

SOUTH AFRICA / JUDGMENT

S v Rwantsana (CC21/2015) [2020] ZAECHMHC 60 (7 December 2020)

[2020] ZAECHMHC 60**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

CC21/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE LOCAL
DIVISION: MTHATHA
CASE
NO. CC21/2015

In the matter between:

THE
STATE
and
SAMUEL CEBISILE
RWANTSANA
ACCUSED

JUDGMENT

JOLWANA J

- [1] The accused appeared in this Court on charges of conspiracy to murder, murder, unlawful possession of a 9mm pistol with an unknown serial number, unlawful possession of an unknown quantity of ammunition. It was alleged that the said firearm was the firearm and ammunition which the accused possessed on the 31 December 2014, at the time at which the deceased was killed. There were further charges of unlawful possession of another firearm, a 9mm RAP 401 pistol with an unknown serial number as well as seven rounds of live ammunition. It was alleged that these latter charges related to a firearm and ammunition which the accused possessed on or about the 23 January

2015. At the commencement of the proceedings the State withdrew the first count which was conspiracy to murder leaving the accused facing the remaining five counts.

[2] It appears from the indictment that the accused was initially charged with one Lusindiso Mnukwa who was accused no.2 initially. However, charges against the said Lusindiso Mnukwa were withdrawn at some stage before the commencement of these proceedings. The indictment was accompanied by a summary of substantial facts which was provided to the accused in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the Act). The summary of substantial facts reads as follows:

“1. The deceased is a stepson of accused no.2’s girlfriend and they were not in good terms.

2. During the month of August 2014 accused no.2 approached Thandolwethu Funani (witness no.5) to kill the deceased. Thandolwethu agreed to kill the deceased.
 3. After sometime accused no.2 further approached accused no.1 and sought his aid in killing the deceased. Accused no.1 agreed to kill the deceased.
 4. On the 31 December 2014 accused persons (excluding Thandolwethu) met at Mthatha and proceeded to Libode with the aim of meeting the deceased. Both accused were travelling with a motor vehicle driven by accused no.2.
 5. Accused no.1 made a phone call and pretended to propose a job to the deceased. Before they could meet with the deceased accused no.2 remained next to the road and waited for accused no.1 on his return. Accused no.1 met with the deceased in the absence of accused no.2 and proceeded to a place where a fictitious job was to be carried out by the deceased.
 6. Upon arrival at Katilumla accused no.1 pretended to fetch the keys from a certain homestead and on his return he shot and killed the deceased.
 7. Accused no.1 was promised an amount of R15 000.00 by accused no.2 if he killed the deceased.
 8. The accused shared a common goal and that was to kill the deceased.
 9. At all material times hereto the accused acted in concert in furtherance of a common purpose to kill the deceased.
 10. The deceased died as a result of “head injury - gunshot.”
- [3] The State invoked the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 in respect of the count of murder. The accused who was legally represented throughout the proceedings pleaded not guilty and

also made it very clear even as he was pleading not guilty that he was not anywhere near the crime scene. His defence was

therefore an alibi defence.

[4] The first witness for the state was Ntando Bango (Ntando). He testified that he knows the deceased who was both his friend and neighbour at Nzwakazi locality, Maqanyeni Administrative Area in Ngqeleni. Before the 31 December 2014 he, Lubabalo Toto, the deceased and Awethu Masoka were planning how they were going to spend the night of the 31 December 2014 ushering in the new year. In the morning on 31 December 2014 he woke up and went to buy airtime. He thereafter called the deceased who said he was coming to him. The deceased arrived driving his white Isuzu double cab bakkie. The deceased told him that he needed to buy something at Pep Stores in Libode and they drove and parked near Pep Stores. The deceased got out of the vehicle which was double parked and went to Pep Stores. He then moved from the passenger seat and occupied the driver's

seat. When the deceased returned he sat in the passenger seat and he drove. The deceased came back carrying a hard cover note book. They drove to Sebza Furnishers and again the deceased alighted and got into that shop.

[5] When the deceased returned he was carrying a calculator which he used to make quotations. After about 30 minutes, the deceased told him that they must drive to Mthatha because he wanted to submit quotations at AM Boards and to also meet a client for whom he needed to take measurements. They arrived at Mthatha at about 12:00. The said client called the deceased and they arranged to meet at Libode. They drove to Libode and arrived there after 13:00. He parked the vehicle next to a butchery called Libode Lounge where they bought some meat. The client phoned the deceased about 15 minutes later saying that he was near Mount Nicholas. The deceased asked him to go and fetch the said client.

[6] He left going to Mount Nicholas to fetch the client. On his arrival there he saw a male person wearing a black hood and a hat. He looked like he had big hair and he was carrying a Spar Supermarket plastic bag. He did not notice what was inside the plastic bag. This person entered the vehicle and they drove back to Libode. They had a conversation on the way and he told him that they were braaing some meat at Libode Lounge. This person had his hood on but his face was not covered. He observed that he had a beard and had a scar along his left eye. He identified that person as the accused.

[7] They alighted at Libode Lounge. The accused said he needed to buy airtime. He showed him where they were seated at Libode Lounge and the accused left to go and buy airtime. About 30 or 45 minutes later one of their friends Lubabalo Toto phoned saying he was near Spar Supermarket. The deceased asked him to go and fetch Lubabalo. On his way out to fetch Lubabalo he met the accused and showed him where they were seated. He returned with Lubabalo and they joined the deceased, the accused and Xabiso Gxara (Xabiso) who were sitting and eating meat. The accused had removed the hood from his head at that stage and was wearing a wool hat. They stayed together for about 10 minutes and left at about 15:00 to go to the accused's homestead to take measurements for some kitchen cupboards. They all boarded the Isuzu vehicle. He was the driver and the accused sat in the front passenger seat to show them directions to his place. Xabiso, Lubabalo and the deceased were sitting at the back seat.

- [8] They drove with the accused showing them directions until somewhere in the Mampondomiseni area in some locality the accused asked him to stop the vehicle because he wanted to fetch a key. The accused took his plastic bag with him and he could see that the plastic bag had something inside but he did not see what it was. The accused left and went down the locality until they could not see him. In the meantime, he and Xabiso alighted from the vehicle to smoke while Lubabalo and the deceased remained in the vehicle.
- [9] A few minutes later the accused re-appeared. It was quiet in that area and there were no other people. As he was coming he and Xabiso Gxara continued smoking outside the vehicle. The accused approached the vehicle and they heard a gunshot sound. He did not see if the accused was carrying anything as he was approaching the vehicle. After the gunshot Lubabalo said that they must take cover as the accused had shot the deceased. He looked and saw the accused carrying an iron object which he did not know what it was pointing in their direction reversing but running. He then turned around and ran fast. There was no other person in that vicinity. He and Xabiso came back to the car. Xabiso and Lubabalo tried to help the deceased to sit up. He drove and rushed the deceased to St Barnabas Hospital in Ntlaza to the emergency section. The nurses examined the deceased and told them that he was already dead.
- [10] Under cross-examination Ntando testified that from Mount Nicholas to the time the deceased was shot they spent about 20 minutes with the accused. All that time the accused had something on his head. The face of the accused was partially covered. It looked like he had dreadlocks on his head as a result the hat was not fully covering his head. He did not witness the shooting. He only heard the gunshot and they were told by Lubabalo what had happened namely that the deceased had been shot.
- [11] He was later called to an identification parade and he pointed out three or four other people. He could not identify the person who shot the deceased because the people who formed the line-up had shaved their heads and beards and were clean and neat, so they just looked different. He was not sure whether he identified the accused and he was not told what the results of the parade were. When they attended court many people including Xabiso told him that the person who killed the deceased was the accused. He testified that on the day of the incident he had enough time to see the accused but during the identification parade a lot had changed. He maintained that he was not making a mistake. On the day of the incident he had enough time to see the accused who had hair and beard, however, on the day of the parade a lot had changed but he was the one who killed
- the deceased.
- [12] Xabiso as is evident from the evidence of Ntando that he was also present on the day of the incident, testified that during December 2014 he resided at his homestead at Mdlankomo locality in Libode. He knew the deceased in that they previously worked together when he was a truck driver. On 31 December 2014 at about 09h00 or 10h00 he received a call from the deceased who told him that he had to do a quotation for some kitchen cupboards at

Mthonjana locality and wanted him to go with him. He and Ntando picked him up and took him to Modern Butchery where they bought braai meat. The deceased received a phone call from a client and he asked Ntando to go and fetch the client at Mount Nicholas. Ntando indeed left and returned later with this person who introduced himself as Lundi. At that stage they were sitting at Modern Butchery waiting for the meat that was being prepared. When Lundi introduced himself they were sitting at different tables that were about 2 metres apart.

- [13] He was seeing Lundi for the first time. He had a hood or his head but his face was visible. He was also wearing a work suit. He observed him for about 30 minutes while they were sitting at the butchery. He did not notice anything on his face but he could recognise him. Lubabalo called asking to be fetched next to Libode Spar Supermarket. Ntando left to fetch Lubabalo and returned 10-15 minutes later with him. They all continued eating braai meat. They left at about 15:00 or 16:00 to go and do the quotation for Lundi. He identified the person who had introduced himself as Lundi on that day as the accused person. They boarded the Isuzu double cab bakkie and Ntando was driving and the accused was sitting

in the front passenger seat giving directions to Mthonjana locality where the quotation was to be done.

- [14] Somewhere at Ngxokweni locality the accused asked Ntando to stop the vehicle so that he could go and fetch a key, he alighted and crossed the road. He and Ntando got out of the vehicle to smoke. The accused was carrying a white plastic bag that was folded although he could not tell what was in it. As they were smoking they heard a gunshot. Lubabalo got out of the vehicle saying they were being shot and they must take cover. He did not know what was going on. They saw the accused running away and realised that the deceased had been shot. When he noticed the accused running away he had already crossed the road. There was no other person in that vicinity other than themselves and the accused. The accused ran away and never came back. They took the deceased to Ntlaza Hospital where they were told that he had passed away.

- [15] On the 03 March 2015 he received a call from Mr Qokweni a police officer who was investigating the case who told him that a person had been arrested in respect of the murder of the deceased. They needed to come and identify that person at an identification parade at Wellington Prison in Mthatha. Indeed, he met Mr Qokweni who took him, Ntando, another lady and another young man he did not know to Wellington Prison. They were placed in a waiting room. Ntando was the first to be called and he left. After a while he was called to the identification parade room. The procedures were explained to him and he was also told that photographs would be taken. He identified the accused and thereafter returned to the waiting room. Thereafter Mr Qokweni took them back from Wellington Prison.

- [16] Under cross-examination Xabiso confirmed that he did not witness the person shooting the deceased but he saw him running away. In the vehicle when they were going to Mthonjana locality to do the quotation he did not see any firearm, he only saw a plastic bag that the

accused was carrying whose contents he did not know. On the 31 December 2014 he was seeing the accused for the first time and he spent about 1 hour and 30 minutes with him on that day. When it was put to him that Ntando had estimated a very short period of time, he said his estimation was for the total time they spent with the accused. He explained that they had to wait while meat was being prepared. Ntando left to fetch Lubabalo and returned and they sat together. When they were going to the place where the incident took place, Ntando was driving and the accused was sitting in the front passenger seat. Lubabalo was sitting in the middle. The deceased was sitting on the far right behind the driver's sit while he was sitting on the far left behind the accused. He conceded that at that time his view of the accused was obscured because the accused was still wearing his hood.

- [17] He testified that when he heard the gunshot and Lubabalo said they must take cover he was frightened as he did not know what was happening. He explained that there were no other people at that place because they were at the end of the locality and the homesteads were far off. When he took cover he tripped and fell down and rose up again. It was when he stood up again that he saw the accused running away. It was put to him that the accused would say that he was mistaken in his evidence as the accused was never there, Xabiso maintained that he saw him there and pointed him at the identification parade. He further testified that while it is so that the accused's name is Samuel Cebisile Rwantsana, he introduced himself as Lundi to them on that day. He did not know why Ntando did not testify about the accused introducing himself as Lundi.
- [18] He testified that he made the first statement to a police officer who said he would give it to the Hawks when they were near PRD building in Mthatha in a police vehicle. He just answered the questions that were asked to him. This was on 02 January 2015. He made another statement on 19 January 2015 to the Hawks at their offices.
- [19] He further testified that they only saw the accused running away, he did not see him arriving after he had left because they were standing on the other side of the vehicle. In the position they were standing in whilst they were smoking, he did not see the accused coming back.
- [20] The state called warrant officer Nocuze. He testified that he is a police officer and in January 2015 he was attached to the National Intervention Unit in Mthatha. On the 23 January 2015 he was at work. He was not part of the team that investigated the murder of the deceased and did not know about it on that day. At about 13:00 on 23 January 2015 while he and his colleagues were doing patrols in Mthatha he received information from an informer. The information was that there was a young man who was terrorising the people at Transido in Hillcrest. This person would arrive at a Transido Workshop where vehicles were repaired and his name was Smalls. This person called Smalls would show off his firearm saying he was not afraid of the police. He was told that this person was there on that day at Transido in Hillcrest and he was wearing a lemon t-shirt, a blue three quarter pair of trousers and white takkies.

- [21] With this information he and his colleague warrant officer Ntsethe proceeded to Transido. They were not wearing uniform and they used a white unmarked vehicle as they normally use unmarked vehicles. On arrival at the Transido Workshop they saw this young man as described. He was ahead followed by warrant officer Ntsethe. He went straight to this person who had been described to him. At that time this person was sitting down with others eating food. They introduced themselves and produced their appointment certificates. This person was shocked. He asked him if he was Smalls and he said he was Samuel Rwantsana. He asked to search him and he agreed and put his take away food aside.
- [22] In searching him he found a small firearm on his waist, on the right hand side and the firearm was visible as he was wearing a t-shirt. He took the firearm and noticed that it was a police issued firearm. From his training he knows that police issued firearms are not sold to members of the public. The firearm he found on the accused was a 9mm RAP 401 pistol. He noticed that its serial number was filed off on the side of the barrel. It had a magazine with seven rounds of ammunition. He then asked the accused to show him a licence for the said firearm and ammunition. The accused told him that he did not have a licence for the said firearm.
- [23] He then told the accused that he was arresting him for possession of an unlicensed firearm and ammunition. After explaining his constitutional rights to him he asked him where he got a police issued firearm and he did not answer. He took him to Madeira Police Station where he charged him with being in possession of a firearm and ammunition without a license. The CAS number opened for the accused's case was CAS 234/01/2015. He entered the said firearm and ammunition in their SAP 13 register as SAP 13/54/2015. The chain evidence relating to the said firearm and ammunition is not in issue and I do not intend to deal with the chain evidence as none of it is in issue.
- [24] Warrant officer Nocuze testified that when he arrested the accused he had no knowledge about Ngqeleni CAS 1/01/2015 under which the murder of the deceased was investigated. The said firearm was exhibited in court and he identified it as the one he found the accused in possession of and for which he arrested him. Under cross-examination it was put to him that the accused denied that the firearm was recovered from him. It was further put to him that the accused would say he was told later by him that they had found the said firearm in a vehicle at the back of the workshop. He described this accused's version as lies. Nothing much came out of the cross-examination as what would later be the accused's version on what happened after his arrest and how the firearm was actually recovered according to him was never put to warrant officer Nocuze.
- [25] The next witness for the State related to the identification parade. The defence indicated that there was an issue relating to the exercise of the rights of the accused during the identification parade. The issue was that the accused was told about his right to legal representation at the identification parade but was not given an opportunity to exercise it even after he mentioned the name of his legal representative. This resulted in the opening of a trial-within-a-trial to determine the admissibility of the evidence of the identification

parade in circumstances where the accused alleged that having been advised of his right to legal representation he was not allowed to exercise that right.

- [26] Warrant officer Gxenyha was called to testify in the trial-within-a-trial and he testified that in March 2015 he was a detective at Madeira police station. He was not involved in the investigation of Ngqeleni CAS 1/01/2015. He conducted an identification parade in that matter having been requested by warrant officer Qokweni who has since passed away. He was phoned by warrant officer Qokweni on 3 March 2015 while he was at work at Savoy where their officers are situated. He told him that the parade was going to be conducted on 4 March 2015. In that conversation warrant officer Qokweni told him that the suspect was Samuel Rwantsana. At that time he did not know Samuel Rwantsana.
- [27] He went to Wellington Prison on 4 March 2015 to conduct the identification parade where he met the accused for the first time and told him that he was there to conduct the identification parade. The time at which the parade was to be conducted was 11:00 in the morning. He also told the accused about his right to legal representation and his right to have a legal representative present during the identification parade. The accused said that he did not have a legal representative. When warrant officer Qokweni called him on the 3 March 2015 requesting him to conduct the identification parade he asked him if he had told the accused that he had a right to legal representation during the parade and he said he did and the accused had said he did not have a legal representative. He further testified that if the accused had told him that he needed legal representation he would not have proceeded with the identification parade and he would have postponed it for that purpose.
- [28] Under cross-examination he testified that an identification parade is one of the most important steps in an investigation of a case. He completed the form SAP 329, the prescribed form and he followed it in this matter. He confirmed that on the 4 March 2015 he phoned the investigating officer, warrant officer Qokweni who told him that the accused was suspected of armed robbery hence he wrote that offence on the form. He explained that the reason he asked warrant officer Qokweni if he had told the accused about his right to legal representation was so that he could arrange legal representation for the accused if he needed one. Even on the 4 March 2015 the accused himself told him that he did not have a legal representative. He conceded that in light of the fact that his understanding was that the accused did not desire legal representation he should have reflected the choice that the accused made on the SAP 329 form and he did not reflect that choice. He denied that the accused had told him that he needed a lawyer. After warrant officer Gxenyha's evidence the State closed its case in the trial-within-a-trial.
- [29] The accused was called to testify in the trial-within-a-trial. His evidence was that he told the police that he needed a lawyer but he was not afforded one. On the day he was told about the identification parade he was appearing in court. Warrant officer Qokweni found him at regional court in Mthatha, and took him to Wellington Prison where the parade was to be conducted. Warrant officer Gxenyha arrived at Wellington Prison and he told him that his legal representative was in Ngqeleni for the case for which the identification parade was

being conducted. He thought he would listen to him and postpone the parade so that he could phone his attorney who could have guided him on the parade.

- [30] Under cross-examination he testified that when warrant officer Qokweni fetched him at the regional court he was not aware that there was going to be a parade. He was at the regional court for another case which had not yet been postponed when warrant officer Qokweni told him about the identification parade that was going to be conducted on that day. On that day he was also going to appear in court in Ngqeleni for another case.
- [31] He had a legal representative for the Ngqeleni case who was already in Ngqeleni. His legal representative was Mr Calaza but he did not have his phone number with him there as it was in his diary which was in prison. There at regional court warrant officer Qokweni took out his own phone and made a call. He could hear warrant officer Qokweni talking to Mr Calaza and saying that he was there with Rwantsana and he was taking him to Wellington Prison for an identification parade.
- [32] It was put to him that warrant officer Gxenia told him about his right to have his legal representative present during the identification parade. He said that warrant officer Gxenia was lying about that in that it was him, the accused who raised that issue. He was the one who enquired from warrant officer Gxenia if the parade would proceed without his legal representative being present saying his lawyer was in Ngqeleni. It was further put to him that his legal representative did not put that version to warrant officer Gxenia and he said he did not tell his legal representative about it. He changed his earlier version about the Ngqeleni court appearance and said he did not know about the Ngqeleni court appearance, he only knew about the regional court appearance in Mthatha. He then changed that version again and said that Mr Calaza was in Ngqeleni for a co-accused.
- [33] It was further put to him that his date of appearance in Ngqeleni was the 12 and 13 March 2015 and his appearance in Mthatha was on 4 March 2015. He responded that he did not know about the dates. It was put to him that warrant officer Gxenia was therefore telling the truth about him having told warrant officer Gxenia that he did not have a legal representative because he also did not have a lawyer for the regional court appearance. Furthermore, on his latest version Mr Calaza was in Ngqeleni for a co-accused. He then said he separated with Mr Calaza in 2017 after he was unable to pay him. I could not understand this response as it made no sense in relation to the question that was put to him. The case for the accused in the trial-within-a-trial was closed.
- [34] After hearing submissions I ruled that the accused had been told about his right to legal representation. There were in the main, two reasons for this ruling. The first one was the accused's contradictory versions. The second one was that it was his version that in his presence warrant officer Qokweni took out his own phone and called Mr Calaza and told him that the identification parade was going to be taking place at Wellington Prison in Mthatha on that day. His evidence that his own legal representative, Mr Calaza was told about the parade by warrant officer Qokweni does not in my view, sit well with him being

denied legal representation. His further evidence that Mr Calaza was in Ngqeleni for a co-accused contradicted his earlier version that he was supposed to appear in Ngqeleni for another matter. He also could not dispute it when it was put to him that he in fact had no court appearance at all in Ngqeleni on the 4 March 2015 and that his Ngqeleni court appearances

were on 12 and 13 March 2015. It was clear to me that his evidence about Mr Calaza being in Ngqeleni was false. In fact he clearly had dispensed with legal representation voluntarily after being advised of his right to it. I need to mention that his case was never that he was not advised of his right to legal representation. His case was that he was told about this right but was not afforded an opportunity to exercise it. It then made no sense that on his own version Mr Calaza was told about the Wellington Prison identification parade by warrant officer Qokweni, still Mr Calaza inexplicably did not come to attend it. It must be remembered that it was him who came up with the version that Mr Calaza was told about the identification parade.

[35] The issue of the challenge to the identification parade having been disposed of warrant officer Gxenywa was again called to testify in the main trial about how he conducted the identification parade on the 4 March

2015. His evidence was that there were eleven participants in that parade who constituted the line-up including the accused. He had arranged for warrant officer Ketu from the Mthatha Local Criminal Record Centre (LCRC) to take photographs of the parade. He explained all the procedures to all the participants in the line-up including their right to choose a different position in which they preferred to stand. The witnesses were guarded by Nomonde Mtshotana who was a member of the correctional services department at Wellington Prison. The witnesses were escorted by Bandile Mokweni to and from the parade hall who was also a member of the correctional services department at Wellington Prison.

[36] He told the accused to choose a position he preferred to stand in. He chose to be at No.6 and was carrying a card marked no.3. When the first witness was brought in he explained the procedures to the said witness. The first witness was Xabiso. This is also reflected in the identification parade form SAP 329. This is important because the evidence of Xabiso was that Ntando was the first person to be called to identify the suspect. Before he arrived warrant officer Ketu took photographs of the line-up. When Xabiso arrived warrant officer Ketu also took a photograph of him standing with Xabiso. He told Xabiso to take his time and look at the line-up. When he identified the person he should walk to him and touch him on the shoulder. After the procedures were explained Xabiso looked at the line-up and touched the accused on his shoulder in approximately 5 minutes and a photograph was taken. The accused was calm after being pointed out and expressed his satisfaction about the process. This detail is required to be reflected on the SAP 329 form. After all the processes were followed, Xabiso was escorted out of the identification parade room. The next witness was ushered in and it was Ntando. Before he came in the accused was advised that he could change his position. Ntando identified a person by the name of Lubabalo Mbombo and did

not identify the accused person.

[37] The State called captain Zwakala who testified that in January 2015 he was attached to the detectives unit in Ngqeleni. On 5 January 2015 he received an instruction from his senior officer colonel Gqetywa to attend a post-mortem examination of the deceased at Mthatha forensic offices. He was present when Dr Qaba conducted the post-mortem examination. Dr Qaba found and removed a projectile from the deceased. He put it in a special glass container and gave it to him and he took it to Ngqeleni police station where he entered it in the SAP 13 register. The late sergeant Gwama booked it out to Madeira police station in Mthatha where he and warrant officer Mbarane took exhibits to the Port Elizabeth forensic laboratory for analysis including that projectile.

[38] The state called warrant officer Yolandy Schoeman a member of the SAPS attached to the ballistics section of the forensic laboratory in Port Elizabeth as a forensic analyst. Her qualifications, competence and experience are not in issue. She testified that in this matter she compiled two reports. The first one was in respect of Ngqeleni CAS 1/01/2015 and the second one was in respect of Madeira CAS 234/01/2015. In respect of Madeira CAS 234/01/2015 she testified that on 18 February 2015 she received a sealed evidence bag with number PA4000865049 from their Case Administration Section containing the following exhibits:

1. One 9mm parabellum Calibre RAP Model 401 Semi-Automatic pistol with an erased serial number which she marked 27379/15A and one magazine.
2. Three 9mm parabellum calibre cartridges which she marked 27379/15 A-C respectively.
3. Four 9mm parabellum calibre cartridges which she did not mark.

[39] She visually inspected one of the cartridges mentioned in 2 above marked 27379/15 A and found that it consisted of a primer, cartridge case, bullet and a propellant. She also examined and tested the pistol mentioned in 1 above and found:

1. That the safety selector and firing pin lock of the said pistol was missing but the firearm was still able to discharge ammunition.
2. She used ammunition for test purposes which she marked 379 TC1-TC2 (on the cartridge cases) and 379TB1 – TB2 (on the bullets) and she fired it in the pistol mentioned in 1 above.

[40] She further testified that on the 18 February 2015 she was requested to compare the ballistic test results of the following cases with the following numbers:

1. LAB Number 27379/15 Madeira CAS 234/01/15;
2. LAB Number 27598/15 Ngqeleni CAS 1/01/2015.

- [41] She examined the fired bullet mentioned in LAB 27598/15 which she had marked 27598/15A and the ammunition used for test purposes marked 379TC1 – TC2 and 379TB1 – TB2 and compared the individual and class characteristics markings transferred to them by firearm components during the firing process using a comparison microscope. She found that the bullet mentioned in LAB 27598/15 marked as 27598/15A was fired from the firearm being the RAP Model 401 with an erased serial number marked 27379/15A.
- [42] I do not intend to deal with warrant officer Schoeman's evidence in respect of the Ngqeleni CAS 1/01/2015 to the extent that it deals with the other firearm for which the State presented no evidence. On the contrary the State indicated that it would not ask for the accused's conviction in respect of that firearm. Of relevance in that report is that the one 9mm calibre fired bullet which warrant officer Yolandy Schoeman marked as 27598/15A was not fired from that firearm. That is the projectile which according to the uncontested evidence of captain Zwakala, read with the post-mortem report compiled by Dr Qaba, was removed from the head of the deceased.
- [43] It is the same bullet which according to the evidence of warrant officer Yolandy Schoeman, was fired from the 9mm RAP Model 401 firearm. Some of the evidence related thereto is reflected in the section 220 admissions which were read into the record as follows:
- "1. That the deceased is the person named in the indictment, to wit Vuyisani Masoka;*
2. That the deceased died on 31 December 2014 as a result of "Head injury-gunshot" which he sustained on 31 December 2014 at Katilumla locality in the district of Ngqeleni
 3. That the body of the deceased sustained no further injuries from the time at which the wound as aforesaid was inflicted on 31 December 2014, until a post-mortem examination was conducted thereupon on 05 January 2015.
 4. That Dr Sylvester Babalo Qaba conducted post-mortem examination on the body of the deceased on 05 January 2015 and recorded his findings on Exhibit "L".
 5. The correctness of the facts and findings of the post-mortem examination is as recorded by Dr Sylvester Babalo Qaba on Exhibit "L".
 6. That during the post-mortem examination the projectile was found lodged alongside left of the deceased's head.
 7. The above said projectile was kept in police custody under lock and key, from 05 January 2015 until 02 February 2015.
 8. On the 02 February 2015 the above said projectile was sealed in evidence bag with seal number PA 4000537082L and forwarded to forensic science laboratory (Ballistic section) for the purpose of forensic examination. The sealed bag was not tampered with while in transit.

9. On 02 February 2015 Constable Mtirara booked out RAP 401 pistol and seven (7) live rounds of ammunition were sealed in an evidence bag with seal number PA 4000865049 and forwarded to Forensic Science Laboratory (Ballistic section) for purposes of forensic examination. The seal bag was not tampered with while in transit.
 10. That warrant officer Gxenyana on 04 March 2015 was at Wellington Prison and in charge of the identification parade.
 11. That Nomonde Mtshotana is a member of Department of Correctional Services who guarded the witnesses before the commencement and during the identification on 04 March 2015.”
- [44] The next State witness was lieutenant Mdlatu. He testified that in January 2015 he was already holding the rank of a lieutenant in the SAPS based at the Organised Crime Unit in Butterworth. Before the 29 January 2015 he did not know about this case and did not know the suspect. He received a call from his superior, colonel Mboniswa requesting him to take a statement from a suspect in Mthatha. Colonel Mboniswa did not tell him the name or surname of the suspect. He then proceeded to Mthatha where he found warrant officer Jacob at the Organised Crime Unit offices in Mthatha. He showed him an office that he was going to use. He also told him that there was a person from whom he was going to take a statement. He waited in that office. That person was brought in by warrant officer Siyephi who thereafter left him with the said suspect.
- [45] He and the suspect were communicating in isiXhosa and after preliminary introductions in which the accused introduced himself as Andile Rwantsana he made a statement which he wrote down. I must mention that the defence had, before this witness testified, indicated that the accused had no objection to the statement being admitted as part of the State’s case. The accused’s only contention was that the contents thereof did not come from him. I understood the accused’s stance in regard to the statement to be that he was not raising the usual issue of the rights of the accused not being explained to him before he made the statement. He was also not raising the other common issue of the statement having been obtained illegally through torture or threats of torture or further torture and the like. For these reasons the defence indicated, correctly in my view, that
- there would be no need for a trial-within-a-trial to determine the admissibility of the statement about which there was no issue.
- How the accused intended to deal with the contents thereof was for the defence to decide.
- [46] Lieutenant Mdlatu went on to read the statement into the record which, although it does not consist of numbered paragraphs, I have created consecutively numbered paragraphs for ease of reading. It reads:

“STATEMENT:

1. During the month of December 2014 I was phoned by Skyvo Lusindiso Mnukwa. He said he wanted to see me. I do not remember the date exactly but it was those days before Christmas. Indeed, we met on this day and it was in the afternoon. On his arrival he was with Terra and they were travelling in a maroon golf belonging to Lusindiso. He said he wanted me to take them somewhere. He said I would drop them somewhere and they will phone when they needed me to pick them.
2. On the following day Lusindiso phoned again and said we should meet and I said we can meet near Jimmy Spar. Even on this day I found him with Terra. He said we should go to this place. He never told me what we were going to do in this place. Skyvo drove to Ngqeleni town to a certain Tavern. From this Tavern he drove up to the street near the police station. As I was listening to them talking they were looking for a white Isuzu Double Cab. When we were on our way back we saw this White Isuzu but unfortunately he was not there.
3. On the third day Skyvo phoned again and we met near S&P Spar. Even on this day he was with Terra in the same Golf. Skyvo said we should go to Ngqeleni again. On this day, I decided to ask Skyvo as to what was going on. Skyvo told me that he wanted to kill a certain man who is trying to be an obstacle in his way. The girlfriend of Skyvo was married to this hunted man's family. Even on this day we didn't find him.
4. Skyvo suggested that a sim card should be bought and phone him. If I remember well the date was the 28 December 2014 and I phoned this man and made an appointment with him. He said he was busy and we could only meet the following day.
5. On the following day this man phoned me and he said he was at Libode to buy some material. I told him that I was also going to Libode. When I was at Libode I phoned this man and told him that I was at Libode. At that time Skyvo dropped me near the speed hump with his vehicle. Then the white double cab Isuzu belonging to that man arrived and picked me to town where they were waiting for one of them from East London.
6. We then left with this Isuzu as if we were going to a place where this man was going to get a job of doing a kitchen unit. We were five in this vehicle. I did not know all of them. The only one that I knew as per description was the one that I was going to kill. This one was shown to me by Terra the days we were still looking for him at Ngqeleni.
7. We then drove to the direction of Ntlaza. We then turned in Hluleka turn off. When we were at the end of the first locality

from the main road, I asked the driver to stop. I then said to them I was going to fetch a key from the nearby homestead. When I came back the two of them were outside and my target was inside the vehicle.

8. I then drew my firearm and shot him while he was inside the vehicle. The two ran away and I also ran away. I found Skyvo at Libode town waiting for me with his Golf. He took me to Maiden Farm where I am staying. When we met he asked me if I killed him and I said I was not sure but I shot him. We agreed to listen to Crime Report the following morning.
9. On the following day Lusindiso phoned me confirming that the man was dead. On the following day we met again and he said he had no money he would pay me at the end of the month. He promised me Fifteen Thousand Rand (R15 000.00). I was then arrested before we met. That is all.
10. The following questions were put to the deponent:

Question: How do you know Skyvo Lusindiso Mnukwa?

Answer: I repaired his damaged vehicle we started phoning each other in such that when he was at Pretoria he phoned and said he wanted to tell me something.

Question: Where did you get the firearm that you used?

Answer: I was given the firearm by Lusindiso and he got it from Terra.”

[47] Under cross-examination it was put to lieutenant Mdlatu that the accused would say he never made the statement. His response was that the accused did make the statement. It was further put to him that the accused remembered appearing before a person where documents were presented to him and he was asked to sign. He was not told what he was signing and the document was not read or interpreted to him. Lieutenant Mdlatu testified that after the accused had made the statement he read it to him and interpreted it before the accused signed it. He further testified that what he wrote was what the accused told him and he wrote it down and everything he wrote down came from the accused.

[48] There was one witness remaining whom the State intended to call and the matter was adjourned for that purpose. That witness was warrant officer Ketj, the photographer who compiled the photo album in relation to the identification parade that warrant officer Gxunya had testified about. Warrant officer Ketj had suddenly and inexplicably disappeared and could not be found on his phone according to Mr Makhubalo who appeared for the State. Mr Makhubalo advised the court that in the circumstances he intended to close the State’s case. When I enquired and it was confirmed that the witness was still a member of the SAPS, I found it unacceptable that a State employee involved in the administration of justice would not be called to testify not because the State did not want to call him but because he had decided not to make himself available. I decided that if necessary the matter would be postponed and warrant officer Ketj would have to be forced to come to court if that was what it would take for him to come to court and either testify or explain his behaviour.

[49] This was absolutely necessary for this case because the admissibility of the photo album about which warrant officer Gxunya had testified depended on warrant officer Ketj otherwise it could be affected by the hearsay rules as it had been provisionally admitted.

Besides that, there is another fundamental principle that is implicated. That principle is that the accused must be given the opportunity to look at the totality of the State's case in its proper form and be enabled to challenge it and in that way be put in as good a position as possible to mount maximum defence against the State's case. The State cannot lead evidence such as that of warrant officer Gxenyha on the basis that the witness upon whom the admissibility of such

evidence depends would testify and then that witness suddenly does not testify for no valid reasons. This is important especially

for the accused who would have prepared for the case on the basis that such a witness would testify.

[50] Furthermore the legal representative of the accused had cross-examined warrant officer Gxenyha with the understanding that the compiler of the photo album would be called to testify. It might very well be that if the defence had known that warrant officer Ketj would not testify the approach of the defence could have been different. The Court was later informed that the State and the defence have in the circumstances agreed to temporarily close and open their respective cases in the overall interests of justice to accommodate this rather unusual situation. Indeed, the State temporarily closed its case and the defence temporarily opened its case pending warrant officer Ketj's evidence. This arrangement assisted the progress on of the matter which was very important especially because the accused has been in custody since his arrest on 23 January 2015 to date.

[51] The accused thereupon opened his case and took the witness stand. He testified that before his arrest he resided at Mphangala

Administrative Area in Libode where he was born. On 31 December 2014 he was on his way home from work in Mthatha travelling by taxi after knocking off at work. He arrived in Libode after 18:00. From 12:00 to 16:00 he was still at work at Transido in Hillcrest. He arrived in Libode after 18:00 and it was after 18:00 when he went to look for a hike near Libode Police Station. While still trying to get a hike that was going to take him home he received a phone call from someone who said he was from Mqanduli. He told this person that he was near Libode Police Station. This person said he had a journey that he needed to take and he wanted him to hand over his vehicle which he had repaired to him and therefore he asked him to return to Mthatha. This person was an old man whom he knew as Thandikhaya. Thandikhaya told him to return to Mthatha and he went to look for a hike to Mthatha on the R61 main road where there were many taxis.

[52] At this stage of his evidence his legal representative reminded him that he needed to deal with the evidence of Xabiso. He then testified that he remembered the evidence of Xabiso and said that Xabiso was lying about him having spent some time with them at a butchery in Libode where they ate meat together. He testified that he saw them for the first time during the identification parade. He did not even know them. All of Xabiso's evidence including him being fetched by Ntando was lies. He never met them and he did not cause the death of the deceased.

- [53] He further testified that warrant officer Nocuze misled the court. He remembered that in January 2015 a lot of people arrived at his workplace in Transido at Hillcrest at the Workshop that was next door to the one in which he worked. There were two door ways to his Workshop, one in the front and the other one on the left hand side of the Workshop. Those people entered hurriedly from both doors and ordered them to lie down. He also confirmed that indeed he was wearing a lemon t-shirt on that day as described by warrant officer Nocuze. He was also wearing Uzzi Khaki trousers and white Adidas takkies. He had nothing on the head but he had dreadlocks. One person who turned out to be a police officer came to him and asked him if he was Smalls. He responded affirmatively because Smalls is indeed his nickname.
- [54] He further testified that warrant officer Nocuze lied about the firearm as he never found a firearm or ammunition on him when he searched him. After he searched him and did not find anything, he then searched the Workshop and the vehicles and even searched his vehicle but found nothing. Warrant officer Nocuze also lied about taking him from Transido straight to Madeira Police Station. He testified that from Transido he was taken to his place of residence at Maiden Farm in Mthatha to search for the firearm that the police said was in his possession. One of the police officers remained at Transido. He was taken to his place of residence in a quantum vehicle by the other police officers. The police searched his place of residence but did not find any firearm. They only found a dagger knife and a cellphone which they said was used in the commission of the murder.
- [55] When they could not find the firearm the police assaulted him. As they were assaulting him the police officer who had remained at the Workshop said they should return to the Workshop as he had found something. They returned to the Workshop where he was shown an old motor vehicle which was on the other side of the Workshop which was not being used. The police asked him to wait at the door. Thereafter warrant officer Nocuze told him to enter and take a firearm from underneath a capsized vehicle. He refused because there were many capsized vehicles there. He was showed one vehicle and told to put his hand underneath a wheel at the back to retrieve a firearm. He told warrant officer Nocuze to put his own hand as he knew that there were many snakes there. Warrant officer Nocuze put his hand and retrieved a firearm which he said was his (accused's). He testified that that was the very same firearm that was exhibited by warrant officer Nocuze in court. He testified that he did not have a firearm. Warrant officer Nocuze took out of the said firearm what he (Nocuze) called a magazine and placed it on the bonnet of a car. He then counted the rounds of ammunition and then said he was arresting him for possession of a firearm and ammunition. It is only then that he was taken to Madeira Police Station. It is important to point out that none of this very detailed version was put to warrant officer Nocuze when he was cross-examined.
- [56] About the identification parade the accused testified that Mr Qokweni arrived at the regional court in Mthatha and said that the people he was eating meat with were at Wellington Prison for an identification parade. He was taken to the identification parade at Wellington Prison

by warrant officer Qokweni. He found warrant officer Gxenia there and asked him if a parade can be done without a lawyer. Warrant officer Gxenia told him to ask warrant officer Qokweni who had brought him there and that he was going to proceed with the parade. He denied that warrant officer Gxenia had asked him if he wanted a lawyer. He was the one who asked him about legal representation. The identification parade proceeded without him being afforded legal representation. The accused testified that Ntando was one of the witnesses but had identified someone else, not him.

- [57] He then testified about the evidence of lieutenant Mdlatu. His evidence was that he never made any statement to lieutenant Mdlatu. After asking to be shown the statement he then said that that statement was not made by him. He was fetched from Wellington Prison by Mr Mdolomba a week or two after his arrest saying he was taking him to Organised Crime Unit offices. When they got there, he found warrant officer Qokweni and other police officers there sitting together. Warrant officer Qokweni asked him to tell them about the killing of the deceased. He told him that he knew nothing about the firearm and would only give an explanation to the NIU police who had arrested him and in the presence of his lawyer. When he was asked to explain what happened to the deceased he refused saying he would give his explanation to his lawyer.
- [58] He further testified that he knew Lusindiso Mnukwa in 2015. In 2014 he had repaired his vehicle which had been involved in an accident. He disputed that he had been hired by him to kill the deceased. When he was taken to Organised Crime Unit offices after his arrest he was told that Lusindiso Mnukwa would implicate him. He concluded his evidence in chief by saying that all the evidence of the state witnesses was lies.
- [59] During his testimony under cross-examination he contradicted his evidence in chief and said when he was arrested he did not have dreadlocks. When it was pointed out to him that when he gave his evidence in chief he had said he had dreadlocks, he said he had said so because he did not want to delay the State as he knew that his turn would come. He said that he had what he called straight backs not dreadlocks. He had decided to agree with warrant officer Nocuze about the dreadlocks. It was then put to him that the description of the person having dreadlocks given by Ntando and Xabiso was therefore correct, he said that they were mistaken as he was never there.
- [60] He further testified that when the police arrived on the day of his arrest he was with seven of his colleagues. He also testified that he never appeared before lieutenant Mdlatu unless he was one of the many police officers who were there. He was forced by all those police officers to put his thumb print on that statement. He explained that indeed on 29 January 2015 he did put his thumb print on a statement that had already been written at the Organised Crime Unit offices. He denied signing the statement. He confirmed that he knew Lusindiso Mnukwa and that he owned a maroon golf vehicle.

- [61] When warrant officer Keti to whom I referred to earlier eventually came to testify he confirmed that he is a police officer attached to the LCRC in Mthatha. He is the photographer who took pictures and compiled an album for the identification parade that took place at Wellington Prison on 04 March 2015. He had been requested by warrant officer Gxenia to take photos at that parade in respect of CAS 1/01/2015 Ngqeleni which he was told was an armed robbery case. He did not know the suspect and did not know the investigating officer. He then explained all the photos in the album and the persons who appeared on them and what was happening when the photos were taken.
- [62] Under cross-examination he testified that he was present from the beginning to the end of the identification parade and when it was finished he left. He could only recall warrant officer Gxenia being there other than the line-up as he only concentrated on him. The witnesses were brought in but he did not recall who brought them into the parade hall because he was concentrating on warrant officer Gxenia. He did not see any other person other than warrant officer Gxenia. He further testified that he did not see Wandile Mokweni bringing the witnesses, he only saw warrant officer Gxenia walking with the witnesses because he was concentrating on him. He said that it might be that other people were there but his focus was on warrant officer Gxenia. His evidence included warrant officer Gxenia having left the identification parade but he would not say for how long or when. He said he might have left for ten minutes but definitely less than an hour because they never leave for an hour. The most generous description of this witness is to say that his evidence was entirely unsatisfactory and unreliable save as it related to certain aspects of the pictures taken during the parade.
- [63] The evidence of Ntando and Xabiso, denuded to its bare essentials, is that they spent some time eating braai meat at a butchery in Libode. They were in that butchery with the accused for whom quotations for some kitchen cupboards were to be done at his homestead at Mthonjana locality in Libode. Ntando's evidence made no sense when he said he spent 20 minutes with the accused when he was the one who fetched him from Mount Nicholas to Libode. He was also part of the people that were eating meat with the accused. He was also the driver of the deceased's vehicle and the accused was sitting in the front passenger seat and therefore he was in the best position to see the face of the accused who was giving him directions to his homestead. He estimated all that time to a mere 20 minutes which obviously could not be correct in my view. Xabiso estimated the time they spent with the accused to about 1 hour 30 minutes which is the more realistic estimate in my view. Logically and without even knowing that place, 20 minutes cannot be correct.
- [64] They both did not know the accused but Xabiso's clear evidence was that he introduced himself as Lundi and had dreadlocks. Most of the details in Xabiso's evidence are also contained in his statement he made to the police on 02 January 2015 a few days after the incident. However, in that statement, he did not mention the dreadlocks, he only described that person as Lundi, short, slender, not too dark with beard on his face and he was wearing a blue duster coat and a black hat or beanie. Save for that, there are no real inconsistencies

between Xabiso's statement to the police on 02 January 2015, his evidence in chief and his evidence given during cross-examination. On both Xabiso and Ntando's evidence Lundi had dreadlocks or big hair on his head which were noticeable even though he was wearing a woollen hat and a hood. I will deal with the issue of dreadlocks again later.

- [65] At some stage on the way to Mthonjana the accused said that the vehicle should be stopped so that he could fetch a key. The vehicle stopped and he left and disappeared in that part of the locality which had no homesteads nearby. There were also no local people in that area. Ntando and Xabiso got out of the vehicle and were on the other side of the vehicle smoking when they heard a gunshot sound. They were told to take cover by Lubabalo who told them that the accused had shot the deceased who was sitting in the vehicle.
- [66] It is important to mention that Ntando's evidence was that he saw the accused coming back. However, Xabiso testified that he did not see the accused coming back to the vehicle. I have some doubts if Ntando really saw the accused coming back. There are two reasons for this. If he had seen him coming back they would have returned to the vehicle because they were waiting for him. Instead, they were both shocked by the sound of a gunshot. Both of them testified that they did not see him shoot the deceased, they only saw the accused running away after the shooting. According to Ntando the accused was carrying something like steel or iron which he pointed to them while running away on reverse and thereafter turned around and ran faster. This is also unlikely to have happened. I just don't see why the accused would have run on reverse pointing something unlike an iron on them when, after the shooting they ran and also fell down at some point. Ntando seeing the accused running away on reverse is improbable. The accused never returned after running away and there is no evidence that he phoned the deceased's phone at any stage after he had left to fetch the key.
- [67] Ntando and Xabiso both returned and together with Lubabalo assisted the deceased who had just been shot while Ntando drove them to St Barnabas Hospital in Libode where the deceased was declared dead on arrival. What is clear from the evidence of Ntando and Xabiso, even taking into account the slight variations between their versions of events from Modern Butchery in Libode to the crime scene and what took place there, it is the same man who had dreadlocks, who introduced himself as Lundi who shot and killed the deceased. That man remained unknown and there was no suspect until the unfolding of events in Mthatha on 23 January 2015 which culminated in the arrest of the accused on then unrelated charges.
- [68] The clear and I must add, credible evidence of warrant officer Nocuze was that on 23 January 2015 he received a phone call from an informer. The informer told him that there was a man named Smalls who was terrorising people at Transido in Hillcrest brandishing a firearm saying that he was not afraid of the police other than those of the National Intervention Unit. This person was wearing a lemon t-shirt, a three quarter blue pair of trousers and white takkies. This person had dreadlocks. He and his colleagues went to Transido and after he had introduced himself as a police officer he asked for permission to

search this person. Based on the description given by the informer about the clothes this person was wearing as described above and the fact that he had dreadlocks the person he talked to was the accused. The permission to search was granted by the accused person. The accused was searched and warrant officer Nocuze's clear evidence was that he found a 9mm RAP 401 pistol with a magazine that had seven rounds of live ammunition on the right hand side of the accused's waist. He asked for a licence for the said firearm from the accused who said he did not have one.

- [69] Warrant officer Nocuze further testified that he arrested the accused and took him straight to Madeira Police Station where he charged him with unlawful possession of a firearm and ammunition. The CAS number for that case was 234/01/2015. His evidence was also that when the events leading to the eventual arrest of the accused were unfolding he did not know about the death of the deceased, who was investigating it or what its CAS number was. The firearm which he found on the right hand side waist of the accused was entered into the SAP13 register.
- [70] This takes me to the evidence of captain Zwakala a police officer who was attached to the Ngqeleni detectives unit. The Ngqeleni police were investigating the murder of the deceased and the suspect was unknown to the police. That investigation included a post mortem examination of the deceased being conducted by Dr Qaba and which captain Zwakala attended. Dr Qaba found and removed a projectile in the head of the deceased. That projectile was eventually taken to the ballistics forensic laboratory in Port Elizabeth together with a firearm and seven rounds of live ammunition which according to the evidence of warrant officer Nocuze, was found in the waist of the accused on 23 January 2015, some three weeks after the death of the deceased. That firearm was a 9mm RAP 401 police issued pistol.
- [71] Warrant officer Yolandy Schoeman gave evidence on how she dealt with the projectile in respect of Ngqeleni CAS 1/01/2015 and the firearm in respect of Madeira CAS 234/01/2015. In short her examination and testing of the relevant exhibits led her to the conclusion that the projectile in respect of the Ngqeleni CAS 1/01/2015 which was found in the head of the deceased was fired from the firearm being the 9mm RAP 401 pistol in respect of the Madeira CAS 234/01/2015 which according to the evidence of warrant officer Nocuze, was found on the right hand side waist of the accused.
- [72] The evidence of the State against the accused included that of an identification parade which, in a trial-within-a-trial, I ruled to be admissible. I am not going to repeat the reasons for ruling it admissible. Because of its significance I consider it necessary to recap it. The challenge to it was solely that the right of the accused to legal representation was explained to him but he was not allowed to exercise it or afforded the opportunity to exercise it. I found this not to be the case on the basis not only of the evidence of warrant officer Gxenyha but and most importantly also that of the accused himself. He had testified that warrant officer Qokweni called his legal representative, Mr Calaza and told him that the identification parade was going to be held at Wellington Prison on that day. I just do not see

how else the accused could have been enabled to exercise his right to legal representation than his legal representative being told of the date and venue of the identification parade. It is not without significance that this information of Mr Calaza being made aware of these important details of the identification parade came from the accused himself and not from the State witnesses. Warrant officer Qokweni calling Mr Calaza and telling him the details of the parade could only be the accused being assisted to exercise his right to legal representation

at the identification parade.

- [73] During that identification parade the uncontroverted evidence of the State is that it was properly conducted at least as it relates to a very important witness, Xabiso, the only witness who identified the accused as the man who was with them at Modern Butchery in Libode, who took them to the scene of crime where the deceased was killed under a false pretence of taking the deceased to do a quotation for some kitchen units or cupboards. In one attempt and within about 5 minutes Xabiso identified the accused even though he no longer had dreadlocks at that stage. I have considered the evidence of warrant officer Ketj whose confusing and often evasive nature in some respects left much to be desired. It is unclear why he could not give clear evidence of what he remembered. The height of his amnesia was when he gave evidence that at some stage which he could not remember, warrant officer Gxunya left the parade room for some time. He could not remember for how long or why and when, if he returned.
- [74] There was no evidence or suggestion from the accused of warrant officer Gxunya leaving the parade room at any stage during the parade. As to why he gave such evasive and confusing evidence after he had previously failed to come to court as reportedly arranged and agreed with Mr Makhubalo is best left to the speculative realm of reasoning which this Court will not venture into. In any event even if it is true that at some stage warrant officer Gxunya left the identification parade room, which I reject as probably false, that would clearly have happened after Xabiso had already identified the accused and left.
- [75] I therefore have no doubt about the integrity of the identification parade and the observance of the procedures from the beginning and at the very least until the first witness Xabiso identified the accused. That the first witness to be called was Xabiso appears from the SAP 329 form itself. There was no suggestion let alone evidence that Xabiso was somehow assisted to identify the accused. It cannot, in my view, be that if something is done which should not have been done by the person conducting the identification parade after the identifying witness has identified a suspect and left, that parade as a whole must necessarily be rejected. The nature of what was done, how it was done and when matters. Most importantly, the mind must be applied to the overall effect to the fairness of the trial to the accused and the State as well as the accused's ability effectively to challenge the State's case and the evidence so presented against him.

- [76] While it is important that an identification parade should be conducted fairly and should not result in an accused not receiving a fair trial, absent a deliberate and purposed attempt to break the rules to achieve, unlawfully, the identification of a person as a culprit, the evidence of the identification cannot and should not be rejected on the mere mention of impropriety. That explains why, if there is an objection to the evidence of an identification parade being led or a challenge to certain aspects of it by an accused, its admissibility must be dealt with through a trial-within-a-trial for the court to properly determine its admissibility even before it is led.
- [77] In *S v Monyane and Others* 2001 (1) SACR 115 (T) Borchers J expressed himself as follows in relation to an identification parade and I respectfully agree with his sentiments:

“The appearance of an accused as a suspect at an identification parade cannot in my view be equated with a situation where he is invited to make a statement or a pointing out which may be incriminatory. At an identification parade, an accused is required to stand mute and passive amongst other people of similar appearance while a witness scrutinises the line-up with the view to identifying the person who has allegedly committed a particular crime. An identification parade does not invite self-incrimination. Its aim is the obtaining of real evidence against the accused, similar to the position where a finger-print is taken with the intention of comparing it with a finger-print found at the scene of a crime, or with the taking of blood sample from an accused with the view to analysing it to ascertain its alcohol content. I entirely agree with the approach adopted in Ex-parte Minister of Justice in re R Matemba 1941 AD 75 at 82 where the following was stated:

‘Now where a palm print is being taken from an accused person he is, as pointed out by Innes CJ in *R v Camane* 1925 AD at 575, entirely passive. He is not being compelled to give evidence or to confess, any more than he is compelled to give evidence or confess, when his photograph is being taken or where he is put upon an identification parade or when he is made to show a scar in court.’”

- [78] The court went on to say in *Monyane*:

“There is in my view no danger that an accused will incriminate himself at an identification parade. The advice of counsel prior to a properly conducted parade cannot achieve any purpose and the procedure is thus in stark contrast to the situation where an accused is invited to make any statement or pointing out, where the advice of the legal representative on the advisability of taking such step may well be of crucial importance to an uninformed accused. There are further differences which need to be underscored.

The decision to make a confession or pointing out is a voluntary decision to be made by the accused himself with, where he so desires, the assistance and advice of a legal representative. But in the case of an identification parade, the accused has no choice as to whether he will participate or not: s 37(1)(b) of the Criminal Procedure Act empowers any police official to make an arrested person available or cause such a person to be made available for identification in such condition, position or apparel as the police officer may determine. This section gives the officer conducting the parade wide powers and the accused little choice (*S v Sibanda and Others*

1969 (2) SA 345 (T)) for it is clear that an accused must participate in an identification parade if required to do so and that, though in practice, the police usually permit an accused to choose his condition, position or apparel such is an indulgence permitted him, not a right enjoyed by the accused. A legal representative present at a parade can enjoy no greater rights than those of the accused, his client. He cannot advise him not to participate, nor can he proffer advice as to the position the accused might take in the line-up, nor offer advice as to the clothing that he should wear, unless permitted to do so by the police officer in charge.

He may, if present, obviously make suggestions to the police as to the conduct of the parade but these can legitimately be ignored.

At best, he can advise the accused to remain silent or not draw attention to himself but this at a properly conducted parade will be achieved by the policeman in charge of the parade.

...

As far as the difficulties an accused may have in detecting and remembering irregular procedures in the line-up itself are concerned, the trial court will decide on the evidence placed before it whether the parade was fair or not. Notes of the procedures followed are always kept on the standard form SAP 329 and all the policemen who officiated, as well as the witnesses called to the parade, can be required to testify. The court will decide this issue in the usual manner, namely on the evidence placed before it. In recent years it has become almost standard practise to produce in evidence, a photograph of the line-up, and this in itself greatly assists in determining whether the suspect was placed among others whose general appearance did or did not resemble his.”

[79] Although the defence did not raise an issue about the line-up or its composition, if there was any doubt about the fact that the line-up was properly constituted, that doubt is dispelled by the fact that there was no real impropriety that was pointed out by the accused. In fact, besides the issue of legal representation, it was clear even from his own evidence that the parade was properly conducted. On the consideration of all the evidence including the evidence of the trial-within-a-trial I am satisfied that the identification parade was properly constituted and conducted. Accordingly, I am satisfied that Xabiso Gxara’s evidence of his identification of the accused is both reliable and credible.

[80] Our law is very clear on the precautionary rules applicable to the evidence of identification in general. In *S v Maradu* 1994 (2) SACR 410 (W) at 411 to 412 a – c the court stated the legal position as follows:

“It is generally recognised that evidence of identification, based upon a witness’ recollections of a person’s appearance, is dangerously unreliable, unless approached with due caution. The Appellate Division in S v Mthethwa 1972 (3) SA 766 (A) at 768 A-C, per Holmes JA, stated the position as follows:

‘Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility

and eyesight; the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene; corroboration, suggestibility, the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in the particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and probabilities.'

It must be emphasized that on a question of identification the confidence and sincerity of the witness are not enough, as Williamson JA in *S v Mehlahe* 1963

(2) SA 29 (A) at 32 F-G said:

'The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence.'

It is in my view necessary for any judicial officer, who has to deal with this type of evidence, to scrutinize it closely. He must be satisfied that the witness in fact has a recollection of the person concerned which goes beyond being merely an impression."

[81] The evidence of the identification of the accused by Ntando and Xabiso in this matter is also corroborated by the evidence of warrant officer Nocuze. It will be recalled that his clear and very credible evidence was that he found a firearm being a police issued 9mm RAP 401 pistol on the waist of the accused as well as a magazine with seven rounds of ammunition. On that day the accused had dreadlocks which was also the evidence of both Ntando and Xabiso. He was not even aware of the Ngqeleni CAS 1/01/2015 under which the murder case of the deceased was opened and investigated by Ngqeleni police and the Organised Crime Unit. He did not know the investigating officer of that case or even the suspect. The uncontested evidence of warrant officer Yolandy Schoeman was that the projectile found in the head of the deceased was fired from that firearm.

[82] The version of the accused is quite a simple one. His version is that the firearm was not found in his possession. He says that that firearm was found on an older part of their Workshop at Transido that was not being used where there were some old vehicles. His version was that that firearm was found underneath one of those vehicles and that warrant officer Nocuze retrieved that firearm underneath a capsized vehicle after he himself refused to take it out for fear of snakes. This version, in my view, is farfetched and not only improbable but also and most importantly it is patently false. The falsity of this version is clearly revealed by many factors including the fact that when warrant officer Nocuze went to Transido where accused was

working, they were acting on an informer's tip off that a person who was described by the said informer was terrorising people

there brandishing a firearm. Indeed, they searched the said person who had been described and found the firearm in the waist of that person. The information of the police was not that there was a firearm kept in those premises. The evidence of the accused that, yes the firearm was found in those premises where he worked but not on him cannot possibly be true in my view.

[83] I am alive to the criticism that can be made about the evidence of Ntando and Xabiso. However, and even after considering the weaknesses in some of their evidence, I am satisfied that their evidence was truthful and they were not mistaken in their evidence that it is the accused who shot and killed the deceased and thereafter ran away. It is in fact most probable that when the accused left on the pretext of fetching a key, they both did not see him when he came back and shot the deceased. They only saw him running away after the shooting and he never came back.

[84] In *S v Oosthuizen* 1982 (3) SA 571 (TPD) at 576 B-C Nicholas J expressed himself as follows with regard to imperfections in a witnesses' statements, version or evidence:

"Where one statement contradicts another, both cannot be true; one of them must be false. Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness that is, if the error of the first witness is established."

[85] The learned Judge went on to say at 576 G-H:

"...[P]lainly it is not every error made by a witness which affects his credibility. In each case the triar of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. Two specific cases must be considered: the case of deliberate falsehood; and the case of honest mistake."

In any event I have not found any really material contradictions in their evidence that cannot be described as being merely mistaken as against being false. Their evidence was, in most material respects credible especially when considered with the rest of the evidence in the State's case that supplements the weaknesses in their evidence especially in respect of the identity of the person who shot and killed the deceased. The possibility of Ntando's evidence being improbable in some respects does not make it false in those respects but unreliable on its own in those respects.

[86] The view that I take, that they are correct in their evidence that it is the accused who shot and killed the deceased is further that bolstered by the statement made by the accused himself to lieutenant Mdlatu. With regard to that statement the accused took a position that says he did not make that statement. He was merely called upon to sign a statement that he did not make. For this reason and especially because he did not raise ill treatment, torture or false promises, the accused's legal representative correctly indicated that that statement may be admitted into the record without a trial-within-a-trial. He only mentioned being forced to put his thumb print on that statement for the first time when he testified after the

State's case was closed. Even then he did not provide any detail or even identify the person who forced him or how he was forced.

[87] The admission of the statement into the evidence which, although the accused sought to distance himself from it, was clearly freely and voluntarily made by him to lieutenant Mdlatu, was in line with the requirements of section 217 of the Act.

[88] Section 217 reads:

“(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto be admissible in evidence against such person at criminal proceedings relating to such offence.”

[89] The attempt by the accused to distance himself from having made the statement was evidently a misguided after thought and was one of his many falsehoods. He clearly made the statement in the circumstances provided for in section 217. Equally misleading and false was his attempt to raise an alibi defence that did not exist beyond his mere ipse dixit. I am alive to the legal position that an accused person has no obligation to prove his alibi. However, once he makes it, the court is required to consider it and see if there is any possibility of it being true, even if the court does not believe the accused. At logical level this legal position is based on the fact that a person cannot

be at two places at the same time. That is the underlying principle behind an alibi defence. I do not intend to deal with the long story in which he explained this defence for the simple reason that it was contrived and therefore clearly false.

[90] I also find it interesting, among many other interesting features of his evidence that the accused testified in court to sustain the alibi defence that he got a hike from Lusindiso Mnukwa from Libode to Mthatha after 18:00. In his statement to lieutenant Mdlatu, he also says:

“I then drew my firearm and shot him while he was inside the vehicle. The two ran away and I also ran away. I found Skyvo at Libode town waiting for me with his Golf. He took me to Maiden Farm where I am staying.”

Ntando and Xabiso running away after the deceased had been shot inside the vehicle and the shooter running away also came out of their evidence. What the accused says in this part of his statement is one of the many instances in which he corroborated their evidence. All of this puts paid to any possibility of a mistaken identity of the person who killed the deceased on 31 December 2014.

[91] As I conclude, I wish to refer to R v Hlongwane 1959 (3) SA 337 (A) in which the legal position in respect of an alibi defence was stated as follows:

“The legal position with regard to an alibi is that there is no onus on an accused to establish it and if it might be reasonably be true he must be acquitted... But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. ... The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the [c]ourt’s impressions of the witnesses.”

[92] In this matter, there is not even the remotest possibility of the accused’s alibi being reasonably possibly true. In fact, it is false and fictional. It follows that it is not reasonably possible that he might be innocent in the murder of the deceased as he falsely contended. His alibi, like most of his evidence, is false and was given for the sole purpose of misleading the Court.

[93] The conclusion that a court must make informed by the totality of the evidence was explained as follows in *S v Van der Meyden* 1999 (2) SA 79 (W) at 82 C-D:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the

logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning

which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the

court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be possibly false or unreliable; but none if it may simply be ignored.”

[94] In my view, the state has proved beyond reasonable doubt that it was the accused who shot the deceased in the head while he was sitting in his vehicle waiting for him. This was after the deceased had been lured by the accused under the pretext of taking them to his homestead to make quotations for some kitchen units or type of cupboards. This he did with the intention of killing the deceased. Tragically the deceased died of a single gunshot wound to the head after being shot by the accused on 31 December 2014.

[95] In the result the accused is found guilty as follows:

1. The accused is found guilty in respect of count 1, the murder of Vuyisani Masoka.
2. The accused is found guilty of count 4, the unlawful possession of a 9mm RAP 401 pistol.
3. The accused is found guilty of count 5, the unlawful possession of seven rounds of live ammunition.
4. The accused is found not guilty in respect of counts 2 and 3, the unlawful possession of a 9mm pistol and the unlawful possession of an unknown quantity of ammunition.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: M. Makubalo

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Mthatha

Counsel for Accused: S. Kekana

Instructed by: Legal Aid South Africa

MTHATHA

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