



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

CASE NO. CC22/2018

In the matter between:

THE STATE

Vs

SIVIWE RULWA

Accused No.1

VUSUMZI MALILA

Accused No.2

JUDGMENT

JOLWANA J

[1] The two accused were arraigned on charges of murder, unlawful possession of firearms and unlawful possession of ammunition. These charges were a sequel to two incidents in which on 15 January 2017, Mr Sabelo Mrali and on 11 May 2017, Mr Zimasile Shepard Mangisa were murdered at Lower Tsojana Administrative Area in Tsomo. Both accused who were legally represented pleaded not guilty to all the charges and reserved the outline of their pleas.

[2] The first witness for the State, Mr Mdeleleni was called as a witness in terms of section 204 of the Criminal Procedure Act (the CPA)¹. His evidence was that

¹ Criminal Procedure Act 51 of 1977.

ordinarily, he stayed at his home in Qombolo Administrative Area in Tsomo but because of threats to his life, he had to leave his home and stay in hiding in the mountains with his family. Accused no.1 was from the same family as himself and therefore he knew him well and accused no.1 would sometimes visit his home in the company of accused no.2 who would drive for accused no.1. He described accused no.1 as his brother in the extended family.

[3] He testified that in May 2017 at about midnight, he received a call from accused no.1 saying that he was at the gate in his homestead and asked him to come out as he needed to entrust something with him. He woke up and went outside to meet him. As he was approaching the gate, he saw a minibus with its head lights on. He went to accused no.1 who was alone in the vehicle which was standing outside of his yard. Accused no.1 asked him to get inside the vehicle which he did. After the exchange of pleasantries, accused no.1 told him that he had killed someone with a firearm and he wanted to entrust it with him. After recovering from the shock of what he had just heard, he told accused no.1 that he could not keep a firearm which accused no.1 said he had used to kill someone. He told accused no.1 that in asking him to keep such a firearm, he was asking him to implicate himself and after they argued about that, he refused to keep the said firearm.

[4] However, accused no.1 insisted that he must keep the said firearm. He then became fearful of accused no.1. At some point he asked him where he thought he could hide it and accused no.1 said that it would be better if he hid it inside the kraal. Eventually they reached an agreement about where the firearm was going to be hidden inside the kraal. He went to his garage to fetch a spade and when he came back, accused no.1 was inside the yard carrying a white sack. He put the sack down

and took the spade and dug a hole with it in which he then put the sack. He never touched the sack but he was standing next to accused no.1 as he was digging the hole and putting the sack in it. Accused no.1 thereafter said that he was leaving and that he would come back the following day to fetch the firearm. Accused no.1 left while he went back inside the house. He woke up the following morning which was a Wednesday and went to work. Accused no.1 did not come back on Wednesday and Thursday and he tried calling him on Friday but the calls could not go through.

[5] On Sunday afternoon, he received a call from accused no.1 who told him that a certain young man would arrive driving a minibus and that he should give the firearm to the said young man. It turned out that the said young man was already near his homestead. He invited him to come inside. Accused no.1 phoned the said young man who then gave him the phone and accused no.1 told him to give the said firearm to the said young man. He fetched a spade and dug out the said sack and gave it to the young man and the young man left. A week later, on the following Sunday, a police van arrived at his homestead with two men one of whom introduced himself as constable Siswana from the Tsomo detective's section. Constable Siswana asked him if he knew the young man who was in his company. He told him that he did not know the said young man. After Mr Siswana told him that the said young man was the one who had been sent by accused no.1 to fetch the firearm, it became clear that he could no longer persist with denying knowing the young man. Mr Mdleleni testified that at no stage did he actually see the firearm as he never looked inside the sack. Even when he dug it out and gave it to the young man when the latter came to fetch it, he never looked inside the sack. He could feel from its weight that it contained something. Eventually, he told constable Siswana what had happened. He testified that when constable Siswana asked him about the number of

firearms that were in that sack, he told him that he did not know as he never opened it, and he did not know what type of firearm it was. He was told by constable Siswana that there were three firearms in that sack. He testified that accused no.1 did not tell him the name of the person he said he had killed.

[6] The State called Mr Wowo who testified that he resided in Cofimvaba and was self-employed as a taxi owner. He did not know the two accused. On a certain Sunday he received a call from one Bonke Makhalala but he could not recall the date, month or the year. Bonke was with him in the taxi industry. Bonke asked him to take a parcel from Qombolo Locality saying the parcel was going to be taken to Cape Town. He went to fetch the parcel from Qombolo Locality. After being given directions to a certain homestead, he eventually met a man there and he called Bonke who told him to give the phone to the said man which was Mr Mdleleni which he did. After that Mr Mdleleni took out a sack from a kraal at his homestead and gave it to him. It was a white sack which was tied and he did not open it. He took it and put it in the vehicle and took it home because it was too late for him to give it to taxis that were going to Cape Town. The following morning, he went to the taxi rank and between 9:00 and 10:00 Bonke arrived and confirmed that the sack was destined for Cape Town and that the sack had firearms.

[7] Bonke said that he would take the sack from him later that day, but he never did. The following day he was walking to work when he received a phone call from Bonke and they arranged to meet on the way so that they could go back to his home to fetch the sack. Two police vehicles appeared, and Bonke was in one of them. He was asked to get inside the vehicle. The vehicles drove towards his home. When they got to his home, Bonke asked him to give him the sack. He went to fetch the sack but the police told him not to touch it. They took the sack and opened it. It was

then that he saw that it contained three firearms and ammunition. Thereafter they all proceeded to Tsomo Police Station. After a statement was taken from him, he was released and he went home. He explained that the firearms were wrapped in a potato bag before they were put in the sack.

[8] The next witness for the State was Mr Mkorwana. His evidence was that he stayed at Lower Tsojana in Tsomo. He knew both accused as they were both residents of Lower Tsojana. He was also related to accused no.1 and they were also members of an agricultural cooperative in which he was the chairperson and accused no.1 was his deputy chairperson. Furthermore, accused no.1 was a school principal, and he was in the School Governing Body of that school. He was also distantly related to accused no.2. He knew the deceased in count 1, Zimasile Mangisa who was also a resident of Lower Tsojana. He did not remember the date in which he died but he heard about his death. In the morning in which he heard about his death, an incident had occurred the night before in which the deceased was shot and killed. He went to the crime scene where he found other local people and the police already there. He was told that the deceased was unknown or unrecognisable because his facial flesh had been scavenged.

[9] There was also a white bakkie that was standing in the crime scene area but there was no one in it. The vehicle was standing at a distance from the body of the deceased. The deceased's body was removed from the crime scene without it being known who it was and nobody knew whose vehicle that bakkie was. When the vehicle was opened by the police, an identity document of Zimasile Mangisa was found inside the vehicle. It was then suspected that the deceased was Zimasile Mangisa and that the vehicle belonged to him. The following day, members of the family of Zimasile Mangisa went to the forensic mortuary where they identified the

deceased as Zimasile Mangisa. On a certain Friday, he was on his way to a night vigil in another locality. He got a lift from accused no.1 who was with accused no.2. Accused no.1 said that they were also going in the same direction as himself and he boarded his vehicle. Because they knew each other very well, they had a conversation and the death of Zimasile Mangisa came up with him indicating that the person who killed the deceased had not yet been arrested. Accused no.1 said that it was him who had killed the deceased together with accused no.2 and his younger brother Oyama.

[10] He asked accused no.1 what had happened, and he said that they had been attacked by four balaclava clad men. They killed the deceased while defending themselves. Some of the assailants ran away but they caught one of them. He asked accused no.1 why they did not call other members of the community and accused no.1 said that the incident did not happen at his homestead. Accused no.1 explained that they were attacked and defended themselves. The assailants ran away and one of them was injured which was Zimasile Mangisa. As the assailants were running away, they caught up with one of them which was the deceased. Accused no.2 also confirmed what accused no.1 was saying.

[11] Mr Mkorwana testified that accused no.2 was always present during the whole conversation but was keeping quiet when accused no.1 was talking. However, accused no.2 confirmed what accused no.1 said after accused no.1 finished talking. Mr Mkorwana testified that he was very shocked by all this revelation. When he reached his destination, he alighted from accused no.1's vehicle. He was instructed by accused no.1 not to tell anyone about what they had told him. Accused no.2 also said that he should not tell anyone. Accused no.1 said that they only told him

because he was their family member. They parted ways and he proceeded to the night vigil.

[12] On another day he received a phone call from accused no.1's mother who asked him to come and check on the sheep and lambs in her homestead. He went to accused no.1's homestead where the police found him. Police said that they were looking for accused no.1 and he told them that he did not know his whereabouts. After being questioned by the police, he was arrested and taken to Tsomo Police Station. At the police station he told the police what he knew, and a statement was taken from him after which he was taken back home. Under cross-examination it was put to Mr Mkorwana that accused no.1 would deny that he ever gave a lift to him when he was on the way to a night vigil. Mr Mkorwana insisted that he did give him a lift on that day. It was further put to him that accused no.2 would say that he was never with accused no.1 and Mr Mkorwana on the day of the alleged lift. It was further put to him that both accused would testify that they never had a conversation with him about the killing of the deceased. Mr Mkorwana maintained his version which he had given in his earlier testimony.

[13] The State called Mr Matomana who testified that he was an 84 year old resident of Tsojana. He knew the deceased, Zimasile Mangisa as he was also residing in the same locality as himself. He testified that one evening at about 21:00, he heard a sound of gunfire. He was at his home with his family at the time. There were also vehicle lights that he observed. The vehicle was at a corner at the bottom end of his garden. However, he only got out of his house the following morning. When he got out, he noticed some dogs near the corner of his garden. There was a dead person lying there and there were dogs around him. He then alerted other members of the

community. He and the members of the community saw the body of a deceased person.

[14] The next witness was sergeant Njengabantu, a member of the SAPS stationed at Tsomo Police Station. He testified about the deceased in count 2. His evidence was that he was at work on 7 January 2017 when he received a phone call from his relief commander who instructed him to go to a crime scene at Ngojini Locality in Tsomo. He, together with constable Mdingi, attended to that crime scene. They went to the crime scene and found a body of a deceased person with multiple gunshot wounds. The detectives arrived being Mr Siswana and Mr Ngonyama. Members from the Local Criminal Record Centre (LCRC) also arrived and took some crime scene photographs and removed some cartridges after which the body of the deceased was removed from the crime scene. The deceased was identified as Sabelo Mrali.

[15] The evidence of constable Siswana was that he was the investigating officer of the case in respect of the killing of Sabelo Mangisa, the deceased in count 1. He was on duty on 11 May 2017. He attended to a crime scene at Tsojana Administrative Area in Tsomo together with constable Mathe. They found community members already gathered there. He saw the body of the deceased with his facial flesh apparently scavenged by dogs. There were also two gunshot wounds to the head. The flesh was also removed from one of his legs and one foot had been removed as well. He also found two empty cartridges which he marked as exhibits. He also observed that there were vehicle wheel marks as if a vehicle had been skidding there. He called officers from the LCRC and sergeant Xwazi attended to that crime scene and took photographs and also collected exhibits. He also noticed that although there was no mud, the hands of the deceased had mud. There were wheel

marks that proceeded from the crime scene and ended near accused no.1's homestead where there is a gravel road. He went back to the place where there was an unknown vehicle. It later transpired that the said vehicle which belonged to the deceased.

[16] Further investigations pointed to the involvement of accused no.2 in the death of the deceased. They questioned accused no.2 who implicated himself consequent to which he was arrested and detained. The following day captain Mayongo took a confession statement from accused no.2. The information they got from accused no.2 led them to accused no.1 who was said to be a school principal at Tsojana Junior Secondary School. They looked for accused no.1 but they could not find him but he later handed himself over to the police and he was arrested and detained. Further investigations led to the recovery of three 9 mm pistols from one Wowo. The said firearms were sent to the forensic laboratory for ballistic testing by constable Mathe.

[17] In respect of the deceased in count 2, Sabelo Mrali, constable Siswana testified that in January 2017 he received a report that a person had been shot and killed at Tsojana. He and sergeant Ngonyama proceeded to the crime scene where they found police officers including sergeant Njengabantu already there. He noticed that the deceased had multiple gunshot wounds all over his body. Crime scene photographs were taken by LCRC officers and exhibits were also taken and the empty cartridges that were picked up at the crime scene were taken for ballistic testing. The ballistic report linked the cartridges with a firearm that was recovered when the murder of the deceased in count 1 was being investigated. With regard to accused no.2, constable Siswana also testified that accused no.2 did a pointing out in respect of count 1.

[18] The evidence of Dr Mbelekane was that on 12 May 2017 he conducted a postmortem examination on the body of Zimasile Mangisa. His findings were that he had two close range entrance gunshot wounds to the parietal area of the head or on top of the head. He had a compound fracture of the skull and one exit gunshot wound on the upper jaw and the second exit gunshot wound was through the nose bridge. His facial muscles had been completely scavenged and his right leg muscle and foot were scavenged. He concluded that the cause of death was gunshot wounds to the head. The nature of the gunshot wounds to the parietal area of the head indicated that those injuries were sustained while the deceased was in a kneeling position and the firearm was probably fired at close range. On 9 January 2017 he conducted a postmortem examination on the body of Sabelo Mrali. He had multiple gunshot wounds including a gunshot wound to the chest which was the cause of death.

[19] The State made an application for the leading of the evidence of a confession of accused no.2 which the State believed, complied with section 217 of the CPA. The basis thereof was that the said statement was made by accused no.2 to a commissioned officer freely and voluntarily while he was in his sound and sober senses without being unduly influenced thereto. Furthermore, the State submitted that accused no.2 made a pointing out freely and voluntarily and it intended to lead evidence of the said pointing out. The legal representative for the accused objected to the leading of the evidence of the confession statement and the pointing out of accused no.2. This was on the basis that the statement referred to one Mayisela and was therefore not relevant to these proceedings. Secondly and in any event, accused no.2 was assaulted by the police who took him from Tsomo to Engcobo at Ezibokweni forest. He was threatened with being detained at Kulukutu if he did not

tell them what they wanted to hear. With regard to the pointing out, it was submitted that accused no.2 was assaulted at Tsomo Police Station before he appeared before the commissioned officer. A trial-within-a-trial was held for purposes of determining the admissibility of the said confession statement and pointing out.

[20] It is not necessary to deal with the evidence led in the trial-with-a-trial in any detail. This is because, when accused no.2 testified in his defence in the main trial subsequent to the death of accused no.1, he recanted his evidence of being assaulted or tortured into making a confession statement and into doing a pointing out. He testified that that evidence was false and that indeed he had freely made the confession and that he had done the pointing out freely. In any event, after evaluating all the evidence led in the trial-within-a-trial I made a ruling that both the confession statement of accused no.2 and the pointing out were admissible. This, as I said before, was confirmed to be so even by accused no.2 himself when he testified in his defence in the main trial.

[21] The State called captain Mthembu who testified that she was employed as a forensic analyst in Port Elizabeth at the Forensic Science Laboratory in the ballistics unit. The evidence of captain Mthembu was not disputed. The evidence of accused no.2 and his defence did not challenge the ballistic report. In fact, his defence had nothing to do with the ballistic report. This will become clearer when I deal with the evidence of accused no.2 and the defence that he proffered. I will therefore not say much about captain Mthembu's evidence which is not disputed or in any way challenged. Similarly, the chain evidence was not disputed by accused no.2. Accordingly, I do not intend to deal with it as no meaningful cross-examination was done when sergeant Xwazi who gave detailed evidence relating to the taking of

photographs and the collection and handling of exhibits and the sending thereof to the forensic laboratory.

[22] Subsequent to the admission of accused no.2's confession statement as evidence, it was read into the record by captain Mayongo. For reasons that will become clear later in this judgment, I consider it important to reflect it verbatim, to the extent possible with its many grammatical errors. It reads as follows:

“On Wednesday 10 May 2017 at about 20:15 I was at Siviwe Rulwa's homestead to fetch a vehicle which I will use to fetch the harvesters on the following day from another location. I got the vehicle and when I was about to leave Rulwa's yard driving a man not known by me suddenly appeared. He came straight to me pointing me with a firearm. Secondly, I saw another one and it is then that I drove away with the vehicle and picked the phone-to-phone Siviwe Rulwa. Siviwe Rulwa asked me as to where this person is and I told him the place [he] can come across this area. He told me that I must come closer to him, so that I can give lights to him. And when I was nearer with lights on I saw at the same time gun shots were fired. I did not notice at that point in time as to where these gunshots were exactly coming from, either from Siviwe or from this person. This man ran away and at that time I was also chasing with the vehicle and Oyama Rulwa was also chasing but with his feet. Siviwe Rulwa was also chasing and at a distance away in a certain mini dongas this man fell down. Siviwe Rulwa quickly arrived to him, disarmed this man his gun and assaulted him on his face. Oyama Rulwa kicked this man on his head, Siviwe Rulwa switched on his phone to light this man and it is then that we discovered that this unknown man to us is Zimasile Myeseli whom we know to be in Gauteng Province. And the reason why we did not know him at that time we were chasing him, it is because it was dark at that time also during the night. Siviwe Rulwa shot Zimasile Mayisela for the last time when he was hit at a close range at the time he laid down on his back and this was the second time. Oyama Rulwa went away leaving me and Siviwe Rulwa behind. A few minutes after that Siviwe Rulwa instructed me to put mud on the deceased hands, saying that this would cause the fingerprints not to be lifted nicely, meaning which this would destroy his fingerprints from the deceased both hands. After I had finished to do that, we went back to our homes, but before that he told me that we must dig a hole where we are going to hide the firearms for him and the deceased firearm.”

Captain Mayongo testified that he got the name of the deceased from accused no.2 which was why he recorded it as he did.

[23] The evidence of Mrs Mangisa was that the deceased in count 1 was her husband. She knew both accused no.1 and no.2. She knew accused no.2 from seeing him in the locality at Tsojana. She got to know both accused when he got married to the deceased. She first got to know accused no.1 just as a local resident but at some point, they became lovers. They started their love relationship in 2010 and at that time she was already married to the deceased. Their homesteads are separated from each other by one homestead. Their relationship ended in 2014. The enmity between accused no.1 and the deceased started when the deceased found out about their love relationship. She testified that she was in Gauteng when her husband died. No further witnesses were called by the State, and its case was closed, and the case was postponed to give the defence time to prepare for the defence case.

[24] In the interregnum, Mr Noxaka who was the legal representative for both accused sadly passed away. This caused enormous delays which were also exacerbated by their new attorney raising issues relating to the incompleteness of the transcribed record especially the in audibles which were said to exist in the record. By the time that issue was dealt with, accused no.1 had also sadly passed away. This resulted in their legal representative withdrawing from the case as his fees were paid by accused no.1 who had passed on and accused no.2 was not able to pay his fees. It came to pass that accused no.2 got legal representation from Legal Aid South Africa. This resulted in further delays to this matter as the new attorney needed transcribed records which delayed the matter even further. Ultimately the matter was set down for trial.

[25] Accused no.2 opened his case by testifying in his defence. His evidence was that on 11 May 2017 he was coming from accused no.1's homestead whom he regarded as his brother as their fathers are brothers. He noticed someone running towards him. The time was at about 19:00 and it was starting to be dark. This person told him to stop his vehicle. He asked this person who he was and this person stopped running and he continued driving. As he was about to enter the gravel road another young man approached him from in front of the vehicle. This young man stopped, greeted him by saying high Ta Svish. Accused no.2 explained that Ta Svish was accused no.1's nickname. Accused no.2 responded by saying that he was not Ta Svish and that Ta Svish was at his home. He then phoned accused no.1 and told him about his encounters with the two men and asked him if he was expecting anyone.

[26] Accused no.1 asked him where those men were and he told him that the first man was behind his homestead and the second one was still walking on the gravel road. Oyama came from accused no.1's homestead and boarded the vehicle he was driving. Accused no.1 phoned him and asked them to come back. As he drove back accused no.1 said that he could see the person. When he and Oyama were near accused no.1's garden corner near a communal water tap, he noticed this person moving and walking away. At that stage he did not notice where accused no.1 was. He heard accused no.1 asking who the person was near an unfinished wall of a house in that area. Thereafter he heard gunshots and he did not know who was shooting but after hearing the gunshots, he drove away. Accused no.1 called for assistance and Oyama alighted from the vehicle. Oyama and accused no.1 gave chase to this person. He also alighted and gave chase following in their direction. He noticed that accused no.1 and Oyama had caught up with this person. When he got

to the place where they had caught up with this person, accused no.1 had already assaulted this person and dispossessed him of his firearm and the person was gasping.

[27] Accused no.1 took out his cell phone and switched on the torch of the said cell phone to see this person. This person was wearing a balaclava and a panty hose on his head which accused no.1 removed. He then heard accused no.1 saying "Zimasile" and he did not know this person. After accused no.1 had identified this person, he asked him (accused no.2) for the keys of the vehicle he was driving and they drove to accused no.1's homestead and thereafter accused no.1 took him to his homestead. While he was still at home, accused no.1 phoned him and said that he was coming. He arrived and took him back to the place where this person was. Accused no.1 stopped the vehicle, and they proceeded on foot to this person. They found him gasping and accused no.1 said that it was better for him to kill the said person. Accused no.1 pulled out a firearm and shot him three times on the head. At some stage he asked accused no.1 who Zimasile was and accused no.1 said he was his neighbour.

[28] Accused no.2 further testified that he stayed in the same locality as accused no.1 but he did not grow up there and he did not know the deceased. After accused no.1 shot the deceased, he said that they should go. They proceeded to accused no.1's homestead and on the way, he asked him who the deceased was and why he killed him. Accused no.1 said that he had a love relationship with the deceased's wife and as he said that he was crying. At that stage he noticed that accused no.1 was a different person from the one he knew. He then decided not to ask him anymore questions. Accused no.1 took him home and dropped him at his homestead. Later that night accused no.1 arrived at his homestead without having

phoned him. Accused no.1 asked him to get dressed and said that they should go back to the place where he had shot the deceased. On their way there accused no.1 told him that he wanted them to remove his fingerprints on the deceased as he had grappled with him. They put mud on the deceased's hands and after smearing the deceased with mud they parted ways.

[29] He went home and took a bath as it was early morning. Members of the community were called to the place where the body of the deceased was, and he went there together with other members of the community. When they got there the deceased was not known by the villagers. Accused no.1 also came to the crime scene but left to go to work. The reason the deceased could not be identified was because he had been eaten by dogs. Police were called and took the body of the deceased away after which the villagers dispersed. He was arrested on 15 May 2017 which was four days after the incident. Accused no.2 testified that he knew nothing about the death of the deceased in count 2, Sabelo Mrali. He confirmed that accused no.1 had a firearm in his possession at the time of the killing of the deceased in count 1. He noticed it when accused no.1 was assaulting the deceased with it and dispossessing the deceased of his firearm. He never saw those firearms again.

[30] Under cross-examination, accused no.2 testified that he was the first to be arrested. His evidence was that he had told the police what had happened after which he was taken for a confession statement and pointing out. He knew Mr Mkorwana and that he stayed in the same locality as himself. He was in a vehicle driven by accused no.1 when they met Mr Mkorwana and accused no.1 gave him a lift. Accused no.1 had told him that they should go and tell Mr Mkorwana about the death of the deceased. Mr Mkorwana was a close family relative of accused no.1's

and an elder in the family. When they met Mr Mkorwana, accused no.1 told him that they killed the deceased and said that it was not intentional.

[31] When the villagers gathered at the crime scene, they could not identify the deceased but he and accused no.1 knew who the deceased was, but they did not tell the villagers. Accused no.2 testified that the reason he did not disclose the identity of the deceased was because he was afraid that accused no.1 could do something to him. He was afraid that if he spoke, what happened to the deceased could happen to him. He denied that he and accused no.1 acted with a common purpose. He denied participating in the killing of the deceased but admitted that he participated in putting mud on the deceased. He testified that accused no.1 never threatened him. At the time accused no.1 shot the deceased he (accused no.2) was standing at a distance from the deceased. He denied that he was in joint possession of the firearm and ammunition. Accused no.2 testified that accused no.1 seemed very angry after the incident even driving the vehicle recklessly. He further said that it was the first time that he saw accused no.1 in that mood. He decided that it would be better for him if he did as instructed by accused no.1. After the evidence of accused no.2 the defence closed its case.

[32] The State placed on record that it was not persisting with seeking the conviction of accused no.2 on the firearm and ammunition related charges which are counts 3 to 6. It was submitted that there was no evidence of accused no.2 being in possession of any firearm. Furthermore, the State submitted that it accepted that there was no evidence on the basis of which joint possession of the said firearms could be established. This concession was well made on the facts of this case, and this reflected a realistic assessment of the evidence and the applicable legal position by the State.

[33] The legal position pertaining to the crime of unlawful possession of firearms and ammunition has, not so long ago, been explained in quite some detail in *Makhubela*² by the Constitutional Court as follows:

“[45] It is common cause that [the applicants] did not have any firearms in their possession. They were, however, convicted of these charges in the trial court on the basis of the doctrine of common purpose.

[46] In convicting the applicants for unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose the trial court departed from settled jurisprudence. The test for establishing liability for the possession of firearms and ammunition was established in *S v Nkosi* as follows:

‘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.’

[47] This test has since been cited with approval in numerous judgments of the High Court and the Supreme Court of Appeal. In these judgments the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purposes but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearms on the basis of the doctrine. The test takes into account the fact that the application of the doctrine of common purpose differs in relation to “consequence crimes”, such as murder and in relation to “circumstance crimes”, such as possession....

[48] Burchell defines unlawful possession of a firearm as an example of a “circumstance crime” in relation to which the principle of common purpose cannot strictly apply in the same manner it applies in consequence crimes:

² *Makhubela v S, Matjeke v S* 2017 (2) SACR 665 (CC) at 678-682.

“Unlawful possession of firearms is punished under section 2 of the Firearms Control Act. *Mbuli* emphasised that unlawful possession of a firearm is a circumstance (or state of affairs) crime, that possession had to be personal or joint and that it is not enough to establish joint possession that the firearm was possessed by only one member in a criminal group in furtherance of a criminal purpose with others. Nugent JA in *Mbuli* did not accept the reasoning of the Supreme Court of Appeal in *Khambule* and emphasised that a common intention to possess a firearm intentionally can only be inferred when the group had the intention (*animus*) to exercise possession of the firearm through the actual detentor and the actual detentor had the intention to hold the firearm on behalf of the group [the test set out in *S v Nkosi*]. This test has been followed in a number of Supreme Court [of Appeal] cases.”

....

[55] These cases show that there would be very few factual scenarios which meet the requirements to establish joint possession set out in *Nkosi*. This is because of the difficulty inherent in proving that the possessor had the intention of possessing a firearm on behalf of a group. It is clear that, according to established precedent, awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another in our law.”

[34] While at some stage accused no.2 became aware that accused no.1 possessed a firearm of his own and even dispossessed the deceased of his firearm, there was no evidence to suggest that accused no.1 possessed the firearm also on behalf of accused no.2. Even when they returned to accused no.1’s homestead after accused no.1 had shot the deceased, accused no.1 dealt with both firearms alone and there was no evidence that the firearms or one of them ever came into the possession of accused no.2. Therefore, as the State has correctly conceded, not only was accused no.2 never in possession of any firearm, but also, there was no evidence to establish possession of the firearms by accused no.1 also on behalf of accused no.2.

[35] Similarly with count 2, the murder of Sabelo Mrali, there was just no evidence whatsoever on the basis of which accused no.2 could be said to have been involved

in his killing. The evidence of the State suggested that only accused no.1 could be implicated as the ballistic evidence linked him to Sabelo Mrali's murder. In so far as accused no.2 is concerned, it is not even a case of there being insufficient evidence. This is a case of there being no evidence at all as no evidence was tendered implicating accused no.2 in that offence. It seems that he was charged in Sabelo Mrali's murder for his known association with accused no. 1. I must point out once again that the State correctly conceded that it presented no evidence against accused no.2 and indicated that it was not persisting with accused no.2 being convicted of the murder Sabelo Mrali.

[36] This brings me to the evidence relating to the murder of the deceased in count 1, Zimasile Mangisa. The State placed much reliance on the evidence of Mr Mkorwana and that of Mr Mdleleni, the section 204 witness. It is important to emphasise that neither Mr Mkorwana nor Mr Mdleleni witnessed the killing of the deceased as they were not there. Accused no.1 whom they implicated passed on as a result of which he could not be confronted with their evidence. Therefore, his credibility could not be assessed thus leaving a very difficult situation as far as the overall assessment of the evidence is concerned. The State also relied on accused no.2's confession statement and the evidence of a pointing out that he did which, after a lengthy trial within a trial, this Court ruled both admissible. It was submitted by the State that on the totality of all the evidence including the evidence of accused no.2, he should be found guilty for the murder of Zimasile Mangisa on the basis of the doctrine of common purpose.

[37] In his evidence accused no.2 explained that he was present when the deceased was shot by accused no.1. The State submitted that it was the first time that accused no.2 made this admission which therefore corroborates the confession that was

admitted as evidence against him. This, so submitted the State, contradicted accused no.2's previous denials which were made on his behalf to State witnesses. Therefore, this version in which accused no.2 places himself at the crime scene was new and was never put to State witnesses. The State postulated that following the death of accused no.1, accused no.2 was now in his evidence, blaming everything on accused no.1. On the basis of the doctrine of common purpose, the State applied for the conviction of accused no.2 for the murder of Zimasile Mangisa. I do not intend to deal with the requirements for the application of the doctrine of common purpose which are trite and have been well known and restated since *Mgedezi*³.

[38] The State submitted that accused no.2 actively associated himself with the killing of the deceased in chasing the deceased and in providing light with the vehicle he was driving for the deceased to be seen. Therefore, it should be inferred that there was an intention to kill the deceased on the part of accused no.2. I am not certain how accused no.2's call to accused no.1 telling him about the men he just met and ultimately his participation in chasing the deceased should result in it being inferred that accused no.2 harboured an intention to kill the deceased or made common cause with accused no.1.

[39] Our case law on inferential reasoning was explained in quite some detail by the full court of this Division in *Tom*⁴ recently by Van Zyl DJP:

“The principles in relation to inferential reasoning are well established. The standard of proof beyond reasonable doubt in criminal proceedings requires the application of what the oft-quoted case of *R v Blom* (Blom) referred to, as the two cardinal rules of logic:

³ S v Mgedezi 1989 (1) SA 689 A at 705 to 706.

⁴ Tom v S 2023 (2) SACR 283 (ECMk) paras 10 to 11.

'In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

- (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 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.'

Some of the key principles underlying the test in *Blom*, as amplified in *R v de Villiers* are the following: the facts from which the prosecution seeks to draw the inference of guilt must not also be reasonably consistent with a hypothesis other than the one relied upon, in other words, the inference of guilt must be the only reasonable inference; there must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or a bare possibility will not be sufficient; as the inferential conclusion sought to be drawn is determined against the strength of the factual premise provided by the context of the facts of the case, all of the circumstances established by the evidence must be considered and weighed in deciding whether the inference is consistent with the proved facts. The evidence must be considered as a whole, and not by a piece-meal approach and following from the fact that the burden of proof rests on the State throughout criminal proceedings to prove the guilt of the accused beyond a reasonable doubt, the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference."

[40] The common cause facts or facts which the State was unable to dispute are that at the instruction of accused no.1, accused no.2 and Oyama assisted in chasing the deceased. With the vehicle accused no.2 was driving, he provided light so that the deceased could be seen. However, there is no evidence that he participated or associated himself with the killing of the deceased by accused no.1. I am at a loss as to how active participation in the murder of the deceased could be inferred from his mere presence or the chasing of the deceased. The only time accused no.2 did anything was, on the instruction of accused no.1, placing mud on the hands of the

deceased. At that stage the deceased had already been shot twice to the head by accused no.1. They had all gone to their respective places of abode after the shooting. It was accused no.1 who came to the home of accused no.2, woke him up and said that they should go back to the place where he had killed the deceased to put some mud on his hands so as to make it impossible to lift fingerprints. Logic dictates that by that time the deceased must have already died. There cannot be an active association in the killing of the deceased as he must have long been dead by then or at least there is no evidence that he was still alive. The evidence of Dr Mbelekane, the doctor who conducted a postmortem examination on the body of the deceased was that the deceased was shot twice at close range on top of his head. There was no evidence of the accused no.2 having been aware that when the deceased was being chased, he, accused no.2, was aware that he was going to be killed or that he associated himself with his killing.

[41] It seems to me that whatever other offence accused no.2 could, on the facts of this case, be convicted of it is certainly not murder. No submission was made that for whatever reason and in the event that the court finds that accused no.2 cannot be convicted of murder, he should nonetheless be convicted of some other named offence.

[42] The State's case was also that accused no.2 confessed to the murder of the deceased. A confession has been defined by our courts as an unequivocal acknowledgment of guilt⁵. It has also been defined as an admission of all the elements of the offence charged, a full acknowledgment of guilt⁶. It was argued on behalf of accused no.2 that he did not make a full acknowledgment of guilt in the

⁵ R v Becker 1929 AD 167 at 171.

⁶ S v Zuma 1995 (1) SACR 568 (CC) at 585 para 27.

murder of the deceased in his confession statement. In making this submission, reference was made to paragraph 16 of the pro forma document which seeks to ensure that before an accused person incriminates himself, he does so freely and voluntarily without having been unduly influenced thereto as required by section 217 of the CPA. Furthermore, the document gives the accused person who has been brought before a commissioned police officer who is not involved in investigating the case or a magistrate an opportunity to change his mind after having been independently apprised of his rights not to make a self-incriminatory statement. This, the pro forma does by asking questions whose purpose is to elicit from the accused answers that enable the confessor in his confessionary and before an independent person to fully understand his right not to incriminate himself in light of his or her fair trial rights.

[43] The question at paragraph 16 of the pro forma or confessionary can be more fully understood by starting at two questions earlier. The relevant questions and accused no.2's answers thereto were the following:

“14. Have you at any time in the past made a statement, whether orally or in writing to any person concerning the incident?

Answer: Yes

15. If so, to whom, when and under what circumstances?

Answer: I do not know the man who took down my statement on the 15:05:2017: Freely from my consent.

16. Why do you wish to repeat the statement?

Answer: To prove my innocence to the commission of the offence.”

[44] The submission was that the intention of accused no.2 was clearly stated in the pro forma as being to prove his innocence from early on as against making an

unequivocal admission of guilt. When one reads accused no.2's confession statement, it is clear therefrom that in it accused no.2 explains how accused no.1 killed the deceased. There was no role played by him other than chasing the deceased at the behest of accused no.1. There was no evidence or even a basis to draw an inference that accused no. 2 knew that accused no.1 intended to kill the deceased, let alone a discussion that the deceased should be killed. Mere presence at the crime scene cannot, without more, suffice for a criminal conviction. In light of what our jurisprudence on inferential reasoning is as already discussed earlier, the intention to kill the deceased in participating in the chasing of the deceased cannot possibly be the only inference to be drawn on the facts of this case.

[45] Without trying to be in any way exhaustive, one other inference that can be drawn in accused no.2's participation in chasing the deceased could have been the capture of the deceased and even a possible handing over of the deceased to the police; the calling of other community members as it normally happens in rural communities where a person is suspected of committing some or other offence. These are some of the inferences that cannot be excluded and therefore the inference of an intention to murder the deceased or active association in his murder cannot be drawn. Our jurisprudence is that an accused person is not even required to prove other possible inferences. The evidence before this Court is that accused no.1 shot the deceased soon after catching up with him. Thereafter, he instructed accused no.2 to smear the deceased's hands with mud to destroy any possible trace of accused no.1's fingerprints on the deceased's hands. This suggests that after the deceased had fallen in the dongas and accused no.1 caught up with him, he must have touched with his hands otherwise it makes no sense to smear the deceased's

hands with mud. Therefore, there could not possibly be any talk of common purpose with accused no.1 in the killing of the deceased.

[46] The question that this Court has to also apply its mind to is the consideration of a competent verdict. This is provided for in section 270 of the CPA which reads:

“If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.”

[47] All that being said, the real question boils down to whether accused no.2, clearly not being guilty of murder, he should nonetheless, be convicted on a competent verdict. On the evidence before court in this matter there is no competent verdict on which the accused could be found guilty. The State did not point to any specific competent verdict to the main charge of murder on which accused no.2 could be convicted. As regards the accused being instructed by accused no.1 to smear mud on the hands of the deceased, it is worth pointing out that for some reason, the State, knowing what it knew about accused no.2's smearing of mud on the deceased's hands as detailed in his confession statement, did not charge him with defeating the ends of justice. This would have been necessary because defeating the ends of justice is not a competent verdict for murder. As a result, the court cannot even consider whether the evidence, while not proving murder, does prove the crime of defeating the ends of justice. This is so because accused was never charged with that offence.

[48] There is another issue that was raised by accused no.2's attorney which presents another layer of difficulty in this matter. This relates to an accused's right to

a fair trial which is entrenched in the Bill of Rights in the Constitution⁷. As I indicated earlier in this judgment, accused no.1 and 2 were represented by the late Mr Noxaka up until the case for the prosecution was closed and the trial was postponed for the defence case. In the interregnum, Mr Noxaka sadly passed on. When the trial resumed, accused no.1 had also sadly passed on. The issue raised on behalf of accused no.2 was that in light of accused no.2's confession statement which was disclosed to the defence as part of the docket that would have been made available to Mr Noxaka even before the criminal proceedings commenced, it was incorrect for Mr Noxaka to represent both accused no.1 and accused no.2. This was so because in his confession statement, accused no.2 made it clear that accused no.1 shot and killed the deceased. Therefore, there was a clear conflict of interests between the two accused as accused no.2 directly implicated accused no.1 in the offence for which they were both charged. This has nothing to do with whether one accused could make a confession statement implicating a co-accused. It has everything to do with his version being put to State witnesses. This did not happen in this case as accused no.2's version some of which is alluded to in this confession statement and elaborated on in his oral testimony was never put to State witnesses. This is a clear manifestation of the accused's right to challenge the case against him being compromised as a result of this manifest conflict of interest. This is one of the issues that go to the core of an accused's right to a fair trial.

[49] The right to a fair trial does not admit of a precise definition nor does it have an exhaustive list of items that must be observed for an accused person to have received a fair trial. It always depends on the facts of each particular case. That is why section 35(3) of the Constitution uses the word "*includes*" to denote that the list

⁷ Constitution of the Republic of South Africa, 1996.

contained therein is not intended to be exhaustive. This fundamental right has a long history with some of its varied expressions even predating the Constitution itself. Recently in *Kapa*⁸ the Constitutional Court had occasion to make some comments on this fundamental right. It said:

“[26] The right to a fair trial enshrined in section 35(3) of the Constitution encompasses various fundamental rights, including the right to remain silent, and to adduce and challenge evidence. In *Molimi*, this Court described the right to a fair trial as follows:

‘[T]he right to a fair trial ... ‘has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime’ ...More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.”

[27] Although the concept of a fair trial is a cornerstone of our criminal law jurisprudence, not every minor irregularity vitiates the right to a fair trial. In *Zuma*, this Court expressed itself as follows on the nature of the irregularities that render a trial unfair:

‘The right to a fair trial ... embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Mthana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire –

‘whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted ... [A court of appeal] does not enquire whether the trial was fair in accordance with notions of basic fairness and justice,” or with the ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration.’

⁸ *Kapa v S* 2023 (4) BCLR 3 70 (CC); 2023 (1) SACR 583 (CC) paras 26-28.

That was an authoritative statement of the law before 27th of April 1994. Since that date, section 35(3) has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[50] The evidence of accused no.2 when he testified in his defence was largely aligned with his confession statement and with some embellishments here and there with some evidence that was not contained in his confession statement. That statement was challenged by accused no.2 on the basis that he had not made it voluntarily in that he had been tortured and assaulted into making it. That statement, after a lengthy trial-within-a trial, was ruled admissible by this Court. This is inconsistent with accused no.2's submission or submission made on his behalf that he has always maintained his version and never wavered from what he told the police shortly after his arrest. However, the nature of the relationship of accused no.1 and no.2 is also very relevant in my view. They appeared to have a master/servant relationship with accused no.2 playing a role of somebody who ran errands on behalf of accused no.1. I have an uneasy feeling that after accused no.1 killed the deceased he embarked on a deliberate and crafty strategy to implicate accused no.2. For example, accused no.1 instructed accused no.2 to smear the deceased's hands with mud. A few days later accused no.1 gave a lift to Mr Mkorwana and confessed to Mr Mkorwana in the killing of the deceased. On the evidence of Mr Mkorwana accused no.2 who was quiet made unsolicited comments implicating himself in the shooting of the deceased which he did not commit. This is very strange and defies logic as what caused accused no.1 to make the confession to Mr Mkorwana, a family elder, in the presence of accused no.2 is extraordinary.

[51] There is another strange feature of this case which appears to be another manifestation of accused no.1's domineering character. Mr Mdleleni was forced to keep the murder weapon by accused no.1 against his will. Even after accused no.1 left his illegal firearms hidden in Mr Mdleleni's kraal with his knowledge and having been told that what he was required to keep was a murder weapon, Mr Mdleleni did not call the police. He only told the police what accused no.1 had done after police, on their own, got to him. It makes no sense for an old man such as Mr Mdleleni to involve himself in what appeared to be accused no.1's web of criminal activities. The point I am making is that accused no.2 appears to have fallen victim of accused no.1's fearsome and domineering character as did Mr Mdleleni. To the extent that some of accused no.2's evidence was also that he was afraid of accused no.1, he never proffered that as a defence in the sense of compulsion or otherwise at least as far as the role he played in accused no.1's criminal activities is concerned. This failure to plead this potential defence cannot be divorced from accused having been legally represented by Mr Noxaka who also represented accused no.1 in circumstances in which accused no.2 implicated accused no.1 as earlier indicated. Practitioners are required by their ethical duty to observe these cardinal rules in how and which accused they represent and not sacrifice one accused at the altar of another where there is manifest conflict of interests. But for the fact that Mr Noxaka passed on before this matter could be concluded, I would be referring it to the Legal Practice Council to investigate Mr Noxaka's possible breach of his ethical obligations.

[52] As I conclude, I must appreciate the good investigative work that the police did in investigating this matter and trying to hold those responsible for the murders of the two deceased persons accountable for their crimes. It is unfortunate and due to no

fault of the investigating officer that accused no.1, who was evidently at the back, front and centre of these murders, including an attempt to have illegal firearms including the murder weapon, taken to Cape Town died before the trial could be concluded. These firearms would most likely have been used for other criminal activities. Accused no.1's death does not detract from the hard work the police officers who investigated these cases, especially constable Siswana, who painstakingly managed to do good investigative work which prevented the said firearms from being taken to Cape Town and arrested the two accused persons. Mr Mdleleni, as a section 204 witness is granted indemnity from prosecution as he met all the requirements.

[53] In all the circumstances, the State has not proved beyond reasonable doubt that accused no.2 committed any of the offences for which he was charged or any offence for which he could be convicted. He is therefore found not guilty and discharged on all the charges preferred against him.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearance

Counsel for the State : N. Ngxingwa

Instructed by : NPA

MTHATHA

Attorney for the accused : X. Babane

Instructed by : Legal Aid South Africa

MTHATHA

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