



**IN THE HIGH COURT OF SOUTH AFRICA
GARIEP DIVISION, UPINGTON**

Case No: K/S20/2024
Heard on: 19-23/5/2025 &
20-22/10/2025; 13/04/2026
Delivered on: 15/04/2026
Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

JOHN IVAN FRANCIOUS MOUTON

Accused

JUDGMENT ON CONVICTION

MAMOSEBO J

[1] The accused is indicted on several counts: two counts of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (CLAA); five counts of attempted murder read with the

provisions of s 51(1) of the CLAA; a contravention of s 120(3)(b) read with sections 1, 103, 120(1)(a), 121 read with schedule 4 of the Firearms Control Act, 60 of 2000, (the FCA) that is, handling a firearm in a manner likely to injure and or endanger the safety or property of members of the public; and a contravention of s 120(6)(a) r/w sections 1, 103, 120(1)(a), 121 r/w schedule 4 of the FCA, pointing of a firearm.

- [2] The accused was legally represented by Mr H Steynberg throughout the trial until the close of the defence case when the matter was postponed for closing arguments. Upon resumption of the proceedings, the Court was informed that Mr Steynberg is no longer part of the establishment of the Legal Aid Board and therefore no longer on record. He has been replaced by Ms B April who stood by the heads prepared by Mr Steynberg but further tendered oral argument.
- [3] Before pleading not guilty to all counts the accused confirmed that his legal representative had explained to him the provisions of the Criminal Law Amendment Act (the CLAA). Mr Steynberg confirmed that the accused's plea of not guilty was in accordance with his instructions. His written plea in terms of s 115 of the Criminal Procedure Act 51 of 1977 (CPA) was handed in as exhibit "A".
- [4] In short, the accused pleads that he acted lawfully in self-defence in respect of counts 1 and 2 of murder contending that the deceased in count 1, Mr Shadrack Tyopo Dube (Dube), wielded a firearm while the deceased in count 2, Mr Bophelo Abram Khumalo (Khumalo) held a tall glass in his hand. In respect of counts 3 to 7 of attempted murder in which it is alleged that he fired shots at the different complainants attempting to kill them he pleaded a bare denial. In as far as counts 8 and 9 are concerned relating to the firearm he also pleaded a bare denial.

- [5] At commencement of the trial the accused admitted to the correct identification of both deceased as those of Messrs Shadrack Tyopo Dube and Bophelo Abram Khumalo in exhibit A. The accused further admitted during trial that the postmortem report compiled by Dr Don Surtie, exhibit “G”, relates to the deceased in count 1, Shadrack Dube. The postmortem report compiled by Dr Lemainè Fouché pertains to the deceased in count 2, Bophelo Khumalo.
- [6] The evidence of the state is to this effect. The deceased as well as Messrs Joshua Rock (Rock), Alfred Mogorosi (Mogorosi), Kealeboga Gaolehelwe (Gaolehelwe), Bongani Tshabalala (Tshabalala) and Ms Ranchiya Nokayi (Nokayi) were initially together at a park for a year end braai and later went to G-Spot tavern on 16 December 2022. They had travelled to that tavern in two Toyota Fortuner vehicles, one white and the other grey in colour. The white Fortuner belonged to Mogorosi, a self-employed director of a security company whilst the grey Fortuner was their official company vehicle driven by Khumalo, the deceased in count 2.
- [7] Whilst at the tavern, Rock asked for and was given the grey Fortuner keys. Different reasons, which are not material, are proffered by the witnesses why he took the keys. What seems common to the rest except to Rock was that he would fetch whatever item, cellphone, sweater or jersey, from the vehicle and return the keys to Khumalo. Realizing that Rock had unduly delayed to return the vehicle keys, Gaolehelwe and Tshabalala tried to establish his whereabouts. The grey Fortuner was missing from where it was parked. They made a report to Khumalo. According to Rock he had asked for the keys to travel to his mother’s

place of residence to fetch his jersey. He was involved in a collision with a blue Toyota Corolla at the corner of School and Finck Streets.

- [8] Both drivers alighted from their vehicles. Rock exclaimed “*what do we do now?*” According to him the other driver, known to him as Frans, who resides in the same street as his mother, responded by saying “*wait there*” whilst he was going to fetch a firearm for Rock. According to Rock the accused produced a firearm from his vehicle and cocked it. The white Fortuner then arrived driven by Dube accompanied by Gaolehelwe and Tshabalala. They left Mogorosi, Nokayi and Khumalo at G-Spot.

- [9] Mogorosi testified that Dube had telephonically contacted him reporting that the grey Fortuner was involved in an accident. Gaolehelwe testified that although they all alighted from the white Fortuner, they remained next to the Fortuner when Dube went and stood between the accused and Rock facing Rock. According to Rock, Dube demanded an explanation from him of what happened. After Rock’s explanation, Dube slapped him several times and ordered him to keep away from the accused as he was armed. The slapping was witnessed by Tshabalala and Gaolehelwe who stated that Rock fled thereafter without witnessing any further interaction between Dube and the accused. Rock heard two or three gunshots as he was leaving the scene. Gaolehelwe and Tshabalala saw the accused in possession of a firearm. According to Gaolehelwe, as Dube faced the accused, he raised his hands in surrender fashion and enquired from the accused what happened. The accused fired a warning shot. Dube called Gaolehelwe, gave him the white Fortuner keys and asked him to summon the police. Gaolehelwe and Tshabalala returned to G-Spot to report to those who had remained behind what happened.

- [10] Gaolehelwe and Tshabalala returned to the collision scene with Mogorosi, Nokayi and Khumalo in the white Fortuner. Mogorosi was the driver. Gaolehelwe testified that as they left G-Spot Khumalo was unarmed. Mogorosi parked the white Fortuner as depicted at point 6 in the sketch plan behind the grey Fortuner depicted at point 5. According to Gaolehelwe, Dube joined them whilst they were assessing damage to the grey Fortuner. Tshabalala and Gaolehelwe stood on the right-hand side of the white Fortuner. Gaolehelwe left towards the back of the vehicle for a smoke. He heard the accused exclaiming that he is not afraid to go to jail. Tshabalala stood more in the middle of the white Fortuner with Gaolehelwe towards the end of the vehicle and Bophelo towards the front but all of them on the same side. He saw the accused approaching Dube with a firearm and a shot went off. He observed the accused facing towards him and he fled. He heard two shots fired in his direction. After fleeing but not far from the Scene he saw Kagisho and Peter, Peter is his brother, approaching the scene. He joined them. Kagisho removed something which could be a wallet or cellphone from Khumalo before he was placed in an ambulance.
- [11] Nokayi, an off-duty police officer, was unarmed. She noticed a male person with a firearm in his hand. She greeted him and asked in Afrikaans '*boetie, wat het gebeur?*' His response, also in Afrikaans, was that he did not want to speak to her. Mogorosi heard: "*ek wil niks hoor by julle maar vandag wil ek julle wys.*" Nokayi then turned and walked away from him. Mogorosi met her halfway and walked with her towards the white Fortuner. She heard Dube saying to the accused that they are not fighting but want to fix things. Dube and the accused were facing each other as he spoke with an estimated distance of 18 to 20 meters between them. The accused's response, according to Nokayi was, '*I will show you.*'

- [12] Nokayi and Mogorosi boarded the white Fortuner to summon the police. Mogorosi sat behind the steering wheel. Whilst Nokayi was on that call with the police, she heard a shot being fired. She saw the accused shot Dube who stumbled and fell. She saw sparks and smoke from the barrel of that gun. She heard Mogorosi screaming '*he is shooting at my friend!*' Mogorosi jumped out of the vehicle but slipped and fell. While on the ground, he heard more gun shots, at least two were aimed at him as the firearm was pointed at him. Mogorosi saw Khumalo next to Dube. According to Mogorosi they were a meter apart. Mogorosi saw the accused pointing the firearm at Dube. Mogorosi was unarmed. Nokayi heard a second shot striking the white Fortuner at the right rear as depicted at photos 84, 85, 86, 87 and 88 and she jumped out and fled. That is more or less where Tshabalala testified he was standing when a shot was fired but missed him. He fled and heard more shots while fleeing.
- [13] As Gaolehelwe was about to flee he saw Dube on the ground, shot. He turned and fell but could see the accused approaching Alfred's vehicle firing shots. Whilst fleeing he observed Khumalo being shot and falling. Nokayi could not say at that time when shots were fired where the other people were. She jumped out of the vehicle and fled, following Mogorosi. Whilst running, Nokayi heard two or three shots fired past her while Mogorosi heard about three or four. They saw a white Volkswagen Polo which they stopped and were taken to the police station where they reported the incident.
- [14] Sgt Peter Gabriel Tieties (Sgt Tieties) and Capt. Visagie accompanied them to the scene. On the way to the scene a Toyota Corolla, approaching from the opposite direction, flashed its headlights and the

police vehicle stopped. The occupants of that Toyota were the accused and his brother, Staff Sgt Marlon Maeclol Van Rooyen (Van Rooyen). The accused, who occupied the passenger seat, alighted and first asked to make the firearm safe before he handed it over with its empty magazine to Sgt Tieties. He informed the police officers that he was going to hand himself over to the police as he had shot two people, which he proceeded to do. Sgt Tieties drove to the shooting incident where they found Dube and Khumalo shot. Khumalo was lying more towards the fence immobile but could still speak. Dube was to the right back of the white Fortuner as depicted at point 3 of photo 125 of exhibit C.

- [15] Mogorosi, Nokayi, Van Rooyen, Tshabalala and Gaolehelwe refuted as untrue the allegations by the accused that Dube walked towards the accused with a firearm in his hand and that Khumalo had a tall glass in his hand that he could have used to attack the accused. They further denied that as Dube approached the accused Khumalo shouted '*kill the bastard!*' Mogorosi, Tshabalala and Gaolehelwe maintained that Dube did not own a firearm and that neither Dube nor Khumalo were armed. Mogorosi asserted that there was nothing threatening or endangering the accused that necessitated him to defend himself. Nokayi also disputed the version of the accused that he only fired shots at the deceased and explained that additional shots were fired. The only pointing of a firearm that Nokayi observed was at Dube. Mogorosi also testified that apart from the firearm being pointed at Dube and himself he did not see anybody else being pointed with a firearm. However, when the shots were fired, they were fleeing in the same direction.
- [16] Sgt Tieties is attached to the Visible Policing Unit of the South African Police Service (SAPS) with over 20 years of service. He was on duty at

Rosedale police station when Capt Visagie asked him to accompany him and the couple that had just reported a shooting incident. They travelled in a marked police double cab vehicle and he was the driver. He confirmed Nokayi's version on what happened when they encountered the accused. Sgt Tieties placed the firearm in the marked vehicle's glove box. Sgt Tieties and the occupants of his vehicle proceeded to the shooting scene. Since there were bystanders, Stg Tieties summoned more police personnel including the forensic investigators to the scene. He used a marked police tape to cordon off the scene. Sgt Tieties observed a male person lying between the two vehicles and another male person lying next to the fence of a church. An ambulance arrived and certified the one between the vehicles dead. The other who was found next to the fence had to be rushed by the paramedics to the hospital. Sgt Tieties handed the firearm, CZ 7.5 9mm pistol number 1[...] with an empty magazine to Sgt Carel Lionel Pieterse of the Local Criminal Record Centre (LCRC) who immediately sealed them in a forensic bag.

- [17] Van Rooyen is employed by the South African National Defence Force (SANDF) as a Staff Sgt for the past 40 years. He refers to the accused as his baby brother. On 16 December 2022 he was at his tuckshop with the accused and one Desmond Medler. They consumed beer together. He left them at around 22:00 and went home. The accused summoned him in the early hours of the morning and reported that he was involved in a motor vehicle accident. Upon arrival he enquired from an unknown man who was standing between the grey Fortuner and the blue Toyota Corolla about 10 – 15 meters from the accused, where the owner of the Corolla was. The unknown man pointed towards the accused. Van Rooyen then walked towards his brother who stood with his firearm in his right hand. Van Rooyen enquired from the accused what had happened. His response was that *'these people came and drove into his*

vehicle and now they wanted to fight him.' Van Rooyen asked the accused to put the firearm away while he went to speak to the other man. The accused placed the firearm in his holster. Van Rooyen turned and walked towards the direction of the unknown man. He heard someone asking what was happening. Van Rooyen also asked the unknown man what was happening but before the man could even respond to him a shot went off. He ducked and lay on the ground. The man was just standing there and did nothing. He did not see a firearm in Dube's possession. As Van Rooyen raised his head, he observed his brother pointing the firearm at the person and shot him twice. The person then fell to the ground. He then saw a white Fortuner. He never heard anybody shouting the words '*kill that bastard!*' before the shooting.

- [18] After the shooting, the accused asked him to take him to the police station to hand himself over. They boarded his vehicle and did not speak on their way to the police station. He has a good relationship with the accused. The person depicted at photo 13 was the person he spoke to. He did not see anyone holding a tall glass. He also confirms what the other witnesses had testified to when they met the police on the road. He testified that he is aware of the charges brought against the accused but that there was no way that his younger brother would attempt to kill him.
- [19] As testified to earlier, Khumalo was rushed to Dr Harry Surtie Hospital by ambulance. On exhibit "B", a Patient Emergency Form: Triage completed by nurse L Potgieter on 17 December 2022 at 02:20, which was handed in by consent, the following is recorded under the head: "Presenting Complaint": Gunshot – right side of chest. The form and patient were handed over to Dr Akombe Adreen Aluta who also compiled his report on the second page.

[20] Dr Aluta is a medical doctor employed as an emergency and trauma officer at Dr Harry Surty Hospital. He attained a bachelor's degree in medicine, MBHB in 2004 at the University of Kinsasha, DRC Congo. He has passed his board exam at the Health Professions Council of South Africa (HPCSA) to practice medicine in the country. On 17 December 2022 he was on call in the emergency and trauma unit, colloquially referred to as casualty, when the patient was received by nurse Potgieter and handed to him 25 minutes later. The patient was struggling to breathe. The nurse had taken the patient's vitals and his blood pressure was 75/42, which he described as very bad. Dr Aluta explained that the systolic 75 cannot be below 90, this reading together with haemoglobin of 9.2 meant that the patient was in shock. The haemoglobin level in the case of a gunshot wound could mean that there was ongoing internal bleeding. Dr Aluta re-took the vitals, and BP was 97/52 which meant the patient was still in shock. From the history given, the suspected internal bleeding could have been due to a penetrating thoracic (chest) injury. The patient was fully awake and well orientated. His Glasgow Coma Scale (GCS) measuring his level of consciousness was 15/15. Dr Aluta observed a chest injury on the upper side, a 2 cm laceration and another one of 1 cm on the left posterior side of the chest. His explanation was that from his studies the entrance wound usually has some abrasions and can be oval or sometimes irregular, and usually appears bigger than the exit, depending on the energy of the shot and the distance. He concluded that the bigger opening was the entrance wound and the smaller opening of 1 cm was the exit wound. The patient was handed over to Doctors Smit and Pillay for surgery. It was a life-threatening injury. Mr Steynberg did not cross-examine the doctor and his evidence is uncontested.

- [21] Dr Lungushinga Christopher Kolongi is also a medical officer at Dr Harry Surtie Hospital. He attained his MBHB, Bachelor of Medicine and Surgery at the University of Kinsasha in 2010. He passed the HPCSA Board Exam in 2015 and started to practice medicine in the country in 2016. On 3 January 2023 he was on duty in the Intensive Care Unit (ICU). Critical patients are admitted in the ICU. He was called by the nursing sister that the monitors were showing a flat line which meant the heart had stopped beating. The patient's pupils were fixed and dilated and he was not breathing. The specialist on call was notified. They completed a form for the forensics and certified the patient dead. The patient had already undergone surgery twice, on the 20th and 23rd of December 2022.
- [22] Dr Adin Don Surtie is a qualified forensic pathologist whose credentials were not questioned. On 20 December 2022 he examined body DR385/22 identified to him by a forensic pathology officer, Keabaka Mokgweetsi, and thereafter compiled a postmortem report on his findings. In his additional notes, Dr Surtie recorded that there were three gunshot wounds. He explained, in his supplementary report, that gunshot (a) is estimated to be a loose contact gunshot wound, meaning that there was either a barrel touch to the body or it touched it loosely, better explained in Afrikaans as '*net, net!*' Dr Surtie could not estimate from how far the gunshot that caused wound (e) was fired without a forensic laboratory analysis of the deceased's t-shirt which was handed over to the forensic pathology officer for hand over to the investigating officer. In the absence of such analysis, Dr Surtie could only describe it as a distant gunshot, i.e, more than 76.2cm. Gunshot (f) was also described as a loose contact gunshot wound.

[23] Dr Surtie recorded the cause of death as consistent with multiple gunshot wounds. The main injuries, as explained by the doctor are at (a) and (e):

- (a) 13 x 8mm elliptical (not a perfect circle one side is longer) gunshot entrance wound with 8 x 7mm inferior medial tract and surrounding abrasion, blackening (burning) that does not wipe off and black smudging that does not wipe off left temporal area. Underlying 25 x 20mm inward bevelling skull defect with multiple fractures radiating from it. Tract continuing inferior medially through brain and exiting skull through $\pm$ 20 x 20mm fractured area in anterior medial left sphenoid bone with fractures radiating from it. Tract continuing with structural damage to exit right cheek with 20 x 8mm lacerated exit wound.
- (e) 10 x 8mm entrance gunshot wound with abrasion rim left lateral anterior chest 190mm from midline and 10mm below sternal notch with inferior medial posterior tract entering chest cavity through 4th intercostal space with fracture of 4th rib. Tract continuing through left lung and exiting chest through 7th intercostal space next to spine with fracture of 8th rib. 15 x 7mm exit wound with small lacerations left central back. 500ml blood left chest.

The third gunshot wound appears at (f) 12 x 14 gunshot entrance wound with abrasion and black burn rim right lateral base of thumb area with anterior medial tract to 8 x 10mm exit wound with lacerations and black smudging that wipes off but not fully.

[24] Dr Lemainè Fouché, a Forensic Pathologist, with the following attained qualifications: MBCHB from the University of Pretoria, (1973); Diploma in Health Administration, University of the Free State,(UOFS) (1995); Diploma in Community Health (UOFS)(1996); MMed Medicino Forensus UOFS (2006); admitted as Fellow to the College of Forensic Officials in 2006; PhD conferred UOFS. She examined the body identified to her by Forensic Pathology Officer Oarabile Joseph Diphoko as DR03/2023. According to the doctor, the deceased was found dead on 3 January 2023 at 10:00. Dr Fouché explained through a schematic diagram attached to the report all the medical interventions conducted on the body of the deceased.

[25] These were Dr Fouché’s chief postmortem findings on the body:

‘The body of a black adult male with a penetrating gunshot with damage to the liver. The brain is macroscopically swollen with flattening of the gyri. There are bilateral tonsillar herniations noted. There are defects through the 9th intercostal space left lateral and 8th intercostal space right anterior. Both lungs are heavy. Both lungs are very edematous and congested on cut section. Both kidneys are pale in colour. ‘

[26] At 4.7 the doctor recorded a defect, 9mm in diameter with a rim of abrasion on the left side of the back. This defect has the appearance of an entrance wound. Dr Fouché concluded that the cause of death is Gunshot: back. Dr Fouché painstakingly explained her opinion on the postmortem report why the entry at 4.7 regarding the 9mm defect with a rim of abrasion on the left side of the back appears to be an entrance wound and that the defect at 4.2, a 1cm long wound on the right chest being the exit wound. She opined that entrance wounds are usually round varying in diameter depending on the calibre of the ammunition used. Coupled with that round defect there is a rim of abrasion around the entrance wound. When ammunition enters the body, it goes in and

the skin relaxes so it takes that 2mm rim of abrasion, and it removes the skin when entering. The exit wound is described as a slit line, more like a little line on the skin. A 9mm pistol has a slit exit wound. It also depends on the tract, if there are bone structures causing the bullet to derail this one went from left, through the liver, having observed the star shaped defect and the star showed to the outer on the right-hand side.

The State closed its case.

- [27] After the closure of the state's case, Mr Steynberg brought an application in terms of s 174 of the CPA for the discharge of the accused in respect of count 7 relating to the attempted murder of Mr Marlin van Rooyen. Van Rooyen denied in no uncertain terms that his younger brother attempted to kill him. There was no evidence from the other witnesses linking the accused to the accusation. Counsel for the State, Ms Engelbrecht, conceded. I found that there was insufficient evidence against the accused in respect of count 7 to warrant a conviction and acquitted him on this charge.
- [28] The accused, Mr John Ivan Franscious Mouton, testified in his defence. He was the driver of the blue Toyota Corolla in Finck Street when a grey Toyota Fortuner approached around the corner from School Street into Finck causing a frontal collision, commonly known as a head on collision, and came to a standstill. Dube alighted from the left side of the grey Fortuner, pulled Rock from the driver's seat and hit him. When the assault took place, he remained seated in his vehicle. Rock then fled. Dube walked towards the accused and shouted at him in a language he did not understand. From his body language and his hand gestures he perceived Dube to be blaming him for the collision. The accused alighted from the vehicle pulled out his 9mm pistol from its holster on

his hip and fired a warning shot and asked Dube to keep away from him. He fired that shot because he saw how Dube had assaulted Rock. The manner in which Dube approached him led him to conclude that Dube was aggressive and would assault him too. After the warning shot Dube climbed into the grey Fortuner and parked it on the right side of the road.

[29] A white Fortuner arrived at the scene and parked behind the grey Fortuner. The occupants of the white Fortuner alighted and approached Dube who was standing next to the grey Fortuner. They had a discussion amongst themselves whereafter the white Fortuner left the scene. But before the white Fortuner left, a woman, now known as Ranchiya Nokayi, walked to him and asked him what had happened. He told her he was waiting for the police and was not going to talk to her. The others left the scene leaving Dube behind. A marked police bakkie drove down School Street and he ran to it, but it drove by. He fired a second warning shot to attract the police's attention but to no avail.

[30] He phoned his brother, Van Rooyen, and asked him to come but also to summon the police. His brother arrived at the scene simultaneously with the white Fortuner. The persons in the white Fortuner alighted and joined Dube standing next to the grey Fortuner while Van Rooyen walked to him. He narrated the collision incident to his brother and asked him to go to the police to report. He also told his brother that Dube wanted to fight him. His brother turned towards his vehicle to fetch the police. At that stage Dube walked towards him. He could see that Dube had a handgun (pistol or revolver) in his hand. It was when Dube came too close to him that he felt threatened and shot him. A male person standing next to the white Fortuner shouted, *'kill the bastard!'* He did not know the person who shouted then but during trial he became

known as Bophelo Khumalo. He cannot recall how many shots he fired at Dube, but he fired at him until he fell to stop his advance.

- [31] After Dube's falling Khumalo came towards him with a long or tall glass in his hand which he could use against him. He also felt threatened because he had earlier screamed '*kill the bastard*'. So he shot him as well. He cannot recall how many times he fired shots at him, but it was until he fell. On the sketch plan Khumalo fell between points 12 and 13. Dube was at point 7. After shooting Khumalo he asked his brother to take him to the police station. He neither fired shots nor pointed a firearm at Mogorosi, Nokayi, Gaolehelwe and Tshabalala.
- [32] On their way to the police station they met Sgt Tieties. His brother signalled him to stop. His brother reported that there was a collision which turned into a shooting incident. The accused alighted from the vehicle, made the firearm safe and handed it to Sgt Tieties. He and his brother drove to the police station. Following the incident, Sgt Tieties came to his shop between Christmas and New Year, and he enquired from Sgt Tieties if they had taken the other person's firearm as well to which he responded in the negative saying it was in the Fortuner's glove box.
- [33] He denied having discharged or handled his firearm in a manner likely to injure or endanger the safety and property of the members of the public, which included Ms Nokayi, Messrs Mogorosi, Gaolehelwe, Tshabalala and Van Rooyen. He further denied pointing the firearm at them. He denied that he said to Nokayi '*I will show you.*' He further denied saying to Rock '*hoerkind, staan net hier dat ek die gun kan kry.*' When he shot Dube and Khumalo he believed his life was in danger and did so in self-defence.

[34] During cross-examination the accused clarified that the gestures made by Dube that he referred to was Dube pointing a finger at him, demonstrating that while the one finger was pointing at him, the other hand was a clenched fist. He conceded that at the time when he produced the firearm, he did not see a firearm on Dube who was about 4.5 paces away when he (accused) produced a firearm. He did not tell Dube that he does not understand the language but just told him to keep away from him. Despite being in possession of a firearm, he was frightened by how Dube pulled Rock out of the car and slapped him, pointing him with a finger and the manner in which Dube walked towards him speaking in a vernacular language. After Dube left to move the grey Fortuner, he tried to call the police but did not get through hence he called his brother. The Fortuner occupants fled after he shot Dube and Khumalo. Khumalo held the glass in his hand with a bent elbow when he approached him. The fact that he had earlier shouted '*kill the bastard*' and walked towards him holding a glass frightened him because '*he could use the glass as a weapon against him.*' He thought Khumalo would stab him with the glass. He shot Khumalo when he was about five meters away from him having concluded that it was not necessary to fire a warning shot as he felt he was being attacked. Not only does he not know what happened to the glass after he shot Khumalo, but he also did not mention the glass to the police when they met on the way. When he shot Dube he was not near the white Fortuner.

The accused closed his case without calling any witness.

[35] The *onus* lies with the State to prove its case beyond reasonable doubt. The Supreme Court of Appeal (SCA) in *S v Chabalala*¹ proffered this

¹ 2003 (1) SACR 134 (SCA) para 15

guidance on the salutary approach to the evaluation of evidence in a criminal trial:

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

- [36] It is settled law following *Van Aswegen*² endorsing *Van der Meyden*³ and *Trainor*⁴ that a compartmentalised assessment of the evidence in a criminal trial is misdirected. Evidence must be assessed in its totality and holistically.
- [37] The defence took issue with the fact that Ms Ranchia Nokayi, in her testimony stated that the complainants discussed the case. This, argued Ms April, undermines their credibility and reliability. However, Ms Engelbrecht, for the state, argued that the defence took her statement out of context because in re-examination Nokayi clarified that they only shared the vehicle registration numbers and their conversation only related to their trauma after the incident, for which she received psychological assistance. Mr Steynberg had also taken issue with the fact that Gaolehelwe and Tshabalala were fetched by Mogorosi for their court appearances and not the investigating officer. I am unable to agree.

² S v Van Aswegen 2001 (2) SACR 97 (SCA) para 8

³ S v Van der Meyden 1999 (1) SACR 447 (W); 1999 (2) SA 79 (W) at 449j – 450b

⁴ S v Trainor 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) paras 8 -9

As will be noted hereunder, the witnesses' testimony, more particularly the four complainants' testimony, was not only observed from different vantage points but also testified to what they had observed. There were differences in their evidence. It would have been surprising if all witnesses had recounted the incident word by word in a similar fashion.

- [38] The defence also submitted that there was contamination of the scene based on the following: first, the testimony of Tshabalala that Kagisho removed either a wallet or cellphone from Khumalo and he was not called by the state to testify to that effect. Secondly, when Mogorosi and Nokayi fled they testified that they left the doors of the white Fortuner open and there is no account of who closed them and when. It must be borne in mind that Khumalo was alive at the scene and according to Dr Aluta, other than being in shock, he was coherent in his speech at the hospital upon admission. The defence is clutching at straws in paddling this argument because whatever item was removed may have been at Khumalo's request and for safekeeping. I don't see how this aspect can contaminate the scene in the presence of paramedics. This submission is misplaced. There seems to be a suggestion that the white Fortuner was not at the scene. This cannot be correct because the key to sketch plan and photographs compiled by Sgt CL Pieters and handed in by consent photos 80 to 88 are of the white Fortuner as taken at the scene. The mere presence of the forensic investigator at the scene permitted him to attend to the vehicle and the mere agreement by the parties to hand his reports and sketch plan rendered his attendance in court nugatory. There is therefore no merit in the contamination accusation.

Counts 1 and 2 of murder

- [39] While on the one hand, the State argued that the murder perpetrated on both the deceased was planned and premeditated, the accused contended

that he acted in self-defence. The version of the accused need only be reasonably possibly true.

- [40] It is common cause that the accused caused the death of both Dube and Khumalo by shooting at them, which begs the question, was the killing justifiable? In other words, was killing them lawful and intentional? Snyman⁵ defines private defence in this fashion:

‘A person acts in private defence, and her [or his] act is therefore lawful, if she [or he] uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her [or him] or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.’

- [41] The SCA reiterated in *Steyn*⁶ that *every* case has to be determined in the light of its own particular circumstances, and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relied upon private defence. There had to be a reasonable balance between the attack and the defensive attack. The proper consideration is whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property.

- [42] The test of private defence is objective. In *S v Ntuli*⁷ the court held that he is guilty of murder if he foresaw the possibility of such resultant death, but persisted, regardless of whether it ensued or not. *S. v Sigwahla*, 1967 (4) SA 566 (AD) at p. 570B – E. (He would, of course,

⁵ CR Snyman *Criminal Law*, 7ed, Updated by SV Hoctor, Lexis Nexis, page 85

⁶ Steyn v The State 2010(1) SACR 411 (SCA) para 19

⁷ 1975 (1) SA 429 (A) at 437 point 6(ii)

also be guilty of murder if, in the circumstances cited in f/n 5, *supra*,⁸ and the resultant death, he directly intended to compass B's death).

[43] The objective evidence is to the effect that when Dube first arrived at the scene of the collision, accompanied by Gaolehelwe and Tshabalala, the accused and Rock had alighted from the vehicles and were standing within close proximity of each other. Dube assumed the role of wanting to understand what had transpired. It was not surprising that after hearing Rock's explanation he was agitated. The evidence is that Rock was on a frolic of his own when he took the company vehicle without consent. It is inexplicable why slapping Rock would have frightened the accused who was at that stage armed with a 9mm pistol. In any event, that assault was not directed at him.

[44] Even if one were to accept the accused's version for the moment that Dube walked towards him holding the gun on his side, Dube was shot three times without retaliating. This is highly improbable. There is evidence that when he approached the accused he had both his hands up with palms facing outward in a surrendering posture. The accused's own brother testified in corroboration to the other witnesses that Dube was unarmed. The witnesses were consistent and corroborated each other in this material respect. I therefore find that the accused's version that Dube was armed with a handgun is a fabrication and his attack on Dube was unlawful and was not aimed at protecting himself or any interest that deserved to be protected.

⁸ Point 5: If A realises that he is using more force against B than is necessary, he is both applying force unlawfully and intending to do this (*dolus*); and he is then guilty of assault. Principles of self-defense no longer apply. Whether A realised that he was using excessive force is a question of fact, involving an enquiry into his state of mind.

- [45] The accused's state of mind when shooting Dube was clarified under cross-examination when he conceded that Dube pointed a finger at him. The accused produced his firearm from its holster when Dube walked towards him speaking a language he did not understand. Dube was 4.5 paces from him. The accused claims to have been frightened of the assault by Dube because someone had also shouted '*kill the bastard*'. He conceded to shooting Dube until he fell. This clearly shows that he aimed to kill Dube. I therefore conclude having looked at these objective facts and what occupied the accused's mind that he must have shot Dube at a time when he was no threat to him. His defence of shooting Dube in self-defence stands to fail.
- [46] I turn to the shooting of Khumalo. This happened shortly after Dube had fallen to the ground. These are the grounds relied on by the accused for believing that his life was in imminent danger. Khumalo had a tall or long drinking glass in a grip which he became aware of when Khumalo shouted '*kill the bastard.*' Khumalo approached him. He thought Khumalo was going to stab him with the unbroken glass. That led to him firing shots at Khumalo when he was about 5 meters away. It was when he shot Dube multiple times that Khumalo approached him.
- [47] The postmortem report shows a gunshot wound on Khumalo's chest which led to him succumbing to the injury. Self-defence requires one's life or the life of another or property to be in imminent danger. The credible evidence is that Khumalo was unarmed. Even if he had a glass in his hand it is a long stretch to think that he 'could have' used the glass he purportedly held in his hand does not justify the extent of the force used to thwart the supposed attack. The accused contended that Khumalo was facing him when he shot him at a distance of 5 meters and cannot remember how many times he shot him. He conceded that he

also shot him until he fell. He does not know what happened to that glass and did not mention the glass to the police either. The explanation about the glass is a fabrication and stands to be rejected as false.

- [48] Taking the grounds relied on by the accused to shoot the deceased, whether individually or cumulatively, they do not indicate that he was in any imminent danger. Khumalo was unarmed and therefore when he came face to face with him, he was not overtly threatening. His claim that he saw a tall glass is illusory. If the accused indeed felt threatened by Khumalo he should have at least fired a warning shot. In *Coetzee v Fourie and Another*⁹ the following salutary remarks were made:

‘If the defendant indeed felt threatened, in my view, the circumstances called for at least a warning to be given by the defendant that he felt under threat before he was justified in shooting. As correctly pointed out by Nepgen J, a firearm is a potentially lethal weapon which should be discharged in the direction of a person only as a last resort. In this case the defendant shot the plaintiff without giving any prior warning of his intention to do so. In my view, he had time and opportunity to do so. It was submitted on behalf of the defendant that he was trapped in the garage and that the defendant did not have enough time and distance to give any warning. I do not think that is borne out by the evidence. The defendant was about 3 metres from the plaintiff when he fired a shot in the plaintiff's direction. The defendant could have retreated further into the garage if he needed more time or distance in order to give a warning.

After retreating he could even have taken cover behind the front of the cars in the garage while at the same time shouting a warning to the plaintiff to stop.’

- [49] The difference in opinion of Doctors Aluta and Fouché pertaining to the entrance and exit wound need not detain us. The defence submitted that the versions of the doctors are materially at odds, and the court should

⁹ 2005 (1) SACR 382 (SCA) para 10

accept the opinion of Dr Aluta as most reliable because when Dr Fouche was asked about the trajectory of the bullet, she said based on speculation, as the argument went, Khumalo could have turned when he was shot. Dr Aluta had opined that the wound on the front of the chest was the entrance wound and the posterior wound was the exit (see para 20 above). Dr Fouché testified to the converse and elaborately explained why (see para 26 above). She is a forensic pathologist with vast experience in this field whose qualifications and credibility were not questioned. She has done an in-depth examination of the body to justify her opinion of exit and entrance wound. It would have been unsettling if they differed on the location of the wounds. The only difference pertains to which one is entry and the other exit. I accept the version of Dr Fouché but mindful to emphasise that both doctors' evidence supports the existence of the wounds and the fact that it was this sole injury that resulted in the death of the deceased. It therefore follows that there can be no contradiction in their versions that may lead to their evidence being discredited. The defence has placed the aspect in issue because it is not favourable to the accused that he shot Khumalo while he had turned his back from him exacerbating his aggression on a defenceless person.

[50] There was clearly no imminent attack on the accused. The objective facts presented do not support his defence. Evidently, Dube and Khumalo were unarmed and defenceless and posed no danger to the accused when he shot them. It follows that in both shootings of Dube and Khumalo, the accused had fired the fatal shots with criminal intent in the form of *dolus directus*.

[51] What remains is the question whether the murder was planned or premeditated. The CLAA does not define the terms 'planned and

premeditated murder.’ The SCA elucidated these concepts in these terms in *S v Kekana*¹⁰

‘Another argument advanced on behalf of the appellant was based on *S v Raath*, where it was held that to prove premeditation, the State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention....In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.’

[52] The SCA in *Peloele v The Director of Public Prosecutions Gauteng Division, Pretoria*¹¹ articulated:

‘The question whether the crime was premeditated requires a consideration of the factual matrix of each case, in order to establish the state of the perpetrator’s mind before the crime was committed. This Court considered the question whether the murder was premeditated in two decisions, namely *Kekana v S*¹² 2014 (Kekana 2014), and *Kekana v S*, 2018¹³ (Kekana 2018). In *Kekana 2018* this Court held:

“In summary therefore, it was for the appellant to lay a factual foundation for a conclusion that the murders were not premeditated, and the issue was one for the trial court to decide. In coming to a decision, the court would have regard to all circumstances of the murders, including the appellant’s actions during the relevant period.”

[53] In Mr Steynberg’s heads, which Ms April stood by it is argued that the accused could have shot the deceased persons when the incident started but he did not do so. According to his brother, Mr Van Rooyen, the accused called him for assistance first. His brother asked him to put

¹⁰ 2014 JDR 2139 (SCA) paras 12 - 13

¹¹ 2022 JDR 2335 (SCA) para 15

¹² [2014] ZASCA 158

¹³ [2018] ZASCA 148; 2019 (1) SACR 1 (SCA)

away the firearm, which he did. It is on this basis that the accused's action was not planned or premeditated. Counsel, acknowledging that despite the period not having to be long it is crucial to establish when the intention was formed.

[54] Ms Engelbrecht countered the submission that the utterances and the conduct of the accused immediately after the collision, namely the insults at Rock and arming himself with a firearm immediately after the collision, the testimony of Tshabalala that the accused said that he is not afraid to go to jail, Nokayi's testimony that accused paced up and down brandishing the firearm should be among the considerations when the Court determines whether there was planning and premeditation before the shooting. The State submitted that the accused had reconciled himself with the consequences of a jail term that was to follow from his actions.

[55] The fact that the accused deemed it necessary after the collision to arm himself with a firearm is telling on its own. He declined the invitation to explain what happened from those who were not responsible for the collision especially Dube whose arms were raised with palms facing outward, a position of surrender. He fired two warning shots, and nobody attacked him before and after the warning shots. His own brother, in corroboration of the evidence of the other witnesses, neither saw a firearm on Dube nor a glass on Khumalo. The accused's version in this regard is contrived. The objective facts do not support his version that he was in imminent danger. His testimony regarding the purported glass held by Khumalo is that he could have used it to injure him. This version is farfetched, fallacious and untenable.

- [56] I am satisfied that the circumstances under which the shooting of both deceased occurred justifies the finding that it was premeditated. It is fanciful that merely witnessing Dube slapping Rock led him to conclude that the same may apply to him. Clearly, Dube's frustration was directed at Rock, correctly so under the circumstances, for having been on a frolic of his own and being involved in a collision thereafter. There was no reason for the accused to have produced his firearm. He formed the intention from the moment he took out the firearm from his vehicle.

The attempted murder charges

- [57] Counts 3, 4, 5 and 6 involve attempted murder charges against the state witnesses Nokayi, Mogorosi, Gaolehelwe and Tshabalala. The State is alleging that the accused intentionally attempted to kill them by firing shots at them with a 9mm firearm. This was a moving scene where the witnesses observed the incident from different vantage points. The common thread is that when the accused fired the shots at them they were all around the white Fortuner. They observed shots being directed at them. The accused fired shots randomly in their direction. I say so because, at some point, when the shots struck Dube, for example, he was standing next to or within close proximity of the white Fortuner in which Mogorosi and Nokayi were sitting. Gaolehelwe and Tshabalala were also close by. This assertion is supported by bullet holes which were exhibited on the white Fortuner.
- [58] It is reasonable to infer that the continued and persistent firing, even after Dube and Khumalo had been shot and had fallen to the ground, can only support the contention that the attack on the remaining witnesses were made with the intention to kill them. When they fled they also ran in the same direction. The shots were directed at them randomly. They were not warning shots because they were in flight and Dube and

Khumalo were eliminated. It is safe to infer that other than the two warning shots, the three that were directly aimed at Dube, the one that struck Khumalo, the rest were fired randomly in the direction in which the deceased and witnesses were. The absurdity of the arithmetic by the defence that there must have been 12 – 14 shots fired at the witnesses and if a total of six comprising the warning shots and those fired at the deceased, it would translate into a total of 18 – 20 spent cartridges. I have already dealt with the aspect regarding how the witnesses perceived the shots. The submission is fallacious.

[59] Snyman¹⁴ succinctly summarised the general rules relating to our law as follows:

1. A person is guilty of attempting to commit a crime if, intending to commit that crime, she [or he] unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime.
2. A person is guilty of attempting to commit a crime even though:
 - (a) The commission of the crime is impossible, if it would have been possible in the factual circumstances in which she [or he] believes exist or will exist at the relevant time,
 - (b) She [or he] voluntarily withdraws from its commission after her [or his] conduct has reached the commencement of the execution of the intended crime.

[60] The SCA has elaborated on this aspect in *S v Du Plessis*¹⁵ when it elucidated:

‘Clearly the decision in any particular case as to whether or not, at the moment of interruption or prevention, the conduct of the accused had progressed beyond the

¹⁴ Ibid Page 242

¹⁵ 1981 (3) SA 382 (A) 399H – 400A

stage of preparation and constituted a commencement of the consummation must in the last resort become a factual enquiry relating to the particular circumstances of the case in which the following factors, amongst others, would play a part: whether at that stage the accused had made up his mind to commit the crime, the degree of proximity or remoteness which that arrested conduct bore to what would have been the final act required for the commission of the crime and, generally, considerations of practical common sense. I doubt whether any greater precision than this can be achieved.’

- [61] When Dube purportedly spoke in a language he claims he did not understand, he made the unwarranted assumptions which he failed to explain in court on what he thought Dube may have said or meant. His utterances, coupled with his conduct, from the time he removed the firearm from his vehicle until he emptied the magazine at the scene, are preparatory tell tales; The accused was, in my view, trigger happy and fired shots without concern for the consequences of his conduct. He intended to kill everyone who he thought was associated with Rock and the people in the white Fortuner, hence the phrase “*these people want to fight with me.*” In instances of this nature, *dolus eventualis* is sufficient.¹⁶

I am therefore satisfied that the accused attempted to kill Nokayi, Mogorosi, Gaolehelwe and Tshabalala.

Counts 8 and 9: contravention of s 120(3)(b) of the Firearms Control Act 60 of 2000 and a contravention of s 120(6)(a) r/w ss 1, 103, 120(1)(a), 121, r/w Schedule 4

- [62] Under this head, the State’s allegation was that the accused discharged or handled a firearm likely to injure or endanger the property or members of the public. This charge applies to the general public but also

¹⁶ Huebsch 1953 (2) SA 561 (A) at 567; Botha 1959 (1) SA 547 (O) at 551 – 552

includes the complainants in the attempted murder counts. Would a finding of guilt on this count result in a duplication of charges since the accused was found to have attempted to kill the four complainants? Ms April stood by the prepared heads of Mr Steynberg which contended that that ought to be the outcome.

[63] I take a cue from *S v Dlamini*¹⁷ where the SCA explained:

‘A brief consideration of the principles regarding duplication of convictions is apposite. Section 83 of the Criminal Procedure Act 51 of 1977 enables the state to draft charges as widely as it may deem necessary, to the extent that it may technically amount to a duplication of charges. That the law permits. But what is not permitted is duplication of convictions, in order to safeguard an accused against being convicted twice in the same case for the same offence. As stated by Cachalia JA, where the application of the two tests to determine whether there has been a duplication of convictions yields no clear result, a court is called upon to apply its common sense, wisdom, experience and sense of fairness to reach a decision.’

[64] Ms Engelbrecht conceded, correctly so in my view, that should the court find that the evidence established the accused’s guilt in the attempted murder charges, it would then amount to a duplication of convictions. I therefore find that the accused stands to be acquitted on count 8. The same argument applies to Count 9: pointing of a firearm.

[65] On a conspectus of the evidence in this case I am satisfied that the State has proved its case beyond reasonable doubt in respect of murder and attempted murder counts and return the following verdicts against the accused:

¹⁷ 2012 (2) SACR 1 (SCA) para 55

Count 1: The accused is found guilty of murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997, with *dolus directus* as the form of intent.

Count 2: The accused is found guilty of murder, read with the provisions of s 51(1) of Act 105 of 1997, with *dolus directus* as the form of intent.

Count 3: The accused is found guilty of attempted murder, read with the provisions of section 51(1) of Act 105 of 1997.

Count 4: The accused is found guilty of attempted murder, read with the provisions of section 51(1) of Act 105 of 1997.

Count 5: The accused is found guilty of attempted murder, read with the provisions of section 51(1) of Act 105 of 1997.

Count 6: The accused is found guilty of attempted murder, read with the provisions of section 51(1) of Act 105 of 1997.

Count 7: The accused was acquitted in terms of s 174 of the Criminal Procedure Act 51 of 1977.

Count 8: The accused is found not guilty and is discharged.

Count 9: The accused is found not guilty and is discharged.

MAMOSEBO J

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the State
Instructed by:

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Office of the Director Public Prosecutions

For the Accused:
Instructed by:

Ms B April
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