

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S21/2020

Heard on: 15 - 24/05/2023;

09 – 12/10/2023

Delivered on: 06/05/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

STEPHANUS DAWID WESSEL OOSTHUIZEN

ACCUSED 1

EDWARD KABELO DE BRUIN

ACCUSED 2

PIET GOHENTSEMANG MULLER

ACCUSED 3

JUDGMENT

MAMOSEBO J

- [1] The accused stands indicted on the following six counts: Count 1: Murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA); Count 2: Kidnapping read with the provisions of section 51(2) of the CLAA; Count 3: Assault with intent to do grievous bodily harm; Count 4: Contravention of s 3(1) r/w sections 1, 120(1) and 121 of Act 60 of

2000 that of unlawfully being in possession of a 6.35 mm calibre pistol with serial number D[...] without the necessary licence, permit or authorisation in terms of the Act; Count 5: Contravention of s 90 r/w sections 1, 120(1) and 121 of Act 60 of 2000 being unlawfully in possession of 6.35 mm calibre cartridges without the necessary licence, permit or authorisation in terms of the Act; and Count 6: Contravention of s 120(10)(a) r/w sections 1 and 121 of Act 60 of 2000 of unlawfully giving possession of a 6.35 mm calibre pistol and 6.35 mm cartridges to accused 2 and 3, persons who were not allowed in terms of the Act, to possess a firearm and ammunition.

[2] At commencement of the trial I was informed by Mr JJ Schreuder, counsel for accused 1, that the accused had succumbed to his illness on 21 December 2022, a submission confirmed by counsel for the State, Mr J Rosenberg. As a result, Mr Schreuder was excused from further attendance. Mr Rosenberg withdrew count 6 as it was against accused 1 only.

[3] Before accused 2 and 3 could plead I ascertained from them if their legal representatives, Messrs Pieterse for accused 2 and Mmutloane for accused 3, had explained the provisions of s 51(1) of the CLAA to them as well as competent verdicts and they confirmed receiving the explanation which they understand. They both pleaded not guilty to all the five counts and chose not to disclose the basis of their defence.

[4] Accused 2 and 3 made these formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (CPA):

4.1 It is admitted that the identity of the deceased is Seun John Modingwane, an adult male.

4.2 It is admitted that the deceased did not sustain any further injuries after being injured on 02 January 2019, during his transportation and hospitalisation until his death on 03 January 2019, and during the

further handling and custody of the body until the post mortem on 07 January 2019.

4.3 It is admitted that the gun recovered on 04 January 2019 at Majaneng Village is indeed a firearm as defined in the Firearms Control Act, 60 of 2000. It is admitted that the rounds recovered on the same date and at the same place are indeed ammunition as defined in the Firearms Control Act, 60 of 2000. The report by Luvuyo Lundi Mlindazwe is admitted as true and correct and is handed in as Exhibit H2.

The State accepted the admissions.

The version of the State

[5] The State called 12 witnesses. Mr Aobakwe Ishmael Pholoholo, a 25-year-old unsophisticated male person of a very small stature, dropped out of school at Grade 5. He is the complainant in counts 2 and 3, kidnapping and assault with intent to do grievous bodily harm (GBH). He testified that the incident happened on a Wednesday in 2021 at around 17:00 but could not remember the month. The witness later recalled that the date was the second of January but could not remember the year. He was in the company of his friend, the deceased, known to him as 'Seun' or 'Tiger'. They were sitting near a ditch at a bridge leading to Magogong Village waiting for the deceased's sister. He estimates the distance from where they were sitting to the watermelons plot to be about 20 meters. Two unknown security guards (accused 2 and 3 jointly referred to as the accused) arrived travelling on the back of a blue Toyota van driven by Dawie (the former accused 1 and owner of the watermelon plot, now deceased). They were guarding watermelons belonging to Dawie.

[6] The accused confronted them, demanding to know their reasons for sitting at the bridge and telling them that they are not supposed to be there. The accused chased him and the deceased. He fled but could not outrun the accused who caught up with him and apprehended him. Accused 2 held a

firearm in his hand when he chased him but did not use it. After he was apprehended the accused assaulted him using bricks and pelted him with stones which struck him on his face and eyes. He was further kicked and pummelled with clenched fists. Thereafter they took him and placed him to lie in the van where he was held.

[7] While accused 3 kept him under guard, accused 2 pursued Seun, the deceased, with a firearm in his hand. Dawie remained seated in the vehicle. After a while he could hear several shots being fired. Although he cannot recall how many shots were fired because he was dizzy and made to lie on his back in the van it was more than one shot. Accused 2 returned to the van and the three of them took him to Dawie's plot and placed him inside the storeroom depicted on photos 1 and 2 of Exh "A". There they made him lie on his stomach and accused 2 and 3 fastened both his hands and feet which were lifted behind his back with a wire as depicted at photos 3, 4 and 5 of Exh "A". He is observed on the photos without any clothing on his upper body and is barefoot. His explanation is that during the assault his T-shirt was torn and the accused threw it away. His shoes also went missing. After tying him up they locked him in that storeroom until he was found and untied by the police.

[8] He denied going to Dawie's watermelon field to steal watermelons. He also maintains that he was not found in possession of any watermelons when he was apprehended. When he and the deceased saw Dawie's vehicle approaching in their direction at high speed they fled because Dawie is ruthless and assaults people on the road as he does not want people near his property. He conceded that he ran into a canal filled with water and accused 2 and 3 helped him out of the canal and started beating him up before putting him at the back of the van. He denied that the injury above his right eye was caused by bumping against the canal wall or jumping into the tunnel as he knows how to swim and could not have injured himself by jumping in the water. He maintained that the injury was a result of the assault by accused 2 and 3. After loading him at the back of the van they

then went to search for the deceased who was found walking with Mtuyedwa.

- [9] Dawie stopped the bakkie where they found them and accused 2 jumped out of the van and instructed the deceased to climb onto the van but he refused. The deceased then fled and accused 2 chased him, firing shots. He could not see if the deceased was struck because he disappeared into a bushy area. Dawie assaulted him at the plot after he was removed from the van by kicking him, slapping him with open hands and clenched fists. It was put to the witness that the reason why he was kept in the storeroom was to keep him safe until the police arrived to arrest him for theft of watermelons.
- [10] He sustained an open wound from the top of his right eye above the eyebrow to the side. He also bled from his nose and mouth. His hands were swollen as a result of being tied with a wire. The police took him to hospital at Hartswater where he was treated and discharged.
- [11] Chico Patrick Mtuyedwa is 26 years old and resides at Diplankeng in Magogong. He passed Standard 8 (Grade 10) in 2019. He is the eye-witness who was in the company of the deceased when he was confronted by the accused. He knew the deceased as Tiger or Seun. On 02 January 2019 he had just knocked off from work at Dawie's watermelon field, where he had worked for a period of four weeks before the incident. He saw the deceased lying on the concrete floor of a bridge facing upwards with his hands to the back of the concrete ground. Dawie arrived at the bridge driving his blue vehicle while the deceased was lying there and Dawie got out of the vehicle and slapped him several times without uttering a word. He (Mtuyedwa) did not enquire from Dawie why he assaulted the deceased fearing that he may be accused of allowing the theft to take place at his farm or even jeopardizing his work. But the deceased asked Dawie why he slapped him and Dawie said for stealing his watermelons. Accused 3 and Aobakwe were at the back (load box or loading bay) of the blue bakkie. He estimates the distance from the bridge to Dawie's watermelon field to be about 60 meters.

- [12] Mtuyedwa was working at the watermelon field on the day of the incident. Had the deceased and Aobakwe stolen watermelons he would have seen them. He refuted the theft accusation levelled against them explaining that he was the one who loaded the watermelons that were in the bakkie on that day. He denied that those watermelons were found in possession of Aobakwe and that he was apprehended with them.
- [13] The deceased ran towards Mtuyedwa after he was slapped by Dawie and they walked home together. He advised the deceased to flee but he refused stating that Dawie had already slapped him. After walking a distance of about 20 to 23 meters Dawie's bakkie approached them again. The accused and Aobakwe were in the loading bay of the bakkie with Aobakwe lying on his back on top of the watermelons. Accused 2 jumped out of the bakkie armed with a firearm. He did not see wherefrom it was produced but only observed it when it was already pointing at the deceased. He saw accused 2 firing a shot at the deceased which struck him on his stomach and demonstrated by putting both his hands on his stomach above his belt. He did not hear accused 2 uttering any warning before firing the first shot except calling the deceased and demanding that he climb on the bakkie. The deceased refused. After being shot the deceased fled into the bushes. Accused 2 continued firing shots whilst pursuing the deceased until he stopped at the canal. He heard about 5 shots being fired. He saw accused 2 returning to the van and boarding the van. He went home.
- [14] When he arrived at his home he noticed that there were members of the community gathered at the deceased's home. He also went there. He made a report of the shooting incident to Malati who subsequently telephonically contacted D/Sgt Godiamang Gladwin Pico and reported to him. D/Sgt Pico arrived simultaneously with two ambulances. The paramedics in one ambulance attended to the deceased who was still alive at that time and rushed him to hospital. The second ambulance was part of the SAPS motorcade dispatched to Dawie's place following up on the report that he had made regarding Aobakwe. He accompanied the police to Dawie's

place. Among the SAPS members present he recalls D/Sgt Moatlhodi David Dikoko, W/O Edward Chabedi, and a female police Captain whose name had escaped him and D/Sgt Pico. After the police found Aobakwe he accompanied them to the police station. There he furnished a statement and was later taken home.

- [15] The following day Mtuyedwa was again fetched by one of the SAPS members, W/O Chabedi, to point out to them where the shooting had occurred. Photographs of the scene and the pointing out were made to W/O Lebogang Percival Sechogela. He ably explained the points in his evidence as captured in Exh A.
- [16] D/Sgt Pico is stationed at Hartswater Police Station. He has been a detective for 6 years. He resides at Diplankeng in Magogong. He knew the deceased as Seun who grew up in front of him. On 02 January 2019 he had just knocked off duty. When he arrived home between 17:00 and 18:00 he was approached by two ladies, Kedisaletse and Kedilatile, who made a report to him. On the basis of that report he accompanied them to the deceased's place.
- [17] Upon their arrival he observed that many members of the community had assembled there. He entered the deceased's residence and found him lying under a bed sheet which he lifted and noticed that his upper body was naked. He observed a wound on the deceased's stomach. D/Sgt Pico demonstrated by placing his hand on the right side of his body just above his waist. The deceased had placed his hand on his stomach but it appeared as if he was holding something. He enquired from the deceased, who was still alive, who caused that injury to him but he could not respond due to shortness of breath. He then summoned the ambulances and the SAPS members to attend the scene. While the one ambulance took the deceased to hospital he, in the company of D/Sgt Moatlhodi David Dikoko, Sgt Nthutang, and Sgt Lukas accompanied by Mtuyedwa, proceeded to Dawie's plot together with the second ambulance. They were investigating

allegations regarding Aobakwe Pholoholo who is known to him as he resides in the same village.

[18] They found Aobakwe fastened in a small room as depicted at photo 4 of Exh “A”. Aobakwe was later taken by the ambulance to hospital and they returned to the police station. During his investigations he received information concerning accused 2 and 3. When they visited Dawie’s place on the night of the incident accused 2 and 3 were not present at that scene. He arrested the accused on 04 January 2019. Accused 2 was arrested at his uncle’s residence, House No 6[...] Ext [...], Taung. They were conducting suspect raiding on that day when the late Sgt Mokgweetsi was contacted by accused 2’s uncle. The information received was that they should rush to arrest him because he was preparing to flee. The SAPS members rushed to the given address and found him in the bathroom with a packed bag. He explained his rights to him verbally and arrested him for attempted murder as the deceased was still alive at that time.

[19] As they left accused 2’s uncle’s place, they received further information from accused 2’s uncle that accused 3 is in Ngolo at his sister’s place. The police went there and while still approaching they were stopped by accused 3’s sister who was in the company of her husband and accused 3 riding together on a donkey cart heading to Taung. He introduced himself to accused 3, explained his rights to him and arrested him as well. The two accused were taken to Hartswater police station. There, he completed the Notice of Rights (SAP14A) for both accused in triplicate giving each accused the original copy, one copy for the docket and the third copy remained in the book, for which they signed to confirm that their rights were explained to them and they understood the explanation made. The notices were accepted by this Court as exhibits “C” and “D”.

[20] When the accused were arrested D/Sgt Pico was accompanied by many SAPS members but remembered offhand D/Sgt Mosalanyane, D/Sgt Markus, D/Sgt Dikoko, D/Sgt Visser and the late D/Sgt Mokgweetsi. He refuted the contention by accused 2 that he went to seek advice from his

uncle maintaining that the uncle advised the police to rush because the accused was preparing to flee. He neither received a complaint from Dawie pertaining to the theft of his watermelons nor was aware of any report made at the police station in that regard. Accused 3's legal representative did not cross-examine D/Sgt Pico.

[21] D/Sgt Dikoko is also stationed at the Hartswater Detective Services. He has been a detective for the past 6 years. On 02 January 2019 he was the detective performing standby duties. He received a telephone call from the police station informing him of a shooting incident in Magogong. He went to Magogong and met D/Sgt Pico and the victim lying in a room in a shack. There were many community members present outside his residence. The deceased is unknown to him. He observed him bleeding from the right side of his stomach. He received information involving another person at Dawie's plot and was accompanied by D/Sgt Pico, and other members of the SAPS to Dawie's plot. It was between 19:00 and 20:00.

[22] Upon their arrival they found Dawie at his plot and asked him about the shooting incident. Dawie was reluctant to divulge any information. He actually acted surprised and seemed not to know what the police were referring to. The police noticed the storeroom which was locked by chain and a padlock from the outside. They knocked on the window and door of that storeroom and heard sounds of a person groaning. They peeked through the window but could not see clearly. Dawie eventually gave the key to one of his employees to unlock the storeroom door. Aobakwe was found inside the storeroom behind the half wall depicted as 2a on photos 1 and 2 of Exh "A". The SAPS members used their cellphone torches for illumination since it was already dark. They found him lying on his stomach facing down with his hands and feet fastened with wires at the back as depicted on photos 3, 4 and 5 of Exh "A". They summoned the LCRC who took pictures of the scene.

[23] As they were busy in the storeroom Dawie, without saying anything to anyone, took off in his vehicle. The SAPS members, excluding the LCRC

members who remained at the scene, immediately pursued him. He drove towards Magogong Village. The police caught up with him. He told them accused 2 and 3 were at the watermelon field which was a lie. Dawie informed the police that he tried to contact the accused telephonically but neither answered his calls. The police left with Dawie to Hartswater police station where he was arrested after his rights were explained to him and the Notice of Rights form was completed.

- [24] W/O Sechogela is a member of the South African Police Service with 17 years' experience of which 14 years was with the Pudimoe Local Criminal Record Centre (LCRC). He received training in Advanced Crime Scene management which entails among others taking official photographs, collecting evidence from crime scenes, attaching and packaging exhibits and sending them to the laboratory. He also attended a DNA Recovery Course. He compiled the affidavit in terms of s 212 of the CPA with key to sketch plan and photographs under CAS 12/01/2019 and LCRC NO: 06/01/2019. At the time of the compilation of Exh A he held the rank of Sgt.
- [25] W/O Sechogela visited crime scene 1 at Plot 6[...], M[...] Village, on 02 January 2019 around 20:55. Const. TW Nthutang pointed out the scene to him and he took photographs 1 to 8 of Exhibit "A". Photos 3, 4 and 5 depict how he had found the victim and photo 6 shows the victim after the wires were removed by one of the police officers at the scene. W/o Sechogela states that visibility was fairly good because of the adequate illumination from the lighting equipment that he had brought with him.
- [26] W/O Sechogela was summoned again by W/O Chabedi on 03 January 2019 at 09:10 to attend the scene at a gravel road next to Skaalwater Waterworks (crime scene 2) in Magogong. Upon his arrival at crime scene 2 he found several police officials and the crime scene was cordoned off. Mr P Mtuyedwa, who is not a member of the SAPS, pointed out crime scene 2 to him. Photos 9 to 26 of Exh "A" relate to crime scene 2. He explained the different points as follows: Point 1b depicted at photo 10 indicates the direction of the victim and the eye witness as they were followed by a blue

Toyota Hilux; point 2b on photos 10 and 11 indicates the place where the Toyota Hilux stopped and the security guard had jumped off; point 3b on photos 10 and 11 indicates the place where the security guard stopped and started shooting as the witness alleged; point 4b indicates the area where the victim was standing when he was shot at by the security guard and it is the place where the first fired cartridge was found; point 5b indicates the place where the second fired cartridge was found; point 6b indicates the place where the third fired cartridge was found; point 7b indicates the place where the fourth fired cartridge was found. Point 8b indicates the place where the eyewitness was standing. The fired cartridge collected at point 4b was packaged in forensic bag with serial number PA6002937072; fired cartridge collected at point 5b was packaged in a forensic bag with serial number PA6002937068; fired cartridge collected at point 6b was packaged in forensic bag with serial number PA6002937070; and fired cartridge collected at point 7b was packaged in forensic bag with serial number PA6002937069. W/O Sechogela later booked the exhibits in the LCRC Register SAP459 for safekeeping.

- [27] Mr William Zwelinzima Dabula is 59 years old and has been residing at Taung Extension [...] since 1999. He is accused 2's uncle. On 03 January 2019 he and his wife left their home around 19:00 to attend a night vigil. Whilst there, he received a call from his daughter between 20:00 and 21:00 informing him that accused 2 was at their home. After the night vigil ended they returned home where they found accused 2. Although accused 2 visited him regularly he never visited them at night. The accused informed him that he is fleeing from the police. When he probed for the reason therefor he said he and his friend had injured someone and their employer demanded that they should flee as he, their employer, has lawyers and he will stand trial for that matter. The employer threatened to shoot them if they did not flee. The accused told him that the name of their employer is Dawie. He advised the accused that there was no way that he could flee from the crime that he has committed and that he should hand himself over to the police. The accused first raised his fear that the police might assault him but

he managed to persuade him to hand himself over. He spent the night with them.

[28] After discussing the matter with the accused Mr Dabula sent a Whatsapp communication around 22:00 to the late detective Mokgweetsi enquiring from him what he knew about the accused and his friend. Detective Mokgweetsi informed him that the police were looking for them. He alerted the detective that accused 2 was at his place and the police should arrange to fetch him from there. An arrangement was made for the next morning. The following morning several members of the police attended to his home and among them he knew Chabedi and Mosalanyane. Mokgweetsi was not among them. During that period up to his arrest accused 2 resided with his mother at her place which is estimated to be about 10 km's from his home. This witness was not cross-examined.

[29] Ms Sara Sekabe resides in Taung and is accused 3's sister. On 03 January 2019 she was telephonically contacted by accused 3 arranging to visit her but withheld the reason for the visit telling her that he will tell her in person. She testified that he does not visit her often. Upon his arrival he informed her that his colleague had shot someone at work and he does not know whether or not that person is alive. He sought advice from her. She advised him to hand himself over to the police as fleeing from them was not a solution. He was concerned about his minor child. She assured him that they will look after the child. Since it was late they retired to bed. The following morning as they were preparing to go to the police station she received a call from the police enquiring about his whereabouts. She arranged with them that she will meet them along the road to hand him over to them. The accused's own residence is at Majaneng. She was also not cross-examined by either of the legal representatives.

[30] Mr Thabiso Mosalanyane is currently employed as an investigator by Bidvest Protea Coin. During January 2019 he was employed by the SAPS as a D/Const in the Hartswater Detective Branch. He was on duty when he and Col Kheswa booked out accused 2 and 3 from the Hartswater police cells

between 09:00 and 10:00 in the morning. After stepping out of the cells he explained the following rights to them in Setswana: that they have a right not to answer any questions that he may pose to them and should they do so anything said would be used against them in court; they were entitled to have an attorney present during the interaction with him at their own cost and if they could not afford an attorney one could be provided from the legal aid. Neither of them objected to the engagement without an attorney present. Both accused were in their sound and sober senses and not under the influence of alcohol or drugs. The subject of the interview was to ascertain the whereabouts of the firearm that was used in the shooting. After he asked them where the firearm was, accused 2 enquired from accused 3 in their presence what he did with the firearm. His response was that it fell at the time when they were fleeing. He then asked them if they would take the police to the alleged point where accused 3 says it fell. They both agreed to take the police to that point.

[31] Cst Mosalanyane left the police station accompanied by the accused, W/O Chabedi, Sgt Pico and Col Kheswa to a plot known as 1 Lima 3 directed by both accused. This plot is the property of Dawie. Upon arrival at the plot he enquired from accused 3 if he remembered the exact spot where the firearm allegedly fell but he could not remember. They then conducted a field search for the firearm together with the accused. During the search they considered other search options and agreed to involve the dog unit. However, before the dog unit could arrive, accused 2 enquired from accused 3, in their presence, about the whereabouts of the bullets he had placed in his bag. Accused 3's response was that the bullets were in the schoolbag at his home in Majaneng. Cst Mosalanyane enquired from them if he should accompany them to Majaneng to show them that school bag. They agreed. Cst Mosalanyane and Col. Kheswa accompanied them to Majaneng leaving the other members at the watermelon plot to continue with the search.

[32] After they alighted from the vehicle at accused 3's home at Majaneng accused 3 said to his girlfriend "*can you please bring the bag that I usually take with to work?*" and she brought it and handed it over to accused 3.

Accused 3 opened the school bag and Cst Mosalanyane saw a box containing bullets in the bag. Cst Mosalanyane said to accused 2 and 3 now that the bullets have been found they could return to the plot to continue with the search for the firearm. Accused 3 walked for some distance from where they all stood, towards a wooden box next to the shack. Cst Mosalanyane followed him closely. The top of that wooden box depicted at photos 2 and 3 of Exh "E" was covered with a cloth or piece of material. Accused 3 pulled the cloth or the material away and uttered the words "*here it is*". Cst Mosalanyane enquired from the accused what he meant but no response was forthcoming. As Cst Mosalanyane peeked into that box he saw a pistol inside. Without handling that pistol he informed Col Kheswa to come and observe.

[33] Cst Mosalanyane and Col Kheswa telephonically contacted their colleagues who were still on a wild goose chase for a firearm at the watermelon field to join them at accused 3's place. They also summoned the LCRC to the scene and Sgt Malgas responded. Cst Mosalanyane pointed out to Sgt Malgas and he took photographs. According to Cst Mosalanyane as Sgt Malgas was making the firearm safe they observed that there was a silver magazine containing five bullets in the firearm and one bullet was inside the chamber. There was an additional silver magazine below the firearm. Sgt Malgas collected the evidence and placed it in the forensic bags.

[34] After all the evidence was collected, Cost Mosalanyane, Col Kheswa and the accused returned to the Hartswater police station where the accused were booked back to the cells. Cst Mosalanyane explained the process of booking the accused in and out of the cells. He typed his own statement on 07 January 2019 where he specified the details of the firearm. He recorded the name of the firearm as a patented model GT 27, calibre.25 with serial number D[...] and the ammunition 6.35. It was put to Cst Mosalanyane by accused 2's legal representative that the accused were telephonically instructed to flee by the owner of the plot Mr Dawie at the time when he (Dawie) had approached the plot with the police. Cst Mosalanyane was

subjected to rigorous cross-examination by the defence but he remained consistent in his version. I found him to be a credible witness.

[35] Brig Sipho Aron Kheswa is also a SAPS member stationed at the Provincial office in the Northern Cape. On 04 January 2019 he held the position of Colonel. He was deployed to the Hartswater Cluster to oversee the SAPS festive operations there. He accompanied Cst Mosalanyane to the Hartswater police cells where accused 2 and 3 were booked out of the cells for investigative purposes and to recover the murder weapon. He witnessed Cst Mosalanyane explaining the accused's rights before he conducted the interview. He did not witness any assault on the accused at any time whilst he was accompanying the investigative team first to the plot and then to accused 3's residence.

[36] After the search for the firearm at Dawie's watermelon plot that lasted for half a day had proved to be an exercise in futility, accused 2 asked accused 3 where the bullets were that were inside the bag. Accused 3's response was that they are at his home in Majaneng. Cst Mosalanyane, accompanied by Col Kheswa and the accused, drove to accused 3's home. Upon arrival at accused 3's residence he called his girlfriend from inside the van, and asked her to bring the schoolbag that he normally carries to work. She returned with the bag and handed it over to accused 3. Cst Mosalanyane asked accused 3 to open the bag and discovered that it contained bullets. Cst Mosalanyane informed them that now that they have found the bullets they must return to the watermelon field to continue with the search for the firearm. Accused 3 asked Cst Mosalanyane to wait for a moment. They had alighted from the police van. Accused 3 took Cst Mosalanyane to a place next to his shack where there was an object used to roll up electricity cables placed upside down. He marked with a cross the object on Exh "E" that appears to be the wooden object from underneath the green cloth below the arrow coming from number 2. It is then that Cst Mosalanyane called Brig Kheswa. He confirmed observing the exhibits found at accused 3's home as depicted on photo 3 of Exh E. Col Kheswa did not escape the laborious cross-examination.

[37] Sgt Tebogo Marvin Malgas, a SAPS member with 14 years active service was attached to the LCRC as a constable in 2019. His duties and responsibilities include, among others, attending crime scenes and lifting fingerprints, taking photographs, collecting exhibits and dispatching them to the Forensic Science Laboratory (FSL). In addition to the Basic Police Training, he also received training in Advanced Crime Scene and Forensics and DNA Recovery.

[38] Sgt Malgas compiled Exh "E" which comprises key to sketch plan and photographs taken at House Number 1[...] M[...] Village on 04 January 2019 at 17:00 as pointed out by Cst Mosalanyane. According to his testimony, point 1 on photos 1 and 2 indicates house number 1[...], M[...] Village. Point 2 on photos 1 and 2 indicates where the exhibits (firearm, silver magazine, a box of bullets) were found. Points 3 and 4 on photo 3 is a blown-up photo of the spot where the aforementioned exhibits were found. Photo 4 depicts the exhibits as collected at house 1[...] M[...] Village. When he removed the pistol from where it was pointed out to ascertain its safety before packaging it, it contained a magazine with 5 live rounds of ammunition and one live round in the chamber. Underneath the pistol there was another silver magazine which also contained 5 unused rounds of ammunition. Inside the box there were 25 rounds of ammunition. He took the exhibits and packaged them as follows as depicted at photo 4 of Exh "E": the top right forensic bag with serial no PA 60033892871 contained a magazine found under the firearm with 5 bullets; the bag in the top middle with serial no PA 6002936930 contained 25 bullets in a box; the big bag to the left of the photo with serial no PA4001873857 contained two swabs of uplifted DNA from the handling of the firearm; the middle bag to the right of the big bag with serial no PA 60033892840 contained one silver magazine with five live rounds found inside the firearm; the bag middle right with serial number PA 5002628803 contained a firearm found at 1[...] M[...] Village; and the bottom left bag with serial no PA 600 33892390 contained a black S & V6.35 handgun and ammunition box; and the bottom right bag with serial

no PA 6002936929 contained the one bullet found in the chamber of the firearm.

[39] Sgt Malgas initially booked the exhibits into the Hartswater Police Station SAP 13 register then booked them out of that register and took them to Kimberley LCRC for the lifting of the fingerprints. The exhibits were booked into the SAP 459 register and were subsequently handed over for ballistic testing. Sgt Malgas packaged the exhibits under the serial no PA 4004168858 and handed them over to Cst Mogoiwa and not to W/O Chabedi as appearing in the letter. Cst Malgas explained that in the report by Captain Luvuyo Lundi Mlindazwe, attached to the Ballistic Section of the SAPS Forensic Laboratory in Pretoria, exh “H2” mention is made of “stapled tampered evidence”. The reason for the bags being stapled was because when the Kimberley fingerprint unit had finalised their examination they re-packaged the exhibits in the same bags. That is why he, Malgas, used the main sealed forensic bag with serial number PA 4004168858 when sending the exhibits to the Forensic Science Laboratory for ballistic testing he used a sealed bag. He was not cross-examined by any of the defence legal representatives.

[40] Captain Luvuyo Lundi Mlindazwe filed an affidavit in terms of s 212 of the CPA (H2) which was admitted by accused 2 and 3 as part of their admissions made in terms of s 220 of the CPA. He is the ballistic expert whose credentials are not disputed. On 23 August 2019 he received two intact sealed evidence bags marked under Hartswater CAS 12/01/2019 from the Case Administration of the Ballistics. In the first intact sealed envelope he specifies the stapled tampered evidence under the following exhibits:

40.1 Bag no PA5002628803 containing one 6.35MM Calibre TANFOGLIO model GT 27 semi-automatic pistol with serial no D[...];

40.2 Bag no PA6002936929 containing one 6.35MM calibre cartridge and marked it as 7[...];

- 40.3 Bag no PA60033892840 containing five 6.35MM calibre cartridges unmarked and one firearm magazine compatible to be used in the firearm mentioned in 40.1, unmarked;
- 40.4 Bag no PA60033892871 containing five 6.35MM calibre cartridges, unmarked and one firearm magazine, unmarked;
- 40.5 Bag no PA6002936930 containing twenty-four 6.35MM calibre cartridges, unmarked.

The second main sealed evidence bag with number PA5002628810 contained one 6.35 MM calibre fired bullet and marked I[...].

[41] Capt Mlindazwe examined the cartridges mentioned in paragraphs 40.2, 40.3, 40.4 and 40.5 and found that they consisted of a primer, cartridge case, bullet and propellant and were designed and manufactured to be fired by a centre-fire firearm. He also examined the pistol mentioned in 40.1 and found that it functions normally without any defects. The mechanism of the firearm in question is self-loading but is not capable to discharge more than one shot with a single depression of the trigger. He also examined the fired bullet that was sent separately in the second intact evidence bag, the projectile retrieved from the deceased's stomach and dispatched for ballistic testing by W/O Chabedi under serial no PA5002628810 and those used for test purposes marked 413TC1 to 413TC2 and 413TB1 to 413TB2 to determine if they were fired from the firearm mentioned in 40.1. His conclusion was that it cannot be determined if the one 6.35 MM calibre fired bullet marked I[...] was fired or not fired from the firearm mentioned in 40.1.

[42] Dr Lemainé Fouché possesses an MBChB degree from the University of Pretoria obtained in 1973; a Diploma in Pathology obtained at the University of the Free State (UFS) in 1985; Diploma in Community Health obtained in the UFS in 1996; M Med (Med Forens) obtained at the UFS in 2006; Admitted as a Fellow to College of Forensic Pathologists in 2006; PhD conferred in 2016 in the Health Professions Education Section.

[43] She is a Principal Pathologist in forensic pathology, stationed in Kimberley, and appointed on a sessional basis by the Department of Health, Northern Cape. To date she has conducted 4175 post mortem examinations. Her credentials are undisputed. She conducted the post-mortem on the deceased's body registered under number KDR 6/2019 identified to her by the forensic pathology officer Lesego Kelapisitswe. It was a body of a black adult male with a slender physique whose reputed age is 29 years. The body was received naked and wrapped in a body bag.

[44] When she started her examination of the body she observed that *rigor mortis*, in other words, the stiffness of the body at death, had already set in and that hypostasis was present and explained that it meant that when death set in and because the body was lying on its back the blood had gravitated to the lowest part of the body.

[45] In as far as the external appearance of the body is concerned, Dr Fouché recorded the following at para 4 of the post-mortem report which she supported by highlighting the exact location of the said injuries on the male diagram attached at the last page to the report:

45.1 A defect, 5mm in diameter and surrounded by a rim of abrasion on the outside aspect of the right lower arm. This defect has the appearance of an entrance wound.

45.2 A slit-like defect, 7mm long in the inner aspect of the right lower arm. This defect has the appearance of a shored exit wound.

45.3 A defect, 7mm in diameter into which a corrugated drain was placed on the lateral aspect of the right abdomen. This defect has the appearance of an entrance wound.

45.4 A bruise, 1.5cm in diameter and 2.5cm left of the umbilicus. An incision into the bruise revealed the projectile which was removed by

myself, placed in an appropriate container and marked KDR 6/2019 by myself and handed over to FPO L Kelapisitswe.

45.5 A defect, 1 cm in diameter with a rim of abrasion on the lateral aspect of the right hip. This defect has the appearance of an entrance wound.

[46] Dr Fouché further recorded that the brain of the deceased, which was pale in colour, was macroscopically swollen with flattening of the gyri. She explained that the paleness of the brain, also observed on both kidneys as well as the liver that had a nutmeg appearance was due to loss of blood. She also observed and recorded the presence of a bloody fluid in both thoracic cavities and in the abdominal cavity. Since all organs are supplied by blood organs and when circulation stops some of the fluids cipher into the cavities. Both lungs were oedematous and congested because of a lack of circulation of blood. There are no X-ray facilities at their institution. If they had X-rays she would have taken them to determine if there were any more projectiles inside the body.

[47] The Chief post-mortem findings made by Dr Fouché on the body were the following:

“The body of a black adult male with a gunshot through the right arm with a re-entry wound into the lateral aspect of the right abdomen with damage to the mesenterium and the colon. There was bloody fluid in both the thoracic cavities and the abdomen. A projectile was retrieved from the anterior abdominal wall left of the umbilicus.”

Dr Fouché found the cause of death to be the gunshot through the right arm with a re-entry wound to the right abdomen.

[48] The doctor answered affirmatively that the wound on the outside aspect of the lower arm (4.1), the wound on the inner aspect of the right lower arm (4.2) and the wound on the lateral aspect of the right abdomen (4.3) were

caused by one bullet. Notwithstanding that she was not in a position to tell the Court which one of the gunshots was fired first. She, however, clarified that the wound at the hip was a graze and hence the recordal as a 1 cm superficial tract with an appearance of an entrance wound. She also elaborated on the question whether the deceased was facing his attacker at the time of the shooting or not. Her explanation was that once a person is in a flight mode it is possible that he may have turned because the shots were from the side.

[49] W/O Edward Chabedi, the investigating officer of the case, also testified. He has been attached to the Hartswater Detectives since 2018. He was assigned the case to investigate on 03 January 2019. He fetched the witness Mtuyedwa to accompany him to the scene for purposes of pointing out. He was accompanied by Sgt Pico. Upon their arrival at the scene there were no other people present. After he observed empty cartridges he cordoned off the scene and telephonically contacted Sgt Sechogela for the collection of exhibits and photographs. W/O Chabedi, did not handle any of the exhibits. W/O Sechogela was responsible for the collection and dispatch of the exhibits to the laboratory. He is aware that the exhibits were sent to Kimberley for fingerprints but is unsure what happened thereafter. He personally first registered the one projectile that was recovered from the deceased's body in the SAP 13 under Hartswater CAS 12/01/2019 then subsequently dispatched it to the Forensic Science Laboratory in Pretoria for ballistic testing under serial number PA 5002628810.

[50] Further investigations conducted on the firearm recovered by Mosalanyane and Malgas revealed that the pistol with calibre description 6.35MM Browning with serial number D[...] belonged to Mrs Johanna Francina Oosthuizen, the wife to the late Stephanus Dawid Wessel Oosthuizen, former accused 1. The details are recorded in Exhibits "G1" and "G2".

[51] W/O Chabedi was requested by the State to establish who the SAPS member was who made the entries in the Occurrence Book (OB) when accused 2 and 3 were booked in and out of the cells for purposes of

searching for the murder weapon. He could not remember the name of the member and could only confirm that it was a female member who has passed away.

- [52] W/O Chabedi was further asked about the whereabouts of Dawie's bakkie which was seized and registered under the SAP 13 as well as the watermelons and the cellphones belonging to accused 2 and 3. He had no knowledge or explanation regarding the watermelons but that the cellphones were handed to Sgt Mojaki to hand them back to the accused.

The State closed its case.

The defence case

- [53] Accused 2 was the only witness who testified in his defence. He was 21 years old when the incident occurred in January 2019. He was recruited by accused 3 who was then employed by Dawie as a security guard. He was employed on 01 January 2018 but officially reported for work on 05 January 2018. He and accused 3 did not receive any form of training for the guarding work. Their responsibility entailed guarding watermelons to prevent theft or loss. The watermelon field is located far from Dawie's residence or plot. Dawie placed accused 3, who is older than him, in possession of a pistol. He was not taught how to operate a firearm and does not know if accused 3 had received any firearm training.
- [54] On the day of the incident, they observed Aobakwe at the watermelon field and chased him. He did not know Aobakwe. Aobakwe fled towards the canal and jumped in the water which could be about 3 m deep. He tried to exit the canal on his own and in the process bumped his head against the canal wall. He and accused 3 pulled him out. They waited for Dawie to arrive in his bakkie and loaded Aobakwe at the back of the bakkie and climbed in with him. There were watermelons at the back of the bakkie. Dawie informed accused 2 and 3 that he saw another person at the bridge and drove towards the bridge.

[55] As they approached the bridge accused 3, who had the pistol on his hip handed it to him and suggested that he should threaten the deceased with the firearm so that he would climb onto the van. Dawie screamed at him to load the deceased. He (accused 2) fired a shot to the side and alighted from the van carrying the firearm in his hand. He asked the deceased to board the vehicle but he refused and produced a knife instead. He again fired a shot to the side and the deceased fled running in a zig-gag fashion. Because he did not have any knowledge of firearms he just continued firing. He was operating a firearm for the first time but fired randomly towards the direction in which the deceased fled. He cannot remember how many shots he had fired. The deceased disappeared in the bushes and he returned to the vehicle and handed the firearm back to accused 3. Dawie and accused 3 left him at the watermelon field taking Aobakwe with them to Dawie's plot. He does not know whether any of the fired shots had struck the deceased. Later, Dawie returned with accused 3 and they loaded the watermelons on the van.

[56] Accused 3 informed him that he and Dawie had put Aobakwe in a garage and that Dawie had told accused 3 that he will report the matter to the police. Dawie later told accused 3 that the police were on their way. Dawie advised him and accused 3 to flee and that he will handle the police. He fled to his uncle and accused 3 to his sister. He denies the intention to injure or kill the deceased as he just wanted to scare him so that they could catch him and hand him over to the police. The police apprehended him at his uncle's place.

Accused 2 did not call any witnesses to testify in his defence but opted to close his case.

[57] Piet Gohentsemang Muller, accused 3, also testified and opted not to call any witnesses to testify in his defence. His evidence was that on 02 January 2019 he was employed as a security guard to guard watermelons at Dawie's watermelon field. Accused 2 was his colleague. He and accused 2 observed Aobakwe and "*Mpharanyane*", the deceased, at the bridge.

Aobakwe walked next to the road and went to the pump house. He followed Aobakwe and as soon as Aobakwe noticed that he was being followed, he ran and dived into a canal. He held out a stick to Aobakwe to help him to exit the canal. Aobakwe was injured above his eye after bumping against the concrete wall of the canal. He (accused 3) was alone with Aobakwe at that time as accused 2 was on the other side of the field. He called Dawie. While they were waiting for Dawie to arrive, Aobakwe pointed towards the watermelons stating that he and *Seun*, the deceased's other name, had picked them. Dawie arrived and enquired from him why Aobakwe was oozing blood and he explained to Dawie that he was injured by the concrete wall of the canal. Dawie ordered them to load the watermelons on the van.

[58] As they drove towards the bridge Aobakwe pointed to the deceased and said there is *Seun*. Dawie drove the bakkie while he and Aobakwe occupied the load box of the van. Accused 2 emerged from the watermelon fields at the stage when Aobakwe pointed at *Seun*. Dawie ordered accused 2 to pursue the deceased. Accused 2 chased the deceased who fled towards the veld and gun shots were fired. As far as he knows accused 2 was not in possession of a firearm when gunshots were fired. He heard three-gun shots. Dawie then drove towards the bus stop at the bridge where accused 2 joined accused 3 and Aobakwe in the load box of the bakkie after the deceased had outrun him. Dawie told accused 3 to guard Aobakwe in the load box as they returned to the watermelon field. Dawie then told accused 2 to alight and remain at the watermelon field while they took Aobakwe to his plot. At the plot Dawie ordered him to offload the watermelons from the bakkie.

[59] Thereafter Dawie told him to guard the storeroom as he called another employee by the name of Rasta and ordered him to lock Aobakwe inside the storeroom. Aobakwe was not tied up when Rasta put him in the storeroom. Dawie was on the phone and subsequently told accused 3 that the police were not taking his call. Dawie then advised him to take food from the shop for him and accused 2 and drove him back to the watermelon field where he

re-joined accused 2 and offered him food. He and accused 2 never had any further encounter with either Aobakwe or the deceased.

[60] Later that evening, around 20:00, Dawie telephonically informed him that the police were at his plot. Accused 2 and 3 saw the police at the watermelon field around 21:00. He does not know what happened to the deceased but learnt the following day that he was shot and had died.

[61] At his shack when the police were searching for a firearm, he asked his girlfriend to bring the bag that he normally carries to work. She brought it and handed it to Cst Mosalanyane who opened it and found a box of cartridges therein. Cst Mosalanyane enquired about the firearm and thereafter went to a table standing under a tree and retrieved another box of cartridges from underneath a cloth. He conceded that when accused 2 asked about the whereabouts of the bullets he responded by saying they are in his bag which is at his home. He denied showing Cst Mosalanyane and Brig Kheswa the table where a firearm and cartridges were found and maintained that he was at all times at the back of the police van.

The law

[62] It is trite that in criminal cases the *onus* rests on the State to prove its case against the accused beyond reasonable doubt. The test is set out as follows in *S v Van der Meyden*¹:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383).”

[63] The proper approach to the evaluation of the evidence has been laid down by the Supreme Court of Appeal in *S v Chabalala*² as follows:

¹ 1999 (1) SACR 447 (W) at 448f -g

[15] ...The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

The issues and the analysis of the evidence

Count 1: Murder read with the provisions of s 51(1) of Act 105 of 1997

[64] The State is alleging that the murder was committed in the furtherance of a common purpose hence the allegation that it falls under the provisions of s 51(1) of the Criminal Law Amendment Act. It is common cause that the deceased died of a gunshot. Mtuyedwa was with the deceased when Dawie's bakkie arrived. The deceased's refusal to board Dawie's bakkie led to accused 2 firing several shots at him. The deceased was struck by the fired bullets and Dr Fouché found one projectile in his abdomen. The reckless shooting incident was witnessed by Mtuyedwa who was subsequently helpful in assisting the police with their investigations.

[65] Mtuyedwa's evidence does not stand alone but was corroborated to a great extent by Aobakwe, Dr Fouché and D/Sgt Pico. There is no ground of justification for this killing. Common between accused 2 and Mtuyedwa is

² 2003 (1) SACR 134 (SCA) para 15

that accused 2 alighted the vehicle pointed a firearm at the deceased and called the deceased but he refused so accused 2 shot him. To substantiate that there were more shots fired while the deceased was fleeing, spent cartridges were retrieved at the scene by the LCRC.

[66] Mtuyedwa was taken to task during his cross-examination pertaining to the difference between the statement he made to the police and his *vivo voce* evidence. He explained that although he spoke in Setswana the statement was written in English and translated back to him in Setswana. Seemingly, there are contradictions between what was contained in that statement and what he had testified to in court. Whether the deceased held his thigh or stomach after being shot, the evidence of Mtuyedwa was corroborated by Sgt Pico and Dr Fouché. In this regard, pertaining to the perceived discrepancies our law is settled. See *S v Mkohle*³ and *S v Mafaladiso*⁴. Contradictions *per se* do not affect the credibility of a witness and it is crucial for the evidence to be evaluated holistically. Mtuyedwa did not mislead the Court. While a bullet was retrieved from the deceased's stomach the post-mortem report also shows an injury on his right thigh area. This therefore means that it is plausible that he may have also held on to his thigh before holding his stomach. It is not a material issue whether the deceased had held his stomach or his thigh or hip as he was fleeing. The fact of the matter is that the deceased was shot at by accused 2.

[67] Mtuyedwa said, which accused 2 did not deny, accused 2 fired shots in order to apprehend the deceased suspected of stealing watermelons. When he fired his first shot accused 2 and the deceased were close to each other at points 3b and 4b. There was no justification to shoot at the deceased at this close range more especially that he acknowledged that he knew what a firearm could do. He directed his shots at an unarmed person who was running away.

³ 1990 (1) SACR 95 (A) at 98f - g

⁴ 2003 (1) SACR 583 (SCA) at 593j – 594e

[68] Mr Pieterse, for accused 2, urged this Court to consider that the bridge where this incident had occurred was very close to the watermelon field which was not secured by fencing. Evidence was to the effect that the watermelon field was separated from the travel road by the canal. Mr Pieterse conceded that the bridge was not privately owned but meant for public use. The bridge allowed access to the watermelon field and the nearby village. Counsel further submitted the description of Dawie by accused 2 that he was aggressive, and by accused 3 as hard core and by Mtuyedwa as having shouted and assaulted the deceased at the bridge claiming that Dawie's attitude can be attributed to being under pressure as a result of the theft of his produce by people from the village. Counsel argued that Dawie ended up employing two security guards to protect his property. I disagree. This type of attitude is inexcusable and unjustifiable because he had lawful remedies and options to explore but opted to arm accused 2 and 3 with his wife's firearm and ammunition unlawfully.

[69] Mr Pieterse contended that his client was not trained for the security guard job. He also did not have any knowledge of a firearm and was only 21 years old when he took up this dangerous security job. He lacked the knowledge of the application of minimal force and was, in fact, junior in age and date of assumption of duty to accused 3 as he only started in 2018 whereas accused 3 had started in 2007. Counsel submitted that arguably he had an accessory duty to accused 3. Accused 2 maintained that he and accused 3 patrolled the field together and did not operate independently.

[70] Mr Pieterse argued that the deceased and Aobakwe were watermelon thieves but this submission, in my view, was not borne out by the facts. What is before court is that when Aobakwe was apprehended and the deceased shot at, they were not in possession of watermelons. They were at a bridge and near the watermelon field and were suspected of being watermelon thieves. Mtuyedwa went as far as stating that the watermelons at the back of the van were loaded by him on that day which punches holes in the defence's averment that the watermelons loaded in the load box were those retrieved from the actions of Aobakwe and the deceased. Aobakwe

explained the reason for being at the bridge as waiting for the deceased's sister.

- [71] The State counsel, Mr Rosenberg, submitted that the accused be convicted of murder, with the form of intent as *dolus directus*. Mr Pieterse, for accused 2, countered the submission by the state contending that a proper conviction in respect of accused 2 would be one of culpable homicide and not murder *dolus directus* or *dolus eventualis*. Mr Pieterse's submission is that the only reasonable inference to be drawn is that the accused wanted to catch the thieves 'red-handedly' stealing watermelons and to hand them over to the police. Counsel contends that accused 2's intention was to apprehend the deceased and to get him to the bakkie so that they can be taken to Dawie's plot. Accused 2 testified that the deceased refused and produced a knife, turned around and fled. I must dispose of the contention that the deceased produced a knife. It was not put to any of the witnesses, more particularly, Mtuyedwa. It is improbable for a person confronted with a firearm to stop and produce a knife. It is also incomprehensible how accused 2 would fire the first shot and even after realising that the deceased has vanished into the bushes continuously and randomly just fire further shots.
- [72] The State alleges common cause in as far as the offence of murder is concerned. Mr Pieterse made the submissions that this Court should reject the evidence of accused 3 in as far as the firearm is concerned. Counsel argued that the firearm was there and according to accused 2, accused 3 gave it to him to subdue the deceased to board on to the bakkie. It is plain that accused 3 must have carried the firearm with the magazine carrying live rounds in it, cocked it and also removed its safety gauge because all that accused 2 did was to pull the trigger, so the argument went. When accused 2 returned from the shooting incident he handed the firearm back to accused 3.
- [73] Mr Mmutloane submitted that there is absence of prior agreement as one of the requirements in the case of *Mgedezi* relied on by the State. He further submitted that accused 3 denies giving accused 2 a firearm and challenged

the evidence of the State as to when accused 3 had given accused 2 the firearm. It is contended on behalf of accused 3 that accused 3 did not share a common purpose with accused 2 because had he ordered accused 2 to threaten the deceased that cannot be common cause with ordering him to kill the deceased. It is on that basis that Mr Mmutloane submitted that the State has failed to prove common purpose. A submission was further made to acquit accused 3 of all charges.

[74] Nhlanhla J, writing for a unanimous court in *S v Makhubela and Another*⁵ on the application of the doctrine of common purpose pronounced the following:

[35] *The operation of the doctrine of common purpose does not require each participant to know or foresee in detail the exact manner in which the unlawful act and consequence will occur. The doctrine of common purpose in our law is clear.*

[36] *In Mgedezi, the Supreme Court of Appeal stated:*

'In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite mens rea;...'

[37] *In Thebus, this court reiterated the principle of common purpose and explained what the 'requisite mens rea' entails if the prosecution relies on this doctrine. The court stated:*

⁵ 2017(2) SACR 665 (CC) para 35, 36, 37 and 38

'If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.'

[38] Finally, in *Dewnath* it was held:

'The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of S v Mgedezi and Others, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.'

[75] Putting the principles as espoused by the ConCourt in the case *in casu*, accused 2 and 3 were present at the scene performing their guarding services on the fateful day. They were together with Dawie driving them around the premises and jointly gave chase to Aobakwe and the deceased. Accused 3 did not only hand the firearm to accused 2 but was also aware of the shooting of the deceased. There is no evidence that he was coerced to be and to remain at the watermelon field or in Dawie's van at the time of the shooting. If accused 3 did not want to be involved in the conundrum he should have enquired from Dawie and accused 2 what their intentions were from the time they started pursuing Aobakwe and the deceased. Or accused 3 should have made his intentions clear before accused 2 had jumped out of the bakkie armed with a firearm, and distanced himself from Dawie and accused 2. He did not do so but remained at the scene with Dawie and accused 2. After hearing gunshots, he did not question the action of accused 2, neither did he flee or disassociate himself from them in any way. Accused 3, instead, misled the court by stating that at the time when he

heard the gunshots, accused 2 was not in possession of a firearm. Accused 2 and 3 had an understanding with Dawie to participate in doing everything possible to prevent the theft and loss of Dawie's watermelons.

- [76] The submission by Mr Pieterse that accused 2 be found guilty of culpable homicide cannot stand. Equally so, the submission by Mr Mmutloane that accused 3 must be acquitted on the murder count is without merit and must fail. I am satisfied that State has met the requirements for a conviction on the basis of common purpose in relation to the charge of murder with the form of intent as *dolus eventualis*.

Count 2: Kidnapping read with the provisions of s 51(2) of Act

- [77] Aobakwe is the complainant in Counts 2 and 3. Aobakwe's evidence was that he was pursued by both accused 2 and 3 who eventually apprehended him. He said during the chase accused 2 was armed with a firearm but it was never used. After his apprehension he was assaulted by both accused before he was detained at the back of Dawie's bakkie and placed under guard by accused 3. Although the evidence of the accused was that the aim of apprehending Aobakwe was for purposes of having him arrested for theft of watermelons, the objective facts do not support the claim.
- [78] There is no evidence whatsoever placed on record explaining why Aobakwe was not taken directly to a nearby police station for the law to take its course. He was, instead, taken to Dawie's residence where he was locked up in a storeroom. During the assault his T-shirt was torn and his shoes went missing and he ended up topless and without shoes. Despite that, he was made to lie on the floor on his belly while his hands and feet were tied to his back. The photographs depict an inhumane picture that completely negates the intention of planning to hand him over to the police.
- [79] The objective facts also show that Aobakwe was locked in the storeroom for a prolonged period because it was still day time when he was apprehended but when the members of the SAPS peeked inside the storeroom it was too

dark for them to see inside the room. After gaining access to the storeroom the LCRC member relied on the lighting that he had brought with for adequate illumination. Dawie's response as testified to by the SAPS members who attended his residence was that he acted surprised as if he was not aware of what they were investigating. He was even reluctant to give them access to the storeroom. This conduct is not supportive of people who were intending to hand over Aobakwe to the police. I am not persuaded of any effort made to report the incident of Aobakwe to the police. Whereas the instruction to apprehend may have come from Dawie, the two accused are implicated through reliable and credible evidence to have not only tied him with wires but also locked the storeroom when they left. Aobakwe identified accused 2 and 3 in court as the people who had tied him up in the storeroom. They both acquiesced with the kidnapping of Aobakwe. It was put to Aobakwe that because of the injury to his head he was dizzy and confused but he maintained the stance that it was accused 2 and 3 who had locked him up.

[80] Mr Pieterse, combined counts 2 and 3, that is kidnapping and assault with intent to do grievous bodily harm, in his submission that what Aobakwe has succeeded to do was to pull a veil on the faces of the police by playing victim instead of transgressor. Counsel argued that Aobakwe has distorted the facts in his favour when in actual fact Dawie would have been the complainant with accused 2 and 3 as his witnesses in a theft charge. Counsel urged this Court to acquit the accused in respect of counts 2 and 3.

[81] Mr Mmutloane, for accused 3, also argued Counts 2 and 3 together. Mr Mmutloane made the submission that it was accused 3's duty as a security guard to guard the watermelon field and should he apprehend watermelon thieves it was his further duty to hand them over to Dawie as his employer. Whatever Dawie did with the persons was beyond his control. It is contended on behalf of accused 3 that the chasing and apprehension of thieves is not unlawful. Mr Mmutloane argues that it was never a case for the State that Aobakwe was apprehended to be assaulted and kidnapped. But this is exactly what the SCA and ConCourt are warning courts not to do,

that is, to evaluate the evidence in a piecemeal fashion. This is what this submission does.

[82] Mr Mmutloane contended that it is so that when you apprehend a person you limit his movement but the intention to apprehend was to hand him over to the employer because he was committing an offence in his watermelon field. This submission lacks merit because when Aobakwe was apprehended he was placed in the employer's van in the employer's presence. The contention of handing over to the employer who is present is absurd. Accused 3 denies having locked Aobakwe in the storeroom and contends that it was Rasta who did. Accused 3 refutes the allegation that both him and accused 2 went with Aobakwe to Dawie's plot to have him locked up. He maintained that accused 2 remained guarding the watermelon field. It is contended on behalf of accused 3 that Aobakwe could have mistaken Rasta for accused 3 because of the dreadlocks. It is further argued on accused 3's behalf that he should be given the benefit of the doubt in the offence of kidnapping more so because he was a single witness who contradicted himself on material aspects.

[83] In as far as the assault GBH charge is concerned, Mr Mmutloane submitted that in the process of apprehending thieves, assaults happen. Mr Mmutloane questioned how Aobakwe would have been injured and not receive any medical treatment. Strangely, Mr Pieterse made the same argument. But the evidence of Aobakwe supported by the SAPS witnesses who attended Dawie's plot was that an ambulance was dispatched to attend to Aobakwe and he was taken to Hartswater Hospital where he was treated and discharged. He reiterated the position of accused 2 and 3 that Aobakwe's injury to the eye was caused by the canal wall and submitted that the assault charge can also not stand against accused 3 and asked that he be acquitted on that charge.

[84] Aobakwe was a credible witness. He only testified to what he could see and did not fabricate his story. The argument made on behalf of accused 3 that the accused's responsibility was to apprehend Aobakwe and what happened

thereafter was not his business cannot stand. He was a willing participant in the deprivation of Aobakwe's movement and fully acquiesced to what was happening. I reject the version of accused 2 and 3 as not only improbable but mainly untruthful. I accept the version of the State that accused 2 and 3 fastened Aobakwe in the manner depicted on the photographs and thereafter locked the storeroom from the outside using a chain and a padlock totally preventing him from exiting that room.

- [85] It is clear to me that Aobakwe was unlawfully and intentionally deprived of his freedom of movement by Dawie, accused 2 and 3. I am not persuaded that the conduct of the accused was to "arrest him" in order to hand him over to the police because had that been the case he would not have been locked up in the storeroom and in that condition. The explanation by accused 3 is incomprehensible that he should stand outside the storeroom where Aobakwe was detained and not lock it up but wait for Dawie to send Rasta to lock it. I do not accept the contention about Rasta being at the scene and find it not only lame but absurd. The denial by accused 2 and 3 of any involvement in the kidnapping of Aobakwe is farfetched and not borne out by any facts. I am satisfied that the State has succeeded in proving its case of kidnapping against accused 2 and 3 beyond reasonable doubt.

Count 3: Assault with intent to do Grievous Bodily Harm

- [86] According to Aobakwe he was assaulted initially at the water canal by both accused 2 and 3 with bricks, pelting him with stones, kicking him and punching him with clenched fists. Thereafter he was placed in Dawie's van in a lying position and guarded by accused 3. The State correctly submitted that the assault happened separately and independently of the kidnapping charge. There is no overlap that may lead to an unfair duplication of charges. Accused 2 and 3 urged this Court to accept that Aobakwe had bumped his head against a concrete wall of the canal and sustained an injury to his eye as a result thereof. The explanation by Aobakwe that he can swim militates against the accused's contention. It is improbable that a person, well knowing that he cannot swim would throw himself in the water

risking his own life. He would have, in any event, sustained graver injuries than the ones he sustained. Accused 2's testimony is similar to Aobakwe's that both him and accused 3 were at the canal and had helped Aobakwe out of the canal together. However, accused 3 presented a different version on this aspect claiming that he was the only one with Aobakwe while accused 2 was on the other side of the field. Accused 3's version is a fabrication when weighed against the totality of the evidence and stands to be rejected as false.

[87] Aobakwe's testimony regarding the assault is consistent and where he needed to make concessions he did. This, to me shows reliability and credibility. His evidence is in certain respects corroborated by accused 2. The contention by the accused that the injury was caused by Aobakwe bumping against the concrete wall is a fabrication that is not only false but also farfetched and stands to be rejected. I accept the version that Dawie was at all times assisted by accused 2 and 3 and that accused 2 and 3 had carried out at the assault.

It follows therefore that the version of the accused is rejected as not only being false and improbable but also not reasonably possibly true. I am satisfied that the State has proved its case of assault against accused 2 and 3 beyond reasonable doubt.

Count 4: Contravention of s 3(1) read with ss 1, 120(1) and 121 of Act 60 of 2000 and Count 5: Contravention of s 90 read with ss 1, 120(1) and 121 of Act 60 of 2000

[88] Section 3(1) of the Firearms Control Act stipulates:

General prohibition in respect of firearms and muzzle loading firearms

“(1) No person may possess a firearm unless he or she holds for that firearm-

(a) a licence, permit or authorisation issued in terms of this Act; or

(b) a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.

(2) No person may possess a muzzle loading firearm unless he or she has been issued with the relevant competency certificate.”

[89] Section 90 deals with prohibition of possession of ammunition and stipulates:

“No person may possess any ammunition unless he or she-

(a) holds a licence in respect of a firearm capable of discharging that ammunition;

(b) holds a permit to possess ammunition;

(c) holds a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or

(d) is otherwise authorised to do so.”

[90] According to the State it is not in dispute that a firearm and ammunition were found at accused 3's residence. The defence admitted the ballistic report marked Exh H. Aobakwe saw accused 2 in possession of the firearm for the first time when they had chased him and before he had jumped into the canal. But he said accused 2 did not use it. Accused 2 testified that he was neither licenced nor trained to handle firearms. He however reconciled himself with the fact that operating a firearm may lead to dire consequences as he has seen in movies. He said the firearm belonged to Dawie who in turn placed it in the custody of accused 3 for purposes of guarding the watermelons. He admitted using a firearm to shoot the deceased. He maintained that Accused 3 had given it to him to threaten or intimidate the deceased with it so that he could board Dawie's van.

[91] Accused 3, on the other hand, denies seeing a firearm at the watermelon field and further contended that accused 2 did not have a firearm on that day. He also claimed that although he heard shots being fired from a distance, he does not know who had fired them. He said that, despite accused 2's admission, to having shot the deceased. Accused 2 explained that after the deceased had vanished into the bushes he returned the firearm to accused 3. Mtuyedwa was a direct eye-witness whose evidence was not only credible but reliable. He was with the deceased when Dawie's bakkie arrived with Aobakwe, accused 2 and 3. He stood about 50 meters away when the shooting incident played out. He saw Aobakwe at the back of Dawie's bakkie under guard of accused 3. This corroborates Aobakwe's version.

[92] Sgt Pico arrested accused 2 and 3 on 04 January 2019. He explained their rights, *inter alia*, to legal representation and to remain silent as appearing in the SAPS14A Notice of Rights form. Cst Mosalanyane and Brig Kheswa's evidence relates to retrieving a firearm and ammunition at accused 3's residence and the circumstances which led to such retrieval. Tasked with the responsibility to find the firearm, Mosalanyane booked the accused out of the police cells and warned them again of their rights. They elected to speak and participate without a lawyer present. The accused alleged that they were assaulted by the police in order to disclose the whereabouts of the firearm. Cst Mosalanyane was subjected to rigorous cross-examination by the defence but he indeed remained consistent. I found him to be a credible witness. His evidence was corroborated on all material aspects by Col Kheswa. Col Kheswa also did not escape the laborious cross-examination. Despite his evidence having some inconsistencies, they were not material and did not affect his credibility. Col Kheswa and Cst Mosalanyane both testified that no assault of accused 2 and 3 had taken place in their presence. It therefore follows that the allegation of assault by the accused which could have induced them, more particularly accused 3, to incriminate himself by pointing out the exhibits to the police, is not substantiated and stands to fail.

[93] Mr Pieterse also argued Counts 4 and 5 together. Counsel, relying on s 22 of the Firearms Act which stipulates:

“Despite anything to the contrary in this Act but subject to section 120 (5), any person who is at least 21 years of age and the holder of a licence to possess a firearm issued in terms of this Act may allow any other person to use that firearm while under his or her immediate supervision where it is safe to use the firearm and for a lawful purpose.”

He asked a rhetorical question: if Dawie was entitled to be in possession of his wife’s licensed firearm could he delegate that possession to his workers? The correct approach of interpreting this section is as espoused by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁶ where the SCA said:

“[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable,

⁶ 2012 (4) SA 593 (SCA) para 18

sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[94] Assuming Dawie's wife as the licensed firearm holder was at least 21 years of age, she may, as the license holder, allow any other person to use her firearm. She allowed her husband Dawie to use it. But there is qualification under which circumstances he may use her firearm: (i) he must be under her immediate supervision, (ii) it must be safe for him to use it and (iii) he must use it for a lawful purpose. Pertinent in this whole scenario is that Dawie did not use it under her immediate supervision, did not do so where it was safe to use it and did not use it for a lawful purpose. Dawie himself was not a holder of the impugned firearm and could not, in my view, have any justification, clearly not on the basis of s 22, to allow any further persons to use the firearm. Giving this section any other meaning would not be sensible and would undermine the purpose of the Act. What exacerbates matters is that at the time when accused 2 used the firearm handed to him by accused 3, to shoot at the deceased, he was not under any immediate supervision by Dawie and the shooting was not for a lawful purpose. Mr Pieterse's submission that it was lawful for Dawie to allow accused 2 and 3 the use of this firearm has no merit and stands to fail.

[95] Counsel further made the submission that accused 2 was in possession of the firearm and ammunition for only a few minutes when he used it to shoot at the deceased. According to counsel there is nothing that connects accused 2 to accused 3's bag, the ammunition found in that bag as well as the firearm and ammunition retrieved at accused 3's residence. The question asked was whether accused 2 was legally in possession of that firearm and ammunition during those few minutes. Counsel submits that

accused 2 was in lawful possession of the firearm under the immediate supervision of accused 3 and had used it in a safe environment and for a lawful purpose. Counsel further submitted that this Court must reject the evidence of accused 3 as he is trying to exculpate himself from the charges.

[96] In *S v Mbuli*⁷ the Supreme Court of Appeal made these insightful remarks pertaining to joint possession:

“[71] What is prohibited by both those sections is the existence of a state of affairs (ie having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in S v Khambule 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view, Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in S v Nkosi 1998 (1) SACR 284 (W) at 286h - i:

⁷ 2003 (1) SACR 97 (SCA) para 71

'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

- (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and*
- (b) the actual detentors had the intention to hold the guns on behalf of the group.*

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.'"

[97] The State has established the following in its evidence. Dawie's wife is the licenced holder of the firearm. She gave her firearm to Dawie who in turn gave it to accused 3 for purposes of guarding the watermelon field. In my view, both requirements (a) and (b) have been met.

[98] The evidence of the two accused had material contradictions and improbabilities. Accused 3, more particularly, was a poor witness whose evidence comprised mainly denials and was misleading. The evidence of accused 2, to some extent, was consistent with the evidence of the state. I accept accused 2's explanation that the firearm was handed to accused 3 by Dawie for them to guard the watermelon field, as probable. More so because it was registered in his wife's name. The conduct of accused 3 distancing himself from any firearm, including that it was recovered with bullets from his residence, is untenable. Even after overwhelming evidence was placed before court that accused 2 had fired shots at the deceased with a firearm, accused 3 still wanted this court to believe that accused 2 did not have a firearm and that he does not know who had fired the shots. It is significant that they denied having fled after the commission of these crimes

and were hiding from the police until their relatives commendably not only alerted the police of their whereabouts but also handed them over to the police. The version of accused 2 and 3 in counts 4 and 5 is rejected as not being reasonably possibly true. I am satisfied that the State has proved its case of unlawful possession of a firearm as well as unlawful possession of ammunition in counts 4 and 5 beyond reasonable doubt.

[99] To sum up: In as far as Counts 1 – 5 are concerned, I reject the evidence of accused 2 in as far as it conflicts with the evidence of the State and its probabilities. I further reject the evidence of accused 3 in its totality. I find that the accused's version is not reasonably possibly true and is also fabricated. On a conspectus of the evidence in this case I am satisfied that the state has proved its case beyond reasonable doubt and return the following verdict against accused 2 and 3:

1. Count 1: Murder r/w s 51 (1) of the Criminal Law Amendment Act 105 of 1997: I find accused 2 and 3 guilty of murder in the furtherance of a common purpose with *dolus eventualis* as the form of intent.
2. Count 2: I find accused 2 and 3 guilty of kidnapping Aobakwe Pholoholo.
3. Count 3: I find accused 2 and 3 guilty of assault with intent to do grievous bodily harm.
4. Count 4: I find accused 2 and 3 guilty of Contravention of s3(1) read with ss 1, 120(1) and 121 of Act 60 of 2000 (possession of an unlicensed firearm)
5. Count 5: I find accused 2 and 3 guilty of Contravention of s 90 read with ss 1, 120(1) and 121 of Act 60 of 2000 (possession of unlicensed ammunition).

MAMOSEBO J
HIGH COURT, NORTHERN CAPE DIVISION
KIMBERLEY

For the State
Instructed by:

Adv J Rosenberg
The Director Public Prosecutions

For Accused 1:
Instructed by:

Adv. JJ Schreuder (*Judicare*)
Justice Centre, Kimberley

For accused 2:
Instructed by:

Mr R Pieterse (*Judicare*)
Justice Centre, Kimberley

For accused 3:
Instructed by:

Mr D Mmutloane (*Judicare*)
Justice Centre, Kimberley