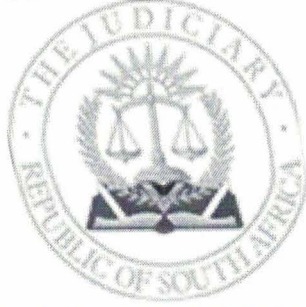


REPUBLIC OF SOUTH AFRICA



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

CASE NO: SS14/2020

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED: <u>YES</u>
	<u>17/05/2021</u>
	DATE
	<u>J. Mabebele</u>
	SIGNATURE

In the matter between:

**THE STATE**

and

**BONGANI BALOYI**

---

**J U D G M E N T**

---

**MABESELE, J:**

[1] The accused is facing four counts of attempted murder and a count of murder, read with section 51(1) of the Criminal Law Amendment Act, 105 of 1997.

[2] The allegations against the accused is that on or about 12 September 2012 and at or near Christian de Wet Road, Roodepoort, the accused did unlawfully and intentionally attempt to kill Urgent Mayo (Count 1).

[3] On 3 October 2019 and at or near South African Drive and Central Africa Republic Road, Randburg, the accused allegedly did unlawfully and intentionally attempt to kill Thabo Mashola (count 2) Shima Marutha (Count 3) and Tshepang Nkwana (Count 4) and did unlawfully and intentionally kill Seja Nkwana (Count 5).

[4] The accused pleaded not guilty to each count. With regards to count 1 and 5, respectively, the accused pleaded self-defence. He made admissions in terms of section 220 of Act 51 of 1977 and admitted, *inter alia*, the course of death of the deceased in count 5, being a "gunshot wound to the head, chest and abdomen" as stipulated in the medico-legal post-mortem examination report marked exhibit 'E'.

[5] Lieutenant Colonel Marais testified on count 1. He has been in the employ of the SAPS for 24 years to date. He was stationed at the Honeydew police station in 2012.

[6] On 12 September 2012, around 07:12, Mr Marais, who was a passenger in a state vehicle which was driven along Christian de Wet Road toward Honeydew, noticed the two vehicles parked outside Jean Fouche road. The vehicles were in the opposite direction not far from him. Three people were standing next to the vehicles and arguing. One was wearing a police uniform and the other holding a firearm in his hand. Having noticed that incident he asked his colleague, Eksteen, to make a U-turn and drive to the area where the vehicles were parked. On their arrival at the scene they stopped 20 metres behind the two vehicles. As he alighted from the vehicle and walked towards the two vehicles he saw the person who had carried a firearm, being the accused, fire a shot at the person who was standing close to the vehicles, being Moyo. After that incident he ran closer to the accused and disarmed him of the firearm. He did not witness any physical fight between the accused and Moyo before a shot was fired.

[7] After Marais had disarmed the accused of his firearm he found out from both of them what they were arguing about. Since none of them had given him a clear explanation he decided to arrest them.

[8] Mr Thabo Mashola testified on counts 2 to 5. The deceased in count 5 was his brother-in-law. Mashola testified that on 3 October 2019, at approximately 19:00, he and his friend, Chicco, were in the company of the deceased and his 4-year-old boy in the deceased's vehicle. They were travelling to Honeydew. He occupied the front passenger seat and Chicco and the boy occupied the backseat. The three of them (that is he, Chicco and



the deceased) had consumed alcohol earlier that day but were ~~not~~ drunk. Along the way they reached an intersection at the South African Drive and Central African Republic Drive. Immediately after they had driven through the intersection a white golf which was travelling in the opposite direction towards them made a U-turn and drove in their lane behind them. Thereafter the golf suddenly drove pass them and travelled slowly in front of them. Upon realising that, the deceased overtook the golf and drove parallel it with the intention to ask the driver of the golf about his manner of driving. Since the windows of the golf were closed the deceased was unable to talk to the driver. The deceased decided to drive pass the golf and immediately stopped his vehicle in front of the golf, thereby forcing the driver of golf to stop behind him. After both vehicles had stopped the deceased alighted from his vehicle and approached the owner of the golf. The deceased did not carry anything in his hands. Few seconds after the deceased had alighted from his vehicle he heard a gunshot and a bullet smashed the back window of the deceased's vehicles while he, Chicco and the little boy were still inside. He explained that in fact the deceased was on his way back to his vehicle when he heard the first shot. The witness testified that while the deceased was in the process of getting into the vehicle he got out of the vehicle and approached the driver of the golf with the intention to calm him down. When he reached the driver at his vehicle he was pointed with a firearm and took cover on the other side of the vehicle. Thereafter he heard several shots. He ultimately ran across the road and hide among the group of people who were standing not far from the crime scene. Lateron he noticed a police vehicle at the intersection where the deceased had just drove through before his vehicle and the golf had stopped.

[9] He saw the driver of the golf running to the police and handing over the firearm to them. He too, ran to the same police to inform them that they were being shot at. As he was about to reach the police he heard the boy cry inside the vehicle of the deceased and he quickly turned and ran to the deceased's vehicle to save the boy. The witness testified during cross-examination that he made two statements to the police. The first statement was obtained at the crime scene and second statement obtained at the police station a day or two latter. The witness was confronted with these two statements and asked to explain the discrepancies insofar as they relate to the conduct of the deceased at the golf after he had alighted from his vehicle. It was pointed out to him that in the first statement he mentioned that the deceased knocked at the window of the golf whereas in the second statement no mention was made about the deceased knocking at the window. His response was that he was still angry when he made the first statement and calm when he made the second statement. He testified that he does not know who shot the deceased and how the deceased got shot. He disputed the version of the accused that he took part in the assault on him.

[10] Mr Shima Marutha, known as Chicco, was in the company of Thabo and the deceased when the deceased drove pass the vehicle of the accused and stopped in front of him. Thereafter the deceased alighted alone from his vehicle and did not carry anything in his hands.

[11] The witness said that since he was playing with the little boy at the backseat he did not notice what happened between the deceased and the accused after the deceased had alighted from the vehicle and approached the accused at his vehicle which was parked behind the vehicle of the deceased. He said that the deceased came back and got into his vehicle. Immediately after the deceased had closed the door he heard a gunshot and a bullet smashed the back window of the vehicle of the deceased. Thereafter he immediately took cover inside the vehicle and protected the little boy with his body against the glasses. As he lifted up his head and look at the back he heard one more bullet on the side of the deceased's door. When he turned his head to see who was firing a shot he saw a man pointing a firearm. The deceased was still inside the vehicle. After he had noticed that, he tried to open the door and escape. While he was still struggling to get out of the vehicle he heard one more shot. He ultimately forced his way out of the vehicle. As he lifted up his head he saw the deceased and the man standing together at a short distance away from the vehicle of the deceased. He does not know how it came about that the deceased got out of the vehicle. As he was watching the deceased and the man next to him, he saw the deceased crawl. Soon thereafter he heard a gunshot and the deceased fell to the ground. Shortly thereafter he saw the police vehicle at a four way stop not far from him. The accused ran to the police and gave them a firearm. Thereafter the police put the accused inside the police vehicle and drove with him to the crime scene. From the scene the accused was driven to the police station.



[12] Dr Gina Rowe testified in respect of the wounds which were identified on the body of the deceased as per the medico-legal post-mortem examination report marked exhibit 'E'. The doctor testified that one bullet penetrated the right upper arm and went through the right hand side of the chest and passes through the body and exited on the left. She testified that the shooter must have been on the right side of the deceased when he fired the bullets that penetrated the right upper arm and shoulders and could have been standing some distance away from the deceased. With regard to the entrance wound in the left frontal area of the head the doctor testified that the bullet was fired at a close range (because of the presence of a tattooing in the left side of the forehead) and went through the brain, mouth and tongue and through the lung. She testified further that the manner in which the bullet penetrated the head into the body suggests that the deceased must have been in a lower position than the shooter.

[13] Mr Thomas Nkwasho is in the employ of the South African Police Services. He testified that on 3 October 2019 at about 19:00 he and his colleague were patrolling around Cosmo City area in a marked police vehicle. As they approached a fourway stop on the South African Drive Road, a certain boy stopped them and told them of the shooting incident. While the boy was still talking to them the accused approached them with a firearm in his hand and told them that people were fighting him and he shot someone. After the accused had handed a firearm to them they drove with him to the crime scene. Upon their arrival at the scene they found members of the community surrounding the deceased on the ground. Having observed that

situation he called a backup. After the arrival of the other police officers he took the accused to the police station. He testified that while the police were busy making the arrangements for the detention of the accused into the cells he heard the accused telling one of the police officers that he sustained injuries on the head, eye and knee due to his involvement in a fight with the people on the road.

[14] He looked at the accused and did not observe visible injuries. However, he made the arrangements for the ambulance to fetch the accused. Thereafter he went back to the crime scene. He did not know whether the ambulance eventually arrived.

[15] During cross-examination the witness was confronted with a warning statement of the accused marked exhibit "W" which was taken at the police station wherein the police officer noted injuries on the eye and left knee of the accused. The witness did not dispute the contents of the statement.

[16] At the close of the state case the court *mero motu* acquitted the accused on count 1 since he had no case to answer. It emerged during the trial that Mr Moyo who was the complainant in this count voluntarily withdrew his complaint or charge against the accused almost six years before the start of this trial. No evidence was led to justify the prosecution of the accused on count 1.<sup>1</sup> This is despite the fact that the state advocate had initially undertook to present evidence of the investigating officers and someone who

---

<sup>1</sup> See S V Vusi Mjoli (case no: SS 44\2020) wherein evidence was led to justify the prosecution of the accused on certain counts despite the complainant having withdrew her complaint against the accused who subsequently murdered her.



was in the company of Mr Moyo when the alleged offence was committed. The only witness who was called to testify did not advance the state case because he did not know why the complainant was shot.

[17] The accused took the stand. He first corroborated the evidence of the state witnesses who were passengers in the deceased's vehicle that he made a U-turn at the fourway stop and drove slowly in front of the deceased vehicle. He was driving alone. The deceased overtook him and drove parallel to his vehicle. During that process the deceased accelerated and stopped in front of him. He too, was forced to stop. His version is that after both the vehicles came to a halt the accused and two passengers alighted from the vehicle of the deceased and approached him while he was still seated inside his vehicle. The deceased and two passengers banged the windows of his vehicle and demanded that he should alight from the vehicle. During that process the two of them opened his driver's door and pulled him out of the vehicle. Thereafter they began assault him with fists and hit him with a hard object on his right shoulder. They ended up pushing him to the ground and continued to assault him with fists and kicking him to an extent that he became dizzy and felt pains. While he lay on the ground he pulled out a firearm from the holster on his waist and one of them kicked his hand and the firearm fell on the ground. He grabbed it and stood up. And one of his assailants grabbed it from his hand. At that stage the other two assailants assisted their colleague to disarm him of the firearm. As he was fighting for a firearm he managed to cock it and a bullet went off. Thereafter he ran away with the firearm while one of his assailant grabbed him from behind and was followed by his colleagues. He

ran for a distance of about 4 metres before his assailant tripped him and brought him to the ground and assaulted him again. While he was on the ground the deceased kneeled and throttled him and the other two held both his hands and tried to disarm him of his firearm. He testified that despite all these, coupled with loss of strength, he managed to pull the trigger twice and the bullets went off. As he tried to stand the deceased throttled him again and while he was in the process of falling on the ground slightly on his back he fired another shot and the deceased fell on him. The other two ran away. He stood up and saw the police vehicle at the fourway stop and rushed to the police.

[18] On arrival at the fourway stop he informed the police that he was under attack and shot someone. After he had handed over his firearm to the police he was put at the back of the police vehicle and the police drove to the crime scene. From the crime scene he was taken to the police station and was arrested. He testified that he sustained injuries during assault.

[19] During cross-examination the accused was referred to his affidavit marked exhibit 'X' which was used by his counsel during his bail application and it was pointed out to him that he mentioned therein that at some stage the assault on him stopped for a while, this being inconsistent with his evidence-in-chief that at no stage that the assault on him stopped. The accused admitted that the contents of the affidavit was read and interpreted to him in court and he confirmed their correctness. The accused did not call witnesses.

[20] It is common cause that there was a road rage and altercations which resulted in the assault of the accused and death of the deceased. The accused sustained minor injuries on his right eye, left knee and minor lacerations, as noted by the police in the warning statement of the accused marked exhibit "W". One bullet was discharged from the firearm of the accused and smashed the back window of the vehicle of the deceased in which a 4-year-old child was seated in the backseat. Three more shots were discharged by the accused and hit the deceased.

[21] The accused pleaded self-defence. It is not in dispute that neither the deceased nor his companions had carried weapons with them.

[22] The issues to be determined are the following:

- I. Who assaulted the accused?
- II. Was the use of firearm by the accused proportionate to the assault on him? And if not, did the accused merely exceed the limits of self-defence or committed a premeditated murder?
- III. Did the accused attempt to murder the occupants in the vehicle of the deceased when a bullet from his firearm smashed the back window of the vehicle?

[23] During closing arguments both counsel incorrectly said that the accused pleaded not guilty to murder in accordance with section 51(2) of Act 105 of 1997 whereas the accused pleaded not guilty in accordance with section



51(1) of the same Act as clearly indicated in the indictment. Both counsel were again afforded an opportunity to address the court on this issue and have corrected themselves.

[24] The evidence of Mashola is that after he had alighted from the vehicle after the bullet had smashed the window and was pointed with a firearm by the accused he went on hiding and did not see what happened to the deceased. This evidence, as correctly argued by the legal representative of the accused, does not advance the case for the state insofar as it relates to the count of murder. Although this witness was not impressive, his evidence that he and Marutha did not alight from the vehicle with the deceased is corroborated by Marutha. In any event the fact that the witness is unimpressive does not necessarily render his or her evidence inadmissible in that there are various factors which may affect the demeanour of the witness in a witness box such as intimidation by the conduct of the cross-examiner or the court room which the witness is not familiar with.

[25] The two statements which were made by Mashola are consistent insofar as his version is concerned that he remained inside the vehicle when the deceased approached the accused. His version that he was angry when he made the first statement and calm when he made the second statement later on at the police station has merit. The first statement was taken by the police at the scene when the witness was looking at his brother-in-law lying stone dead on the ground after he was shot.

[26] The tendency by the police to obtain the statements from the witnesses at the horrific crime scene where their loved ones had just been murdered is unacceptable. It can hardly be said that such witnesses were in their sober minds when they made such statements although the legal representatives persist in their argument that the witnesses made such statements while the incidents were still fresh in their minds and are not credible in that their statements differed from their evidence-in-chief. In fact what is fresh in the minds of the witnesses at the crime scene is nothing else than the gruesome murder which they had just experienced and possibly the scream or last words spoken by the deceased. Although the legal representatives have the right to cross-examine the witnesses on their statements which were taken at the crime scene there is nothing that debar them from being sensitive when cross-examining the witness on those statements.

[27] Most of the witnesses whose statements are taken at the crime scene including streets are “poor” (lacking knowledge or ignorant about their rights due to illiteracy) and to regard them as incredible witnesses in that their statements differ from their evidence-in-chief is to take away from them their self-esteem and this cannot be encouraged. It is disrespectful of someone’s right to dignity to obtain the statement from someone in the street and commission the statement in his absence.<sup>2</sup>

[28] Mashola and Marutha corroborated each other that the bullet smashed the back window of the deceased’s vehicle while they were inside the vehicle

---

<sup>2</sup> See the evidence of the police officer (Commissioner of Oaths) in S V Govender and Another Case No: SS103/2019

with a 4-year-old child and the deceased was already back to his vehicle. The evidence of these witnesses persuade me to accept that the bullet smashed the window while they were inside the vehicle and did not alight from it with the deceased when he approached the accused.

[29] With regards to the count of murder the state relies on the evidence of Marutha. This is evidence of a single witness and should be approached with caution as stated in numerous decisions. In *R V Mokoena*<sup>3</sup> it is stated that in considering the evidence of a single witness the court should investigate closely both the credibility of the witness and the reliability of the evidence given by that witness. The evidence must be clear and satisfactory in every material respect<sup>4</sup>.

[30] Marutha testified that as he was struggling to get out of the vehicle after the bullet had smashed the window he saw the accused standing next to the right door of the vehicle of the deceased and had pointed a firearm. The deceased was inside the vehicle. Shortly thereafter he heard two gun shots. This version of the gun shots is strengthened by the two cartridge cases marked 'C1' and 'C2' respectively, found on the ground on the right side of the deceased's vehicle and the front side towards the left, as depicted in the photos 1 and 2 of exhibit 'H' and a bullet mark on the right door as depicted in photo 24 of the same exhibit. This version of Marutha is again strengthened by the argument of the counsel for the accused during closing argument that

---

<sup>3</sup> 1958(2) SA212at 215 (T)

<sup>4</sup> *Mocke V S* [2008] 4 All SA 330 (SCA) See also, section 208 of the Criminal Procedure Act, 51 of 1977



he had no problem with it though he does not accept it. This last phrase is correct in that the evidence is accepted or rejected by the court.

[31] Marutha testified that he did not see how the deceased alighted from the vehicle after he heard the gun shots and seeing the accused standing on the right door of the vehicle. He suddenly saw the deceased and accused on the island not far from the deceased's vehicle. The deceased carried nothing in his hands. He then saw the deceased crawl and fell on the ground and during that process he heard a gun shot. This version of a shot is strengthened by a cartridge case marked 'C4' next to the body of the deceased as depicted in photo 39 of exhibit 'H'.

[32] When this witness mentioned that the deceased crawled counsel for the accused asked him to physically crawl in court to demonstrate that he understands the meaning of the word. That exercise did not materialise because it was stopped by the court.<sup>5</sup>

[33] All the counsel, though understandably working under pressure most of the time, should always be mindful that every witness or accused has inherent dignity and the right to have their dignity respected and protected. Similarly, the judicial officers (myself included) should always guard against being harsh on counsel when questioning them about certain issues. All these are aimed at enhancing the decorum of the court.

---

<sup>5</sup> See S V Rampai (case no: SS 122/2018) wherein state counsel (female) is encouraging the accused (female) to undress and show the presiding judge (male) the injuries on her breasts despite the fact that the J88 was admitted as evidence. The accused was stopped from doing so by the court and defence counsel

[34] The evidence of Marutha insofar as it relates to how the deceased got shot is clear and satisfactory in every material respect and is accepted.

[35] The version of the accused is that after he was pulled out of the vehicle by the three assailants he was hit with fists and a hard object on the shoulder and pushed to the ground and kicked and became dizzy and felt pains. Based on this version of events, I find it improbable that the accused could have still managed to pull out a firearm from the holster on his waist and cock it while he lay on the ground.

[36] Furthermore, it is impossible that the accused would have managed to pull the trigger three times while he lay on the ground and being throttled and had lost strength and both his hands held by his assailants. Therefore, his version that the bullet was discharged from his firearm during physical attack by the deceased and his companions is rejected as not being reasonably possibly true.

[37] Since there is evidence that the accused sustained minor injuries and a finding that Mashola and Marutha did not alight from the vehicle with the deceased when he approached the accused the reasonable conclusion is that the accused was assaulted by the deceased.

[38] The question now is whether the accused's plea of self-defence is sustainable. A person acts in self-defence, and his or her act is therefore

lawful, if he or she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon him or her bodily integrity, property or other interest which deserves to be protected provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack (Snyman Criminal law, p.102)

[39] The accepted versions of Mashola and Marutha that the deceased was already at his vehicle when the bullet smash the window suggests that the accused had fired a bullet after the deceased had gone back to his vehicle after he had assaulted him. This conclusion is strengthened by the version of the accused which is stated in his affidavit marked 'X' that the assault on him stopped for a while. Therefore, it cannot be said that the accused discharged a bullet to repel any attack on him. In addition, the evidence of Dr Rowe that the person who shot the deceased on the right arm and shoulder must have been standing at a distance away from him suggests that the accused was not being assaulted when he fired shots.

[40] After the accused had fired the first shot he approached the deceased in his vehicle and fired more shots. Another shot was fired when the deceased was outside the vehicle on the island and hit the deceased on the left side of the forehead below the hairline and went through the mouth and the lung into the spinal column. Since the first shot was fired until the last shot on the island, the deceased, according to the evidence of Marutha, had not pose any threat to the accused.



[41] The question now is whether the accused merely exceeded the bounds of self-defence or committed a premeditated murder.

[42] The term 'premeditation' refers to an action of planning something (especially a crime) beforehand. The plan may take a long or short period of time depending on how soon the planner intends to achieve the results.

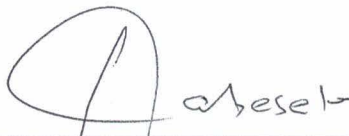
[43] The accused fired the first shot when the deceased was no longer near him and not posing any threat to him. When the accused approached the deceased inside his vehicle he had already planned to murder the deceased in that he fired more shots. This plan to murder the deceased is also demonstrated by the accused's conduct of again firing a shot on the deceased's forehead on the island despite the fact that the deceased had not pose any threat to him. For these reasons the accused should be guilty of murder as charged.

[44] The accused fired the first shot which smashed the window of the deceased's vehicle in which there were three passengers. Undoubtedly, the accused ought to have foreseen the possibly that the passengers may be present inside the vehicle but nevertheless decided to fire a shot at the vehicle. Therefore, the accused is also guilty of attempted murder as charged.

[45] I wish to express my displeasure by the unprofessional manner in which both the counsel conducted themselves at the time they were listening to the evidence of a witness in the recording machine. Counsel should always respect both the court and members of public in court.

[46] In the result, the following order is made:

1. The accused is acquitted on count 1.
2. He is guilty on counts 2,3,4,5 as charged.



---

**M. M MABESELE**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of Judgment	:	17 May 2021
For the State	:	Adv Dube
Instructed by	:	Office of the Director of Public Prosecution
For the Accused	:	Mr Lisha
Instructed by	:	Lisha Attorneys