

SOUTH AFRICA / JUDGMENT

S v Koboka (CC39/11) [2014] ZAECPEHC 85 (27 November 2014) [2014] ZAECPEHC 85

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

C Plasket

CASE / FILE NUMBER

CC39/11

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
PORT ELIZABETH

Case No. CC39/11

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In the matter between:

THE STATE
and
LUVVOYO KOBOKA

JUDGMENT

PLASKET, J:

[1] The accused is charged with having committed seven offences. They are: robbery with aggravating circumstances (count 1), it being alleged that on 16 March 2009 at KwaDwesi, he, acting in concert with others, robbed one Xhalani Mthana, an employee of Group Four Securicor Cash Services, of R209 016.75 in cash and a 9 mm Norinco semi-automatic firearm, and that aggravating circumstances were present because a firearm was wielded during the robbery and Mthana was threatened with the infliction of grievous bodily harm; unlawful possession of a firearm (count 2), it being alleged that on 16 March 2009 at KwaDwesi, he was in possession of a firearm without holding a licence, permit or authorisation to do so; murder (count 3), it being alleged that on 17 October 2009 at Njoli Street, KwaZakhele, he, acting with two others, killed one Mlungiseleli Bindwini by shooting him; unlawful possession of semi-automatic firearms (counts 4 and 6), it being alleged that on 17 October 2009 and 3 December 2009, he was in possession of two 9 mm semi-automatic firearms without holding a licence, permit or authorisation to do so; and unlawful possession of ammunition (counts 5 and 7), it being alleged that on 17 October 2009 and at Njoli Street, KwaZakhele and on 3 December 2009 at Mavuso Road, KwaZakhele, he was in possession of 9 mm rounds of ammunition without being the holder of a licence in respect of a firearm capable

of discharging that ammunition, nor being statutorily licenced, permitted or otherwise authorised to do so.

[2] The indictment brought to the attention of the accused the fact that certain prescribed minimum sentences applied in the event of him being found guilty. In terms of s 51, read with the various parts of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, prescribed minimum sentences of 15 years' imprisonment, life imprisonment and 15 years' imprisonment apply in the event of convictions of robbery with aggravating circumstances, murder and each count of unlawfully possessing a semi-automatic firearm.

[3] The accused pleaded not guilty to all of these charges, offered no plea explanation and made no admissions.

[4] The summary of substantial facts is to the following effect.

[4.1] On 16 March 2009 security guards employed by Group Four Securicor Cash Services collected cash from Shoprite at the KwaDwesi shopping complex. When one of the security guards reached the vehicle used to transport cash, the accused pointed a firearm at him and demanded the cash, while other robbers were in the vicinity. The accused made off with R209 016.75 in cash and the security guard's 9 mm Norinco semi-automatic firearm. He and the other robbers ran to two get-away vehicles and left the scene in them.

[4.2] The deceased referred to in count 3 had been the driver of one of the get-away vehicles. He had agreed to give evidence for the State against his comrades. The accused and other members of the gang found out about this. On 17 October 2009, the accused and two other men waited outside the Studio Lounge tavern in KwaZakhele and, when the deceased came out of the tavern, they fired 66 shots at him. He died on the scene as a result of multiple gunshot wounds.

[4.3] On 3 December 2009, when the accused was arrested, he was found in possession of two semi-automatic firearms, one of which was used to shoot and kill the deceased.

The State's evidence

- [5] The first witness to be called by the State was Mr Andrew Lotz. He testified that on 16 March 2009 he had, in his capacity as an employee of Group Four Securicor Cash Services (G4S), been the driver of a so-called cash-in-transit vehicle that had collected cash from various shops at the KwaDwesi shopping complex. He had seen his crew commander, Mr Xhalani Mthana, coming out of Shoprite with a cash box. As he had opened the back of the vehicle, he was approached by a man armed with a firearm and robbed.
- [6] Lotz saw a person wearing a red cap running away with the money, but it was no longer in the cash box. He saw a number of others who also appeared to have been involved. With his crew commander safe in the back of the vehicle, Lotz gave chase to the robbers in the vehicle. They ran to a getaway car that he described as being a white Mazda, and made good their escape from the scene. He was not able to identify any of the robbers.
- [7] Mr Zuko Matshiyane testified that his sister, Vuyokazi had been the girlfriend of Bindwini, the deceased. Matshiyane received cellphone calls warning him that if his sister continued to drive the deceased's cars – a white Mazda and a white Honda – she would be in danger. When he spoke to his sister about the threats she informed him that the deceased had recently been arrested but he had been released on bail. Despite his warnings, his sister continued to drive the deceased's cars.
- [8] As a result, he asked his sister to arrange a meeting with the deceased. She did so, and he duly met the deceased. He learnt that the threats were the result of co-conspirators of the deceased holding the belief that he had been released on bail because he had informed on them. (As it happens, the fact that he was released on bail because he had agreed to give evidence for the State was confirmed by the investigating officer.) The deceased denied that he was a turncoat and it was agreed that a meeting would be held with his comrades so that he could explain himself.
- [9] That meeting was attended by Matshiyane, the deceased and either two or three others. It was agreed that a copy of the docket would be obtained and perused to see whether the deceased was a turncoat. Despite this meeting, Matshiyane remained apprehensive about the safety of his sister and the deceased. He warned them to stay away from the townships. They chose to ignore this advice.

- [10] Ms Vuyokazi Matshiyane testified that on the evening of 17 October 2009, she went to the Studio Lounge night club in Njoli Road, KwaZakhele to fetch the deceased. When they left the nightclub and were walking towards their car, three men approached the deceased and shot him repeatedly. (The pathologist who performed the post-mortem examination on his body counted 59 bullet wounds.) Although he was taken to Dora Nginza Hospital, it would appear that he had died on the scene of the shooting. She was unable to identify any of the men because they wore what she described as white plastic masks, 'like the ones in the movies'.
- [11] She was aware that the deceased had been arrested. He told her that he had been arrested in connection with a robbery in which he had driven a getaway car. She confirmed that she drove his vehicles, a white Mazda and a white Honda. Strangely, she denied that her brother had spoken to her about threats to her safety that he had received and that he had warned her and the deceased to stay away from the townships.
- [12] The investigating officer, Captain Willie Mayi, said that he knew the deceased from a number of cases against him. He had been arrested in connection with the KwaDwesi robbery but had been released. He was later arrested by Mayi in connection with a robbery in East London. He told Mayi on this occasion that he wanted to tell him about all of the robberies in which he had been involved. He proceeded to do so, naming those who took part in them with him. He also gave information in relation to the KwaDwesi robbery.
- [13] The deceased made a confession and took part in pointings out. He was charged in both East London and Port Elizabeth. He was the only person charged with the KwaDwesi robbery at that stage. He was released on bail on 15 September 2009. After his release, the police obtained information that those who had been implicated by him planned to kill him. He was offered, but refused, witness protection. Although he left Port Elizabeth for a while, he contacted Mayi to say that he was returning to attend a meeting where he was going to clear his name. About a week after the meeting – clearly the same meeting that Matshiyane had testified about – the deceased was killed.
- [14] On 3 December 2009, members of a police task team received information concerning the whereabouts of the accused. A number of policemen under the command of Mayi went to the accused's home in Mavuso Street, KwaZakhele. The accused was seen in front of his home. He had a backpack on his back. When he saw the police, he ran. He jumped over the fence between the yard of his home and the next house still wearing the backpack. When he was seen scaling the next fence, however, he no longer had the backpack.
- [15] The accused was arrested a short while later in a nearby house. According to both Mayi and Sergeant Llewellyn de Vries, he was warned of his rights and then volunteered to show the police where he had hidden the backpack. He led the police to a yard where he pointed to a dustbin. De Vries opened the dustbin and extracted the backpack from it. In one of the side pockets was a can of lubricant. When he opened the backpack, he saw that, apart from some items of clothing, it also contained two firearms, both 9 mm pistols, with their magazines

and 28 rounds of ammunition.

- [16] Captain Mandisi Mngwadleka, a ballistics expert, was provided with these firearms as well as the ammunition, spent cartridges collected at the scene of the killing of the deceased, bullets and bullet fragments taken from the deceased's body. After performing tests and examining these objects, he drew three conclusions of importance: first, he found that some of the cartridges found at the murder scene had been fired from one of the firearms; secondly, he found that a further two firearms had been used to kill the deceased; and thirdly, he found that both of the firearms in the backpack were semi-automatic firearms.
- [17] Mayi testified that he had obtained the cellphone number of the accused and of some of his alleged associates during the course of his investigation. In addition, after the arrest of the accused, he had found a Motorola cellphone on him and had obtained and checked the number. He had also checked the cellphones of the accused's alleged associates who had been arrested. He found that the accused's cellphone number was on their cellphones listed under his nickname, Ray. He gave the number as [...].
- [18] Ms Hilda du Plessis, a forensic data analyst and manager employed by MTN, testified that she was subpoenaed to obtain and provide certain information concerning cellphone number [...].
- [19] The deceased's girlfriend had testified that the deceased was killed 'roundabout past eight to nine o'clock' (at night). Ms Du Plessis testified that on 17 October 2009, the accused's cellphone was in Motherwell from 17h00 to 19h41. At that stage it moved and, by 20h17, it was within the range of a base station at KwaZakhele. It remained there from 20h17 to 20h26 when it moved again. It continued to move thereafter for a number of hours. The base station in KwaZakhele covered Njoli Street where the Studio Lounge was situated.

The trial-within-a-trial

- [20] The State sought to introduce a statement that it alleged the accused made to Mayi on 4 December
2009. Its admissibility was objected to by Mr Van Rooyen, who appeared for the defence. The basis was that the accused denied having made the statement but, he said, if it was shown that he had, it was not freely and voluntarily made. I was informed that both issues somehow ran into each other. It was agreed by both Mr Sesar, who appeared for the State, and Mr Van Rooyen that a trial-within-a-trial was the preferred way to deal with the admissibility of the statement. I considered it the safest option from the perspective of the protection of the rights of the accused. Hindsight has shown, however, that a trial-within-a-trial was not required because the admissibility of the statement turned only on credibility, but no harm has been done by the procedure followed. I admitted the statement at the end of the trial-within-a-trial but did not provide my reasons for doing so. Those reasons follow.

[21] The investigating officer, Mayi was the first witness to be called. He testified that he took down the accused's statement on 4 December 2009. His evidence and that of the other State witnesses who were called in summary is that the accused was warned of his rights when he was arrested on 3 December

2009. He was again warned of his rights at the offices of Mayi's task team. When he was taken to the Despatch police station that evening to be detained he was warned of his rights yet again. He signed a document containing the warning and was given a copy.

[22] During the course of 3 December 2009, the accused was asked questions by various task team members about various offences he was suspected of. No statement was taken from him and Mayi had little to do with him on that day.

[23] On the following day Mayi conducted an interview with him in which the statement was taken. The interview commenced at 13h40 and concluded at 14h20. According to Mayi's evidence and the form he completed, the accused was informed that he was suspected of murder, the unlawful possession of two firearms and ammunition and robbery; and that the purpose of the interview was to give him the opportunity to make a statement if he wished to but that he could opt to remain silent. His right to legal representation was explained to him and he was allowed to telephone his girlfriend to arrange for an attorney to represent him when he appeared in court.

[24] Mayi recorded that the accused said he was willing to make a statement. It is also recorded that the accused was asked whether he had injuries; that he answered that he had no injuries; and that Mayi recorded that he had not observed any injuries.

The accused was asked if he had been threatened, assaulted or influenced to make a statement and he said he had not been. He appeared to Mayi to be in his sound and sober senses.

[25] The accused, Mayi and a commissioner of oaths signed at the bottom of each page of the statement.

[26] The accused's version was that he was about to leave his home on the morning of 3 December 2009 when he saw a man armed with a firearm. As he feared for his life, he ran through the yard of his home, through a gate and over a fence. He ran to a house belonging to a person named Brenda. He entered the house. He was not carrying or wearing a backpack as alleged.

[27] After a while two policemen entered the house. After identifying themselves as policemen, they asked him his name and, on being informed of his name, they said they were looking for him. They made him lie on the floor and proceeded to kick him repeatedly in the stomach and the sides. He said in cross-examination that he blocked many of the kicks with his forearms. A number of other policemen arrived, including Mayi.

- [28] Mayi asked him questions about the whereabouts of police uniforms, a cell phone and firearms and when the accused said he knew nothing of these things, he was again assaulted by being kicked repeatedly, including on the head. He denied all knowledge of the police uniforms, cell phone and firearms.
- [29] His hands were tied together with cable ties and a transparent plastic bag was placed over his head to suffocate him. His interrogation continued but he persisted in his denials. During this process he both wet and soiled himself.
- [30] He was taken back to his house which was searched. He was ordered to go to a toilet to clean himself and change his clothing. A policeman asked him which room in the house was his. After the accused had answered this question, the policeman left and returned with a pair of jeans and the accused's backpack which was packed with various items. These included an overall, a face cloth, a toothbrush and a pair of takkies.
- [31] The accused was taken to police offices in Newton Park. There, a policeman wearing surgical gloves took a plastic bag containing two firearms and a can of lubricant out of a cupboard. These were placed in the accused's backpack. A photographer arrived, the backpack was unpacked and photographs were taken of its contents including the firearms and the can of lubricant.
- [32] The accused was taken to a second office where he was handcuffed to a chair. He was left on his own at times and, at other times, policemen entered and asked him about various robberies in Jeffrey's Bay, Port Elizabeth, East London and Fort Beaufort.
- [33] At some stage, a policeman bandaged his wrists and handcuffed him before blindfolding him. He was asked questions by Mayi and, when he denied knowledge of the robberies he was asked about, a plastic bag was again placed over his head. This style of interrogation continued intermittently and once again he wet and soiled himself.
- [34] Eventually he was taken to the Despatch police station where he was detained overnight. He was taken back to Newton Park early the next morning. Because of the lateness of his arrival at Despatch and the early hour of his departure the next morning, he missed dinner and breakfast.
- [35] On arrival at Newton Park he was placed in the first office he had been in the day before. He was told by Mayi that a man would be coming to see him and that he should behave himself. He was moved to another office. A policeman entered who told him that he was a captain stationed at KwaZakhele and that he had come to conduct a pointing out. The accused told him he had no knowledge of any crimes and so had nothing to point out. The captain became angry and said that Mayi had wasted his time. He left.

- [36] He was taken to the room where he had been tortured the day before. Once again, his wrists were bandaged and handcuffed and he was blindfolded. He was again asked about robberies and the murder of Bindwini. He denied, yet again, knowledge of these crimes. After this, the accused was taken to Mount Road police station for his finger prints to be taken.
- [37] In addition to Mayi and his colleagues, the State also called Colonel Marius Rheeder of the South African Police Service, a handwriting expert. In addition to the accused, the defence called Colonel Gerhardus Cloete, a retired policeman now in private practice and also a handwriting expert. They were called to express their expert opinions on whether or not the accused had signed the statement.
- [38] Rheeder was at something of a disadvantage because the accused refused to give him sample signatures, so he had to find signatures that were not disputed to compare to the disputed signatures on the statement. Despite this problem he concluded that the disputed signatures displayed no characteristic that could suggest them to be forgeries and that they were all written by the same hand. He said that a great deal of expertise would have been required to forge the disputed signatures. He concluded at first that the disputed signatures were most probably written by the accused. After he had read Cloete's report and briefly examined the 66 sample signatures at Cloete's disposal, he downgraded his opinion: the disputed signatures, he said, were probably written by the accused.
- [39] Cloete had the benefit of the accused's full cooperation. He too concluded that the disputed signatures did not have any characteristics to indicate them to be forgeries and he said they were signed by the same hand. He was not prepared to say they were probably signed by the accused because he was concerned that in six of them one particular characteristic of a combination of two letters was repeated, while in the other two, a variation of the combination appeared. He would have expected a greater natural variation. So, he concluded that, in his opinion, it was possible that the accused made the disputed signatures. He said
- that if the disputed signatures were forgeries, they were forgeries of a particularly high standard and that it would have taken a professional forger to have forged them.
- [40] What stands out in the evidence of both Rheeder and Cloete is the following: first, neither says that the accused did not make the disputed signatures; secondly, that it was extremely unlikely that the disputed signatures were forgeries; and thirdly, that it would have taken a person of rare skill to have forged the disputed signatures.
- [41] The issue that I have to decide is whether the accused signed the statement as Mayi alleges. The accused's version, after all, is that no interview with Mayi took place, he made no statement and that consequently he never signed the statement in question. The beatings and torture that he says that he endured are irrelevant to this issue. If I disbelieve him on his version, I cannot see on what basis I can accept that he was in fact beaten and tortured and then conclude that despite his evidence to the contrary, those beatings and that torture induced him to make a statement he denies making.

- [42] If the accused's version is to be accepted it also has to be accepted that the police – probably Mayi – first concocted the statement and then procured the services of a highly skilled professional forger to forge the accused's signature; and that the forger first studied the accused's signature and its natural variations before forging some with one of the natural variations and some with another. This is improbable in the extreme.
- [43] Mayi's evidence may be subjected to criticism to an extent. For instance, he was clearly not open with the court when he denied that the accused had at some stage soiled himself. The purpose of his denial is beyond me because he had, in the accused's bail application, given evidence that the accused had indeed soiled himself. For the rest, he was attacked in cross-examination for minor errors in filling in the form on which the statement had been taken. By and large, however, on the central issue of whether he interviewed the accused on 4 December 2009, whether he warned the accused of his rights, whether he took the statement and whether the accused signed it, he was a satisfactory witness. His evidence is supported too by the probabilities.
- [44] The accused, on the other hand, gave a version that suffered from a number of problems. He claimed to have been severely assaulted by the police kicking him, inter alia, on the head a number of times but does not appear to have suffered any visible injuries as a result. He made no complaints of injuries when booked into the cells at Despatch and no injuries on him were noted by anyone there. He claimed that the police planted two firearms in his backpack but, as it happened, ballistic testing established months later that one had been used to shoot the deceased, a fact that the police could not have known at the time. But perhaps most tellingly, the accused's version simply cannot answer the overwhelming improbabilities that are highlighted by the evidence of both Rheeder and Cloete. As a result, it cannot be reasonably possibly true. On the other hand the State's version accords with the probabilities and I also accept the evidence of Mayi that he interviewed the accused, warned him of his rights, took down the accused's statement and saw the accused sign the statement on each page.
- [45] As a result, I concluded that the State had proved the making of the statement by the accused beyond reasonable doubt. I accordingly admitted the statement.

The statement

- [46] In the statement that the accused made to Mayi he referred to three incidents: the murder of the deceased on 17 October 2009; his possession of firearms and ammunition of 3 December 2009; and a robbery at KwaDwesi in March 2009.
- [47] In respect of the first, he said that he was in Motherwell when he received a call from his friend Luzuko Mhlauli who informed him that the deceased, who he named by his nickname, was at the Studio Lounge. There had been a decision taken to kill the deceased because he had been talking about 'cases he did with us'. The accused met people by the name of Sizwe and Luzuko Tjale. Mhlauli was 'looking after' – presumably keeping an eye on – the deceased at the Studio Lounge. Then, said the accused, as the deceased came out of the

Studio Lounge with his girlfriend, the accused, Sizwe and Tjale opened fire on him. They then ran to their car and drove away.

- [48] In respect of the second incident, he said that he was on his way to George when he saw policemen approaching him. He ran away and hid his bag in a rubbish bin. He ran into a house but the police found him there. He took the police to where he hid the bag. He admitted that there were firearms inside the bag.
- [49] Turning to the third incident, he said that he, the deceased and others, in March 2009 at KwaDwesi 'robbed a G4S cash van'. They were travelling in the deceased's car, a white Mazda 323, having removed its number plates. He said that they shared about R21 000 between them.

The accused's version

- [50] The accused's defence to the charge of robbery is that he could not have taken part in it because, during that period, he looked after his infirm grandfather during the mornings. (The robbery was committed at about 08h30.)
- [51] His defence to the murder charge was an alibi. He said that he attended a traditional ceremony in Motherwell on 17 October 2009, got drunk, passed out and went home the following morning.
- [52] His version in respect of the charges of unlawful possession of two semi-automatic firearms and ammunition has been set out more fully in the evidence in the trial-within-a-trial. In essence, it is that he never had a backpack when he ran from the armed person that he saw on 3 December 2009; after he was arrested he never led the police to a dustbin where they found a backpack with the firearms and ammunition; and at the police offices in Newton Park a policeman took out of a cupboard two firearms and a can of lubricant and planted them in his backpack containing clothes.
- [53] The accused also denied having a cellphone at the time, knowing the deceased and knowing any of the people mentioned in his statement.
- [54] I turn now to an assessment of and decision on the various counts.

Count 1: Robbery with aggravating circumstances

- [55] In the light of his confession, the accused's defence that he would have been looking after his infirm grandfather on the day and at the time that the robbery was committed must be false: if he had been looking after his grandfather he would not have been able to provide the information that he did in his confession, and he probably would not even have known about the robbery. Instead, he said that it was committed at KwaDwesi, that a G4S cash van was robbed, that the getaway car was a white Mazda 323 driven by the deceased and that it was committed in March 2009.

- [56] Lotz, the driver of the cash van, confirmed that he worked for G4S security firm at the time; that his crew commander was robbed of money he had collected from a supermarket; that there were, as far as he could recall, about five robbers involved; that the one who dispossessed his crew commander was armed with a firearm; and that the robbers made their getaway in a white car that 'looked to me like a Mazda'.
- [57] Section 209 of the Criminal Procedure Act 51 of 1977 provides that an accused 'may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence other than such confession, to have been actually committed'. In my view, if Lotz's evidence does not confirm the confession in a material respect, it certainly is evidence that the robbery confessed to was actually committed.
- [58] Lotz's evidence that one of the robbers wielded a firearm in order to effect the robbery by overcoming his crew commander's resistance renders the robbery a robbery with aggravating circumstances. There was no evidence to establish that a firearm was stolen in the robbery as alleged in the indictment. The only evidence concerning the amount of money that was stolen is the accused's statement in his confession that he and his comrades shared about R21 000.
- [59] On the basis of the evidence as a whole, and for the reasons stated above, I reject the accused's version as false beyond reasonable doubt and find that the State has proved count 1 beyond reasonable doubt.

Count 2: The unlawful possession of a firearm

- [60] This count relates to the possession by one of the robbers of the firearm used in the robbery. Mr Sesar conceded – and properly so – that there is no evidence that the robber who possessed the firearm was the accused and that there was also no evidence to establish that the accused was a joint possessor of that firearm. He must, accordingly, be acquitted of count 2.

Count 3: Murder

- [61] The accused's defence to the charge of murder is an alibi: that he was at a traditional ceremony in Motherwell from before the deceased was killed until the following day.
- [62] In order to assess whether this version is reasonably possibly true, it is necessary in the first instance to consider the evidence relating to the cellphone records. That requires me to determine whether the cellphone number that Ms Du Plessis tracked related to the accused's cellphone.
- [63] The accused denies that he owned a cellphone at all at the time. His denial is gainsaid by his confession in which he speaks of being 'phoned' by Luzuko Mhlauli about the presence of the deceased at the Studio Lounge. It is also improbable, in this day and age, that a person

such as the accused, a young and, it seems to me, sophisticated, man would not own a cellphone. I am of the view that Mayi's evidence concerning the accused's ownership of the cellphone with the number 073 999 7533 is firstly, not hearsay, and secondly acceptable. I do not accept the accused's denial as it is improbable and flies in the face of the overwhelming evidence adduced by the State in this respect.

- [64] The evidence of Du Plessis destroys the accused's alibi. Not only does it establish that he left Motherwell prior to the murder of the deceased, but that he was in the broad vicinity of the Studio Lounge at about the time that the deceased was killed. When one adds to this the evidence of the deceased's girlfriend that three men were involved, the ballistics evidence that three firearms were used and that one of the firearms that were found in the accused's possession on 3 December 2009 had been used in the shooting of the deceased, then, it seems to me, the accused's confession is confirmed in material respects. At the very least the actual commission of the offence has been proved.
- [65] When the accused's confession is taken together with the evidence I have outlined, the State's case against the accused is overwhelming. In the result, I find that his version is not reasonably possibly true and I reject it. I accept the evidence adduced by the State and find that it has proved the accused's guilt on this count beyond a reasonable doubt.

Counts 4, 5, 6 and 7

- [66] There were some contradictions between the evidence of De Vries and Mayi concerning the arrest of the accused and the discovery of the firearms and ammunition. They are, I believe, explicable on the basis of the passage of time. They related to detail that was not central to the material issues concerned. These two witnesses corroborated each other on the material aspects: that the accused ran when he saw the police; that he carried a backpack; that when he was arrested, he no longer had it; that he led the police to a dustbin where his backpack was found; and that it contained two loaded firearms. The evidence also establishes that both firearms had ammunition – 15 and 13 rounds respectively.
- [67] The firearms were examined by Captain Mandisi Mngwadleka, the ballistics expert, who found that both firearms were semi-automatic firearms.
- [68] The accused's confession is in harmony with the version given by De Vries and Mayi. Their evidence confirms the confession in material respects.
- [69] The accused's version – that he never possessed the firearms and that they were planted in his backpack by the police at their office in Newton Park is highly improbable. It presupposes that the police acquired the two firearms somehow and planted them on the accused for some inexplicable reason. And then it transpired months later that one of them was linked to the murder of the deceased. At the time that the police were supposed to have planted the firearms in the accused's backpack, they could not have known that one of the firearms was connected to the murder of the deceased.

[70] In the light of the overwhelming State case, coupled with the probabilities I have mentioned, I am of the view that the accused's version cannot be reasonably possibly true and I reject it. I accept the evidence tendered by the State, including the accused's confession, and I find that the State has proved counts 4, 5, 6 and 7 beyond reasonable doubt.

Verdict

[71] For the reasons that I have given in this judgment, my verdict in respect of each count is as follows:

- (a) Count 1: Robbery with aggravating circumstances – guilty;
- (b) Count 2: Unlawful possession of a firearm – not guilty;
- (c) Count 3: Murder – guilty;
- (d) Count 4: Unlawful possession of a firearm – guilty;
- (e) Count 5: Unlawful possession of ammunition – guilty;
- (f) Count 6: Unlawful possession of a firearm – guilty;
- (g) Count 7: Unlawful possession of ammunition – guilty.

C Plasket

Judge of the High Court

APPEARANCES

For the State: J Sesar, office of the Director of Public Prosecutions, Port Elizabeth

For the accused: C van Rooyen instructed by the Port Elizabeth Justice Centre

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