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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO.:097/2018

(1)REPORTABLE: Yes/Yes

(2)OF INTEREST TO OTHERS JUDGES: Yes/
NO

(3)REVISED

13 September 2019

DATE

SIGNATURE

THE STATE

And

SHEZI MANDLA MHLAKANIPHISENI

JUDGEMENT

MOLAHLEHI, J

Introduction

- [1] The accused, Mr Shezi Mandla Mhlankaniphseni, was arraigned before this court on the charges of robbery with aggravating circumstances, murder, attempted murder and contravention of the Firearms Control Act of 2000. The charge of robbery is read with the provision of s 1 of the Criminal Procedure Act (Act number 51 of 1977) read with the provisions of s 51 (1) of the General Law Amendment Act (Act number 105 of 1997and Schedule 2 of Act 105 of 1997and further read with ss 92 and 280 of the Criminal Procedure Act . The two charges of murder are to be read with s 51 (1) and Schedule 2 of the CPA and further read with ss 92 (2) , 257, 258 and 270 of Act 51 of 1977.
- [2] The accused was warned about the minimum sentencing regime that may apply if convicted of the murder charges and or the robbery with aggravating circumstances. He pleaded not guilty to all the charges and made a statement in terms in terms s 115 of the CPA, in terms of which he denied all the allegations against him. He also made several admissions in terms s 20 of the CPA which were read into the record.
- [3] The incident relating to the alleged robbery, murder and attempted murder occurred on 10 November 2017 at Sams hardware store (the store).
- [4] In support of its case, the State presented evidence of the following witnesses:

- [5] **Mr Andries Makola** (Andries), who testified about events leading to the shooting. He also testified about what happened on the day in question and about the identity of the accused.
- [6] Andries testified that on Friday, 10 November 2017, the incident related to the charges proffered against the accused occurred from the time the store was re-opened after lunch. The store was reopened upon the return of the owner from the afternoon prayer.
- [7] After the opening of the store, Andries proceeded to the security door at the counter. He was at that point stopped by the accused, who referred to him as the "uncle." The accused told him to stop because he (the accused) and the other person he was with "wanted to work." He was at that stage about to exit the store through the glass door when the accused produced a firearm and pointed it at him.
- [8] At the stage the accused pointed a gun at him, Daniel Netshithuthuni (Daniel) one of the employees at the store, was at the security gate. He was aware that Daniel also had a firearm. He seemed to have been concerned that Daniel may confront the accused and his co-perpetrator. He signalled to Daniel to comply with the instruction of the accused that they must return back into the store. Daniel complied, and both entered the counter area, followed by the accused, walking towards where Mr Zaheere, the owner of the store, was seated.
- [9] After passing, Zaheer, the accused demanded money, seemingly in an aggressive manner. Zaheer told him to "relax" and took money in the money bag and threw it on the floor. At that point, Daniel turned, looked back and took out his firearm. Andries immediately whispered to Daniel

to wait a bit as he was scared that there would be a shoot-out in the store.

[10] The fear of a shoot-out materialized immediately after Andries whispered to Daniel not to produce his firearm. Gunshots were shortly after that fired in the store. In the process, Vernon and Daniel were fatally wounded, and Zaheer seriously injured but survived the injury.

[11] After the shooting, the incident was reported to the police who arrived after some time. Andries and Daniel's sister, took him (Daniel) to the nearest fire station in a van where they were informed on arrival that he had passed away.

[12] Although he did not see the co-perpetrator shooting Daniel, believed it was him because of the manner he appeared to have been shot.

[13] Concerning the issue of the identification of the accused, Andries, described him as being slightly taller than him, was not 'that dark but was coffee-coloured in complexion'. He had a short and curly hair, which protruded below the woollen hat he was wearing. The hairstyle was what he referred to as the "Shembe Church" hairstyle. He was wearing a work jacket. In evidence in chief, he stated that he could not describe how the co-perpetrator was dressed. However, during cross-examination, he stated that he was wearing an overall jacket whose colour he could not recall. He persisted during cross-examination that the accused was the person who fired the gunshots on the day in question. The incident took about seven minutes, and it was during daylight and was able to observe the accused at the entrance of the store, when he proceeded to the security door and when produced the firearm.

- [14] **Mr Mandla Sibanyoni**, (Mr Mandla) testified that he was at the back of the store when he heard gun shots. He then heard the owner of the store calling for help. He did not see who was firing the shots.
- [15] **Mr Sifiso Gumede** (Sfiso), also an employee at the hardware store, testified that after the opening of the store at about 13h30, he went behind the counter to serve customers. He was with Andries, David, Daniel and Vernon at the counter.
- [16] He further testified that while attending customers at the counter he suddenly felt somebody grabbing him at the back. He looked and saw the accused who demanded money. The accused had a gun which he poked into his ribs.
- [17] Zaheer, who at the time was seated on a chair, pleaded with him not to shoot. He (Zaheer) opened the till, took money out and threw it on the floor. The accused enquired from him what he was doing in throwing the money on the floor. After that, there were gunshots fired inside the store.
- [18] He saw the accused seated on the floor outside the store after the shootings. He was wearing a blood-stained fawn T-shirt.
- [19] Sfiso further testified that after the shootings and while inside the store, he heard people outside the store screaming and saying that the person (responsible for the shootings) ran towards the direction of the railway line. He then joined and followed the crowd to see where the accused had gone to. He met with the police outside the store.
- [20] After meeting with the police, they ran towards the railway line which, according to him, is not very far from the store. They proceeded beyond the railway line and found the accused seated on the ground in the

informal settlement. He was not wearing the clothes he had when he was in the store and also did not have his hat on. He was however still wearing the T-shirt he had when he was in the store, but at that time the T-shirt was blood-stained.

[21] He testified during cross-examination that he did not see the two robbers enter the store. He further stated that on arrival at the informal settlement where the accused was seated on the ground, he pointed him out to the police as the person who fired gunshots in the store.

[22] About the identity of the accused Sfiso testified that he was able to look and observe the accused at a close range. He saw him for nearly a minute. The fluorescent lights illuminated the store. He described the accused as being of light complexion and had loops on his ears. He was wearing a striped T-shirt and a work suite and a black hat. During cross-examination, he persisted that the robbery took place after they entered the store. And throughout that process, he was behind the counter including at the point when the accused pulled him and pointed a firearm at him.

[23] He also testified that at some point after the shooting, he saw the accused seated at the door with blood on him. He did not, however, see him stand up and walk away. He only realized that he was no longer there.

[24] Sfiso conceded, during cross-examination, that he contradicted himself about what he said in his statement to the police. (para 8 of his statement). This relates to the number of robbers who entered the store

on the day in question. His explanation for the contradiction is that he concentrated on the accused and not his perpetrator during the robbery.

[25] The other issue raised with Sfiso relates to the statement he made to the police. He said he observed the accused standing next to him, but in court, said he saw him after his arrest by the police. He explained that at the time of making the statement to the police, he was still traumatized.

[26] Sfiso persisted during cross-examination that he pointed the accused to the police when he found him seated in the informal settlement.

[27] **Mr Joas Chipote**, an employee of another store next to Sams hardware store situated at number 101 Union road, Kliptown, testified that on the day in question, 10 November 2017 at 13h50, he was outside the store when he heard two gunshots. He then ran into the street to see what was happening.

[28] He saw two men running on the street one of them holding a gun. One of the men was wearing a blue work suit and a black winter hat and blue jeans. The other one had a blue overall.

[29] The men ran towards the railway line. The train came as they were about to cross the railway line and thus had to wait. After the train passed, they crossed the railway line and walked across to the informal settlement, known as "Majampasporo."

[30] After observing the two men cross the railway line, Chipote went back to the store. He then heard people screaming about the arrest of the robber. On arrival at the scene, he found one of the men seated and his hat and his work suit were next to him. He described the man as being tall, light complexion and had a muscular body.

- [31] During cross-examination, he denied that the accused had dreadlocks and stated that he had an Afro-hair. He described the accused's hair on the day in court as being the same as it was on the day of the arrest.
- [32] **Mr Zaheer Abdul Moosa Rehman** (Zaheer), who as stated earlier, is the owner of the hardware store where the robbery and murder took place, described where the hardware store is situated - opposite the Soweto hotel and on the left thereof is Cavier Electronic shop. He also testified that there are eight CCV cameras installed in the store and described where they are situated.
- [33] He testified that on his return from the Mosque, he instructed one of his employees to open the store and after that, he went behind the counter with Sifiso, Andries and Daniel- Venon, joined him and sat at the opposite side of the counter.
- [34] Soon after the arrival of Vernon, he heard Sefiso calling him (Zaheer), and when he looked around, he saw an unknown person standing next to him on his left-hand side. The unidentified man who pointed a firearm at him was about a metre away from him. He observed him for less than a minute.
- [35] The robber then demanded money which was in a bag. Zaheer took the bag and threw it on the ground. The robber enquired as to what he was doing by throwing the money bag on the ground. The money handed to the robber was in the sum of R9000,00.
- [36] After handing the money to the robber, Zaheer suddenly heard gunshots whose direction he could not tell. He then tried to get off the chair but was shot in the face on the left-hand side before he could do so. He fell

and hit his head against steel stand. The gunshots continued for some time as he lied down, pretending to be dead. As he was lying down, he saw Vernon and Daniel also lying on the ground but did not see the accused. He was after that taken to the hospital and was admitted for one day.

[37] He described the accused as a person who had ear lobes with a light complexion, well build and was wearing either a blue or green overall.

[38] Zaheer attended the identity parade of those suspected of the robbery at the Diepkloof police station. He could not state with certainty that the accused is the person he pointed out at the identity parade. He explained that he was still traumatized as the parade was done soon after the incident and was still under medication.

[39] He stated that the reason he was able to identify the accused in court was that he had calmed down and had the opportunity to reflect. Although he had discussed the incident with the employees, he did not consider his identity with them. He could neither recall the features of the accused's hair nor could he remember whether he had a hat on. The main feature through which he could identify the accused were the holes in his ears. He could not say whether he saw the holes at the parade as the police refused to allow him to get closer to the glass that was dividing where he was with the suspects.

[40] **Sergeant Sekeleni**, of the Kliptown SAPS also part of the Visible Police Unit stated that he was with Warrant Officer Mathebula on the day in question, 10 November 2017 at 13h45. He was attending a complaint from a member of the community. He then saw a group of people on

Union road, calling on W/O Mathebula to come to where they were. He at the same time received a call from their commander informing them that there was a robbery underway at the store.

[41] They proceeded to the store where on arrival they found Sifiso standing outside the store. He informed them that one of the robbers had run towards the railway line. He ran with him (Sifiso) to the direction of the railway line.

[42] The accused was found seated not far from the railway line in the informal settlement. Members of the community who were angry at what he was alleged to have done surrounded him.

[43] The accused was found seating on the ground leaning towards his right and appeared to be in pains. He was wearing a blue jean and a blood-stained T-shirt.

[44] W/O Mathebula wanted to call an ambulance but was concerned that the crowd would attack the accused. He decided not to wait for the ambulance but to arrest and took him (the accused) to the police station.

[45] Upon reaching the accused, Sfiso pointed him as the person responsible for the robbery at the store. After his arrest, his constitutional rights were explained and then driven to the police station. He was at the police station, searched and a cell phone, found on him was taken and placed in a forensic bag. (PAD 0016709). The pair of gloves were found at the scene where the accused was seated.

[46] **W/O Mathebula** of the Visible Police Unit at Kliptown police station essentially confirmed what Sgt Sekelini stated. She testified further that

at the time of the arrest, the accused was wearing a brownish T-shirt with strips and was wearing blue jeans.

[47] W/O Mathebula testified during cross-examination that Sfiso told her that there was only one suspect who went the direction of the railway line.

[48] **Mr Andries Riad** is the owner of Kabir Electronics based at Kliptown, assisted the SAPS with the footage of the CCTV footage taken from the cameras of his store. Refiloe, an IT specialist, developed the footage of what happened on 10 November, from 13h45 to 13h55.

[49] **Col Maphoto** of the SAPS, Kliptown testified about the hand gloves found near the railway line and not far from the accused was found seated. In my view, the evidence about the hand gloves does not add any value in the consideration of this matter because Col Maphoto could not say how it related to the accused and the robbery. In other words, he could not say how the gloves ended up where they were found.

[50] **W/O Mthombeni** of the SAPS testified that on the day in question, he heard over the two way radio that there was robbery at the store. He proceeded to the scene where, on arrival, he inquired from the owner as to what happened. A gun and spent cartridges were pointed out to him. The deceased person who had been shot was lying in the store.

[51] **Mr Mandla Moorosi**, (Mandla) the cousin of, Thabiso Moorosi (Thabiso) one of the suspects, testified how a police officer approached him at his home and inquired about Thabiso. The police said they were looking for him (Thabiso) because he had committed a crime.

- [52] Mandla informed the investigating officer that Thabiso passed away and showed him his death certificate. He also gave him the cell phone of Thabiso being [...].
- [53] **Cpt Moodley** of the Forensic Pathologist-Scientific Analysis testified as an expert. He holds a Bsc degree and has three years of experience in analysing gunshot residue. He explained how the characteristics of gunshot residue originating from the prime of a gun can be identified.
- [54] Capt Moodley analysed the samples which had been given to him by the investigating officer. The sample tested negative for gunshot residue. This evidence must be rejected without much ado for it provides no probative value in the resolution of this matter.
- [55] **W/O Tefo Tshepo Ndlovu**, testified as an expert on video footage analysis. He created a photo album from the video footage and analysed each of the pictures taken from the video footage.
- [56] **Capt Mokhajoa** of the SAPS, Silverton ballistic unit testified and confirmed the contents of his affidavit in terms of s212 of the CPA. He testified about the four sealed evidence bags he received on 10 September 2018 from Case Administration Ballistic Section. The bags contained the evidence concerning the fired cartridge cases, bullets, bullet core and bullet collected as exhibits in the Orlando Cas 471/11/2017 and the Kliptown Cas 195/11/2017 (Orlando Cas). The evidence of what was contained in the bags is set out in this affidavit, specifically at paragraphs. 3.1 to 3.4 and 3.5 to 3.11. And the contents of the bag containing the evidence from the Kliptown Cas is described at paragraph 4.1 to 4.6 of the affidavit.

[57] After examining and comparing the evidence in paragraphs 3.1 to 3.8 and 4.1 to 4.5 using the comparison microscope, Capt Mkhathshwa made the following findings:

- a. The cartridge cases mentioned in 3.1 marked 003TC1, 4.1 marked 549471/17 A5, A6, A7, A8 and 4.5 were fired in the same firearm.
- b. The bullet mentioned in 4.2 marked 549471/17 B4, B5 and 4.4 were not fired from the same firearm as the test bullet mentioned in 3.4 marked 645ZTB1.
- c. The bullet mentioned in 4.2 marked 549471/17 B4 and B5 were not fired from the same firearm as the test bullet jacket mentioned in 3.8 marked 645XTB1.
- d. It cannot be determined if the bullet jacket mentioned in 4.4 was fired or was not fired from the same firearm as the test bullet mentioned in 3.8 marked 645XTB1.
- e. The test bullet mentioned in 3.8 marked 003TB1 was not fired from the same firearm as the exhibit bullet mentioned in 4.4.
- f. It cannot be determined if the bullet mentioned in 4.2 marked 549471/17 B4 and B5 were fired or were not fired from the same firearm as the test bullet mentioned in 3.8 marked 003TB1.
- g. The bullet mentioned in 3.4 marked 577645/17 B1 and B3 were not fired in the same firearm as the bullet and bullet jacket mentioned in 4.2 marked 549471/17 B4, B5 and 4.4.

- h. He further testified that paragraph 6.2 and 6.3 show that there are two other firearms used in the shootings. He could not say whether there were other firearms used in the episode.

- [58] **Dr Deren Lietigy**, the medical practitioner, specializing in surgery and working in the trauma unit at the Pretoria University, testified how he examined the accused at the Chris Hanni Baragwanath hospital. He noticed six wounds on his body, which were consistent with bullet wounds. He described the wounds on the body of the accused. The accused had a wound on the anterior right chest and the right chest at the back. The shots, according to him, would have been in the straight line between the two wounds. The trajectory between the two wounds on the left arm was also a straight line. The other wounds were next to the area of the heart and the lumber area - back left.
- [59] **Constable Mongoe** of the SAPS in Florida and employed in the Visible Policing Unit, testified about the incident that occurred on 24 November 2017 and specifically at Orlando in Soweto.
- [60] He received a WhatsApp message from one of his colleagues informing him about a robbery involving a Toyota Combi, registration [...] GP in the Langlagte area. He encountered the vehicle in question on his way to the scene of the crime. He gave chase, and the suspects drove to the direction of Orlando.
- [61] The occupants of the vehicle fired shots at them as they were driving away. At some point during the chase, the sliding door of the Kombi opened, and three persons jumped out and ran away. The Kombi came to a stop after hitting a road barrier. One person who was lying next to

the sliding door was found dead. The gun found next to him was taken for forensic testing.

[62] **Ms Amanda Fouree**, a Voda Com employee, testified as an expert witness concerning the data collected every time a call is made from a cell phone.

[63] **Sgt Ndlovu** of the SAPS Organised Crime Unit in Gauteng testified that he was appointed to investigate the crimes in this matter. On 24 January 2018, he received information relating to the address of Thabiso Moorosi. He visited the house and was told by his cousin brother that he had since passed away. The cousin gave him the cell phone number he used before passing away.

[64] Sgt Ndlovu applied and received permission to conduct an analysis of the cell phone number from the magistrate in terms of s 205 of the CPA

The case for the defence

[65] The accused was the only witness who testified in his defence. He testified about the events of 10 November 2017 and in particular about what happened on Union Road. He conceded in evidence in chief that he had holes in his ears, he was wearing a blue trousers, maroon t-shirt, worn out and accordingly its colour had slightly changed. He was referred to photo F on page 75 which reflected his hairstyle at the time.

[66] Concerning how he suffered bullet wounds the accused testified that he was walking on Union Road when he was shot. He did not see who fired the shots at him. He only realized at the hospital that he was shot more than three times. After the injury he suffered from the bullet wounds he ran with other people who were running away from the shootings. He

tried to run away towards the informal settlement but as soon as he crossed the railway line which is not very far from where he was shot at, he lost energy and set on the ground.

[67] While sitting on the ground feeling weak the police arrived and arrested him. He disputed ever hearing any person pointing him as one of the robbers.

[68] The police took his Samsung cell phone with the sim card number [...].

[69] He denied knowledge of the deceased, Thabiso and also that his cell number was 06464377006. He denied having participated in the robbery that took place on the day in question.

The general standard of prove in criminal matters

[70] The general standard of prove, to secure a conviction, is that the State has a duty to prove its case against the accused beyond a reasonable doubt.¹ The standard does not, however, require proof to be beyond the shadow of a doubt.² This means that the court is not required to convict an accused person only on absolute certainty, but rather on justifiable and reasonable ground.³

[71] In considering whether it is reasonable and justifiable to convict an accused person the court is required to have regard to the totality of the evidence before it. In other words the evidence before the court should be evaluated holistically and assessed in its totality. The Court must consider inherent strengths and weaknesses in the evidence, and consider the merits, demerits and probabilities. The approach to

¹ S v Mthethwa (CC03/2014) [2017] ZAWCHC 28 (16 March 2017) at paragraph [65].

² Ibid

³ Ibid

assessing and evaluating evidence was summarised in *S v Trainor* (468/01) [2002] ZASCA 125; [2003] 1 All SA 435 as follows:

“A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.”

[72] The nature of the evidence which the State relied on in seeking to place liability on the accused for the murder, robbery and attempted murder in this matter is primarily based on circumstantial evidence. It also relied on the doctrine of common purpose.

[73] The approach to adopt when dealing with circumstantial evidence is dealt with in *R V Blom*.⁴ The court in that case referred to the two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial. The first rule requires that the inference sought to be drawn must be consistent with all proved facts. The second rule is that the proved facts should exclude every reasonable inference from them save the one to be drawn. Failure to satisfy these requirements would render the inference drawn unsustainable.

⁴ 1939 AD 288.

[74] In applying the two rules referred to above the circumstantial evidence need to be considered in its totality

[75] In *R v De Villiers*,⁵ the Court held that:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn.”

[76] In *S v Reddy & Others*,⁶ the Court said the following regarding the assessment of circumstantial evidence:

*“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in **R v Blom**1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored.”*

The doctrine of common purpose

[77] The doctrine of common purpose has been defined by Burchell and Milton,⁷ in the following terms:

⁵ 1944 AD 493.

⁶ 1996 (2) SACR 1 (A).

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.”⁸

[78] The essence of the doctrine of common purpose is stated by Snyman,⁹ in the following terms:

“... if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.”

[79] It is apparent from the authorities that liability in terms of the doctrine of common purpose arises where the participants agree or associate together with others to commit a particular crime with the requisite *mens rea*. The basis of common purpose can thus be by way of prior agreement which may be express or implied. It may also be by way of association between the co-perpetrators. In general active association may be evidenced by conduct of the co-perpetrators. It is not necessary to show that the participation of the co-perpetrators was causally connected to the consequent crime.¹⁰ The other principle governing common purpose is that it is not necessary for the prosecutor to prove

⁷ Burchell and Milton *Principles of Criminal Law* 2nded at 393.

⁸ The definition was referred to with approval in *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003). In this case the constitutionality of the doctrine of common purpose was unsuccessfully challenged.

⁹ Snyman *Criminal Law* 4thed at 261.

¹⁰ See *S v Sefatso* 1998 (1) SA 868 at 895. This judgment confirmed those decisions that overruled the cases that had held that the doctrine of common purpose required causal connection between the act of the accused and the consequent death to be shown.

beyond reasonable doubt that each of the co-perpetrators directly and/ or actively participated in the unlawful conduct. Once the element of fault has been satisfied, then the conduct of the co-perpetrator of the crime is attributed to the other participants. In other words what the prosecutor needs to establish is that one of the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants.¹¹

[80] The prerequisites in order to attract liability in a case based on the doctrine of common purpose are set out in *S v Mgedezi*,¹² in the following terms:

- a. The accused must have been present at the scene where violence was committed.
- b. He or she must have been aware of the crime committed.
- c. He or she must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others.

[81] In *S v Thebus*,¹³ the Constitutional Court in dealing with the doctrine of common purpose held that:

“If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea*

¹¹ See *S v Leroux and Others* 2010 (2) SARC 11 (SCA), where the court found on the authority of *S v Mgedezi* 1989 (1) SA 687, that the conduct of “the individual accused should be individually considered with the view to determining whether there is sufficient basis for holding a particular accused person is liable on the ground of active participation in the achievement of a common purpose that developed at the scene.”

¹² (415)/1987) [1988] ZASCA 135.

¹³ 2003 (2) SACR319 (CC).

concerning the unlawful outcome at the time the offence was committed. That means that he or she had intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.”

The principles governing identification of an accused person

[82] The approach to adopt in dealing with the issue of identification of an accused person was summarised by Legodi J, (as he then was) in *Phetla and Another v S*,¹⁴ as follows:

“[1] It is generally accepted that evidence of identification based upon witness' recollections of person's appearance is dangerously unreliable unless approached with due caution. The average witness's ability to recognise faces is poor, although few people are prepared to admit that they have made a mistake. On a question of identification, the confidence and sincerity of the witness is not enough.

[2] The often patent honesty, sincerity and confidence of an identifying witness remain, however, a snare to a judicial officer who does not constantly remind himself of the necessity of disputing any danger of error in such evidence. The witness should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement

¹⁴ A632/2015) [2016] ZAGPPHC 555 (24 June 2016).

unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistake.

- [3] A court has a duty to assess and evaluate the cogency of the evidence of identification. Many of the criteria for assessing what weight is to be attached to evidence of identification are to be found in a number of cases. The trustworthiness of the witness's observation, recollection and narration of, are all three factors relevant to the assessment of evidence of identification and are affected by various factors.

'Because of fallibility of human observation, evidence of identification is approached by the court 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 and mobility of the scene. Corroboration of the suggestibility, the accused's face, voice, build, gait and dress, the result of the identification parade, 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 a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities.'

- [83] In the present matter it was argued on behalf of the accused that the evidence presented by the State was insufficient to place him at the scene of the crime on the day in question.

- [84] It was submitted that the evidence of Andries, relating to the identity of the accused should be rejected because the twenty seconds he claims to have observed the accused is too short to be reliable in particular when regard is had to the fact that on his own version he was too shocked. His evidence is also criticised on the ground that his description of the hair style that the accused was alleged to have been wearing is in conflict with the one appearing on photos 73, 74 and 75 in the photo album.
- [85] Similarly, the evidence of Sfiso is criticised on the ground that he observed the accused for a very short period and was shocked at the time he observed him. In support of this contention the defence also referred to the CCTV CAM 02 picture 5 on Exhibit "K" which indicates that the suspects entered the store at 13h33:44 and left it at 13h34:20 which means the incident took 36 seconds.
- [86] Zaheer's evidence is criticised on the ground that he failed to identify the accused at the identity parade which was held at the Diepkloof SAPS premises on 17 December 2017. It was further argued that his pointing out of the accused in court should be treated as dock identification and should thus be accorded little weight.
- [87] The evidence that sought to link the accused with Thabiso through the cell phone data and the crime scene in question was also criticised for not showing beyond reasonable doubt that the data placed them at or near the scene of the crime prior to the robbery. It was argued that the proposition that the calls from cell phone number 0646437006 should be rejected as the telephone calls may have been made by another person in whose name the phone was registered in terms of the RICA records.

- [88] The version that Thabiso died at the scene in the Orlando Cas and that the gun found next to his body was according to the defence, unsustainable because the State failed to prove that the firearm found at the scene belonged to the deceased.
- [89] As indicated earlier in this judgment the State led the evidence of three witnesses concerning the identity of the accused. The first witness in this regard is Andries who was stopped, as he was exiting from the counter side through the red security gate in the store, by the accused and the other robber. According to him the robbers at that point were walking into the store. He observed the front profile of the accused who at that point was about half to a meter away from him. It was during the day and nothing obstructed his view of the accused. It was during sunny day and the lighting inside the store was good. The brightness outside store is confirmed by the video footage.
- [90] Sifiso was the second witness to testify about the identity of the accused. He saw the accused in the store at the time he grabbed and pointed a gun at him. It was at this point that he looked and saw the accused who was very close to him. He was able to observe the accused for approximately one minute and his observation in the store which was bright and clear was not obstructed by anything. He described the physical features of the accused and how he was dressed.
- [91] He saw the accused again after the shootings when he (the accused) was seated next to the door with a blood stained T-shirt. His version during evidence in chief and cross examination was consistent regarding the features of the accused including how his was dress.

- [92] The third time that Sfiso saw the accused was when he pointed him to the police at the point when he was seated on the ground in the informal settlement.
- [93] The third witness to testify in relation to the identity of the accuse is Joao who described how he saw two men running towards the railway line after he heard gun shots not so far from where he was. He describe how one of them was dressed in a black winter hat, blue work suit jacket and jeans. He joined the other community members who followed the accused with his co-perpetrator across the railway line into the informal settlement. He found the accused seated on the ground injured. He was certain that the accused is one of the two men he saw running away after he heard the gun shots in the neighbourhood.
- [94] The last witness to testify about the identity of the accused is Zaheer, the owner of the store. He attended the identity parade but was unable to positively point at the accused. He pointed the accused in court. His evidence is thus dock identification.
- [95] In dealing with the approach to adopt when dealing with dock identification the court in *Mafikili v S*,¹⁵ held that:

“8] The cases make it clear that evidence of a dock identification is not inadmissible, as had been suggested in *S v Maradu*, but that a dock identification ‘may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight’, as has been held in *S v Tandwa and others*.³ As with all evidence of identification, dock identifications carry with them dangers of which a

¹⁵ (CC56/01) [2009] ZAECHC 11 (8 December 2009).

trial court must be acutely aware. There is a danger that a lay person on seeing accused persons in the dock, 'feels reassured that he is correct in his identification, even though this may not have been the position were they were not there': and that '[t]o any member of the public ... the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect'.

[96] In the present matter Zaheer testified, before pointing at the accused in the dock, that at the relevant time the accused was slightly in front of him, had the opportunity to look at his face for less than a minute and the area they were in had good lighting. His description of the accused broadly confirms and is corroborated by that of the other witnesses.

[97] The other aspect of the identity of the accused appears from the video footage. Although the degree of clarity and quality of the footage is not perfect the visuals shows the two robbers as described by the witnesses. In this respect persons dressed in the similar manner as described by the prosecution witnesses appear on the footage. A person wearing similar clothes and a hat as described by the witnesses appears on the footage.

[98] In my view, having regard to the totality of the evidence discussed earlier, the accused was beyond any reasonable doubt placed at the scene of the crimes cited in the indictment. In other words the State has beyond any reasonable doubt shown that the accused is the person who together with his co-perpetrator carried out the robbery, the murder and attempted murder at the store on the day in question.

- [99] It follows that the version of the accused that he was never in the store at the time the offences were committed stands to be rejected on the ground that it is not reasonably possibly true. The version is inherently improbable. It does not make sense that a person injured as the accused was, would run for close to a kilometre without seeking refuge in the near shops that he ran pass as he was going towards the railway line. The danger or attack was on his version not so imminent that he could not enter any other store in the neighbourhood. This is confirmed by the version that he and his co-perpetrator could afford to await for the train to pass before crossing over the railway line. This version was not disputed by the accused.
- [100] I now proceed to deal with the issue of common purpose having found that the accused was positively identified beyond any reasonable doubt as one of the perpetrators of violence against the deceased and the owner of the store on the particular day.
- [101] The inference to be drawn from the circumstances leading up to and the surrounding infliction of the fatal attack on the deceased and the serious injury on the other victims including the owner of the store is that the accused and his co-perpetrator had the intention to cause fatal injuries on their victims.
- [102] The accused and his co-perpetrator were armed when they approach Andries and as they proceeded to enter the store. The only inference to be drawn from the proven facts is that the accused and his co-perpetrator did foresee that there might be resistance to their plan to rob

the store from people inside the store. They in the circumstances foresaw death occurring as they sought to implement their plan.

[103] Having foreseen the possibility of death occurring the accused and his co-perpetrator reconciled themselves with the foreseen possibility and proceeded to enter the store and carried out their plan.

[104] The fact as presented by the state shows that the accused was present at the time the shooting took place in the store. He was aware of the action of his co-perpetrator. He never retreated or even called upon him to stop or disassociate himself with the violent action of the other robber. The accused did not only make common purpose with his co-perpetrator in committing the offences but manifested in sharing the common purpose by acting and performing the same act as that of his co-perpetrator.

[105] The inference drawn above is consistent with all the proven facts and thus in the circumstances, I find that the accused had prior to the execution of the crime armed himself with a firearm and ammunition which he used in the execution of the plan to rob the store. He thus did foresee death occurring in the course of the execution of their plan but was reckless as to the consequences thereof.

[106] The cumulative effect of all the proven facts lead to the inference of guilt being the only reasonable one. I am in this respect satisfied that the State has proved the guilt of the accused beyond any reasonable doubt in relation to all the charges proffered against him.

[107] In the circumstances Mr Mandla Shezi you are found guilty of all the charges that appear on the indictment. In other words you are found guilty of the following:

1. Count 1 guilty of robbery with aggravating circumstances.
2. Count 2 guilty of murder.
3. Count 3 guilty of guilty of murder.
4. Count 4 guilty of attempted murder.
5. Count 5 guilty of unlawful possession of firearm.
6. Count 6 unlawful possession of ammunition.

E Molahlehi

Judge of the High Court

Representation:

For the State: Adv Surrendra -the Department of Public Prosecution

For the defence: Adv Simpson – Legal Aid South Africa

Judgment delivered: 13 September 2019