunition through Mr Khumalo in that Mr Khumalo had to eliminate any resistance and that he thus had the intention to hold the firearm and ammunition on behalf of Mr Ncube, as he was the getaway driver for them both.

[142] However, the mere fact that Mr Ncube participated in the robbery where Mr Khumalo had a firearm, does not *per se* sustain an inference beyond reasonable doubt that he possessed the firearms jointly with him.³⁵ Likewise, the mere knowledge that a group member has a firearm, or even if he has accepted its use in the execution of the common purpose to commit the crime, is not sufficient for joint possession.³⁶ In the Israel Street shooting, there is no evidence as to who possessed the firearm.

Conclusion

[143] The State has thus presented a coherent version which explains all the evidence, that is persuasive beyond reasonable doubt on most counts, but not all. The version of the accused is thus rejected.

³⁴

³⁵ *Leshilo v S* [2020] ZASCA 98

³⁶ *S v Khambule* [2023] ZAKZPHC 43.

Order

[144] I, therefore, make the following order:

1. Accused 1 is found guilty of
 - a. Count 1, 9, 13 robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997;
 - b. Count 2 and 5, attempted murder of Constable Leketi and Mr Ngwenya;
 - c. Count 6, discharge of a firearm in a built-up area of any public place;
 - d. Count 7, 11, 14 unlawful possession of an arm;
 - e. Count 8, 12, 15, 16 unlawful possession of ammunition;
 - f. Count 10, murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997;
2. Accused 1 is acquitted of count 3 and 4.
3. Accused 2 is found guilty of
 - a. Count 1, 9, 13 robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997;
 - b. Count 2 and 5, attempted murder of Constable Leketi and Mr Ngwenya;
 - c. Count 10, murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997;
 - d. Count 11, 14 unlawful possession of an arm;
 - e. Count 12, 15 unlawful possession of ammunition;
4. Accused 2 is acquitted of count 3 and 4.

WJ DU PLESSIS

Acting Judge of the High Court

Counsel for the State:

Adv A de Klerk

Counsel for the accused:

Ms S Bovu

Instructed by:

Legal Aid South Africa

Date of the hearing:

2, 3, 4, 6, 10 and 12 October.

Date of delivery of judgment:

20 October 2023