

SOUTH AFRICA / JUDGMENT

S v Zimele and Others (CC16/2020) [2022] ZAECMHC 55 (24 March 2022)

[2022] ZAECMHC 55

COURT

Eastern Cape High Court, Mthatha

BEFORE

RWN Brooks

CASE / FILE NUMBER

CC16/2020

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, (MTHATHA)

BIZANA CIRCUIT COURT

CASE NO: CC16/2020

DATE: 24 March 2022

Reportable

In the matter between

STATE

and

CAMANGU ZIMELE

Accused 2

SIPHELO MASE

Accused 3

SAMKELO MKHUTSHWA

Accused 4

JUDGMENT

BROOKS J

[1] In the indictment the accused were charged with the following offences:

Count 1 – Robbery with Aggravating Circumstances:

IN THAT upon/or about 15 December 2018 and at/or near Pick and Save Store, Main Street, Lusikisiki in the district of Lusikisiki

the accused did unlawfully and intentionally assault Zenjohn Calipa Fay, Mlamli Zide and Zimpens Mi, by shooting them with firearms and did then and with force take from them two Corona beer cases and an amount of R170 000, their property or property in their lawful possession, aggravating circumstances being that before, during or after the commission of the robbery firearms were used by the accused.

Count 2 – Murder, with the applicability of Section 51(1) of Act 105/1997:

IN THAT upon about 15 December 2018 and at/or near Mrotshozeni in the district of Lusikisiki the accused did unlawfully and intentionally

kill Alfred Vila Vutulula an adult male person.

Count 3 – Unlawful Possession of Firearm:

IN THAT upon/or about the same time and at/or near the same place mentioned in count 1 the accused did unlawfully have in their

possession firearms without holding licences, permits or authorisation issued in terms of the Act to possess such firearms.

Count 4 – Unlawful Possession of Ammunition:

IN THAT upon/or about the same time and at/or near the same place mentioned in count 1 the accused did unlawfully have in their

possession ammunition, the quantity of which is unknown to the State, without being the holders of:

- a) a licence in respect of a firearm capable of discharging that ammunition;
- b) a permit to possess ammunition;
- c) a dealer's licence, manufacturer's licence, gunsmith's licence, import or export in-transit permit issued in terms of the Act; or
- d) otherwise authorised to do so.

[2] The reason for the provisions of Section 51(1) of Act 105/1997 to be applicable to count 2 is that the deceased in that count was a member of the South African Police Services at the time of the death.

[3] Subsequent to the service of the indictment and in separate proceedings charges were withdrawn against accused 1 on the basis that the State had insufficient evidence with which to pursue the prosecution against him.

- [4] In these proceedings accused 2, accused 3 and accused 4 benefited from legal representation throughout. Prior to being asked to plead the accused confirmed that they were aware of the minimum sentence provisions and their applicability to count 2. In respect of all four charges all three accused pleaded not guilty. As they are entitled to do, the accused elected to make no outline of the basis of their pleas of not guilty.
- [5] A number of witnesses were called on behalf of the State to give evidence of the circumstances surrounding the death of the deceased in count 2. It would appear therefrom that the deceased was shot by a person travelling on a bakkie, travelling in front of the vehicle in which he was travelling, and which was attempting to escape from that vehicle under the cover of darkness. This attempt at escape followed the robbery referred to in count 1. In respect thereof evidence was also led by witnesses who were present at the time of the robbery. In respect of the robbery itself, and indeed in respect of the subsequent attempt at escape, none of the State witnesses were able to identify any of the participants therein.
- [6] Evidence was also led about the recovery of a firearm from accused 2 on 13 September 2019. The evidence also revealed that certain ammunition was also recovered. That firearm was linked forensically to a cartridge that had been picked up by a member of the police along the route taken by the vehicle during the attempted escape.
- [7] As part of the evidence against accused 3 the State sought to introduce a statement dated 15 September 2019. In doing so the State relied upon the provisions of Section 217 of the Criminal Procedure Act 51/1977. It was contended on behalf of the State that the statement was made freely and voluntarily by accused 3 and that it amounted to a confession in respect of the charges that he faces.
- [8] The position adopted by accused 3 in respect of this statement was outlined by counsel appearing on his behalf. He denied that the provisions of Section 217 had been complied with and contended that the statement was offensive to various subsections of Section 35(1) of the Constitution of the Republic of South Africa 1996. The bases for these assertions are the following contentions:
- [8.1] Accused 3 claimed that after his arrest on 13 September 2019 in East London he had made it clear to the arresting officer during an interview held on 14 September 2019 that he wanted to contact his legal representative. This was facilitated. Accused 3 then elected not to make a statement. This election was respected by the arresting officer.
- [8.2] On 15 September 2019 accused 3 was fetched by members of the South African Police Services (the SAPS) working in the Directorate of Priority Crimes Investigation (the DPCI). He contended that an interview was held in Mthatha without any further reference to the rights of accused 3 not to make a self-incriminating statement and to legal representation at that stage. Had he been asked he would have indicated that he did not wish to make a statement.

[8.3] He claims that he was caused to appear before a commissioned officer who in turn made no reference to accused 3's right not to make a self-incriminating statement, or his right to legal representation at that stage. Accused 3 claimed that he was caused to sign the statement dated 15 September 2019 without being the author of its content and without being informed of the nature thereof.

[9] In the circumstances the Court declared that a trial-within-a-trial be held in respect of the admissibility of the statement dated 15 September 2019 against accused 3.

[10] As its first witness in the trial-within-a-trial the State called Sergeant Ceba, a member of the SAPS attached to the DPCI based in East London. He confirmed that on 13 September 2019 accused 3 was arrested in connection with offences committed in the district of East London. On 14 September 2019 he had interviewed accused 3 in connection with these offences. Prior to the commencement of the interview he had informed accused 3 of the nature of the allegations against him and told him that he had the right to remain silent. He informed him further that he had the right not to be compelled to make an incriminating statement or a confession. Although there appears to have been some discussion between accused 3

and Ceba about the allegations, accused 3 elected not to make any statement. This was based upon advice given to him by his

sister who is an attorney and whom Ceba had allowed accused 3 to contact.

[11] Ceba confirmed that he had allowed accused 3 to make no statement. However, it appears that during their discussion accused 3 had made reference to certain events in Lusikisiki about which Ceba had no knowledge. After the interview was over Ceba contacted Warrant Officer Diko, an SAPS colleague attached to the DPCI in Mthatha under whose jurisdiction the district of Lusikisiki ultimately falls. Ceba told the Court that he had advised Diko that he had interviewed a suspect who, "mentioned his involvement in a case in Lusikisiki".

Under cross-examination this evidence was amplified. Ceba stated the following:

"I informed him there were suspects I arrested and one of them made a statement and he is narrating a story as to what transpired at Lusikisiki. And the second one confirmed what was in the statement before I could see it. So I said to Diko, "I

think you guys can attend to this".

It was clarified under further cross-examination that the person referred to by Ceba as, "the second one", was accused

3. It was also clarified that when accused 3 volunteered self-incriminating information during the interview Ceba had stopped him from doing so.

[12] In due course Warrant Officer Diko gave evidence. He confirmed that based upon information given to him by Ceba, he had been amongst those who had fetched accused 3 and brought him to Mthatha for an interview. He claimed that the interview was led initially by Captain Ngxola who had told accused 3 of the reason for the interview and had, “appraised him of his constitutional rights”. Diko said that at that stage Captain Ngxola felt ill and Diko had taken over. He said that he too had then advised accused 3 of his constitutional rights, and these included the right to have a legal representative present during the interview and the right to remain silent. He stated that he had told accused 3 “that anything that he said in the interview may be used against him as evidence in court”. Diko claimed that, as had been his response to Captain Ngxola, accused 3 had indicated that he understood his constitutional rights. Moreover, when Diko asked accused 3 what he intended to do, he said, “that he chose to dispense with a legal representative and he would cooperate with us and tell us everything”. According to Diko the interview continued. It culminated in accused 3 incriminating himself in respect of, “the cases we were investigating”, and “the cases in East London of which we knew nothing”. It was claimed by Diko that accused 3 then acknowledged that he was “confessing”. This prompted Diko to remind him again of the fact that if he elected

to make a statement, it would be written down and would be used as evidence against him in court. Diko claimed that accused 3 had no difficulty with that and agreed “to tell it to an independent person who is not from our office and who will reduce his narration into writing”. Diko stated that on the strength of this election Diko telephoned Captain Mdepha at around midday to arrange for him to record a statement from accused 3.

[13] As corroboration for his evidence Diko produced a desk diary that he had maintained in 2019. Details pertaining to this interview appear therein on the page allocated to 13 September 2019. This anomaly was explained as resulting from a deliberate decision to select the page because the space allocated in the diary to 15 September 2019, the date of the interview, was the lower portion of the next page whose upper portion was allocated to 14 September

2019. The diary was so configured because 14 September and 15 September were a Saturday and a Sunday respectively. Diko indicated that at the time he had felt that there may be insufficient room if he had placed the details in the space allocated to 15 September

2019. Diko made the diary available to the Court. A copy of the relevant page was handed in as EXHIBIT J. Several features call for comment. The manner in which the entries are made on EXHIBIT J raise a suspicion that an important alteration thereto was effected after the interview was held. The page is delineated commencing with a line allocated to 07h30.

Against this time appear details of the names, identity number, address, marital status and motor vehicles pertaining to accused 3. The information recorded there is all objective neutral information recorded in a bold handwriting that makes use of the lines printed on the page in a generous and flowing manner. Below the objective personal details is recorded the fact that, and I quote:

“Accused 3 was questioned about the case of Tsolo which he told us everything and about Lusikisiki case and the case of East London”.

It is then recorded that Captain Mdepha was arranged to take a confession.

[14] In contrast to the style adopted in the main body of the entry made by Diko, in a cramped style that shows handwriting that diminishes in size increasingly as it approaches the detail recorded against the time 07h30, appear four lines in which are recorded the details of Captain Ngxola informing accused 3 of the reason for the interview and, quote: “his constitutional right”. In the last line of this portion of the entry Diko records that he also warned accused 3 of his constitutional rights. Diko claimed that in this cramped style the entry was actually written before anything else. He said it was his style to start at the very top of the page of his diary. An examination by the Court of the diary, which was replete with entries, indicated that this was not the case. Only one other entry showed the very top section of the page being used, and that pertained to a visit to the scene of an accident. Various details thereof were scattered all over the

page with clear additions being made above the boldly printed date in a manner that is consistent only with an addition being made when the rest of the page was full. Overall the relevant page looked more like a word map of figures, measurements, car registration and telephone numbers, names and note-like observations. In this, the content of the page and its configuration thereon is unique. It bears little resemblance to the way in which the page dedicated to 13 December had been filled in.

[15] When one looks at the entries made on that page, the copy becoming EXHIBIT J, it is evident that when the first four lines of the entry were made, the phrase, “At speech”, that appears above the names of accused 3 alone on the line opposite the printed word, “Times”, was already extant when the words appearing above it were written. This is because nothing appears to the left or to the right of the term, although there is room on both sides of it on the line on which it is written.

This indicates to the Court that at the time that “At speech” was written, the space within which it was written was blank. The avoidance of a collision with this term by the way in which the preceding words have been recorded, is clear from the cramped nature thereof and the angle at which the last two lines of this earlier section have been written. The making of entries at this angle did not commence at the top of the page. If the third and the fourth lines of this section were written when the page below remained blank, the natural inclination of the writer reflected lower down would have been to maintain the entry level with the printed lines that were available below. Indeed, the angle appears to have resulted from the need by Diko to contain the

information that he needed to within the space above the term “At speech”. Diko claimed that all the lines of the entry he made were written consecutively and from the top. The Court has great difficulty in accepting that this is demonstrated by the manner in which the words have been recorded on the page. It is not without significance that the words in the first four cramped lines refer to the constitutional rights. The possibility of their addition after the rest of the entry was made suggests that they were not offered to accused 3 at the start of the interview when the note taking commenced. Once this possibility is recognised it leads very naturally to a suspicion that the constitutional rights were not explained to accused 3 before or during this interview.

- [16] In short, if the evidence of Diko was correct in the way in which the proceedings had been conducted, the record on the page would all have flowed line-below-line without any impression of additions being made. That no constitutional rights were explained to him is what was claimed by accused 3 to be a feature of the interview. In my view EXHIBIT J does nothing to corroborate the evidence given by Diko. In contrast EXHIBIT J creates the distinct impression that Diko’s evidence may at best be unreliable on the point, and that there is a reasonable possibility that accused 3’s complaint is not without merit. It is also not without significance that despite there being plenty of room at the foot of the page, there is no record of accused 3 being reminded of the consequences of making a statement to a commissioned officer having been indicated to him at the crucial moment.
- [17] Captain Mdepha gave evidence in support of the content of the proforma that he had completed in respect of the statement dated 15 September 2019. He claimed that the proforma was completed by inserting the responses given by accused 3 to all the questions posed in the proforma. Read as a whole the completed proforma prima facie corroborates the evidence of Mdepha to the effect that he informed accused 3 of all his constitutional rights and of the consequences of making a self incriminating statement to a commissioned officer. It also prima facie corroborates the evidence of Mdepha to the effect that accused 3 freely and voluntarily elected to make a statement on 15 September 2019, cognisant of the fact that it would be recorded by Mdepha and would be used in evidence against him.
- [18] In his evidence Mdepha referred to the fact that prior to 2018 there existed within the SAPS a form known as the 3 M Form. This had been designed for use by police officers conducting interviews with suspects. Inter alia the content thereof made reference to the constitutional rights of any suspect. According to Mdepha the 3 M Form was then replaced by a form that is headed with the words “Warning Statement by a Suspect”. Under cross-examination Mdepha confirmed that the purpose was that this form replaced the 3 M Form. If one has regard to the nature of the typed content of the new form, this purpose is demonstrated clearly. An example of such a warning statement was handed in as EXHIBIT K. The heading itself is important as it refers to the process of “Warning” and refers to a “Suspect”. The first line of the form makes specific reference to an interview, leaving room for the insertion of appropriate details. The term “Suspect” is retained where the printed words record that the suspect has been informed of the provisions of Section 35 of the Constitution and records that a copy of those provisions is attached to the warning statement. In the body thereof

appear the following words:

“The suspect is now informed of an allegation (charged) of () that is being

investigated:

‘I was informed that I am not obliged to make a statement, but should I make a statement it will be taken down in writing and may be used as evidence against me in court.

I was informed that I may first consult an attorney or have an attorney present before I make a statement or answer any questions.”

Immediately thereunder appears a question in block capitals in the following terms:

“DO YOU UNDERSTAND THE ALLEGATION AGAINST YOU?”

Thereafter is a space for an appropriate answer from the suspect and a place for his or her signature. The following question then occurs in the following terms:

“I am obliged to put certain questions to you and by answering these questions you may be able to explain points whereby you may prove your innocence.”

The third question is as follows:

“You must be careful what you say as this is a serious matter. Do you understand?”

There again is a space allocated for the recording of the answer given and a place for the signature by the suspect. Underneath that is a separate section which contains the following subheading:

“I know and understand my legal rights and elect to:”

Four options are inserted thereunder as follows:

- “1. Consult an attorney;*
2. Finalise the case as soon possible;
 3. I desire to make the following statement;
 4. I do not wish to make a statement.”

At the foot of the first page again appears a space for the application by the suspect of his or her signature.

[19] Indeed, the second page of the warning statement contains material drawn directly from the provisions of Section 25(1) and Section 25(2) of the Constitution. At the foot of page 2 is a place for a suspect to affix his or her signature as confirmation that the provisions of Section 25(1) and Section 25(2) of the Constitution have been explained to him or her and have been understood. The third page of the document is headed by the following words, “Name of Accused”. There is then a space next to those words followed by the following, “I deny/do not

deny the allegation against me.” It is clear the purpose is for the name of the suspect to be written at the top of the page and for there to be an indication by a deletion of the election whether or not to deny the allegations made against the suspect. Thereafter significant space is afforded for the inclusion of any statement that the suspect may wish to make over and above those elicited by the proforma. The name of the suspect appears again at the foot of page 3 above a space in which the particulars of the police official taking the statement must be inserted.

[20] The language employed in the construction of the warning statement, the concentration on the all-important question of the constitutional rights and of the fact that allegations are made at that stage against a suspect, indicate clearly that it is intended to have been used during initial interviews. That this was its purpose was stated unequivocally by Mdepha in his evidence-in-chief. Contradicting the purpose for the introduction of the warning statement described by him in his evidence, and indeed the purpose evident in the wording of the document itself, Mdepha then claimed that it is not necessary to make use of the warning statement in conjunction with an interview of a suspect. He stated that it is quite acceptable to obtain a confession from a suspect before obtaining a warning statement from that suspect. The Court struggles to identify rationality or logic in this approach. Not only is this approach evident in this matter, but it is evident in other matters that have come before this Court and in which the approach endorsed by Mdepha has been criticised. (See for example *S v Siphiwo Morris Jula and Others* 17/2020, unreported judgment delivered 19 October 2021).

[21] Explored further the view that is widely held within the SAPS was disclosed to be that a warning statement is only to be completed in preparation for an accused person's first appearance in court. In other words, it is only completed when an accused person is formally charged. By this stage, upon an adoption of the common practice, in many instances a confession may well have been obtained from an accused person pursuant to any number of interviews. Despite the wording of the warning statement and the clear intention that it replaces the 3 M interview form, somehow the importance of

using the warning statement at the early stages of an interview process has been overlooked. The unfortunate possibility exists that this may indeed be deliberate on the part of the SAPS.

[22] In adopting the perfunctory attitude towards the use of a warning statement that seems increasingly popular amongst members of the SAPS, investigators are inhibiting the inevitable inquiry of a Court into the admissibility of confessions made by accused persons when these are sought to be introduced into the evidence. The fairness of the investigation process is of fundamental importance in ensuring that an accused person who elects to make a confession does so freely and voluntarily. It is also therefore of fundamental importance in ensuring that an accused person receives a fair trial as prescribed by the Constitution.

- [23] It is of fundamental importance that the warning statement be used in connection with interviews held with suspects. This is because it is of fundamental importance to ensure that a suspect is fully appraised of his or her constitutional rights at the earliest opportunity. The completion of the warning statement and the signature thereof by a suspect would play a very important role in enabling the Court to establish whether or not this has been achieved.
- [24] One has to look no further than the evidence of Ceba in this matter for the most likely reason for the avoidance by members of the SAPS of the use of the warning statement in conjunction with interviews. In respect of warning statements generally he stated as follows.

“A warning statement is a document that should form part of the docket when the accused is brought before Court. It is a procedural

thing. The case will not proceed if it is not there. It does not have to be obtained before a confession is taken.

There is no law that says a warning statement must happen before a confession. In some cases you take the accused after an

interview. You notice he incriminates himself and you explain his constitutional rights when he is taken to an officer for a statement. I read the statement to see if the content thereof accurately reflects what I was told by the accused. If I then see that the accused has changed his story to the officer and it is not what he told me in the interview, I want some evidence to investigate further which would mean I cannot complete a warning statement in respect of him. When you interview a suspect it is not a must that you say the questions in this manner. You interview a suspect in any manner to get what you want. The questions just guide the police officers to show what sort of questions you can ask.”

- [25] That this evidence given by Ceba reflects the current attitude within the SAPS is a serious indictment on its members. Rendered even more simply, the view expressed by Ceba seems to be that an interview, and therefore an investigation, may be less successful from the investigator’s perspective if a warning statement is taken too soon. Such a view goes a long way to creating a climate in which the viva voce evidence of a police officer to the effect that he or she has explained in full the provisions of Section 25(1) and Section 25(2) of the Constitution to a suspect at the outset, is viewed with deepening suspicion.

- [26] In his testimony accused 3 stated as follows:

“Mr Mdepha asked my names and I told him. He then introduced himself to me. He then said he was investigating Lusikisiki

cases. He then said all the information he is investigating, he has got it because my co-accused has implicated me in the case and there is no reason for me to deny the case. Nothing was written or recorded. What I noticed is there were papers he was carrying. Then he said to me what can make things short is for me to sign these papers and not make things difficult, because he did not

want to be there the whole day. I did not know what I was signing. I said to Mr Mdepha that I would like to contact my legal representative to explain what I was signing because I did not know. The same request as I made to Sergeant Ceba when I did not make a statement. Mdepha said he was not going to do that. He said I should have asked from the police officers before they brought me. I said I did, but I was refused. I signed. I did not know what I was signing for. I requested him to read what was written in these papers, but he said there is no need.

He did not explain EXHIBIT I to me before I signed it.”

At first blush the claims made by accused 3 that he was not the author of the statement dated 15 September 2019 would seem to be preposterous. However, it is to be recalled that Ceba testified that when he first interviewed accused number 3 the latter confirmed the content of a statement that had been taken from another suspect in respect of this matter. For Ceba to have known this it is reasonable to assume that as at 14 September 2019 such a statement was extant. Accused 3 stated that on the trip to Mthatha Diko and his companion had read from a document to accused 3 and asked if he could confirm the content as being correct. It is not impossible that the document to which he refers was a copy of the statement taken from another suspect to which Ceba had made reference. Remote though the possibility may seem and incredulous in its nature, it remains a possibility that this statement was thereafter made available to Mdepha. In this regard the accused bears no onus of proof.

[27] Once again, this matter presents an example of a matter where the investigating team elected to obtain a confession from an accused person with almost unseemly haste. In doing so use was made of a commissioned police officer who was part of the Provincial Organised Crime Unit of the SAPS based in Mthatha. Quite apart from being an independent and unconnected person, one could hardly find a closer connection with DPCI. Accordingly, whatever happened between accused 3 and Mdepha, there can be no doubt that accused 3 saw Mdepha simply as part of the investigation team. This completely undermines the purpose of Section 217 in its attempt to ensure the provision of a safe and independent space within which an accused person may feel at ease and able to reveal improper conduct on the part of an investigation team where this has been his/or her experience. It is only before a Magistrate that an accused person is likely to perceive a real disconnection from the SAPS, the body charged with the investigation of crime in this country.

[28] It is not without significance too that one of the investigating officers in this matter gave evidence as a defence witness in the trial-within-a-trial. He confirms that on 19 November 2019 he took a warning statement from accused 3. It was a copy of this warning statement that had been handed in as EXHIBIT K. This document records accused 3's election not to make a statement. This is reflected on page 1 of the statement and in the body of the statement where the actual denial of the allegations by accused 3 is recorded. Here too is his request to involve a legal practitioner recorded.

- [29] In its general content the attitude of accused number 3 and the election he makes on 19 November 2019 is identical to the attitude he demonstrated on 14 September 2019 before Sergeant Ceba. This feature is in accordance with the main elements of the objections recorded on behalf of accused 3 to the tender of the statement dated 15 September 2019 in terms of Section 217 of the CPA. It is also in accordance with the key elements of accused 3's evidence on the point.
- [30] It was argued on behalf of the State that the Court should ignore the effect of the election made by accused 3 and communicated to Ceba, because it pertained only to the investigation of East London offences by that police officer. The argument was developed to submit that the only relevant evidence pertains to what was described by Diko and Mdepha pertaining to the events of 15 September 2019. In my view the argument is fundamentally flawed. What is of relevance is the state of mind of accused 3 in respect of the giving of a self incriminating statement to the SAPS. This state of mind was clearly expressed to Ceba and in due course to the investigating officer in this matter when accused 3 was eventually arrested in respect of the present charges.

- [31] Whilst the Court accepts that there was an obligation on the part of Ceba to inform his Mthatha colleagues that accused 3 had indicated a knowledge of events that had occurred in Lusikisiki, the Court is of the view that the obligation does not end there. In giving his colleagues the information that commenced the process which occurred on 14 and 15 September 2019, there was also an obligation on the part of Ceba to inform his Mthatha colleagues of the election that accused 3 had made. There is also an obligation on the part of the police officers becoming subsequently involved with accused number 3 to have respected that election.
- [32] It is against this background that one must evaluate the evidence tendered by the State in respect of the events of 15 September 2019. The evidence given by the accused must also be considered. In the light of the evidence given by members of the SAPS in respect of their attitude generally towards the taking of a warning statement and the particular circumstances of this case, the Court is of the view that the State has failed to prove beyond a reasonable doubt that the statement dated 15 September 2019 was obtained from accused 3 freely and voluntarily. Accordingly, the Court ruled that that statement should not form part of the case against the accused.

- [33] Upon the delivery of this ruling the State case was closed in respect of accused 2, accused 3 and accused 4. Applications were made on behalf of accused 2, accused 3 and accused 4 in terms of Section 174 of the CPA for their discharge on all counts. Mr Makhubalo who appeared on behalf of the State very properly conceded that the State was not able to oppose the application. The reasons therefor and for the inevitable success of the application are as follows:

[33.1] On count 1, the charge of robbery with aggravating circumstances in respect of the Pick and Save Store in Lusikisiki on 15 December 2018, there was no direct evidence to implicate any of the accused. The only potential evidence implicating one of them pertained to accused 4. This evidence came from a police official who reported to the Court that he had seen accused 4 standing on the sidewalk opposite the shop premises shortly before the robbery. Consequently, this is circumstantial evidence potentially against accused 4. Viewed generously it may well be that this evidence is consistent with an inference being drawn to the effect that accused 4 then became involved in the robbery itself. However, in order to be relied upon the evidence must be such that it excludes all other possible inferences save the inference sought to be drawn. On this second leg of the test the evidence fails to establish the requisite probative value. The evidence does not exclude inferences such as the accused being an innocent bystander at the time, or a pedestrian who then passed by before the robbery even occurred.

[33.2] In respect of count 2, the charge of murder, there is no direct or circumstantial evidence which implicates any of the accused before Court.

[33.3] In respect of count 3, the charge of the unlawful possession of a firearm, the only evidence placed before the Court demonstrates that on 13 September 2019 a firearm and ammunition were recovered from accused

2. In addition, there is evidence that links a cartridge case that was recovered subsequent to the events of 15 December 2018 which is linked to that firearm. Once again this is circumstantial evidence. The first leg of the inquiry is satisfied inasmuch as the evidence possibly enables the drawing of an inference that accused 2 was in possession of the firearm at the relevant date and at the relevant place. However, because the recovery of the firearm occurred almost nine months later and at a place significantly far from the place of the incident, the evidence does not exclude the drawing of an inference that a person other than accused 2 was in possession thereof on 15 December 2018. In the circumstances the circumstantial evidence does not have the probative value required to ensure the conviction of any of the accused on counts 3 or 4.

[34] It follows that the application was correctly brought in terms of Section 174 of the CPA and it is not to be expected of the accused that they take the witness stand to implicate themselves and to supplement the State case in its deficiency. It follows therefore that the Court makes the following orders:

[34.1] ACCUSED 2: On COUNTS 1, 2, 3 AND 4 you are found NOT GUILTY AND DISCHARGED.

[34.2] ACCUSED 3: On COUNTS 1, 2, 3 AND 4 you are found NOT GUILTY AND DISCHARGED.

[34.3] ACCUSED 4: On COUNT 1, 2, 3 AND 4 you are found NOT GUILTY AND DISCHARGED.

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances

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