



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: CCD30/2025

In the matter between:

THE STATE

and

NKANYISO COLLEN NDLOVU

THE ACCUSED

JUDGMENT

Hlatshwayo AJ

Introduction

[1] Following the horrific death of the accused's ex-partner, Ms Z[...] M[...] and her mother Mrs. D[...] M[...] who were shot in execution style on 6 August 2023, the accused is facing two counts of murder relating to their death. In addition, he faces one count of attempted murder. This count relates to an attempt on the life of his son who I shall hereafter refer to as JJ in order to protect his identity considering he is still a minor. The accused also faces two counts of unlawful possession of firearms and one count of unlawful possession of ammunitions. Section 51(1) part 1 of

schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('CLAA') is applicable to counts 1,2 and 3. Counts 4 and 5 is read with 51(2) part II schedule 2 of the above Act.

[2] The accused pleaded not guilty to all charges and briefly disclosed in terms of s 115 of the Criminal Procedure Act 51 of 1977 ('CPA') that on the day in question he was highly intoxicated and cannot recall all the events. He, therefore, lacked an intention to commit the offences. The defence made certain admissions in terms of Section 220 of the CPA which were then placed on record. As a result, exhibit 'B' to 'I' was entered on record by agreement. The State called the two children of the accused. Other than JJ referred to above, the State also called the accused's daughter. I shall refer to her as DD. The following witnesses were also called by the State. Doctor Nzey Mundeke who treated JJ at RK Khan Hospital, Doctor Bernice Nonjabulo Ndlovu who conducted a post mortem examination on the two deceased bodies, Sergeant Nkosi Dladla who was the first police officer on the scene, Constable Brendon Doraivelu who checked on the status of JJ at the hospital, Warrant Officer Swelihle Mlambo from the local criminal record centre who uplifted the exhibits and took photographs of the scene, Warrant Officer Aramugan Pillay who conducted a forensic ballistic examination of the exhibits recovered from the scene, Mr K[...] who is the father of the deceased, Warrant Officer Moses Mbongeni Nxumalo who arrested the accused in Johannesburg, Sergeants' Zwelihle Henrrick Mzimela and Njengenkosi Muntuwenkosi Mthethwa who apprehended the accused in 2021 on the charge of unlawful possession of a firearm, Sergeants' Elvis Dumakude and Syabonga Manzini who stored and transported the said firearm in 2021 and Sergeant Ndumiso Khambule who is the Investigating Officer in this matter. For the defence, it was only the accused who testified.

Preliminary applications

[3] The State commenced with a number of preliminary applications before the testimonies of the two child witnesses. It applied in terms of s 170A(1) of the CPA for the appointment of an intermediary. The basis of the application is that the appointment of the intermediary will assist and protect the child witnesses likely to be exposed to undue stress when testifying about their traumatic events. It also sought orders in terms of s 158(2) and (3) for the witnesses to testify via closed circuit

television to mitigate the trauma of testifying in court and the exposure of testifying against their father. Lastly the State applied in terms of s 153 for the child witnesses to give their evidence on camera on the basis that the nature of the evidence is sensitive, stressful and public proceedings are likely to retraumatise the said children. The defence did not oppose any of the above applications.

[4] Indeed section 170A implores a court to consider the likely exposure of the child to undue psychological, mental or emotional stress and trauma when he or she testifies and to appoint a competent intermediary. In *casu* those sufferings are exceptionally pronounced. The minor children are called upon to testify not only about the murder of their mother, grandmother and the attempted murder of one of the said children but the person accused of those crimes is their father. Should they testify unassisted this would result in undue suffering and trauma. The court must protect the wellbeing of the minor children and give effect to the Constitutional imperative that the child's best interests are paramount in matters involving children.

[5] For those reasons I ordered that an intermediary must be appointed to assist with the evidence of the two minor children. As part of a protection mechanism, I also ordered that the said children testify via closed circuit television or other similar means as sanctioned by s 158(2) and (3) of the CPA. Lastly, I ordered that the proceedings be held in camera as provided in s 153(2) of the CPA and that their names must not be published.

[6] Before the testimony of the two minor children, an enquiry in terms of s 164 of CPA was conducted to determine if the said minor children are competent to testify and whether they understand the nature and import of taking an oath. Certain questions were put to both JJ and DD. I concluded that both understand the difference between the truth and falsehood and both understand the nature and import of taking an oath.

[7] Both the prosecution and defence were dissatisfied with the above finding in particular as it relates to the child witness DD. The State argued that the proper approach is that after the determination that she knows the difference between truth

and falsehood, the child should be admonished due to her youth. Reliance was placed on *Director of Public Prosecutions, KwaZulu Natal v Mekka*¹ which held that: 'the fact that the magistrate after having established the age of the complainant proceeded to inquire whether she understood the difference between truth and lies and then warned her to tell the truth is in my view a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath.'

[8] The defence on the other hand was of the view that the court only dealt with the competency of the child in its questioning and did not satisfy the requirements of the oath.

[9] After considering both parties submissions I was not swayed that my finding that the child witness understood the nature and import of taking an oath was wrong. In my *ex tempore* ruling on the issue I outlined reasons for the above decision. I do not intend to rehash those reasons. It will suffice to emphasise that from the peremptory provisions of ss 162 and 164 of the CPA our courts generally conduct a two-stage enquiry regarding whether a witness understands the difference between truth and falsehood and the nature and import of taking an oath. The matter of *S v SM*² is instructive on this issue. Dambuza JA held:

'An inquiry whether a potential witness can distinguish between truth and falsity goes to whether a witness is competent in the first place. On the other hand, a question directed to a witness on whether he or she understands the nature and import of the oath and affirmation goes to whether the witness should be caused to take the oath or affirmation, or should be admonished to speak the truth.'

[10] Having said that it must be acknowledged that an enquiry is not always necessary in order to make a finding required by s 164³ and the youthfulness of the witness may justify such a finding. However, a finding that the witness does not understand the nature and import of the oath must still be made based on the information available to the presiding officer. This is also clear from *DPP v Mekka* where the supreme court of appeal held that the magistrate found that the child does

¹ *Director of Public Prosecutions, KwaZulu-Natal v Mekka* 2003 (4) SA 275 (SCA) para 11.

² *S v SM* 2018 (2) SACR 573 (SCA) para 19.

³ *S v SB* 2003 (1) SA 552 (SCA).

not understand the oath before admonishing the child. In this case based on the information before me, I made no such finding. It is clear from the reading of the provision that for the admonishment to be triggered there must be a finding that the witness does not understand the nature and import of the oath.⁴ From the information provided, I found that the child witness recognises the dangers and wickedness of lying and understands the nature and import of the oath.

Summary of evidence

[11] The case for the prosecution is that the accused was previously in a relationship with Z[...] M[...] and that they shared two minor children. I shall refer to her as deceased 1. The State alleges that during their relationship, the accused had abused deceased 1 both physically and verbally. This resulted in their separation and deceased 1 left the accused's residence in Mbulwane, Greytown and returned to Durban in December 2022. On Friday 4 August 2023, the accused had brought the two minor children to visit deceased 1 and her family at her residence at 1[...] informal settlement in Chatsworth, Durban. On Sunday, 6 August 2023, the accused returned to deceased 1's residence to pick up the said children.

[12] An argument had ensued between the accused and deceased 1. The altercation centred around missing monies that were meant for the minor children which had been given to deceased 1. Prior to the argument, deceased 1 had sent JJ to call the grandmother, Mrs Q[...] M[...] who lived around 80 meters away from her. I shall herein refer to her as deceased 2. She then joined deceased 1, the accused and the two minor children. Whilst deceased 2 was in the kitchen the accused proceeded to the said kitchen and fired a shot at her head. Both deceased 1 and JJ immediately ran out of the house. The accused pursued them firing further shots. JJ was shot on the chest whilst deceased 1 was shot on her buttock and was subsequently shot on her head. Both deceased 1 and 2 died on the scene and JJ who was critically injured was rushed to RK Khan Hospital where he received emergency medical assistance. The accused drove away at high speed and fled from the scene.

⁴ *JS v State Eastern Cape Division* 2025 (2) SACR 204 (ECMk) paras 25, 26.

[13] The State avers that the accused acted with the requisite premeditation. To elucidate these allegations, it led evidence of his conduct prior and after the incident and prior domestic violence against deceased 1. To this end the State led the evidence of Mr K[...] who is the stepfather of deceased 1 and the husband of deceased 2. He testified that on the day of the incident his wife was busy cooking Sunday dinner when she was requested to go to her daughter because the accused had arrived. Against his advice she proceeded to the said premises. Mr K[...] subsequently heard the accused's car which was parked in front of his daughter's yard drive off at high speed. When he went to investigate, he was shocked to find that both his daughter and his wife had been shot to death. He testified that in the early hours of the following morning he was contacted by the accused who told him that he should have been present in order to make him kneel like his wife. He also testified about an incident where his daughter contacted her mother but he overheard the accused insulting his daughter and their subsequent fight. In addition, he observed at one stage a healed injury to his daughter's ear and cheek. She initially attempted to hide the said injury but she eventually disclosed that she sustained the injuries as a result of the assault by the accused. The latter part of his evidence amounts to hearsay which is inadmissible. However, this evidence was provisionally admitted, pending the prosecution's application for this and other hearsay evidence to be admitted.

Trial within a trial

[14] The State applied in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ('LEAA') for the admissibility of deceased 1, Z[...] M[...]’s sworn affidavit deposed to in support of her application for a protection order in terms of the Section 6 Domestic Violence Act 116 of 1998 and the relevant application. The admissibility of the said documents was opposed by the accused and the court entered into a trial within a trial to determine its admissibility. The State proceeded to lead the evidence of Ms. N[...] D[...] and Ms N[...] M[...]. For the defence, Mr Ndlovu and his mother, Mrs Bongekile Lucia Mkhize testified.

[15] Ms D[...] testified that she is employed as an Administrative Clerk in the domestic violence section at Chatsworth's Magistrate's Court. Her duties entail processing of domestic violence applications. She outlined the process when an

applicant approaches the court seeking a protection order. In brief she would provide the applicant with the relevant application, form 6, which must be completed by the applicant in his or her own handwriting. When she has finished she would confirm if the information is true and correct and would administer the oath in line with the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 ('Justices of Peace Act') and the applicant would sign. She would then take the applicant to appear before a magistrate who will conduct the necessary interview in her presence. The magistrate will decide whether an interim protection order or a notice to show cause should be issued.

[16] The abovementioned process was conducted in respect of deceased 1's application as reflected in Exhibit AA and an interim protection order was subsequently issued by the magistrate. According to Ms D[...] there are no records of service of the interim protection order. The chief allegations made by the deceased in Exhibit AA is that the accused has been assaulting her for the last ten years that they have spent together. She then detailed a few acts of assault as follows. One incident in December 2021 where they fought over his girlfriend and the accused assaulted and shot at her. The firearm was taken by his brother. Another incident where he assaulted her causing her ear and cheek to be cut. Her cheek was subsequently stitched. In the affidavit deceased 1 stresses that the accused owned an illegal firearm and had threatened to kill her and family. Ms. N[...] M[...] is the eldest child of the deceased 1 and the stepdaughter of the accused. She confirmed witnessing the above incidents and she is the one who called the accused's mother and brother who subsequently took the firearm away from him. Whenever these assaults occurred they would sleep over at the neighbour residence with the assistance of the accused's mother. She also added incidents of assault whilst she stayed with the accused and deceased 1 in Johannesburg. She alleged that most of the assaults occurred when the accused had consumed alcohol.

[17] When the accused testified he denied the allegations of assault on deceased 1. Whilst he accepted that he lived with deceased 1 and his stepdaughter N[...] M[...] in Johannesburg and subsequently at his home in Mbulwane, he denied incidents of assault on deceased 1 and alleged he never possessed a firearm. He described the relationship with deceased 1 as good and that like any relationship it had its ups and

down. Regarding the specific allegations outlined in the deceased's affidavit, the accused denied the assault and the use of a firearm. In fact, he denied that the affidavit in question was written by deceased 1 because it was not her handwriting. Deceased 1 had previously written letters to him and he had seen her curriculum vitae and thus knew her handwriting. In support of his allegations Mrs. Bongekile Mkhize who is the accused mother also disputed allegations of assault on the deceased whilst they resided together in Mbulwane. She denied coming to deceased 1's rescue by breaking the window during an assault on the deceased. That was the evidence of both parties during the trial within a trial.

[18] The State submitted that the hearsay evidence of deceased 1 must be admitted in terms of s 3(1)(c) of the Law of Evidence Amendment Act (LEAA) because the interest of justice requires its admission. It was argued that the said affidavit not only meets the threshold of admissibility as provided in the LEAA but considering factors outlined in *S v Kapa*⁵ the deceased affidavit is reliable and consistent with the broader evidence presented by the State. It also completes the picture of the accused conduct, intent and motives. The defence submitted that the affidavit must not be admitted because it is prejudicial to the accused and infringes upon his rights guaranteed in the Constitution of the Republic of South Africa Act 108 of 1996 to challenge the evidence against him. It was also argued that the accused placed in dispute whether the affidavit was written by deceased 1. He also denied the assault and was supported in this regard by his mother.

[19] After considering the evidence and the submission of both parties I ruled that deceased 1's affidavit is admissible. I set out the reasons for this decision below.

Section 3(1) of the LEAA reads as follows:

'Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a)

(b).....

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

⁵ *S v Kapa* 2023 (1) SACR 583 (CC) para 77.

- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.’

It is clear from the reading of the act that as a general rule hearsay evidence must be excluded. It is trite that courts are hesitant to admit hearsay evidence that is decisive in convicting an accused or plays a significant part in the conviction of the accused. The admission of such evidence must only be entertained where there are compelling reasons to admit it. Thus Section 3(1)(c) operates as one of the exceptions to the rule where the court in its discretion forms an opinion that it is in the interest of justice to admit such evidence, regard being had to the factors listed therein. These factors have been judicially explained in a plethora of cases.⁶ I turn to consider these factors in relation to this matter.

Nature of the proceedings

[20] These are criminal proceedings wherein the accused rights to liberty may be affected in light of serious murder charges he faces. It is for this reason that our courts are less likely to admit hearsay evidence in criminal proceedings as compared to other proceedings. However, the interest of justice may be a compelling factor in favour of its admission.

Nature of evidence

[21] What must be determined here is whether the evidence in question is reliable. The court must weigh its probative value against potential prejudice. In this matter the State wishes to introduce a sworn affidavit of deceased 1 deposed to during her application for a protection order. The said statement outlines incidents of prior

⁶ *S v Ndhlovu and Others* 2002 (6) SA 305 (SCA); *S v Kapa* 2023 (1) SACR 583 (CC); *S v Ramavhale* 1996 (1) SACR 639 (A); *S v Mbanjwa and Another* 2000 (2) SACR 100 (D) and *Van Willing and Another v S* [2015] ZASCA 52.

abuse and violence against the deceased, the use of a firearm during the assault and threats to kill her and her family.

[22] Whilst our courts have expressed an aversion to admit hearsay evidence on the basis that it is generally unreliable and not tested by way of cross examination,⁷ the reliability of this statement in this matter is strong for a variety of reasons. The said statement was deposed to under oath in terms of the Justices of Peace Act. It was also contemporaneity made in the process of formal court application for a protection order as envisaged in the Domestic Violence Act. It further corroborates the evidence of deceased 1's daughter, N[...] and the close relationship between the allegations in the statement and the subsequent evidence against the accused in the murder of the deceased and her mother.

The purpose of tendering the evidence

[23] The statement provides a crucial picture of the relationship between the accused and deceased 1. The statement does no more than to corroborate the evidence of the State witnesses in particular the deceased father, Mr Khumalo and deceased 1's daughter, N[...] regarding their evidence of prior abuse and threat to kill the deceased and her family. It plays no primary role regarding the guilt or otherwise of the accused on the allegations of murder and unlawful possession of firearms. It is common cause that the State relies on other evidence and witnesses against the accused.

The probative value of the evidence

[24] When it comes to the definition of the probative value of the hearsay evidence, I can do no better than to borrow from *Ndhlovu*⁸ who describes it as follows:

'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness.'

⁷ See *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (1) SACR 545 (CC).

⁸ See fn 6 above para 45.

[25] It is axiomatic that the statement carries significant probative value. The statement was sworn to by deceased 1 in the presence of Ms D[...] in the course of her duties as an administrative clerk at Chatsworth Magistrate's Court and was repeated before a judicial officer who issued an interim protection order as a result. The allegations contained in the affidavit, in particular, the assault and injuries to the deceased and the use of a firearm by the accused is corroborated by Mr Khumalo and Ms N[...] M[...]. There are compelling reasons for admitting the hearsay affidavit in this matter due to the strong pointers of its truthfulness.

Reasons the evidence is not given by the deponent

[26] It is common cause that Ms Z[...] M[...] is the deceased on count 1 and the accused faces the charges relating to her death and that of her mother.

Prejudice to the accused

[27] The main prejudice to be suffered by the accused is the inability to cross examine the deponent and test the credibility and reliability of the allegations against him. This however is not the only consideration. The accused still has an opportunity to challenge the reliability of the affidavit when the totality of the evidence is evaluated. The court must also consider the reliability, the probative value and indicators of the truthfulness of the statement. Ultimately the overriding considerations of the interest of justice must play an important role.

[28] It must however be emphasised that the fact that the admissibility of the hearsay evidence will strengthen the State's case does not amount to prejudice to the accused. In *Ndhlovu*⁹ the Supreme Court of Appeal ('SCA') stated:

'Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice.'

Any other factor

⁹ *ibid* para 50.

[29] It is important to restate the trite principle that the decision of the court must take into account all the evidence. Where such evidence is reliable, probative and corroborated as in this matter, the demands of interest of justice cries out for its admission. For reasons outlined above I am satisfied that the State succeeded in establishing the admissibility of deceased 1's statement and the said statement was accordingly declared admissible.

[30] Turning to the remaining allegations against the accused, it was also the case for the prosecution that long before the incident and in particular on 8 February 2021 at the accused's residence members of South African Police Service ('SAPS') descended at the residence of the accused in Mbulwane, Greytown. They had received information that the accused was in possession of a firearm illegally. Sargent Mzimela and his crew Sergeant Mthethwa proceeded to the accused's home around 11.30 pm. On their arrival they knocked on the door of his two-room house and announced themselves as police officers. The accused opened the door and gave them his name which matched the details provided. Sergeant Mzimela requested to search for a firearm on his premises and the accused agreed. Sergeant Mzimela conducted the search whilst Mthethwa was observing the events. Sergeant Mzimela retrieved a 9mm firearm from underneath the mattress. This firearm was described as a black Glock with serial number U[...] 6[...] and had one magazine with one live round ammunition.

[31] When the accused was asked if he possesses a licence for the said firearm he stated that he does not have any. He was informed of his rights and he informed the said officers that he bought the said firearm from unknown boys at Maphumulo. He was thereafter placed under arrest and was detained at Matimatolo police station. The said firearm was then handed over to the CSC Commander Sergeant Dumakude. This was after it was entered into the SAP 13 register number 35/2021. Sergeant Dumakude confirmed the above and testified that he kept the said exhibit in the safe and keys were always in his possession. The Investigating Officer, Sergeant Manzini booked out the exhibit and transported it to Amanzimtoti ballistic unit where the said exhibits were tested. Indeed, Warrant Officer Shoji who filed a statement in terms of s 212 of the CPA. He confirmed that he examined one, 40

calibre Glock semi-automatic firearm with serial number U[...] 6[...] and determined that it was designed to fire centre fire ammunition.

[32] The State also accuses Mr Ndlovu of unlawful possession of another firearm on 6 August 2023. The foundation of this charge is predicated on the allegations that on the above-mentioned date the accused was in possession and discharged the firearm that killed both deceased and attempted to kill his son JJ. The State's contention is that Warrant officer Mlambo from the local criminal record centre attended the scene and uplifted four cartridge cases and 19mm a projectile or a bullet. These were later examined by Warrant Officer Pillay, a Forensic Analyst from the Forensic Science Laboratory at Amanzimtoti. He then determined that the said cartridge cases were fired from the same firearm. The State contends that by process of inferential reasoning the accused is guilty of unlawful possession of the said firearm. The State then closed its case.

[33] I now deal with the defence's case. In brief the accused testified that he had been in a relationship with deceased 1 for around 18 years and they shared two children which I have referred to as JJ and DD. He described their relationship as good but noted that it had its ups and down. He denied the allegations that he assaulted deceased 1 and threatened to kill her and her family. He also denied he owned an illegal firearm that he used to assault deceased 1 with.

[34] The accused and deceased 1 lived with their children in Mbulwane, a rural area in Greytown. He testified that sometime in 2021, deceased 1 requested money to travel to her home in Chatsworth, Durban to attend a relative's funeral. Deceased 1 never returned and left behind the minor children with the accused. She subsequently contacted him requesting that the children visit her. Indeed, on Friday 4 August 2023 he transported the two minor children and left them with her in Chatsworth. He also left a sum of R800 with her to take care of the children.

[35] On Sunday 6 August 2023, he asked his cousin S[...] to accompany him in order to pick up the children. Along the way S[...]’s friends contacted the latter and requested that they must pass by their address in Umhlanga where they were having a party. The accused and S[...] joined the party at Umhlanga, Durban where they

consumed a large amount of alcohol. Both of them were intoxicated but proceeded with their trip to pick up the children in Chatsworth. On their arrival both alighted from the car and entered the deceased residence. Whilst the accused and the deceased were discussing an argument ensued regarding the whereabouts of monies that he left for the children and other funds that were in the account.

[36] The argument was heated to the extent that both were loud and shouting at each other. The accused was upset and he took a firearm that was tucked onto the waist of his cousin, S[...]. Upon seeing the firearm, the deceased threw the young child at him. The accused does not recall what took place thereafter because of his intoxication. The following day around 8.00 am, he woke up at a particular home in Maphumulo. When he enquired what had taken place, he was informed that he had been lying on the side of the road and they assisted him with a place to sleep. He subsequently made his way to his home in Mbulwane where he found his daughter DD. The next day he travelled to Johannesburg to fix his motor vehicle.

[37] When he heard that police wanted him, he was scared of handing himself over. However, he was subsequently arrested and made a statement before a magistrate. The accused denied killing both the deceased and attempting to kill his son. When it comes to the charge of unlawful possession of a firearm allegedly committed on 8 February 2021, the accused denied that a firearm was found in his possession. He alleged that police arrived at his house and demanded firearms. They proceeded to search the premises without his consent. When he was taken outside of the house, police came out and informed him that they found the firearm under his bed. He flatly disputed that he unlawfully possessed a firearm in any manner. The defence closed its case.

Issues for determination

[38] As alluded earlier, both parties agreed on facts that are not disputed and this culminated to the accused's admissions in terms of s 220 of the CPA. Consequently, the following issues are common cause:

- (a) The post mortem examination of the two deceased by Dr Ndlovu and her findings that the causes of deaths were contact perforating gunshot wound to

the head and distant perforating gunshot wound to the head involving the face respectively are not in dispute.

- (b) The two J88 reports compiled by Doctor Mundeke outlining the injuries sustained by JJ and the treatment he received at RK Khan Hospital were also not in dispute.
- (c) The photographs of the scene, the forensic ballistic examination and findings regarding the exhibits recovered from the scene are not in dispute.

Consequently, the crisp issues that are to be decided are:

- (a) Did the accused shoot and killed both deceased with the necessary premeditation and did he attempt to kill his son JJ.
- (b) Is the accused guilty of unlawful possession of firearms and ammunition
- (c) Is the accused defence of lack of criminal capacity by reason of intoxication valid and is his general denial reasonably possibly true?

The law

[39] The onus always rests upon the State to prove that the accused is guilty of the offences charged beyond a reasonable doubt. When it comes to firearms and ammunitions charges, the State must still show the same standard of proof that the accused possessed the above in contravention of the FCA. In evaluating whether the State has achieved the onus resting upon it, the court must consider the evidence as a whole. The case of *S v Chabalala*¹⁰ succinctly sets out what must be considered. It was held that:

‘The correct approach to evaluating evidence is to weigh up all elements which point towards guilt of 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 State as to exclude any reasonable doubt about accused’s guilt. The result may prove that one scrap of evidence or one defect in case for either party was decisive but that can only be *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 context of full picture presented in evidence.’

¹⁰ *S v Chabalala* 2003 (1) SACR 134 (SCA) at p134F-I.

Evaluation

[40] The evidence of the two minor children, JJ and DD, regarding what took place on 6 August 2023 was fraught with difficulties. DD testified that when the accused arrived, there was an argument with her mother in her presence inside the house. The accused went outside and fired a shot at the roof. This was followed by the accused grabbing her and placing her into the car. The accused followed her mother and shot her. Her evidence does not account for the shooting of her grandmother which took place whilst she was inside the house. The allegations of the accused shooting at the roof is inconsistent with the statement made to the police which makes no mention of the accused shooting at the roof. She also admitted telling the police that she saw the accused taking out a firearm and shooting her grandmother.

[41] The evidence of JJ also had its own challenges. He testified that on the accused's arrival, his mother told him to call his grandmother. He returned with his grandmother and after an argument between his mother and the accused, he saw the accused go to the kitchen where his grandmother was and thereafter heard a gunshot. He and his mother went out running. His mother was behind him and he further heard another gunshot. This is when he was shot. He subsequently heard another gunshot. However, under cross examination, he admitted that the accused took the firearm from his cousin S[...]. In his evidence in chief he made no mention of this and it is contrary to his statement to the police. When further asked under re-examination, he stated he no longer remembers.

[42] It goes without saying that the two witnesses are minor children and the testimonies of young witnesses may in general be susceptible to undue influence and desires to impress others. Accordingly, caution must be applied when considering the evidence of young witnesses. The court must consider all relevant factors when evaluating their evidence. In *S v Maila*¹¹ the court noted that:

‘the evidence of a child must be considered as a whole taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases) cross examination should be ‘trustworthy’. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child

¹¹ *S v Maila* [2023] ZASCA 3 para 18.

witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. '

[43] The events were extremely traumatic to the said child witnesses. They witnessed the gruesome killing of their mother and grandmother. JJ nearly lost his life on that day. It is however clear that the two witnesses share a very close bond with the accused and his family. Both witnesses have always and still reside with the accused's family. They also maintain constant contact with the accused despite his incarceration and the serious allegations of killing their mother and grandmother and attempt on the life of JJ. Both JJ and the accused confirmed that the last conversation between them was a week before trial. The conduct of the accused is completely improper in light of his full knowledge that his children featured high on the list of witnesses for the State. Sergeant Khambule also testified in details about attempts by the accused family to hide the whereabouts of JJ on the trial date when he went to pick him up. There is no doubt that the circumstances under which the two minor children testified is untenable and the relationship between them, the accused and his family provided a fertile ground for undue influence. No wonder their evidence drastically changed which is a clear indication that they were influenced. Their evidence became contradictory and unreliable regarding certain events that took place on 6 August 2023. This court shall take into account their evidence where it is consistent or corroborated by other or objective evidence.

[44] In this case the State has presented further evidence that paints a clear picture of what took place leading to both the deceased death. The photographs and key as taken by Warrant Officer Mlambo depicts a disturbing scene at 1[...] informal settlement in Chatsworth. Photograph 45 shows deceased 2 lying face down in the kitchen having been shot. The evidence of Doctor Ndlovu was that she was shot in the head at a distance. The evidence before court clearly shows that the accused is the only person who possessed a firearm after the argument with deceased 1. The above taken together with JJ's evidence that after the accused proceeded to the kitchen where his grandmother was, he subsequently heard a gunshot strongly implicates the accused in the murder of deceased 2.

[45] The same inference must be drawn regarding the murder of deceased 1. Photographs one to 18 shows the deceased 1 lying in the pool of blood outside on the side of the road. Again, Doctor Ndlovu found the deceased 1 had effectively had 4 injuries. In brief she had an injury on the left buttocks and the second injury is an exit wound to her left thigh. The third injury would be an entry wound to the back the head or scalp and the exit wound to the right frontal scalp. She determined that the fatal shot is the head injury which had the presence of soot due to the barrel being pressed on the head. This means the deceased was firstly shot on her buttocks which did not cause instant death. This in turn is consistent with both child witnesses that the accused followed the deceased 1 who was running away firing shots at her. This strongly links the accused to her murder. It also implicates him in the shooting of his son JJ who was running in front of his deceased mother.

The evidence taken as a whole leads to the inescapable conclusion that the accused committed the said offenses. In *Rex v Blom*¹² It was held that:

- (1) 'The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the only one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[46] It also follows from the above that the case against the accused for unlawful possession of a firearm without a licence on 6 August 2023 is strong. To sustain this, charge the State relies on the evidence that the accused had possessed a firearm which he used to shoot both the deceased and his son, JJ and that he had no lawful authority or licence to possess the said firearm. The defence argued that no physical firearm was recovered from the accused for the State to secure a successful conviction. I do not agree that in all circumstances the State must show that a physical firearm was recovered from the accused for a successful conviction on unlawful possession of a firearm. There is overwhelming evidence supporting the state's contention. I have outlined some of the evidence earlier such as the existence of soot in the deceased skull and the findings by Warrant Officer Pillay that the exhibits were fired from the same firearm. It would also defy any logic that the

¹² *Rex v Blom* 1939 AD 188 at p202-203.

accused may be held responsible for the deceased murder where a firearm was used but avoid a conviction on unlawful possession of a firearm without a licence using the same firearm merely because no actual firearm was recovered. Such a conclusion would be contrary to the objectives of the Firearms Control Act 60 of 2000 which *inter alia* includes the prevention of proliferation and abuse of firearms, to protect the right to life and the right to be free from all forms of violence. Whilst the technical definition of a firearm must be satisfied, the existence of evidence that shows that a firearm as envisaged in the Firearms Act was used, would be sufficient. In *S v Gcabashe and Another*¹³ this court held:

‘Adopting the similar inferential process of reasoning it is inescapable that when the accused shot and killed the deceased he was in possession of a firearm for the purposes of the Act and that the 15 spent cartridges represents ammunition as envisaged the Act’

[47] When it comes to the charge of unlawful possession of a firearm and ammunition on 8 February 2021, the evidence of Sergeant Mzimela and Mthethwa was straightforward. They both corroborated each other that the firearm was recovered under the mattress of the accused’s two-room house. I have no reason to reject their evidence. It was given in a clear and uncontradictory manner. Nothing turns on the defence submission that no search warrant was presented and the accused did not consent to the search in his house. Both officers testified that the information received was that the accused was leaving in the morning and believed that had they applied for a warrant it would have been issued to them. The search on the accused’s premises without a warrant thus complies with s 22 of the CPA. The said section reads:

‘A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who

may consent to the search of the container or premises consents to such search and the seizure of the article in

question; or

(b) if he on reasonable grounds believes-

¹³ *S v Gcabashe and Another* [2023] ZAKZDHC 79 para 47; See also *S v Jordaan and Others* 2018 (1) SACR 522 (WCC).

- (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
- (ii) that the delay in obtaining such warrant would defeat the object of the search.'

[48] It is clear from the reading of the section that the two officers were entitled to conduct a warrantless search on the accused premises. In addition, had they awaited the following day to apply for a search warrant, this would have defeated the purpose of the warrant since the accused was due to leave his residence in the morning. I am also satisfied with the chain and custody of the said firearm which was subsequently transported to the ballistic unit at Amanzimtoti for testing. The evidence of both sergeants' Dumakude and Manzini on how the firearm was stored in the safe at Matimatolo police station and subsequently transported for testing was clear. What completes the State's case is the statement in terms of s 212 of the CPA compiled by Warrant Officer Vincent Shoji which found that the firearm in question functions normally and was designed to fire centre fire ammunition.

[49] I now turn to deal with the defence's case. The upshot of the accused defence is that he was intoxicated and does not remember what happened on 6 August 2023. Accordingly his defence, though vague in its formulation, raises a legal question whether at the time of the offence, did the accused have the requisite criminal capacity to commit the offence. It is trite that consumption of alcohol depending on the degree may affect a person's capacity to control, appreciate the nature and consequences of his conduct, to appreciate the wrongfulness of their conduct and may act impulsively. The court in *Chretien*,¹⁴ whilst distinguishing between voluntary and involuntary intoxication concluded that in exceptional circumstances a person may because of excessive consumption of liquor, completely lack criminal capacity and not be criminally liable.

[50] The test to determine whether the intention has been excluded by intoxication is subjective.¹⁵ The court must ask itself whether in light of all the circumstances including the degree of intoxication did the accused have the intention to commit murder. The court may also draw conclusions about his state of mind from his

¹⁴ *S v Chretien* 1981 (1) SA 1097 (A).

¹⁵ *S v Van Vuuren* 1983 (1) SA 12 (A).

conduct before, during and after the events. This court must also not close its eyes on the unassailable evidence against him. In *S v Eadie*¹⁶, the SCA confirmed the court a quo finding and said the following:

‘He was right to consider the appellant’s goal-directed and focused behaviour, before, during and after the incident in question, as indicating presence of mind. The appellant was angry with the deceased and intended to vent that anger. He intended to be violent and destructive. All of his actions were performed with presence of mind. How can we believe him when he says that his directed and planned behaviour was suddenly interrupted by a loss of control over his physical actions when those actions are consistent with the destructive path he set out on when he was admittedly conscious? The learned Judge correctly considered the appellant’s detailed account of the assault as an indicator of consciousness. Griesel J was correct to conclude that there were no signs of true disorientation subsequent to the event. The learned Judge’s conclusion that the appellant’s deceitful behaviour immediately after the event should count against him cannot be faulted. His finding that the appellant could not be believed about his State of mind at the relevant time is wholly justified, as is the conclusion that the psychiatrists’ evidence has to be viewed against that fact.’

[51] The accused did not fare well when he testified and his version was poor. For starters the accused alleged that he was not the driver of his motor vehicle when it arrived in Chatsworth and after the incident. The evidence of his children was that he transported them to Chatsworth. His son JJ testified that that when he arrived on the day of the incident the accused was the driver. DD alleged that after the shooting he grabbed her and drove her to Mbulwane, Greytown, a distance of approximately 250 km away from Chatsworth. Their evidence was undisputed and the first time the accused alleged he was not the driver was when he gave his evidence. This was a constant feature in his version which demonstrated he was fashioning his version as he testified. From the evidence the roads at 1[...] informal settlements in Chatsworth are in bad conditions and not straight but he was able to drive his motor vehicle. The above is the first clear evidence that shows that his claim of excessive intoxication to the point that he does not remember what took place when both the deceased were shot and what he did thereafter is contrived.

¹⁶ *S v Eadie* 2002 (1) SACR 663 (SCA) para 66.

[52] The explanation of the events of that day by the accused is replete with serious contradictions and inconsistencies. He testified that when the argument took place he took a licenced firearm from S[...]. Upon seeing the firearm, deceased 1 threw the child to him. Firstly, it is improbable that S[...] will mount no resistance to his licenced firearm being taken under those circumstances. Secondly he contradicted his evidence whether the child was thrown to him or pushed towards him. The accused also makes no mention of him cocking the firearm which suggest that there was no discharge of the firearm by him. When pressed under cross examination whether he did fire a shot, he claimed he does not remember. This however contradicts the version he instructed his lawyer to put to the State witnesses and his own s 220 admissions wherein he confirmed that he fired a shot and thereafter does not remember what took place. It bears mentioning that this is the same version he relayed to the magistrate upon his arrest. The accused's version is a hallmark of a fabricated version and the claim of loss of memory is a convenient excuse aimed at evading accountability for his actions.

[53] It is also clear from his own evidence the accused has an excellent ability to remember the vivid details of the events except the shooting and his escape from the scene. The accused testified in details how he travelled with S[...] taking a long route to Maphumulo and to Umhlanga where they joined the party. He was able to recount in details the alcohol consumed ranging from three bottles Jameson (750ml), three bottles of Johnny walker and 48 beers. He was able to remember traveling thereafter to Chatsworth and the discussion he had with the deceased, the details of the argument over money and the amount of money involved. However, when it comes to the details of the shooting, he suddenly could not remember. I agree with Mr Singh's submission that the accused's evidence of intoxication has no substance and his claim of loss of memory is deliberately selective. His evidence that he woke up in Maphumulo more than 200km away from the scene is inexplicable and an attempt to hide his escape from the scene. His daughter, DD, contradicted his evidence and testified that he took her to the car and transported her to Greytown.

[54] The evidence before me shows that the accused's actions were goal oriented and designed to achieve the result. It is common cause that the argument occurred at the deceased's lounge. The evidence shows that the accused took out a firearm

and proceeded to the kitchen where he shot deceased 2. The evidence of Doctor Ndlovu was that the shot was at a distance. That shot demonstrates precision contrary to an excessively intoxicated shooter. It does not end there, deceased 1 and JJ ran away and were chased. Both were shot at a distance again demonstrating a determination to achieve the goal. What is worse deceased 1 was subsequently shot point blank and in execution style. This is proven by the presence of soot in her skull. I have no hesitation that the accused is guilty of killing both the deceased and attempting to kill JJ. His defence of lack of criminal capacity by reason of intoxication is rejected as false beyond reasonable doubt.

[55] What remains to be determined is whether the accused had the necessary premeditation to commit murder. There is no definition of premeditation or planned in the statute. In *S v Raath*¹⁷ the court defined it as follows:

'Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only, an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated'.'

[56] In support of its contention that the accused had long premeditated the murders, the State relied on deceased 1's affidavit, deposed to in support of her application for a protection order. From the reading of this statement it clear that the accused has been abusive and extremely violent against the deceased. At one stage deceased 1 was assaulted, and her cheek was cut to such an extent that she was stitched. Another incident a firearm was used and the accused's brother removed it from him. Of course, the accused denies the allegations. However, these incidents are highly credible. They were corroborated not only by deceased 1's daughter N[...]

¹⁷ *S v Raath* 2009 (2) SACR 46 (C) at p53D-F.

who witnessed the abuse but also the deceased's father who confirmed seeing the above injuries on the deceased. This demonstrates a pattern of domestic violence that deceased 1 suffered at the hands of the accused and living under constant threat to her life. No wonder she ran away from the accused leaving behind her very young children. What is also extremely relevant to this enquiry are the express threats to kill the deceased and her family. There is no other clear case of premeditated murder where those threats are finally executed with precision with deceased 1 literally being chased and executed. He did not end there he also distastefully reminded Mr Khumalo the following morning of the incident that he should have been there to face death like his wife. This is a clear indication that the accused had planned to carry out his threats of wiping off the deceased's family. The State has proved premeditation when the accused had shot and killed both deceased.

[57] I am also satisfied that the accused is guilty of unlawful possession of a firearm and ammunition as alleged on counts 5 and 6. The accused's evidence on what took place on 8 February 2021 is contradictory and inconsistent. The version he put to the State witnesses was that he shared the house with his three brothers. This was also repeated by the defence during closing arguments. When the accused testified he contradicted this and testified that when police arrived, he shared the house with a female and a child. Even his reference to a Female was vague and poor. Under cross examination he told the court that this was the deceased. It is however clear that he regarded deceased 1 as his wife and mother of his children because he paid Lobola and nothing prevented him from placing before court the accurate status of the female he was with.

[58] The conspectus of the evidence is that the firearm was not only recovered in his possession but that throughout he had been using and possessing illegal firearms. The affidavit of deceased 1 lays this bare. N[...] also witnessed this and testified that the accused fired a shot and the firearm was taken by his brother. There is no hesitation that the accused was found in possession of the said firearm and ammunition. The accused must also be convicted of unlawful possession of a firearm on 6 August 2023 which must follow from its use in the killing of the deceased as I have outlined above. The State however failed to show that the firearm in question is

a semi-automatic firearm in accordance with the technical definition in the Firearms Act in order to invoke the applicability of the CLAA.

[59] In the circumstances the accused must be convicted on all counts.

Order

[60] As a result the following order is made:

1. Count 1. The accused is found Guilty of Murder read with the provisions of S 51(1) Part 1 of Schedule 2 of Act 105 Of 1997.
2. Count 2. The accused is found Guilty of Murder read with the provisions of S 51(1) Part 1 of Schedule 2 of Act 105 Of 1997.
3. Count 3. The accused is found Guilty of Attempted Murder read with the provisions of S 51(1) Part 1 of Schedule 2 of Act 105 Of 1997.
4. Count 4. The accused is found Guilty of unlawful possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000.
5. Count 5. The accused is found Guilty of unlawful possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000 read with the provisions of S 51(2) Part 2 of Schedule 2 of Act 105 Of 1997.
6. Count 6. The accused is Guilty of unlawful possession of an ammunition in contravention of Section 90 of the firearms control's Act 60 of 2000.

Hlatshwayo AJ

Reserved on : 31 July 2025
Delivered on : 5 August 2025

APPEARANCES

Counsel for the accused : Ms Z Fareed
Instructed By : Legal Aid South Africa

Counsel for the State : Adv. R Singh
Instructed By : Director of Public Prosecutions.