

SOUTH AFRICA / JUDGMENT

S v Likgopo (SS32/2022) [2022] ZAGPJHC 1029 (23 November 2022)

[2022] ZAGPJHC 1029**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal

CASE / FILE NUMBER

SS32/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: SS32/2022****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

23/11/

2022

THE

STATE

and

PALO

MAHEA LIKGOPO

ACCUSED

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] Mr Mahea Likgopo Palo (hereinafter referred to as “the accused”) appears before this court charged in an indictment, which contains 10 counts.

Count 1: Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”), in that upon or on 8 May 2021 and at or near Muldersdrift, in the district of Mogale City, the accused did unlawfully and intentionally kill Mathoema Tshabalala, an adult male person.

Count 2: Murder read with the provisions of section 51(1) of the CLAA, in that upon or on 18 October 2021 and at or near Muldersdrift, in the district of Mogale City, the accused did unlawfully and intentionally kill T[...] M[...]4, an adult male person.

Count 3: Robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) and read with the provisions of section 51(2) of the CLAA. In that upon or about 29 August 2021 and at or near Muldersdrift, in the District of Mogale City, the accused unlawfully and intentionally assaulted Boikie Eugene Amanda, and with force and violence took a black Samsung S8 cell phone valued at R7600, his property or in his lawful possession, the aggravating circumstances, as defined in terms of section 1 of the CPA being present.

Count 4: Robbery with aggravating circumstances as intended in section 1 of the CPA and read with the provisions of section 51(2) of the CLAA. In that upon or about 18 October 2021 and at or near Muldersdrift, in the District of Mogale City, the accused unlawfully and intentionally assaulted T[...] M[...]4, and with force and violence took a Nokia cell phone, his property or in his lawful possession, the aggravating circumstances, as defined in terms of section 1 of the CPA being present.

Count 5: Robbery with aggravating circumstances as intended in section 1 of the CPA and read with the provisions of section 51(2) of the CLAA In that upon or about 18 October 2021 and at or near Muldersdrift, in the District of Mogale City, the accused unlawfully and intentionally assaulted M[...] B[...], and with force and violence took a Huawei cell phone valued at R5000, her property or in her lawful possession, the aggravating circumstances as defined in terms of section 1 of the CPA being present.

Count 6: In that upon or about 29 August 2021 and at or near Muldersdrift, in the District of Mogale City, the accused did unlawfully and intentionally attempt to kill Boikie Eugene Amanda, an adult male person.

Count 7: In that upon or about 19 October 2021 and at or near Muldersdrift, in the District of Mogale City, the accused did unlawfully and intentionally attempt to kill Schalk Jacobus Du Plooy, an adult male person.

Count 8: Contravening section 3 of the Firearms Control Act, Act 60 of 2000 (“FCA”) read with section 51(2) of the CLAA. In that upon or about 19 October 2021 at or near Muldersdrift, in the District of Mogale City, the accused did unlawfully and intentionally have in his possession a silver Norinco firearm with a serial number filed off as per the ballistic report, without holding a license, permit or authorization issued for the firearm in terms of the FCA.

Count 9: Contravening section 90 of the FCA. In that upon or about 19 October 2021 at or near Muldersdrift, in the District of Mogale City, the accused did unlawfully and intentionally have in his possession an unknown quantity of ammunition without being the holder of a licence in respect of the firearm capable of discharging that ammunition.

Count 10: That on or about 18 October 2021 at or near Muldersdrift in the District of Mogale City, the accused did unlawfully and intentionally assault M[....] B[....], an adult female person, with a firearm with the intent to cause her grievous bodily harm.

- [2] Before pleading, the Court warned the accused regarding the possibility of the imposition of the minimum sentences if convicted on the relevant charges.
- [3] The accused is legally represented by Ms Bovu from Legal Aid South Africa (“LASA”) and she confirmed that the trial could proceed without assessors.
- [4] The accused indicated that he understood the charges. He pleaded guilty to count 1 and 2, murder read with section 51(2) of the CLAA and count 10, assault to do grievous bodily harm. He pleaded not guilty to count 3, 4, 5, 6, 7, 8 and 9.
- [5] The accused presented a statement (“Exhibit A”) in terms of section 112(2) of the CPA in respect of counts 1, 2 and
- 10. The statement was signed by the accused. Exhibit “A” reads as follows:

“I, the undersigned

LIKGOPO MAHEA PALO

- 1. Freely and voluntarily and without undue influence and of sound and sober senses declare the following:
- 2. I understand the charges against me as per the indictment.
- 3. I was informed by my legal representative of my constitutional right to remain silent.
- 4. I am not compelled to make this statement.
- 5. I plead guilty to the following charges:

6. COUNT 1: Murder read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997.
7. COUNT 2: Murder read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997.
8. COUNT 10: Assault with intent to do grievous bodily harm.
9. AD COUNT 1:
 - 9.1. On 8 May 2021 I was at Muldersdrift, in the district of Mogale City.
 - 9.2. I admit that on the said day and address I did unlawfully and intentionally kill Mathoema Tshabalala (herein after, the deceased)
an adult male person.
 - 9.3. I admit further that the deceased was my relative and my next-door neighbour.
 - 9.4. On the date of the incident, I had an argument with the deceased.
 - 9.5. The deceased took a stick and hit me on the head.
 - 9.6. I managed to disarm the deceased and threw the stick on the floor.
 - 9.7. I took out my firearm from my waist and unlawfully and intentionally shot
 - 9.8. the deceased once on the head and the deceased fell.
 - 9.9. By shooting the deceased on the head I unlawfully and intentionally caused the deceased's death.
 - 9.10. The intention to kill the deceased was not premeditated.
 - 9.11. I admit that I had no legal defence for my actions as set out above, that I had not acted in self-defence and that my actions are punishable by law.
 - 9.12. The cause of death was found to be "GUNSHOT WOUND OF THE HEAD".
 - 9.13. The body of the deceased did not sustain any further injuries from the time the injury was inflicted on 8 May 2021 until a post-mortem examination was conducted thereupon by Dr JESSICA CLAIR MEDDOWS-TAYLOR.
 - 9.14. Dr Jessica Clair Meadows-Taylor conducted a post-mortem examination on the body of the deceased on 11 May 2021.
 - 9.15. I admit that the facts and findings of the post mortem examination recorded by the doctor are true and correct and have no objection if it can be handed to court as exhibit.
 - 9.16. I further admit that the injuries I inflicted on the deceased has caused his death.
 - 9.17. I have no right whatsoever to assault and kill the deceased.

10. AD COUNT 2 and COUNT 10

10.1. On 18 October 2021 I was at Muldersdrift in the District of Mogale City.

10.2. I admit that on the said day and address I did unlawfully and intentionally kill T[....] M[....]4 (herein after, the deceased) a male person.

10.3. On the date of the incident, I was residing with the complainant in count 10: M[....] B[....] as girlfriend and boyfriend at my shack and as a tenant and was paying a rental to my landlord P[....] M[....]3.

10.4. The deceased was known to me and was also a boyfriend of the said complainant.

10.5. On the said day the complainant brought the deceased in my shack whilst I was out.

10.6. Upon my arrival I found the deceased in the company of the complainant at the door of my shack.

10.7. I had a verbal argument with the deceased.

10.8. The deceased assaulted me with a clanged fist on the body and I got angry and took out my firearm which was in my waist and shot the deceased on his body more than once and the deceased fell.

10.9. By shooting the deceased on the body I admit that I caused his death.

10.10. The intention to kill the deceased was not premeditated.

10.11. The cause of death was determined to be "MULTIPLE GUNSHOT WOUNDS".

10.12. The body of the deceased did not sustain any further injuries from the time the injury was inflicted on 18 October 2021 until a post-mortem examination was conducted thereupon by Dr OUMAKIE SANNAH HLALELE.

10.13. Dr Oumakie Sannah Hlalele conducted a post-mortem examination on the body of the deceased on 20 October 2021.

10.14. I admit that the facts and findings of the post mortem examination recorded by the doctor are true and correct.

10.15. I further admit that the injuries I inflicted on the deceased has caused his death.

10.16. I have no right whatsoever to assault and kill the deceased.

10.17. I admit that on the said day and address I did unlawfully and intentionally assault M[....] B[....] an adult female person, with a firearm with intent to cause her grievous bodily harm.

10.18. After I shot the deceased, the complainant got angry and held me on the head I then hit her once with my firearm on the forehead with the intention to cause her grievous bodily harm.

10.19. I admit further that when I hit the complainant with a firearm, she was in possession of a cellphone namely Huawei which I bought for her as a gift.

10.20 The said cellphone fell when I hit her, I then took it from the floor and left.

10.21. The said cellphone was found in my possession when I was apprehended on 19 October 2021.

10.22. I admit that the injury sustained by the complainant was as a result of my unlawful actions.

10.23. The further admit to the contents of the J88 report and has no objection if it can be handed to court as exhibit.

10.24. I admit that I had no legal defence for my actions set out above, that I had not acted in self-defence on both counts 2 and 10 and that my actions are punishable by law.

10.25. I was very much aware that my actions were wrongful, unlawful and punishable by law.

10.26. I had no right or permission to act in such a manner.”

- [6] The state accepted the guilty plea on count 1, murder read with section 51(2) of the CLAA, and count 10, assault to cause grievous bodily harm. The state refused to accept the plea of guilty on count 2, murder. The state was of the view that the murder in count 2 was planned/premeditated and therefore section 51(1) of the CLAA was applicable to the charge.
- [7] The court was satisfied that the accused admitted all the allegations in count 1 and 10 and in terms of section 112(2) of the CPA, the accused was found guilty on count 1, murder read with section 51(2) of the CLAA and 10, assault to cause grievous bodily harm.
- [8] The court, in terms of section 113 of the CPA, recorded a plea of not guilty on count 2, murder.
- [9] In terms of section 115 of the CPA the accused exercised his right to remain silent regarding count 3 to 9.
- [10] The following admissions in terms of section 220 of the CPA were recorded, see exhibit “A1”, wherein the accused admitted the:
- (a) Identity of the deceased in count 1, being that of Mathoema Tshabalala.
 - (b) That Mr Tshabalala died on 8 May 2021 and that his death was caused by a gunshot wound to the head.
 - (c) That the body of Mr Tshabalala sustained no further injuries from the time of his death until the Post Mortem examination was conducted on the body on 11 May 2021 by Dr Jessica Clair Meadows-Taylor. The contents of the Post Mortem examination were admitted, and the report was handed in and marked as exhibit “B”.

- (d) Dr Jessica Clair Meadows-Taylor concluded that the death of Mr Tshabalala was caused by a gunshot wound to the head.
- (e) That on 8 May 2021 Warrant Officer Marina van Tonder attended to the crime scene at Diswilmar, Muldersdrift, whereafter she compiled a photo album which correctly depicted the crime scene. The photo album was handed in and marked exhibit “C”.
- (f) Identity of the deceased in count 2, being that of T[....] M[....]4.
- (g) That Mr M[....]4 died on 18 October 2021 and that his death was caused by multiple gunshot wounds to the chest area.
- (h) That the body of Mr M[....]4 sustained no further injuries from the time of his death until the Post Mortem examination was conducted on the body on 20 October 2021 by Dr Oumakie Sannah Hlalele. The contents of the Post Mortem examination were admitted, and the report was handed in and marked as exhibit “D”.
- (i) Dr Oumakie Sannah Hlalele concluded that the death of Mr M[....]4 was caused by multiple gunshot wounds.
- (j) That on 18 October 2021 Warrant Officer Stephen Dibate Molefe attended to the crime scene at [...], C[...], Muldersdrift, whereafter he compiled a photo album which correctly depicted the crime scene. The photo album was handed in and marked exhibit “E”.
- [11] The accused further admitted the contents of a J88 report compiled by Dr Lewane, employed at the Dr Yusuf Dadoo Hospital on 21 October
- 2021. The report was compiled following a medical examination of the complainant, Ms M[....] B[....]. The said report was marked exhibit “A2”.
- [12] During the trial the State called 6 witnesses, namely:
 - (a) Mr Boikie Eugene Amanda, the complainant in count 3 and 6;
 - (b) Ms M[....] B[....], eye witness regarding count 2 and 4, and the complainant in count 5 and 10;
 - (c) Mr M[....]3 P[....] M[....]2, eye witness regarding count 2, 4, 5 and 10;
 - (d) Mr Schalk Jacobus Du Plooy, complainant in count 7;
 - (e) Constable Majaha Mashaba; and
 - (f) Sergeant Booyens, the investigating officer.
- [13] The following exhibits were handed in during the State’s case,
 - (a) Exhibit “F”- sworn statement made by Mr Schalk Jacobus Du Plooy on 19 October 2021 at 15h10;
 - (b) Exhibit “G”- Extract of the Muldersdrift SAP 13 register, entry 689; and

(c) Exhibit “J”- Subpoena in Criminal Proceedings: Brigadier David van Niekerk.

[14] Following the closure of the state’s case, the accused testified under oath and no witnesses were called in the defence’s case.

Evidence in the State’s Case

Mr Boikie Eugene Amanda

[15] Mr Boikie Eugene Amanda (“Boikie”) testified that on 29 August 2021 at 18h20 he was on his way home and was walking on Hendrik Potgieter Road near Cradlestone Mall. He noticed a male person approaching from the opposite direction. After passing each other, Boikie testified that he had a feeling that a person was following him. As he turned around, he noticed the same person who passed him earlier, behind him. The person had a silver firearm in his hand and instructed the witness to hand over his cell phone. It later transpired that the person was the accused.

[16] The witness refused to hand over his cell phone whereby the accused pointed the firearm in his direction, luckily three vehicles approached and the accused ran away, across the road. Boikie stated that he could not see the accused at that stage, because there were no street lights on the other side of the road. The witness immediately ran in the direction of the garage near the bridge in order to get help.

[17] As he was on the bridge, he saw the accused approaching him from the side, the accused said that he told Boikie to hand over his cell phone, whereafter a shot was fired and the witness was struck on the left upper thigh/hip area. According to Boikie the bullet exited on his front right upper leg. Boikie told the court that after he was shot, he fell on the pavement next to the road. He took his cell phone from his trouser pocket and handed it over to the accused. The accused then ran away and disappeared under the bridge.

[18] The witness testified that he screamed for help. While he was sitting on the pavement, members of the public came to his rescue and assisted him. As he was reporting what had transpired, the accused appeared and watched them from a distance. Boikie pointed the accused out to those assisting him. The accused was standing at a distance about 15/20 metres from where he was sitting on the pavement. A police vehicle entered the garage and one of the people assisting him, walked to the garage, where he informed the police officers what happened.

[19] The police arrived at the scene and Boikie pointed the accused out to them. The police officer approached the accused after which he fled and disappeared into a Business Park nearby.

[20] Boikie testified that he was admitted to hospital on the night of the incident and was discharged on 19 September 2021.

[21] The witness testified that where the incident occurred the area was well lit by street lights.

- [22] After his discharge from hospital, he enquired from a friend he used to visit at the squatter camp, Matumbu, what the name of the accused was. Prior to the incident he used to see the accused at the squatter camp, in an area called Collen's. He never interacted with the accused, but he knew him by sight. Following his own investigation and enquiries, he referred the information to the police.
- [23] After some time, he was summoned to the Police Station and requested to identify his cell phone. He was shown cell phones, but his cell phone was not amongst the cell phones showed to him by the police. His cell phone was a black Samsung S8 valued at R 7900, the cell phone was never recovered. The witness testified that the police officer accompanied him to an office, where he identified the accused as the assailant.
- [24] Boikie testified that at a later stage, he attended a formal identity parade where he again pointed out the accused as his assailant.

Ms M[....] B[....]

- [25] Ms M[....] B[....] ("M[....]") testified that on the evening of the incident, 18 October 2021, she was residing in a shack at [....], C[....], Muldersdrift. She stated that she was involved in a relationship with Mr M[....]4 ("the deceased" in Count 2) since 2013 and a child was born out of the relationship. At the time of her testimony, the child was 6 years old. The relationship between her and the deceased was terminated in June 2020, because the deceased was arrested and in prison.
- [26] Following the arrest of the deceased, she got involved in a relationship with the accused. They would visit each other and at times stay over at their respective homes. The accused was residing in a shack on his brother's yard, not far from where she was residing. She indicated his shack was about a distance of 30 metres from her shack. They never cohabited together as husband and wife.
- [27] The witness testified that during September 2021 she told the accused that she did not love him anymore and the relationship was ended. However, she did spend a night with the accused after the termination of their relationship. She would also visit the yard of the brother of the accused, where she would engage with all the residents living in the yard, including the accused.
- [28] The reason for the witness to end the relationship between her and the accused was due to the fact that she realized the accused was not accepting her and the fact that she communicated with the deceased, the father of her child. Furthermore, she realised it did not sit well with the accused when she visited the deceased in prison and when she attended his court appearances.

- [29] After the deceased was released from prison, he stayed with his parents in Lenasia. On the day of the incident, she and the deceased arranged to meet in Johannesburg, whereafter she would accompany the deceased to her shack in order for him to collect his property which was in her possession.
- [30] They indeed met in Johannesburg, whereafter they proceeded to her shack in Muldersdrift. On arrival at the shack at about 18h00, the witness testified that while she was unlocking the entrance door, she heard two gunshots fired behind her. As she turned around, she saw the deceased lying on the ground, on his right side, with his left hand on his left side of his chest. The accused was standing near the deceased and she asked the accused why he shot the deceased. His reply was: 'I shot him before he could shoot me'.
- [31] The witness testified that she was screaming and crying, and no-one came to her assistance. She stated that she knelt beside the deceased and she noticed that he was still alive. The accused at that stage moved out of the yard only to return after a few minutes, where he again fired 2 gunshots at the deceased lying on the ground. At that stage she confronted the accused and a scuffle ensued. During the scuffle the accused struck her with the firearm on her forehead.
- [32] After being struck on the forehead with the firearm, she ran to the house of her neighbour, Mr M[....]3. The accused fired another shot at the deceased and left the yard.
- [33] According to her, an unknown person called the police. On arrival of the police the deceased had passed on.
- [34] The witness testified that her cell phone was lost during the incident, she was unable to state how and where the cell phone got lost. She was informed, the following day, that her cell phone was at the police station. She told the court that the cell phone was a gift from the accused. She testified that the accused paid the rent for her shack to the landlord, M[....]3.
- [35] According to her, while she was unlocking the door of the shack, the deceased was standing behind her and he had his cell phone in his hand. After the incident the deceased cell phone was never found. She had no knowledge as to how the deceased cell phone got lost.
- [36] The witness testified that she sustained an injury on her forehead. She attended to the doctor who gave her tablets. The wound was not stitched, but was bleeding profusely after the incident.

Mr M[....]3 P[....] M[....]2

- [37] Mr M[....]2 ("M[....]3") testified that at the time of the incident, Ms M[....] B[....] was his neighbour. Prior to the incident he knew the deceased as well as the accused.

- [38] M[....]3 testified that on the evening of the incident he was inside his shack when he heard two gunshots being fired. He stated that he was scared and did not want to go outside to see what was happening. M[....]3 was in the company of another man inside his shack, and the man took cover underneath the bed when the shots were fired.
- [39] M[....]3 testified that after a few minutes he went outside to see what was happening. He noticed the accused at the gate of the yard and the deceased lying on the ground. He reprimanded the accused, during which time M[....] was walking in circles inside the yard, screaming and calling the name of the accused's brother. He stated that at some stage, the accused was in a scuffle with M[....], during which she was injured with the firearm in the accused's possession. After M[....] was injured, she ran to his shack.
- [40] The witness testified that the accused, after a few minutes, walked to where the deceased was lying and he fired twice at the deceased. After the shots were fired the accused picked up an object from the ground next to the deceased and left the yard. M[....]3 stated that he heard another shot being fired, but he was unable to indicate in what direction the shot was fired.

Mr Schalk Jacobus du Plooy

- [41] Mr Schalk du Plooy ("Du Plooy") testified that at the time of the incident he was employed at Inter Active Security as a security officer. He reported for duty on 18 October 2021 at 16h00. At around 24h00 he received a radio "call-out" to 105 I[....] line. According to the information received, the owner of the property called in as there were suspected persons on his property. The witness proceeded to the address, which was situated in the Honeydew/Muldersdrift area.
- [42] Du Plooy testified while he was driving, he noticed a person walking next to the road in his direction. It later transpired that the person was the accused. The accused was wearing a hoody, with a cap, carrying a backpack. He had a cell phone in his hand with earphones in his ears. The witness drove passed the accused, but stop a few metres away, the reason for him stopping was that he found the situation suspicious. He reversed his vehicle, and parked next to the accused. Du Plooy alighted and approached the accused where he was standing at the right front on the vehicle.
- [43] At the stage the accused had his phone in his one hand and his other hand was inside his jacket pocket. Du Plooy stated that he enquired from the accused from where he was, and the accused said "Honeydew". This was also suspicious, as the accused was proceeding in the direction of Honeydew. Du Plooy requested the accused to take his hand out of his pocket, because of the situation Du Plooy took out his official firearm from its holster and held it at his side pointing to the ground.
- [44] The witness testified when the accused took his hand out of his jacket pocket, he saw that the accused had a silver firearm in his hand. The accused pointed the firearm at the witness' chest, and he moved towards him. The accused pulled the trigger, but fortunately, the

firearm malfunctioned and the live round was ejected from the chamber and fell to the ground. The accused, again pulled the trigger, whereafter a shot went off. The witness at that stage retaliated and fired shots in the direction of the accused, whereafter the accused retreated in the direction he came from. While the accused was retreating, he kept on pointing the firearm in the direction of the witness and fired shots. Du Plooy continued firing shots in the direction of the accused, he stated that he was unable to indicate how many gun shots were fired.

- [45] Du Plooy testified that the accused ran and jumped over a razor fence at [...] I[...], where he disappeared into the bushes. The witness immediately requested back up. Tyrone Duranty arrived on the scene and they searched the area for the accused.
- [46] The accused was found lying on the ground near a bush. The witness noticed that the accused was injured at his pelvic and chest area. The backpack was lying on the right side of the accused on the ground, inside the bag were two cell phones and clothes. The firearm was found about 2 metres away from the accused, on his left side.
- [47] The police and ambulance services were summoned to the scene. Arrangements were made with the owner of [...] I[...] to open the gate of the premises for the ambulance to enter the premises in order to attend to the accused. The accused was transported to the hospital.
- [48] Du Plooy testified that he was removed from the scene when the police arrived. His firearm, a Glock 19 pistol was handed over to Warrant Officer Booysen.

Constable Majaha Mashaba

- [49] Constable Mashaba testified that he had 13 years' experience as a police officer and was stationed at Muldersdrift. He was on standby duty on 18/19 October 2021, when he was called out to a crime scene at I[...] [...]in the Muldersdrift area. During his testimony, Constable Mashaba stated that he could be making a mistake as to the plot number, and that it could have been I[...] [...].
- [50] On his arrival at the crime scene, he met a security officer from Inter Active Security and police officers from the Muldersdrift Police Station. The police officers on the scene directed him to the accused. The accused was lying in a veld and he was injured. The witness noticed a firearm, a pistol, lying next to the accused. The firearm had no serial number as the serial number was obliterated. Constable Mashaba also noticed 4 cell phones lying next to the accused.
- [51] The witness stated that the accused was not talking, he was breathing and his eyes were open. He further testified that he had to enter the plot via a gate and he was unable to confirm whether the plot was fenced with a razor fence. The witness confirmed that the accused was not found lying in the street, but in a bushy area inside a plot.
- [52] The witness testified that he seized the following items found on the crime scene:

- (a) Silver Firearm with no serial number;
- (b) Black Samsung cell phone;
- (c) Blue Samsung cell phone;
- (d) Black Nokia cell phone;
- (e) Silver Huawei cell phone with a damaged screen; and
- (f) Green Power Bank.

[53] Constable Mashaba testified that the exhibits were handed in at the Muldersdrift SAP 13-689. The witness confirmed the contents of an extract of the Muldersdrift SAP 13 Register relating to the exhibits relevant in this matter. The document was handed in and marked as exhibit “G”.

[54] The witness stated that prior to handing the items into the SAP 13, he sealed all the exhibits in official exhibit bags. The exhibits were sealed in the following exhibit bags with the serial numbers as stated:

- (a) Silver firearm, empty magazine and 3 live rounds- [...];
- (b) Black Samsung, Blue Samsung, Silver Hawaii and Black Nokia cell phones- [...]; and
- (c) Glock Alsta 9x19 with serial number [...] empty magazine with the same serial number and 10 live rounds- [...].

[55] Constable Mashaba testified that all the exhibits were handed over to the CSC Commander, Warrant Officer Morobela.

Sergeant Booyens

[56] Sergeant Booyens testified that he was employed by the South African Police Services for the past 15 years and stationed at Muldersdrift

Detective Branch. He stated that he was the investigating officer in the matter.

[57] Sergeant Booyens testified that on 27 October 2021 he received two sealed exhibit bags from the CSC Commander at Muldersdrift Police Station. Due to the fact that the backside of the exhibit bags was transparent, the contents of the exhibit bags were visible. He corroborated Constable Mashaba’s evidence regarding the contents of the two exhibit bags and the seal numbers.

[58] The witness stated that he transported the exhibits to the Forensic Ballistic Unit of the South African Police. When he handed the two exhibit bags over at the Ballistic Unit, the bags were sealed and not tampered with. He received two receipts of acknowledgment, exhibit “H”.

Evidence in the Defence Case

Mr Mahea Likgopo Palo (“the accused”)

- [59] The accused testified that during October 2021, he was in a relationship with M[....]. He stated that they cohabited in a shack on the premises of M[....]3 at Collens, Muldersdrift. On the day of the incident, 18 October 2021, he left the shack and on his return at about 18h00 he found M[....] and the deceased, Mr T[....] M[....]4 on the premises. M[....] was inside the shack close to the door and the deceased was standing outside the door.
- [60] The accused confronted the deceased about his presence at his shack, whereafter the deceased struck him with a fist on his left shoulder-chest area. The accused testified that after he was struck with a fist, he took out his firearm and opened fire on the deceased. The deceased collapsed to the ground. The accused stated that he was unable to indicate how many shots were fired.
- [61] While the deceased was lying on the ground, M[....] grabbed the accused from behind and a struggle ensued. During the struggle his jacket was pulled from his body. The accused succeeded to free himself, whereafter he hit M[....] with the firearm while she was standing behind him. M[....] then ran into M[....]3's shack. The jacket was lying on the ground.
- [62] The accused testified that he proceeded to the gate when he realised that he left his jacket and cap behind. He turned around and fetched his jacket and the cap, he noticed M[....]'s Huawei cell phone was lying on the ground. He picked the cell phone up and with his jacket and cap left the yard.
- [63] The accused testified that after the incident he handed the firearm to his friend, Chicken ("Khoho"). He did not remain in the area, because he was worried that M[....] would point him out to the police, and therefore at around 23h00 he left to Honeydew.
- [64] On his way to Honeydew, he met Du Plooy, the security officer, who was traveling in a vehicle. After Du Plooy alighted from the vehicle, he approached the accused. The accused testified that he noticed Du Plooy speaking to him, but he did not understand what he was saying. The accused in reply pointed in the direction of Honeydew and he also said, "Honeydew, Honeydew."
- [65] Du Plooy, without saying a word, pulled out his firearm and fired various shots in his direction. During the shooting the accused stated that he was injured on the left shoulder, chest area and in the groin. After he was injured, he collapsed on the street and lost consciousness. He only woke up in hospital.
- [66] The accused denied being in possession of a firearm when he met Du Plooy. He conceded that he was in possession of cell phones, namely, a Nokia and Samsung, which belonged to him and the Huawei cell phone belonging to M[....].
- [67] The accused denied any involvement in the shooting where Boikie was robbed of his cell phone. The accused testified that on the night of the incident, 29 August 2021, he was at home.

Common Cause

[68] It is not in dispute that:

- (a) On 18 October 2021, the accused killed Mr T[....] M[....]4, the deceased died as a result of multiple gunshot wounds.
- (b) In the early hours of the morning on 19 October 2021, while the accused was walking in the direction of Honeydew, he was accosted by Mr Du Plooy a security officer employed by Inter Active Security Company; and
- (c) During the encounter, the accused was shot and injured, whereafter he was transported to the hospital and subsequently arrested.

Facts

in dispute

[69] The following issues are in dispute:

- (a) Was the accused involved in the shooting of Mr Boikie Eugene Amanda and did he rob him of his cell phone;
- (b) Was the murder on the deceased, Mr T[....] M[....]4, planned or premeditated;
- (c) Did the accused rob Mr T[....] M[....]4, the deceased, and Ms M[....] B[....] of their cell phones;
- (d) Did the accused attempted to kill Mr Du Plooy;
- (e) Did the accused possess a firearm in contravention of section 3 of the FCA, and lastly;
- (f) Did the accused possess ammunition in contravention of section 90 of the FCA.

Case Law and Evaluation

[70] The basic principles of criminal law and the law of evidence that apply in this case are trite. The first principle is that the guilt of the accused must be proved by the State and that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. In the matter of *S v T[1]* the importance of this principle was emphasize as follows:

“The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.”

[71] It also follows from the fact that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt and that no onus rests on the accused to prove his or her innocence.[2] In order to be acquitted, the version of an accused need only be reasonably possibly true.[3]

[72] In *S v Van Der Meyden*, [4] Nugent J said:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

[73] In the matter of *Naude and Another v S* [5] Navsa JA, continued as follows:

“Importantly, in that case Nugent J warned against separating evidence into compartments and to examine either the defence or State case in isolation.”

Evaluation Evidence – Count 3 and 6

[74] In the first place, I will start with the evaluation of the evidence pertaining to the incident that occurred on 29 August 2021 during which Boikie was robbed of his cell phone.

[75] Boikie was a single witness regarding what transpired on the day of the incident. Nothing prevents a court from convicting a person on the evidence of a single witness. Section 208 of the CPA provides that: “[a]n accused may be convicted of any offence on the single evidence of any competent witness”. However, it is trite that “...the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility”.[6]

[76] Furthermore, Boikie also provided the court with evidence relating to the identification of the perpetrator, a further aspect to be approached with extreme caution. In *Arendse v S* [7] the Supreme Court of Appeal quoted with approval the trial court’s comments in *R v Dladla*: [8]

“... There is a plethora of authorities dealing with the dangers of incorrect identification. The locus classicus is S v Mthetwa 1972

(3) SA 766 (A) at 768A, where Holmes JA warned that: ‘Because of the fallibility of human observation, evidence of identification is approached by courts with some caution. In *R v Dladla* 1962

(1) SA 307 (A) at 310C-E, Holmes JA, writing for the full court referred with approval to the reM[....]3 by James J – delivering the judgment of the trial court when he observed that: ‘one of the factors which in our view is of greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... In a case where the witness has known the person previously, questions of identification ..., of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.’”

[77] A useful summary of the test is set out in Volume 18 of LAWSA paragraph 263, where the learned authors state as follows:

“Judicial experience has shown that evidence of identity should, particularly in criminal cases, be treated with great care. Even an honest witness is capable of identifying the wrong person with confidence. Consequently, the witness should be thoroughly examined about the factors influencing his or her identification, such as the build, features, colouring and clothing of the person identified. An early identification before the trial (which is admissible as an exception to the rule prohibiting previous consistent statements) lends credibility to the evidence. Particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness; then the cautionary rule relating to single witnesses should also be taken into account.”

[78] Boikie made a favourable impression during his testimony. The witness testified in a calm, collected and chronological manner. He gave detailed evidence pertaining to the incident. When evaluating his evidence in its entirety, I cannot find that he harboured any negative feelings or vengeance towards the accused in order to implicate him falsely in the commissioning of the robbery.

[79] Regarding the identification of the perpetrator, I evaluated the evidence with caution. The attack on the witness was of a violent nature, the perpetrator was armed with a firearm, it occurred at night which would make identification difficult, and undeniably, it must have been a traumatic experience for the witness.

[80] Undoubtedly, Boikie had a sufficiently clear recollection of what transpired, his ability to recall the incident in detail was impressive. An important fact to consider is that he testified that prior to the incident he knew the accused by sight. Prior knowledge of the identity of the accused has important bearing upon Boikie’s observations relative to his identification of the accused.

[81] The witness qualified his previous knowledge of the accused in the following ways:

- (a) He used to visit a friend who conducted business near Cradlestone Mall, at the friend's residence, which was in the area known as Collen's. He stated that on two occasions he saw the accused in the street, however he never conversed with the accused.
- (b) Shortly after his discharge from hospital, he approached construction workers in the Collen's area and he obtained further information regarding the accused, which he traversed to the police.
- (c) He also gave a clear description of the accused to the Police at the crime scene, he described the accused as dark in complexion, short and he had a cheese cut hair style. The witness also described the clothing, the accused was wearing as follows, a grey jacket, jeans and All Star takkies.
- (d) After the arrest of the accused on 19 October 2021, the witness was called to the police station to see whether his cell phone was handed into the SAP13. The witness's cell phone was not amongst the cell phones shown to him; however, he saw the accused in an office at the police station and he immediately identified the accused as the person who attacked him on the night of the incident.

[82] I am of the view that Boikie had more than sufficient opportunity to make a reliable identification of his attacker. What makes this incident different from similar incidents is that the accused approached the witness more than once during the incident. Boikie testified that the accused approached him from the opposite direction where he was walking and passed him, at some stage he turned around and saw the accused following. At that stage the accused approached him and threatened the witness with the firearm and demanded his cell phone. Due to three vehicles passing them, the accused ran away.

[83] Boikie then ran to the service station nearby, but before reaching safety, the accused again approached him from the side, armed with the firearm. The accused fired at the witness and the witness fell to the ground. Boikie, at that stage, handed over his cell phone to the accused. It is evident that during the attack the accused was an arm length from the witness.

[84] Boikie testified that he was walking on the side of Hendrik Potgieter Road and the area was well lit by street lights. As expected, the accused when disturbed by passing vehicles ran to the other side of the road because there were no street lights on the other side of the road and it was dark. The illumination of the crime scene was such that I have no doubt that the witness made a reliable and trustworthy identification in the circumstances. The witness was in close proximity to the accused throughout the attack.

[85] Boikie made a good impression, he was confident during his testimony and I find that he was an excellent witness. He did not contradict his evidence-in-chief examination during cross-examination. The arrest of the accused 3 weeks later was a pure coincidence. Boikie could never have known that the accused was arrested for committing crimes that involved the use of a firearm. Furthermore, Boikie was previously acquainted with the accused, and such a factor bears a deal of reliability to the identification of the accused. I can find no

reason not to accept his evidence as honest, truthful and reliable.

[86] Therefore, I find that on 29 August 2021, the accused robbed Boikie of his cell phone.

Furthermore, that during the incident, the accused was armed with a firearm which was used to threaten and injure the witness.

[87] I will now turn to the question as to whether count 3, robbery with aggravating circumstances, and count 6, attempted murder, amounted to duplication of charges or the so-called splitting of charges.

[88] Section 83 of the CPA provides that where it is doubtful which of several offences is constituted by the facts of a case, an accused may be charged with “the commission of all or any such offences” and such counts may be tried together. An accused cannot be convicted of all charges if more than one charge of conviction results from the same criminal act. The reason for this is that conviction on more than one count which results from one criminal act exposes an accused to being sentenced more than once for the same offence.

[89] In Hiemstra’s Criminal Procedure the “test for splitting” (duplication of conviction) is as follows:

“There is no universally valid criterion for determining whether there is splitting. In S v Davids 1998

(2) SACR 313 (C) the topic is discussed afresh and the most important decisions are usefully summarised. The courts over the course of time developed two practical aids (S v Benjamin en 'n Ander 1980

(1) SA 950 (A) at 956E-H):

(i) If the evidence which is necessary to establish one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (R v Gordon 1909 EDC 254 at 268 and 269). This can be called ‘the same evidence test’.

(ii) If there are two acts, each of which would constitute an independent offence, but only one intent and both acts are necessary to realise this intent, there is only one offence (R v Sabuyi 1905 TS 170). There is a continuous criminal transaction. This test is referred to as ‘the single intent test’.”

[90] Ordinarily, the relevant and particular circumstances of a specific case will dictate which one of these two aids (tests) applies.[9] The Supreme Court of Appeal referred to the “single intent test” with approval in S v Dlamini[10] but added:

“There is, however, no all-embracing formula. The various tests are more guidelines, and they are not rules of law, nor are they exhaustive.

Their application may yield a clear result but if not, a court must apply its common sense, wisdom, experience and sense of fairness to make a determination.”

- [91] When analysing the evidence regarding the robbery and attempted murder charges and whether ‘the same evidence test’, ‘the single intent test’ or a common-sense approach is applied to the facts, it is evident that the accused fired at Boikie and injured him solely for the purpose (intent) to rob him of his cell phone. Due to Boikie refusing to hand over his cell phone, the accused with force, succeeded in depriving the witness of his property. The evidence to sustain the attempted murder charge is necessary to sustain the robbery with aggravating circumstances conviction.
- [92] Therefore, I am of the view that in convicting the accused on both count 3 and 6 would amount to a duplication of convictions.

Evaluation Evidence- Counts 2, 4, 5 and 7

- [93] Counts 2, 4, 5 and 7 related to the incident that transpired on 18/19 October 2021, where Mr T[...] M[...]4 was murdered, Ms M[...] was assaulted and Mr Du Plooy was shot at.
- [94] First and foremost, I will discuss the issue pertaining to statements made by witnesses and the evidential weight to be attached to averments contained in witness statements and differences in relation thereto during viva voce evidence in court.
- [95] In this matter, Mr du Plooy was confronted with the contents of his sworn statement, see exhibit “F”. The defence emphasised and focussed in detail on the witness statement during cross examination. The attack was based on so-called
- “contradictions”. Mr du Plooy was heavily criticised by the lack of detail recorded in his statement.*
- [96] Contradictions in written statements per se do not result in a conclusion that the evidence of the witness is to be rejected. In *S v Mahlangu and Another*[11] Horn J restated the principles relating to written statements by witnesses. The learned judge held:

“In order to discredit a witness who made a previously inconsistent statement it must be shown that the deviation was material (S v Bruinders 1998 (2) SACR 432 (SE) at 437e; S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA) at 593e). Deviations which are not material will not discredit the witness. Police statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness’ statement to conclude that the witness said in court was unsatisfactory or untruthful.

There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail. Should a witness through a lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover, the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in

the final analysis consider the evidence as a whole in order to determine in what respects the witness' evidence may be accepted and in what respects it should be rejected. Counsel who act on behalf of accused persons, are wont to pounce on any differences, no matter how insignificant, which may arise between an extra curial statement of a witness and the witness' testimony in court (See *S v Govender and Others* 2006

- (1) SACR 322 (E) from 326c, where Nepgen J gives an insightful discourse on this topic.) The witness is often lambasted where his testimony in court gives more detail than what appears in his written statement. The more differences that can be found between the statement and the testimony in court, the more successful counsel feels his cross-examination has been. However, as has been pointed out, that is not the correct approach. The test is: were the differences material, always bearing in mind that a witness' testimony in court will almost without exception be more detailed than what the witness said in his written statement."
- [97] I will fully deal with the credibility of Du Plooy during the evaluation of his evidence. However, I find that the so-called contradictions in his sworn statement are not material and not an indication of his evidence being unreliable.
- [98] M[...] during her testimony was forthcoming regarding her relationship with the accused and the deceased. She at no stage attempted to hide away from the fact that she had a relationship with the accused while the deceased, the father of her child, was in prison. She admitted that even after she ended the relationship with the accused, she met him occasionally and they even spent a night together. M[...] stated that the accused paid the rent of her shack to M[...]3, the landlord. She did not hide the fact that the Huawei cell phone was a gift from the accused.
- [99] M[...] had more than enough opportunity to fabricate evidence against the accused. I can find no indication that she was vindictive or revengeful towards the accused, despite witnessing the brutal and senseless murder of the deceased. In fact, she testified that the accused did not take her cell phone with force, but that the cell phone must have fallen out of her trouser pocket during the scuffle.
- [100] Furthermore, her evidence that she was involved in a scuffle with the accused, was corroborated with the contents of the J88, exhibit "A2". The report corroborated her evidence in that she sustained 3 bruises, one on the left forehead at the hairline, one on the back of the right upper arm, and one on the back of the left upper arm. This is not in accordance with the version of the accused that he only struck her with the firearm on her forehead.
- [101] I do not agree with the submissions by Ms Bovu, that the evidence of M[...] and M[...]3 contradicted each other. One has to be mindful of the fact that witnesses present during the commissioning of a crime would evidently give different versions. Different versions are not always indicative of malicious intent. Witnesses are human and humans are different and can make mistakes. But the fact that a witnesses might be wrong about a particular detail of the crime does not necessarily disqualify them or render their evidence unreliable. In all

the years of presiding in criminal cases like these, I have yet to come across a case where witnesses agree on every single detail during their evidence in court.

[102] Furthermore, during stressful situations, like the incident witnessed by M[....] and M[....]3, one could expect that their versions would differ. There are many factors that could influence a witness' perception and recollection of an event, to mention a few, physical location during the incident, past experiences, familiarity with crimes being witnessed, a witness' emotional state and language skills in describing what they witnessed are all important aspects to take into consideration when evaluating the evidence.

[103] Witnesses see things differently, forget minor details and recount stories in odd orders. In fact, if M[....] and M[....]3' evidence pertaining to the incident was identical, and did not differ by an acceptable margin, I would have been suspicious and that would have been of great concern.

[104] The evidence presented by M[....] and M[....]3 amounted to the following: after the deceased was shot by the accused, the accused left the yard, but returned and again fired shots at the deceased while the deceased was lying defenceless on the ground. I can find no reason not to accept the evidence as reliable and truthful.

[105] When evaluating the evidence of Du Plooy, I again take note of the cautionary rule pertaining to the evidence of a single witness.

The witness testified in a calm, collected and chronological manner, even during cross examination, he did not contradict his evidence-in-chief examination. He was extensively cross examined by Ms Bovu, and his evidence was unshakable.

[106] Du Plooy provided the court with a detailed and consistent version. His involvement during the arrest of the accused was pure coincidence. He testified in the early hours of the morning; he noticed the accused walking in the direction of Honeydew. Obviously, as a security officer on duty and alerted to attend a complaint in the area, he was suspicious of the circumstances surrounding the accused's presence in the near vicinity of the complaint.

[107] Constable Mashaba arrived on the scene after the accused was injured. His evidence corroborated the evidence by Du Plooy in that the accused was found in a bushy area, in a plot. He stated that he gained entry through a gate, and furthermore, he found the accused injured and lying on the ground. He confirmed the evidence of Du Plooy that a firearm was found next to the accused. Mashaba has no reason to fabricate evidence, Du Plooy and the accused were unknown to him.

[108] I will discuss the improbabilities in the version of the accused in detail below. I find the evidence of Du Plooy reliable.

[109] The accused testified under oath. He denied his involvement in the robbery of Boikie on 29 August 2021. During cross-examination of Boikie, the defence put it to the witness that the accused cannot remember where he was on the night of the incident, but he was not the

person who robbed him. However, during his evidence under oath, the accused testified that on the night of the incident he was at his place of residence. It is evident that the accused was fabricating evidence as the trial progressed. I find it highly unlikely that the accused would have been able to remember where he was weeks prior to his arrest. More so, nothing noteworthy happened on the day in question. In such circumstances I would have expected the accused to have no recollection of where he was and what he was doing. The fact that the accused remembered his whereabouts on 29 August 2021 was, to my mind quite incredible. This did not, in my judgment, have a ring of truth to it.

- [110] His version regarding the incident involving M[....], M[....]3 and Du Plooy was broadly similar regarding what transpired on the fateful night. The version presented by the accused raised various questions. M[....] stated that on the day of the incident she was not involved in a relationship with the accused and they were not cohabiting in her shack. I can find no reason as to why she would lie about these aspects, taking into consideration that she openly stated that she was previously involved with the accused, and even after the relationship was terminated, she visited him and even spent a night with him.
- [111] The accused stated that he and the deceased had an argument and the deceased hit him with a fist. The accused further testified that he lost his temper took out his firearm and shot the deceased more than once.
- [112] According to the post mortem report compiled by Dr Hlalele, exhibit 'D', the deceased was shot 4 times in the chest and twice in the right upper arm. The chief post mortem findings in this case were:

"Post-Mortem examination shows multiple gunshot wounds. Post-Mortem examination further shows hemopneumothorax, perforation of the lung, liver, pancreas, mesentery and kidney. The internal organs are pale on dissection, indicating blood loss"

- [113] M[....] and M[....]3 would not have the knowledge pertaining to whether a murder was planned or premeditated. Their evidence regarding the killing of the deceased was clear and they provided the Court with detailed versions of what transpired on the night. Their evidence corroborated where one would expect corroboration. M[....] testified that she did not witness the first shots fired, she stated that after she heard the gun shots, she turned around and saw the deceased lying on the ground behind her and the accused had a firearm in his hand. She further testified that she approached the accused and a scuffle ensued during which she was injured. After being struck with the firearm on the head she ran to M[....]3'. At that stage M[....]3 was standing at the door of his shack reprimanding the accused. According to both witnesses the accused moved to the gate only to return where he again fired shots at the deceased.
- [114] In relation to count 7, attempted murder of Du Plooy, the accused expects the court to believe that Du Plooy fired and injured him without any provocation or threat of harm. In fact, the accused gave his full co-operation when the witness approached him and enquired as to his presence in the area. Even more far-fetched, is the fact that the accused insinuated

that after he was shot, Du Plooy must have lifted him over a fence, in order for the police to find him inside the plot. That is the only inference that the Court can draw, because Mashaba testified that the accused was found lying on the ground, inside a plot and not on the street where the accused stated he was shot by Du Plooy.

[115] The version presented by the accused in regard to count 7 is improbable and unacceptable.

[116] I find the state witnesses' evidence is a true account of what transpired on the night of 18/19 October 2021 and I reject the version of the accused as false.

Premeditated/Planned Murder

[117] The terms 'planned', or 'premeditated' murder is not defined in the CLAA. The legislature has left it to the court to define or interpret the concept. The court in the case of *S v Raath*[12] relied on the Concise Oxford English Dictionary for the meaning of the concept planned and premeditated and explained as follows:

"The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The Concise Oxford English Dictionary 10 ed, revised, gives the meaning of premeditated as "to think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time"."

[118] In the case of *S v PM*, [13] the court defined the term planned and premeditated murder as two different concepts, which do not have the same meaning, however, it has the same consequences. The court defined 'premeditated' as "something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension".

Whereas, 'planned' has been described as "a scheme, design or method of acting, doing, proceeding or making,

which is developed in advance as a process, calculated to optimally achieve a goal".

[119] Finding that the murder was planned requires that there must have been a plan, design, or scheme in place. The accused must have thought about the murder days in advance, the planning must have been done in order to ensure that the act of murder is successful.

[120] The court in *S v PM* above stated the elements of 'planned' as follows:

"(1) The identification of the goal to be achieved;

(2) the allocation of time to be spent;

(3) the establishment of relationships necessary to execute;

(4) the formulation of strategies to achieve the goal;

- (5) arrangement or creation of the means or resources required to achieve the goal; and
- (6) directing, implementing and monitoring the process.”[14]

[121] In the case of *Kekana v S*, [15] in paras 12 to 13, the court dismisses the idea given in the case of *Raath supra* that in proving premeditation, the state must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. The court held that it is not necessary for the appellant who is the accused, to have thought or planned their action over a long period of time in advance, before carrying out their plan. The court further held that time is not the only consideration, because even a few minutes is enough to carry out a premeditated action.

[122] It is clear that there is a difference between the two concepts of planned and premeditation. However, it is important to note that the mere fact that an accused formed an intention to kill someone beforehand does not automatically mean that the murder is premeditated or planned. It is also important to note that the test for determining intention is subjective, whereas the test of determining premeditation and/or planning is objective.

[123] It must be borne in mind that the finding of premeditation or planned murder does not rely on whether there was an intention to kill. First, the Court has to find that there was an intention to kill. Then the court must look at the evidence to determine (based on the surrounding circumstances) whether there is premeditation or planning.

[124] I have accepted the evidence presented by the state regarding count 2, the murder of the deceased. The accused had direct intention to kill the deceased. After firing two shots at the deceased, the accused proceeded to the gate of the yard, however, he returned and fired further shots at the deceased while lying defenceless on the ground. These actions of the accused clearly indicate planning as defined and described by Mathopo AJA (as he then was) in the matter of *Kekana supra*.

[125] Therefore, I conclude that the accused is guilty of murder of the deceased in count 2 read with section 51(1) of the CLAA.

Count 4- Robbery with aggravating circumstances – Deceased Nokia cell phone

[126] The accused is charged with two charges of robbery with aggravating circumstances, which relate to the cell phones of the deceased and M[...]. There is no evidence on record that the accused robbed the deceased of his cell phone. None of the witnesses, M[...] or M[...]3, provided any evidence in this regard.

[127] The state argued that the deceased was in possession of his cell phone on the night of the incident, and the cell phone of the deceased was never found following the night in question, therefore, the state was of the view that the only inference the Court should make, is that the accused robbed the deceased of his cell phone.

[128] I am not inclined to find that the only inference in the circumstances is that the accused robbed the deceased of his cell phone. As already stated, there is no evidence on record to make such finding.

[129] Therefore, the accused should be given the benefit of the doubt regarding count 4.

Count 5- Robbery with aggravating circumstances – M[....]'s Huawei cell phone

[130] It is not disputed that the accused took the cell phone of M[....] during the incident. M[....] testified that the cell phone was in her trouser pocket and must have fell from her pocket during the scuffle with the accused. The accused testified that he took the cell phone and left the yard with it.

[131] In the circumstances it is clear that the cell phone was not taken with force from M[....]. Therefore, the state did not proof the elements pertaining to robbery.

[132] However, the state proved that the accused took the cell phone without the permission of M[....] and, as such, deprived M[....] of the possession of her cell phone. Theft is a competent verdict on robbery.[16]

[133] I am therefore satisfied that the state proved the crime of theft in regard to count 5.

Count 8 and 9: Possession of unlicensed firearm and ammunition

[134] The evidence before this court conclusively proved that since May 2021, the accused was in unlawful in possession of a firearm and ammunition, furthermore the accused admitted that he shot and killed the deceased in count 1 and count 2 with the same firearm.

[135] Due to the lack of interest by police officers employed at the Ballistic Unit of the police, no ballistic report was available during the trial. At this stage of my judgment, I find it prudent to address the challenges this Court experienced with regard to the unavailability of the ballistic report.

[136] This trial was set down for hearing on 31 October 2022, and was to run for 2 weeks. Prior to commencing with the trial both the state and defence approached me in chambers, where I was informed that the ballistic report was not available. The state indicated that following numerous enquiries by the investigating officer, Sergeant Booyens said that the report would be available on 2 November 2022.

[137] On 2 November 2022, the state requested a remand, and stated that the report would be available on 4 November 2022. Ms Bovu objected to the request for remand. After considering the seriousness of the offences in the matter and interests of justice, I granted the requested remand. Needless to say, on 4 November 2022, the report was still outstanding, and the state requested another remand, indicating that he was unable to indicate with certainty when the report would be available. According to the information he received from the investigating officer, the report might be available on 10 November 2022. Ms Bovu again objected to the request for remand.

- [138] As a result of the delay in the proceedings and conduct of the police officers attached to the Ballistic Unit of the police, I ordered a summons be issued and served on Brigadier David van Niekerk at the Ballistic Unit, Pretoria. My intention was to obtain certainty as to when the ballistic report in this matter would be available.
- [139] Sergeant Booyens informed me, in open court, that Brigadier van Niekerk during the previous enquiries, told him that he would not attend court, as a summons had to be served 14 days in advance of the appearance date.
- [140] As anticipated, Brigadier van Niekerk did not attend court on the date indicated on the summons, namely 8 November 2022. The summons was marked exhibit “J”. The state again requested a remand to obtain the ballistic report and Ms Bovu objected to the request.
- [141] It is so that courts have a duty to ensure that the rights in terms of section 35(3) of the Constitution, to have trials commencing and being completed without unreasonable delay, are upheld. Section 342A (1) of the CPA enjoins a court before which criminal proceedings are pending to ‘investigate’ any cause of the delay during criminal proceedings.
- [142] In *S v Van Huysteen*,^[17] *Traverso J* (as she then was) held that section 342A (3)(c) of the CPA does not require that a formal enquiry be held nor that a formal finding has to be made. If the presiding officer enquires as to the reasons for the request for a further postponement and concludes that a further postponement would lead to injustice, that is sufficient. The learned judge further held that section 342A of the CPA merely provides guidelines for the factors which a court should take into account when deciding whether to refuse a postponement or not. The Honourable Judge held that:^[18]

“Na my mening hoef daar geen formele ondersoek gehou te word of geen formele bevinding gemaak te word ingevolge hierdie artikel nie.

Indien die voorsittende beampte navrae doen oor die redes vir die versoek om 'n verdere uitstel, en die mening huldig dat 'n verdere

uitstel tot 'n onreg sal lei is dit na my mening voldoende. Na my mening le art 342A slegs riglyne neer oor die faktore wat 'n hof in aanmerking moet neem by die oorweging van die vraag of 'n uitstel geweier moet word al dan nie.”

- [143] The learned judge recognising the importance and indispensability of section 35 of the Constitution, stated the following:^[19]

“Hierdie artikel moet voorts ook geles word teen die agtergrond van die bepalings van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 en meer bepaald die bepalings van art 35 daarvan, waarvolgens ‘n beskuldigde se reg op 'n regverdige verhoor (met inbegrepe sy reg om sy verhoor sonder 'n onredelike vertraging te begin, en af te handel) aangestip word.”

- [144] Due to the absence of any indication as to when the ballistic report would be available, I refused the request for remand by the state. As a result, the state refused to close the state's case, whereafter I closed the state's case.[20]
- [145] The disregard and disrespect shown by some police officers is unfortunate and disquieting.
- [146] Even though the unviability of a ballistic report, the proven facts show that the accused was in possession of a handgun of make and calibre unknown and at least 8 rounds of ammunition the said firearm. He has not offered any evidence to suggest that he was legally authorised to be in such possession.[21]
- [147] Ms Bovu, counsel for the accused, argued that the state had failed to prove the charges in terms of count 8 and 9 because no expert evidence had been adduced to establish that the device used by the accused had been a firearm as defined in section 1 of the FCA.
- [148] The word 'firearm' is defined in the FCA as follows:
- " 'firearm' means any-*
- (a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
 - (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
 - (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
 - (d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
 - (e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5."
- [149] In *S v Filani*[22] the appellant's convictions in respect of the unauthorised possession of a firearm and ammunition in contravention of the FCA was set aside and the court held that it had been incumbent on the state to adduce evidence establishing that the device used fulfilled the technical criteria in the definition of "firearm". Pickering J said the following:
- "... [O]n an acceptance of Ms Hendricks' submission, any weapon which was capable of discharging or propelling a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of 'firearm' contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it."*
- [150] In *S v Jordaan and Others*,[23] Binns-Ward J made the following remark:

“The logic of the court’s reasoning in Filani is difficult to fault on the facts of that case. Depending on the evidence adduced in a particular case it could, however, give rise to uncomfortably anomalous results if applied as a general doctrine. In the current matter, for example, it is plain beyond question that a significant wound was inflicted on the complainant by a shot fired by accused 2 from a firearm in the ordinary sense of the word. It would make something of an ass of the state of the law if the court were to find the accused guilty of the common law offence of attempted murder committed with the use of a firearm, but be unable to hold that he had possessed the firearm without a licence on the basis that the weapon’s muzzle energy had not been empirically proved. Such a result would be especially anomalous in the context of the expressly stated objects of the Firearms Control Act. The preamble to the Act states that the enactment is directed at the protection of every person’s ‘right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence from either public or private sources’ and acknowledges the duty placed on the state by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights in the context of the contribution of the increased availability and abuse of firearms and ammunition to the high levels of violent crime in our society. It seems to me that it would be inimical to the stated objects of the Act to apply its provisions in such a way as would place a higher burden on the state to successfully procure convictions in respect of the unlawful possession of firearms and ammunition. Certainly, if the language of its substantive provisions were construed to have such an absolute effect, the result would be undermining of the statute’s stated objects.”

[151] In *S v Sehoole*,^[24] the Supreme Court of Appeal rejected the reasoning of the court a quo, that in the absence of expert ballistic evidence it could not be proved that ammunition found in possession of an accused was

“ammunition” within the defined meaning of the term. The following was said:

“Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the state to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence, be deduced to be ammunition related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances.” (In that matter there had been a ballistic report put in evidence confirming the character of the firearm.)

[152] In the current matter, having regard to the evidence by Boikie, M[....], M[....]³, Du Plooy, Constable Mashaba and the evidence contained in the post-mortem reports -exhibits “B” and “D”, identifying the object that the accused was carrying as a firearm and the nature of the injury inflicted on Boikie, M[....] and both the deceased, I am satisfied beyond reasonable doubt, in the absence of any countervailing evidence, that the firearm was one with a muzzle energy materially ‘exceeding 8 joules (6 ft-lbs)’.

[153] The consequences of the shooting incidents demonstrate that the firearm used could not have been a device of the nature that the legislature excluded from statutory regulation in terms of the FCA. It is clear from the evidence adduced at the trial that the accused is familiar with and knows how to use firearms and Boikie indeed asserted under cross examination, that he knew a firearm when he saw it. The description by the witnesses of

the firearm and on the version for the accused it is clear that a firearm was indeed used during the commissioning of the crimes.

[154] In the circumstances, the accused falls to be convicted on counts 8 and 9 in respect of the charges brought under the FCA.

[155] As mentioned before, at the commencement of the trial, the accused pleaded guilty on count 1 and 10. The defence handed in a statement in terms of section 112 of the CPA admitting all the allegations pertaining to the said counts. Following the state's acceptance of the facts contained in the statement, the accused was found guilty on count 1, Murder read with section 51(2) of the CLLA and count 10, assault with the intent to cause grievous bodily harm.

[156] The accused is acquitted on the following counts:

Count 4: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977 and read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997; and

Count 6: Attempted Murder.

[157] The accused is found guilty of the following counts:

Count 1: Murder read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997;

Count 2: Murder read with section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997;

Count 3: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 and read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997;

Count 5: Theft;

Count 7: Attempted Murder;

Count 8: Contravening section 4 of the Firearms Control Act 60 of 2000, Unlawful Possession of a firearm: Make and Calibre unknown to the State;

Count 9: Contravening section 90 of the Firearms Control Act 60 of 2000, Unlawful Possession of ammunition: Unknown to the State; and

Count 10: Assault with the intent to cause grievous bodily harm.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 30

October, 1, 2, 4, 8, 11, 16, 18, 22, 23 November 2022

DATE JUDGMENT DELIVERED: 23 November 2022

APPEARANCES:

On Behalf of the State: Advocate Mthiyane

On behalf of the Accused: Ms. Bovu

[1] 2005

(2) SACR 318 (E) at para [37].

[2] See S v Mhlongo 1991

(2) SACR 207 (A) at 210D-F and R v Hlongwane 1959

(3) SA 337 (A) at 340H.

[3] S v Van der Meyden 1999

(1) SACR 447 (W) at 448F-G.

[4] Id.

[5] [2011] 2 ALL SA 517 (SCA).

[6] See Stevens v S 2005 1 All SA 1 (SCA) at para [17]. See also S v Sauls and Others 1981

(3) SA 172 (A) 180E G where Diemont JA established the approach to the “cautionary rule”.

[7] Arendse v S [2015] ZASCA 131 at para [10].

[8] R v Dladla and Others 1962

(1) SA 307 (A) at 310C-E.

[9] R v Johannes 1925 TPD 782.

[10] 2012

(2) SACR 1 (SCA) at para [20].

[11]

[2012] ZAGPJHC 114.

[12] 2009

(2) SACR 46 (C) at para [16].

[13] 2014

(2) SACR 481 (GP) at paras [35]-[36].

[14] Id at para [36].

[15] [2014] ZASCA 158.

[16] See section 260(d) of the CPA.

[17] 2004

(2) SACR 478 (C).

[18] Id at para [8].

[19] Id at para [9].

[20] Section 342A(3)(d) of the CPA provides: “(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order - (a) ... (b) ... (c) ... (d) where the accused has pleaded to the charge and the State or the defence, as the case maybe, is unable to proceed with the case or refused to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed ...”

[20] Section 342A(3)(d) of the CPA provides:

“(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order -

(a) ...

(b) ...

(c) ...

(d) where the accused has pleaded to the charge and the State or the defence, as the case maybe, is unable to proceed with the case or refused to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed ...”

[21] See section 250 (1) of the CPA, which provides: “Presumption of lack of authority (1) If a person would commit an offence if he- (a) carried on any occupation or business; (b) performed any act; (c) owned or had in his possession or custody or used any article; or (d) was present at or entered any place, without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the ‘necessary authority’), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

[21] See section 250 (1) of the CPA, which provides:

“Presumption of lack of authority

- (1) If a person would commit an offence if he-
 - (a) carried on any occupation or business;
 - (b) performed any act;
 - (c) owned or had in his possession or custody or used any article; or
 - (d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the ‘necessary authority’), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

[22] 2012

- (1) SACR 508 (ECG) at 515F-G.

[23] [2017] ZAWCHC 131 at para [101].

[24] 2015

- (2) SACR 196 (SCA) at para [19].

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