

SOUTH AFRICA / JUDGMENT

S v Bailey and Others (D31/2019) [2023] ZAKZDHC 102 (12 December 2023)

[2023] ZAKZDHC 102

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mathenjwa

CASE / FILE NUMBER

D31/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL

DIVISION, DURBAN

CASE

NO: CC D31/2019

In

the matter between:

THE
STATE
and
Langelihle
James Bailey
Accused
1
Phumulani A Siyaya
Accused
2
Bonisile
Lili
Accused 3
Bhekisisa
Mhlongo

Accused 4
Sehliselo
H
Dladla
Accused 5
Mazwi
P
Nzama
Accused 6
Mandla
J Masango
Accused 7
Njabulo
S
Cele
Accused 8
Bhekiziwe
Nzuza
Accused 9
Erick
M
Chiliza
Accused 10
ORDER
I

make the following order:

1.
Accused
6,9 and 10 are found not guilty and they are discharged in all
counts.
2.
Accused 1, 2, 3, 4, 5, 7, and 8 are
found not guilty in count 1.
3.
Accused 2, 5, and 8, are found not
guilty in count 3.
4.
Accused 1, 2, 3, 4, 5, 7 and 8 are found
guilty in counts 2, 4, 5, 6, 7, 8 and 9.

JUDGMENT

Mathenjwa J

Introduction

- [1] The accused appeared before court on nine different counts. In count 1 all ten accused are charged with assault with intent to do grievous bodily harm to the person of Xolani Wiseman Madondo. In count 2 all accused are charged with murder read with s 51(1) of the Criminal

Law Amendment Act[1] in respect of Christopher Mkhari Madondo, the deceased. In count 3, accused 2, 5, 6, 8, 9 and 10 are charged with attempted murder in respect of Mphathi Madondo. In count 4 all accused are charged with attempted murder in respect of Artwell Khaya Ndodo Dlamini. In count 5, all accused are charged with attempted murder in respect of Thulani Wiseman Madondo. In count 6 all accused are charged with malicious damage to property in respect of a Toyota Fortuner motor vehicle which is the property of the deceased. In count 7 all accused are charged with defeating the administration of justice. In count 8 all accused are charged with attempted murder in respect of Bongumusa Mzobe and in count 9 all accused are charged with attempted murder in respect of Sibonelo Lloyd Mngoma.

- [2] The deceased and Thulani Madondo were taxi owners and members of the Ixopo and District Taxi Association (the Association). Xolani Madondo and Mphathi Madondo are both biological sons of the deceased. At the time of the commission of the offences both Xolani and Mphathi were driving taxis owned by the deceased which operated on the route from Ixopo to Durban and back. Sihle Madondo is the nephew of the deceased and Thulani Madondo. He was driving a taxi owned by Thulani Madondo which operated on the same route. Artwell Khaya Ndodo Dlamini was employed by the deceased and Thulani Madondo to assist with the loading of their taxis at Brooke Street taxi rank in Durban. All the accused were employees of Mvimbeni Security and were represented by

Mr Mlotshwa. The State was represented by Mr Gcaba, assisted by Mr Gcweka. The accused pleaded not guilty to all charges, remained silent and put the State to prove all the charges against them. Prior to evidence being led the accused made admissions in terms of s 220 of the Criminal Procedure Act[2] (the CPA). The admissions related to the chain of evidence relating to the time the deceased was shot until a post-mortem report was conducted, the identity of the deceased and the contents of the post-mortem examination.

Factual

background

- [3] On 11 September 2015 the Association and Mvimbeni Holdings Pty Ltd (Mvimbeni) entered into a service agreement in terms of which Mvimbeni was appointed to provide security services to the Association at Brooke Street taxi rank. Terms of the agreement were that Mvimbeni would provide day security services and monitor the site on behalf of the Association. The Association undertook to pay a service fee to Mvimbeni every Saturday and it was entitled to terminate the agreement at any time by providing written notice to Mvimbeni if circumstances existed justifying such termination. After the signing of the security service agreement, Mvimbeni deployed armed security officers at Brooke Street taxi rank to guard the site. Mvimbeni security officers monitored the taxi rank on behalf of the Association and managed to drive away other taxi associations which attempted to take over from the Association the taxi route between Ixopo and Durban. The Association had two rank managers. One of them was Mr Mbanjwa who was operating at the Ixopo area and the

other was Mr Siyabonga Ndlovu who was operating at the Brooke Street taxi rank. Members of the Association had agreed on a method to collect contributions among themselves for payment of the security service fees to Mvimbeni. The money was collected by Mr Mbanjwa from each of the taxi owners and he paid it over to Mvimbeni.

- [4] According to Thulani Madondo, during 2014 and 2015 other taxi associations outside Ixopo were forcefully attempting to take away from the Association its route from the Brooke Street taxi rank to Ixopo and back. For that reason, the Association entered into the agreement of security services with Mvimbeni. The Association paid Mvimbeni R28 000 per week for rendering security services. The Association collected the security services funds from their taxi owners. Mvimbeni security officers managed to drive away and prevented those associations outside the Ixopo area from taking their route by force and illegally operating on their route. Other members of the Association, including the deceased and Thulani himself, were of the view that the agreement with Mvimbeni should be terminated because there was no longer any threat to their business. Subsequently, on 23 or 24 April 2018 a meeting of the Association was held to discuss the issue of the termination of the Mvimbeni agreement. The matter went to a vote, with the majority of the taxi owners voting in favour of continuing with the agreement with Mvimbeni. After the deceased and a few others were outvoted at the meeting the deceased advised the chairperson of the Association that he would not continue to pay his contribution for the provision of security services and he subsequently stopped paying the contribution. About two days after the meeting of the Association had taken place, he received a telephone call from Mr Getsemame whom he described as a boss of Mvimbeni, informing him that it had come to his knowledge that he and the deceased wanted to terminate the security agreement between Mvimbeni and the Association.
- [5] According to Elphas Menzi Mbanjwa, the rank manager at Ixopo taxi rank, sometime in April 2018 the deceased informed him that he would not pay contributions towards the security service fees and if Mr Getsemame asked him about the shortfall on the service fees he must inform him to contact the deceased directly. Subsequently, Mr Getsemame called Mr Mbanjwa and asked him about the shortfall on the security service fees. Mr Mbanjwa informed him that the deceased said he must contact him about his non-contribution to the service fees. Thereafter Mr Getsemame called Mr Mbanjwa and informed him that he would stop the taxis whose owners were no longer paying the service fees from operating.

Documents handed into court and statements admitted in terms of s 212 of the CPA

- [6] Mvimbeni's firearm register was handed into court as exhibit "CC"; firearm permits were handed into court as exhibit "DD" and the statement of Thulani Hlongwane, the supervisor and fire arm issuing officer was handed into court as exhibit 'GG'. The firearm register reflects particulars of a firearm, particulars of a security officer to whom it was issued, date when the firearm was issued, signature of the Mvimbeni personnel who issued the firearm, signature of the Mvimbeni security officer to whom the firearm was issued and particulars of the taxi rank where the security officer was posted. The firearm permit reflects

particulars of a firearm, particulars of the person to whom it was issued and the date when it was issued. The firearm register, firearm permits and statement of Hlongwane reflect that on 27 April 2018 the following firearms were issued to the following accused:

- (a) accused 1, Bailey was issued with rifle with serial number 3[...];
- (b) accused 2, Siyaya was issued with rifle with serial number 3[...];
- (c) accused 3, Lilli was issued with rifle with serial number 3[...];
- (d) accused 4, Mhlongo was issued with rifle with serial number 3[...];
- (e) accused 5, Dladla was issued with rifle with serial number H[...];
- (f) accused 6 Nzama was issued with rifle with serial number 3[...];
- (g) accused 7, Masango was issued with rifle with serial number 3[...];
- (h) accused 8 Cele was issued with rifle with serial number H[...];
- (i) accused 9 Nzuza was issued with rifle with serial number H[...]; and
- (j) accused 10 Chiliza was issued with rifle with serial number H[...] and pistol with serial number 4[...].

[7] The following statements were handed into court in terms of s 212 of the CPA:

- (a) statement of Warrant Officer Sphelele Charles Gumede handed in as exhibit 'N';
- (b) another statement of Warrant Officer Sphelele Charles Gumede handed in as exhibit 'Z';
- (c) statement of Warrant Officer Mbali Sinenhlahla Zuma in respect of the ballistic expert examination of firearm belonging to Thulani Madondo was handed in as exhibit 'Y';
- (d) another statement of Warrant Officer Mbali Sinenhlahla Zuma on the ballistic report of the firearm and cartridge cases found at Brooke Street taxi rank and those found in the Mvimbeni Toyota Quantum and in possession of accused 1, 2, and 7 was handed into court as exhibit 'BB'.
- (e) statement of Warrant Officer Ruwain Kader on the ballistic examination of the firearms was handed into court as exhibit 'X'; and
- (f) statement of Warrant Officer Gumede on the ballistic expert examination of the Toyota Fortuner belonging to the deceased and Toyota Quantum belonging to Thulani Madondo were handed into court as exhibit 'Z'.

State case

- [8] The State called numerous witnesses. Xolani Madondo is the complainant in count 1 and a witness in counts 2, 3, 4, 5, 6 and 7. On 26 April 2018 he was operating the deceased's taxi at Ixopo taxi rank situated in Brooke Street, Durban. At about 17h00 while he was uploading passengers into the taxi the accused came running to him. Accused 5 instructed all the

passengers who were already seated in the taxi, to get out of the taxi while accused 1, 4, 5, 6 and 10 assaulted him. He broke free, ran away and accused 1 shouted and told him that if he dare comes back with his father to load passengers at the rank, they, the Mvimbeni would kill him. He suffered severe injuries as reflected in the medical report contained in the J 88 which was handed into court. On 27 April 2018 he went back to Brooke Street taxi rank where he found the deceased, Thulani Madondo and Artwell Khaya Ndodo Dlamini already at the rank. The deceased and Thulani were seated in a Toyota Quantum taxi that was owned by Thulani. Artwell was seated near the pavement. He observed all accused running from the direction of the Port Shepstone taxi rank to the Ixopo taxi rank in Brooke Street. As they came, they were asking where are the Madondo's.

- [9] Accused 1 asked Artwell about the whereabouts of the people who were with him the previous day and shot him with a firearm on his thigh. Ndlovu, the manager at Brooke Street taxi rank known as "Nomvete" pointed at the Toyota Quantum where the deceased and Thulani were seated. The accused fired shots at the Toyota Fortuner vehicle that belonged to the deceased which was parked at the taxi rank, then moved towards the Quantum vehicle and fired shots at the Quantum. While the shooting was going on Thulani opened the sliding door of the vehicle, came out and ran away. After the accused had stopped shooting, accused 5 instructed his co-accused to pick up the cartridges from the scene. He saw accused 2 and 4 picking up the cartridges and thereafter the accused disappeared from the scene. Police arrived shortly after the accused had left the scene. After

the arrival of the police he came closer to the Quantum vehicle, and saw the deceased inside the vehicle and he was seriously injured. The deceased received medical attention, but he passed away at the scene. The deceased did not have any firearm and he did not see any firearm in the Quantum vehicle. The accused are well known to him for years except accused 4 who was new, but he had seen him previously. At a later stage he attended an identification parade where he pointed out accused 1, 2, 4, 5, 6 and 8 as the persons who participated in the incident where the deceased, Thulani and Artwell were shot on 27 April. However, he also pointed out other people who were not suspects in this case as people who participated in the shooting incident.

- [10] Mphathi Madondo is the complainant in count 3. On 27 April 2018 at about 11h00 he was at Brooke Street taxi rank. When he parked the taxi to load passengers at the loading stand accused 2, 5, 6, 8, 9 and 10 approached him. When he opened the vehicle's window, accused 2 slapped him on his face and the other accused grabbed him. Some were pulling him out through the window while others were pulling him out through the taxi door. All accused participated in grabbing him. While they were hitting him accused 5 and 10 told him to tell his father, the deceased, that if he dare come to the taxi rank with his brother, they will kill them, they did not want to see the Madondo's at the taxi rank any more. He sustained injuries, which are reflected in the medical report contained in the J88 which was handed into court. He reported the incident telephonically to the deceased and later met with the deceased when he reported the incident at the police station at Market Place, Durban. He left the deceased at the police station and went for medical treatment. Later on, he returned

to the Brooke Street taxi rank. On his way to the rank he found his uncle Thulani Madondo in the ambulance. Thulani informed him that he had been shot at, at the taxi rank. He proceeded

to the taxi rank where he found his father lying on the stretcher and the paramedics were attending to him. Shortly thereafter he learnt that his father had passed away. On the following day he and Sihle Madondo went back to the taxi rank and tried to collect the Toyota Fortuner vehicle. Accused 9 and 10 approached them, pointed big guns at them and told them to get out of the place, otherwise they would kill him like his father. On 9 May 2018 he pointed out accused 9 and 10 to the police and they were arrested accordingly. Upon cross-examination by the defence counsel, it was put to him that on 28 to 30 April 2018 accused 8 was in custody and he could not have been at Brooke Street taxi rank on that day. Furthermore, he conceded under cross-examination that he did not make a statement to the police about the incident of 28 April when he tried to collect the vehicle at the rank.

[11] Sihle Madondo is a witness in counts 2, 4, 5, 6 and 7. His evidence supports Xolani Madondo's evidence. On 27 April 2018 at about 15h30 he arrived at Brooke Street taxi rank to offload passengers. He immediately saw the accused arriving carrying big firearms. Some of the accused insulted Artwell Dlamini

by calling him by his mother's puss and asked him where were the people who were in his company the previous day. While uttering

these words the accused were dragging Artwell by his arm towards the Toyota Fortuner. He saw accused 1, 2, 5, 6, 7, 8, 9 and 10

participating in mishandling Artwell. He then heard the sound of a gunshot from the direction where the accused were standing. He realized that Artwell was shot on the thigh. Accused 2, 5, 7, 8, 9 and 10 moved straight to the Quantum vehicle and fired shots at the vehicle. While the shooting was going on, Thulani Madondo came out of the vehicle and ran away. After the accused had stopped shooting at the vehicle, they collected cartridges on the ground and disappeared from the scene. He then proceeded to the direction where Thulani had run to. He found him lying down on the road and the police were attending to him. The ambulance took Thulani to hospital and he returned to the taxi rank and found the deceased being laid on the stretcher. He was later informed that he had passed away.

[12] About three to four days after the shooting incident Mphathi and Sihle returned to the taxi rank to fetch the Toyota Fortuner. When Mphathi tried to start the vehicle, accused 9 and 10 approached and stopped them from taking the vehicle. Accused 10 shouted at Mphathi and told him that he would die like his father. Later on, he attended an identification parade where he pointed out accused 2, 5, 6, 7 and 8 as the persons who participated in the shooting incident at Brooke Street taxi rank. However, some of the people he pointed out at the identification parade were not suspects in the present case. He testified that accused 7, 8, 9 and 10 were the people who approached and stopped them from taking the vehicle. Under cross-examination it was put to him that accused 7 and 8 were arrested on 27 April 2018.

From that date they have been in custody and they could not have been present at Brooke Street at the time when he and Mphathi came to fetch the vehicle. He insisted that he saw them at the scene of the crime on that date. Thulani Simon Madondo is the complainant in count 5 and a witness in counts 2, 4, 5 and 6. On 26 April 2018 while he was with the deceased in Durban, the deceased received a phone call informing him that his taxis were prevented from loading passengers in Brooke Street. He at once left with the deceased in separate vehicles to Brooke Street. He was driving behind the deceased. On arrival at Brooke Street taxi rank he found the deceased being involved in a dispute with the rank manager, Ndlovu. He made peace between the deceased and Ndlovu. The next day he and the deceased went to the police station at Market place to report the incident that occurred the previous day where Mvimbeni prevented the deceased's taxis from loading at the taxi rank. While they were at the police station the deceased's son Mphathi arrived and informed the deceased that Mvimbeni had assaulted him and prevented him from loading passengers at Brooke Street taxi rank. The deceased went to the taxi rank. He later followed the deceased and found him standing in front of his Toyota Fortuner. He and the deceased set in the Toyota Quantum vehicle. The deceased was unarmed and he, was in possession of a pistol which is his licensed firearm. He suddenly saw Mvimbeni security officers approaching from the front part of the vehicle. As they approached they were carrying big firearms and asking "Where are they". He heard a gunshot sound and saw Ndlovu, pointing at the vehicle where he and

the deceased were seated. The security officers then fired shots at the vehicle.

[13] He saw accused 1, 4, 6, 7 and 9 among the security officers who fired shots at the vehicle. While the shooting was going on he opened the sliding door and ran away. While getting out of the vehicle he was struck by a bullet on his right arm elbow. While running on the road, a police vehicle approached, he reported the incident to the police and he was taken by an ambulance to hospital. He did not fire any shots from his firearm and the deceased was unarmed. His firearm was taken by the police. He later attended an identification parade where he pointed out accused 1, 5, 6, 7 and 8 as the persons who participated in the shooting incident at Brooke Street taxi rank. However, at that parade he further pointed out other people who were not suspects in this case and one of them was not even an employee of Mvimbeni. During cross-examination he confirmed that he had communicated with Mr Getsemane through an SMS informing him about the Association's meeting that was to take place and discuss the review of the security agreement.

[14] Zindela Patric Madondo is the brother of the deceased and Thulani Madondo. On 27 April 2018 he was at Brooke Street taxi rank to speak to the rank manager about the situation that related to the stopping of the deceased's taxis from loading passengers at the taxi rank. At that time, he was still employed by the South African Police Services (SAPS) as a Captain. On his way to the rank he saw the rank manager, Ndlovu on the stairways near the Port Shepstone taxi rank. He approached him, but Ndlovu was very angry at the deceased and he told him that he had spoken to Mvimbeni, who were coming and, on their arrival, they will

finish the deceased. Suddenly Mvimbeni security arrived. He requested to talk to accused 5 who was the supervisor and pleaded with him that the problem involving the deceased should be resolved peacefully. Accused 5 told Zindela that there was nothing he could do because the instruction was given by their boss. Accused 5 did not elaborate on the instruction that was given to them and the accused proceeded to the taxi rank. He then heard continuous gunshots at the rank. After the sound of gunshots had ceased, Mvimbeni security came back running, got into their Toyota Quantum vehicle and left. Under cross-examination he denied that he told accused 5 that police were coming to kill Mvimbeni. He disputed that there were armed men other than the Mvimbeni security

at the taxi rank.

[15] Sibusiso Khumbulani Mayeza was operating a taxi belonging to Thulani Madondo. On 27 April 2018 he was at the taxi rank when Mvimbeni security arrived. His evidence supports that of Xolani and Sihle with regard on the arrival and shooting at the taxi rank. He also heard the security asking as to where the occupants of the Toyota Fortuner vehicle were. Someone shouted and pointed at the Quantum, indicating that the deceased who was the owner of the Fortuner was in the Quantum. He saw the security proceeding to the Quantum and thereafter he heard gunshots being fired from the direction where the Quantum was parked. He ran away and was not able to identify individual members of Mvimbeni. He was cross-examined and nothing came out of his cross examination. Ndlovu testified that on 25 April 2018 he was at the taxi rank when accused 5 and 6 stopped the deceased's taxis from loading passengers. They informed him that the taxis could not load passengers because the deceased was no longer paying his contribution to the security services fees. The following day, on 26 April, the deceased arrived at the taxi rank and asked him for the reasons why his taxis were being prevented from loading passengers. A fight ensued between him and the deceased and he was hit by the deceased with a hammer. The

following day on 27 April he was on the stairway near Hammersdale taxi rank in Brooke Street when Zindela approached him. Zindela

wanted clarity about the stopping of the deceased's taxis from loading passengers. While talking to Zindela, accused 5 approached

and informed him that there were people loading passengers without a permit at the taxi rank. At that time Zindela asked Ndlovu to tell accused 5 that he wanted to talk to him. He further saw Mvimbeni security officers carrying firearms and firing shots at the rank. He ran away and hid. He disputed that there were hitmen or any other people interfering with the loading of taxis at the rank. Under cross-examination he denied that he called Mvimbeni to come back to the taxi rank on that day. He confirmed that he wrote a statement to the police wherein he stated that on 27 April 2018 the deceased and his brothers stopped the taxis from loading passengers at the rank, and the taxi drivers called Mvimbeni security to return to the rank.

[16] Thulebona Samuel Hlongwane was employed by Mvimbeni as a supervisor and firearm control officer. Hlongwane testified about the records of Mvimbeni that were seized by the police from its offices when accused 1 to 8 were arrested. These records are the firearm register (exhibit “CC”) and the firearm permit (exhibit “DD”). Immediately after Hlongwane had taken the witness stand and before he was led by the prosecution, he said that he first wanted to inform the court that on 27 April 2018, the date when the accused were arrested, he was tortured and assaulted by police at the Mvimbeni offices in Pinetown. Mr Mlotshwa for the defence objected to the admission of Hlongwane’s evidence on the basis that he was assaulted by the police. After both Mr Mlotshwa and Mr Gcaba had concluded their arguments the court ruled that the evidence was admissible and reasons for the ruling were given in court. Hlongwane confirmed that exhibits “CC” and “DD” were Mvimbeni records. He informed the court that when a firearm was issued to a security officer, a firearm permit was also issued to that security officer. Furthermore, the firearm register and firearm permit correspond to the particulars of a firearm and the person to whom it was issued.

[17] Hlongwane was cross-examined by the defence counsel and thereafter re-examined by the State counsel. During

re-examination, he informed the court that he was no longer feeling safe to continue testifying because during the break someone outside the court told him that if he continued protecting the person who killed another person he may end up being arrested as well. The court directed the investigating officer Colonel Ntshangase who was present in court to assist the witness with regard to that complaint. After adjournment the State counsel read the police occurrence book entry where Hlongwane had reported at Durban Central Police Station that he was not laying a charge but wanted the police to warn the person who threatened him if he saw him in court again. The person who allegedly threatened Hlongwane was never identified by him to the police. During the course of re-examination, the State made an application to declare Hlongwane a hostile witness. The defence opposed the application. After both parties concluded their arguments, the court declared Hlongwane a hostile witness and the reasons for that ruling were given in court. The affidavit made by Hlongwane to the police on 29 April 2018 relating to this matter was handed into court as exhibit “GG”.

[18] Sergeant Van Zyl was patrolling in a police vehicle when he received a call from radio control informing him that there was a shooting taking place at Brooke Street Durban. On his way towards Brooke Street he found Thulani Madondo lying down on the road with a gunshot wound on his right arm. He had a firearm in his possession and the firearm had not been used. Thulani had a valid license to possess the firearm. Sergeant Van Zyl removed the firearm from him, which was later collected by members of the local crime experts. On 27 April Sergeant Buhlebuyeza Mkhwanazi was a crew member in a police van driven by Constable Bhengu when they received a message over the police radio about the shooting at Brooke Street taxi rank. They were informed of the description of the vehicle which was used by the people to get away from the scene where the shooting occurred. They gave chase to the vehicle. The vehicle took the N3 in the direction of Pinetown. He called radio control

for backup and he chased the vehicle until it stopped in Pinetown. Under cross-examination he informed the court that accused 1, 2, 3, 4, 5, 6, 7 and 8 were in the vehicle, but accused 9 and 10 were not in that vehicle.

- [19] Sergeant Bongumusa Mzobe received a message from radio control about a vehicle coming from Durban which was involved in the shooting at Brooke Street taxi rank. When he spotted the vehicle near New Germany headed towards Pinetown, he pressed on the blue light of his police vehicle and gave chase to that vehicle. When he was chasing the vehicle in Pinetown, one occupant from that vehicle opened the window and fired shots with a big gun at him. He retaliated and fired two shots at that vehicle. The vehicle turned at Scots Road and stopped near the municipality building. Some people came out from the vehicle, ran away and entered the municipality building. He looked inside the vehicle and found one big gun lying on the seat and two magazines lying on the floor. He was cross-examined by the defence, but nothing came out of his cross examination. Sergeant Sbonelo Lloyd Mngoma was wearing his police uniform and patrolling in a marked police vehicle when he received a message for backup relating to a vehicle whose occupants were shooting at the police in Pinetown. He encountered the vehicle in Scots Road, Pinetown. The occupants of the vehicle fired three shots at him. He retaliated and fired shots back at the vehicle. The vehicle stopped and he saw five of its occupants running into the municipality building. He was cross-examined, but nothing came out of his cross-examination. Warrant Officer Nehemiah NkwaNkwa was attached to the SAPS National Intervention Unit in Durban. When he received the message about the shooting between the police and suspects at Pinetown, he gathered members of the Unit and proceeded to Pinetown. Inside the municipality building he saw accused 4 who was wearing a municipality uniform lying down under the trees. When he made him to stand up, he realized that he was lying over an AK rifle, one shotgun and one small pistol. He further found one spent cartridge in the shotgun and he arrested the accused. He was cross-examined but nothing came out of his cross-examination.
- [20] Constable Sandile Fortunate Msane entered the municipality building and found five people jumping over the concrete fence that divides the municipality premises and Mvimbeni building. Accused 5 was the last person to jump over the fence. Constable Msane also jumped over into Mvimbeni premises and arrested accused 5. Sergeant Khulekani Adam Sithole entered the municipality premises and inside the building he found accused 3 who was wearing a municipality uniform trying to push big guns into a locker. Upon checking the locker, he found that there were three guns inside the locker and he arrested the accused. Sergeant Philani Selby Ndwane was also called as backup for the incident involving the shootout at Pinetown. He found accused number 2 running on the road, stopped him, searched him and found three spent cartridges of a shotgun and arrested him. On the same road he found accused 1 and accused 7. He searched them and found three spent cartridges of a shotgun in the possession of accused 1 which was in the pocket of his trouser and three spent cartridges in the possession of accused 7 which was in the pocket of his trouser. He arrested all three accused accordingly. Then the State closed its case.

Defence case

- [21] All accused testified in their defence. Accused 1 to 10 denied that they were at the Brooke Street Ixopo taxi rank when the complainant Mphathi Madondo was assaulted on 26 April 2018. The accused 1 to 8 version is that on 27 April 2018 at about 06h00 they were posted in different taxi rank sites and knocked off duty between 13h00 and 14h00. They worked half day on that date because it was a public holiday. When booking on duty they were issued with firearms and signed the firearm register. They were further issued with firearm permits and signed a posting sheet. When they knocked off duty they returned the firearms that they were issued with that morning. While they were still at Mvimbeni premises accused 5 informed them that he had received a phone call from Ndlovu informing him that there were people at the taxi rank who were loading passengers without a permit. Thus, accused 1 to 8 and other members of Mvimbeni who were not before court had to return to the taxi rank and solve the problem. They were issued with firearms and signed a new firearm register because the register they had signed in the morning was not available. On their arrival at Brooke Street taxi rank they found Ndlovu on the stairway talking to Zindela Madondo. Accused 5 remained behind and spoke to Ndlovu who then explained to him the situation at the taxi rank. Accused 5 shouted and informed his co-accused that the vehicle that was loading passengers should not be loading, instead a vehicle driven by a driver known as '38' should be loading passengers. There was a Toyota Quantum vehicle with tinted windows parked at the shelter. They heard gunshots which were fired towards them, coming from the direction of the Quantum vehicle. Accused 1, 2, 4, 5, 7 and 8 fired back in self-defence. That was the common version of accused 1 to 8. Next, I deal with the evidence of the individual accused which is distinguished from their common version.
- [22] Accused 1 testified that the first shot was fired from the direction of Prasa and thereafter he saw a person next to the Quantum wearing civilian clothing firing shots at them, and he retaliated and fired back at that person. Under cross-examination he was referred to his evidence during his bail application when he said that the shots fired by a person next to the Quantum was directed at him but in this court, he stated that he did not see the gun from which the shots were fired. He confirmed that the firearm register and firearm permits before court were Mvimbeni's registers. Accused 2 testified that when some of his colleagues opened the sliding door of the vehicle he heard gunshots which were fired from the direction of Prasa premises. He then saw a person's hand shooting at them through the window of the Quantum vehicle. Under cross-examination he confirmed that based on the firearm register and firearm permits he was issued with the same firearm on 25, 26 and 27 April 2018. Accused 3's evidence is that he heard gunshots from the direction where the Quantum was parked. He took cover and then ran away and he did not fire any shots at Brooke Street nor in Pinetown. Accused 4 testified that after accused 5 had informed them that the taxi that was loading was not supposed to be loading he asked passengers to alight from the taxi. He saw two people approaching from the direction of the East London taxi rank. They fired shots at him and he retaliated by firing shots back at them. Under cross-examination he confirmed that according to the firearm register and firearm permit he was

issued with the same firearm on 25, 26 and 27 April 2018.

- [23] Accused 5 was the supervisor. On 26 April 2018 when he was in Brooke Street he was approached by a police officer, Mr Sokhulu, who asked him why the Madondo taxis were not allowed to load passengers, and he informed him that it is the rank manager who can respond to that question. He, together with all Mvimbeni officers, left the taxi rank about 16h30. He disputed that he and other Mvimbeni security officers assaulted Xolani Madondo at 17h00 since they had already left the taxi rank by that time. On 27 April between 06h00 and 14h00 he was at Brooke street taxi rank, but disputed that he had seen and assaulted Mphathi Madondo. After he had knocked off he received a call from Ndlovu informing him that they must rush back to the taxi rank because there were hitmen carrying big firearms. He informed his colleagues about the situation. The controllers issued them with firearms and they returned to the rank. On his way to the taxi rank he again phoned Ndlovu who informed him that he had moved away from the taxi rank because the hitmen were disturbing him from doing his work and chased him away from the rank. On arrival at Brooke Street they parked their vehicle and he went over the stairway, and spoke to Ndlovu. Ndlovu informed him that the driver known as '38' should be loading but the hitmen removed his vehicle from the loading stand, instead the 32-seater belonging to the Madondo's was loading passengers. While talking to Ndlovu, Zindela arrived and introduced himself as a Madondo and a police officer. Zindela informed him that they needed to discuss the issue of the loading of taxis. He shouted to the security officers and informed them that the taxi that should be loading at that time was for driver '38'. He said there was nothing he could discuss with Zindela because he did not know him. Zindela informed him that the police were coming and they would shoot at them. He then heard gunshots that were being fired continuously. Another shot was fired while he was on the stairway and the bullet struck very close to him. He moved back to their vehicle; his colleagues followed him and they left for their offices in Pinetown.
- [24] Accused 6 was present when Mphathi Madondo arrived at the taxi rank on 27 April 2018. Ndlovu informed Mvimbeni security that the car driven by Mphathi was not supposed to load passengers. Some among his colleagues approached Mphathi, but they did not assault him. Later on, together with accused 1 to 8, he returned to the taxi rank. He heard gunshots while on his way to Ixopo rank he leaned against the wall until accused 5 came back rushing from the taxi rank and all his co-accused had appeared from the rank. They boarded their vehicle and left to their offices. He did not fire any shots from his firearm on that date and he did not collect any spent cartridges at the rank. When they were close to the gate of their offices in Pinetown a certain vehicle appeared and the occupants thereof fired gunshots at them. After their vehicle had stopped, he ran away, entered into the municipality offices and jumped over the fence to reach their offices. Accused 7 testified that on 26 April 2018 he was not present at Brooke Street when Xolani Madondo was assaulted in count 1. When he, together with accused 1 to 6 and 8 returned to the taxi rank he went up the stairway to the Port Shepstone rank to look for any person carrying a firearm and who might be a hitman. He then heard the sound of gunshots; he saw someone from the direction of Prasa premises

firing shots towards the rank. He then fired shots at that person in self-defence. He saw other members of Mvimbeni security moving away from the rank, he followed them and met up with them. On their way to their offices a gunshot was fired from behind their vehicle and damaged a back windscreen of their vehicle. The vehicle stopped, he got out and

entered the municipality premises. He saw an unlocked locker in the municipal building, opened it took out a municipality T-shirt and wore it. He did that for safety purposes. He got out of the municipality premises and on his way to their offices he was approached by police and was arrested.

[25] Accused 8 denied that on 26 April 2018 at 17h00 he and other members of Mvimbeni security assaulted Xolani Madondo. On arrival at the taxi rank on 27 April he took cover at the Port Shepstone taxi rank. He then heard a gunshot and thereafter there were a series of gunshots that were fired. He saw a person near Matatiele taxi rank firing shots at one of Mvimbeni's security members and he then fired shots at that person. He returned to their vehicle and left for Pinetown. While they were at Scots Road, he heard gunshots, the vehicle stopped, he alighted, entered into the municipality offices and crossed over to Mvimbeni's offices. Police arrived and arrested him at Mvimbeni offices. Under cross-examination he confirmed that the same firearm was issued to him on 26 and 27 April. He disputed that he assaulted Mphathi on 27 April and contended that on that day he was posted at the Port Shepstone rank, he was not present at Ixopo rank where Mphathi was assaulted.

[26] Accused 9 and accused 10 disputed that they were at Brooke Street and participated in the assault of Xolani on 26 April 2018 and to the shooting incident on 27 April. On 27 April they were posted at La Lucia where they were guarding the home of Mr Getsemane, the owner of Mvimbeni Security. At about 11h30 they received an instruction to meet a client at a garage in Durban North who needed close protection. Under cross-examination accused 9 conceded that during his bail application he told the court that on 27 April he was in Brooke Street because, the attorney who represented them at the bail hearing informed accused 9 and 10 that they must also state that on 27 April they were at Brooke Street. The reason being that according to Mvimbeni registers it was recorded that they were in Brooke Street on that date. He conceded that according to the firearm register they were posted at Brooke Street but explained that the posting sheet which was not before court should indicate that they were on guarding duties at La Lucia on that date. They met the client Mr Shazi at Sasol garage in Durban North and escorted him to Pinetown. They waited for Mr Shazi while he was attending a wedding at Pinding Hotel in Pinetown. After the wedding they escorted him back to Durban North. He contended that when he and accused 10 were arrested on 9 May 2018 the police took away their cell phones. These

cell phones could assist to support their version about their movements and whereabouts on 27 April. Under cross-examination accused 10 confirmed accused 9's version regarding their whereabouts on 27 April. Furthermore accused 10 informed the court that there were documents that were seized by the police at Mvimbeni's offices including a posting sheet that reflected that they were posted at La Lucia on that day. The court directed the State to make available to the

defence all the documents that were seized by police at Mvimbeni offices. Both the defence and State counsel confirmed in court that the investigating officer had brought

the register where all the documents seized from Mvimbeni were recorded and the posting sheet and new firearm permits were not among those documents. The defence then closed its case.

Evidence

[27] The State's evidence is mainly based on the principle of common purpose, eye witnesses, documentary evidence in the form of registers, ballistic analysis and circumstantial evidence. The approach that a court should adopt in approaching evidence is well traversed in case law. In *Tshiki v S*[3] it was stated as follows:

'In a criminal court a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'. (Reference omitted.)

In counts 1, 2, 3, 4, 5, 6 and 7 the various witnesses and Mvimbeni registers place the accused at the scene of crime. This brings me to the application of the principle of common purpose. It is trite law that in cases of common purpose the act of one participant in causing the death of the deceased is imputed as a matter of law, to the other participants.[4] In *S v Safatsa and Others*[5] the legal principle that applies in common purpose was re-stated. Botha JA[6] cited with approval Holmes JA in *S v Madlala*[7] where it was held that:

'It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof

- (a) that he individually killed the deceased, with the required *dolus*, eg by shooting him; or
 - (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
 - (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see *S v Malinga and others* 1963 (1) SA 692 (A) at 694F-H and 695; or
 - (d) that the accused must fall within (a) or (b) or (c)
- it does not matter which, for in each event he would be guilty of murder.'

Generally, the principle of common purpose entails the existence of an agreement among the accused persons to commit a crime. In *S v Mgedezi and Others*[8] the court elaborated and restated the principle that applies in proving common purpose in the absence of prior agreement among the accused. In *Mgedezi* the accused were tried for murder and assault of inmates of room 12 in a hostel. Botha JA elaborated further on the requirements that must be established in proving that the accused acted in common purpose with each other. The court stated as follows: [9]

‘In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault, Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensure.’

[28] In the present case the State argued that all the accused had prior agreement to assault the complainant in count 1 on 26 April 2018, to kill the deceased in count 2 and to commit the offences in counts 3, 4, 5, 6, 7, 8 and 9. The nature of this case is that all the accused were employees of Mvimbeni. They acted in the scope of their employment. For that reason, their mere presence at Brooke Street taxi rank on 26 and 27 April 2018 could not necessarily prove prior agreement to commit the offences. Furthermore, the accused before court were not the only employees of Mvimbeni who were at the rank, but other employees present at the rank on that date were questioned and were released by the police. For that reason, the State has not shown that there was prior agreement amongst all the accused to commit the offences. Its trite that in the absence of prior agreement, the starting point is whether the accused were present at the scene where the offences were committed. The State relies on evidence of three witnesses who place the accused at the scene of the crimes. Next, I deal with the evidence of identity.

[29] In minimising the danger of incorrect identification our courts approach evidence of identification with caution.[10] The principle relating to the evidence of identity was restated in *Abdullah v S*[11] as follow:

‘...It is not enough for the identifying witness to be honest. The reliability of his identification must be tested against other factors such as lighting, visibility, proximity of the witness and opportunity for observation.’ (Footnote omitted.)

In determining the reliability and credibility of the identification of the accused in counts 1-7, I consider that all three witnesses

attended the identification parade and identified other people who were not suspects in this matter. Both Sihle Madondo and Mphathi

Madondo were credible witnesses. Although they sometimes became emotional and broke down when testifying about the murder of their

father in count 2, they stood to their testimony during cross-examination. Thulani was criticized by the defence for not disclosing that he had communicated with Mr Getsemane about the meeting of the Association which was convened to review the security services agreement. Thulani explained that his communication with Mr Getsemane was not a secret, all members of the Association communicated with him. In his evidence in chief he referred to the communication with Mr Getsemane that occurred after the meeting of the Association. Thulani was a credible witness, he did not deviate and did not contradict himself under cross-examination.

[30] However the honesty of a witness may not equally translate to the reliability of his or her observation. It is not in dispute that the complainant in counts 1 and 3 were assaulted and sustained severe injuries. However, there are challenges in respect of the evidence of identification in respect of counts 1-7. Despite the fact that the accused were well known to the witnesses, the witnesses pointed out other people who were not suspects nor employed by Mvimbeni at the identification parade. Moreover, Sihle informed the court that accused 8 was among the people who assaulted Mphathi when he tried to fetch the vehicle sometime after 27 April. This evidence cannot be correct because accused 8 was arrested on 27 April and had been in custody since then. The state submitted that the evidence of identity is corroborated by circumstantial evidence. The cardinal rule regarding admission of circumstantial evidence was established in *R v Blom*[12] where it was held that the inference sought to be drawn from the evidence must be consistent with all the proved facts and they should exclude every reasonable inference from them save the one sought to be drawn. In the present case there is no evidence that the accused were the only members of Mvimbeni security present at the scene of the offences, but there is evidence that for instance on 27 April there were other members of Mvimbeni who were present at the rank but were not charged with the offences. Further, both complainants in counts 1 and 3 were single witnesses. It is clear that the complainants were assaulted by members of Mvimbeni security, but owing the unsatisfactory evidence of identification, and in the absence of any corroborating evidence, the court cannot find without any doubt that the accused before court are the ones who committed the offences in counts 1 and 3.

[31] In respect of counts 2, 4, 5, 6, 7, it is not in dispute that accused 1 to 8 were at the scene of the shooting incident on 27 April. That fact is in line with the accused own versions. However, accused 9 and 10 disputed that they were at Brooke Street taxi rank on that day. It was during the cross-examination of the State witnesses that the defence put the versions of accused 9 and 10 that they were not at Brooke Street, and they were at La Lucia guarding Mr Getsemane's house on 27 April. Furthermore accused 9 and 10 disclosed late during their cross-examination by the State that after 11h00 on that day they escorted a client to

Pinetown. The State correctly criticised the accused for disclosing their alibi late. However, the failure to disclose an alibi timeously does not justify an inference of guilt, but it is relevant in determining the weight to be placed on the alibi.[13] In determining the truth of the accused alibi, the alibi does not have to be considered in isolation from other evidence, it should be considered in the light of the totality of the evidence presented before court. It is not in dispute that accused 9 and 10 were not in the vehicle that was used by accused 1 to 8 to and from Brooke Street. Furthermore, it is not in dispute that accused 9 and 10 were not amongst the accused who were at the Mvimbeni offices and arrested by police on 27 April. Further, while the firearm register reflects that the accused were posted at Brooke Street on that date, but it was further recorded in the register that accused 9 and 10 were escorting. The entries were recorded by Hlongwane, the supervisor and firearm controller on 27 April, before the registers were seized by the police and even before accused 9 and 10 were arrested. For that reason, it might be reasonably possible true that accused 9 and 10 were on escort duty on 27 April.

- [32] Next, I determine whether or not accused 1 to 8 associated in a common purpose in respect of counts 2, 4, 5, 6, 7, 8 and 9. The evidence of accused 1, 2, 4, 5, 7 and 8 is that they fired shots in self-defence. Accused 3 and accused 6 dispute that they fired any shots at the taxi rank and therefore did not associate in the common purpose. With regard to the issue of self-defence, it is trite law that an act of assault or killing of a human being is *prima facie* unlawful. 'Once it becomes common cause that the accused has assaulted or killed the deceased or victim in self-defence, an evidential burden is placed on the accused to rebut the *prima facie* presumption of unlawfulness'.[14] According to the evidence of Warrant Officer Gumede who examined the Toyota Quantum wherein the deceased and Thulani Madondo were seated, there were multiple entry and exit gunshot impacts around the vehicle. Different firearms were used in shooting the vehicle. The ballistic examination on the firearm of Thulani shows that the firearm was not discharged on that day. This evidence is corroborated by the evidence of Sergeant Van Zyl who removed Thulani's firearm from him. No firearm was found in the possession of the deceased nor in the vehicle where the deceased was seated. According to the accused version they proceeded to the taxi rank because they were told that there were hitmen with firearms who were interfering with the loading of the vehicles, but none of the accused have seen any hitmen with firearms on arrival at the taxi rank. No other persons other than the Madondo's and Artwell were shot and injured at the taxi rank. The taxi rank is a congested place with a high density of people. If the evidence of the accused were to be believed that gunshots were fired randomly from the direction of Prasa premises, Port Shepstone rank and from the Madondo's Quantum, people other than the Madondo's would have been injured in the process.
- [33] The defence counsel submitted that the fact that there were cartridges found at the rank that were not linked to any of the firearms issued to the accused, support the accused version that there were people who fired shots at them and they retaliated in self-defence. I am not agreeable with that submission because some of the firearms issued to some of the accused and other members of Mvimbeni security were not recovered and therefore not sent for

ballistic testing. I am satisfied that the accused defence of private defence is a mere fabrication by the accused, no one fired shots at the accused, they fired shots with the intention to kill the deceased and other victims. The s 212 statement relating to the injuries sustained by Artwell was not admissible evidence and the reasons for refusing its admission was given during the trial. However, Artwell's statement that was handed into court and the evidence of Sihle and Mphati Madondo shows that he was shot at and injured by the accused at the rank. The State evidence in respect of the shooting of Thulani Madondo at the taxi rank is further supported by the medical examination of Thulani contained in J 88 that was handed into court.

[34] This now brings me to the evidence of the firearm register, firearm permits, and Hlongwane's statement. I do not intend repeating the reasons I gave during trial for admitting the evidence of Hlongwane. However, since the defence raised the issue again in their heads of argument, it is appropriate to re-state that the Mvimbeni firearm registers was handed over to the police by the ladies who were employed by Mvimbeni, it was not handed over by Hlongwane. The firearm permits were handed over by Hlongwane to the police. With regard to the admissibility of Hlongwane's statement, he made the statement to the police on 29 April 2018, two days after the alleged assault upon him. Section 35(5) of the Constitution provides that:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

Hlongwane and the other people who handed over the documents to the police were not suspects and they were never charged in this case. The production of these documents would not impact in any way on the rights of the accused before court to a fair trial. Further, the security documents are public documents and its seizure was necessary in either exonerating or proving the case against the accused, therefore seizure of the documents would not be detrimental to the administration of justice.

[35] All the accused contended that when they returned to the taxi rank and shot at the deceased and other victims they were issued with other firearms different from those issued to them in the morning. They contended that the controller gave them new firearm registers which they signed when booking the firearms and new permits. The challenge with the accused version is that neither they nor Mvimbeni could produce the new registers that they allegedly signed and the new firearm permits that were allegedly issued to them. Both the defence and State counsel inspected the list of documents that were seized by the police at the Mvimbeni offices and the alleged new register and permits were not among those documents. I do not doubt that if the new registers and permits existed that the defence would have produced these documents to support the accused versions. The alleged registers were not produced in court because they do not exist. Thus, the registers before court are the only and correct registers that show who was issued with which firearm on 27 April.

[36] All firearms found in the possession of the accused, inside Mvimbeni's Quantum Toyota vehicle, inside the municipality offices and in the Mvimbeni offices were sent for ballistic analysis. Furthermore, all the cartridge cases that were found in Brooke Street taxi rank, in the possession of the accused and inside Mvimbeni's vehicle were sent for ballistic analysis. It is appropriate to point out that some of the firearms issued to the accused and other Mvimbeni security officers were not recovered and therefore not sent for ballistic examination. Those were the firearms issued to accused 5, 6, 9, 10 and other security officers who were not before court. The ballistic examination links the accused to the shots fired at the taxi rank and the cartridge cases found inside Mvimbeni vehicle. In her s 212 statement, Warrant Officer Zuma gives a ballistic analysis of the firearms retrieved and cartridge cases collected from the different scenes. Some of the cartridges found in Brooke Street taxi rank, inside Mvimbeni's vehicle and in possession of accused 1, 3 and 7 were fired from the firearm issued to accused 1; nine

cartridge cases fired at Brook Street taxi rank were fired from the firearm issued to accused 2; 15 cartridge cases collected at Brooke Street taxi rank were fired from the firearm issued to accused 3. A cartridge case found in Brooke Street taxi rank and one cartridge case found in the accused pockets were fired from the firearm issued to accused 4; seven cartridge cases found at Brooke Street taxi rank were fired from the firearm issued to accused 7 and three cartridge cases found at Brooke Street taxi rank were fired from the firearm issued to accused 8. Therefore accused 1, 2, 3, 4, 7 and 8 are all linked by ballistic examination to the shooting at the taxi rank and in Pinetown.

[37] This brings me to the position of accused 5 and 6 regarding their association in a common purpose. Accused 5 was the supervisor, he is the person who was giving instructions and coordinating the attack on the deceased and other victims to the co-accused and instructed them to collect spent cartages after they had shot the deceased and other victims. The State succeeded in proving that accused 1, 2, 3, 4, 5, 7 and 8 acted in common purpose to kill when they fired shots that killed the deceased in count 2, attempted to kill Artwell in count 4, and attempted to kill Thulani in count 5. With regard to accused 6 it is clear that apart from the unsatisfactory evidence of identity there is no credible evidence that establishes that he participated in the shooting at the rank. His version that he did not reach the shooting scene and did not fire shots at the taxi rank cannot be said to be not reasonably possible true. There is no credible evidence that he fired shots at the deceased and victims and therefore the State has not succeeded in proving that he associated in a common purpose in respect of all the counts against him.

[38] It is apparent from evidence before court that it is the non-payment of the security service fee by the deceased that provoked the actions of the accused to kill him and other victims. Mr Mbanjwa testified that after the deceased had stopped payment of the security service fees, Mr Getsemane told him that he will stop the deceased's taxis from operating at the taxi rank. Mr Mbanjwa was a credible witness who was not shaken even during cross-examination. He is an independent witness, not related to the Madondo's. The version on the motive for the killing is further supported by the evidence of Zindela who testified that

when he approached accused 5 and pleaded with him to resolve the matter amicably, accused 5 informed him that there is nothing he could do because they were acting on an instruction. Although the evidence of identity was not satisfactory, the totality of the evidence before court shows that the attack on Sihle and Mphathi Madondo was inflicted by members of Mvimbeni security. Thus, within days after the deceased had stopped paying his contribution for the security service fees the attack ensued against the Madondo's which ended with the murder of the deceased and attempted murder of Artwell and Thulani. Mr Getsemane was not charged

in this case therefore, I do not make any finding against him, suffice to state that based on the facts before court it is clear

that the murder of the deceased was provoked by his non-payment of the security service fees. With regard to Ndlovu's

evidence I am agreeable with the defence that it is problematic. In his statement to the police he stated that Mvimbeni security was called to the rank because the Madondo's were interfering with the loading of the vehicles. In his evidence before court he stated that on 26 April he asked accused 5 why the Madondo taxis were stopped from loading passengers and accused 5 informed him that they were stopped because they were no longer paying the security service fees. In court he denied that he called the security to return to the taxi rank. However, Zindela's evidence is that Ndlovu told him that Mvimbeni security was coming to finish the deceased and indeed they came and killed the deceased.

[39] Regarding count 6, malicious damage to property, it is apparent that the accused were bent on doing everything including assault, murder and damaging the vehicles of the Madondo's in executing their purpose to stop them from operating at the taxi rank. There is undisputed evidence before court that the Toyota Fortuner vehicle was shot at by one of the accused. Under those circumstances the seven accused associated in a common purpose to damage the deceased's Fortuner vehicle. Regarding count 7, defeating the administration of justice, there is evidence that spent cartridges were found in possession of accused 2, 3 and 7. That evidence corroborates the State evidence that the accused picked up spent cartridges at the scene of crime. This they did in order to destroy evidence at the scene. In considering the whole evidence before court it is apparent that the accused attempted to evade arrest and destroy evidence. This they did by firstly, removing the spent cartridges from the scene, secondly by shooting at the police when they were trying to stop them in Pinetown and thirdly some of the accused changed their uniforms and wore the municipality uniforms in order to avoid arrest.

[40] Regarding counts 8 and 9 there is undisputed evidence before court that six cartridges were found inside Mvimbeni's Quantum vehicle. The discovery of spent cartridges inside Mvimbeni's vehicle corroborates Mzobe and Mngoma's evidence that someone inside Mvimbeni's vehicle fired gunshots at them. Furthermore, there is evidence that the cartridges found inside the vehicle were fired from the firearm which was issued to accused

1 and accused 1 himself was inside the Mvimbeni vehicle when the shots were fired from the vehicle. Thus, the evidence supports Mzobe and Mngoma's evidence that they were shot by the accused inside Mvimbeni's vehicle. sergeants Bongumusa Mzobe and Sibonelo Loyd Mngoma who testified in respect of counts 8 and 9 were credible witnesses. There were no contradictions in their evidence. It is trite law that the accused may be convicted of murder if the killing was unlawful and there is proof that he was part of a common purpose to commit some other crime and saw the possibility of one of them causing the death of a human being in the execution of the plan and persisted reckless

of the consequences. I am agreeable with the State's submission that in the case of common purpose intention may exist in the form of *dolus eventualis*. Accused 1, 2, 3, 4, 5, 7 and 8 were armed with firearms, foresaw that the execution of their common purpose may result in the death of someone and they reconciled themselves to that possibility.

[41] It is trite law that the onus rests on the state to prove the guilty of the accused beyond reasonable doubt. If the version of the accused is reasonably possible true he / she must be acquitted. Having regard to what is stated in the preceding paragraphs, more particularly regarding the unsatisfactory evidence of identification and when invoking cautionary rules on the evidence of single witnesses, I am of the view that, the evidence cannot sustain a conviction in counts 1 and 3. Furthermore, I am of the view that the state has not succeeded in proving the guilty of accused 6, 9 and 10 beyond reasonable doubt in all counts.

Order

[42] In the premises I make the following order:

1. Accused 6, 9 and 10 are found not guilty and they are discharged in all counts.

Sentencing

[43] I now turn to sentencing. The accused are convicted of one count of murder, four counts of attempted murder, one count of malicious damage to property and one count of obstructing the administration of justice. It is common cause that in terms of the Criminal Law Amendment Act[15] (the CLAA) the prescribed minimum sentence on count 2 is life imprisonment and on counts 4, 5, 8 and 9 is five years' imprisonment in respect of each count unless there were substantial and compelling circumstances. The defence counsel submitted that the fact that all the accused had been in custody for more than five years pre-sentence; are first offenders and committed the offences in the course of their employment with Mvimbeni constitute substantial and compelling circumstances. The personal circumstances of each of the accused as placed on record by their counsel are as follows:

- (a) accused 1 is 40 years of age, is not married but has two children who are 18 and 15 years of age respectively;
- (b) accused 2 is 37 years of age, he is unmarried and has a five-year-old child who is staying with her mother;

- (c) accused 3 is 35 years of age, is unmarried with two children aged seven and eight years respectively. The children are staying with their mother. The accused had just started his employment with Mvimbeni, four months prior to the commission of the offences;
- (d) accused 4 is 41 years of age, he is married, his wife is unemployed, and has four children who are 17, 14, seven and three years of age respectively;
- (e) accused 5 is 40 years of age, was married, but his wife passed away while he was in custody. He has four children who are 18, 15, 14 and eight years of age respectively.
- (f) accused 7 is 56 years of age, was married and his wife passed away while he was in custody. He has six children the eldest is 33 years of age, and the youngest is six years of age; and
- (g) accused 8 is 46 years of age, he is unmarried, he has two children who are 19 and 15 years of age respectively.

[44] Mr Gcweka for the State submitted that there are no substantial and compelling circumstances existing. The murder in the taxi industry is prevalent in the province; these serious offences were committed at a public place the taxi rank and were pre-planned. Although the accused committed the offences in the course of their employment, the argument went, that they had the right to refuse an instruction that was illegal.

[45] In determining an appropriate sentence on matters in which the legislature prescribed minimum sentences, the starting

point is to establish whether or not substantial and compelling circumstances existed. If they do not exist, the court has no discretion but to impose the prescribed minimum sentence, but if the court finds that substantial and compelling circumstances existed, it may deviate and impose a lesser sentence. The determination of substantial and compelling circumstances has received judicial

attention. However courts have not attempted to formulate a comprehensive definition of “substantial and compelling

circumstances”, thereby leaving it to the trial court to assess all factors in the case and draw a conclusion whether the circumstances existed or not.[16] The factors are not considered individually, but all factors relevant to the nature and seriousness of the offence, personal circumstances of the accused, aggravating and mitigating circumstances and the needs of the society are considered

holistically.[17] In *S v Malgas*[18] Marais JA in expressing the principle that should guide the court in assessing whether or not substantial and compelling

circumstances existed in a case stated as follows:

‘If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence’.

It is not in dispute that the pre-sentencing period in detention is one of the factors that is considered, together with other relevant

factors when assessing whether the substantial and compelling circumstances circumstances existed in a particular case, but the pre-sentencing detention period does not logically and individually constitute substantial and compelling circumstances. In *S v Radebe and Another*,^[19] Lewis JA considered earlier court decisions that dealt with the pre-sentencing period of detention in assessing the existence or

non-existence of substantial and compelling circumstances. At paragraph 14 it was stated as follows:

‘A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into

account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention...the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.’

[46] It is not in dispute that the accused committed the offences while they were on duty and were wearing Mvimbeni security uniforms. The accused were not the only members of Mvimbeni security who arrived at the taxi rank on the date and time of the commission of the offences. There were other Mvimbeni security officers who were at the taxi rank, but they did not participate in committing the offences. Thus, the accused had a choice not to participate in the commission of the offences. Regarding the pre-detention period, no information was placed before court about the circumstances that led to the accused spending more than five years in detention prior to sentencing. In the absence of such information the court is not able to assess the effect of the pre-sentencing detention period in determining the appropriate sentence. The evidence before court shows that the murder and attempted murders were pre- planned. Within a period of about two days after the deceased had pronounced that he would no longer contribute to the Mvimbeni security fund, Mvimbeni security officers launched an attack on the members of Madondo family

who were operating the deceased’s taxis. The evidence before court shows that when the accused arrived at the taxi rank on 27 April 2018 they asked where were the Madondo’s and then fired shots at the deceased and Thulani who were sitting in their car; fired shots at Artwell Dlamini and

fired shots at the Toyota Fortuner vehicle owned by the deceased. The offences were committed at a taxi rank in full view of members of the public. The gravity of the offences is evident from the number of cartridges fired at the taxi rank. Thirty-five of the spent cartridges collected at the taxi rank were linked to firearms in the possession of the accused. This number does not include other cartridges collected that were not successfully linked to the accuseds firearms. With regard to counts 8 and 9, the attempted murder of police officers in the course of their duties constitutes aggravating circumstances. Thus, considering the nature and gravity of the offences, the manner in which they were committed together with the personal circumstances of the accused and the pre-sentence detention period of the accused, I find that there are no substantial and compelling circumstances that would warrant deviation from the prescribed sentences in counts 2, 4, 5, 8 and 9.

[47] In respect of counts 4, 5, 8 and 9 the gravity of and manner in which the offences were committed attract sentences heavier than the prescribed minimum sentences. It is by sheer luck that the victims in counts 4 and 5 survived in spite of the number of shots that were fired at them. With regard to counts 8 and 9 the accused fired shots at the police officers in order to evade arrest. The SAPS are directed by the Constitution to maintain public order, protect and secure the inhabitants of the Republic and to enforce law and order.[20] Incidents of attack to members of the police service are on the increase in this country. If the attack on police officers continue unabated that would weaken their capacity to maintain public order and law, and would consequently compromise the safety of the inhabitants of the Republic. The conduct of the accused displayed not only their disrespect for human life but that they regarded themselves as being above the law. The deceased and other Madondo's had the right to choose and practice their business in the taxi industry freely.[21] The accused were determined on stopping them from practising their trade at all cost, even by taking life, as they eventually murdered the deceased. Furthermore, the accused were hired to protect the members and property of the association at the taxi rank, but they turned against the very people that they were hired to protect and attacked them.

[48] Having regard to all the circumstances the following sentences are imposed:

1. In respect of count 2 (murder of Christopher Mkhari Madondo) each of the accused is sentenced to life imprisonment.
2. In respect of count 4 (attempted murder of Atwell Dlamini) each of the accused is sentenced to 8 years' imprisonment to run concurrently with the sentence of life imprisonment.
3. In respect of count 5 (attempted murder of Thulani Madondo) each of the accused is sentenced to 8 years' imprisonment to run concurrently with the sentence of life imprisonment.
4. In respect of count 6 (malicious damage to property) each of the accused is sentenced to 3 years' imprisonment to run concurrently with the sentence of life imprisonment.

5. In respect of count 7 (defeating the administration of justice) each of the accused is sentenced to 12 months' imprisonment to run concurrently with the sentence of life imprisonment.
6. In respect of count 8 (attempted murder of Bongumusa Mzobe) each of the accused is sentenced to 8 years' imprisonment to run concurrently with the sentence of life imprisonment.
7. In respect of count 9 (attempted murder of Sbonelo Mngoma) each of the accused is sentenced to 8 years' imprisonment to run concurrently with the sentence of life imprisonment.

Date of Judgment: 1 November 2023

Date of sentencing: 12 December 2023

Appearances:

Counsel for all accused: Adv. CS Mlotshwa Instructed by: Mthembu attorneys Durban Counsel for the state: Adv.MC Gcaba Assisted by: Adv. E Gcweka Instructed by: Director of Public Prosecutions

- [1] Criminal Law Amendment Act 105 of 1997.
- [2] Criminal Procedure Act 51 of 1977.
- [3] Tshiki v S (58/2019) [2020] ZASCA 92 (18 August 2020) para 23.
- [4] S v Safatsa and Others 1988 (1) SA 868 (A) at 898A.
- [5] Ibid.
- [6] Ibid at 896G-897A.
- [7] S v Madlala 1969 (2) SA 637 (A) at 640F-H.
- [8] S v Mgedezi and Others 1989 (1) SA 687 (A).
- [9] Ibid at 705I-706B.
- [10] S v Mthetwa 1972 (3) SA 766 (A) at 768A.
- [11] Abdullah v S (134/2021) [2022] ZASCA 33 (3 March 2022) para 20.
- [12] R v Blom 1939 AD 188 at 202-203.
- [13] Tshiki v S (358/ 2019) [2020] ZASCA 92 (18 August 2020) para 51.
- [14] S v Manona 2001 (1) SACR 426 (Tk) at 427F.
- [15] Criminal Law Amendment Act 105 of 1997.
- [16] S v Malgas 2001

(1) SACR 469 (SCA) para 25 (G).

[17] S v Vilakazi 2009

(1) SACR 552 (SCA) para 15.

[18] S v Malgas ibid para 25 (I).

[19] S v Radebe and Another 2013 (2) SACR 165 (SCA).

[20] Section 205(1)-(3) of the Constitution.

[21] Section 22 of the Constitution.

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