

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE HIGH COURT: MTHATHA]**

Case No. CC41/14

In the matter between:

THE STATE

And

MAKABONGWE “BOTSOTSO” TUTSHANA

ACCUSED NO.1

JONGIKHAYA “JOE” MHLAULI

ACCUSED NO.2

SIMPHIWE “MSAYBHO” MATU

ACCUSED NO.3

AVIWE LOBI

ACCUSED NO.4

JUDGMENT

JOLWANA J

Introduction

[1] The accused were charged with 13 counts being three counts of murder, one count of arson, four counts of kidnapping, three counts of attempted murder, unlawful possession of a firearm and unlawful possession of ammunition.

[2] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) recorded the following:

- “1. The below incidents took place after it was alleged that the victims were involved in the killing of a taxi driver. Thereafter the people involved (taxi owners/drivers and conductors) traced the suspects in that murder case with intention to pay revenge.
2. Upon or about the 2nd October 2010 and at or near Tyumbu location, Mthatha the accused arrived at the homestead of some of the victims, assaulted them and burnt the house of Bulelani Dikana Filiya. They also kidnapped Bulelani Filiya and Avela Tuswa.
3. They went to the homestead of Thuso Solani (the deceased in count 8) kidnapped and killed him. They dumped his body in the mealie fields.
4. On the 15 October 2010 the accused kidnapped and killed Gcinikhaya Canzibe. He died of “*stab wounds*”.
5. On the 14 November 2010 the accused went to the homestead of Malusi Filiya carrying firearms. They shot and killed him (the deceased in count 11). He died of “*gunshot wounds*”.
6. The provisions of section 51(1)(d) of Act 105 of 1997 are applicable in that the death of the deceased was caused by a group of persons acting in the execution or furtherance of a common purpose or conspiracy.”

[3] All the accused pleaded not guilty to all the charges preferred against them. They all elected to reserve their bases of their pleas of not guilty.

The state's case

[4] The state called its first witness, Bulelani Filiya-Dikana (Bulelani) who testified that he is one of the complainants in this case. He knows all the accused. He and accused no.1 are from the same locality. He knows accused no.2 because they were once arrested together in respect of an unrelated matter. He only saw accused no.3 and accused no.4 for the first time on the day of the incident in this trial.

[5] On 02 October 2010 he saw all the four accused persons and two other unknown men who were not arrested when they arrived at his house. It was in the morning at

about 9:00. He was with Avela Tuswa (Avela) in his house which was a three roomed structure and they had just had breakfast in the kitchen. He went to his bedroom to rest leaving Avela in the kitchen. He heard a noise of people who were talking, coming into his house as they were talking. Those people entered the house and the first person to enter was Anathi who was his neighbour. As he entered he was pointed with a firearm by accused no.2. Anathi was a fourteen year old boy at the time.

[6] As they entered his house accused no.2 was holding Anathi by the neck pointing a 9mm firearm at his head. Accused no.2 was with many other people including accused no.1, 3 and 4 who all entered the house. They proceeded to the kitchen where Avela was and attacked him. All the accused attacked Avela. As a builder he had some spades and hammers in the house which those people took and used to attack Avela. All four accused participated in the attack on Avela.

[7] Accused no.1 took the spade, accused no.2 was carrying a firearm which he used to hit Avela. He did not see what accused no.3 and 4 were carrying but they took his building tools and hit Avela with them. He could hear Avela screaming from the kitchen. All four accused participated in the attack on Avela who was on top of a bed. They were asking Avela why they had killed a taxi driver and why did they take the drugs. Avela was crying asking for forgiveness.

[8] They asked Avela about the other people who lived with him in the house. Avela told them that he was present in the other room. Others remained with Avela and others came to his bedroom. It was the two unknown men who entered his bedroom. As those two men entered accused no.2 participated when he was apprehended. They

assaulted him but he managed to flee. The one who assaulted him was one of the two unknown men. He ran to his parental homestead. However, his parents were not at home, only his eighteen year old sister Busiswa was there. At that time he was bleeding from his head. He was being chased by the two unknown men and accused no.2. He realized that he could not get help at his parent's homestead and decided to run to another homestead in which he found young children. In the rondavel of that homestead he took off his jacket and threw it on top of the bed, jumped into an unused refrigerator to hide.

[9] The four accused persons and the two unknown men entered that homestead. They asked about him from the little children who said a man had entered their house. He could hear the footsteps of his pursuers entering the rondavel saying here is the jacket of this young man. They searched the rondavel and even opened the refrigerator he was hiding in. They found him in the refrigerator and took him out saying here was the dog. It was accused no.2 who opened the refrigerator and assaulted him with accused no.1 and the two unknown men. They hit him on the head with a spade, the two men were carrying knives and accused no.2 was carrying a firearm. He was assaulted with a spade and a firearm. He was also stabbed on the back and face with a knife.

[10] After being taken out of the refrigerator and assaulted he became unconscious. A few minutes later a venture vehicle arrived and he was loaded into it and blindfolded with a cloth. When he was about to get into the venture the cloth on his face moved slightly and he noticed that his house was on fire. Accused no.1 and others had remained behind when he was chased and it was them who set his house on fire. It was when he returned from hospital that he saw that his house had been completely

burnt down. He had to go to hospital where he was sutured and was discharged the following morning.

[11] The venture drove away and stopped in town at the taxi rank. At that stage the cloth that had covered his face was now on his neck. In the venture vehicle it was himself and accused nos 2, 3 and 4. Accused no.1 had been left at his homestead with other people. Some other people were off loaded from a bakkie and loaded into the venture. He noticed that it was Avela and Thuso Solani (Thuso).

[12] Accused no.2 instructed Avela to get under a seat of the venture. Accused no.1 arrived carrying two litres of juice in a container. Accused no.2 instructed him to drink the juice and he realized that it smelt like it had maize tank insecticide tablet which is poisonous. He swallowed some of the juice. As he was drinking the juice Avela and Thuso were being assaulted. Accused no.2 had a knife and a firearm. He started vomiting. Avela and Thuso were also made to drink the juice and they also vomited. As all of that was taking place the vehicle was being driven out of town.

[13] The vehicle stopped at Lindile locality. As accused no.2 was carrying the juice and it was getting finished he could see the poisoning insecticide tablets in the juice. Accused no.2 tore the container of the juice and took one tablet and put it in his mouth and in Thuso's and Avela's mouths. He, however, did not swallow the tablet, he just kept it in his month. Thuso and Avela swallowed the tablets and Avela vomited it.

[14] On realizing that they were becoming weak they were left near a river by their captors who drove away. When they were alone Thuso said he had swallowed his tablet and his stomach was aching. Avela said he had also swallowed it but had

vomited it. It was then that he suggested that they should run away so that even if they died they died in the presence of other people. They got up and ran away. As they were running Thuso was becoming weak and he fell next to a project garden near the river.

[15] They continued running leaving Thuso behind and he saw two vehicles coming. Those vehicles chased him and Avela and the community members of Lindile location appeared. Their chasers started shouting that they were thieves. Two of the people who were chasing them went on foot in the direction in which Thuso had fallen and they later said they had finished Thuso. It was accused no.2 and one of the unknown persons called Lindi. They were taken and loaded in a quantum vehicle by accused no. 1 and 2 and the two unknown men. In the quantum vehicle he noticed that accused no.3 was also in the vehicle.

[16] They were taken to an unknown forest where they were going to be killed. In the forest they were assaulted by the four accused persons with sticks. They were also vomiting and they even vomited blood. He then asked accused no.1 who is from his locality if he was also part of this. Accused no.1 said it was being done by people from the taxi rank and therefore he also needed to be present. He testified that he was not involved in the taxi business, he was not a driver and he was not involved in drug dealing. He was being killed because he was with Avela at the time they were attacked at his homestead. It was Avela who had killed a taxi driver and had also snatched drugs from drug dealers.

[17] In that forest it was accused no.3 who tried to intervene saying that they should be pardoned. Avela was taken deep into the forest by accused no.1 and 2 and Lindi while he remained in the quantum vehicle. They returned without Avela. Accused no.3 and 4 and one of the unknown men had remained with him in the quantum vehicle. Accused no.2 and the other unknown men took him into the forest.

[18] As they entered the forest he decided to run. Accused no.2 fired a shot and he continued running and threw himself into the tarred road. As he fell on the road accused no.1 and 2 came out of the forest and apprehended him. Two police vehicles appeared and stopped near the road. A police officer alighted and accused no.2 told him that they were thugs who had robbed people in town. The police officer returned to his vehicle and drove away. He was taken back to the quantum vehicle.

[19] By then it was in the afternoon and he was taken to a homestead at Payne location where it appeared that accused no.2 lived there. He was tied with shoelaces and put in a shack in that homestead which was then locked with a padlock. One man came and unlocked the padlock. He took an iron rod and assaulted him asking him why he had stolen a tyre from his home. That man later left. He managed to untie himself but pretended to be still tied. Accused no.3 arrived and said that was his opportunity to escape as he had been trying to let them set him free.

[20] Accused no.3 left and he managed to escape and ran away. He ran to a certain homestead and hid in a toilet. An old lady from that homestead gave him R20.00 which he used to take a taxi home. He went to see a doctor who wrote his injuries in a book. His J88 was handed to court as an exhibit together with a section 212 affidavit. It is

noteworthy that in that J88 form there is not even a mention of Bulelani complaining of having ingested poison. Part of his evidence was that he had been fed a poisonous tank insecticide.

[21] Apparently Avela had also managed to run away because he later met him after his own escape. When he returned home from hospital he learned that accused no.1 had been making threats and that his youngest brother had been killed. He went to stay with his girlfriend as his homestead had been burnt down. His younger brother is the deceased in count 11. His brother's killers had gone to his parent's homestead thinking that he was there when in fact he had put up at his girlfriend's place. They found his younger brother there and thought it was him and they shot and killed him.

[22] Under cross examination by Mr Dingiswayo for accused no.1 he testified that accused no.1 owns a shop near his homestead. It was put to him that accused no.1 was at his shop when whoever abducted him did that and he denied that. It was further put to him that accused no.1 was in a condor vehicle when he was brought into it which then drove to town and he denied that as well. At or near Kei Cash in town he was taken out of that condor vehicle to a mini bus taxi and accused no.1 was not part of all that. Bulelani said that in that regard accused no.1 was telling the truth. He, however, later sought to dispute that which became one of many inconsistencies that characterized his evidence.

[23] It was pointed out to him that in his evidence in chief he had testified that accused no.1 had remained behind when he had run away and hid in an unused refrigerator in another homestead and he had also said that when he was taken out of the refrigerator

accused no.1 had participated in the assault on him. He then said that those who were left behind had also given a chase using a vehicle. His evidence under cross examination changed quite significantly to his earlier version which he had given in his evidence in chief in very material respects which were too many to mention.

[24] Under cross examination by Mr Nohiya for accused no.2 he testified that he went to hospital at night on the same day on which they were attacked which was the 02 October 2010. It was put to him that according to his J88 form he went to hospital on 20 October 2010 at 10:49 and he could not explain the discrepancy.

[25] Under cross examination by Mr Lavisa for accused no.3 and 4 he confirmed that the four accused and other people arrived at that other homestead and took him out of the refrigerator he was hiding in. He testified that accused no.3 was not carrying anything and accused no.4 was carrying a stick. He also testified that both accused no.3 and 4 did not take part in assaulting him. He was unable to dispute that accused no.4 had been forced into being present when all of that was happening. He confirmed that accused no.3 and 4 were present at Lindile locality but did not assault him.

[26] It is noteworthy that on his evidence, Bulelani watched from his bedroom as Avela was being attacked with hammers and spades and other dangerous weapons. He did not go to try and save Avela. Neither did he run away. He waited in his bedroom, watched as Avela was being attacked and saw all the accused and two other men attack Avela. He only ran away when they came to his bedroom. Furthermore, he testified that he saw accused no.3 and 4 for the first time when he and Avela were being attacked. No identity parade was held and he did not describe how he was able to

identify them as he saw them for the first time that day. There was no attempt by the state to clear any possibility of a mistaken identity as far as accused no.3 and 4 were concerned.

[27] The state's next witness was Bulelani Makhallima, a police officer who was called to testify on counts 9 and 10, the kidnapping and murder of Gcinikhaya Canzibe. He testified that on 15 October 2010 he and sergeant Booitjies received information that there was a dead person near Tyumbu Bridge. They went there and found the deceased with stab wounds. They were informed by a young man who was herding sheep that he saw a group of people assaulting the deceased and leaving him there. He and his colleagues called crime scene photographers and the detectives. That body had 37 stab wounds. The deceased was identified as Gcinikhaya Canzibe. I must mention that this and Ayavela Mhlola are the only witnesses which were called by the state on counts 9 and 10. It remains unclear how the state hoped to prove the guilt of the accused on their evidence. More about Ayavela Mhlola's evidence later.

[28] In respect of count 11, the murder of Malusi Filiya (Malusi) the state called warrant officer Mphuthumi Kopana, a police officer. He testified that on 14 October 2010 he and warrant officer Boyana were on duty. They received information that a person had been shot dead at Tyumbu locality in Mthatha. They went to that crime scene and found the deceased in a flat. He had a gunshot wound above the stomach. The next state witness was Ernest Khawula, also a police officer and an investigating officer in respect of two of the murders in this case. He testified that a taxi driver was killed when he was being robbed and four men were arrested for his murder. This was in September 2009.

One of the men who were arrested for the murder of the taxi driver was Gcinikhaya Canzibe, the deceased in counts 9 and 10. He was arrested with Avela and Thuso.

[29] When they were released on bail both Gcinikhaya Canzibe and Thuso Solani were killed. The home of Bulelani was burnt down after Avela went to hide at his homestead. Following the burning down of his homestead, Bulelani went to stay at his father's other homestead. This led to the killing of his brother Malusi who was shot at. The killers believed him to be Bulelani as he normally slept in that room in which Malusi was killed.

[30] He testified that their investigation led to the arrest of accused no.1. Under cross examination on behalf of accused no.1 he testified that he had no other evidence on which he arrested accused no.1 except the information he received from family members. He further testified that no witness said they had seen accused no.1 shooting the deceased Malusi Filiya. His information from his witnesses was that accused no.1 was seen carrying a firearm. Once more this and Phelo Dikana were the only witness called in respect of count 11. I do not understand how it could ever have been hoped that there could be a conviction on the evidence of warrant officer Kopana and Phelo Dikana. Save for the *ipse dixit* of Phelo Dikana, there was just no other evidence led in corroboration.

[31] The next witness for the state was Eric Mzimasi Gomana, a warrant officer and a member of the South African Police Services. He testified that he was on duty on 10 October 2010 with other police officers. He received a call that a dead body had been found at Tshemese locality in Mthatha. He proceeded to the said crime scene where he

found two police officers already there standing next to a fence of a mealie field. Those police officers told him that a dead person had been found in the veld.

[32] They took him to where the deceased person was. He observed that the deceased could not be identified and his leg was missing probably due to scavengers. Even the members of the community could not identify the deceased. No crime scene photographs were taken and the body was removed to a mortuary.

[33] The state called its next witness Phelo Dikana on count 11, the murder of Malusi Dikana. He testified that he only knew accused no.1 from Tyumbu locality. On 14 November 2010 he was at his house in Tyumbu locality where he stayed with his family, his parents and siblings. His siblings are Bonile and Bulelani Dikana. On the 14 November 2010 at about 22:00 that night he was watching TV in his bedroom when he heard a gunshot which he did not at that stage think it was in his premises. He reduced the volume of the TV and heard a second gunshot and realized that the shooting was actually in his premises.

[34] He went outside to check and noticed accused no.1 and about five other men getting out of the gate. Next to the room where he heard the gunshots there was light which enabled him to notice accused no.1 and those men. He went to the room where his elder brother slept and tried to push open the door. However, the door was blocked. He left the door and went in between the houses and saw accused no.1 whom he already knew from the area. He went to wake up his parents in their room. He told them that something had happened in Malusi's room.

[35] He then went out of the gate to follow those people to see if he could identify the others as he had already identified accused no.1. He went and stood next to a shop called Joko but could not see the other people but he saw accused no.1, who together with the other people in his company got into a quantum vehicle which then drove off with its lights switched off. The lights of the quantum vehicle were only switched on when it reached the tarred road. When he returned home he noticed that his brother Malusi had been shot dead. He noticed that the shots that killed Malusi had been fired through the window.

[36] He testified that when he saw accused no.1 walking towards the gate he was carrying a firearm. He did not know the motive for the killing of his brother Malusi. Under cross examination he was asked that if the room in which Malusi slept was next to the gate as he had testified, it would not be necessary for the people he said he saw to go past his room, he said he would not be able to answer that. Before and after the shooting he did not notice whether his older brother Bulelani was there or not as he was focusing on the people who shot Malusi. After the shooting when the killers had gone he did not see Bulelani. He later changed to say he saw him in the premises.

[37] He did not talk to Bulelani about the fact that he had seen accused no.1 whom they both knew very well in the locality. After he heard the gunshots and saw those people leaving the premises and Malusi's door could not open, he assumed that he was shot. He could hear that he was in pain inside the room and he followed the shooters in order to identify them.

[38] On counts 9 and 10 the kidnapping and murder of Gcinikhaya Canzibe, the state also called Ayavela Mhlola. He testified that on 10 October 2010 he was at his workplace at Tyumbu locality where he is a headman. He was with other people below the kraal when he noticed the light of a motor vehicle coming. The door of the vehicle was opened and somebody screamed. They could hear that the person was being assaulted. They all went to the houses to report what they saw. They all later went up to where the person was found and saw the person lying down there.

[39] Police were called and they came and they noticed that the person was dead. When the people from forensic services came, they noticed that the deceased had stab wounds on his chest and his right eye was not there. The vehicle they had seen earlier was a white quantum. He could not identify the people who assaulted the deceased as it was dark and they were at a distance. He also did not know the registration number of the vehicle they were using. I do not understand what the purpose of calling this witness was as he clearly said he could not identify the people who murdered Gcinikhaya Canzibe.

[40] A J88 medico-legal examination of Bulelani Dikana completed by Dr Mkombe was admitted as an exhibit. It was completed and signed by Dr Mkombe at 10:49 on 20 October 2010. His clinical findings recorded that Bulelani had been assaulted with a bushknife on the hand and back. No mention in it is at all made of any poisoning or possible poisoning in light of the fact that he had testified to having been fed poisoned juice which caused him to vomit blood.

[41] The medico legal report in respect of Thuso Solani was completed by Dr Notyalwa on 14 October 2010. He reported therein that the cause of death was decomposed body and scavenger bites. He also recorded that the body of the deceased was found or death occurred on 10 October 2010. There was no attempt at explaining the cause of death in relation to what Bulelani had said had happened in his evidence.

[42] With this evidence and some exhibits that were just handed up by agreement, the state closed its case. I must mention that when the state closed its case the original counsel for the state Advocate Trietch was not available due to a personal commitment. Advocate Joubert had agreed to take over the matter at short notice and immediately expressed his personal misgivings about the state's case and indicated that he would assess his position on whether it would be in the interest of justice to try and call further witnesses. He later reported to court that indeed the state had decided to close its case. At that stage it was also reported and confirmed that accused no.2 had died. Mr Lavisa legal representative for accused no.3 and 4 had also died and was replaced by Mr Sonqwelo on legal aid instructions.

[43] The defence applied for a discharge of the accused on all counts. In summary, the basis for the application was that there was no evidence on which a reasonable court could convict and the credibility of some of the state witnesses was extremely questionable.

[44] Section 174 of the Criminal Procedure Act provides:

"If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the offence referred to in the charge or any offence of which he may be convicted on that charge, it may return a verdict of not guilty."

[45] I must point out that it is with a deep sense of appreciation that counsel for the state, Mr Joubert made an upfront concession that the presentation of the state's case left much to be desired. The record reflects that the evidence of the state was, at best, disjointed with the only two witnesses who directly implicated the accused, Bulelani and Phelo Dikana being so contradictory as to be rendered totally incredible and of no evidential value. It is not clear why the state decided to proceed with the case which had not been investigated at all by the police in more than seven years. The matter was enrolled in this court for the first time on the 08 December 2014. Since then there have been numerous postponements for reasons that are not clear.

[46] The matter was eventually enrolled for trial on 02 May 2018 almost eight years after some of the incidents. Indeed the matter did in fact proceed on that date. The list of witnesses provided by the state in terms of section 143(3) of the Criminal Procedure Act reflected some 32 witnesses. Most of those witnesses were police officers and those who were called gave evidence that did not prove anything more than the undisputed fact that the deceased had died. Most of the evidence by the police officers was in the form of crime scene evidence which was more of a report that a deceased person was found at a particular place. There was no evidence of anything that was found at the various crime scenes and in some cases crime scene experts were not even called to look for evidence at the crime scenes.

[47] I must point out that on the evidence of the state there were also two witnesses, the complainant Bulelani Dikana and Phelo Dikana, who are brothers to each other and are both brothers to the deceased in count 11, Malusi Dikana. It transpired from their evidence and that of the investigating officer Ernest Khawula that the death of a taxi

driver, led to the arrest of some of the deceased in this case who, when released on bail were then killed, allegedly, by the accused, attempted murders in this matter were also apparently part of the attempt to kill all those who had some involvement directly or otherwise in the murder of that taxi driver. There were also unsubstantiated allegations of drug peddling in the taxi industry which it seemed, might also have been a motive for the killings.

[48] Despite the fact that the kidnapping of Bulelani and the subsequent murder of at least one of the deceased, Thuso Solani took place in broad day light in the presence of many people, the investigation of the case seems not to have happened at all as was the case with all the other murders. The evidence of the complainant Bulelani Dikana and his brother Phelo Dikana was characterized by an attempt not to honestly tell the court what happened on the 10 October 2010. It was more of the trial being used by them to avenge at all cost the suffering they obviously went through, the loss of property through Bulelani's homestead being burnt to the ground and the killing of their brother Malusi and the killing of Thuso Solani and the attempted murder of Avela Tuswa who was never called to testify.

[49] In presenting the evidence the state made no attempt to lead its witnesses to present credible evidence in a coherent manner. In fact it is not clear to me if the state had any hope of a successful conviction from the start of the trial to the end as there seemed to have been very poor if any preparation was done. This calls into question the basis on which the state decided to proceed with the trial some eight or so years later without any thorough preparation. It seems to me that the matter needed to be assessed afresh as against merely executing a decision to prosecute taken almost 10

years earlier. Since then some of the witnesses could have died or could not be traced all of which needed an honest and dispassionate assessment of the case. I must thank Mr Joubert, who although he got involved very late in this matter, realized that calling other witnesses would be flogging a dead horse.

[50] This is not to say that some or all of the accused were not involved in some of the crimes. If some of the questions put by their defence counsel on their behalf is anything to go by, it is clear that they might have been involved in some way. Also their versions again put to the state witnesses suggested that they might in fact have been directly involved in some of the crimes in differing degrees. However, at the risk of stating the obvious, their presence at various crime scenes even if proved, or not disputed cannot, without more, amount to evidence on which a conviction can follow.

[51] In *S v Majavu* 1994 (2) SACR 265(Ck) at 275 Heath J invoked some of the old principles of criminal prosecution from English jurisprudence which, in my view, still find application. He cited the case of *Boucher v The Queen* CCC 203 ([1955] SCR 16; 20 CR1) where the court said:

“It cannot be over-emphasized that the purpose of a criminal trial prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof and facts is presented: It should be done firmly and pressed to its legitimate strength, but it must be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, a seriousness and justness of judicial proceedings.”

[52] In this case there was no attempt by the state to present *credible evidence* nor was *all available legal proof and facts presented*, nothing was *done firmly* nor was anything

pressed to its legitimate strength. Evidently there was no attempt to show the *seriousness and justness of judicial proceedings* by the state or the pursuit of the case *with an ingrained sense of dignity.*

[53] Other than the poor and I emphasize, the extremely poor quality of the evidence presented by the state, even the documentary evidence was just handed up, not to prove anything. There was no attempt to create some *nexus* between the evidence presented by the state witnesses and the documentary evidence. If anything the state proved that people died a gruesome death, which was not in dispute. It was also proved that the accused had a motive to kill the deceased which is hardly relevant for a conviction, without credible evidence of the accused's actual involvement and participation in the crimes. The state sought to rely on witnesses who did not give evidence of what happened but their own conclusions of what happened generously drenched in inconsistencies and contradictions. No attempt was made to deal with a very important matter of the doctrine of common purpose which had been invoked by the state.

[54] In *S v Lubaxa* 2001 (2) SACR 703 (SCA) the court said:

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

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration

that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognized by the common law principle that there should be 'reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Thennisson* 1955(1) SA129 (A) at 135 C-E) and the constitutional protection afforded to dignity and personal freedom (s10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

[55] In this case the evidence of the state was hopelessly poor beyond redemption when the state closed its case. Were I to allow the case to proceed beyond this point, it would be only on the unconstitutional basis that the accused might incriminate themselves if they elected to testify. Such an injudicious exercise of a discretion would amount to a court embarking on a fishing expedition in the vain hope of resuscitating a case that had been dead from the start. I hope that it was never the hope of the state that the accused might incriminate themselves when the proceedings commenced on the 18 May 2018. If it was the case and I sincerely hope it was not, the state would be using its machinery and its powers of prosecution for an unconstitutional motive, not to discharge its duty but to pursue an unconstitutional outcome. Each case must be thoroughly investigated and professionally presented so that courts are enabled to discharge their responsibility effectively and are not called upon to decide cases that had not been investigated. The state made no attempt, let alone serious attempt to achieve a just outcome. This was a costly travesty of justice at its best which obviously reinforced the sense of impunity in some of the violent crimes in this country.

[56] In the result the following order shall issue:

1. The application in terms of section 174 of the Criminal Procedure Act is granted.
2. The accused are found not guilty and discharged.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: D.TRIETCH

Instructed by: NPA

MTHATHA

Counsel for accused NO.1: E.S. DINGISWAYO

Instructed by: LEGAL AID BOARD

MTHATHA

Counsel for Accused No.2: A. NOHIYA

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