

SOUTH AFRICA / JUDGMENT

S v Mbatha and Another (CCD34/2020) [2021] ZAKZPHC 55 (3 June 2021)

[2021] ZAKZPHC 55

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes, S Miloszewski

CASE / FILE NUMBER

CCD34/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

KWAZULU

NATAL DIVISION, PIETERMARITZBURG,

NORTH

EASTERN CIRCUIT, MTUNZINI

Case

No. CCD34/2020

In

the matter between:

The
State
and
Celokuhle
Innocent
Mbatha First
Accused
Nhlonipho
Innocent
Mncube Second
Accused

JUDGMENT

Lopes J,

[1] Messrs Celokuhle Innocent Mbatha (Mr Mbatha) and Nhlonipho Innocent Ncube (Mr Ncube) were charged in the circuit court sitting at Mtunzini with the following crimes:

- (a) housebreaking with intent to commit murder;
- (b) the murder of Wiseman Ntokozo Sithole (Mr Sithole);
- (c) the murder of Nonhlanhla Cynthia Sangweni (Ms Sangweni);
- (d) robbery with aggravating circumstances of a Nissan NP200 motor vehicle (the Nissan) from Mr Sithole.

[2] It was alleged that all the offences took place on the 13th March 2019 at or near Ntababomvu in Babanango. The history and circumstances of the incident resulting in the deaths of Mr

Sithole and Ms Sangweni, as disclosed in the evidence of the witnesses, may be summarised as follows:

- (a) Mr Sithole was married to Mr Mbatha's sister, Janet Sizakele Sithole (Mrs Sithole).
- (b) The parental family home of the Sithole family was at Ntababomvu, consisting of a three roomed structure, two rondavels (one incomplete), a flat and a rectangular structure. Mrs Sithole resided in a three-bedroom flat with Mr Sithole, apparently at Umzumgazi in Richards Bay.
- (c) At some stage before November 2018, Mr Sithole expressed the wish to marry a second wife. His intended was Ms Sangweni. Mrs Sithole then decided to enlist her brother, Mr Mbatha, at least to regain possession of the Nissan which was registered in her name. It is evident that at that stage, relations between Mr and Mrs Sithole were somewhat strained, exacerbated very probably by the fact that Ms Sangweni was pregnant by Mr Sithole. Mr Mbatha and Mr Sithole, however, seemed, at least, to be on good terms, and Mr Mbatha

regularly assisted Mr Sithole with his work of repairing electrical wiring at schools and building houses.

- (d) Mr Mbatha agreed to assist Mrs Sithole in her efforts to gain possession of the Nissan, primarily to prevent it falling into the possession of Ms Sangweni. To that end, he enlisted the assistance of a traditional healer Mbuyiseni Jacob Mbambo (Mr Mbambo).
- (e) Mr Mbambo and Mr Mbatha had become acquainted with each other during

2017. At that stage Mr Mbatha and Mr Mbambo's late father had dealings when Mr Mbatha sold logs and gates to Mr Mbambo's late father. The logs were used as fencing for the property of the Mbambo family. In 2018 Mr Mbatha returned to school near the home of Mr Mbambo, and used to visit him often before and after school and during tea breaks.
- (f) During about October or November of 2018 Mr Mbatha confided in Mr Mbambo that Mrs Sithole wanted to dispossess Mr Sithole of the Nissan. To do so, she wanted to have another key cut for the Nissan, to enable Mr Mbatha to repossess it for her. Mr Mbatha told Mr Mbambo that he wanted Mr Mbambo to drive him to Ntinini to repossess the Nissan once the key was obtained.
 - (g) At some stage thereafter Mr Mbatha phoned Mr Mbambo and told him that, at the Nkandla taxi-rank, he had obtained possession of the second key, which had been cut in Empangeni. He then arrived at Mr Mbambo's home during exam time in 2018. He left the key on a nail in a wall in the home of Mr Mbambo.
 - (h) Mr Mbambo was clearly unhappy at the prospect of having to take Mr Mbatha to Ntinini, and he used the excuse that his motor vehicle was broken down. A few days later Mr Celimpilo Khanyile (Mr Khanyile), arrived at the home of Mr Mbambo in a Golf II motor vehicle. He told Mr Mbambo that he had borrowed the Golf II from Mr Mbatha's cousin, Sgidi, so that they could transport Mr Mbatha to Emachitshana, which area adjoins (but is geographically further than) Ntinini. Emachitshana was the place Mr Mbatha had asked Mr Khanyile to take him to.
 - (i) Mr Mbambo was still unhappy about the arrangement and persuaded Mr Khanyile to disable the Golf II. Mr Khanyile did this by disconnecting the coil wire of the Golf II, thus disabling it.
 - (j) Mr Khanyile did so because he had been told by Mr Mbambo that Mr Mbatha not only wished to repossess the motor vehicle for his sister Mrs Sithole, but that he also intended to kill Mr Sithole.
 - (k) Mr Khanyile had known Mr Mbatha for some time having repaired motor vehicles for him, including a Mitsubishi L300 truck and a Toyota

Corolla motor vehicle. The L300 was not working property and could only be driven in one gear, and was therefore unsuitable to be used in the trip to Emachitshana, via Ntinini. The Toyota Corolla Sprinter also belonging to Mr Mbatha was unreliable and broke down from time to time. Whilst Mr Khanyile was in the process of trying to fix the gear problem on the Mitsubishi L300, he assisted Mr Mbatha by performing certain functions for him, such as conveying bricks. Mr Mbatha had given him R200 to fill the Golf II with petrol for the trip to Ntinini.

- (l) As a result of the disconnection of the coil wire of the Golf II, the engine could not be started. Mr Khanyile procrastinated and pretended that he could not get the Golf II started. Eventually, when it was too late to do the trip, he reconnected the coil wire and persuaded Mr Mbatha to help him push-start the vehicle and he drove off, leaving Mr Mbatha at Mr Mbambo's home.
- (m) The next day Mr Mbatha scolded Mr Mbambo, saying that they did not wish to help him. It was unclear at that stage whether Mr Mbatha had become alerted to the fact that his trip had been deliberately frustrated by Messrs Mbambo and Khanyile.
- (n) Mr Mbatha then continued to put pressure on Mr Mbambo. He suggested that if Mr Mbambo was unwilling to drive him to Ntinini, his sister Mrs Sithole would do so, but she would drive Mr Mbambo's motor vehicle. Mr Mbambo considered that an awkward situation, because the motor vehicle he would use, in fact belonged to his uncle. In the circumstances, he decided to drive Mr Mbatha to Ntinini himself. Prior to embarking on the trip to Ntinini, Mr Mbambo again spoke to Mr Mbatha about the matter and Mr Mbatha indicated that his sister wanted Mr Sithole killed because she did not want to have anything more to do with him. He also said that he was going to murder Mr Sithole because Mr Sithole was emotionally traumatising Mrs Sithole.
- (o) On the 12th March 2019, at approximately 7.00 pm, Mr Mbambo left his home with Mr Mbatha to drive to Ntinini. On the way, and on the instruction of Mr Mbatha, he stopped at a crossroad and Mr Mncube boarded the vehicle. The crossroad was at a bus stop area where passengers alighted from Nqutu, and within walking distance. When Mr Mncube was in the vehicle, they discussed matters generally, but nothing relating to the task at hand. Mr Mbatha and Mr Mncube eventually alighted from the vehicle and Mr Mbambo made a U-turn and returned to his home.
- (p) At approximately 10.00pm Mr Mbatha phoned Mr Mbambo and told him that his brother-in-law was at home, having unexpectedly arrived early from Johannesburg where he had been visiting. Mr Mbambo asked Mr Mbatha what he would do, and he said that he would see.
- (q) At about 3.30 the next morning, Mr Mbatha arrived at the residence of Mr Mbambo, driving the Nissan. Mr Mbambo was asleep and heard Mr Mbatha hooting at the gate, and phoning him. Mr Mbambo said that visitors arrived at his home at all hours and he did not fear for his safety. Mr Mbatha then told Mr Mbambo what had happened – that when they arrived at Mr Sithole's home, they realised that Ms Sangweni was there. Mr Mbatha said that he had to kill them both because he had been recognised by Mr Sithole, who apologised to him, using his name. Ms Sangweni would then have been aware of the identity of their attackers. They had then picked up the spent cartridge cases in the room where they shot the couple, and later disposed of them.
- (r) Mr Sithole had been able to recognise Mr Mbatha by the fact that a cell phone-torch was used by either Mr Mbatha or Mr Mncube, and

illuminated Mr Mbatha.

- (s) Mr Mbambo then contacted Khaya Ndaba and asked him to look after the Nissan – it was considered that Mr Mbambo's home was too public a place for it to be stored there. Later, after hearing that Mr Ndaba had been using the Nissan to visit his girlfriends, it was moved to a paternal uncle of Mr Mbambo. Eventually the Nissan was returned to Mr Mbatha because Mr Mbatha wanted it to be taken to Newcastle in order to check whether the Nissan was still registered in the name of Mrs Sithole. On the way there, and at Babanago, Mr Ndaba was arrested by members of the South African Police, and the Nissan remains at the Babanango Police Station to this day.
- (t) The role of Mr Mbambo was then revealed, and he explained to the police officers that Mr Ndaba did not know of the circumstances during which the vehicle came to be in the possession of Mr Mbambo. After being contacted by police officers, Mr Mbambo had gone to the Babanango Police Station to surrender himself. He had taken his medication and toiletries with him because he fully expected to be arrested. In the result he was not arrested.
- (u) A week after the murders, Mr Mncube went to visit Mr Mbambo in order to obtain some traditional medication. They discussed the events of the murder, and Mr Mncube told him that Mr Mbatha had been careless or reckless.
- (v) Although Mr Mbambo co-operated with the Babanango police officers, he shielded Mr Mncube, referring to him only as 'K', and pretended that he did not know his real identity. He said he did this because Mr Mbatha (who lived close to Babanango) would hear what he had said to the police officers from them, and he and Mr Mncube might seek retribution against him. He also said that Mr Mbatha had asked him if there was not a way that they could organise the death of Mr Ndaba, so that the blame for the murders could be shifted to him
- (w) On a day when Mr Mncube and a Mr Zungu (from Msinga) were at the home of Mr Mbambo, members of the police (led by Captain Thusi) arrived looking for a firearm. Mr Mbambo told them that Mr Mbatha had left a firearm with his fourteen-year-old son (in the temporary absence of Mr Mbambo), for 'cleansing', shortly after the murders. Mr Mbambo had loaned the firearm to Velihle Ntombela for his protection. The firearm, a 9mm Petro-Berretta, was duly recovered from Mr Ntombela. Mr Mbambo stated that he did not point out Mr Mncube to the police officers at that stage because he knew that both Mr Mncube and Mr Zungu were armed, and he feared a gun-battle breaking out.
- (x) At different times after the murders, Mr Mbatha, Mrs Mbatha and Mr Mncube visited Mr Mbambo for 'cleansing'. This included

protection from various spells cast over the coffin of Mr Sithole which could have endangered them. During the visit of Mr Mncube, he further related the circumstances of the murder to Mr Mbambo, including that: they had broken the wire fence on Mr Sithole's

property to gain access to it; Mncude had kicked open the door; Mr Mbatha's firearm had jammed after the first few shots; and Mr Mncube had to 'finish off'. They had collected the spent cartridges after the shooting.

- (y) Two firearms were recovered, one from Mr Ntombela, and one from Mr Mncube's brother who testified that he had been given it to hide by Mr Mncube.
- [3] At the end of the State case, Mr Singh for Mr Mbatha, and Mr Chliliza for Mr Mncube brought applications for discharge in terms of s 174 of the Criminal Procedure Act, 1977. After a short debate, Mr Singh, correctly in my view, withdrew his application. For various of the reasons set forth above, I was of the view that;
 - (a) There was direct evidence implicating both Messrs Mbatha and Mncube directly in the commission of the crimes with which they were charged.
 - (b) I disagreed with the submission by Mr Chiliza that the evidence of Mr Mbambo was of such a poor quality that none of his evidence could be accepted.

I accordingly dismissed the application by Mr Chiliza.

- [4] Mr Mbatha then testified. His version was basically a denial of the evidence of Mr Mbambo, who 'told a lot of blue lies'. He denied:
 - (a) ever having borrowed his cousin's Golf II;
 - (b) obtaining a duplicate key for the Nissan;
 - (c) asking Mr Mbambo to take him to Ntinini;
 - (d) asking Mr Khanyile to take him to Emachitshana;
 - (e) giving Mr Khanyile the sum of R200 for petrol to take him to Emachitshana;
 - (f) showing the duplicate key to Mr Khanyile;
 - (g) taking the Nissan to Mr Mbambo's home after the murders;
 - (h) phoning Mr Mbambo and asking him to send someone to fetch him and his sister so that Mr Mbambo could 'cleanse' them;
 - (j) handing over a firearm to Mr Mbamo's son;
 - (k) that Mr Mbatha, his mother and Mrs Sithole visited Mr Mbambo to allow him to treat his mother, and that during the visit Mr Mbatha had test-driven the Nissan using the duplicate key. Mr Khanyile saw him, Mrs Sithole and her children at the home of Mr Mbambo;
 - (l) that he told Mr Mbambo that Mrs Sithole wanted Mr Sithole murdered because he was going to take a second wife;

- (m) that after the funeral, Mr Mbatha phoned Mr Mbambo and asked him to meet him and his sister, and asked him to send someone to fetch them so that Mr Mbambo could 'cleanse' them; and
- (n) that Mr Mbambo had sent Khaya Ndaba to fetch them in his Tazz motor vehicle, they arrived together with two small children and Mr Mbambo performed a 'cleansing' ritual on them and that they paid R300 for the petrol costs.
- [5] Mr Mbatha's evidence was that Mrs Sithole did not mind the fact that Mr Sithole married a second wife, on condition that the second wife lived in the rural home at Ematchitshana. He suggested that Mr Mbambo was framing him in order to conceal a crime which he knew about. The suggestion that Mrs Sithole objected to the taking of a second wife was merely to bolster his story.
- [6] For the sake of convenience, I deal firstly with the defence evidence. Mr Mbatha was not a good witness. He started off denying that he knew Mr Mbambo's father, and then said that he did know him, and had in fact done business with him. It had been put to Mr Mbambo that it was a lie to suggest that Mr Mbatha had known Mr Mbambo through his father, and that they had done business together. He claimed that, to the best of his recollection, that he was at home in Babanango when the murders took place. Almost all of his evidence consisted of bare denials of the truth of what was said in evidence by the State witnesses. He was vague when it suited him, and had to be reminded a number of times to speak-up. He was, save for denials, unable to deal

convincingly with the allegations against him.

- [7] Only one witness was called for Mr Mbatha, his sister, Balungile who spoke to a phone call between her and Mr Khanyile, regarding the progress of Mr Mbatha's bail application. The suggestion was that Mr Khanyile was being threatened by Mr Mbambo regarding his support for Mr Mbatha. This was not put to either Mr Khanyile or Mr Mbambo in cross-examination by Mr Singh. In addition, Balungile Mbatha had been seated in court throughout the proceedings. No other witnesses were called in support of Mr Mbatha. His cousin, Sgidi, concerning whom the dispute over the lending of the Golf II to Mr Mbatha arose, was never called to back-up his denial that he had ever borrowed the Golf II.

- [8] Mr Mncube gave evidence that he was wholly unable to remember where he was between the 12th and 14th March

2019. He denied having been picked-up by Mr Mbambo on the way to Ntinini. He also denied ever asking Mr Mbambo to 'cleanse'

him, and the conversation which was alleged to have taken place during that incident.

- [9] Mr Mncube admitted having brought Mr Ntombela to the home of Mr Mbambo. He alleged that was for a problem experienced by Mr Ntombela relating to the payment of lobola for a woman he wished to marry, and her having abandoned him. Mr Mbambo was to have

provided 'muti' to ensure her return to Mr Ntombela. He denied the version of Mr Mbambo that Mr Ntombela was brought to his home to purchase a firearm, and was loaned one instead. He gave a version which basically tallied with that of Mr Ntombela, and confirmed that Mr Mbambo had placed an item (which turned out to be the firearm recovered from Mr Ntombela) wrapped in black plastic behind the front seat of Mr Ntombela's motor vehicle. He was unable to say what was in the plastic wrapping.

- [10] Mr Mncube also confirmed that he had been present, with Mr Zungu, at the home of Mr Mbambo when Captain Thusi and other officers from the National Task Team had arrived to question Mr Mbambo about the whereabouts of the firearm used by Mr Mbatha. He alleged that they had heard Mr Mbambo crying out after he was placed in the motor vehicle with the police officers. He and Mr Zungu had approached towards the police vehicle in order to see and hear what was going on. They were effectively told to back-off by Captain Thusi and another officer, Khumalo. He also maintained that Captain Thusi had requested permission to search them, had done so, and removed and took away their cell phones, despite them protesting. The police officers then left with Mr Mbambo. Mr Mncube returned the next day to recover his cell phone from Mr Mbambo, who had been given the cell phones by Captain Thusi. This version differed from that given by Captain Thusi who denied having asked, or having searched either of them. His reason for not doing so is that they did not wish to upset Messrs Mncube and Zungu, believing them to be clients of Mr Mbambo.
- [11] Mr Mncube maintained that members of the South African Police had told him that Mrs Mbatha had told them that Mr Mncube's firearm was with his brother, and this was how they able to track it down. He had no explanation how Mrs Mbatha would have known that fact, contenting himself with saying that the police officers never told him. He then said that he never knew whether the firearm was with his brother. He firmly maintained that his brother lied in saying that he had given the firearm to him, and said that he had never seen the firearm. Significantly, Mrs Mbatha was never called as a witness, and Mr Singh, on behalf of Mr Mbatha, denied that his mother had ever spoken to the police officers about the firearm.
- [12] There are several aspects of the evidence generally, which are important to record:
- (a) Although ballistic tests were performed on the bullet-heads, the experts were unable to confirm whether they had been, or had not been, fired from the same firearm. No attempt appears to have been made to connect them to either of the firearms obtained by the police officers.
 - (b) The firearms concerned fall into the category of 'prohibited firearms' in terms of s 4(1)(f)(iv) of the Firearms Control Act, 2000. None of the sections of the Act prohibiting the possession of such a firearm were sought to be made applicable in this case.
 - (b) A great deal of time and cross-examination was devoted to what came to be referred to the 'isiSkebhe incident'. The isiSkebhe are evidently a community based, loosely formed, organisation of citizens who deal with incidents of stock-theft in their own way. They apparently do not co-operate with the police force, and deal out harsh punishments to those

deemed to be guilty of offences relating to the theft of livestock. They are very clearly feared in the communities involved in this matter. All the legal practitioners were agreed that the 'isiSkebhe incident' referred to was not indicative of the guilt or innocence of either Mr Mbatha or Mr Mncube. Mr Chiliza, however, insisted on dealing with it because it was, so he contended, indicative of the credibility of Mr Mbambo. The 'isiSkebhe

incident', according to Mr Mncube, occurred in the following way:

- (i) A certain Mr Khumalo, who had recently lost seven cattle, saw some cattle near the Mncube home, and identified one cow as belonging to him. He asked the 'herd-boys' the identity of the person to whom the cow belonged.
- (ii) Having been told they belonged to the Mncube family, he left a message with some children, and arrived the next day with members of the isiSkebhe.
- (iii) Mr Mncube told them that the cow had followed some calves being driven to his home. He then produced a document apparently evidencing that Mr Mncube's brother, Mbuyani, had purchased the cattle from Mr Mbambo.
- (iv) Everyone then went to the Mbambo home. Mr Mbambo told the isiSkebhe members that the cattle had been brought there by Messrs Mbatha and Mncube, and produced a permit to that effect. Everyone then proceeded to the home of Mr Mbatha. The Mbatha family then claimed that the cattle had been purchased by Mr Sithole. Mrs Mbatha then explained that Mr Sithole had been buried a week or two earlier.
- (v) The isiSkebhe decided that as the matter now involved a dead person, the cattle must have been taken by Messrs Sithole and Mbambo. They ruled that they would not humiliate the Sithole family, and that Mr Mbatha and Mr Mbambo should pay back the cattle lost by Mr Khumalo.
- (vi) None of the documents mentioned above were introduced into evidence. Indeed, the provenance of the permit book appeared to be itself in dispute. Mr Mbambo also maintained that the purchase agreement only recorded his name as the seller (without his permission), and it was done when he was in Empangeni. Mr Chiliza stated that as the matter only concerned the credibility of Mr Mbambo, no witness from the isiSkebhe would be called by Mr Mncube.

Mr Mbambo had denied selling the cows belonging to Mr Sithole, and alleged the Mr Mbatha knew about the cows. He had added two calves to the number of cattle sold to Mr Mncube's brother who wanted them to be able to pay lobola. He alleged Mr Mbatha stole the cattle from Mr Sithole.

I expressed the view during the hearing of evidence that it was a collateral matter, but in view of the submissions of Mr Chiliza, allowed the cross-examination. In my view the isiSkebhe incident could not be resolved on the evidence, and is of no assistance in qualifying the credibility of Mr Mbambo. I accordingly do not consider it necessary to deal with it in any depth in arriving at our decision.

[13] With the exception of two of the State's witnesses, they all impressed us as honest witnesses. They were cross-examined to no material effect. Their evidence was often corroborative of each other and Mr Mbambo, and we have no hesitation in accepting their evidence as honestly given, and accurate. The two witnesses who require further consideration were:

(a) Mr Mbambo, who testified in terms of s 204 of the Criminal procedure Act ('the Act'). His evidence has the advantage of his 'insider' knowledge, and we are conscious of the need to approach it with caution, which we have done. He was also a single witness to much of what occurred, and we have considered his evidence with caution in that respect, where it was relevant to do so. His evidence was strongly disputed by both Messrs Mbatha and Mncube. Mr Mbambo's evidence was, however, corroborated by the following:

(i) The evidence of his son, who testified about the firearm which was delivered to their home by Mr Mbatha, and the reasons why it was delivered.

(ii) The evidence of Mr Khanyile which confirmed his reluctance, and that of Mbambo, in becoming involved in the crimes to be committed.

(iii) The fact that Mr Khanyile saw Mrs Sithole and her children with Mr Mbatha at the home of Mr Mbambo after the murders, when Mr Mbambo told him that they had come for 'cleansing'. Mr Khanyile said he had also seen Mr Ndaba at Mr Mbambo's home on that occasion, and Mr Mbambo told him that Mr Ndaba had driven them there at the request of Mr Mbatha. All this was strenuously denied by the defence.

(iv) The evidence of Mr Mbongeleni Richard Mncube, the older brother of Mr Mncube, who Mr Mncube had asked to hide his firearm – and which was recovered from his older brother.

(v) When challenged in cross-examination about the fact that his brother had given him the firearm, Mr Mbongeleni Mncube pertinently asked how the police knew he had the firearm? The response to that question was, eventually, that the mother of Mr Mbatha told the police that it was in the possession of Mbongeleni Mncube. Not surprisingly, there was no evidence to support this proposition, and it was never put to Mbongeleni that this was so.

(vi) The evidence of Ms Thubelihle Nyandeni, the sister of Mr Sithole, that he, Ms Sangweni and three children had gone to Johannesburg on the 12th March 2019, and had returned at about 9.00pm. She also discovered the bodies of Mr Sithole and Ms Sangweni the next morning.

Notwithstanding some contradictions in the evidence of Mr Mbambo which do not reflect adversely on his credibility, we are of the view that he gave his evidence in a manner which was substantially frank and honest. He did not seek to shield himself from admissions of criminality, in particular in being an accessory in assisting Messrs Mbatha and Mncube by driving them to the crime scene, and concealing the Nissan and the firearm belonging to Mr Mbatha.

(b) Mr Ntombela – his evidence contradicted that given by Mr Mbatha with regard to the manner in which Mr Mbatha's firearm came into Mr Ntombela's possession. Mr Ntombela's evidence was that he was taken to Mr Mbambo by Mr Mncube in order to obtain spells and

potions to get back a woman he wished to marry. As he was leaving, Mr Mbambo allegedly slipped the firearm onto the floor of his vehicle behind the driver's seat. Upon discovering it on his return home, Mr Ntombela phoned Mr Mbambo and vehemently protested Mr Mbambo's conduct. Mr Mbambo's version was that Mr Mncube had brought Mr Ntombela to him to buy a firearm for protection. This dispute does not affect any decision in the matter, being a neutral fact, save for a possible reflection on the credibility of Mr Mbambo. Had Mr Ntombela's professed self-righteous indignation been genuine, he would surely have gone directly to the police, or would have immediately sought to return the firearm to Mr Mbambo. In the event he did neither, merely allegedly phoning Mr Mbambo on two occasions and telling him to fetch the firearm from him.

[14] Mr Mbambo made a statement to Warrant Officer Nhleko on the 29th May 2019, some twelve weeks after the murders. He was cross-examined on his statement by Mr Singh. The paragraphs in issue were those numbered three, four, five, seven, eight, nine, ten, and eleven. Mr Singh asked a variety of questions relating to the contents of those paragraphs. In our view, no material discrepancies were evident, and although there were some items in the evidence of Mr Mbambo which do not appear in his statement, they were all minor (eg - the times of phone calls and exactly what time Mr Mbatha arrived back at his homestead), and to be expected, given the lapse of time between his statement and his giving evidence. One discrepancy related to the reason that the Nissan was taken to Newcastle – in his evidence Mr Mbambo said it was to check the registration details, and in the statement, it was to find a buyer. Although the more probable reason was to find a buyer for the Nissan, Mr Mbambo was adamant that it was for the former purpose.

[15] A feature of the evidence was that Mr Mbambo had been asked to take Mr Mbatha to Ntinini. It was suggested that the home of Mr Sithole was a further half-hour drive from there. However, in his statement he recorded that

'I drove towards Ntababomvu. I drop them where there was a gate and fence. Scelo said they are all right now, he will see me when he brought a vehicle which they were going to take after killing the deceased.' (as recorded).

Mr Mbambo was cross-examined on this, and he stated

'... where I turned there is a road turns with a gate and fence there where I dropped them off and left.'

This appears to have been a confirmation by Mr Mbambo of his statement.

[16] Viewing the evidence in its entirety, we have no hesitation in accepting the evidence of the State witnesses. We also reject the evidence of Messrs Mbatha and Mncube as false beyond a reasonable doubt. Mr Chiliza argued strongly that there was no evidence linking Mr Mncube to the murders. That may be so if the evidence of Mr Mbambo and the brother of Mr Mncube are ignored. Mr Chiliza submitted that the firearm recovered from Mr Mncube's brother (if that evidence was to be accepted), was retrieved some five months after the

murders and there was nothing linking this firearm to the murder! The problem for Mr Mncube is that he denies any connection with the firearms, and alleges Mrs Mbatha told the police officers that his brother had the firearm. As stated above, she was not called to give evidence. Nor did he attempt to explain how Mrs Mbatha could have known that his brother had the firearm, nor what firearm it was that Mrs Mbatha knew about. He then claimed not to know that a firearm was really recovered from his brother.

[17] In all the circumstances we are of the view that the State has proved beyond a reasonable doubt that both Mr Mbatha and Mr Mncube are guilty on counts one, two and three. On count four the intention to remove the Nissan was clearly formulated before the murders, and the later intention to kill Mr Mbatha was coupled with the intention to remove the vehicle. The intention to kill Mr Mbatha if he resisted the removal of the Nissan was also established in the evidence of Mr Mbambo. Their guilt on count four is then also established. The murder of Ms Sangweni was solely to prevent her from testifying against Mr Mbatha on the basis of the last words of Mr Sithole which identified Mr Mbatha. Both murders then fall within the ambit of s 51(1), read with Part I of Schedule 2 to the Criminal Law Amendment Act, 1997.

[18] I make the following orders:

- (a) Mr Mbatha and Mr Mncube are convicted on all four counts as charged.
- (b) In terms of s 204(2)(a) and (b) of the Criminal Procedure Act, 1977, Mr Mbambo is discharged from prosecution on all four counts, and any competent verdicts thereof.

Lopes J

S Miloszewski (Assessor).

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