

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS112/2020

DATE: 2022-07-15

|                                            |
|--------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE         |
| (1) REPORTABLE: YES / NO.                  |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO. |
| (3) REVISED.                               |
| DATE                                       |
| SIGNATURE                                  |

10 In the matter between

THE STATE

and

MPANZA THOKOZANI AND ANOTHER

Accused

## J U D G M E N T

**KARAM AJ:** The accused, Thokozani Sakhi Mpanza, accused 1 and Khumbulani Johan Sithole, accused 3, were indicated in this court (which original indictment was amended without objection) on the following charges.

Counts 1 and 2, murder, counts 3, 4 and 5, attempted murder, count 6, unlawful possession of a fully automatic prohibited firearm and count 7, unlawful possession of ammunition.



Counts 1 and 2 were read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, hereinafter referred to as the minimum sentence provisions. Count 3, 4 and 6 were read with the provisions of section 51(2) of the minimum sentence provisions.

It is not clear as to why the accused were not charged on count 5 in terms of section 51(2) of these provisions. The Court was advised in the course of the pre-trial of this matter that accused 2 is deceased and the death certificate handed up at the time reveals that he died on 19 March 2021 of unnatural causes.

The Court was advised that his death was unrelated to the current matter, which events occurred on 1 May 2019. For the purposes of clarity and that there be no confusion, the Court directed that the trial proceed with the numbering of the accused as they appear on the indictment.

The accused were represented by Mr Mthembu of Legal Aid South Africa and the State was represented by Mr Mohammed. At this juncture the Court can state that both counsel are known to this court as experienced, competent and professional counsel.

Prior to pleading, the court satisfied itself that the accused had been made fully aware of and understood the charges and the minimum sentence provisions; as well as the doctrine of common purpose as reflected in paragraph

10 of the indictment; and the issue of competent verdicts. The record will reflect same.

The accused pleaded not guilty to all charges and no statements were made in terms of section 115 of the Criminal Procedure Act. The record will further reflect that ultimately the accused were prepared to make various admissions in terms of section 220 of the Criminal Procedure Act.

These are contained in EXHIBIT A, the section 212B(1) of the Criminal Procedure Act notice, and relate to the following: The identities, dates and causes of death and correctness of the post-mortem findings in respect of the deceased in counts 1 and 2, EXHIBITS B and C respectively;

The ballistics report regarding cartridges found on the scene of crime, EXHIBIT E; and the photographs developed from the video footage, EXHIBIT F. The accused further provisionally admitted the crime scene photographs as depicted in EXHIBIT D.

20

The court will proceed to summarise the evidence. Mbongiseni Mvina Buthelezi testified. He is the complainant on count 5. He hails from Mahlabathini in Kwa-Zulu Natal and is a local taxi owner. He was called by one Mzobanze Ngobesi who requested that the witness attend a meeting at the Mguni Hostel in Vosloorus and that Zakhele Luthuli

(the complainant on count 4) accompany the witness.

The witness and Luthuli attended the meeting on 1 May 2019 at approximately 11:00 AM. Apart from them, Mzobanze Ngobesi, Slash Ngobesi and one Mzinyathi were in attendance. The meeting related to the killing of people from Mahlabathini and Nkuthu. The meeting did not resolve the issue and Mzobanze stated, 'if people must die, let them die'.

Luthuli hails from Nongoma in KZN and the other three men from Nkuthu in KZN. The witness knew accused 1 for approximately three years prior to this date, the latter being a patron of the witness's shop at this hostel where food, cold drinks and liquor were sold.

Accused 1 also hails from Nkuthu and knows the other three men aforesaid as they all resided together at the hostel. Accused 1 was not part of the meeting, but the witness saw him with these three men subsequent to the meeting and prior to the witness leaving the hostel in the kitchen of their house.

20 The witness also knew accused 3 for some three years prior to this date as he too was a patron at the witness's shop. The witness did not know where accused 3 originated from. Accused 3 knew the other three men as he was always at their home. He would purchase from the witness's shop and proceed to their home.

Subsequent to the meeting the witness and Luthuli proceeded to the Somhlolo Taxi Rank in Vosloorus, where they both work. They arrived there at approximately 14h00. They proceeded to the shelter as depicted on photograph 11 of EXHIBIT D, where there were many people.

Subsequent thereto, a white Quantum vehicle bearing no registration plates approached. This vehicle was driven by Mzobanze Ngobesi. Accused 1 alighted there from. The witness was 12 to 15 metres away and nothing obscured his view.

Malihenja Mpanza and Khubikane Ngobesi also alighted. These three men stood at the shelter where people board taxis, some 10 metres away from the shelter where the witness was. The witness looked for Luthuli and was advised that the latter was around the corner near the Spar entrance speaking on his cellular telephone. The witness went to that area and saw Luthuli speaking on his phone.

The witness then observed a white NP300 vehicle with no registration plates approaching. The vehicle is depicted on photograph 9 of EXHIBIT F. At the back of this *bakkie* were Mzwake Nxumalo and the erstwhile accused 2. Twooy Ngobesi was the driver of this vehicle and the front passenger was accused 3.

The witness did not know accused 3's name and

surname at that stage. When the witness saw accused 3 in this vehicle, the witness was 3 to 4 metres away from him and nothing impeded his view. The witness then returned to the shelter where he was originally and stood there with Mazibuko, the deceased on count 2.

Luthuli returned to where the witness was, still speaking on his phone. Mzwake Nxumalo and the erstwhile accused 2 joined the other three men (including accused 1) at the shelter where people board taxis. Accused 3 was not standing with them. He, that is accused 3, approached from a direction of the gate that leads to Spar.

He approached the witness from the witness's left-hand side and was 4 to 5 metres from the witness. Accused 3 was in possession of a large firearm like a shotgun or rifle or AK47. The witness was shocked and moved away from Mazibuko towards Luthuli. The witness then saw accused 1, the erstwhile accused 2, Mzwake Nxumalo, Khubikane Ngobesi and Malihenja Mpanza, in other words the five persons that were standing together under the other shelter, take out firearms and fire in the witness's direction.

The witness then heard the sound of a large firearm being fired. Accused 3 was firing same, also in the witness's direction. The witness then withdrew his licensed firearm and fired in the air. If had fired at those firing at him, he would have struck innocent people as the people at

The witness hid at the female toilets and when he appeared again therefrom he saw the five men who had been standing at the other shelter run towards the Quantum vehicle that had been driven by Nzobanze Ngobesi and accused 3 running to the gate that leads to Spar.

He stated that the person depicted on photographs 9, 11 and 12 of EXHIBIT F is familiar to him, namely accused 3 and that accused 3 was so attired before and during the shooting. These photographs depict accused 3 subsequent to the shooting. Subsequent to the shooting he and others gathered at the scene and he saw the deceased in counts 1 and 2.

The witness sustained no injuries but Luthuli was injured. The two deceased were not armed and the witness did not see Luthuli withdrawing his firearm and discharging same at the time of the incident. The two vehicles with the assailants arrived within some 5 minutes of each other and the shooting commenced less than 5 minutes later.

20

Accused 1 was wearing a two piece blue work overall. On 27 March 2020 the witness attended an identification parade whereat he pointed out accused 1, the erstwhile accused 2 and accused 3. He pointed out accused 1 and accused 3, because he knew them prior to this incident and they were among those firing towards him.

The fact that the accused were identified is not in dispute. What is in dispute is the fact that accused 1 and accused 3 were dissimilar or markedly different in appearance to the other persons standing on the parade. In cross-examination he explained his role at the meeting.

At the hostels there were chiefs from different areas and he had been required by the Mahlabathini chiefs to deal with complaints or attend meetings relating to people from Mahlabathini, because of the length of time the witness had resided at the hostel. At the meeting he was given names of boys against whom complaints were directed and who were to be reprimanded.

This list was to be given to the chiefs, which he did after several days. The shooting took place because of the earlier meeting. He did not give the list of names to the police when they interviewed him regarding this incident as it was meant to be given to the chief.

The issue at the meeting related to the boys from these two areas fighting and killing each other at different shebeens. When Mzobanze Ngobesi uttered the words, 'from now onwards let them die or let us die', he was referring to the people from Mahlabathini. It was a declaration of war.

The witness was surprised at Mzobanze's utterance as he, that is the witness, was hitherto, unaware of these

incidents of violence and he asked Mzobanze as to why the latter, being aware of these incidents, had not raised them before. Mzobanze indicated that he thought the boys from Mahlathini had advised the witness thereof.

When the witness informed Mzobanze that he had no knowledge thereof, the threat was uttered. It would appear that Mzobanze was angered at being asked why this was not raised before and that he did not believe that the witness had no prior knowledge thereof.

10 It was put that the word 'matile' in Zulu denotes that death can ensue either way. The witness disputed this, stating that it is a threat to the person to whom those words are uttered, in other words, 'let you and your people die'. The witness disputed that he concealed the list of boys from the police to protect them from getting into trouble.

When the witness attended the meeting, he saw accused 1 and accused 3 present inside Mzobanze's house. It was put that accused 1 and accused 3 reside at Mazibuko Hostel, not Nguni Hostel. The witness responded that he 20 knows them as people from Nguni Hostel and that they reside there.

The witness did make a statement to the police regarding the incident. Same was not read back to him and was not written by him. It was put that the statement reads that there was male seated in the front passenger seat of

the *bakkie* wearing a blue T-Shirt who the witness does not know, but can point out.

The witness responded that he told the police that he does not know this person's name, but that the witness knows this person and that this person resides at block F at Nguni Hostel. If the statement was read back to him, he would have picked up that what he had told the police aforesaid was not contained in the statement.

10 It was put that accused 3 will testify that he has never been to Vosloorus and the Nguni Hostel prior to this incident or on the day of the incident and that he does not know Vosloorus. The witness disputed this. When the witness was asked whether he was surprised that notwithstanding Mozobanze's threat, that nobody from Mahlabathini died on that day, the witness responded *inter alia* that the intention was to kill him, that is the witness.

It was put that if accused 3 was 4 metres away from the witness, intending to shoot the witness, he would have succeeded in doing so. The witness replied that there were 20 many people at the shelter, some died, some were injured and that God had protected him.

There were many under the shelter which is 4 to 5 metres in length and 3 to 4 metres wide. There were approximately 15 people under this shelter. He was not concealed under the shelter by other people and firearms

were pointed at him. He disputed that no attempt was made on his life.

The witness fired two shots and did tell the police this. The police did not take the witness's firearm. It was put that accused 1 would say that on the day of the incident he received a call from the erstwhile accused 2 to meet the latter at that taxi rank. That accused 1, on his own, went to meet him.

As accused 1 was approaching accused 2, who was standing with other people, he heard gun fire. He turned and saw that it was the witness firing shots and he was struck by one of the witness's bullets. Accused 1 then took out his firearm and fired shots randomly whilst he, that is accused 1, ran away.

The witness disputed the version stating that he saw accused 1 arriving and standing under the shelter with the others and at the time he were shot at; that accused 1 did not shoot randomly, but fired in the direction where the witness was standing; that the witness did not shoot at accused 1 or injure him; that the witness is unaware as to whether accused 1 was struck by a bullet or not.

It was put that accused 1 ran away to Mazibuko Hostel where he lived and the following day went to Nkuthu where he received treatment for his injuries. The witness had no knowledge of this, but stated that he did not see

other people firing shots. He disputed that his bullets could have struck accused 1 as he, that is the witness, fired upwards because of the other people in front of him.

The witness confirmed that at the identification parade, accused 1 was the only person wearing a surgical boot on his leg and that accused 3 was the only person who had a blood stain on his trouser, a bandage below his right knee and his left arm in a sling.

The witness disputed that he pointed out accused 1 and accused 3 because of these unique features. In questioning by the Court the witness stated that he knows the person depicted on photographs 10, 11 and 12 is accused 3. The witness knows him and that the witness knew him before the shooting and at the time of the shooting.

He had stated that this person is accused 3 and the problem was possibly with the interpreter in stating that the person depicted is familiar to accused 3. (In rereading its trial notes in preparation for this judgment, the Court noticed that the probable reason for the witness answering in this fashion was as a result of the manner in which the State had posed the questions to him in respect of these photographs, namely, 'who does this person look like', and again, 'does the person look familiar to you').

He did not hide inside the female toilets, but behind

the wall of such toilets. When asked why the witness stated that he did not know, in relation to the proposition that accused 1 could not have been struck by any other stray bullet other than that of the witness, the witness stated that he disputed same as he could not have shot accused 1 as he, that is the witness, was firing upwards.

The State then advised the Court that it intended presenting evidence of a pointing out and confession statement made by accused 3. The Defence indicated that these were made as a result of accused 3 having been assaulted.

The matter then moved into a trial-within-a-trial. Col Sithole testified regarding the pointing out. After this witness had completed his evidence, the Court was subsequently advised by the State, wisely in the Court's view, that the state no longer intended pursuing the trial-within-a-trial in respect of both the pointing out and the confession statement and the State closed its case in the trial-within-a-trial. The court, accordingly, will not deal with the evidence of this witness.

Meldon Makatshwa testified. He is a captain in the South African Police Services stationed at the Forensic Science Laboratory in Pretoria. EXHIBITS L, L1 and M were handed in by consent. This relates to the ballistic evidence. Ballistically, he stated that it was impossible that

the six cartridges found on the scene and marked F1 to F6 on the sketch plan in EXHIBIT D would result from a shooter running away.

Rather, the pattern is indicative of the shooter firing whilst standing in the same position. When the surface is solid, the cartridge case falls and bounces and moves a little distance. Had the shooter been running, the pattern would have been in the form of a line and the cartridges would have been a few metres apart.

10 F7 and F8 on the sketch plan are different cartridges from F1 to F6, in other words from a different firearm. The two cartridges found on the scene referred to in paragraph 4.1 of the witness's EXHIBIT M are usually fired by AK47's.

In cross-examination he stated that police and soldiers use rifles that have 5.56 X 45 ammunition. If a person is running, the cartridges can bounce and take another direction, but would not form the pattern as depicted on the sketch. A cartridge can travel 2 to 4 metres 20 when discharged, depending on various factors.

The distances between the cartridges would have been greater if the shooter was running and this firearm, referring to F1 to F6, is a semi-automatic, unlike a fully automatic firearm that can eject some six cartridges at the same time. If a shooter is running, the pattern would be a

line and if the shooter is running in circles, the pattern would be a circle.

On the Court's questioning it was revealed that the cartridges found at the scene reflect that three firearms were used at the scene, two 9mm pistols and an AK47. F1 to F6 emanate from a 9mm Parabellum and F7 and F8 from a 9mm pistol.

The casings from the AK47 are not depicted on the sketch plan. Only one firearm was recovered, the 9mm Parabellum referred to in paragraph 3.1 of EXHIBIT M. (It is common cause that this is accused 1's licensed firearm and that the cartridges F1 to F6 emanate from this firearm).

It is possible that F7 and F8 were cartridges emanating from Buthelezi's firearm (or from Luthuli's firearm, having regard to the subsequent evidence of Luthuli that he fired two shots on the scene). In re-examination and questions arising from the Court's questions, the witness stated that it was unlikely that Buthelezi fired F7 and F8, his evidence being that he stood some 10 metres from the shooters, and that F7 and F8 was probably fired by a shooter in the vicinity of accused 1. (This does not include Luthuli, having regard to his subsequent evidence). On further questioning by the Defence, the witness stated that he would be speculating if he agreed that the person who fired F1 to F6, that is

accused 1, fired when moving away from F7 and F8.

There is no distance calculated between F1 and F7

and F8. It was put that accused 1 would say that he ran from the vehicle at point X on photograph 82 of EXHIBIT D in the direction depicted thereon firing shots. The witness replied that if accused 1 was in fact running, he would have stopped and then fired the shots, having regard to the pattern.

Further, accused 1's firearm ejects cartridges to the right-hand side, so the arrow is the point where the shots were fired, hence the cartridges being on the right-hand side. On further questioning by the State, the witness stated that accused 1 would have been standing at the cone depicted on photograph 82 and firing north, in other words towards the top or north of the photograph.

If accused 1 was running towards to bottom or south of the photograph as in the direction of the arrow and fired, he could only have done this if he fired with the firearm behind his back or whilst retreating, but this would still not account for the pattern that reflects that he was standing still whilst firing.

Capt Ndzinisa testified. He is based at the provincial office of organised crime and he is one of the investigating officers in this matter. On 14 April 2021 he retrieved a firearm from the SAP13 in Kwa-Thema. The

firearm was sealed and taken to ballistics in Durban.

It was reflected on the system that accused 1 is the

licensed holder of this firearm and accused 1 confirmed to

him that he possesses a license. He testified further that

the complainant in count 3 did not participate in the

identification parade due to fear and he did not want to be

involved in this matter as he was the driver of one of the

taxis owned by one of the people involved in this fighting,

notwithstanding that he, this complainant, was shot at in

this incident. It would take approximately 25 minutes to

travel from Nguni Hostel to Mazibuko Hostel, the latter

Hostel being in Katlehong. Vosloorus and Katlehong share

a municipal border.

In cross-examination he stated that his

investigation revealed that accused 1 and accused 3

resided at Mazibuko Hostel. Buthelezi did not inform this

witness that he had fired shots in the course of this incident

and he would have taken Buthelezi's firearm for ballistic

testing had he been so informed.

20

This witness did not take Buthelezi's statement, nor

did he interview him about this incident. This witness only

spoke to Buthelezi and Luthuli about the identification

parade. Had Buthelezi informed Capt Maake, the captain

who took Buthelezi's statement and which captain is now

deceased, procedure would require Maake to have informed

this witness thereof.

Buthelezi spoke Zulu and Capt Maake spoke North

Sotho, so there could possibly have been a language issue.

Samuel Mnguni testified. He is a sergeant in the South African Police Services currently stationed at the Local Criminal Record Centre in Springs. His role is a draughtsman, photographer and collector and dispatcher of forensic exhibits.

10

This witness compiled EXHIBIT D and confirmed the correctness of the content thereof, including what he did with the cartridges found on the scene. The sketch plan is not complete as is because of the size of the page, it cut out points on the scene.

He produced a complete sketch plan reflecting all points. Same was handed in by consent as EXHIBIT D1 and EXHIBIT D, provisionally accepted into evidence was now, by consent, formally and finally accepted.

20

In cross-examination he stated that he did not determine the distance between F1 and F6 on photograph 82 of EXHIBIT D.

He estimated the distance to be about 5 metres. He agreed that F2 appears closer to F6 than F1 and that F3, F4 and F5 appears much closer to F6. He arrived at the scene at 20h17. A detective who arrived at the scene prior

to this witness, showed this witness the cartridge cases lying on the floor at the scene and this witness placed the cones there as depicted on the photographs.

Photograph 81 reflects a Kombi struck by a bullet at the scene.

In re-examination he stated that Sgt Masoma was the detective referred to and it was the latter who advised the witness that the Kombi was struck by a bullet at the scene.

Zakhele Luthuli testified. He is the complainant on

count 4. He is 52 years of age and has known Buthelezi for some 5 years. The witness lived at Nguni Hostel for some 20 years and his father and brother reside there, some 12 metres from the Ngobesi family residence there.

On 1 May 2019 he accompanied Buthelezi to a meeting with the Ngobesi's. Upon his arrival he found Slash Ngobesi, Mzinyathi Ngobesi and Mzobanze Ngobesi. They thanked him for his presence at the meeting. They said to Buthelezi, 'we are being killed by your boys'. Mzobanze enquired from the witness whether the witness was aware of this and the witness replied that this was the first time that he had heard of this.

Mzobanze said that he is now informing the witness that they are being killed by the boys of this man, referring to Buthelezi. The witness stated that this matter required the attention of the higher leaders and Mzobanze replied

that he does not care about the higher leaders as they do not arbitrate correctly.

Mzobanze stated to the witness, 'brother, let us fight if we have to fight'. The witness replied, 'Mzobanze, I am not part of this, let me go', requesting that he be excused from the meeting. During this period Mzobanze and Buthelezi were arguing on the other side of the area and the witness heard Mzobanze saying to Buthelezi, 'let us fight, because we are being killed by your boys'.

10 He did not hear Buthelezi's response. He and Buthelezi then left in the witness's vehicle, left the vehicle at the carwash and they walked to the Somhlolo Taxi Rank. They arrived there at approximately 14:00. The witness knows accused 1 and accused 1's name and had known him for over a year prior to the incident.

He used to see accused 1 at the hostel at the residence of the Ngobesi's. Accused 1 arrived at the taxi rank in a white Quantum vehicle with no registration plates. The witness was playing snooker at the shelter at the time as reflected on photograph 3 of EXHIBIT D.

There were five people who arrived in that vehicle including accused 1, namely Mzobanze Ngobesi, Malihenja Mpanza, Khubikane Ngobesi and Mzwake Nxumalo. They stood at another shelter just opposite to that where the witness was and spoke among themselves.

There were 10 or more people under the shelter where the witness was. Buthelezi was there in sight, talking to other people. An NP300 white van then arrived some 15 minutes later, also without registration plates and as depicted in photograph 2 of EXHIBIT F.

The witness observed that the Two-boy Ngobesi was the driver, there was a passenger inside next to the driver, and the two people at the back of the *bakkie* namely Sizwe Makhubane and Mzwake Nxumalo. The passenger next to the driver was known to him by sight, but he did not know his name at the time.

That person is in court and he pointed out accused 3. When he saw accused 3, it was at a distance of approximately 7 or 8 metres and the witness waved at the driver and the driver waved back at him. The witness saw accused 3 earlier that day when he attended the meeting.

He was standing in a group speaking to others not far away whilst the witness was in the meeting. He had further seen accused 3 on prior occasions at Nguni Hostel with the Ngobesi family when he, the witness, used to visit his family there.

When Sizwe Makhubane and Mzwake Nxumalo alighted, they joined the group from the Quantum at the shelter. Buthelezi approached the witness after the *bakkie* arrived and asked the witness whether he saw the *bakkie*.

The witness stated that as he was walking around the rank, the *bakkie* arrived and stopped at the steel gates leading to the rank.

The witness then moved to the area of the snooker table. Accused 3 approached holding a big firearm. He demonstrated like a person carrying a rifle or shotgun. He approached and is the person who started firing towards where the witness was.

Accused 1 and Sizwe Makhubane were near accused 3 and they also fired shots in the direction of where the witness was under the shelter. Accused 1's life was not in any danger before accused 1 fired shots as they were the people who arrived with firearms, and the witness and those with him had done nothing at that stage.

The witness was 8-10 metres from accused 3 at the time accused 3 fired shots and approximately 8 metres from accused 1 and Sizwe Makhubane. Accused 1 and Sizwe Makhubane was standing together when firing and were 1.5 metres apart from each other.

Accused 3 had alighted from the vehicle with the big firearm and came through the gate that leads to Spar. As he entered the gate, he pointed the firearm and fired shots. Accused 1 and Sizwe were near accused 3 when he entered the gate and they were 10-12 metres from the shelter where they had stood after exiting the Quantum.

As the deceased on count 2 was struck, the witness ran away. The shooting continued and did not stop. He ran some 15 metres and felt something strike him on his back. He turned around, saw accused 1 and fired two shots towards accused 1.

The J88 in respect of this witnesses' gunshot injury, was handed up by consent as EXHIBIT O and reflects that this witness was struck by a bullet in his right upper back. Accused 1 made a groaning sound after the witness had fired at him. He did not see where accused 1 went thereafter.

After the shooting accused 3 went to the gate and exited the rank. He identified the person depicted on photographs 6, 7, 8 and 11 and 12 as accused 3 and this was after the shooting. At the identification parade the witness pointed out accused 1, accused 2 and accused 3. Both the witness and Buthelezi possessed 9mm Norinco firearms at the time and the witness confirmed that he had a license to possess same at the time.

20 In cross-examination he stated that he was the link between the leaders of Ngome and the residents from Ngome at the hostel. Similarly, Buthelezi was the link.

The witness was invited to the meeting by the Ngobesi's to listen to the issue surrounding the problem with the Mahlabaithini boys. Notwithstanding the fact that

he attended the meeting with Buthelezi, he regarded himself as a neutral person and did not take sides. He decided that he would take this issue to the highest authority.

When Buthelezi was confronted with this issue by the Ngobesi's, Buthelezi stated that this was the first time that he had heard of this issue. He confirmed that Buthelezi informed him that there are some boys referred to, that he needs to see.

Buthelezi mentioned that there was a list of boys names, but the witness did not see the list being written and did not request Buthelezi to see it. It appeared to the witness, from Mzobanze's utterances, that the fight between Mahlabaathini and Nkuthu must continue.

The witness did not hear the full argument between Mzobanze and Buthelezi as he, the witness, was speaking on the other side to Slash and Mziyathi. He did not hear the words, 'let there be death', but did hear the words, 'let there be a fight if we have to fight'.

Slash and Mziyathi were elders and they were trying to defuse the tension between Buthelezi and Mzobanze. The meeting was disrupted because of Mzobanze's words aforesaid and the others were attempting to calm Mzobanze.

It was put to him that Buthelezi had stated that three persons alighted from the Quantum, namely accused

1, Malihenja and Khubikane, not five people as the witness stated (including Mzwake Nxumalo and Mozobanze). The witness was adamant as to what he saw and maintained his testimony.

The witness disputed that the two persons who alighted from the back of the *bakkie* joined those three at the shelter thus making them five in total. The witness maintained his version. The witness confirmed that he was speaking on his cellular telephone near the *bakkie*.

10 When asked why he did not also greet accused 3 seated in the *bakkie*, if he knew accused 3, the replied that it was not a verbal greeting to anybody-he waved his hand. He confirmed that he said in chief that he waved at the driver, but he also knew accused 3.

After his greeting, the *bakkie* proceeded to the side at the Spar and disappeared behind the Spar, subsequent to the other two having disembarked from the back of the *bakkie*. When the witness proceeded back to the shelter where the snooker table was, his back was to the gate. He did not see accused 3's clothing whilst he was seated in the *bakkie*, but saw his blue T-Shirt.

It did not take 2 minutes for accused 3 to emerge from the corner carrying the firearm which the witness believed to be an AK47. The witness did not see him disembarking from the vehicle. The windows of the *bakkie*

were not tinted.

All Buthelezi said to the witness was, 'do you see these people', at the stage when the *bakkie* arrived. The witness did not brace himself for war. As far as he was concerned there was no war for him and he would not know who he has to fight.

The witness stated that he suspected that Buthelezi could be a target, and not himself as he works at the taxi rank and patrols it. He was simply invited to the meeting and not part of the altercation. When he saw the vehicles arriving he went to the gate as he did suspect that there could be trouble.

However, he never thought or expected anything would happen and he did not brace himself for something to happen. The witness went to hospital before the police arrived at the scene. When he made his statement he informed the police that he had fired shots at the scene.

The police did not take his firearm as at that stage he had been hijacked of his vehicle and his firearm was therein. After his discharge from hospital he remained at home, afraid, not leaving his home and waiting for the police investigating the matter to approach him.

He was discharged from hospital the day after the incident and was hijacked in July 2019. Ultimately, the police approached him regarding this incident. He intended

reporting the incident to the police, but did report same to the headmen at the hostel.

He confirmed that he made a statement to the police on 19 August 2019. When he reported the hijacking, the police advised him that there is a policeman handling another case, namely the current matter, that the witness needs to meet with.

He did inform the police about the current matter

when reporting the hijacking, but the investigating officer in this matter has not as yet approached the witness. Notwithstanding that there is nothing contained in this witness's statement regarding him having fired shots during the incident, he maintained that he told the police of this and that he directed his firearm at accused 1.

At the time of the incident, accused 1 and accused 3 were not residing at Nguni Hostel, but were visiting there. The witness visited his family on a daily basis at the hostel and would see accused 1 and accused 3 there on weekends. Both accused 1 and accused 3 were at the hostel on 1 May 2019.

He disputed that accused 1 fired randomly and stated that he shot towards the witness. He further disputed that accused 1 was running away when firing. He maintained that he, the witness, and not Buthelezi shot accused 1. He disputed accused 3's version that he was

not at the scene that day, stating that he knows accused 3 and the latter was there.

On the Court's questioning, he stated that neither accused 1 nor accused 3 were party to the meeting. The persons who he mentioned fired shots are those he saw firing. There may have been others who also fired shots. When he saw accused 1, accused 1 was shooting at the witness.

He has not fully recovered from his injury in that there are days when he still suffers from pain.

On further questioning by the Defence, it was put that Buthelezi said he saw accused 1 and accused 3 inside the Ngobesi house at the hostel at the time of the meeting. The witness stated that they were outside the house.

The State then closed its case. After the closure of the State's case, Mr Mthembu advised the Court that both accused elected not to testify and to close their respective cases. He advised the Court that he had explained the implications thereof to the accused and the fact that the Court will in such case have to determine the matter solely on the evidence before it, namely that of the State witnesses.

The Court requested the interpreter to interpret same to the accused, which was done, and the accused indicated that they understood. They then confirmed to the

Court that they did not wish to testify in their respective defences.

The Defence closed its case.

Counsel subsequently addressed the Court in argument.

It is trite that in a criminal trial the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test, but is applied in order to ensure that only the proven guilty are convicted. It is further trite that the Court is required to adopt a holistic approach in respect of the evidence, and its assessment thereof, and to use a common sense approach.

It is not sufficient if the guilt of the accused appears possible or even probable, their guilt must be proven beyond reasonable doubt. See generally in this regard *S v Hadebe and Others* 1998 (1) SACR 422 (SCA), *S v Van Der Meyden* 1999 (1) SACR 447 (SCA), *S v Phallo and Others* 1999 (2) SACR 558 (SCA), *S v Van Aswegen* 2001 (2) SACR 97 (SCA), *S v Shackell* 2001 (2) SACR 185 (SCA) and *S v Chabalala* 2003 (1) SACR 134 (SCA).

Regarding the failure of the accused to testify. Whilst they have a right not to testify, the nature of the damning evidence against both of them certainly resulted in a case that they had to answer to. However, and notwithstanding their failure to testify, the stringent onus on the State remains the same and is in no manner altered or

diminished. See *S v Boesak* 2001 (1) SACR 912 (CC), *Mphanama v S* (Case no 1107/2020) ZASCA 11, an unreported judgment of the SCA handed down on 24 January 2022.

It is trite that versions put on their behalf by their legal representative do not constitute evidence, unless and until same is testified to by the accused. Mr Mthembu is an experienced counsel and advised the court that he had explained to the accused the implications of their failure to testify.

The Court ensured that the accused understood that it could in such circumstances only determine the matter on the evidence before it, namely that adduced by the State. Notwithstanding that their versions put are not evidence before this Court, the Court makes the following observations:

It was put that accused 1, having been shot and injured by Buthelezi, was hospitalised and or had to receive treatment. He fled home and the following day left to Nkuthu in KZN and received treatment there. It is surprising that he left to Nkuthu and did not seek treatment in the many local hospitals or clinics.

It is suspicious that on his version, he went to the taxi rank to meet the erstwhile accused 2, the latter being one of the people the complainants say were in the group that shot at

them.

Accused 1's version that it was Buthelezi who had shot and injured him was denied by Buthelezi who had testified that he had fired into the air, and it was Luthuli's evidence that he himself had shot and injured accused 1.

Regarding accused 3's version that he was not there on the day in question, and had never hitherto been to Vosloorus or Nguni Hostel. It is clear from the evidence of the complainants that they knew him from the hostel having seen him there on various occasions at the residence of the Ngobesi's.

Further, that he present there on the morning of the incident when the meeting took place.

Both Buthelezi, and Luthuli in particular, were impressive witnesses. It is clear to the Court that they were simply testifying to what occurred and as to what they observed.

There was no attempt to exaggerate their evidence or falsely further implicate the accused, which they could easily have done. They were cross-examined extensively and nothing material emanated therefrom that adversely affects the strength of the State's case.

The Court finds them to be honest witnesses, there is no reason to disbelieve them and their evidence is further independently corroborated in material respects. There is no evidence of any ill feeling or bad blood between

themselves and the accused prior to the day in question and prior to the shooting later that day and nothing of this nature was put to them by the Defence.

It must be noted that whilst Buthelezi emanated from Mahlabathini, Luthuli did not and there would be no reason for him to implicate the accused who emanate from Nkuthu. The Court finds that the criticisms levelled against them during argument are neither material nor relevant and do not impact upon their credibility.

10 The Court finds that it immaterial whether or not accused 1 and accused 3 resided at Nguni Hostel at the time of the incident. What is relevant is that both complainants saw them regularly there at the Ngobesi family, including on the morning of the incident when they attended the meeting.

It was not disputed on behalf of accused 1 that he was regularly at the Ngobesi family. It is further irrelevant whether accused 1 and accused 3 were inside or outside the residence at the time of the meeting. What is relevant is that both complainants testified that both accused were present.

There is the inconsistency between the complainants as to the number of people who alighted from the Quantum vehicle and stood under the shelter, Buthelezi stating that it was three of the five people therein and

Luthuli stating that all five had alighted.

Discrepancies of this nature are to be expected where different eyewitnesses give an account of the same incident, in an intense and moving scene. See *S v Sithole* 2006 JDR 0739 (SCA). This may possibly be argued is a material contradiction were accused 1 not included in those who alighted.

However it is the evidence of both complainants that accused 1 did alight from that vehicle, coupled with the fact that his identity is not in issue. Even if the Court were to accept that the complainants did not inform the police that they fired shots with their own licenced firearms, they were certainly legally entitled to shoot, given the life threatening situation confronting them and the failure to inform the police would not detract from the veracity of their testimony or their credibility.

What is clear from their evidence is that on the day in question they attended the meeting at approximately 11h00 at the hostel at Mzobanze Ngobesi's request. The latter threatened Buthelezi. Several hours later and at approximately 14h00 the assailants, who the complainants knew, arrived at the taxi rank where the complainants work and were present.

The assailant were all armed and opened fire on the complainants. This occurred in broad daylight, at very

close range, and there was nothing obstructing the respective views of the complainants. The assailants then left the scene. In these circumstances there is no issue regarding possible mistaken identification.

The Court attaches little if any weight to the evidence pertaining to the identification parade. It is evident from the photographs that accused 1 and accused 3 stood out proverbially 'like sore thumbs' from the other suspects on the line up.

10 Whilst this parade may have been necessary to ascertain the identity of accused 3, it was never specifically put to the complainants that they do not know accused 3 and that he does not know them.

Both complainants testified that they knew accused 1. This was not disputed and the parade was unnecessary pertaining to him. See *R v Diadia* 1962 (1) SACR 307 (A), *S v Bailey* 2007 (2) SACR 1 (C), *Arendse v S* [2015] ZASCA 131 (SCA) and *Abdullah v S* (Case no 134/2021) ZASCA a decision of the SCA delivered on 31 March 2022).

20

Notwithstanding the fact that there was no expert evidence that the person depicted in the video footage is accused 3, one does not need to be an expert to observe, as this Court did, given the clarity of same and the striking similarities and resemblance, that the person depicted is indeed accused 3.

There is further no evidence before this Court that accused 3 has an identical twin brother. It is further clearly visible from the photographs taken from the footage that accused 3 was in possession of an automatic firearm or weapon and there is the admitted ballistic evidence of cartridges from an automatic weapon found at the scene.

There is further the admitted ballistic evidence of cartridges from accused 1's licenced firearm found at the scene.

10 Regarding counts 1 and 2. It is clear from the evidence that the intention was to kill, at the very least, the complainant Buthelezi.

It is further clear from the evidence that there was planning and that several hours had passed from the failed meeting to resolve the issue, at which meeting Mzobanze Ngobesi had uttered the threat of death to Buthelezi. Whilst Buthelezi was the target, he was in the company of other people, including the two deceased, when the firing commenced.

20

Clearly the legal intention in respect of the murder of the two deceased was in the form of *dolus eventualis*. Part 1 of schedule 2 of the minimum sentence legislation does not specify that the intended victim has to die in order for same to be applicable. In other words, Buthelezi did not have to die as the murder victim for this section to be

invoked in respect of the deceased in counts 1 and 2. The two deceased were murdered in the course of the execution or furtherance of a common purpose or conspiracy, namely to murder Buthelezi.

It does not matter further who of the assailants fired the fatal shots or with which firearm they were fired. The doctrine common purpose having been alleged in the indictment, is applicable, and there was no evidence to dispute same or that there was no prior agreement to kill 10 Buthelezi.

In the circumstances, subsection (d) of Part I of Schedule 2 of Act 105 of 1997 applies.

Regarding count 3. In the course of argument, counsel for the State conceded that there was no evidence to support a conviction on count 3, the complainant being available but refusing to testify.

Regarding counts 6 and 7. Counts 6 and 7 pertain to the firearm in possession of accused 3. It is common cause that accused 1 had a licence in respect of his own firearm. The State submitted that accused 1 also be convicted on counts 6 and 7 on the basis of joint possession.

For this to occur, firstly accused 1 must have had the intention to exercise possession of accused 3's firearm through accused 3, and secondly, the actual *detentor*,

accused 3, must have had the intention to possess his firearm on behalf of accused 1.

However, mere knowledge by accused 1 that accused 3 was in possession of his, that is accused 3's firearm, and even acquiescence by accused 1 in its use to commit the offence, is not sufficient to make accused 1 a joint possessor.

See *S v Nkosi* 1998 (1) SACR 284 (W), *S v Mbuli* 2003 (1) SACR 97 (SCA), *S v Ramoba* 2017 (2) SACR 353 (SCA). The State has failed to proof these requirements aforesaid. The further fact that accused 1 possessed his own firearm tends to negate such intention.

Counsel for the Defence argued that the State had failed to prove that the firing mechanism of the fully automatic weapon was functional. The State submitted that whilst there was no ballistic proof thereof, that same could be inferred from the evidence.

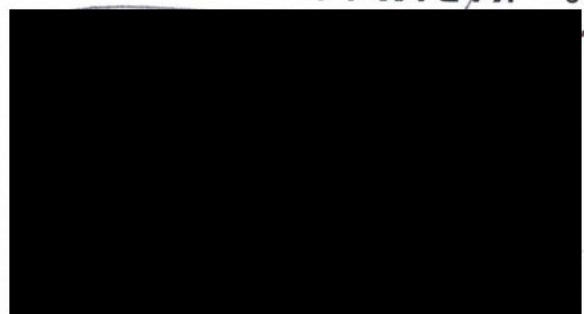
The Court is required to use a common sense approach. Both complainants testified to only accused 3 being in possession of an automatic weapon and that he fired same. The other shooters wielded handguns. The admitted still photographs in EXHIBIT F depict accused 3 in possession of same.

The ballistic evidence confirms that two cartridges from such a weapon were found on the scene. The Court

finds that this, and in the absence of any evidence that accused 3 had a licence to possess same or any evidence from accused 3 to counter that of the complainants, constitutes proof beyond reasonable doubt of accused 3's possession of same.

Accused 1, Mr Mpanza, on counts 1 and 2 you are found guilty as charged. On count 3 you are found not guilty. On counts 4 and 5 you are found guilty as charged. On counts 6 and 7 you are found not guilty.

10 Accused 3, Mr Sithole, on counts 1 and 2 you are found guilty as charged. On count 3 you are found not guilty. On counts 4, 5, 6 and 7 you are found guilty as charged.



20 KARAM AJ

JUDGE OF THE HIGH COURT

DATE: .....