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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

**Case Number: SS084/2022
DPP Ref: 10/2/11/1 – 2022/28**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

01 MAY 2026

DATE

SIGNATURE

In the matter between:

THE STATE

and

DIMAKATSO KHANG

Accused 1

MASHUDU MICHAEL TSHIFHANGO

Accused 2

MZWANDILE HLOPE

Accused 3

MICHAEL PHUNGO

Accused 4

LUCAS JOHANNES VAN DER NEST

Accused 5

JUDGMENT

MBONGWE, J:

[1] The five accused, who are members of the South African Police Service, stand before this court arraigned on the following charges:

[2] COUNT 1

Murder read with the provisions of Section 51(1) of Act 105 of 1997, and further read with the provisions of Section 257 of Act 51 of 1977. The victim ('the deceased') was Nicholas Philani Ngcobo, an adult male.

[3] COUNTS 2, 3 & 4

Attempted Murder read with the provisions of Section 51(2) of Act 105 of 1997 and further read with the provisions of Section 257 of the Criminal Procedure Act 51 of 1977. The targeted victims in counts 2,3 and 4 were:

3.1 Given Mapamela, an adult male;

3.2 Mxolisi Ncube, an adult male, and;

3.3 Mhlengi Ndlovu, an adult male.

[4] Defeating or obstructing the course of justice. Included in this charge were:

4.1 The alleged failure by the Accused to disclose to Sergeant Maluleka that both the police vehicle the Accused were travelling in and the deceased's vehicle formed part of the crime scene and had to be processed by him.

4.2 Accused 5's planting of a toy gun near the body of the deceased was intended to fortify the false narrative of Accused 2 and 3 that there had been a shootout between them, on the one side, and the deceased and Mhlengi, on the other.

4.3 By their said conduct, Accused 5, Accused 2 and Accused 3 interfered with the crime scene and thereby hindered or obstructed the IPID official from conducting full investigations and exercising his functions and powers fully. The conduct of Accused 5, Accused 2 and Accused 3 was in contravention of the provisions of Section 33(1) read with Sections 1, 28 and 29 of the Independent Police Investigative Directorate Act 1, 2011.

4.4 The state alleged that Accused 5, Accused 2 and Accused 3 had acted in the furtherance of a common purpose in this regard.

BACKGROUND FACTS

- [5] The charges against all the Accused emanate from events that occurred in Mofolo South, Soweto, on 1 February 2016 when the accused, while patrolling in a police Toyota Quantum vehicle, noticed a stationary Toyota double cab bakkie ('the bakkie') with four male occupants parked near a bottle store.
- [6] The police made a u - turn and drove past the bakkie again. The deceased, being the driver of the bakkie, started driving in the direction of the police vehicle and drove past it. The police followed the bakkie for a while before the deceased picked up speed. The police gave chase along Aaron Motsoaledi Road. The deceased turned into Sekhukhune Street and subsequently turned into Mbangeni Street.
- [7] According to the witnesses, Mxolisi Ncube and Mhlengi, who were travelling with the deceased, the deceased lost control and veered into the veld, but managed to drive back onto the tarred road on Mbangeni Street. Mxolisi Ncube, who was sitting in the front passenger seat, pulled the handbrake causing the

bakkie to stop on the pavement of the corner house on the left side of Mbangeni. The bakkie was facing the residence of the witness, Mr Sithole.

[8] The deceased and Mr Mhlengi came out of the bakkie from the right-hand side doors and ran into the open veld between the residence of Mr Sithole, and the river with reeds. There is a continuous wall at the back of the houses on the left side of veld. Mhlengi Ndlovu and the deceased ran past Mr Sithole who was standing in his yard. Accused 2 and 3 ran past Sithole as they pursued the deceased and Mhlengi and firing gunshots at them.

[9] From observation of the scene during the inspection in loco and the pointing out, the body of the deceased had laid about 1,5 metres to the end of the wall. It transpired that the point at which the body lay was at the back of the deceased's residence.

REPRESENTATION

[10] The parties were represented as follows:

10.1 Ms Williams, from the office of the NDPP, Johannesburg, appeared for the State.

10.2 All five accused were legally represented throughout the trial as follows:

10.2.1 Accused 1 was represented by Mr Sekgatja;

10.2.2 Accused 2 and 3 were represented by Mr Selala;

10.2.3 Accused 4 and 5 were represented by Mr Bouwer.

PLEAS

[11] All five accused pleaded not guilty to the charges against them and proffered no plea explanations in terms of Section 115 of Act 51 of 1977.

FORMAL ADMISSIONS

[12] The five accused tendered formal written admission in terms of Section 220 of Act 51 of 1977 which were handed in as Exhibit C wherein they is admitted that:

- a. The deceased was the person named in Count 1 of the indictment, to wit, Nicholas Philani Ngcobo.
- b. Except the gunshot wound, the body of the deceased had sustained no further injuries when a post-mortem examination was conducted thereon.
- c. Dr Funeka Nciweni, a pathologist, conducted the post-mortem examination on the body of the deceased on 2 February 2016.
- d. During the post-mortem, Dr Nciweni extracted a sample of the blood of the deceased and sealed it in a polystyrene container which she sealed with seal numbered PMK273259.
- e. The sealed blood sample was forwarded to the Forensic Chemistry Laboratory, Johannesburg.
- f. That Maliviwe Guza, a forensic analyst attached to the Forensic Chemistry Laboratory of the Department of Health, Johannesburg, received the sealed container and conducted a forensic examination on the contents thereof.
- g. That Maliviwe Guza stated his findings in a statement marked exhibit D. The correctness of the facts and findings of Maliviwe Guza as recorded in Exhibit D was admitted.

h. As at the time and date of the incident, 01 February 2016, all five Accused were on duty and were members of the South African Police Service stationed at the Moroka Police Station, in Soweto,

i. That the Accused were tasked to conduct crime prevention duties.

[13] Further formal admissions in terms of Section 220 were tendered by the accused during the trial and are contained in Exhibit U. On 1 February 2016, the accused had been issued with and had in their possession, individually, the following firearms:

13.1 **ACCUSED 1**

- a) was in possession of a 9mm Vektor Z88 pistol with serial number Q[...].
- b) On 19 February 2021, the said firearm was seized without a magazine by Sergeant MP Mukwevho and sealed in a forensic evidence bag with number PA4004249O83.
- c) The sealed forensic evidence bag was booked into the SAP 13 register with reference number SAP 13/211/2021.
- d) The sealed forensic evidence bag with serial number PA4004249O83 was correctly forwarded to the Forensic Science Laboratory, Pretoria.
- e) The said sealed forensic evidence bag was with the serial number PA400429083 was booked into the administration unit at the ballistic section of the Forensic Science Laboratory, Pretoria, with the seal intact and without tampering with the contents thereof.

13.2 **ACCUSED 2**

- a) Accused 2 was in possession of a 9mm Parabellum Calibre LEW Model Z88 semi-automatic pistol with the serial number Q[...]2 which he surrendered to the South African Police Service during 2018.
- b) On 1 February 2016 Accused 2 was issued with a 5.56 X 45mm Calibre Lew model R5 full-automatic assault rifle with serial number 3[...] and 35 cartridges.
- c) This rifle was seized on 2 February 2016 together with a magazine with thirty (30) 5.56X45mm calibre Lew cartridges and sealed in a forensic evidence bag with the seal ICD-10435 by Sergeant Terrence Khakhu.
- d) The sealed forensic evidence bag was booked into the SAP 13 register with reference number SAP13/357/2016 (Exhibit LL).
- e) On 5 FEBRUARY 2016, Mr Stanton Govender, an IPID Investigating officer, booked out the sealed forensic evidence bag with the seal ICD-10435, and forwarded it to the Forensic Science Laboratory, Pretoria.
- f) The sealed forensic evidence bag with seal ICD-10435 was booked into the administration unit of the Forensic Science Laboratory, Pretoria, with the seal intact and without tampering with the contents thereof.

13.3 **ACCUSED 3**

- a) Accused 3 was in possession of a 9mm Parabellum calibre LEW model Z88 semi-automatic pistol with serial number Q[...]3.
- b) The said firearm was seized on 2 February 2016 together with a magazine and eleven (11) 9mm Parabellum cartridges, by Sergeant

Terrence Khakhu and sealed in a forensic evidence bag with the number PA3000616952.

c) The said forensic evidence bag was booked into the SAP13 register with reference number SAP13/357/2016 (Exhibit LL) and forwarded to the Forensic Science Laboratory in Pretoria.

b) The sealed forensic evidence bag with seal PA4001958598 was booked into the administration unit of the Forensic Science Laboratory, Pretoria, with the seal intact and without tampering with the contents thereof.

13.4 **ACCUSED 4**

a) On 1 February 2016 at about 12h10, Accused 5 was issued with a 9mm Parabellum LEW model Z88 semi-automatic pistol with serial number Q[...]4, a magazine and fifteen (15) 9mm cartridges.

b) The following morning, on 2 February 2016 at 06h29, Accused 5 booked the said firearm with serial number Q[...]4, a magazine and fifteen (15) 9mm cartridges back to the SAPS Moroka Crime Prevention Office.

c) On 19 February 2021, the said firearm was, without a magazine, was sealed in a forensic evidence bag with number PA4004249082 by Sergeant MP Mukwevho.

d) The sealed forensic evidence bag was booked into the SAP13 register with reference number SAP13/211/2021.

- e) The said sealed forensic evidence bag with the serial number PA4004249082 was forwarded to the Forensic Science Laboratory, Pretoria, and booked into the administration unit of the Forensic Science Laboratory with the seal intact and without tampering with the contents thereof.

EVIDENCE FOR THE STATE

[14] The State called 16 witnesses whose evidence is paraphrased in this judgment.

MR BONGANI SITHOLE ('Sithole')

[15] Mr Sithole resides at the corner house facing Mbangeni Street and is situated next to a stretch of open veld lying between his house and the river with the reeds. The deceased and Mr Mhlengi Ndlovu had run on this veld past Mr Sithole's house and were pursued by Accused 2 and 3.

[16] Mr Sithole testified that late afternoon on 1 February 2016, he was walking into his yard on Mbangeni Street, when he heard gunshots. He could not see where the gunshots were being fired from. He went into the house to warn his mother to move away from the window, where she usually sat when watching television, as the gunshots were coming in the direction of the front of the house.

[17] Sithole had gone outside again to look for his children when he noticed a Toyota bakkie was driving towards his house. The bakkie stopped at the corner on the left-hand side of Mbangeni Street, facing his house. He noticed two men alighting from the doors on the right of the double-cab bakkie. He also noticed another vehicle, the Quantum, with screeching tyres, driving in pursuit of the bakkie. He heard more gunshots being fired from the Quantum.

[18] The two men who alighted from the bakkie ran past him and onto the veld. The police Quantum stopped on the right-hand side of the road facing the veld while gunshots continued. Two police officers, Accused 2 and Accused 3 alighted from the Quantum and ran after the two fleeing men.

- [19] Sithole asked the two police officers as they ran past him to stop shooting as there were children playing in the vicinity. Sithole lost sight of Accused 2 and 3 after they had turned at a curved part of the wall, but he could still hear the firing of gunshots.
- [20] Sithole subsequently saw Accused 2 and 3 walking back to the Quantum. He walked in their opposite direction towards where the deceased and Mhlengi had run. Sithole overheard one of the two police officers saying to the other: "I have created a problem." It was Accused 2 telling Accused 3. Sithole testified that he knew Accused 3 by sight and that they had attended the same school. Sithole further testified that Accused 2 had a big firearm, while Accused 3 had a smaller firearm.
- [21] Sithole testified that he arrived at a spot where he noticed the body of the deceased lying on its back on the ground. Members of the community came to the scene and looked at the body of the deceased. He noticed that some of these members appeared to know who the deceased was.
- [22] Sithole testified that he noticed Accused 2 and 3, accompanied by a white man, Accused 5, returning to the body of the deceased. The witness testified that he had known Accused 5 before. Accused 2, Accused 3 and Accused 5 were engaged in a conversation, but he could not hear what was being said.
- [23] Accused 5 ordered the community members, including Sithole, to go away. Sithole walked into the nearby passage that was about 12 metres from the body of the deceased. He stood at the corner where he could still see the body of the deceased. Accused 5 disappeared for a short while and returned to the body. Sithole testified that he saw Accused 5 planting a firearm near the body of the deceased. That firearm had not been there earlier when he had earlier been to look at the body of the deceased, and before Accused 5 had chased them away.
- [24] I pause to mention that the passage Mr Sithole went to, was the same passage Mhlengi had used to escape when he was seen by the wife of the deceased. The deceased's wife herself walked in that passage to go to the scene, and,

lastly, it was the same passage that Accused 2 and 3 stood on while guarding the body of the deceased.

[25] At the trial, Sithole had made a mark on a photo presented to him by the Prosecutor, indicating where, in relation to the body of the deceased, Accused 5 had planted the firearm.

[26] Sithole testified that an argument ensued between community members and the police, after Accused 5 had announced that there had been a shoot-out between the police and the deceased and Mhlengi – a statement the community disputed. This had resulted in Accused 5 ordering the community members to leave the scene.

[27] According to Sithole, the two men from the bakkie who ran past him did not have firearms. He further testified that one sandal of the deceased had come off his foot and was left near Sithole's house.

INSPECTION IN LOCO

[28] An inspection in loco was conducted at the scene in Mofolo South, where points of relevance were pointed out by Sithole, and measurements were taken.

MR MHLENGI NDLOVU ('Mhlengi') (second State witness)

[29] Mhlengi testified that in the afternoon of 1 February 2016, he knocked off from work and proceeded to Ikwezi Railway Station, Soweto, where he was to meet with the deceased around 16h00. He found the deceased in the company of Given Mapamela and Mxolisi Ncube. The purpose of meeting was for all four of them to work together to assist Given move his belongings to his new residence in Dobsonville.

[30] They drove in the deceased's twin-cab Toyota bakkie and stopped at Tshabalala bottle store in Mofolo South, where the deceased sent him to go

and buy alcohol. On his way back, he noticed a police Quantum vehicle driving past. He got into the bakkie, and the deceased drove off. Mxolisi Ncube was sitting on the front passenger seat, while Given Mapamela sat behind Mxolisi on the rear seat. Mhlengi also sat on the back seat behind the deceased. As the deceased drove, the Quantum followed the bakkie. The deceased started accelerating when driving on Elias Motsoaledi Drive. Asked why he was speeding, the deceased replied that he had been drinking alcohol earlier and did not want to be arrested for drunk driving. The deceased suggested that Mxolisi throw the alcohol out of the window. The police Quantum also picked up speed in pursuit of the bakkie.

[31] The deceased drove into Sekhukhune Street near Mofolo South Clinic. The Quantum followed. Mhlengi testified that he soon heard the sound of gunshots. There was only the bakkie and the Quantum in the vicinity at that stage. The deceased lost control of the vehicle at a curve on Mbangeni Street, resulting in the bakkie veering off the road and onto the veld. Mhlengi testified that he heard more gunshots. The deceased had managed to drive back onto the tarred road, where Mxolisi Ncube pulled the handbrake, and the bakkie came to a standstill shortly thereafter on the left pavement of the corner house on Mbangeni Street.

[32] Mhlengi and the deceased alighted through the right hand side doors of the bakkie and ran in the direction of the open veld between Sithole's house and the river. More gunshots were fired at them by the police. Mhlengi and the deceased continued to run between the wall behind the houses on the left and the river with reeds on the right-hand side.

[33] The shooting stopped temporarily after the deceased and Mhlengi had turned at the curved portion of the wall but started again when the police had also turned and could see them. Mhlengi testified that he was ahead of the deceased and could hear by the sounds that the gunshots were fired from two different sizes of firearms, one big and the other smaller.

[34] Mhlengi tripped and fell at some stage and saw the deceased behind him as well as the two police officers further behind. He held his two cellular phones in

his hands and ran into the passage left to escape closer to the end of the wall. He could no longer see the deceased nor the police behind. He ran until he got to a park where he hid himself.

[35] Mhlengi testified that no one in the bakkie they drove in was in possession of a firearm. He further testified that he was still hiding at the park when he received a call on his cell phone that the deceased had been fatally shot by the police.

[36] In response to a question, the witness testified that he later went home and to the scene the following morning. He was never at the police station nor was he ever charged for any offence about the events of 1 February 2016.

MR MXOLISI NCUBE (third state witness)

[37] Mr. Mxolisi Ncube (Ncube), testified that on the 1st of February, 2021, he was with the deceased and Given Mapamela the whole day. In the afternoon they drove in the deceased's bakkie to Ikwezi Railway Station to pick up Mhlengi Ndlovu before proceeding to move the belongings of Given to his new residence in Dobsonville.

[38] After Mhlengi had arrived, they drove to Mofolo South, where they stopped at Tshabalala Bottle Store. The deceased sent Mhlengi to buy alcohol. They were still waiting for Mhlengi when the witness saw a police vehicle driving past slowly and noticed that the police were looking at them "in a bad way" (suspiciously).

[39] When Mhlengi returned, the deceased started driving in the direction of the Quantum and passed it. The police followed the deceased's vehicle. The deceased was driving along Aaron Motsoaledi Drive when he increased the speed ostensibly to leave the police, but the latter did the same and tailed the bakkie. The deceased turned into Sekhukhune Street near Mofolo South clinic. There was no longer traffic after leaving Aaron Motsoaledi Drive. The police started shooting.

- [40] The witness testified that they had asked the deceased why he was speeding and he had told them that he did not want to be arrested as he had been drinking alcohol during the day.
- [41] In response to a question, the witness testified that the police had never stopped them, nor given an indication that the deceased should stop.
- [42] The deceased lost control of the vehicle at the curve along Mbangeni Street, and the bakkie veered onto the veld. There were gunshots fired by the police. The deceased had regained control of the bakkie and had driven back onto the tarred road when Mxolisi pulled the handbrake, but the bakkie did not stop immediately - it eventually stopped on the pavement of the corner house. The deceased and Mhlengi Ndlovu hastily alighted and ran towards the open veld. Before that, Mhlengi had stated that he did not have a (valid) passport.
- [43] The witness testified that police officers ran after the deceased and Mhlengi and fired gunshots at them. The witness testified that he did not see how many police officers had pursued the deceased and Mhlengi.
- [44] The witness further testified that he and Given Ncube had remained in the vehicle. Three police officers, which the witness pointed out, being, Accused 1, Accused 4 and Accused 5, had approached them from the Quantum pointing firearms at them. Accused 5 interrogated the witness and Given demanding to know where they were coming from and heading to. The police then searched the witness, Given and the bakkie, but found nothing, except two cellphones which the police confiscated. The witness and Given were then handcuffed and ordered to lie down on the ground near the bakkie.
- [45] Another police officer arrived and spoke to Accused 5. The two officers then walked to the veld.
- [46] The witness testified that he noticed one of the officers who had pursued the deceased and Mhlengi returning to the Quantum. The witness identified that officer as Accused 3 who took something, the witness could not identify, from the Quantum and walked back to the veld.

[47] Accused 5 returned after a while and told the witness and Given that there had been a shootout between the police, the deceased and Mhlengi. The witness testified that he told Accused 5 that the deceased and Mhlengi did not have firearms. Accused 5 told them that Mhlengi had run away and that the deceased was fatally shot. Accused 5 further told the witness that shooting at the police was a serious crime that can result in the witness and Given spending the rest of their lives in prison and that the truth will set them free, if they stated that the deceased had been in possession of a firearm.

[48] The witness testified that he and Given were taken and placed in the Quantum and later taken to the Moroka police station. They were not booked in and were released around 02h00 in the morning. Their cell phones that had been confiscated at the scene were returned to them.

[49] At this stage, the court adjourned before the witness could finalize his evidence in chief.

[50] When the court resumed on the Monday following, counsel for Accused 4 and 5 sought and was granted an opportunity to address the court. He then read an affidavit from his clients seeking my recusal as they felt the court was biased against them. Counsel for the state objected contending that there was no basis for the application and that not much evidence had been led by the state at that stage. Counsel for accused 1, without saying much, contended that the recusal application was not prematurely brought. Counsel for Accused 2 and 3 told the court that he had no instructions regarding the recusal application. In an ex-tempore judgment, I found that there was no sound reason for me to recuse myself and dismissed the application accordingly.

MR GIVEN MAPAMELA (third state witness)

[51] Mr Mapamela testified that on 1 February 2016 at about 16h00, he, the deceased and Mxolisi Ncube drove in the deceased's vehicle to Ikwezi Railway Station to pick up Mhlengi Ndlovu, who was to assist them in moving the witness's belongings from Mofolo South to his new residence in Dobsonville,

Soweto. They were on their way to the deceased's house when the deceased decided they should stop at a bottle store to buy alcohol.

[52] The deceased parked his bakkie facing the bottle store and sent Mhlengi to go and buy alcohol inside. While waiting, the witness noticed a marked police Quantum vehicle driving past. When Mhlengi returned, the deceased drove off. The police followed the deceased's vehicle. The deceased panicked ostensibly as he had consumed alcohol during the day. There was, however, no indication that the police wanted the deceased to stop. As a result of panic, the deceased picked up speed purportedly to escape from the police. The police also picked up speed in pursuit of the bakkie.

[53] The deceased was driving along Mbangeni Street when he lost control of the vehicle at a curve. The vehicle veered into the veld and hit a rock. The witness testified that it was at that stage that he heard gunshots being fired from behind them. The deceased drove the vehicle back onto the tarred road. Mxolisi pulled the handbrake of the vehicle. As soon as the vehicle stopped, the deceased and Mhlengi alighted and ran towards the veld. The witness testified that he noticed accused 2 and accused 3 running after the deceased and Mhlengi while firing gunshots at them. Accused 1, Accused 4 and Accused 5 came to the bakkie. Accused 4 and Accused 5 instructed the witness and Mxolisi to come out of the vehicle and lie down on the ground next to the bakkie.

[54] Accused 5 left and walked towards the veld where the deceased and Mhlengi ran to. After a while, Accused 5 returned and told the witness and Mxolisi that the deceased had been fatally shot in a shoot-out with the police. Accused 5 also asked the witness if he knew that the deceased was carrying a firearm. Accused 5 further told the witness that the law will be on their side if they say that the deceased had a firearm. Accused 1 and Accused 4 were present when Accused 5 made this suggestion. The witness testified that none of them in the bakkie had a firearm.

PHINDILE SITHOLE

[55] The witness, Ms Phindile Sithole, was the wife of the deceased. She testified that on the afternoon of 1 February 2016, she was in the house when she heard the sound of gunshots. She went out to look for her children who were playing outside. She saw Mhlengi Ndlovu running in the passage next to her house. Mhlengi had continued to run without looking back. He had nothing in his hands.

[56] The witness testified that she then heard her husband calling her and stating that he had been shot. The witness proceeded to the passage to go to the veld from where her husband had come. She was prevented by a policeman carrying a big firearm from going to the veld. She subsequently was able to get to the veld and to the body of her husband after her landlord had intervened. She testified further that many people had arrived and were looking at the body of the deceased. The witness testified that she was approached by a white male police officer who asked her how she was related to the deceased. She told the officer that the deceased was the father of her child. In response to a question, the witness testified that there was no firearm near the body of the deceased when she got to and looked at it.

[57] Ms Sithole testified further that the following morning, she was accompanied by other members of the family to the scene with a view to cleansing the area where the body of the deceased had laid. It was during the cleansing of that area that a family member picked up three spent cartridge cases which she handed to the witness. The witness handed those empty cartridge cases to the IPID investigator, Mr Govender, when he came to her house.

SERGEANT DOUBT MALULEKE

[58] Sergeant Maluleke, a member of the Local Criminal Records Centre (LCRC) stationed at Protea Glen, Soweto, testified that he received a telephone call at about 18h40 on 1 February 2016 to attend a crime scene in Mofolo South. He was also contacted by Accused 4 with the same request. He arrived at the scene at approximately 19h00. He introduced himself to the police officers present and explained the reason for his presence there. He then inquired who

was in charge of the crime scene, and he was directed to Accused 4. He then noted the names and details of accused 4.

[59] The witness testified that Accused 4 related to him the events leading to the death of the deceased and also pointed out the relevant points on the scene, including the exhibits thereon. The witness wrote down all the information he received from Accused 4 (Exhibit P). He also took photos of the crime scene and of the various locations where exhibits were found. He compiled an album (Exhibit E), giving a detailed explanation of each item on the photos. Of importance in this regard were the following exhibits:

<u>ITEM</u>	<u>EXHIBIT</u>	<u>LOCATION</u>
Toy gun	(A1)	near the body of the deceased.
Four (4) fired 9mm Calibre cartridge cases	A2, A3, A4 & A5	on tarred road near the edge of the veld
Three (3) spent (R5) 5.56 x 45mm Calibre cartridge cases	A6; A7; A8	on tarred road Close to the veld
Two (2) spent 9mm calibre cartridge cases	fired from the firearm of Accused 3	where the body of deceased had laid

One (1) fired 5.56 x 45mm	fired from the R5 rifle	In the vicinity of
Calibre cartridge case	used by accused 2	The body of the
		Deceased

[60] In response to a question, the witness testified that neither Accused 4 nor any of the police officers involved in the incident had advised him that the Toyota bakkie of the deceased and the police Quantum parked at the scene formed part of the crime scene. That had resulted in him not processing the two vehicles.

CAPTAIN NTINI

[61] Captain Ntini is a forensic analyst attached to the Forensic Science Laboratory, Pretoria. He gave evidence as a ballistic expert in this case. Captain Ntini testified that he received sealed exhibits that were seized at the crime scene by Sergeant Maluleke, including the firearms of Accused 2 and Accused 3. He conducted ballistic tests on the exhibits and concluded as follows:

61.1 The toy gun, Exhibit A1, that was found near the body of the deceased was not regarded as a firearm and was incapable of discharging ammunition.

61.2 The three spent cartridges that were found by the deceased's family during the cleansing, to wit: 2 X 9mm calibre cartridge cases were fired from the firearm used by Accused 3, and; 1 X spent 5.56 x 45mm Calibre cartridge case was fired from the R5 rifle used by accused 2.

61.3 The following firearms were not linked to any of the spent cartridges found at the crime scene:- the 9mm Calibre firearms that were in the possession of Accused 1, Accused 2, Accused 4 and Accused 5.

61.4 There were three spent 9mm calibre cartridges that were found on the tarred road; A3, A4 and A5 that were fired from two different unidentified firearms.

61.5 According to the witness, the bullet that killed the deceased entered through his upper lip and moved towards the back of his head. This, according to the witness, meant that the deceased was either facing the shooter or had turned his head towards the shooter when the bullet struck him.

61.6 The witness testified that the bullet that killed the deceased was fired from a distance; it was not at close-range shot. This was in line with the evidence of Accused 2, who testified, without stating that he shot the deceased, that he was about 40 metres away from the deceased when he saw him fall to the ground

61.7 The witness testified that during a consultation with Dr Nciweni, the latter had informed him that the bullet that hit and killed the deceased had fragmented into 12 tiny particles that could not be retrieved. The witness testified that only ammunition fired from a high velocity rifle, a 5.56 X 45mm rifle, fragments multiple times upon contact with a target. Ammunition of that calibre cannot be discharged by a pistol. The witness testified that the R5 rifle that was used by Accused 2 is a 5,56 X 45mm assault rifle.

it is important to state at this stage that even on his own version, Accused 2 had discharged five rounds at the scene from his R5 rifle. Three spent cartridges of the five were found on the tarred road and one.....Circumstantially and without doubt, if the evidence of Sithole and the conduct of Accused 2, 3 and 5 regarding the planting of the toy gun, speaks volumes. Such conduct would not have been necessary had Accused 2 not shot the deceased.

Mr SPAC SEABELA

[62] Mr Seabela testified that on 1 February 2016, he was on duty at Moroka Police Station where he was employed as a Fleet Manager responsible for the issuing of SAPS vehicles to police officers. He testified, in relation to the police Quantum vehicle that was used by the Accused on that day, that:

62.1 The Quantum was white in colour, marked with the police emblem. The Quantum was and was fitted with a siren. It did not have a blue light fitted to it. The witness disputed a suggestion by counsel for Accused 2 and Accused 3 that a blue light in police vehicles is movable and could be placed anywhere in the vehicle. The witness testified that SAPS vehicles do not have movable blue lights and that if a vehicle has a blue light, such a light would be fitted in a particular place and cannot be moved around.

SERGEANT KHAKHU

[63] Sergeant Khakhu testified that he is a member of the South African Police stationed at Moroka Police Station Crime Office. On 1 February 2016 at 19h00, he received a telephone call to attend a crime scene at Mofolo South. He proceeded to the crime scene, where he arrived 25 minutes later at 19 hours 25.

[64] Upon his arrival, he found Accused 1 and Accused 2 inside a police Quantum vehicle. He inquired what had transpired. Accused 2 informed him that there had been a shootout with the police and that a person had been killed. Accused 2 led the witness to the body of the deceased. The witness further testified that he had observed that Sergeant Maluleke of the LCRC was already busy collecting exhibits at the scene. A number of police officers were present at the scene when the witness arrived.

[65] Sergeant Khakhu testified that Accused 2 informed him that he and Accused 3 were involved in the shoot-out with two suspects. The witness then seized the firearms of both Accused 2 and Accused 3.

[66] In response to a question, the witness testified that he did not receive a complaint from any of the Accused that Sgt Maluleke was drunk, nor did he personally notice anything in the conduct of Sgt Maluleke suggesting that he was drunk.

[67] According to Sgt Khakhu, it was irregular for Sgt Maluleke to process the scene before he, or any member of the crime office, had arrived.

[68] The witness testified that he had opened an inquest docket under Moroka CAS 52/2/2016, as police officers were involved in the shoot-out that had resulted in the death of a civilian. The witness, however, did not investigate the matter, as the docket had to be handed over to IPID. He did not even follow up on the matter.

COLONEL LIDUVHA

[69] Colonel Lidavha testified that she was the duty officer at Moroka Police Station on 1 February 2016. She testified that as a duty officer, her duty was to attend to crime scene and give directives. On arrival at the crime scene in Mofolo South, she found Captain Chetty, the effective detective, and requested him to lead her to the senior of the crew members involved in the incident. Mr Chetty took her to Accused 5 who was standing near the Quantum.

[70] The witness requested Accused 5 to relate to her what had transpired. Accused 5 explained that they were conducting patrols in Mofolo South when they spotted a suspicious Toyota Bakkie and tried to stop it, but the driver did not stop. They gave chase in the police Quantum until the bakkie stopped at Mbangeni Street. The driver of the bakkie and a passenger alighted and ran onto the open veld. Accused 2 and Accused 3 pursued the two fleeing men who started shooting at them. A shoot-out ensued, and the deceased was fatally shot. Accused 5 informed the witness that the gun used by the suspects was later found at the scene.

[71] According to the witness, the scene had already been cleared when she arrived. She testified that it was irregular and that such should not have happened. Both IPID and herself had had to be present before the scene could be processed.

[72] The witness requested accused 5 to take her to the other members of his crew. Accused 5 took the witness back to the Quantum. The witness found accused 1, accused 2, accused 3, and accused 4 seated in the Quantum. The witness talked to those members who, she stated, looked traumatized. She talked to them about their well-being.

[73] The witness compiled Exhibit CC, her report on the incident as narrated to her by accused 5.

[74] In response to a question, the witness testified that Accused 5, as the most senior member of the crew, was responsible for his fellow crew members. No member of IPID was present at the scene when the witness arrived, she concluded.

MR STANTON GOVENDER

[75] Mr. Govender, a member of IPD, testified that he was the initial investigator of Moroka CAS 52/1/2016 and Moroka CAS 51/2/2016, being the respective inquest docket that was opened by Sgt Khakhu, and the attempted murder docket that was opened by Accused 2 and Accused 3, against the deceased and Mhlengi.

[76] Mr. Govender testified that he was an IPID Investigator. He received a call at 19h00 to attend a crime scene in Mofolo South, Soweto, on 1 February 2016. He arrived at the scene at 20h30.

[77] The witness testified that he had noticed, on arrival, that there was no crime scene; - as the scene was not cordoned off and exhibits had been cleared. According to this witness, the crime scene ought to have been cordoned off and no one allowed access to it, until IPID and other role players had arrived. This

witness testified that, due to the nature of this case, all police officers who were involved in the events at the crime scene were obliged to preserve the crime scene until an IPID officer arrived. In this instance, it was Accused 5, as the most senior crew member who was obliged to ensure that the scene was cordoned off and its integrity, including the evidence thereon, was preserved. This is so, as IPID, as an oversight body, has to ensure fairness and transparency in its investigations of the scene in instances where death had occurred as a result of police action. The witness testified further that, in terms of Section 29 of Act 1 of 2011, any police officer has a duty to ensure that IPD is immediately informed of a crime scene where death occurred as a result of police action as well as incidents where police firearms were discharged.

[78] According to Govender, Accused 2 and Accused 3 had opened an attempted murder docket, Moroka CAS 52/2/2016, and submitted complainant statements which were handed in as Exhibits HH and Exhibit JJ.

[79] Accused 1, Accused 4 and Accused 5 were requested by Govender to submit witness' statements as they were not regarded as suspects at the time. Govender, had requested his colleagues at IPD to assist him and obtaining the witness statements from Accused 1, Accused 4 and Accused 5. This was subsequently done by IPID officers, Mr. Thabani Zulu, Mr. Fete Mathoka. and Mr. Vusi Dlamini. These officials also testified in this court on the statements they obtained from accused 1, accused 4 and accused 5.

[80] All defence counsel strenuously raised issues regarding the status of these sworn statements, that is, the admissibility, the validity and the evidential value thereof. This notwithstanding the clarification by Govender that at the time the sworn statements were taken, Accused 1,3 and 5 were seen as witnesses to the attempted murder charges laid by Accused 2 and Accused 3 under Moroka CAS 52/2/2016. It had not been anticipated that the police officers would end up being Charged in respect of the inquest docket that Sgt Khakhu had opened.

[81] To avoid a simmering impasse and delay, this court accepted the sworn statements of Accused 1, 4 and 5 provisionally and called upon both counsel

for the state and for the defence to submit heads of argument, and that the final decision on those sworn statements and the reasons therefor, will be given in this judgment.

That is done later Under the heading ‘ANALYSIS’.

DOCTOR NCIWENI

[82] Doctor Nciweni testified that she is a pathologist and had performed the postmortem examination of the body of the deceased and compiled a report. She testified that she had observed, during the examination, that the body of the deceased had a 4mm by 5mm oval penetrating gunshot wound on the right upper lip, which was surrounded by a 1mm collar of abrasion situated 10mm below the nostril. The appearance of the wound was consistent with that of an entrance wound.

[83] The witness testified that the body of the deceased was X-rayed, and that from the X-ray, she counted 12 fragments of the ammunition that had penetrated the deceased and was located around the C1 (on the neck). Due to the anatomical position and tiny size of the fragments, she had determined that the fragments could not be extracted for later analysis by the relevant official.

[84] Doctor Nciweni determined that the cause of the death of the disease was a penetrating gunshot to the neck, via the right upper lip and to the oval cavity, where the ammunition fragmented. The fragments were buried in the soft tissues around level C1, which had fractured.

SECTION 174 OF ACT 51 OF 1977 APPLICATIONS

[85] At the close of the state’s case, counsel for the Accused brought applications in terms of Section 174 of ACT 51 OF 1977 for the discharge of the accused at the close of the state’s case. Counsel for the state opposed the applications. Considering the evidence that the state had led, I determined that the Accused

had a case to answer. The applications for the discharge of the accused were dismissed, accordingly.

THE DEFENCE

[86] Accused 1 elected not to give evidence and closed her case.

ACCUSED 2

[87] Accused 2 testified and confirmed that he was on duty on 1st February 2016 and that he was part of the crew with his co-accused. He testified that they were patrolling the area of Mofolo South and driving in a marked police Quantum vehicle. As they were driving, he noticed a suspicious Toyota bakkie with four occupants parked next to a bottle store. When the bakkie drove off, the witness and his crew decided to follow it. They indicated by sounding the siren and flashing a blue light for the bakkie to stop. The driver of the bakkie did not stop and, instead, accelerated. He drove recklessly and through red robots and stop signs in an attempt to escape from the police. The police pursued the bakkie until it came to a standstill, whereupon the driver and the front seat passenger alighted and ran towards the open veld.

[88] The Quantum parked behind the bakkie. The witness and Accused 3 alighted and pursued the fleeing men. The witness and accused 3 were about to turn at the corner of the wall when he heard gunshots being fired. Accused 2 testified that he took cover and cocked his R5 rifle. He peeped and saw the two men, each armed with a firearm. The men continued to run while firing gunshots backwards towards Accused 2 and Accused 3. The witness returned fire with his R5 rifle. Accused 3 was running on the side of the witness, and together, they continued shooting at the two fleeing men. According to Accused 2, he fired five shots from his rifle during the shootout, while the deceased and Mhlengi fired a lot of gunshots.

- [89] Accused 2 testified that at some stage he noticed that the deceased was running behind Mhlengi. Accused 2 testified that shortly thereafter, he saw the deceased falling to the ground. There was a distance of about 40 metres between him and the deceased when he fell down.
- [90] Accused 2 and Accused 3 continued to run towards the fallen deceased. Mhlengi had continued shooting until he reached the end of the wall, where he turned and disappeared.
- [91] Without stating that the deceased had sustained a fatal gunshot wound, Accused 2 testified that he (Accused 2) had returned to the Quantum to inform Accused 5 of what had transpired on the veld.
- [92] Accused 2 found Accused 1, Accused 4 and Accused 5 busy with the other two men who had remained in the deceased's bakkie. He and Accused 5 walked to the Quantum, where Accused 5 retrieved a radio before they returned to the scene where the body of the deceased was lying. Accused 5 called all the role players over the radio, alerting them of what had transpired at the scene.
- [93] Accused 2 testified that Captain Moshani arrived at the scene with Captain Chetty and Sergeant Khakhu.
- [94] Accused 2 had remained with Accused 3 standing at the passage close to the body of the deceased, keeping guard. Accused 2 testified that he had remained in that position until the body of the deceased was removed to the mortuary. Incidentally, Accused 3 had stated the same.
- [95] The witness testified that Accused 5 had already walked back to the vehicles when Sgt Khakhu arrived. Accused 2 testified that he did not recall seeing Accused 4, in the company of General Kekana and other officers, coming near the body of the deceased.
- [96] In response to a question, Accused 2 insisted that he only fired gunshots from his R5 when he and Accused 3 were shot at and were in danger after they had turned at the curved wall, chasing the deceased and Mhlengi.

[97] Accused 2 denied that he had fired shots from the R5 rifle before he and Accused 3 had begun chasing the deceased and Mhlengi on the veld, where they were being shot at.

[98] In cross-examination, Accused 2 testified that he first saw Mhlengi when the latter ran past in front of the approaching Quantum towards the veld. He saw Mhlengi again later that evening at the police station. The witness insisted that the Mhlengi who testified in court was not the person he had seen and chased at the scene. This despite Mhlengi's and other witnesses' evidence that Mhlengi ran to the veld with the deceased and was also seen by the deceased's wife running in the passage. Mhlengi testified that he never went to Moroka police station and that he was never called to that police station and charged.

CROSS- EXAM (PAGE 37 – 44)

Mr THOMAS FREDERICK WOLMARANS

[99] Mr. Wolmarans was called to testify on behalf of accused 2. More specifically, Mr. Wolmarans was called to dispute two (2) aspects in the ballistic evidence of Mr Ntini; namely, that only a 5,56 X 45mm assault rifle can discharge ammunition that fragments multiple times upon contact with a target / object, and, that a pistol is not capable of discharging that type of ammunition. The difference, Mr Ntini clarified, is the velocity in the R5 assault rifle and a pistol. In this regard, Mr. Wolmarans testified that ammunition fired from a .357 magnum does occasionally fragment on hitting a target. He could not, however, state the extent of the fragmentation, but conceded that it is the high velocity of a 5.56 X 45mm assault rifle that causes the multiple fragmentation of the ammunition.

[100] Mr. Wolmarans testified that there were self-made firearms that could discharge ammunition that fragments multiple times, but those had to be loaded or reloaded every time a shot was to be fired.

[101] Mr Wolmarans' evidence was of no assistance, nor was he a Ballistic expert.

ACCUSED 3

[102] Accused 3, Constable Hlope, confirmed that he was the driver of the marked police Quantum vehicle concerned in this matter on 1 February 2016. He testified that while driving on patrol in Mofolo South, he noticed a suspicious Toyota bakkie parked near a bottle store. He and his crew decided that the bakkie had to be stopped and searched. The police tried to stop the bakkie, but the driver did not stop. Instead, the driver had accelerated and skipped several red robots, noticing that the police were following in pursuit.

[103] The bakkie came to a standstill at a curve on Mbangeni Street. The driver and a front seat passenger alighted from the bakkie and ran in the direction of the open veld. The witness testified that he and accused 2 pursued the deceased and his accomplice. The witness testified that before they could reach a telephone pole on the veld, he heard gunshots being fired at them by the fleeing men. He feared that he and Accused 2 were in danger, and both had fired back at the two men.

[104] The witness testified that he saw the deceased, Philani, fall to the ground while his accomplice, Mhlengi, continued to shoot until he reached the end of the wall where he turned and disappeared.

[105] After the witness and Accused 2 had checked the body of the deceased, the witness had asked Accused 2 to run and call for assistance. Accused 2 had obliged and shortly returned, accompanied by Accused 5. The witness testified that he had seen a firearm on the left-hand side of the deceased's body which was lying on its back. Accused 3 testified that he had remained in the passage nearby guarding the body of the deceased until it was removed from the crime scene.

[106] Accused 3 denied that he had fired shots prior to the police Quantum coming to a standstill. He further denied that Accused 5 had planted a firearm near the body of the deceased.

[107] During the cross-examination, it was put to the witness, by counsel for Accused 4 and Accused 5, that the firearm was not on the left side of the body of the deceased, but at point A1 as depicted on Exhibit E photo 3. Point A1 was on the outside of the right foot of the deceased. The witness disputed that and insisted that the firearm was found on the left-hand side of the body of the deceased.

CROSS EXAM (page 47 – 51)

ACCUSED 4 (MICHAEL PHUNGO)

[108] Accused 4 elected not to give evidence, but called Colonel Moshani to testify as his witness. Colonel Moshani testified that he held the rank of Captain in the SAPS and was stationed at Moroka police station on 1 February 2016, when the incident occurred. He arrived at the crime scene at 18h00 and left at 19h00. He could not recall if he had found an IPID official at the scene.

[109] According to the witness, accused 4 was allowed to point out the scene to the LCRC member, Sergeant Maluleke, despite the absence of an IPID official. The witness further testified that there was nothing irregular about the conduct of accused 4 in that regard. The evidence of this witness contradicted the evidence of Brigadier Joseph and Colonel Lidavha, who testified that it was irregular for Accused 4 to point out the scene prior to the arrival of Colonel Lidavha and IPID. The witness conceded, however, that it was the duty of IPID, not the police, to investigate the scene where death has occurred as a result of police action or where the police had discharged a firearm resulting in the death of a person.

[110] The witness testified that he was informed at the scene by Accused 2 that the LCRC member, Sergeant. Maluleke was drunk. The witness had approached Sergeant Maluleka and had found that he smelled of alcohol. Although his walk was normal, Maluleke's speech was slurred, continued the witness.

[111]The witness testified that he was taken to the body of the deceased by accused 5. Accused 5 who pointed out a firearm near the body of the deceased. The witness was requested to make a mark on a sketch of the scene to show where he had seen the firearm. He made an X mark on the sketch. The mark coincided with the mark that was made by Mr Sithole as the point where he had seen Accused 5 plant the firearm, which was outside the right foot of the deceased.

ACCUSED 5 (VAN DER NEST, LUCAS JOHANNES)

[112]Accused 5 testified that he is a police officer in the SAPS and was currently holding the rank of Captain. He has 28 years of service in the SAPS. On 1 February 2016, he was part of the crew comprising his co-accused that patrolled the area of Mofolo South and drove in a police marked Quantum vehicle. The crew was driving past the Tshabalala Bottle Store when they noticed a Toyota bakkie that looked suspicious with four occupants, parked near the bottle store. The crew had observed the bakkie and followed it when it drove away.

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[113]The witness testified that the driver of the bakkie started accelerating when noticing the Quantum following him. He drove recklessly and failed to stop at red robots and stop signs in an effort to evade the police.

[114]Went further to testify that at some point the driver of the bakkie had lost control of the vehicle and drove into the veld. The witness saw the bakkie coming to a standstill, both the driver's and the front seat passenger doors opening and the driver and front seat passenger alighting and running towards the open veld. Accused 2 and Accused 5 alighted from the Quantum and ran after the fleeing men.

[115]The witness, Accused 1 and accused 4 were struggling to open the sliding door of the Quantum when they heard gunshots being discharged. After they had

opened the sliding door and ran towards the bakkie. Accused 5 had a glimpse of Accused 2 and Accused 3 before they turned at the corner on the open veld.

[116] The witness, Accused 1 and Accused 4 found two male occupants inside the Toyota bakkie. At that stage Accused 5 testified that he heard more gunshots being fired on the veld, but was unable to determine who was shooting. Accused 5, Accused 4 and Accused 1 ordered the occupants of the bakkie to come out and searched them, but nothing was found.

[117] Accused 2 came and informed Accused 5 that one of the fleeing men had been shot. Accused 5 immediately reacted by taking a hand radio and accompanying accused 2 to where the body of the deceased was lying. The witness testified that noticed a firearm lying at the feet of the deceased. The witness contacted Client Service Centre and informed them of the incident. He also called Colonel Moshani and informed him of the incident. The witness did not contact IPID.

[118] Accused 5 took control of the scene and prevented members of the public from coming near the body of the deceased. Not long after 18h00, Captain Chetty and Colonel Moshani arrived at the scene. The witness handed over the scene to Captain Chetty but remained at the scene although he no longer had control thereof. Accused 2 and Accused 3 remained near the body of the deceased waiting for an ambulance for the deceased to be declared dead, the scene to be processed and the body of the deceased removed to the mortuary.

[119] Accused 5 testified that when he went to the body of the deceased, he saw a firearm that was lying outside the right foot of the deceased. The witness disputed the markings that Mr Bongani Sithole and Colonel Moshani made regarding the position of the firearm in relation to the body of the deceased.

[120] According to Accused 5, he had no interaction with LCRC. He further denied talking to Colonel Lidavha on the scene and informing her that a toy gun was discovered near the body of the deceased. According to accused 5, he was not even aware at that stage that the item that was found near the body of the deceased was in fact a toy gun. Accused 5 only realized that it was a toy gun after the exhibits were collected. He denied ever giving Colonel Lidavha any information.

[121] Accused 5 denied that gunshots were fired from the Quantum prior to it coming to a standstill. According to this witness, it was the duty of the police members who had discharged ammunition from their firearms to point out where they had fired shots, the reason being that he did not have that information. The witness denied that he planted the toy gun near the body of the deceased as was alleged by Mr. Bongani Sithole.

[122] According to Accused 5, it has never happened before in his career that an LCRC member processes a crime scene prior to the arrival of the crime office detective. Accused 5 testified that he did not have knowledge of IPID in 2016. He knew, however, that IPID had to be contacted to attend to the scene.

[123] According to Accused 5, there is no fixed rule as to who may point out a crime scene. Consequently, there was nothing wrong if Sergeant Maluleke requested accused 4 to point out the scene to him.

[124] Accused 5 confirmed that he was wearing a red T-shirt, jeans and tekkies on the day of the incident as was testified to by Mr. Bongani Sithole. The witness, however, disputed that the tekkies he was wearing were white in colour.

[125] Asked why his evidence with regard to the position of the firearm in relation to the body of the deceased differed from the evidence of Accused 2 and that of Colonel Moshani and Mr Sithole. Accused 5 testified that he was not present when the firearm was shifted from where he had initially seen it.

[126] Accused 5 denied that the scene was processed prior to the arrival of Colonel Lidavha. Accused 5 did not, however, see when Colonel Lidavha arrived at the scene. He also did not notice that Sergeant Maluleke was drunk. According to this witness, he was in control of the scene where the body of the disease was lying, while Accused 4 was in control of the area in Mbangeni Street.

BRIGADIER JOSEPHS

[127] Brigadier Josephs was called as a witness for Accused 4 and Accused 5 to give evidence in support of the version of Accused 5 in relation to the role of IPID in

instances where there has been death as a result of police action. He testified that IPID must be called, but it was not a requirement that IPID be present at the crime scene prior to the commencement of the processing thereof.

[128] Brigadier Josephs' version was crushed when he was referred to paragraph 22(3) of Exhibit TT, being National Instruction 2 of 2015 of the South African Police Service, which reads as follows:

".. the task of the crime scene manager must be performed by the detective duty officer. He or she may assign the crime scene manager, provided that, in cases where a death occurred in police custody or as a result of police action, a crime scene manager must be assigned in consultation with IPID."

[129] The witness also testified that the police officer(s) who fired gunshots must point out the crime scene to the crime scene officer - in this case, to Captain Chetty and Sergeant Khakhu.

[130] According to this witness, the accused should not have allowed the LCRC Member, Sergeant Maluleke, to process the crime scene prior to the arrival of the crime scene officers, Captain Chetty, Sergeant Khakhu and the duty officer, Colonel Lidavha.

[131] The witness further testified that IPID does not take over the crime scene. He, however, proffered no explanation when confronted with the provisions of Regulation 4(1) and 4(3) of the Regulations for the operation of the Independent Police Investigative Directorate (IPID) which state that:

"4. Investigation of deaths in police custody or as a result of police action;

(1) The investigation of the death of a person in police custody or the death of a person as a result of police action or

omission, or both, must be done in accordance with this regulation.

(2)

(3) An investigator designated in terms of sub regulation (2) must, as soon as practicable, but within 24 hours designation;

(a) attend the scene where the death occurred, ensure that the scene is secured in terms of Regulation 8, oversee the scene and conduct a preliminary investigation.”

and

“(e) collect or ensure the collection, by forensic experts, of exhibits for processing by the Forensic Science Laboratory and ensure the proper registration. handling, transportation and disposal of exhibits”.

[132] It was further evidence of the witness that it was irregular for accused 4 to point out the crime scene to the LCRC member, Sergeant Maluleke.

[133] According to the witness, Colonel Moshani had a duty to place Sergeant Maluleke off duty if he became aware that Sergeant Maluleke was drunk. Colonel Moshani also had a duty to submit a statement to that effect to Sergeant Maluleke’s commander to institute disciplinary steps against Sergeant Maluleke. According to the witness, who was the station commander at the time, he received no report that Sergeant Maluleke was under the influence of alcohol at the scene.

ANALYSIS AND APPLICABLE LEGAL PRINCIPLES

[134] The state case is buttressed primarily on circumstantial evidence. The facts admitted by the Accused, the evidence of independent witnesses and the explanation or lack thereof, in the location of exhibits and/ or the absence of crucial exhibits is an important consideration part in this case. In *S v Nkuna* 2012 (1) SACR 167 (B), The court said the following with regard to the approach to circumstantial evidence at paragraphs 121 to 122:

“121. The valuation of circumstantial evidence must be guided by the test of reasonableness. The onus on the state is not that it must prove all its cases with absolute certainty, or beyond a shadow of a doubt. All that is required is such evidence as to satisfy the court and prove its case beyond a reasonable doubt. It is trite law that the accused is under no obligation to prove his innocence. The state must prove the guilt of the accused beyond a reasonable doubt.

122. In the case of circumstantial evidence. Such as this one. I'm guided by the locus classicus case of R v Blom 1939 AD 188 which sets cardinal rules of logic that have to be satisfied When dealing with inferential reasoning. First, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn and, secondly, the proved facts should be such that they exclude every reasonable inference from them, save the one that is sought to be drawn. If they do not exclude the other reasonable inferences, then there must be doubts as to whether the inference sought to be drawn is correct.”

THE ISSUES FOR DETERMINATION

[135] The following issues require determination:

- 135.1 Whether there was a basis for the Initial following of the deceased's vehicle. Put differently, whether the provisions of section 40 of the

Criminal Procedure Act 51 of 1977 relating to the arrest of a person(s) without a warrant, were complied with by the Accused;

135.2 Whether the initial shooting at the deceased's vehicle by Accused 2 and Accused 3 was justified and lawful was lawful; I must state in this regard except the presence of spent cartridges on the tarred road near the edge of the open veld, there is no cogent evidence that the Accused had fired at the deceased's vehicle. The question, therefore has to be, whether it was justifiable for Accused 2 and Accused 3 to shoot at the fleeing deceased and Mhlengi.

135.3 Whether the State has proved beyond a reasonable doubt that Accused 2 and Accused 3 did not act in self-defence when they shot at the fleeing deceased and Mhlengi.

135.4 Whether the State has proved beyond a reasonable doubt that the killing of the deceased was pre-meditated and that Accused 2 and Accused 3 had acted with a common purpose to kill the deceased and Mhlengi.

135.5 Whether the State has proved that the accused had the direct intent to kill the deceased and the three passengers he was travelling with the deceased, (the attempted murder of Mhlengi, Given and Mxolisi while travelling in the bakkie).

THE BURDEN AND STANDARD OF PROOF

[136] It is trite law that the state carries the burden to prove the guilt of an accused person beyond reasonable doubt and that if the version of an accused is reasonably possibly true, then the accused is entitled to an acquittal [see *S v Toubie* 2004 (1) SACR 550 (W)].

[137] The owners rests upon the State in a criminal case to prove the guilt of the accused beyond a reasonable doubt - not beyond all shadow of a doubt [see *Sv Ntsele* 1998 (2) SACR 558 (SCA)].

[138] In evaluating the evidence, the court must adopt a holistic approach. And take into account all the evidence- *Sv Monyane & Others* 2008 (1) SACR 543 (SCA) at [549].

ANALYSIS OF THE EVIDENCE AND FINDINGS

[139] None of the Accused who testified, Accused 2, Accused 3 and Accused 5 could give a cogent reason for following and pursuing the vehicle of the deceased, let alone for the distance and the manner it was done. A mere suspicion could never lend a justification for pursuing the Accused's vehicle. What came out unambiguously in this case was that the deceased and his friends had not committed any offence necessitating that the vehicle they travelled in be followed.

None of the accused who testified was able to explain what triggered their suspicion of persons sitting in a car. Section 40 of Act 51 of 1997 seeks more than a mere suspicion to justify the arrest of a person. Accused 2 gave more than one incoherent reason, firstly, that he had wanted to arrest the deceased for reckless driving and, subsequently, that he had wanted to ask the deceased why he was avoiding the police. The vehicle of the deceased was parked when first noticed by the police. There was no evidence that prior to being tailed by the police, the deceased had driven recklessly. I cannot reasonably fathom that the Accused had acted in accordance with the provisions of section 40 when following and pursuing the vehicle of the deceased. Thus any arrest of the deceased and/or his companions would have been unlawful.

[140] The evidence of the Accused who testified, denying that Accused 2 and Accused 3 had fired gunshots in the direction of the deceased and Mhlengi prior to Accused 2 and Accused 3 pursuing them in the open veld, was false. This was proved by the evidence of Mr. Sithole which was corroborated by the evidence of Sergeant Maluleke relating to the presence of spent cartridges on the tarred road before the open veld.

[141] The evidence of Sergeant Maluleke could not be disputed in this regard, considering that it was Accused 4 who pointed out the scene to him, including the exhibits thereon. Amongst the spent cartridges were those linked to the R5 assault rifle used by Accused 2 and the 9mm pistol used by Accused 3.

[142] The evidence of Accused 2 and accused 3 that the deceased and Mhlengi fired gunshots in their direction on the open veld, was false. Both these accused could not explain the absence of spent cartridge fired from the purported firearms used by the deceased and Mhlengi, despite them having fired plenty gunshots in the direction of Accused 2 and Accused 3. Instead, a toy gun which Mr Sithole testified he saw Accused 5 planting near the body of the deceased, was collected as an exhibit by Sergeant Maluleke near the body of the deceased. Mr Ntini, the ballistic expert. Testified that He had examined the gun concerned which proved to be a toy gun and incapable of discharging ammunition. Thus the evidence of Accused 2 and Accused 4 that there was a shootout between them and the deceased and Mhlengi, was a plain false narrative calculated to mislead and defeat the ends of justice.

[143] The evidence of Mr Sithole That he saw Accused 5 planting the firearm firearm near the body of the deceased was met with a bare denial by Accused 5. In particular, Mr. Sithole described the clothing Accused 5 was wearing on the day of the incident and further testified that he knew Accused 5 from years back when he used to arrest many people in Soweto. Both the averments by Sithole were confirmed by Accused 5, save for the colour of the tekkies he was wearing. I found Mr Sithole to be a credible witness whose evidence was confirmed by the finding of exhibits where he testified there had been a shooting by Accused 2 and Accused 3.

[144] By his actions described above, Accused 5 had made himself guilty as an accessory after the to create a false narrative that the deceased had fired gunshots at Accused 2 and Accused 3.

[145] Both Mxolisi Ncube and Given Mapamela testified that Accused 5 had sought to threaten them with serving long terms of imprisonment, unless they stated that the deceased was in possession of a firearm. This, the witnesses testified,

was stated by Accused 5 in the presence of Accused 1 and Accused 4 who, despite this evidence incriminating them of having been complacent in Accused 5 pursuit of the defeat of the ends of justice. Accused 1 and Accused 4 were present in the Quantum when shots were fired by Accused 2 and Accused 3. In my view, Accused 1 and Accused 5 acted in concert with Accused 2, Accused 3, Accused 4 in to hide the wrongfulness of Accused 2 and Accused 5 in shooting at the deceased and Mhlengi as they fled towards or as they entered onto the open veld.

[146] Accused 2, Accused 3 and Accused 4 each testified that he had remained guarding the body of the deceased. What is strange is that they, particularly Accused 3 and Accused 5 contradicted each other with regard to the position of the firearm in relation to the body of the deceased. Despite their claims to have remained guarding the body of the deceased, none of them knew how, when and by whom the toy gun was removed to a different position. In my view, all three of them acted in concert, by positive action or otherwise, to unlawfully interfere with the crime scene prior to the arrival of IPID and other roll players concerned with the gathering of evidence at the scene of crime where death had occurred as a result or involving members of the police force (SAPS)..

VERDICT

[147] I cannot find that the state has succeeded in proving beyond a reasonable doubt that Accused 1, Accused 4 and Accused 5 had the intention to kill the deceased, Mhlengi Ndlovu, Mxolisi Ncube and Given Mapamela or that they had attempted to do so. I, consequently, find Accused 1, Accused 4 and Accused 5 not guilty of counts 2, 3 and 4. I cannot say the same in respect of Accused 2 and Accused 3 who each brazenly shot at the unarmed deceased and Mhlengi. I find Accused 2 and Accused 3 guilty of premeditated murder of the deceased and, together with Accused 5, guilty of acting in concert in interfering with the crime scene for purposes of defeating the ends of justice (the doctrine of common purpose).

[148] I find Accused 5 guilty as an accessory after the fact by planting a toy gun near the body of the deceased for the purpose of creating a false narrative that Accused 2 and Accused 3 had defended themselves in firing shots at the deceased and Mhlengi and ultimately killing the deceased.

[149] In summary, the state has succeeded in proving the guilt of the Accused beyond a reasonable doubt in respect of the offences for which the Accused have been found guilty individually and/or as a collective, including their commission of the offences referred to in the evidence of Brigadier Josephs, particularly during cross-examination by the state.

[150] The finding of murder against Accused 2 is premised on the ballistic expert evidence of Mr Ntini that only the R5 assault rifle that was used by Accused 2, and the evidence of Accused 5 himself, that he was the only person to discharge ammunition from an R5 rifle, which, according to Mr Ntini, fragments multiple times on contact with an object or target, as was the case in the instance of the deceased. Furthermore, Sergeant Maluleke could retrieve only four of the five R5 cartridges Accused 5 had admittedly fired at the deceased and Mhlengi at the crime scene.

CONCLUSIONS

[151] The evidence of Accused 2, Accused 3 and Accused 5, in denial that conclusively established by the locations of where spent cartridges were found fired from the firearms used by Accused 2 and 3 were retrieved on the tarred road. The silence of Accused 1 and Accused 5, who were with their co-accused, especially Accused 2 and Accused 3, when the latter fired shots from their firearms, including from the high velocity R5 rifle, cannot exonerate them from culpability in the face of incriminating evidence against the accused individually and collectively. It was established successfully by the state that the Accused had from the onset of the shooting, acted in concert in their failure to disclose all areas, including the Quantum and the bakkie of the deceased, as constituting part of the crime scene that required investigation by IPID. It was the contention of the state that all five accused had acted in common purpose

in the commission of the crimes proffered against them by the state. The versions of the Accused who testified was tainted with falsity from the commencement of the events that led to the shooting and the killing of the unarmed deceased. The evidence of Accused 2, Accused 3 and Accused 5 stand to be rejected as false to the extent that it contradicts the evidence of the state witnesses Mr Sithole, Mhlengi Ndlovu, Mxolisi Ncube, Gift Mapamela, Sgt. Maluleke and the expert witness called by the state.

**MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA**

Date of Delivery: 28 November 2025

Date of Judgement: 01 May 2026

**THIS JUDGEMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES'
LEGAL REPRESENTATIVES 01 MAY 2026.**

