



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: CC49/2022

In the matter between:

THE STATE

And

LWANDISO SINGAMA

ACCUSED

Coram: YAKE AJ

Argument: 19 February 2026

Delivered: 25 February 2026

Summary: Admission of hearsay evidence – section 3 of the Law of Evidence Amendment Act 45 of 1988 - mere allegation of a witness's unavailability is insufficient, State must bring substantive application - the impact of closing the defence case without leading evidence – right to remain silent – section 35 of the Constitution of SA Act 108 of 1996 - splitting of charges and duplication of convictions -section 83 of the CPA - cautionary rule and reliability - section 208 of the Criminal Procedure Act 51 of 1977 — common purpose

JUDGMENT

YAKE AJ

Introduction

[1] On the evening of 19 March 2022, at approximately 20h00, Mr Luxolo Kowa ("Kowa"), an Uber driver, transported his client, Mr Zola Spaji ("the deceased") to Dlavu Close, Makhaza, Khayelitsha, in his white Volkswagen Caddy. While they were seated in the vehicle and conversing, three men approached from behind the Caddy and ambushed them.

[2] The men started firing shots at them. Kowa managed to escape, leaving the deceased behind and went to seek assistance. He stopped a police vehicle driven by Constable Bokolo ("Bokolo") and reported the incident. Bokolo then accompanied him back to the scene where he left his Caddy.

[3] Upon arrival at the scene, other police officers were already there and one from the three suspects involved in the shooting, the accused, was already arrested. Kowa later learned that the deceased had been fatally shot and found lying in front of a shack at eMsindweni, a nearby informal settlement. A CZ firearm was found lying next to the accused, and a second firearm, a Glock was found nearby. A second deceased was also discovered near the toilets at eMsindweni.

[4] Consequently, the State indicted the accused on the following charges:

(a) Two counts of murder (count 1 and 6), read with the provisions of **section 51(1)** of the Criminal Law Amendment Act 105 of 1997 ("CLAA"), alleging that the killings were planned or premeditated and committed in the furtherance of common purpose. Upon conviction, a prescribed minimum sentence of life imprisonment applies.

(b) Two counts of attempted murder (count 2 and 3).

(c) Three counts of unlawful possession of a prohibited firearm (count 4, 7 and 9)

(d) Three counts of unlawful possession of ammunition (count 5, 8 and 10).

[5] Throughout the trial, the accused was legally represented by Ms. Adams of Legal Aid South Africa and Advocate Cecil appeared on behalf of the State. The accused pleaded not guilty to all charges preferred against him and tendered the following plea explanation in terms of **section 115** of the Criminal Procedure Act 51 of 1977 ("CPA").

- a) On 19 March 2022, the accused was consuming alcohol with his uncle Zanowonga Singama, at eMsindweni informal settlement in Makhaza. Approximately between 20h00 and 21h00, he left for his home at 40618 Dlavu Street, Makhaza. Despite having consumed alcohol, he remained aware of his surroundings.
- b) Upon his arrival at home, he found his uncle Klass Makinana, together with his wife Monique, and three of their children, while one child was still outside. Shortly thereafter, while conversing with his family and food being prepared for him, he heard gunshots and people running outside. Concerned that his nephew was still outside, he went out to look for him.
- c) Outside he noticed a white motor vehicle parked in the street with one of its doors open. Moments later, several people emerged from a distance and started shooting. He was struck by the gunshots and fell on the ground. It is only after sustaining injuries, did he realise that the shooters were in fact police officers. He bears no knowledge of the events leading to the shooting and indicated that he intends to call two witnesses, namely Klass Makinana and Zanowonga Singama.

[6] The accused confirmed the plea explanation tendered on his behalf. He further confirmed that a minimum sentence of life imprisonment, applicable to count 1 and 6 as well as the minimum sentence of 15 years imprisonment applicable to count 7 and 9, together with their competent verdicts, had been explained to him. He also confirmed that he elects to proceed without assessors.

[7] During the course of the trial, the defence made admissions in terms of section 220 of the CPA confirming that the body of the deceased in WC/14/0883/22 sustained no further injuries from the time it was removed from the scene until the autopsy was conducted by Dr. Smit. The defence also admitted that Elru Hansen, identified the body of the deceased in WC/14/0887/22 to Dr. Smit and further admitted the chain of custody in respect of Harare Cas 407/3/2022 and Harare Cas 409/3/2022.

[8] The State brought an application in terms of section 3(1)(c) of the General Law Amendment Act seeking to introduce hearsay evidence regarding the primer residue results obtained from the accused. The defence opposed the application, and the Court refused it. Reasons for the ruling will follow later in this judgment.

Issues for determination

[9] The court is called upon to determine, (a) whether the State has proven the identity of the accused as the person who shot at Kowa and Qokombane, (b) whether the accused was found in possession of the two firearms, the CZ and the Glock, (c) whether the circumstantial evidence presented is sufficient to bring about the conviction of the accused on murder charges. Put differently, whether the inference sought by the State exclude all other reasonable inferences, specifically, the issues of whether the accused participated in the killing of the two deceased and acted in the furtherance of common purpose, and (d) whether any adverse inference may be drawn from the accused's failure to testify in light of the evidence presented by the State.

State case

[10] Mr Luxolo Kowa ("Kowa") testified that on the evening of 19 March 2022, shortly after 20h00, he received a phone call from the deceased, Mr Zola Spaji, requesting a ride from Khayelitsha to Dlavu Close. He went to pick up the deceased in his VW Caddy, and they proceeded to Dlavu Close. Upon arrival, he turned at the cul- de- sac and parked the vehicle facing the entrance / exit. They remained seated and continued their conversation. The area was dark as there were no streetlights. The only source of light came from the Caddy's headlights.

[11] As they were conversing, three men approached from behind the Caddy on the passenger side. When they were a few meters ahead of the vehicle, they turned and started shooting towards the vehicle. Kowa observed that two of the men were armed. One was tall, wearing a black sweater and walking on the left side carrying a firearm in his hands. The accused was positioned in the middle, wearing a black and white striped t-shirt and also carrying a firearm. He was unable to identify the third man who was closest to the passenger side.

[12] In an effort to protect himself, Kowa opened the door and fled behind the Caddy towards the passage leading to eMsindweni informal settlement. He then crossed Japhta K. Masemola Road into Fukutha Road, where he stopped police vehicle driven by constable Bokolo. He reported the incident and the police accompanied him back to the scene.

[13] Upon their return to the scene, several police officers were already there. He noticed that both front doors of the Caddy were open, and the accused was seated on the ground to the left of the vehicle, having already been apprehended. Kowa immediately identified the accused as one of the shooters who was in the middle during the attack. He was thereafter taken to a nearby house in eMsindweni, where he identified the deceased, as depicted in photos 67 to 71 of exhibit A.

[14] He conceded under cross-examination, that his identification of the accused was based solely on the clothing observed during the incident, as he never attended any identification parade. He confirmed that he pointed out the accused only upon returning to the scene with the police. He denied the accused's version that he was not involved in the shooting and remained adamant that the accused was one of the shooters.

[15] Sergeant Peter Solomons ("Solomons"), the arresting officer, testified that on 19 March 2022 at approximately 22h15, while conducting crime prevention duties in the Makhaza area, he received a call from radio control about the shooting in progress at Dlavu Close. He called for backup and proceeded to the scene with his passenger

Qokombane. Mboniswa accompanied by officers Gweva, Myoyo and Nzoyiya, also arrived at the scene as backup.

[16] Upon arrival at Dlavu Close, they parked at Nyanda Avenue and proceeded to the crime scene on foot. All members were armed with their service pistols and rifles. As they entered Dlavu Close, they observed a white Caddy parked on the right-hand side of the road facing the entrance. Although the visibility was dark, there were lights in the area. Upon approaching the Caddy, they notice that the doors were wide open, and the windscreen had a bullet hole, and no one was inside. They checked the immediate surroundings but found no one in the close vicinity.

[17] Solomons instructed his team to take cover, in anticipation of any suspects' return. He positioned himself at the entrance of Dlavu Close, while Qokombane took cover in the yard on the right side of the Caddy. Mboniswa and other members, Gweva, Myoyo and Nzoyiya, took cover in the yard on the left side of the Caddy.

[18] Five minutes later, a suspect, later identified as the accused, approached from behind the right side of the Caddy. He walked past the driver's door, swinging up a firearm in his right hand. Although he appeared to be saying something, his words were inaudible. As the accused passed the driver's door, he looked towards the direction where Qokombane had taken cover and started firing shots. Qokombane retaliated and fired back at the accused. The accused continued shooting while retreating towards the passenger side of the Caddy. Once the accused was at the passenger side, Solomons obtained a clear view of him and started shooting as well, striking him in the right leg causing the accused to fall.

[19] Solomons then approached the accused, who had sustained a gunshot wound to his right leg and upper arm. A 9mm CZ pistol was found lying next to his left side. Solomons kicked the firearm away, ensuring it was safe and had no ammunition inside. The accused was wearing a white with black striped t-shirt and grey jeans. They secured the scene, summoned an ambulance, and the accused was placed under arrest.

[20] A backup vehicle arrived, followed by detectives and LCRC members. A second firearm, a 9mm Glock pistol with a magazine containing ten live rounds, was found approximately seven meters from the accused. Cartridge cases were also found at the scene. Further investigation revealed two additional crime scenes, where two bodies were discovered: one located roughly ten to fifteen meters from the entrance of the passage and the other one near the toilets. Kowa later arrived with a complaints' vehicle, but he had no interaction with him.

[21] Constable Sivuyile Qokombane ("Qokombane"), confirmed attending the crime scene at Dlavu Close with Solomons. His evidence was consistent with Solomons' in all material respects. He confirmed taking cover behind the toilet in the yard on the right side of the Caddy. Few minutes later, he heard voices coming from eMsindweni passage, but the speakers disappeared before he could see them. Shortly thereafter, he heard another voice approaching. When he looked again, it was the accused approaching with a firearm raised in his right hand. As the accused was near the bonnet of the Caddy, he instructed him to drop the firearm and identified himself as a police officer. The accused responded by firing shots, prompting him to fire back. During the shooting exchange, the accused retreated towards the 'area where Solomons and Mboniswa had taken cover, after which he lost sight of him.

[22] He saw Solomons approaching the accused, who was now lying face-down on the ground near the rear passenger-side wheel. The accused had sustained gunshot wounds to his leg and arm. He was wearing a white t-shirt with black stripes and grey jeans. A 9mm CZ firearm with a serial number that was filed off was found next to him, which Solomons kicked aside for safety. A second firearm, a black Glock with a magazine and ammunition - was found approximately seven meters away from the accused.

[23] eMsindweni community members arrived and reported that there was a body lying near the toilets. Qokombane, accompanied by Gweva and other police officers, proceeded to the informal settlement, where they saw two men standing next to the body that was lying on the ground. Upon seeing the police, both men fled. The police officers gave chase and apprehended one suspect. He was questioned regarding the

deceased and was subsequently arrested. When Qokombane returned to the Dlavu Close, the accused was already in the ambulance. Different role players were summoned, Bokolo from the complaint's vehicle arrived and took over the scene.

[24] Sergeant Sibongile Mboniswa ("Mboniswa"), confirmed being part of team that accompanied Solomons to Dlavu Close on the night in question. His evidence aligned with that of Solomons and Qokombane in all material respects. He confirmed that the accused was wearing a white t-shirt with black stripes and a pair of grey skinny jeans, later identified by the driver of the Caddy as one of the assailants involved in the attempted hijacking. He confirmed that the accused was the person whom the police shot and apprehended. Mboniswa further confirmed that a CZ firearm, without ammunitions was found next to the accused and a second firearm, a Glock with a magazine and ammunitions and a serial number filed off was found nearby. Different role players, including IPID were summoned, and a shooting report was compiled.

[25] Sergeant Nothokoza Gweva ("Gweva"), confirmed being part of the team deployed to Dlavu Close under Solomons' command. Her evidence aligned with that of Solomons, Qokombane and Mboniswa in all material respects, save to state that after the accused was shot, they received information from community members that two people had been fatally wounded at eMsindweni informal settlement. The team decided to split up, Solomons remained at Dlavu Close scene with the accused while other members proceeded to the first body that was found lying on the veranda. Gweva attended to the second body, later identified as Sizwe Feke, which was lying near the toilets, accompanied by Myoyo and Nzoyiya. She organised different role players after which Mr Booysen from the mortuary services arrived and took the deceased away.

[26] Constable Vulikhaya Myoyo ("Myoyo"), confirmed being part of the team deployed to Dlavu Close under Solomons' command. His evidence aligned with that of Solomons, Qokombane, Mboniswa and Gweva in all material respects insofar as it related to his role.

[27] Sergeant Robert Barnard ("Barnard") testified that whilst doing patrols at Fukutha Road, he and his team were stopped by Kowa. After Kowa briefly spoke to the driver of the accompanying patrol vehicle, he entered the vehicle, and they proceeded to Dlavu Close. Upon arrival at Dlavu close, he observed a white Caddy with its lights on and all four doors open. The accused was lying on the ground nearby with a firearm lying not far from him. Due to inadequate lighting, he used the cellphone flashlight to illuminate the area. He also noticed a Glock firearm at the scene.

[28] He took photos of the accused, the firearm and the Caddy using his cellphone. The accused was wearing a white t-shirt with stripes and skinny jeans. He secured the Glock by removing its magazine, wearing gloves throughout. He then followed the nearby small field towards the passage, where he noticed blood splats. He followed the blood splats until he discovered an unknown male lying in the pool of blood in a veranda. After calling for backup, he continued following the blood trail deeper into the shacks, where he found a larger pool of blood next to the shacks and a broken window with scattered glass. He returned to Dlavu Close and Sergeant Mehlomakhulu took his statement, thereafter he left the scene.

[29] Constable Lwando Bokolo ("Bokolo"), stationed at Harare Police Station, testified that while on patrol, he received a report of a shooting that was in progress in Makhaza. He and his partner constable Plaatjie, proceeded to the area via Fukutha Road. At the intersection of Fukutha Road and Cebula Street, they were stopped by Kowa, who requested assistance. Kowa reported that after dropping off a passenger at Dlavu Close, three men attempted to hijack his vehicle, which he left at the scene. Bokolo accompanied Kowa back to the scene.

[30] Upon arrival, he condoned off the scene and took over from Solomons who had been in charge. Kowa identified the white Caddy as his vehicle. The windscreen had a bullet hole; all doors were open and the left rear wheel was deflated. Kowa further pointed out the accused, who was lying on the ground as one of the men who attempted to hijack him. The accused was wearing a white t-shirt with black stripes and greyish jeans. A CZ firearm was found next to the accused. Solomons pointed out

a second firearm, a Glock, that had been recovered nearby. Solomons then led him through the passage towards eMsindweni, where they discovered a body lying in front of the door with gunshot wounds and Kowa identified him as his passenger.

[31] He then requested details of the incident from Kowa and Kowa explained to him what happened. He proceeded to organise different role players. Sergeant Hlangadala ("Hlangadala"), a photographer and an ambulance arrived on the scene. After the photographs were taken, the accused was transported to Khayelitsha District Hospital. Mr Smith from the mortuary services arrived and took the body of the deceased to Tygerberg and a tow truck later arrived and towed the Caddy to Stikland.

[32] Under cross-examination, Bokolo conceded that his written statement did not contain all the details of the incident. He explained that, had the investigating officer requested further information, he would have provided a supplementary statement. His statement was admitted into evidence as Exhibit G.

[33] Sergeant Thandiswa Mehlomakhulu ("Mehlomakhulu"), the standby investigating officer, testified that she received a call about a shooting that occurred at Dlavu Close. After receiving the report, she proceeded to the scene. On arrival, the ambulance was busy attending to the accused. Barnard pointed out several exhibits, including the firearm lying on the grass near the pole at the end of the cul-de-sac. She followed a blood trail which led to a body lying in front of the shack and then to another shack with a broken window. Thereafter, she returned to Dlavu Close, where she noticed a white Caddy parked at the scene and the ambulance leaving with the accused. The driver of the Caddy informed her that, he and his passenger were shot whilst seated in the vehicle, but he managed to flee and alerted the police who assisted him. After speaking to the driver, she left the scene.

[34] Thirty minutes later, she was called to another scene located near eMsindweni toilets. There, she found a body belonging to Thandisizwe Feke, leaning against the toilet with gunshot wounds. Thereafter she proceeded to Khayelitsha Hospital, where

she was informed that the accused had been transferred to Tygerberg Hospital. At Tygerberg, the accused refused to answer her questions. She later sent two firearms; the Z88 and the Parabellum belonging to the police to Platteklouf laboratory and handed the docket over to Warrant Officer Davids.

[35] Sergeant Khanyiso Hlangadala ("Hlangadala"), stationed at the Local Criminal Record Centre in Mitchell's Plain with 16years' experience in policing and 12 years as a photographer testified on exhibit A, S and T. On 20 March 2022 at approximately 03h18, he collected two firearms, cartridge cases and bullets at Dlavu Close. He thereafter conducted a touch DNA swab on the firearms and obtained gunshot residue samples from the accused's hands, at Khayelitsha District Hospital. He marked the left-hand sample red, and the right-hand sample blue. These samples were sealed in a gunshot residue evidence collection kit with seal number 1951A5891 and placed in a sealed forensic bag with serial number PA4005022054. All exhibits were booked into Harare SAP 13 register and later booked out for processing. The exhibits were later booked in the 459 register with reference number 673 of 2022 for safekeeping. He then compiled a covering letter and attached it to the forensic bag PA4005022054 until it was collected by the courier to Pretoria Forensic Science Laboratory.

[36] He conceded under cross-examination that his statement contained an error; he incorrectly wrote that the gunshot residue sample was taken at Dlavu Close rather than at Khayelitsha District Hospital. He further indicated that he bears no knowledge of any gunshot residue samples collected from the accused at Tygerberg Hospital.

[37] Warrant Officer Bradley Davids ("Davids"), the investigating officer, testified that he took over the case from Mehlomakhulu, who informed him that the accused had been admitted at Tygerberg Hospital. He proceeded to the hospital but was unable to speak with him as he was sedated. After the accused was discharged, he was detained at Harare cells where he was formally charged and subsequently appeared in court. He again forwarded the police firearms to the laboratory for analysis and later spoke with Kowa who narrated the incident to him.

[38] Warrant Officer Mduduzi Radebe ("Radebe"), a ballistic forensic analyst stationed at Platteklouf Forensic Laboratory, testified that on 22 April 2025 he received four intact sealed evidence bags from Case Administration. Three bags contained police firearms - Vektor R5 automatic assault rifle (serial number 343282), a 9mm parabellum Beretta semi-automatic pistol (serial number N822264Z), and a 9mm LEW Z88 semi-automatic pistol (serial number Q068656). None of these firearms were accompanied by magazines.

[39] He also received a sealed evidence bag (serial number PA40005978721) containing a 9mm parabellum Glock semi-automatic pistol with an obliterated serial number on the frame and a barrel, marked "204372/22G3" with a magazine and ten unfired 9mm cartridges. He further received another sealed evidence bag (serial number PA4005978720) containing a 9mm CZ semi-automatic pistol with an obliterated serial number on the frame, slide and barrel, marked "204372/22G4.

[40] He again received the following exhibits from Dlavu Close scene:

- (a) A sealed evidence bag (serial number PA5002474476) containing six fired test cartridge cases and one fired cartridge case fired from Vektor,
- (b) A sealed evidence bag (serial number PA6004375030) containing seventeen fired parabellum cartridge cases,
- (c) A sealed evidence bag (serial number P2B000644136) containing three fired parabellum cartridge cases,
- (d) A sealed evidence bag (serial number P2B000644139) containing seven fired cartridge cases and one fired test cartridge case,
- (e) A sealed evidence bag (serial number P2B000644137) containing two fired cartridge cases,
- (f) A sealed evidence bag (serial number P2B000651750) containing one fired bullet and one test bullet.

[41] A further sealed evidence bag (serial number P2B000826825) containing one fired cartridge case marked 1A3 and another sealed evidence bag (serial number

P2B500492616) containing two fired cartridge cases marked 1A1 and 1A2 individually from the toilet scene were also received.

[42] On 24 April 2025, he received one sealed evidence bag (serial number PA6002709634) containing one unknown fired bullet fragment marked "204372/22 J" and another sealed evidence bag (serial number P2B000552004) containing one fired bullet marked "204372/22 B" from the Case Administration of Ballistic Section.

[43] He examined the ten unfired cartridges and found they were designed and manufactured to be fired by a centre-fire firearm. He also examined all fired cartridge cases found at Dlavu Close and found that they, too were designed to be fired by a centre-fire firearm. He tested three cartridge cases found from the toilet scene and found them to be designed and manufactured to be fired by a centre-fire firearm. Finally, he tested all five firearms and found each to be a self-loading firearm capable of discharging more than one round with a single trigger.

[44] He then compared the seventeen fired cartridge cases found from Dlavu Close scene, two found from the toilet scene as well as the test cartridge cases from CZ firearm, he found them all to be fired in one firearm – the CZ pistol. He further compared eight fired cartridge cases also found from Dlavu Close scene with the test cartridge case from the Glock pistol, he found them all to be fired in one firearm – Glock pistol. One fired cartridge case from Dlavu Close scene was linked to a Vektor pistol. The remaining cartridge cases found from Dlavu Close scene, and one found from the toilet scene, were fired from two different firearms which were unknown to him, meaning they were not sent for analysis.

[45] He also examined the bullets found from both scenes, and compared them with the test bullet of Vektor, Beretta, LEW Z88, Glock and CZ firearm, he could not make any determination if they were fired in the CZ but confirmed that they were not fired from Vektor, Beretta, LEW Z88 and Glock pistols.

[46] Mr Jacques Booysen ("Booyesen"), a Forensic Officer at Tygerberg Forensic Laboratory, testified that on 20 March 2022, at approximately 04h38, he received a report of a shooting involving a 35-year-old male person in Makhaza from radio control. Upon arrival at the scene, constable Duduzo pointed out the deceased who was later identified as Sizwe Feke. He completed the necessary documentation, including the declaration of death (SAP 180). Thereafter, he obtained information from the police officer at the scene for handover purposes and photographed the deceased before removing the body to the mortuary.

[47] He noted blood on the deceased's chest and back. After taking the photographs, he contacted Tygerberg Forensic Pathology to register the deceased on the FPS system, where all the deceased's information is captured. He allocated WC14/0887/22 number via a tag to the deceased and loaded the body into the vehicle and handed the WC number to the police before departing to their facilities. He returned to the facility at approximately 06h14 without any incidents.

[48] Upon arrival at the facility, the body was offloaded without sustaining any further injuries. Standard post-mortem procedures were conducted, including recording of measurements and weight of the deceased and documenting all visible external wounds. Two gunshot wounds were recorded: one to the chest and one to the left arm. Facial photographs were taken, after which the body was placed in the refrigerated storage. All collected information and documentation, including photographs were captured in the system so that the pathologist can have access.

[49] Mr Oyisa Ngqabeni ("Ngqabeni"), a forensic officer at Tygeberg Forensic Pathology testified that on 22 March 2022, at 08h59 he assisted Bulelani Feke in identifying the body of his brother, Sizwe Feke.

[50] Mr Bulelani Feke ("Feke") testified that the deceased, Thandisizwe Feke was his brother, was not married and had a 21-year-old son. On 22 March 2022, he

identified the body of the deceased to Ngqabeni at the mortuary, accompanied by his sisters. The body was thereafter handed over to the family's undertakers of choice.

[51] He described that the death of the deceased left the family traumatised. They were scared as they did not know what will happen to them due to not knowing the reason why the deceased was killed. He was even scared to come to court. They struggled to bury the deceased as he did not have a funeral policy.

[52] Doctor Magdel Smit, a medical officer in the Department of Health, Forensic Medicine Division in Tygerberg Hospital. Her duties entail performing an autopsy and thereafter compiling a report. On 24 March 2022 at 07:30, she performed the autopsy on the body of an adult male, marked WC14/0883/22 and thereafter compiled a post-mortem examination report which was admitted into evidence as exhibit D.

[53] The body was identified by Mr W. Meyer. The deceased sustained a stab wound to the right side of the neck close to the veins as depicted in photo 2 of exhibit C. He also suffered six perforating gunshot wounds - two to the right thigh involving soft tissues, three to the left thigh involving soft tissues and one to the right side of the chest wall and right arm involving soft tissues. There was a collection of 200ml of blood in the chest cavity. The second and third right ribs were fractured with large collection of blood in the chest cavity due to the gunshot wound, which would not have caused instantaneous death. The organs were pale and no projectile was recovered in the body. She concluded that the cause of death was multiple injuries to the body constituting an unnatural cause.

[54] According to her, the stab wound was inflicted by a sharp instrument, and it penetrated the right internal vein, a major vessel in the neck and shoulder region. This resulted in significant loss of blood into the right chest area. While several wounds sustained could have been fatal but the stab wound to the neck was the most critical and fatal one. She was unable to indicate the depth of the wound as it extended into an open cavity.

[55] On 25 March 2022 at 07:30, she conducted an autopsy to another body of an adult male, marked WC14/0887/22. Thereafter she compiled a post-mortem examination report which was admitted into evidence as exhibit E.

[56] The body was identified by Officer Hansen. The deceased sustained four perforating gunshot wounds: two were tracked to the head involving the brain and soft tissues of the neck, two were tracked to the thorax involving the heart, the aorta and the left lung. There was a collection of 30ml of blood found in the heart and 950ml of blood and air in the left thorax. The organs were pale and no projectile was recovered in the body. She concluded that the cause of death was a gunshot wound to the head and chest constituting an unnatural cause.

[57] According to her, the shooter was positioned more than one meter away. She testified that the clothing was sent forensic laboratory to determine the proximity of the shooter from the victim. She could not express an opinion on whether the second deceased might have survived if medical assistance had arrived sooner, due to the severity of the injuries. With this evidence, the State closed its case. The defence closed its case without calling the accused or any witnesses.

Hearsay evidence

[58] During the trial, the State applied in terms of **section 3(1)(c)** of the Law of Evidence Amendment Act for hearsay evidence to be admitted. The defence opposed the application and the Court refused it. At that stage of the proceedings, I intimated that full reasons for my ruling would follow in this judgment. I now pause to give my reasons:

[59] **Section 3(4)** of the Law of Evidence Amendment Act¹ defines hearsay as 'evidence - whether oral or in writing – whose probative value of which depends upon the credibility of any person other than the person giving such evidence'.

¹ Law of Evidence Amendment Act 45 of 1988.

[60] The jurisdictional requirements for admitting hearsay evidence are set in **section 3(1)(c)**² as follows:

- “(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
- ...
- (c) the court, having regard to—
- (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (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.’

[61] The general rule is that hearsay evidence is inadmissible in criminal proceedings. Notwithstanding this exclusionary legislative command, **section 3(1)**³ provides three exceptions where hearsay evidence can be admitted as evidence in criminal proceedings: (a) where there is mutual agreement between the parties; (b) where the original declarant will later testify at such proceedings; and (c) where the jurisdictional requirements set out in **section 3(1)(c) (i) to (vii)** are met. I shall make no reference about subsections 1(a) and (b), as they are not applicable to the current case. The matter solely revolves around subsection 1(c) and the factors listed in

² Law of Evidence Amendment Act 45 of 1988.

³ Law of Evidence and Amendment Act 45 of 1988.

section 3(1)(c) must be assessed holistically to determine whether admitting the hearsay evidence would be in the interests of justice.⁴

[62] Both counsels were *ad idem* that, the nature of these proceedings is of a criminal nature, and the State seek to introduce a statement intended to corroborate evidence already presented by its witnesses. These pertain to placing the accused at Dlavu Close on 19 March 2022, and his alleged discharge of a firearm. The State contends that the hearsay statement has high probative value as its author Warrant Officer Craword Mehlape ("Mehlape") is an independent expert who analysed the gunshot residue evidence collection kit on 11 April 2022 - *Section 3(1)(c)(i)-(iv)*.

[63] Most importantly, the State submitted that the reason why Mehlape was unable to testify, is because she is no longer employed by the South African Police Service and her whereabouts are unknown. The State argued that the accused would suffer no prejudice from the admission of hearsay evidence, as he would still have an opportunity to cross-examine Colonel Inge Jacobs, whom the State intended to call as an expert. On this basis, the State contended that admitting hearsay evidence would be in the interests of justice - *Section 3(1)(c) (v)- (vii)*.

[64] In response to the State application, the defence argued that no explanation has been advanced on attempts made to secure the presence of Mehlape in court. The defence contends that admitting Mehlape's statement would prejudice the accused, as he would be denied an opportunity to cross-examine her.

[65] I note that the State's application is largely premised on the alleged unavailability of the witness who is the author of the gunshot residue report. Section (3)(1)(c)(v) requires that whichever party wishes to rely on hearsay evidence, to furnish a cogent explanation why the declarant cannot testify, as this addresses any issues relating to reliability and credibility. While the courts have, in appropriate

⁴ Schwikkard and van der Merwe above n **Error! Bookmark not defined.** at 298.

circumstances admitted hearsay evidence where the witness is genuinely unavailable, such admission must be supported by adequate justification.

[66] In *S v Saeed and Another*⁵ the court admitted hearsay evidence of four witnesses. Three of these witnesses were deceased and the fourth one escaped from police protection two days prior to the date on which he was supposed to testify against the accused. The court found that there had been undue influence and drastic pressure which induced the witness to chicken out. The court held that there was prima facie indication that one or two or more or all the accused persons were responsible for the absence of the witness and his resultant inability to testify.

[67] Also in *S v Kapa*⁶ the Constitutional Court upheld the decision to admit hearsay evidence of the witness, because she had since passed away. By contrast, in *S v Cupido*⁷, the Supreme Court of Appeal held that hearsay should not be admitted where a witness is alive and available, unless a satisfactory explanation is provided for his absence. The Court stated:

‘In my view the purpose of the Hearsay Evidence Act is to ensure that all the relevant evidence is placed before court. The evidence remains hearsay and therefore inadmissible unless the court decides that it is in the interests of justice to admit it, regard being had to the factors mentioned in ss 3(1)(c). The primary objective is to cater for non-witnesses who are no longer available to testify due to, for example, death or mental incapacity after the incident. It could never have been the intention of the legislature that witnesses who are available should simply be excused from giving evidence without any explanation why they are not called. This would in fact not be in the interests of justice, as this may open a floodgate to witnesses running away from being tested under cross-examination.’

[68] In *Cupido*, the court declined to admit hearsay because two witnesses – though alive and listed as State witnesses- did not testify and no explanation was provided for

⁵ *S v Saeed and Another* (65/2009) [2012] ZAFSHC 153 (17 August 2012).

⁶ *S v Kapa* 2023 (1) SACR 583 (CC).

⁷ *S v Cupido* (1257/2022) [2024] ZA.SCA 4 at para 47

their absence. The present matter is analogous in that the Court was merely informed that the witness was unavailable, yet no evidence was presented on whether she passed away or is alive and whether reasonable steps had been taken to secure her attendance. In fact, her name appears on the State's witness list and no affidavit from the investigating officer was filed to explain or substantiate efforts made to trace her. The State's submission was based solely on hearsay, that the investigating officer 'could not find' the witness is insufficient. A court cannot condone the absence of a witness without a proper and satisfactory explanation. To do so would risk creating a precedent that allows witnesses to evade cross-examination and undermining the interest of justice.

[69] Having considered all the factors before me cumulatively, I concluded that admitting a hearsay statement would not be in the interest of justice. The State failed to present sufficient evidence explaining Mehlahe's unavailability to testify in court. The application was therefore refused. Now that the issue of hearsay has been laid to rest, I turn to the evaluation of evidence.

Closing argument

[70] Both counsels filed written heads of argument, and they each summarise them on record. I do not intend to repeat each and every submission made on their written arguments or during their summations in court, but where necessary I will refer to some of the points they raised. In essence, the State seeks a conviction of the accused on the two counts of attempted murder (count 2 and 3), the two murder counts (count 1 and 6), the charges relating to illegal possession of prohibited firearms (count 4 and 7), as well as the charges relating to illegal possession of ammunition (count 5 and 8). The State correctly conceded that they could not prove count 9 and 10. The defence on the other hand calls for acquittal of the accused on all charges, submitting that the State failed to discharge its *onus* of proving guilty of the accused beyond a reasonable doubt.

Burden of proof

[71] It is trite that for a conviction to stand, the State must prove its case beyond

reasonable doubt.⁸ The accused bears no obligation to prove his innocence or even persuade the court of the truthfulness of any explanation that he provides. To determine whether the State has discharged its *onus*, the court must evaluate all the evidence holistically, rather than in isolation. In *S v Van der Meyden*⁹ the court held that the proper approach is to consider the totality of evidence when assessing whether the State has discharged its *onus* beyond reasonable doubt. Put differently, the evidence ought not to be looked at piecemeal and in isolation. All of it should be analysed and weighed together in determining whether the State has proved its case beyond a reasonable doubt – *S v Radebe*¹⁰.

Common cause

[72] The following facts are common cause:

- (a) The incident occurred on 19 March 2022 approximately 20h00 at Dlavu Close, Makhaza.
- (b) Two firearms - a CZ pistol and a Glock pistol, were recovered at the scene.
- (c) Two bodies were later recovered at eMsindweni informal settlement: one on a veranda and another one near the toilets.
- (d) The accused sustained gunshot wounds after being shot at by police officers. He was later transported to Khayelitsha District Hospital and later transferred to Tygerberg Hospital.

Issues in dispute

[73] The following facts are in dispute:

- (a) Whether the accused is the person who attempted to kill Luxolo Kowa and Sivuyile Qokombane.
- (b) Whether the accused is the person who shot and killed the two deceased.

⁸ *S v Gentle* 2005 (1) SACR 420 (SCA).

⁹ *S v Van der Meyden* 1999 (1) SACR 447 (W).

¹⁰ *S v Radebe* 1991 (2) SACR 166 (T).

- (c) Whether the accused was in possession of the two firearms - a CZ pistol and a Glock pistol as well as ammunitions.

The impact of closing the case without giving evidence

[74] It is trite that an accused person is under no obligation to testify. Such absence of obligation stems from section 35 (1) (a) and (b) of the Constitution¹¹ which guarantees every arrested person's right to remain silent and to be presumed innocent. The accused is therefore not required to prove his innocence, the burden of proof rests solely with the State. This right to remain silent applies both at the time of arrest and during trial.

[75] The fact that the accused is under no obligation to testify, does not mean that there are no consequences attached to his decision to remain silent. Where the State presented evidence that clearly calls for an answer and he elects to remain silent in the face of such evidence, a court may well be entitled to conclude that the unchallenged evidence is sufficient to establish his guilt beyond reasonable doubt. This principle is affirmed in S v Boesak¹².

[76] This does not necessarily mean that the State's case is automatically proven beyond a reasonable doubt merely because the accused elected not to testify. The evidence presented by the State must still be assessed and evaluated to determine whether it meets the required standard of proof. However, where the defence puts forward a version during cross-examination but present no evidence under oath, the court will only be left with the State's evidence before it and if that evidence is credible and sufficient, a conviction may follow.

Evaluation and assessment of evidence

[77] The principles applicable to the evaluation of evidence was articulated by Navsa JA in S v Trainor¹³ as follows:

¹¹ South African Constitution Act 108 of 1996

¹² S v Boesak 2001 (1) SACR (CC).

¹³ S v Trainor 2003 (1) SACR 35 (SCA) 41 at para 9.

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.'

[78] I will first address counts 4, 5, 7, 8, 9 and 10 (illegal possession of a prohibited firearm and illegal possession of ammunition charges). The State correctly conceded during argument that they failed to prove count 9 and 10, as such those counts will require no further consideration. The remaining issue is whether count 7 and 8 constitute duplication of count 4 and 5. Once that is determined, then the Court must assess whether the accused was found in possession of a firearm and ammunition, and whether these were subsequently used in the commission of attempted murder and murder charges. As such, identification remains central, as the accused denies being found in possession of a firearm and ammunition.

Splitting of charges and duplication of conviction

[79] Before addressing potential duplication of charges relating to the possession of a firearm and ammunition charges, it is necessary to first determine whether the accused was indeed found in possession of the firearm. Although, Kowa could not identify the type of firearm used, but he was adamant that the accused shot at him. His evidence in this regard is corroborated by five police officers; Solomons, Qokombane, Mboniswa Gweva and Myoyo; who were first to arrive at Dlavu Close. All five confirmed that the accused emerged from the eMsindweni passage, armed with a firearm. After Qokombane instructed him to drop the firearm, the accused started shooting. He was subsequently shot and fell on the ground, sustaining a gunshot wound. A CZ firearm was found next to him and cartridge cases later recovered at the scene, were linked to this firearm. No evidence suggests that any other person was involved in the exchange of gunfire, as the officers found the accused alone on the ground injured, after the shooting.

[80] I take cognisance that, despite the limited visibility at the scene, all witnesses testified that the area was sufficiently illuminated by an Apollo light, the Caddy's headlights and additional lights from the cellphone torches. On the strength of this evidence, I am satisfied that the witnesses were able to identify the accused as the shooter. The accused presented no evidence to rebut their testimony, in the absence of any version to the contrary, I find that he was in possession of a CZ firearm and ammunition.

[81] Having found that the accused was in possession of a CZ firearm and ammunition. I now turn to the question of duplication of charges. The State contends that counts 4 and 5 relate to the two attempted murder charges, whilst counts 7 and 8 relate to the two murder charges. The Defence submitted that counts 7 and 8 amount to an improper duplication of count 4 and 5. The State has albeit reluctantly conceded that duplication may indeed be present.

[82] Our law prohibits the duplication of convictions, though it allows the State to split the charges. **Section 83** of the CPA provides:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason, it is doubtful which of the several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.'

[83] Du Toit et al, in their Commentary on the Criminal Procedure Act, summarise the effect of **section 83** as authorising the inclusion of all charges that may reasonably be supported by the facts even when they overlap in the following terms:

'**Section 83** authorizes the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions ... An accused may thus not object, at the beginning of the trial, to the charge sheet

or indictment on the basis that it contains a duplication of charges. Such a duplication will occur where more than one charge is supported by the same culpable fact . . . In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.'

[84] Put differently, where there is doubt from the facts which offence has been committed, the State may charge the accused with all potentially applicable offences and have such offences tried together. However, the accused may not be convicted on all charges arising from the same criminal act as this would amount to being punished twice for the same conduct.

[85] In determining whether a duplication of charges has occurred, the court in **S v Benjamin en 'n Ander**¹⁴, developed two practical tests named '*same evidence test*' and '*single intent test*' as follows.

(a) The first is whether the evidence which is necessary to establish the one charge also establishes the other charge - then there is only one offence. If one charge does not contain the same elements as the other, there are two offences (*R v Gordon 1909 EDC 254_at 268 and 269*). This can be called the "*same evidence test*".

(b) The second test is if there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realize this intent, there is only one offence (*R v Sabuvi 1905 TS 170*). There is then a continuous criminal transaction. This test is referred to as "*the single intent test*".

[86] The interpretation of these two tests was explained in **S v Dlamini**¹⁵ as following:

¹⁴ *S v Benjamin en 'n Ander* 1980 (1) SA 950 (A) at 956E-H,

¹⁵ *S v Dlamini* 2012 (2) SACR 1 (SCA)

‘There is, however, no all-embracing formula. The various tests are more guidelines, and they are not rules of law, nor are they exhaustive. Their application may yield a clear result but if not, a court must apply its commonsense, wisdom, experience and sense of fairness to make a determination.’

[87] In this matter, it is undisputed that the firearm referred to in counts 4 and 7 is same CZ pistol. The State alleges that the accused used this firearm during the attempted murder of Kowa and Qokombane and again during the killing of the two deceased. The elements of the offences in counts 4 and 7 (possession of prohibited firearm) are the same, as are the elements in count 5 and 8 (possession of ammunition). Although the incidents occurred at different locations and times, but the accused intention in possessing the firearm and ammunition remain singular and continuous act. It will therefore be wrong and unjust for me to treat the conduct as four separate offences when it clearly constitutes a single intent. Accordingly, I find that counts 7 and 8 amount to duplication of count 4 and 5. Having established that the accused was in possession of the CZ firearm and ammunition, I turn to the assessment evaluate attempted murder charges.

Cautionary Rule

[88] I note that Kowa is a single witness pertaining to the circumstances surrounding the attempted murder allegations against him and Qokombane evidence is supported by other officers. I have already made a finding that the accused was in possession of the CZ pistol. However, he denies attempting to kill Kowa and Qokombane, as such identification remains in dispute. Accordingly, the cautionary rule applicable to single witness and identification evidence must therefore be applied.

[89] **Section 208** of the CPA provides that ‘an accused may be convicted of any offence on the single evidence of any competent witness’. This approach as to how the evidence of a single witness should be treated is well established.

[90] In *S v Miggel*¹⁶, the court articulated the applicable principles governing the assessment of single witness and identification testimony as follows:

‘That it was settled law that the evidence of a single witness had to be approached with caution. In the normal course of events, the evidence of a single witness would only be accepted if it were in every important respect satisfactory or if there were corroboration for that evidence. The corroboration that was required was confirmatory evidential material outside the evidence that was being corroborated. The corroboration did not necessarily need to link the accused with the crime.

Held, further, that the court had to be satisfied that the witness making the identification was not only honest, but also reliable. Honesty by itself was no guarantee of reliability. Consequently, a witnesses’ honesty and own conviction as to the correctness of his or her identification could never be allowed to take the place of an independent inquiry into the reliability of the identification itself.’

[91] In *Rugnanan v S*¹⁷ the Supreme Court of Appeal stated that ‘cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated.’

[92] Counsel for the accused submitted that Kowa’s identification as a single witness was unreliable as it was based solely on the clothing description; no formal identification parade was held, and he was unable to provide a facial description of the accused. The State argued that a conviction may still follow where there is corroborative evidence and such corroboration need not independently link the accused to the offence. The State further contended that Kowa’s evidence was corroborated by the evidence of the police officers.

[93] It suffices to state that the court is left with the version of the State witnesses for evaluation, as the accused elected not to testify. Kowa stated that while he and the deceased, Spaji, were seated in the Caddy, three men approached from behind. The

¹⁶ *S v Miggel* 2007(1) SACR 675 (C).

¹⁷ *Rugnanan v S* [2020] ZASCA 166 para 23.

accused who was amongst them was walking in the middle. Although the area was dark, the vehicle's headlights provided sufficient light for him to observe the accused's clothing. He described that the accused was wearing a striped black and white t-shirt. He testified that after passing the Caddy, the men turned and fired shots towards them. He fled the scene leaving the deceased behind. Approximately thirty minutes later, he returned to the scene with the police and observed that the accused was already arrested. He immediately identified him as one of the shooters. The accused was still wearing the same clothing he wore during the attack.

[94] Kowa's evidence is corroborated by the testimony of Qokombane, Solomons, Mboniswa, Gweva and Myoyo regarding the accused's clothing. All five officers who arrived at the scene shortly after the shooting, confirmed that they observed the accused wearing a black and white striped t-shirt. Despite limited visibility, the area was sufficiently illuminated by an Apollo light, the Caddy's headlights and cellphone torches. Each witness was able to observe at close range after the shooting, and they consistently described his clothing. It is highly improbable that Kowa was shot by a person wearing black and white striped t-shirt and the accused was later found in identical clothing by coincidence, in the same vicinity. This consistency supports and strengthens the reliability of Kowa's identification evidence.

[95] Furthermore, all five officers gave consistent evidence, in that upon arrival at the scene, a few minutes after the shooting, they took cover in different positions in anticipation of any suspect that may return to the Caddy. While taking cover in a yard on the driver's side of the Caddy, the accused approached swinging his firearm. When he was close enough, Qokombane instructed him to drop his firearm, and identified himself as a police officer. The accused ignored the instruction, instead started firing at Qokombane and Qokombane fired back causing the accused retreat towards the passenger side of the vehicle. That is when Solomons shot him and he fell on the ground. A CZ firearm was found next to him, and he sustained a gunshot wound in his legs.

[96] Further corroboration in Kowa's identification evidence is found in the evidence of Mboniswa and Bokolo. Both Mboniswa and Bokolo confirmed that when Kowa returned to the scene, he immediately pointed out the accused as the person who fired shots at him. Once more, this points to the reliability of Kowa's identification evidence.

[97] Kowa impressed the court as an honest, reliable and credible witness. Despite being a single witness, his evidence was clear, concise, coherent and chronologically consistent. He confirmed that he had never seen the accused before the incident but was nonetheless able to describe his clothing, height and position among the three men. No contradictions whatsoever were noted in his testimony. Nothing in his evidence suggests fabrication or falsely implicating the accused. Notably, he did not attempt to mislead this court and implicate the accused in the shooting of Spaji, despite having an opportunity to do so, which further supports his reliability. Considering that there is no evidence contradicting his version and nothing suggests that Kowa was mistaken in his identification. The fact that Kowa relied on clothing in identifying the accused rather than an identification parade, does not in my view render his identification unreliable.

[98] Although an identification parade is a valuable investigative tool and may enhance reliability, however, it is not a strict legal requirement in our law. The absence of such parade does not automatically vitiate the proceedings, as it is not a *sine qua non* for conviction. I acknowledge that it is not enough for the identifying witness to be honest and that even an honest witness is capable of identifying the wrong person with confidence. However, the Courts may still consider other available alternative forms of identification, and assess them using the factors outlined in **S v Mthethwa**¹⁸ such as visibility, proximity, reliability of the witness observation, dress code, corroboration, the list is endless, which in my view have been proved through Kowa's evidence and corroborative testimony of the police officers.

[99] The defence counsel's submission that his identification of the accused is inadequate and not satisfactory because he could not provide a facial description is

¹⁸ In *S v Mthethwa* 1972(3) SA 766(A), at 768A-C.

unpersuasive. In fact, as it stands, his evidence is undisputed, in the absence of any evidence contradicting Kowa's version, I am satisfied that his identification of the accused was satisfactorily proved beyond a reasonable doubt and has passed the test of the cautionary rule applicable to a single witness required by section 208.

[100] Same with Qokombane and the rest of the police officers at the scene, they all presented themselves as honest and credible witnesses. They were performing their routine patrol duties and had no prior knowledge of the accused. None of them claim to have seen the accused shoot Kowa and kill the deceased persons. They testified only on what they personally observed that night. The defence contention that they gave contradictory versions regarding the number of people emerging from the passage is without merit and unfounded.

[101] Yes, there might be some discrepancies in their evidence regarding this, some may have seen two people, others three and some only heard voices, but these discrepancies do not, in my view, amount to contradictions. There is nothing unusual nor suspicious for witnesses to give different account of versions of the same incident, given their different positions and opportunities for observation. It will be absurd if this court were to expect two or more witnesses, to give identical evidence with reference to the same incident. It is incumbent on the court to decide whether such differences are materially significant to warrant rejection of the State's version, having regard to the totality of the evidence, which I find they are not. See *S v Bruiners and Another*¹⁹. Notably, all witnesses were consistent that when the shooting commenced, the accused was the only person at the crime scene. Having considered all the above, I am satisfied that there is sufficient evidence presented by the State that the accused attempted to kill Kowa and Qokombane.

Murder and Circumstantial evidence

[102] Turning to the two murder counts, the State relies solely on circumstantial evidence, as there is no direct evidence linking the accused to the commission of the offences. The Court must therefore determine whether a nexus exist between the

¹⁹ 1998 (2) SACR 432 (SE) at 435a - b

firearm found in the accused's possession and the cartridge cases found at the toilet scene. Put differently, whether the cartridge cases were discharged from the firearm found on the accused in order to draw an inference that the accused is the person who shot and killed the two deceased, Zola Spaji and Thandisizwe Feke.

[103] It is trite that circumstantial evidence must be approached and assessed with great circumspection. If not, it may result to an incorrect inference or conclusion drawn or even result in either possible inference being overlooked. The Court must therefore remain alert and vigilant against drawing an incorrect or wrong inferences or overlooking other possible inferences which may be drawn from the facts.

[104] When considering cases based on circumstantial evidence the starting point is the *locus classicus* of ***R v Blom***²⁰, where Watermeyer JA formulated that in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored.

'(i) the first rule is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(ii) the second rule is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'²¹

[105] In ***S v Mcasa and Another***²² Mthiyane J referring to the approach to be adopted in assessing circumstantial evidence quoted the following from *S v Reddy and Others 1996 (2) SACR 1 (A) at 8C-D*, the court warned against a fragmentary approach to the assessment of circumstantial evidence when the following was said:

'In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the

²⁰ 1939 AD 188, at 202-3.

²¹ *R v Sesetse* 1981 (3) SA 353 (A), at 360-70.

²² 2005 (1) SACR 388 (SCA) at 392.

explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the often-quoted dictum in *R v Blom* 1939 AD 188 at 202 - 3, where reference is made to two cardinal rules of logic which cannot be ignored.'

[106] Applying the first cardinal rule of *Blom supra*; the facts proven must demonstrate that the two deceased were killed and that the accused is geographically placed not far from the murder scenes. Put differently, the inference sought to be drawn that the accused killed the two deceased must be consistent with and be supported by all the proven facts. Once the first rule has been established, only then the court must consider the second rule: whether the inference sought to be drawn that the accused killed the two deceased excludes any other reasonable inferences that can be drawn.

[107] It has been established that the two deceased were killed. According to Doctor Smit's post-mortem report, the deceased Mr Spaji died as a result of multiple injuries, which include one stab wound and six gunshot wounds.²³ The post-mortem report of Mr Feke, on the other hand, depicts that he died as a result of gunshot wounds to the head and chest²⁴. What remains is to determine whether there is any evidence that geographically places the accused in the close proximity of the murder scene.

[108] Evidence shows that the shooting incident involving Kowa at Dlavu Close occurred approximately between 20h00 to 21h00. The police arrived at approximately 22h00 and shortly thereafter, the accused was apprehended with a CZ firearm in his possession. A few minutes later, two bodies were found not far from Dlavu Close. Mr Spaji was certified dead at 22h58 and Mr Feke at 03h20.

[109] Mehlomakhulu, the initial investigating officer, testified that upon arriving at the scene, Barnard pointed out a Glock firearm lying at the end of cul-de-sac. While still there, she noticed a splat of blood and decided to follow its trail. The blood trail led him

²³ Exhibit D of record.

²⁴ Exhibit E of record

to the body of Spaji found lying in front of the shack. Approximately thirty minutes later, she was called to the scene at the toilets, where the body of Mr Feke was recovered.

[110] On arrival of the LCRC members, fired cartridge cases were collected at Dlavu Close and three additional cartridge cases were collected next to Mr Feke at the toilet scene. These cartridge cases found in these two scenes (Dlavu and toilets) were sent for ballistic analysis to determine whether they were discharged from the CZ firearm found in accused's possession. The analysis confirmed that sixteen fired cartridge cases found at Dlavu Close and two fired cartridge cases found at the toilet scene, were all fired from the CZ firearm. It is on that basis that the State argued that the circumstantial evidence supports the inference that the accused is the person who shot and killed the two deceased.

[111] The defence counsel argued that, because no projectiles were retrieved from either body, the evidence presented does not support the conclusion to be reached that the deceased were killed by shots fired from the CZ. The defence counsel contends that the available facts do not support the conclusion that this is the only reasonable inference that can be drawn, she submits, alternative inferences remain open under the circumstances.

[112] It appears that the defence is grasping at straws, there is undisputed evidence that clearly establishes that the accused was in possession of the CZ firearm and that he used it to shoot at Kowa and Spaji. Kowa fled the scene and could not account for what transpired thereafter. However, Mehlomakhulu's evidence reveals the presence of a blood trail from the passage leading towards eMsindweni, where Spaji was later found dead. Considering that the accused fired multiple shots at the vehicle in which Spaji was seated, and the post-mortem confirms several gunshots wounds to Spaji's legs, the only reasonable inference to be drawn is that Spaji sustained those injuries while attempting to flee. I find that there is no other reasonable inference to be drawn under the circumstances. In fact, I am inclined to believe that he may have even be the one who stabbed him or his friends might have caused Spaji's stab wound. Although no fired cartridge cases were found next to Spaji's body, their absence does

not negate that the accused fired shots, as the doctor's conclusion is that the deceased died due to multiple injuries including gunshot wounds. I am therefore satisfied that the accused was involved in the murder of Spaji.

[113] Regarding the murder of Feke, evidence shows that three fired cartridge cases were found next to him, two of which were conclusively linked to the CZ firearm found in the accused's possession. The absence of projectiles retrieved in the body, does not detract from the fact that he was shot. If the CZ firearm was not used in the shooting of Feke, its cartridge cases would not have been present at the scene. On the available evidence, the only reasonable inference that I can draw is that the accused was involved in the shooting of Feke.

[114] In considering the *mosaic* of evidence, I am satisfied that the State has discharge its *onus* of proving circumstantial evidence beyond a reasonable doubt, that there is no other inference to be drawn save for the one that the accused indeed shot and killed the two deceased. This conclusion is based on the following:

- (a) The accused was arrested in the close proximity to both murder scenes shortly after the shooting;
- (b) Spaji sustained injuries to his legs, consistent with being shot whilst fleeing;
- (c) The blood trail from the end of the cul-de-sac to the shack where Spaji was found supports being shot from Dlavu Close;
- (d) The cartridge cases found at Dlavu Close and at the toilet scene were ballistically linked to the CZ firearm found in the accused's possession; and
- (e) The cartridge cases found where Feke was found are linked to the CZ pistol.

Doctrine of common purpose

[110] Having found that the accused participated in the killing of both deceased persons, the remaining question is whether the evidence presented satisfies the jurisdictional requirements of **section 51 (1)** of the CLAA, which prescribes life imprisonment where murder is committed in the furtherance of common purpose. The

State argued these requirements have been met, in that the accused acted with two other people during the shooting of Kowa. Further, the number of cartridge cases found at Dlavu Close, even though not accounted for, proves that there were other people involved in the shooting. This is further supported by the additional cartridge case found at the toilet scene. Taken together, the evidence established that the accused was not alone when he committed the murders.

[112] The Constitutional Court in *S v Thebus and Another*²⁵ defined the doctrine of common purpose as follows:

'The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime.'

At paragraph 19 the Constitutional court recognised that a common purpose ("a joint criminal enterprise") has two forms. "The first arise where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'

[113] Thebus, referred with approval, to the following two definitions of the doctrine of common purpose by Burchell and Milton, and Snyman respectively:

'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime.'²⁶

And

'The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others.'²⁷

²⁵ *S v Thebus and Another* 2003 (6) SA 505 (CC) at para 18.

²⁶ Burchell *Principles of Criminal Law* 5 ed (Juta, Cape Town 2016) at 477.

²⁷ Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 257.

[114] Applying these principles to the case at hand, it is evident that the conduct of the three men demonstrates a shared intention to commit the offences. They approached the Caddy together from behind, and two of them opened fire on Kowa and Spaji. The cartridge cases found at Dlavu Close further corroborate that some were fired from CZ pistol and others were fired from the Glock. The evidence established that during the exchange of fire with the police, the accused used the CZ firearm. The presence of Glock cartridge cases at the scene supports the only reasonable inference; that one of the men accompanying the accused fired shots at Spaji as he fled. Accordingly, the accused acted jointly with the person in possession of the Glock in shooting of Spaji. Furthermore, a third cartridge case found at the toilet scene was not discharged from the CZ. This indicates that at least two firearms were used against at Feke.

[115] The accused unfortunately did not take this court into his confidence. He chose to exercise his constitutional right to remain silent. The difficulty that he is facing is, he is directly implicated by eyewitness(es) in the shooting of the Kowa and Qokombane. The direct evidence further establishes that he was found in possession of a firearm and ammunition, linked to the killing of the two deceased. In the face of this damning prima facie evidence, directly implicating him to the commission of the offences, the accused elected to leave the evidence unanswered. The assertions put to witnesses during cross examination do not constitute evidence, unless confirmed under oath. By choosing not to testify, the accused relied solely on the possibility that the State would score own goals in either by failing to prove its case against him or contradict itself – neither of which occurred.

[116] In Mahlalela v S,²⁸ Dlodlo AJA stated the following:

'I agree that where a prima facie case is proved against an accused person in a case built and resting upon circumstantial evidence to which a reply from an accused would be expected, the fact that the accused elects not to reply may be a factor which, together with other factors in the case, leads to an inference of guilt. However, the

²⁸ *Mahlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016) para 16.

weight to be attached to the accused's silence depends on the facts of the particular case.'

[117] In light of all the surrounding circumstances, the only reasonable inference to be drawn is that the accused acted in the furtherance of a common purpose in killing the two deceased persons. I am satisfied that the evidence presented by the State weighs so heavily as to exclude any reasonable doubt about the accused's guilt. Expressed differently, the mosaic of evidence as a whole is, beyond reasonable doubt, inconsistent with the accused's innocence. See *Khumalo v S*²⁹. Accordingly, I find that the State has proved its case beyond reasonable doubt.

ORDER

[121] In the result, I make the following order in connection with the charges as formulated in the indictment, namely:

- a) The accused is found guilty of the murder of Mr Zola Spaji as set out in count 1 of the indictment based on the common purpose doctrine.
- b) The accused is found guilty of attempted murder of Mr Luxolo Kowa as set out in count 2 of the indictment.
- c) The accused is found guilty of attempted murder of Constable Sivuyile Qokombane as set out in count 3 of the indictment.
- d) The accused is found of illegal possession of prohibited firearm and ammunition as set out in count 7 and 8 of the indictment.
- e) The accused is found guilty of murder of Mr Sizwe Feke as set out in the indictment based on the common purpose doctrine.

²⁹ (723/2020) [2022] ZASCA 39 (4 April 2022) at para 19.

- f) The accused is found not guilty on illegal possession of prohibited firearm and ammunition as set out in count 4, 5, 9 and 10 of the indictment.



S. YAKE
Acting Judge of the High Court

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