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**IN THE HIGH COURT OF SOUTH AFRICA**

**[EASTERN CAPE DIVISION: MTHATHA]**

**CASE NO. CC26/2021**

**In the matter between:**

**THE STATE**

**And**

**SIZWE BEBULA**

**Accused**

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**JUDGMENT**

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**JOLWANA J**

*Introduction*

[1] On 24 January 2020 at Ngolo Administrative Area in Libode (Ngolo) in the morning an incident occurred in which Mr Thandile Mbono was brutally murdered by a lone gunman who shot and killed him while he was sitting in his car with his wife ready to drive to their places of employment. The accused was later arrested and appeared in this Court facing one count of premeditated murder and firearm related

charges. Accused pleaded not guilty to all the charges preferred against him and reserved the basis of his defence.

[2] The prosecutor addressed the court in terms of section 150 of the Criminal Procedure Act (the CPA)<sup>1</sup>. In its address<sup>2</sup> the state placed on record the following essential features of the state's case against the accused. The deceased was shot and killed in the morning whilst he was driving out of the garage at his homestead, and he was with his wife. The state would rely on direct evidence, the evidence of an identification parade, the tracker records of the car that drove from Cape Town to the crime scene as well as cell phone records. Thereafter admissions in terms of section 220 of the CPA were entered into the record by agreement between the state and the defence. The state thereafter led all the witnesses it intended calling and closed its case after which counsel for the accused indicated that his instructions were to make an application for the discharge of the accused in terms of section 174 of the CPA<sup>3</sup>. This judgment is concerned with the said application.

### *The evidence of the state*

[3] The first witness called by the state was Mrs Mbono, the wife of the deceased. Her evidence was that on 24 January 2020 she and the deceased were at their homestead at about 07:00 in the morning about to leave for their workplaces. They both went to board the vehicle which was still inside the garage. The deceased was driving and he reversed the vehicle. She was seated in the front passenger seat of

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<sup>1</sup> Act 51 of 1977.

<sup>2</sup> Section 150(1) of the CPA provides that the prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining to the change and indicating without comment, to the court what evidence he intends adducing in support of the charge.

<sup>3</sup> Section 174 of the CPA provides:

If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

their double cab Amarok vehicle. She heard a sound or noise which she initially thought was the vehicle bumping on something. Upon looking around she realised that they were being shot at as there was someone pointing at them with a firearm and at the time the deceased had fallen back on his seat. The shooter was shooting from the driver's side of the vehicle, and he was very close to the vehicle next to the driver's window. As the vehicle was still in motion, she tried to reach for the handbrake and pulled it up to stop the vehicle. The shooter continued firing more shots.

[4] She was able to see that the shooter was a male person as his face was not covered. She had lifted her head up and at that moment she faced the shooter. It was a young man, but she could not say if he was still a boy or a man, but he was still young. This person had dreadlocks on his head, and he also had a beard on his face. He was light in complexion. He was wearing a golf t-shirt with the last knob closed. As the assailant continued shooting, she pulled the passenger door open and ran into the garage. She ran into the children's room which is at the far end of the house, banged the window calling for help from a neighbouring house. Her house and that of her neighbour are separated by a wire fence and are very close to one another. At some point it went quiet and she came out of that room.

[5] Police took a statement from her and also told her that her husband had passed on. She explained that the shooter was carrying a small firearm. The vehicle's windows were tinted but she could see the shooter jumping around holding the firearm with both hands and as he was firing shots, it was as if he was looking for an angle. She only saw that person for the second time when she was taken for an identification parade.

[6] She had received a phone call from colonel Mshiyo informing her that a person had been arrested and that she should prepare herself for an identification parade. He told her that she would be fetched by police and brought to the identification parade venue. Indeed, police fetched her and she was taken to PRD building but did not go inside that building. From there she was taken to the identification parade venue by two male police officers. At the identification parade venue she was handed over to a certain Andiswa who took her to a waiting room where she waited. At some stage Andiswa handed her over to another police officer who explained to her the identification parade procedures and processes. After the identification parade procedures were explained to her Andiswa came and took her back to the waiting room where she continued waiting.

[7] At some stage Andiswa told her that the people who were going to form the line-up were ready and she took her to the parade room and handed her over to another police officer. At that stage the parade line-up was ready. That officer asked her if she could point out the person who had killed the deceased after which he moved away from her. She looked at the line-up from the first one to the last one. However, her eyes were drawn to one particular person whom upon seeing him, all the recollection of the incident came back and she could see that it was him. She pointed at the person and said that that was the person who killed the deceased. There were about 10 participants in the line-up. The person she identified was light in complexion with dreadlocks and some beard. The prosecutor invited Mrs Mbono to point at that person if he was in the court room. The witness pointed at the accused who was already sitting alone in the accused stand.

[8] In response to a question from the prosecutor about her description of the assailant previously as being someone who had dreadlocks, she explained that

although the accused did not have dreadlocks on the day she pointed at him in court, she still had a clear picture of him because when she was told that she would be called to testify, she had nightmares in which everything became clear such that even if the accused could have shaved his beard or removed his dreadlocks, his picture was still in her mind. She testified that she saw the assailant for the first time during the shooting incident. She did not take much time to identify him at the identification parade as everything that happened during the incident came back. However, she could not say how many seconds or minutes it took her to point at that person.

[9] Mrs Mbono's further evidence when she was testifying under cross-examination was that when she heard the first gunshot sound, the back part of the vehicle had moved out of the garage as it was reversing. When she first heard that sound, she thought the vehicle had bumped on something, but when she lifted up her head, she realized that they were being shot at. The vehicle was still in motion and when she lifted up her eyes the deceased had fallen on the seat. She heard the gunshot sound, noticed the deceased having fallen on the seat, pulled the hand brake up and on looking around she saw the person who was continuing to shoot at them. The windows of the vehicle were fully closed and tinted. However, even though they were tinted the one inside could see outside of the vehicle clearly.

[10] She was asked how long after the first gunshot did she see the person firing shots. She said she could not remember because everything happened fast. After the first shot the shooter continued firing shots in quick succession. She was unable to tell how long the shooting continued as she was in shock with what was happening. The shooter was on his feet and she could see his full upper body but the lower part of his body was not visible as it was obscured by the door of the

vehicle. She never saw the shooter standing near or next to the garage door before the shooting began or when he was walking or running away after the shooting. The person was only wearing a black t-shirt or golf shirt. She was not sure if it had long or short sleeves and it was buttoned up to the last button. She was unable to see if the t-shirt had short or long sleeves because it was a moving scene. After hearing the first gunshot sound, she saw the deceased having fallen on the seat and the shooter was still firing more shots. She could not tell for how long her eyes were fixed on the shooter. She could not tell whether it was a couple of seconds, a minute or minutes. When she first saw the shooter he was already firing shots at them through the driver's window. The window was not shattered but after the incident she saw bullet holes in the window.

[11] It was put to Mrs Mbono that she could not see the accused's traditional clan face marks and two visible warts, one on his cheek and the second one on his forehead. She, however, maintained that she saw the shooter and was able to identify him. She was able to observe that he had beard all over his face, but she could not tell the colour of his beard. He had dreadlocks, his hair was not neatly combed, and it looked like dreadlocks. With regard to the identification parade she testified that she looked at the people who formed the line-up and her eyes were drawn to the accused. Everything came back and she recalled everything he did which was very painful. After she pointed at him, she was asked if she was certain and she confirmed that she was certain.

[12] The next state witness was Ms Mrwabo. Her evidence was that she knows the deceased and Mrs Mbono as they were her neighbours. She did not know the accused. On Friday 24 January 2020 at about 7:00 in the morning she was preparing her child to go to school when she heard a sound like that of firecrackers or

crickets. It was just herself and her children in the house. She was in the kitchen which is not far from Mrs Mbono's homestead about 12 paces away. She peeped through the window and the sounds continued. She then saw smoke next to the Mbono homestead vehicle. The vehicle had reversed out of the garage at that stage. The garage is on the far end from her house, about 20 meters away. The door on the passenger side of the vehicle opened and Mrs Mbono exited and ran back into the garage in a stooping position. Thereafter she saw a male person coming to the front of the vehicle and at that stage the deceased had already fallen from his seat and was lying on the passenger side. Upon seeing that male person who was carrying a firearm going to where the deceased was lying, she decided to hide. She did not see him properly but she noticed that he had a beard and was of medium height. He was wearing black clothes, but she could not tell if it was a t-shirt or a jacket. She decided to peep through again and saw the deceased lying on the ground on his back and the man carrying a firearm was shooting the deceased on his upper body and continued to do so. Thereafter the man walked away and exited the gate. He was walking normally carrying a small black firearm in his hand.

[13] As the shooter walked away from Mrs Mbono's homestead he put the firearm on his waist. He walked until she could not see him anymore. She then went to Mrs Mbono's homestead and called for help and other members of the community came. They found the deceased lying in a pool of blood. She could not identify the shooter fully because she did not look at him properly as she was scared. She was then asked if she could tell if the shooter was an Indian person, a coloured person or what. Her evidence was that she did not observe him that much and that she was unable to tell whether he was a black man, a Xhosa man or anything. She did not

observe if he had anything on his head. Nothing was obscuring her view of the shooter but she was unable to properly observe his clothing and his complexion.

[14] The evidence of Ms Matyeni was that on 24 January 2020 she had visited her cousin to tell her about a family bereavement at about 7:00 in the morning. After informing her cousin about the bereavement she left going back to her place. After leaving her cousin's place a red motor vehicle appeared from the back. The person in the vehicle enquired about a shortcut presumably to the main road. The vehicle was a small vehicle, and it was on the gravel road in the locality. It had CA registration plates, but she did not observe the registration numbers. There were two people in the vehicle and both of them were young men. She did not notice whether they were white or black males. After she showed them the direction the vehicle sped away. She did not recognise or identify the faces of those two males.

[15] Mr Sipamandla Bebula (Sipamandla) testified that the accused is his brother in that the accused's mother and his father are siblings. He resides in Grabouw in the Western Cape but was born in Qumbu. At some stage he and the accused stayed together. He was visited by police who told him that the accused had killed someone and they were looking for him. Those police officers were colonel Mshiyo, captain Maliwa, sergeant Njobe and warrant officer Maginindana. He was at work when police arrived. The police said that accused had told them that a firearm was with him, and he told them that he knew nothing about that firearm. They took him to the police station in Grabouw where they further questioned him. They also asked him about the accused's girlfriends, and he told them accused's girlfriends. He told them about Ms Nyameka Sigonyela (Nyameka) and another one, Ms Gwaza. They also asked him about a cell phone number the accused was using, and he told them that

accused had several cell phone numbers. There was a number that the accused was using which he did not recall.

[16] He was asked about the accused's cars. He told them that he had one vehicle which was a Mazda 3 which was black in colour and that a golf 4 was his and a BMW 355i belonged to his friend but accused used those vehicles. He was also asked about hiring cars. He told them that he hired out cars. He was then asked about a red renault clio vehicle and he told them that he remembered hiring out such cars, but he could not remember to whom he had hired them to. He remembered the people he hired cars to, but he could not tell which car he hired to which person or which person he had hired the red renault clio vehicle to. The people he hired out cars to were Madlomandile Mfanta, Tshele Langa and Luzuko Jiba. He was not sure to whom he had hired the red renault clio to among those three people. He was shown a contract of a hired car which was a red renault clio vehicle with registration number C[...]. He testified that he hired that car on 20 January 2020, and it was to be returned on 29 January 2020 but the contract was extended. He hired cars from rental companies and hired them out to people as a business. As he was asked questions and answering them colonel Mshiyo was writing down and at the end of the interview he was asked to sign and he signed that document without reading it. He had hired a car to the accused, but he could not remember the date or the year. The accused had said that he was going to sign for his parole in Qumbu. He could not recall if he gave the numbers 0[...] and 0[...]2 to the police as being numbers that were used by the accused.

[17] Captain Diko testified that he is attached to the Directorate for Priority Crime Investigations (DPCI) and was never involved in the investigation of this case. He was requested by warrant officer Maginindana to conduct an identification parade in

this case and he agreed to do so. She told him the name of the police station in which the matter was reported, the CAS number and the charge as well as the name of the suspect. Accused was informed that he was entitled to legal representation and he chose not to be legally represented during the identification parade. He did not know who made arrangements for the photographer to be present. He did not know who arranged for the police officer who guarded the witness. He assumed that they were arranged by the investigating officer. He approached captain Jojo who escorted the witness to the parade. She had made a request that she wanted to observe how an identification parade is conducted. Because there was no one to escort the witness from the waiting room to the parade room, he requested her to assist.

[18] There were 10 people who formed the line-up in the parade. They were of about the same height, build, age and appearance and were dressed in more or less the same way as the accused. The accused was informed that he could change his position in the parade and could make any reasonable request and he requested to change the t-shirt and trousers. The accused indicated that he was satisfied with the parade including the other people in the line-up and how the parade was conducted. The participant's ages varied with the youngest being 20 years old and the oldest being 48 or 49 years old while the accused was 39 years old. They were organised by the investigating officer. Accused was positioned at number 7 and the participants were not told what position to take. He had requested the accused to choose any position in the line-up and that he could choose to be between people of almost the same height, build or similar to him in complexion so as to confuse the witness and he chose to be positioned at number 7.

[19] The witness was asked to point out the suspect. The parade was conducted in the form of a one-way glass in which only the witness was able to see the people in the line up while they could not see her. She took 40 seconds to point number 7 which was the accused. After she had pointed at the accused, she became emotional as if she was going to cry and she was even shaking. She uttered words to the effect that there was the person who shot her husband using her head to point at the accused and he requested her to point him with her finger and indicate the number the person was carrying and she indicated that it was number 7.

[20] Under cross-examination it was pointed out that the accused was the only one with dreadlocks in the line-up and as he was holding position no.7, next him was no.5 who was 49 years old and no.8 and 9 also did not have dreadlocks or even beard on their faces. No. 10 was wearing a mask covering his face and none of the other people in the lineup had dreadlocks. It was put to him that it was only the accused who had the distinctive features of having dreadlocks and a beard on his face. I digress to point out that captain Diko did not immediately or unequivocally accept this proposition. It was unclear why he would not accept for instance that the person carrying card no.1 did not have the same features as the accused or that in many ways whether it be age, height or build or even complexion, there were almost no similarities amongst the participants in the line-up with the accused. This is more so that on his own evidence, he did not choose the people forming the line-up. However, he did ultimately concede that they all did not have dreadlocks or even beard covering their faces except the accused.

[21] The evidence of captain Jojo was that she was a member of the DPCI in Mthatha in 2020. She noticed that captain Diko would be requested to conduct identification parades from time to time. Because she wanted to learn how they

were conducted she decided that she would like to be present to observe. She told captain Diko about her interest and asked him to take her with him when he was going to do an identification parade. On the day on which the identification parade was going to be conducted in this matter captain Diko told her about it and she joined him. They went to Savoy building where it was going to be conducted. Captain Diko realised that he did not have a sufficient number of police officers for the different roles that needed to be played. He requested her to assist him as he also did not have enough female officers as the witness was a female person. He requested her to fetch the witness from the organised crime unit offices at PRD building. She proceeded to PRD building where she found members from organised crime unit there. One of them showed her the witness and she took her to Savoy building. At some stage she took the witness to the parade room but she did not enter that room, only the witness entered while she waited outside.

[22] Thereafter the door in the parade room opened and the witness came out. The witness cried loudly with tears running down her cheeks while placing her hands on her head. She approached the witness and assisted her as she was crying until they reached the waiting room where she consoled her and asked her why she was crying. She continued to cry and told her that she remembered the day her husband was killed as if it had happened the previously day and that she had seen the person that had killed her husband.

[23] Warrant officer Maliwa testified that he was based in Qumbu and attached to the detective's unit. The murder case in this matter occurred when he was already investigating another case in which he was looking for the accused for that case in which the murder victim, one Anele Luntinta was killed. He had information that the accused was involved in that case. He applied for a J50 warrant for his arrest and it

was issued. At that time he did not know the accused but his informers provided him with the accused's photograph. He looked for him in various localities but he would be told that he had been there but had already left until he received information that the accused was in Cape Town. He sent the J50 warrant of arrest to Cape Town police. He then heard about this murder case and that the accused was suspected of being involved. He received a phone call from colonel Mshiyu subsequent to which a team was formed to investigate both cases. He later received a phone call from Cape Town police telling him that accused had been arrested.

[24] A team was sent to fetch the accused from Cape Town, and he was part of that team. At the time accused was using two cell phone numbers, one starting with 073 and another one with 064. He got this information from one of the accused's relatives whose names he could not recall. He also got those numbers from his contacts some of whom were his informers. He and warrant officer Maginindana applied for the billing of those numbers which were MTN and Vodacom numbers. They later received the billing information. The billing information showed the 064 number leaving the Western Cape and proceeding to the Eastern Cape on 23 January 2020. It also showed its presence in Qumbu on the same date and taking a signal from Ngolo Administrative Area. Ngolo is where the crime scene occurred in this matter. That phone was also getting a signal from Ngolo before 05:00 to about 06:00 in the morning on 24 January 2020. After some time that cell phone was moving from Ngolo to Mthatha, Idutywa and ultimately towards the Western Cape.

[25] As the accused had been arrested in Cape Town, they proceeded to fetch him. They found him and questioned him about the Qumbu and the Libode cases. They already had the billing information when they went to fetch the accused. He had been arrested in Grabouw and they got him there and took him to the Eastern Cape.

With reference to the billing information, he testified that the number 0[...]3 is his number and it received a call from 0[...] at 17:02 on 23 January 2020 but he did not recall speaking with the accused. He did ask the accused about the phone numbers he got from his relatives and the accused confirmed them to be his numbers. He confirmed that he never obtained any statement from the accused's family members or the informer regarding the ownership of those numbers. However, he obtained a statement from the girlfriend of the accused in Cape Town confirming those cell phone numbers as those of the accused. He never confirmed with any bank that any of those numbers were used by the accused to open any bank account.

[26] He testified that the photograph of the accused which he got from his informers was sent to his cell phone and it was the photo that he was using in looking for the accused as he did not know him. However, he deleted it after the accused was arrested by police in Cape Town even before he met the accused. He saw no need to keep it as the accused had been arrested and his phone did not have sufficient space. He disputed the accused's suspicion that Mrs Mbono was shown that photograph of the accused for the purposes of the identification parade insisting that he had already deleted it at the time of the identification parade.

[27] The evidence of colonel Mshiyu was that on the day of the incident he received a call from Libode police reporting a shooting incident in Ngolo and requesting the office of the organised crime unit to which he was attached to attend to that crime scene. The call came at about 07:00 in the morning. He was attending a cluster meeting at the time, and he therefore instructed other members from his office led by captain Baduza to attend to that crime scene. He went to the meeting and requested to be excused to go to that crime scene. He went there and found captain Baduza already there and other police officers including some from Libode were there. She

interviewed Mrs Mbono and obtained a statement from her which he handed to captain Baduza and left. The docket of that case was later transferred from Libode to his office for further investigations. He formed a team that was going to investigate the case and he was the commander of that team. Ultimately, the accused was brought from the Western Cape. At some stage there was an identification parade which he had to arrange but he did not form part of it. He received a report that the accused was positively identified by Mrs Mbono.

[28] Accused mentioned his brother Sipamandla Bebula and they went to meet him in Cape Town. Sipamandla told them that he hired a vehicle from a vehicle hiring company for the accused who needed to attend a parole in Qumbu. They also went to see Nyameka Sigonyela at Khayelitsha Hospital. They obtained a statement from her as well. He testified that he also obtained certain cell phone numbers from Sipamandla which he alleged belonged to the accused.

[29] During cross-examination it was put to colonel Mshiyo that the so-called A1 statement was made by warrant officer Mangaliso and that initially the matter had been allocated to warrant officer Mnukwa from Libode police station. What took a surprising turn of events was that both police officers, warrant officer Mangaliso and sergeant Mnukwa had been made available to the defence by the state despite being in the list of state witnesses and colonel Mshiyo who was not in the list of state witnesses was called instead. It was put to colonel Mshiyo that after the two officers were made available to the defence, counsel for the defence consulted with them and their version was that colonel Mshiyo was not at the crime scene on the morning of the incident and that he did not take a statement from Mrs Mbono. He disputed that he did not attend to that crime scene and that he did not take a statement from Mrs Mbono. It was further put to him that warrant officer Mangaliso took Mrs

Mbono's statement in which she said that she could not be able to identify the person who shot at her and the deceased on that day. It was further put to colonel Mshiyo that sergeant Mnukwa was present when warrant officer Mangaliso took Mrs Mbono's statement and when she told them that she was not able to identify the assailant. Furthermore, that statement of Mrs Mbono was in the docket when the docket was transferred to the organised crime unit offices.

[30] Colonel Mshiyo accepted that the billing information for the number 0[...] did not confirm that that number belonged to the accused. It was put to him that Sipamandla confirmed hiring the vehicle from Tempest Car Hire but there was no statement from any person who saw the accused driving that vehicle. Furthermore, Sipamandla's evidence was not that he gave the said vehicle to the accused.

[31] The evidence of captain Baduza was that at 8:00 on the 24 January 2020 in the morning he was at work at PRD building when he received a call from colonel Mshiyo informing him of a municipal employee who was shot and killed in Ngolo and asked him to go there with other police officers. He, together with warrant officer Maginindana went to the homestead of the deceased. On arrival there he found many people and also saw a police vehicle and sergeant Mnukwa as well as warrant officer Mangaliso standing near the gate. He was still outside the house with the crime scene being processed when he phoned colonel Mshiyo and gave him a report about that crime scene.

[32] Colonel Mshiyo arrived and he introduced him to sergeant Mnukwa and warrant officer Mangaliso and to sergeant Mqikwa. He and colonel Mshiyo went into the house to meet Mrs Mbono. She told them what happened and when she finished, he went outside the house leaving colonel Mshiyo with Mrs Mbono. At some point

colonel Mshiyo exited the house and gave him Mrs Mbono's statement which he placed in his dairy and later gave it to sergeant Mnukwa after which they parted ways. He disputed that colonel Mshiyo was not at the crime scene on that day or that Mrs Mbono's statement was taken by sergeant Mangaliso.

[33] Captain Baduza further testified that he was present in the room when Mrs Mbono was giving her statement to colonel Mshiyo. He said that the description of the assailant as given to colonel Mshiyo by Mrs Mbono was that the assailant was slender, light in complexion and had dreadlocks. He was wearing black jeans and a black lumbar jacket and takkies. Captain Baduza could not recall the colour of the t-shirt that the assailant was wearing. He gave that description to their tracking team. He further testified that colonel Mshiyo gave him Mrs Mbono's statement.

[34] The evidence of Nyameka Sigonyela was that she was the girlfriend of the accused, but they broke up before he was arrested. She received a call on a date she could not remember in which a police officer from Vredendal Police Station told her that the accused had been arrested. She enquired if she could come to see the accused as her vehicle, a silver-grey polo was with him. He was renting it to buy it from her. She called Sipamandla, the accused's brother and told him that the accused had been arrested. They arranged to go together the following day to see the accused in police custody. They proceeded to Vredendal police station but they were told that only one of them could see the accused and they decided that she should be the one who saw the accused as she wanted to regain possession of her vehicle. She met the accused and he told her that the car keys were with his neighbour. She and Sipamandla went to fetch the vehicle. Nyameka confirmed meeting captain Maliwa. She received a phone call from colonel Mshiyo while she was still at work at the time. She was asked if she knew the accused and she

confirmed that she knows him as he was her ex-boyfriend. At the time she was using a cell phone with the number 0[...]<sup>4</sup>. They asked her what the accused's cell phone numbers were, and she told them that she did not remember them.

[35] When she told colonel Mshiyo that she could no longer remember accused's cell phone numbers, he became angry and threatened to report her to the Nursing Council as she is a professional nurse at Khayelitsha District Hospital. She was taken to Harare Police Station where she was further questioned about her cell phone number which the police said was calling the accused's number. She told them that she received calls from many people and that the numbers they said were accused's numbers did not belong to him. She was given a statement which the police said she should read but she was traumatised and did not read it. Even when captain Maliwa read it for her she was not concentrating as she was tired and hungry and she was not listening. She was asked to sign it, and she asked them what it was and they said it was about their visit there and she signed it. They then took her back to where they had picked her up. She denied telling the police that the numbers that were in the billing information were the accused's cell phone numbers.

[36] Nyameka confirmed that the number 0[...]<sup>4</sup> was her number and that as she is in the taxi business, she received many calls from many people, and she did not always know the callers. She was asked about a call from an 064 number which called her from Sada or Ngolo or Cape Town. She testified that she did not have friends or relatives in Ngolo. She denied ever confirming that the number 0[...] was the accused's number and said that the police did not take her phone to check if that number was in her contact list. Furthermore, no billing was done on the number 0[...]<sup>4</sup> which was her number. She expected the police to do a billing on her phone number, but they did not do it to show that the number 0[...] was calling her number.

[37] When the state had exhausted its witnesses, counsel for the accused applied for the recall of Mrs Mbono to further testify in light of sergeant Mnukwa and warrant officer Mangaliso having been made available to the defence as witnesses. On her recall, Mrs Mbono testified that on the day of the incident she gave information to the police officers who came to the crime scene. She was approached by two police officers and one of them asked if she saw the person who committed the offence. She told him that the said assailant was unknown to her and that she saw him for the first time that day during the incident. She did not recall warrant officer Mangaliso but she recalled sergeant Mnukwa.

[38] She further testified that she saw the assailant who was unknown to her and that was what she told warrant officer Mangaliso and sergeant Mnukwa. Those officers did not sit down with her, and she therefore did not give them a description of the assailant. On that day they did not take any statement from her, and they did not give her any document to sign. Her brother was approached by a certain man four days after the incident, and he introduced himself as Mr Mnukwa. When she saw her, she recalled that he was one of the two officers who were there on the day of the incident. She was surprised to learn that he was her neighbour and that he had just arrived in the area. Mr Mnukwa asked if the culprit had been arrested and she told him that the culprit had not yet been found. He asked if she knew the culprit and she said that she had never seen that person but if she could see him, she would point him out. Mr Mnukwa did not ask her to describe the assailant, and she did not give him a description of the person. He was not writing or recording anything down.

[39] She confirmed that it was the first time she was telling the court that she told sergeant Mnukwa that she could identify the assailant. She said that this was because on the day of the incident sergeant Mnukwa and warrant officer Mangaliso

did not have time to be with her and it was chaotic at her homestead with many people having gathered there. A certain lady came to her telling her that two police officers wanted to see her two hours after sergeant Mnu kwa and warrant officer Mangaliso left. One of them introduced himself as colonel Mshiyo and he was with warrant officer Maginindana. She, colonel Mshiyo and warrant officer Maginindana went to another room in which colonel Mshiyo asked her what happened. She told him what happened after which they left. She only saw colonel Mshiyo and warrant officer Maginindana, and she did not know who else was with them.

[40] It was put to Mrs Mbono that captain Baduza said that he was with colonel Mshiyo when they visited her homestead and that she gave colonel Mshiyo a description of the assailant which captain Baduza gave to their tracking team. She testified that the police officer she saw was warrant officer Maginindana who was pointed to her by colonel Mshiyo. She did not see other people. She testified that she did not recall captain Baduza being there. It was put to her that according to captain Baduza the description of the person who attacked them was that he was slender, not big, light in complexion with dreadlocks, wearing jeans and also wearing takkies. She testified that that description was not correct as the lower part of their attacker was not visible to her. She could not see the jeans as she could not see the lower part of his body. She did not recall giving captain Baduza any description of the assailant. At no stage did warrant officer Mangaliso and sergeant Mnu kwa obtain a statement from her. It was only colonel Mshiyo who did. Mrs Mbono's evidence marked the end of the case for the prosecution.

### *Discussion*

[41] I turn now to examine the evidence of the state some of which has already been summarised above in some detail. The state's case against the accused is anchored on two main pillars being circumstantial evidence and the evidence of identification of the accused which is direct evidence. It is to the assessment of the comparative strengths of those two pillars of the state's case that this Court must look into with a fine-tooth comb bearing in mind the applicable test at this stage.

[42] The first pillar of the state's case is the billing information in respect of two cell phone numbers which the state alleged, belong to the accused. The evidence of the state in this regard was that police informers and accused's unnamed relatives gave those numbers to the police. Furthermore, the accused's girlfriend Nyameka and the accused's brother Sipamandla were called to testify for the state. However, none of them confirmed knowing those numbers as those of the accused or even having given them to the police. At best, Sipamandla testified that he did not know which numbers he gave to the police whereas Nyameka denied knowing those numbers as belonging to the accused or having given them to the police. The weaknesses of the evidence of the state's case are evident in this regard as it showed that witnesses called by the state were certainly not singing from the same hymn book on very important features of the state's case. In addition to that, the state did not have independent evidence of those numbers being registered with any service provider in the name of the accused. Furthermore, no evidence of independently verifiable information was given that those numbers belonged to or were used by the accused at any time before the incident.

[43] The second important aspect of the state's evidence was the vehicle tracking of a vehicle allegedly hired by Sipamandla and allegedly given by him to the accused, which he then used to travel to the crime scene area according to the police. There

is no reason not to accept that a vehicle being a red renault clio with registration number C[...] was in the vicinity of the crime scene round about the date and time of the incident. However, the evidence of Sipamandla was that he was at the time hiring vehicles from vehicle hiring companies. He hired the red renault clio vehicle for a period 20 January 2020 to 29 January 2020 which contract was further extended. He hired it for purposes of hiring it out as he generally did as a form business. However, he did not testify that at the time material to the incident he had hired out that vehicle to the accused. He hired vehicles to a few other people and had done so for the accused as well but would not confirm hiring that particular vehicle for the accused at that particular time. Therefore, its presence around the crime scene could not be connected to the accused, certainly not on his evidence bearing in mind that Sipamandla was also a state witness. Furthermore, the tracking report showed that vehicle stopping in certain areas between the Western Cape and the Eastern Cape, but no evidence was provided by the state of anybody who saw the accused driving that vehicle. There was no CCTV footage evidence of the accused alighting from that vehicle either at a fuel filling station or anywhere on his way both to and from the Eastern Cape. Even the witness called by the state who saw the vehicle in the Ngolo area not very far from the deceased's homestead, that is, Ms Matyeni gave no evidence of the accused being one of the two people in that vehicle when it stopped. Those people asked her for a short route out of that area. She saw them and she spoke to or with them, but it was not her evidence that the accused was one of them.

[44] The evidence of the state relating to the cell phone billing information and the hiring of the red renault clio vehicle and its sojourn to the Eastern Cape is what is normally referred to as circumstantial evidence. The state used the contradictory evidence of Nyameka and Sipamandla and the evidence of the cell phone billing and

the tracking of the red renault clio vehicle to place the accused at or near the crime scene. This evidence, being of circumstantial in nature, falls foul of the legal position relative to inferential reasoning as recently articulated by Van Zyl DJP in *Tom*<sup>4</sup> in which he said:

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

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

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

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

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<sup>4</sup> Tom v S 2023 (2) SACR 283 (ECMk) paras 10-11.

[45] The case of the state, to the extent that it relies on the cell phone billing evidence and the vehicle tracking of the red renault clio is without reliable evidential foundation and therefore speculative as it is largely based on conjecture, leaving open many other reasonable inferences that can be drawn about who could have driven to the crime scene on the date of the incident. These include any other person other than the accused being in the vicinity of the crime scene area and being in the red renault clio vehicle at the time in which the horrible crime in this matter was committed.

[46] The second pillar of the state's case against the accused is that of identification. The evidence of the identification of the accused at the crime scene was provided by Mrs Mbono who was the only person who was with the deceased when they were shot at. Briefly, her evidence was that they were late, rushing to their workplaces at about 07:00 in the morning. As their vehicle was reversing out of the garage, she suddenly heard a bang which she initially thought was their vehicle hitting something. That was quickly followed by a volley of gunfire at the driver's window. This happened in quick succession. Because the vehicle was already in motion when she saw her husband having fallen on his seat, she reached for the handbrake to stop the vehicle from moving. She had to quickly open her door and run for her life into the garage back to the house.

[47] Her evidence was that she was able to see the shooter in the midst of what was happening between the first gunshot sound and the other gunshots that were fired into the vehicle in quick succession. This is the basis of her description of the assailant relying on her ability to see the shooter in those circumstances. This is in addition to the suddenness of the entire incident, the shock, the fear and the need to stop the vehicle by quickly pulling up the handbrake, as well as the urgent need to

open her door and run for her own life. That is more or less the entire foundation on which the entire case on the identification of the accused as the assailant is based. It is that identification description that was given, having been observed in those very shocking, scary and very life-threatening circumstances that was given to the police, colonel Mshiyo in particular, on whose evidence it was given to him in the presence of his colleague captain Baduza.

[48] That description was that the assailant's face was not covered, he was a young man with beard, dreadlocks on his head, light in complexion, of medium build and wearing a black t-shirt with its knobs closed up to the last knob. She could not see the lower part of his body because the driver's door obscured the assailant's lower body. This is quite a detailed description of the assailant, well until one looks at it closely and compares it with the rest of the evidence of the state. The state's evidence on identification included the evidence of Mrs Mbono's close neighbour Ms Mrwabo. Her evidence was that she was preparing her child or children for school when she heard what she initially thought were firecrackers or crickets and on peeping through the window she observed that the deceased's vehicle was reversing out of the garage and there was smoke coming out of the vehicle but not from its exhaust. The gunfire was in quick succession, and she saw Mrs Mbono exiting the vehicle and running into the house while stooped low.

[49] She saw a man going towards the front of the vehicle carrying a firearm. She saw that man shooting the deceased as he lay on the ground on the passenger's side of the vehicle. That man had beard, was of medium height and was wearing black clothes. Even though she took cover, nothing obscured her view such that she even observed the man walking out of the gate casually putting the black firearm in his waist. Most importantly, she was clear that she could not identify that man and

could not even tell if he was a Xhosa man, as she put it, or even an Indian man. This man was only 20 paces away from her, but she could not see him properly amongst other reasons, because she was afraid or scared despite her vantage position of being in the neighbouring house and possibly invisible to the assailant and not being under gunfire and her life facing no imminent danger.

[50] The leading authority on identification is the judgment of Holmes JA delivered more than five decades ago in *Mthetwa*<sup>5</sup> in which he expressed himself as follows:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities”

[51] It does need to be emphasized that when the shooting started there had not been a sighting of the shooter before. Therefore, what alerted Mrs Mbono to what was happening was gunfire and her husband falling in his seat all of which happened suddenly and unexpectedly. The vehicle was moving hence she saw the need to pull up the handbrake. The shooting was continuous hence she ran away stooping so as to minimize the opportunity of harm to herself and to save her own life. All of these are natural instincts in what was not just a fast-paced succession of events in a moving scene but a shocking, fearful and life-threatening situation. The point is that one does not have to disbelieve Mrs Mbono or even make credibility findings

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<sup>5</sup> S v Mthetwa 1972 (3) SA 766 (A) at 768.

against her as an identifying witness. One has to just make a realistic assessment of what was happening in deciding on the reliability of her evidence on identification in circumstances in which the assailant was a complete stranger to her.

[52] Expanding on *Mthetwa*, Saner AJ said in *Miggel*<sup>6</sup>:

“The probability that an identification is reliable is strengthened when the person who has been identified was known before hand to the identifying witness. But even in that case, close attention must be paid to the opportunity which the witness had of identifying the person in question in circumstances then prevailing, in order to ascertain whether a correct identification was made.”

[53] The problems with the evidence of the state as it relates to the identification of the assailant by Mrs Mbono was not assisted by the evidence of captain Baduza. His evidence was that he was in the room with colonel Mshiyo when Mrs Mbono gave a description of the assailant. He took that description and gave it to their tracking team. However, there are serious discrepancies between what he claimed to have been the description given by Mrs Mbono to him and colonel Mshiyo. Suddenly, on his evidence there was a lumbar jacket and black trousers as well as takkies being worn by the shooter. This is nothing short of shocking in terms of the revelation it makes about what was at play in captain Baduza’s attempt at landing corroboration to not only Mrs Mbono’s evidence but also to that of colonel Mshiyo. However, he ended up giving a description that was materially at variance with the evidence of Mrs Mbono on the very important aspect of the identity and identification of the assailant.

[54] Even the presence of captain Baduza in that room is not without its own problems. First amongst which is, as I said before, he gives a wrong description of

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<sup>6</sup> S v Miggel 2007 (1) SACR 675 (CPD) at 678 g-h.

the assailant which then contradicts that of Mrs Mbono in material respects. That is not the only problem though. The other problem is that even captain Mshiyo was seen at the crime scene by Mrs Mbono some two hours after warrant officer Mangaliso and sergeant Mnukwa had left her room. That contradicts colonel Mshiyo's own evidence of being there even before 08:00 that morning as he had asked to be excused from the meeting he would have attended. Most importantly, and for a reason that is completely bewildering, captain Baduza was not even seen in that room by Mrs Mbono. Yet warrant officer Maginindana, the investigating officer of this case was not called by the state in circumstances in which she was placed in that room by the state's key witness, Mrs Mbono as having been introduced to her by colonel Mshiyo, another important witness of the state.

#### *The identification parade*

[55] This whole picture undermined the whole evidence of what transpired at the identification parade. The identification parade had its own problems whose significance captain Diko who conducted it might not have fully appreciated. The line- up of participants consisting of 10 people including the accused person was much less than satisfactory as he was the only one with dreadlocks. The dreadlocks appeared to have been key to Mrs Mbono's identification of the accused as the assailant. Furthermore, he was the only one who appeared to have been bearded in the manner that he was. Most of the other participants were mostly very young, some as young as 20 years old and some as old as 48 or 49 years old when he was 39 years old. A combination of these factors, especially the dreadlocks made the accused stand out quite prominently.

[56] There is another issue that that was raised on behalf of the accused which, in my view, is of some importance. The evidence of captain Maliwa was that he was sent a picture of the accused on his cell phone as he was looking for him for an unrelated case he was investigating. He claimed to have deleted that picture from his cell phone to clear the space on his cell phone after hearing that the accused had been arrested. He did this even before he and his colleagues went to fetch the accused from the Western Cape. In other words, even before he had seen the accused and confirmed that the Western Cape police had arrested the correct suspect. The suspicion that this was carefully choreographed to exclude any suspicion that the picture of the accused may have had an opportunity of being shown to Mrs Mbono before the identification parade is difficult to regard as farfetched. I hasten to point out that I make no finding in this regard as there is no evidence of that happening. However, it contributes to the long list of inexplicable situations in which police appeared to have been too desperate to bring what might have been evidence of the accused's complicity to the crime at all costs. The criticism I express about certain aspects of the evidence of the police is not taken lightly but I consider it necessary to express my disquiet as there are way too many instances of the police's handling of this case that cause a strong feeling of disquiet about certain aspects of the conduct of the police.

[57] There is also another issue of some importance. It relates to the version that was put to the state witnesses including Mrs Mbono about the version of warrant officer Mangaliso and sergeant Mnukwa. That version by those two officers who were made available to the defence by the state, which on its own was hair raising, was that Mrs Mbono told them that the assailant was unknown and that she did not give them a description of the assailant. Her reasons for not giving the description

were that while they were in the room with her much earlier than colonel Mshiyo, they did not have time to sit down with her. This begs the question why would they not have time? Mrs Mbono was the only person who was present at the crime scene, and she therefore was the only one who could have assisted them in apprehending the suspect. Furthermore, it is simply not enough for Mrs Mbono to say that they did not ask her, even in that traumatic condition, to give them a description. I do not see why it would have been difficult for her to tell them that she saw the assailant, that it was an unknown young man and that she could identify him if she saw him again and most importantly give them the description. She only gave the description to colonel Mshiyo some two hours later in circumstances in which she did not know and had no reason to think that other police officers would come later. The presence of colonel Mshiyo was just fortuitous and not something she could have counted on.

[58] The point I am making is not that the evidence of the state witnesses suffered from a credibility crisis in its entirety. The point is that with all of these problems which are just too many and too important to ignore, the state's case against the accused is hoisted on evidence that suffers from a reliability crisis. In this regard the Supreme Court of Appeal stated the legal position as follows in *MEC for Health, Frere State*<sup>7</sup>:

“I must emphasize that it is not suggested that the appellant was not a credible witness. Rather, she was an unreliable witness. There are conceptual differences between credibility and reliability which should not be conflated. Credibility has to do with a witness' veracity. Reliability, on the other hand, concerns the accuracy of the witness' testimony. Accuracy relates to the witness' ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not

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<sup>7</sup> HAL obo MML v MEC for Health, Frere State 2022 (3) SA 571 (SCA) para 66.

credible cannot give reliable evidence on the same point. Credibility on the other hand, is not a proxy for reliability; a credible witness may give unreliable evidence. The passage of time that we have in this case of over 13 years from the relevant events impacts on the reliability of the witness's evidence not her credibility. The unreliability of the appellant's evidence is understood by the fact that, where relevant, her purported recollection of dates, times and events is not supported by the objective evidence ...”

### *Dock identification*

[59] The last point relating to the state's case against the accused is Mrs Mbono's invitation by the prosecutor to indicate if the person who attacked them on the date of the incident was present in court. The dangers of this type of evidence cannot be underestimated. Besides everything else, the accused was not seated in the gallery with other members of the public when the witness was invited to point at him if he was present in court. Of course, he was present in court sitting alone in the accused's box standing out like a saw thumb even as he no longer had dreadlocked hair. I do not see how the witness could have pointed at anybody else other than the accused sitting alone in the dock. This type of evidence cannot be put any better than simply to say that such a witness was invited to make an obvious choice where no other sensible choice was even worth making. It is therefore a serious understatement to even call it evidence.

[60] The legal position on an accused's application to be discharged at the close of the case for the prosecution was clearly articulated in *Lubaxa*<sup>8</sup> in which Nugent AJA had this to say:

“[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates

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<sup>8</sup> S v Lubaxa 2001 (2) SACR 703 (SCA) at 707 f-j and 708 a.

himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrate v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

### *Conclusion*

[61] It would simply be unjust and could even threaten the accused's right to a fair trial to expect him to answer to what amounts to no more than police suspicions, even suspicions that may be for very good reasons, about the accused's involvement in the killing of the deceased. The evidence on which the accused's prosecution is founded is unfortunately based on evidence of a speculative nature in which he would, if not discharged, be expected to answer a case that at best, is based on unreliable evidence with too many inconsistencies on material aspects of the state's case. Even worse, with the state's very own witnesses contradicting each other including the police themselves in very material aspects of the state's case

against the accused. In those circumstances, extreme prejudice to the accused and his right to a fair trial are manifest as he would, if not discharged, be required to deal with the evidence of the state that is littered with internal contradictions and inconsistencies that could even make it difficult for him to make out what the state's case against him is exactly. It seems to me that the internal weaknesses of the case of the state against the accused militate against him being put on his defence.

### *Results*

[62] In the result the following order is issued:

1. The application for the discharge of the accused in terms of section 174 of the Criminal Procedure Act 51 of 1977 is granted.
2. The accused is discharged on all the charges preferred against him.

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**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

### Appearances

Counsel the state : N. Mvandaba

Instructed by : NDPP

Mthatha

Counsel for the accused : Z. Z. Matebese SC with V.N. Calaza

Instructed by : W Quluba Inc.

Mthatha

Date heard : 12 February 2026

Date delivered : 22 May 2026