

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. CC26/2018

In the matter between:

THE STATE

VS

ODWA SQANDULO SONGCA

JUDGMENT

JOLWANA J

Introduction

[1] The accused was indicted in this Court on four charges being the pointing of a firearm in contravention of the Firearms Control Act 60 of 2000, murder, possession of an unlicensed firearm and possession of unlicensed ammunition in contravention of various provisions of the Firearms Control Act. The incidents to which the charges arose, according to the indictment, occurred on the 7 April 2018 at night in the town of Mount Frere on the N2 national road.

Summary of substantial facts.

[2] The summary of substantial facts attached to the indictment and provided to the accused in terms of section 144(3) (a) of the Criminal Procedure Act 51 of 1977 (the CPA) read as follows:

- “1. On the 7 April 2018 at about 12 midnight the deceased was driving his motor vehicle, to wit, Toyota corolla with registration number FN15NZ GP when he parked it in front of other vehicles on the main street, Mount Frere village, Mount Frere.

2. The accused was sitting in one of the vehicles parked behind the deceased when on seeing the deceased arriving, he remarked, "*Here is this dog*" referring to the deceased.
3. Earlier on the accused had complained to his friends and witnesses that the deceased who is a policeman and one of his colleagues are giving him hard times in his criminal activities and that he would kill them.
4. The accused even showed his friends and witnesses a firearm that he would use to kill these police officials.
5. As the deceased was still sitting in the driver's seat, the accused approached him from his side and fired several shots at him killing him.
6. The accused then ran away.
7. The deceased died as a result of "**Gunshot wound of the head.**"

[3] The court was further advised that certain admissions in terms of section 220 of the CPA have been agreed by the State and the defence. They read thus:

- "1. That the deceased in this case was at all material times correctly identified as **PHUMZILE MICHAEL NTANDO**, being the male person mentioned in the indictment.
2. That **DR MXOLISI GCWABE** conducted the post mortem on the body of the above-mentioned on the **10th of April 2018**.
3. That the body of the deceased suffered no further injuries from the time of the alleged offence up to the time that the post-mortem aforementioned was conducted on his body by **DR MXOLISI GCWABE** on the **10th of April 2018**.
4. That on the date aforementioned **DR MXOLISI GCWABE** correctly noted his findings on the post-mortem report per **Death Register No. 93/2018** in accordance with the examination on the body of **PHUMZILE MICHAEL NTANDO**.
5. That the cause of death of the deceased, **PHUMZILE MICHAEL NTANDO**, is as indicated on the post-mortem report, to wit '**GUNSHOT WOUND ON THE HEAD**'.
6. That the photo album together with the key to it with Reference Number: **39/04/2018** depicts a correct view of the scene of crime".

The case for the State.

[4] The accused who was, throughout, legally represented, pleaded not guilty to all the charges. His legal representative advised this Court that he would not be disclosing the basis of his plea of not guilty.

[5] The State called its first witness Simthandazile Njence. He testified that he resides at Lubhacweni Administrative Area in the district Mount Frere. He knows the accused from the taxi cabs that they drove in that town ferrying passengers and they were also friends. On the night of the incident he was driving a taxi cab which was a white Jetta 4 at about 23:00. He approached Bongani who was in his green Toyota Tazz near or opposite Boco Hardware on the main street in Mount Frere and placed his finger on his neck. There were street lights that provided enough light in the area. At that stage the accused cocked a firearm and pointed it at him. The accused was inside Bongani's car with others at that time. He could not see what type of a firearm that was but it was a small firearm. He thought that the accused was playing with him and they laughed it off and left it at that whereafter the accused put his firearm back.

[6] Thereafter a white motor vehicle arrived and parked in front of Bongani's vehicle. At that time he was still standing near the driver's window outside Bongani's vehicle. This was a security vehicle branded with Mount Red Security branding branded in red. The accused uttered the words, "*here is this dog*" when that vehicle arrived. He knew the owner of that vehicle but at that stage he did not see who was driving it. Bongani said he wanted to go home to his wife and he left. He also went to his own vehicle which was also parked there. Some 15-30 minutes later he heard gunshot sound near deceased's vehicle which was that Mount Red Security vehicle. That vehicle was parked about three vehicles away from where he was and the shooting happened in

front of him, not behind him. After the shots were fired he saw the accused crossing the road towards SSS bottle store running. Nobody was chasing the accused. He heard that Mr Ntando had been shot and killed in that area the following morning.

[7] under cross-examination Simthandazile testified that there were many people who came out of the car wash tavern after the shooting. He confirmed that he did not see who shot the deceased as he was not able to see the person who shot the deceased from where he was. He just saw the accused running across the road immediately after the shots were fired. On that basis he assumed that it was the accused who had fired the shots. He disputed it when it was put to him that the accused would say that he never saw him that day. He also insisted that the accused had uttered the words "*here is this dog*". He testified that he did not make any statement to police about being pointed with a firearm because at the time he thought that the accused was playing with him. He heard the following morning that it was the accused who shot the deceased. He maintained that the accused pointed him with a firearm. He also confirmed his evidence that he never said the accused shot the deceased, he only said he saw him coming from where the deceased's vehicle was running across the street.

[8] When he was re-examined by the prosecutor he testified that people came out of the tavern after the shots were fired. However, there were no people at the place of the shooting at the time of the shooting. Immediately after the shooting he saw the accused running across the street before people came out of the drinking place in the car wash. He further disputed the accused's version that he never saw him that day. He testified that Bongani was sitting in the driver's seat of his vehicle. Siseko, the accused and another slender person and Qetse were sitting in that vehicle. Bongani's vehicle's window was opened and he was standing outside the window. The accused

was in the back seat but he was not sure whether the accused was sitting in the middle or behind the driver's seat on the right hand side. When Bongani said he wanted to go home, the accused and the others who were in the vehicle got out of the vehicle and Bongani left. He returned to his vehicle where he was with Asanda. He had known the accused for a year and they also used the same mechanic to repair their taxi cab vehicles.

[9] The next witness for the State was Bongani Mkoko. Bongani testified that he stayed in Mount Frere. He was in town on the night of the 6 or 7 April 2018. He knocked off from work at about 17:00. He then took a young man called Thabo with him and they went to see his girlfriend at her place. He came out from his girlfriend's place at about 22:00. As they drove past the car wash on the main street he heard a person calling his name. He stopped his vehicle and parked on the side of the road. He realized that the person calling him was Qetse who opened the near door and entered the vehicle. The accused and Siseko also came inside his vehicle. The accused said he needed his assistance regarding a vehicle engine. He said he had bought a vehicle from one Makiyoyo that needed an engine. He told the accused that he did not know anyone with that engine.

[10] Simthandazile arrived and put his finger on his neck and he turned to look at him. At that stage he heard a clicking sound and saw the accused hiding something. He then said to the accused he must not use a toy to scare them. This was with reference to the cocking sound. It was dark in the vehicle but what he saw seemed like a firearm or a toy of a firearm. A vehicle from Mount Red Security Services arrived and parked in front of his vehicle. The accused then said "here is this dog" or "here comes this dog". He reprimanded him not to say that in his presence about another person. He told them to get out of his vehicle because he wanted to go home. The Mount Red

Security vehicle was driven by the deceased and he did not know whether he was alone in his vehicle. He did not remember whether the street lights in that vicinity were working but there were lights from other vehicles. He explained that that place near which they parked their vehicles was a car wash and people danced and consumed liquor there. He and Thabo left after accused and others got out of his vehicle. No shooting had occurred when he left.

[11] Under cross-examination he testified that when he parked his vehicle it was dark. Where the deceased's vehicle was parked there were no lights and the lights of his own vehicle were off. Only the lights of the deceased's vehicle were on. It was put to him that the accused admitted being with him that night at about 22:00. He testified that he does not drink alcohol and he was coming from his girlfriend's place when somebody shouted his name which was why he stopped his vehicle. He insisted that the accused did utter the words "here is this dog" or words about a dog referring to the owner of the security vehicle which had just parked there. He testified that he did not see the accused shooting the deceased. He only heard the following day that a person was killed in that vicinity.

[12] The next State witness was Yanga Qetse Mayitshe (Qetse). He testified that he resided at Lubhacweni Administrative Area before he was placed in the witness protection programme. He got to be placed in the witness protection programme after it was alleged that the accused's friends wanted to kill him because he witnessed it when he killed the deceased. The trial delayed and in the meantime he received an ancestral calling. Because of his ancestral calling he requested to be discharged from the witness protection programme. He now no longer resides at Lubhacweni. He now resides in Kwa-Zulu Natal.

[13] On the night of the 7 April 2018 he was in town in Mount Frere. He was with the accused in Bongani's vehicle with Siseko as well. It was at night. He got out of that vehicle and went to buy himself tobacco. When he returned he realized that the vehicle was full. He then went to the car wash which is a drinking place. He did not get the tobacco at the car wash and went to look for it at the garage. As he got out of the car wash the deceased's vehicle was parked under a tree and he noticed that the deceased was busy on his phone. At that time he was walking past the vehicle on his way to the garage. He already knew the deceased as a police officer in Mount Frere. The engine of the deceased's vehicle was running and the headlamps were on and the security vehicle lights on the vehicle were also on. There were also street lights there providing enough light. When he looked back the accused appeared from behind. He then rushed. This was because he saw the accused carrying a firearm which was a pistol. Thereafter he heard gunshot sounds. The accused was shooting the deceased. When the deceased was shot he was sitting in his vehicle in the driver's seat. He was alone in the vehicle. He was shocked and he did not know how many shots were fired but it was more than one shot. Thereafter the accused went across the street running. People came from the car wash asking if he was not the one who shot the deceased. While they were sitting in Bongani's vehicle earlier with the accused they were all having a general conversation. He saw the accused carrying a firearm in Bongani's vehicle. When Simthandazile arrived the accused cocked the firearm and pointed him with it. When the deceased arrived he had not yet arrived. He did not hear anyone saying "*here is this dog*".

[14] Under cross-examination he testified that at the time he was sitting inside Bongani's vehicle with others he never heard anybody making any remark about a dog. When he went to buy himself some tobacco it was before the shooting. When

he returned to the vehicle he was told that the vehicle was full. He testified that he saw the accused shooting the deceased. He was about 12 metres from the vehicle of the deceased and there were street lights there. There were also lights coming from the deceased vehicle. He could see the accused shooting the deceased because of the street lights and the vehicle lights. It was put to Qetse that the accused never came out of his vehicle. Qetse testified that he saw the accused walking up the street behind him. He maintained that he saw the accused shooting the deceased. He also testified that he did go to the car wash where he consumed alcohol. It was very late at about 23:00. Even though he did consume alcohol he could still appreciate what was going on. He further confirmed that earlier the accused had pointed a firearm at Simthandazile. When it was put to him that he could not have seen the shooting because there was no sufficient light there for him to identify the accused, he testified that there was sufficient light where the shooting took place. He already knew the accused from taxi cabs and he had known him for a long time although they did not usually hang out together.

[15] The next witness for the State was Thabo Phikwa. He testified that he resides at Lubhacweni in Mount Frere and he knew the accused through Bongani. At the time he had known the accused for about two years. On Friday the 6 April 2018 he was in Bongani's vehicle at about 18:00 or 19:00. They were going to Bongani's girlfriend. At a certain point when they were near SSS car wash on the main street in Mount Frere the accused came with Siseko and they sat at the back seat. He was sitting in the front passenger seat. There was a general conversation about something the accused wanted from Bongani relating to a vehicle engine. After a short while the deceased's vehicle arrived and parked a distance behind them. The deceased alighted and came to Bongani's car and they spoke through the window. The vehicle

lights in the deceased vehicle were on. He did not notice if the street lights were on or not. He knows Simthandazile and he saw him that night. He came to Bongani's vehicle and had a conversation with them. The accused uttered some words saying "*here is this dog*". He was not sure if the deceased had already come to Bongani's vehicle and returned back to his vehicle when these words were uttered. He did see a firearm being taken out by the accused as though he was playing with it. It was a 9mm pistol. It was black in colour. However, he did not see anyone being pointed with a firearm. The person who was carrying a firearm was the accused. He was sat in the front passenger seat and because of that he did not notice the person the accused was playing with a firearm with. He heard a clicking sound as though the firearm was being cocked. He was not there when the shooting took place because he had already left with Bongani.

[16] Under cross-examination he testified that while he was present he did not see the accused pointing a firearm at anyone. However, the accused did play with a firearm.

[17] The State called sergeant Mvinjelwa, a police officer stationed in Mount Frere. She testified that she was a constable at the time of the incident. She was on duty at the Community Service Centre at Mount Frere police station on the 7 April 2018. Her superior asked her and constable Giwu to attend to the crime scene. They went to the crime scene and found the deceased's vehicle engine running on the N2 in the main street in Mount Frere opposite Buco Hardware. The deceased was sitting in the driver's seat with blood on his neck. He had a number of bullet wounds on his upper body. She saw about seven empty cartridges close to the vehicle and two other empty cartridges a short distance from the vehicle. Those were cartridges of a 9mm pistol. She called the emergency services who confirmed that the deceased was dead. She called the Local Criminal Record Centre and a photographer came and took photos

and collected exhibits. When the deceased's body was being taken out of the vehicle she noticed his firearm between his thighs. It was a 9mm State issued firearm with one magazine and 15 live rounds of ammunition. The detective had also come to the crime scene and the body of the deceased was taken away by Forensic Services.

[18] Under cross-examination sergeant Mvinjelwa testified that when she arrived at the crime scene the street lights were on. She did not see who shot and killed the deceased. The deceased was a police officer at Mount Frere police station and was a sergeant. The deceased's vehicle was branded with Mount Red Security Services branding in red. The vehicle had a red security light on top and its lights were on.

[19] The next witness for the State was Taruni Vumazonke. He testified that he resides at Mount Frere. He knows the accused as his customer as he is a vehicle mechanic. The accused used to take his vehicles to his workshop for repairs. He met the accused for the first time in 2017 which was at about the time he opened his workshop. The accused would bring his vehicles to him for repairs from time to time. One of his other customers was the deceased and sometimes the accused and the deceased would arrive at the workshop about the same time. The accused and the deceased knew each other. On one occasion he was at the deceased's place near Ludidi building where he stayed. He was fixing the deceased's vehicle. The accused saw him there and stopped his vehicle and approached him. He did not notice any bad relationship between the accused and the deceased and they were chatting about some woman. The deceased later brought up the issue of a woman called Andisiwe and he got the impression that he was jealous of the relationship she had with the accused.

[20] On one occasion the accused came to his workshop with Simthandazile. They were just visiting him. He noticed some tension between them but he thought they

were just jealous of each other as they were both in the taxi cab business. One time the accused came to his workshop. He saw a small firearm carried by the accused although he was not sure if it was a real firearm. It was a black small firearm. It had a police badge on it. The accused was inside a vehicle with one Sifiso that evening. He himself was outside the vehicle. There were lights that were on there. There was a grinder at his workshop which he shared with Sifiso who did panel beating on vehicles. The grinder was being used in that vehicle to grind the firearm. He knows the police officer called Gripa.

[21] One day the accused once came to his workshop with Simthandazile. The accused asked him to look for the deceased who was already his client. The accused did not tell him why he needed the deceased. He did not look for the deceased as the accused had asked. When he met the deceased he told him that the accused was looking for him. However, the deceased was dismissive and did not take it seriously saying he was not afraid of the accused. He later received a phone call from the accused asking him to fetch him near Spar in town. When he met the accused the accused enquired if he had found the deceased and he said no. He said no because he had realized that the accused had a bad attitude towards the deceased.

[22] Under cross-examination he testified that the accused did come to his workshop carrying a firearm. It was put to him that the accused would testify that he never asked for a grinder from his workshop. Mr Vumazonke testified that the accused got the grinder from his colleague Sifiso. He assumed so because he shared that grinder with Sifiso and the accused did not get it from him. When he was re-examined he testified that when the grinder was used on the firearm he assumed that it was being used to file-off the serial number of the firearm as the vehicle the accused was in with Sifiso did not need a grinder.

[23] The next witness called by the State was warrant officer Maliwa. On the day of the incident he received a call from captain Latsha who told him that the deceased had been shot and killed and asked him to go to the crime scene. This was in the morning and he found sergeant Mvinjelwa who was then a constable already at the crime scene. He saw the deceased's car and his bullet riddled body. There were empty cartridges around the crime scene. The deceased's vehicle was branded with Mount Red Security branding and had security lamps on top. The deceased was in the driver's seat but he could tell on how his body was leaning aside that he was no more. There were many empty cartridges of a 9mm pistol at the crime scene.

[24] After the crime scene had been worked on captain Latsha constituted a team of detectives to investigate the case and he was part of that team. In the process of the investigations they received information that it was the accused who had shot and killed the deceased. Because of the information they received they called the accused for questioning about three days after the incident. He had come to the police station to report as one of his bail conditions for another matter on which he had been released on bail. They asked to see him as a team and questioned him about the allegations of his involvement in the murder of the deceased. The accused denied any involvement in the deceased's murder or knowledge about it. They then asked him if he was in the Mount Frere area at the time of the incident especially on Friday. He told them that indeed he was in Mount Frere to sign for his bail. After signing at the police station he immediately returned to his place of residence in Mthatha at about 18:00. He insisted that at about 18:00 he returned to Mthatha.

[25] They then took his details including his phone number told him that they would contact him if they needed him again. He gave them an 063 number which he said it was his number and told them that his phone was always with him. They then let him

go on the understanding that they would call him again on that number if necessary. They continued with their investigations and witnesses told them that it was the accused who killed the deceased. They obtained a court order in terms of section 205 of the CPA to obtain his billing information from his cellphone network service provider. They intended to check from the billing information his whereabouts at the time of the incident as he had told them that he had left for Mthatha after signing for his bail. The billing information revealed that at the time of the incident he was still in Mount Frere from the afternoon of that day until about 1:00am when, according to the billing information, he returned to Mthatha.

[26] The investigations continued and they received information that the accused seen around the crime scene playing with a firearm. One of the witnesses called Qetse told them that he saw the accused shooting the deceased. Another witness, Siseko Gontshi told them that the accused called him in the morning after the incident and told him that he had shot and killed the deceased. They took Siseko's cell phone number and applied for another section 205 order on Siseko's number. The billing information revealed that indeed the accused and Siseko spoke for some minutes around the time of the incident. They continued with their investigations and received information that the accused had visited a traditional healer at Kwa-Bhaca called Ayanda Mtongana. They went to see the traditional healer who told them that the accused visited him asking to be cleansed because he had killed the deceased. They thereafter used the accused's number to obtain another section 205 order to obtain billing information of the accused. This was to confirm if on the day referred to by Mr Mtongana the accused had communicated with him. The billing information revealed that the accused had telephone contact with Mr Mtongana and that he ended up at Mr Mtongana's area where he spent about 30 minutes. The billing information also

showed him going back to Mthatha. That gave them confidence in the information they got from their witness especially because the accused had confirmed to them that his cellphone was always with him and he did not lend it to anyone else.

[27] They then called the accused and went to his brother's house in Mthatha where they arrested him. After they explained the constitutional rights to the accused he opted to remain silent. They had obtained a search warrant. They searched at his place of residence for the murder weapon. However, they did not find it and that firearm has to date not been found. The accused was detained at Mount Frere police station and when he appeared in court he applied for bail which was ultimately refused.

[28] Further investigations revealed that a police officer who was stationed at Mount Frere police station, Mr Jijana, who was also called Gripa spent time and consumed alcohol with the accused. At some point his firearm went missing and they believed that it had been used in killing the deceased as the they believed that deceased was killed with a police firearm. They also received information that the accused had asked to use a grinder and filed off a serial number of a firearm which he carried on that day and that it was a police firearm.

[29] Warrant officer Maliwa further testified that the deceased was one of their best detectives. Before he was murdered he had been investigating some of the cases for which the accused had been arrested. The deceased was going to testify in those case against the accused. They believed that he was killed to silence him. Those cases were Mount Frere CAS 147/09/2017 which was in respect of a suspected stolen property which was the engine of a motor vehicle. The second case was Mount Frere CAS 109/12/2015 which was in respect of vehicle hijacking. The deceased was going

to testify against the accused in those cases and that caused bad blood between the accused and the deceased.

[30] After the accused was arrested for this case one of the witnesses in this case told him that he was being sought by the accused's friends who wanted to kill him. He then put the said witness in a witness protection programme. The accused had also called some of the witnesses and tried to dissuade them from testifying even though he was in custody and therefore he should not have a cellphone while in custody.

[31] The last witness for the state was Ayanda Mtongana. He testified that he is self employed as a traditional healer. He knows the accused. He also knew the deceased during his life time as he used to see him and he was aware that the deceased was a policeman. On 12 April 2018 he was at home at around 13:30 and he was busy consulting with his clients or patients. The accused arrived at his home and told him that he had killed the deceased, Mr Ntando. He told him that he killed him with a firearm. When he told him all this they were sitting inside a vehicle at his home and it was just the two of them in the vehicle. This information perturbed him so much that he phoned the police and told them what the accused told him. Police later came to him and obtained a statement. He testified that he had assisted the accused in respect of another case which involved vehicle theft but he did not know if the accused actually won that case. Under cross-examination Mr Mtongana confirmed that he had been visited by the accused who told him that he had shot and killed the deceased. When the accused told him that he had killed the deceased he became emotional. He was perturbed because a few months earlier his own brother had been shot and killed. He became so emotional that on that day he could not continue consulting with his other patients. After his evidence the state closed its case.

The case for the accused.

[32] The accused took to the witness stand and testified on his behalf. He started his evidence by explaining that on the 7 April 2018 he was not in Mount Frere and that he was at his place of residence in Mthatha. However, on 5 April 2018 he proceeded to Mount Frere in order to sign for his bail. He arrived at Mount Frere police station and signed. He has a taxi cab business in Mount Frere. He went to town after signing at the police station. It was in the afternoon. There was a car wash in Mount Frere and there were many people in the car wash area. It appeared that there was going to be an event at the car wash. He decided to stay on for the event. He phoned Siseko to come and assist him with his cab. They stayed in Mount Frere until very late ferrying people who needed transport. At some point Bongani arrived while he was talking to Siseko about a vehicle engine. The time was about 22:00 and it was dark there and there were trees in that area. Bongani parked in front of his vehicle. There was also a white Jetta driven by Simthandazile which was parked behind him. He came out of the car wash to chat with Siseko and they chatted next to his car. Bongani did not alight from his vehicle and they went with him. While they were in Bongani's car Qetse knocked on the window and got into the back seat of Bongani's vehicle. At that time, he was talking to Bongani about a vehicle engine for his polo vehicle which needed an engine. Siseko alighted leaving Qetse in the vehicle and he also alighted because Bongani said that he was going home to his wife.

[33] He and Siseko went to the car wash where his vehicle was parked. The car wash was full with many vehicles coming in and out of the car wash. He then heard gunshot sounds. They looked and noticed that the gunshot sound was coming from town along the main road. They saw people looking and worried. They could not see where exactly the shooting was taking place. After that he got into his vehicle to take people

to Badibanise location in Mount Frere. The time was about 23:00. When he returned to town there were many people getting into and out of the car wash. The car wash was a drinking place and it was full of people. There were other cars that were parked outside the car wash even on the right hand side of the road. There were two taverns there, the car wash and another one called SSS. There were many people roaming around the area.

[34] He saw the security vehicle which was driven by the deceased. Bongani parked his vehicle and after that the deceased arrived. His vehicle had a red security light on top. He parked his vehicle in front of Bongani's vehicle. He was inside Bongani's vehicle when the deceased arrived. He did not see the person who fired the shots. As they were inside the car wash they heard the sound of gun fire and they were all asking as to what was going on. He was at the car wash when he heard the gunshots. Bongani had already gone for some time by then. He was with passengers taking them to Badibanise location. When the shots were fired he was already inside his car. He did not see where the shooting was taking place. When he was with his colleagues in Bongani's vehicle he was not armed. Even when he was in his own vehicle he was not armed as he is not into arming himself. He denied shooting the deceased.

[35] He testified that he was born in Mount Frere and he grew up in Mount Frere. He drove in Mount Frere quite regularly. There were no street lights there that day and it was dark. He knows Mr Mtongana and he knows him as Makhosi. He would go to Mr Mtongana's place to deliver people or Mr Mtongana's clients to his place from town. He denied that he ever went there and told Mr Mtongana that he had killed a person. When he went there he had taken his passengers there who were Mr Mtongana's clients. He does not even believe in traditional medicine. He would therefore not have

asked for medicine from him. He denied pointing a firearm to anyone and he denied killing the deceased.

[36] Under cross-examination by the prosecutor the accused insisted that this incident happened on 5 April 2018 at night. He could not explain why it was not put to State witnesses that the incident did not happen on 07 April 2018 but it happened on 5 April 2018. He could only incoherently say that he always knew that he would get his opportunity to say that the incident happened on 5 April 2018. He insisted that on 7 April 2018 he was not in Mount Frere but he was in Mthatha.

[37] He further testified that on the day of the shooting he was in Mount Frere. He did not dispute that he was in Mount Frere on the night the deceased was killed. He testified that the shooting occurred at about 23:00 on 05 April 2018. The reason he checked the time was because he wanted to leave. As he was looking from his car he did not see anyone carrying a firearm. They also did not know who was shooting and they were all concerned at the car wash about the shooting. He heard for the first time when warrant officer Maliwa testified in this court that the deceased was investigating cases involving him. The police officers he knew were investigating his cases were Mr Gonya and Mr Mayitshe from Mthatha Vehicle Theft Unit which is also called group 46 in Mthatha. In those cases he was accused of taking his girlfriend's car and another one was in respect of possession of a suspected stolen engine.

[38] The accused could not explain under cross-examination why his version was never put to warrant officer Maliwa. He also could not explain why he never placed his version on record when he gave his evidence in chief. He, however, insisted that warrant officer Maliwa lied in his evidence. He testified that he never saw Simthandazile on that day. It was therefore a lie that he pointed him with a firearm

because he just never saw him. He could not explain why he never testified that the charge of pointing Simthandazile with a firearm could not be sustained on the basis that he never even saw him that day. He also denied Simthandazile's evidence that when the deceased arrived he uttered the words, "*here is this dog*" and he described it as a lie. He explained that he and Simthandazile were not in good terms. This he said was because Simthandazile was employed while he owned his cab taxis. Simthandazile's gripe was that he was working harder than him and said that he should also have only one taxi cab.

[39] He also disputed Simthandazile's evidence that he saw him running across the street towards SSS after the shots were fired. On Qetse's evidence that he saw him shooting the deceased he testified that Qetse was lying although he did not know why he lied. He further explained that Qetse had consumed liquor and therefore was drunk. Furthermore, it was dark there. He, however, could not explain why it was never put to Qetse that he was drunk. He further testified that he would not dispute that Qetse was put in a witness protection programme. He explained that there was a time when he was in the same cell as Qetse. If he wanted to do anything to him he would have done it then. He thought that Qetse was promised money because a reward of R50 000.00 for anyone who came with information was advertised.

[40] He disputed Mr Mtongana's evidence that he was his patient or client. He only went there to bring to Mr Mtongana's place people that were his clients. He called Mr Mtongana before he left Mthatha. It was the customers of his cabs who would call him and ask him to take them to Mr Mtongana. The accused also disputed Mr Vumazonke's evidence that he came to his place carrying a firearm. He further said that if that was true Mr Vumazonke should have reported that to the police before a

person got killed. He never used any grinder there and further said that Mr Vumazonke made up the grinder story.

[41] The accused's legal representative indicated that the accused intended to call two witnesses, Siseko Gontshi and Anathi Nkompela and that the accused need to be assisted by the state in getting those witnesses to come and testify for the accused. The prosecutor indicated that as the defence would have realized, Mr Gontshi was in the list of the witnesses the State had intended to call. However, he could not be called because he could not be found by the police. It was reported that he had left Lubhacweni to look for employment elsewhere and his whereabouts were unknown. For this reason, the State could not call him.

[42] With regards to Anathi Nkompela Mr Ntikinca agreed on behalf of the accused that it would be sufficient if his statement was handed up as an exhibit by agreement. Accordingly, his statement was indeed handed up by agreement and calling him was dispensed with. The reading of Anathi Nkompela's statement does not reveal anything significant. In any event like some of the state witnesses he did not see who shot the deceased. Briefly in his statement he said that he noticed the vehicle from Mount Red Security which was parked on the N2 main street in Mount Frere. He was on duty on that day the 7 April 2018 as a security guard under the employ of Vukeza Security. He was posted at Bucu Hardware. The street lights were not working and it was dark. The lights at Bucu Hardware were also not working. He heard some gunshots while doing patrols. He saw a person standing next to the door of the Mount Red Security vehicle and shots were fired and he ran away. After the shooting the shooter came towards Bucu running and he decided to hide. In shot Mr Nkompela did not see who the person who shot the deceased was because, according to his statement it was

dark as the street lights were not working. The handing in of Mr Nkompela's statement marked the end of the defence case.

The analysis of the evidence.

[43] The statement of conveyance of the body of the deceased submitted in terms of section 212(4)(a) the CPA indicates that the body of the deceased was removed from the crime scene by forensic services officials on 7 April 2018. Similarly the affidavit by warrant officer Dlamini, the Local Criminal Record Centre official who attended the crime scene indicates that she attended at the crime scene at 08:30 on 7 April 2018. These documents therefore make it clear that the deceased was killed during the night of the 6 April 2018 or the early morning of the 7 April 2018. The accused confirms being in the area of the crime scene on the night the deceased was killed although he denies being involved in his killing. Therefore, his insistence that this would have been on or about 5 April 2018 cannot possibly be true.

[44] The evidence of State witnesses is consistent that since about 2017 to 2018 the accused had been in possession of a small firearm, possibly a 9mm pistol. Whether or not it is the firearm that was used in the commission of the offences in this matter remains unclear. There is no evidence from the State beyond mere suspicion as to whether or not it is the same firearm that he had in 2017 or the same firearm that the accused was apparently seen using a grinder to file off the serial number as some of the evidence of the State seems to suggest. This brings me to the events of the night of the 6 going to the 7 April 2018.

[45] It is common cause that during the night of the 6 April 2018 the accused, Bongani, Simthandazile, Qetse, Thabo and possibly another person or others were together on the main street in Mount Frere at some point. Some of these people either owned or

drove taxi cabs in Mount Frere while others were just friends or acquaintances of others. While in his vehicle Bongani saw what he believed was a firearm carried by the accused and heard it making some cocking sound. The said firearm was also seen and heard making a cocking sound by Thabo. I must say I sensed some reluctance on the part of these witnesses to directly implicate the accused while they tried to testify about what they clearly saw. But some of them did testify that they saw him having in his possession what they believed could either be a firearm or a toy. What the accused did with it led to Bongani cautioning the accused not to scare them with a toy. In his evidence Bongani did not say that what he saw the accused handling was not a firearm but a toy. His evidence was that he was not very certain as to what it was. Qetse also testified to have been sitting in the back seat of Bongani's car with, amongst others, the accused. He saw the accused carrying a firearm and playing with it. He, however, did not see the accused pointing it at Simthandazile.

[46] On the other hand Simthandazile's evidence was that the accused did point him with a firearm. However, they laughed it off because he believed that he was playing and not really pointing him with it. The accused's denial in this regard is just that - a denial and a bare one. His evidence that he was not in the habit of carrying weapons and or even arming himself is clearly false. He was in possession of a firearm in Bongani's vehicle and he did cock it in that vehicle according to the State witnesses. I will not say he was playing with it as I do not understand conceptually, the idea of anybody playing with a firearm. It appears from the evidence of Simthandazile that he never intended to report the firearm pointing to the police on the basis of the notion that the accused was playing with the firearm. What is clear is that contrary to what he testified to, the accused liked carrying a firearm and even showing it off to his acquaintances. This is besides the fact that he clearly did not have a licence to

possess any firearm. The evidence of the State in this regard even with all its weaknesses establishes beyond reasonable doubt that the accused, since 2017 and in particular on the night of the murder of the deceased he was in possession of a firearm in Bongani's vehicle. Both Simthandazile and Qetse gave very clear testimony that what the accused had in his possession and what he was playing with was in fact a firearm which on Bongani, Qetse and Simthandazile's version he cocked it.

[47] The evidence of Simthandazile on how he was pointed with that firearm is not satisfactory. He was standing next to the window of Bongani's vehicle. Bongani was sitting in the driver's seat and his driver's window was opened. There was no evidence from Simthandazile on how the pointing with a firearm occurred. The accused would have been sitting somewhere in the back seat at the time. In that position the evidence of whether the pointing occurred through the back window of that vehicle or somehow through the front driver's window was unclear.

[48] It is common cause that when the deceased arrived and parked somewhere in front of Bongani's vehicle Bongani and Thabo were already there. On Bongani's version he stopped there because somebody shouted his name as he was driving home from his girlfriend's place. He stopped and the accused and Siseko got into the vehicle. On accused's version Qetse later knocked on the back window and got into the vehicle. This would explain Qetse's evidence that he did not hear the accused or anybody uttering the words or words to the effect that "here is this dog" when the deceased's vehicle arrived there. This also means that the deceased got there before Qetse got there. If the deceased got there afterwards it might have been when Qetse had gone to the car wash. It was the evidence of both Simthandazile, Bongani and even Thabo that the accused did utter those words. I accept the evidence of these

witnesses as being credible in this regard. I also accept their evidence with regards to the accused having been in possession of a firearm.

[49] Qetse testified that at some point he got out of the vehicle to go and buy himself tobacco. When he returned he was told that the car was full. He left going to the car wash. It must have been at this point when Qetse had gone to the car wash that Bongani and Thabo left that area leaving the accused and Siseko there.

[50] When Qetse decided to get out of the car wash going to the garage in search of tobacco, he saw the accused walking behind him carrying a firearm. He also saw the accused going to the deceased's car on the driver's side and shooting the deceased who was sitting in his car in the driver's seat. Shortly before this he had seen the deceased sitting in his driver's seat with his engine running and his vehicle lights on. His evidence and that of some other witnesses was that the street lights were also on. However, some of the State witnesses were either not sure about the fact that the street lights were on or did not notice whether they were on or not. However, all of them were consistent that the vehicle headlamps of the deceased's car were on and that his vehicle security lights on top of his vehicle were on. I am prepared to accept that the street lights might not have been working or there is an element of doubt as to whether or not they were working. This is more so that even the statement admitted by agreement between the State and the defence signed by Mr Nkompela indicates that the street lights were not working.

[51] The question then is whether there was sufficient lighting for Qetse to have seen the accused carrying a firearm and shooting the deceased. It will be recalled that Qetse's evidence as does of other State witnesses was that the deceased headlamps were on. Furthermore, Qetse was with the accused in Bongani's vehicle earlier before

the shooting occurred. On that basis the lighting provided by the deceased's vehicle headlamp would have been sufficient for him to see and identify the accused whom he had seen a short while earlier. That would include the fact that when he saw him he noticed that he was carrying a firearm. After all he had seen him earlier in Bongani's vehicle carrying a firearm. For whatever reason, he did keep his eye on the accused. Furthermore, even on the accused's version the car wash was a drinking place with cars coming in and out at about the time of the shooting. Bongani testified that the other vehicles provided light in addition to that provided by the deceased's vehicle. The evidence of the State was also that the deceased's vehicle was parked near the gate of the car wash. As to how many metres to the gate is unclear. Most of the evidence indicates quite clearly that there was sufficient light there provided even by the deceased's vehicle.

[52] On Qetse's evidence, after the accused shot the deceased he ran across the street towards Boco Hardware. This is what Qetse testified to have seen with his own eyes and he made a statement to the police on what he saw. His evidence was not challenged and it was never suggested that he did not report to the police or that his statement was not consistent with his evidence in this regard. It will be recalled that the evidence of Simthandazile was that after Bongani had left he heard the sound of gun fire. After he heard the shooting he saw the accused running across the street towards SSS. On his evidence although he did not see the accused shoot the deceased, he did see him running from near the deceased's vehicle shortly after the shooting running across the street. This is in accord with the evidence of Qetse about what the person whom he said was the accused did after shooting the deceased. Simthandazile was equally very clear that the person he saw running across that street was the accused.

[53] There is also the evidence of warrant officer Maliwa. His clear evidence was that the information they received was that the accused killed the deceased. They did question the accused about the allegations of his involvement. The accused co-operated with them and gave them his cell phone numbers. They obtained the accused's billing information which showed that the accused was in Mount Frere on the night of the deceased's murder. This was contrary to what the accused had told them, namely that he had left for Mthatha and was not there at the time of the shooting. In any event the accused does not dispute his presence in Mount Frere on the night of the murder of the deceased. In fact on his own evidence he was not only in Mount Frere but he was also around the area of the crime scene. This is in addition to the State witnesses that place him there. According to warrant officer Maliwa, Qetse told them that he saw the accused shooting the deceased. This means that Qetse's evidence in this regard cannot possibly be an after thought or fabrication. This is what he had told the police from the very onset.

[54] Mr Mtongana also gave very clear evidence of the visit of the accused to his homestead. It was during that visit when the two men were sitting in a vehicle that the accused told him that he needed cleansing from him because he had killed the deceased. The uncontested evidence of Mr Mtongana was that this perturbed him and he told the police about what the accused had told him. After satisfying themselves that the information that they received was trustworthy the police eventually arrested the accused.

[55] The accused's evidence was simply that of a bare at best denial. He either denied and disputed the evidence of the State where it implicated him and was cagey with his explanation and at times contradicted himself on very crucial aspect of his own evidence. His evidence often did not make sense. He came up with new versions

throughout his evidence. While he was unable to explain why some of his many versions were not put to State witnesses he also could not explain why even when he testified during his evidence in chief he did not mention some of the important aspects of his evidence. The evidence of the accused was, in my view, made up of stories and/or versions he clumsily put together as he went along in order to deal with the mounting evidence given by State witnesses as the trial progressed. This explains his inability to put some important aspects of his version to State witnesses for them to respond thereto. When all is said and done, he not only failed to put his version to the State witnesses, he also did not come up with any coherent version even as he gave his evidence in chief. In the end it became impossible to understand what his defence was beyond bare denials and at times incredible conspiracy theories and lies. His evidence stands to be rejected as largely not just improbable but outright falsehoods that were made up to deal with the avalanche of the credible evidence of State witnesses.

[56] Amongst other submissions made on behalf of the State, it was also argued that the accused could not explain why many witnesses would testify against him and implicate him in the crimes that were committed in this matter. While it is indeed true that the accused was unable to explain himself other than coming up with all sorts of conspiracy theories and bare denials and falsehoods, I do need to clarify that it is impossible for any accused person to know that which resides entirely in the mind of the witness or witnesses concerned. The fact that an accused person may not be able to explain himself in this regard cannot, without more, lead to a conviction as the accused person bears no onus and the State must, regardless of any explanation or lack thereof, prove its case beyond reasonable doubt.

[57] I am fortified in this view by the sentiments expressed in *S v Ipeleng* 1993 (2) SACR 185 (T) at 189 c-h in which Mohamed J had this to say:

“It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: ‘Why should the State witnesses have falsely implicated the accused?’

The case of *S v Makobe* 1991 (2) SACR 456 (W) is instructive on this point. At 459 of the judgment, reference is made to certain earlier authorities. The learned Judge refers to the case of *R v Mtembu* 1956 (4) SA 334 (T) at 335-6 where Dowling J said the following:

‘The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late Millin J in *Schilles v Pretoria City Council*, a judgment delivered on 8 June 1950, but not reported, are very pertinent to this point. He says:

‘It is a wrong approach in a criminal case to say ‘Why should a witness for the prosecution come here to commit perjury?’ It might equally be asked: ‘Why does the accused come here to commit perjury?’ True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say ‘I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore, his evidence must be true and the accused must be convicted.’ The question is whether the accused’s evidence raises a doubt,’”

[58] It was submitted on behalf of the accused that the evidence of Qetse must be treated with caution on the basis that he was a single witness. Putting aside the fact that as the State correctly pointed out, Qetse was not just an uncorroborated single witness, his evidence was, on the contrary, corroborated by a lot of circumstantial evidence. Even if Qetse was a single witness, our law has long allowed for the conviction of an accused person even on the basis of a single witness. This is subject to certain conditions being met by the State and the court being satisfied that indeed such conditions have been met. It was never submitted on behalf of the accused that treating the evidence of Qetse with caution should result on his evidence being rejected on the basis that this evidence did not meet the criteria. I am, in any event, of the view that Qetse's evidence was very clear, credible and reliable. In fact it met all the legal criteria.

[59] In *S v Olawale* [2010] (1) All SA 451 (SCA) at 455 the legal position was restated as follows:

“[13] It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

[14] In evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant and further look at the probabilities of the State's version.

[15] The State's case rested on the evidence of a single witness as to the actual robbery. The evidence of a single witness has to be clear and satisfactory in every material

respect. The evidence has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is truthful beyond reasonable doubt.”

[60] In *S v Van der Meyden* 1999 (2) SA 79 (W) at 82 C-D the process of evaluating the evidence in a trial was explained as follows:

“The proper test is that an accused is bound to be convicted if the evidence established his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be possibly false or unreliable, but none of it may simply be ignored.”

[61] Upon the consideration of all the evidence of the State witnesses considered together with that of the accused there is no possibility that the accused might be innocent of the murder of sergeant Phumzile Michael Ntando. In my view, the State has proved the guilt of the accused beyond reasonable doubt in respect of counts 2, 3 and 4. I am however, not satisfied that the State has discharged its responsibility of proving beyond reasonable doubt that the accused pointed Simthandazile Njece with a firearm.

[62] In the result:

1. The accused is acquitted and discharged in respect of count 1, pointing a firearm at Simthandazile Njece
2. The accused is found guilty in respect of counts 3 and 4, the unlawful possession of a firearm and ammunition.
3. The accused is found guilty in respect of count 2, the murder of sergeant Phumzile Michael Ntando

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: M. BALIWE

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MTHATHA

Date head : 02-10 November 2021

Delivered on : 11 November 2021