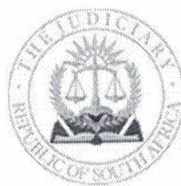


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF South Africa GAUTENG LOCAL DIVISION,
JOHANNESBURG

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

05 JULY 2022

A handwritten signature in black ink, appearing to read 'M. Moko', enclosed within a large, loopy oval stroke.

In the matter between:

case no: SS 065/2021

THE STATE

Versus

KEKANA TSHEPISHO

MOTSEOTHATA CIDRAAS BOITUMELO

LEGODI MADIMETJA JOSEPH

MOHAMMED VICTOR NKOSINATHI

1st Accused

2nd Accused

3rd Accused

4th Accused

INTRODUCTION

1. All the accused persons are members of the South African Police Services, working for the section or unit called Public Order Policing. On the 10 of March 2021, they were on duty and were defusing a strike or protests by Wits students. Their immediate supervisor was Captain Shange together with Colonel Moeketsi as their overall Commander.

THE CHARGES

2. The State put the following charges against the accused persons,
 - a) Murder: In that upon or about 10 March 2021 and at or near De Beer street in Braamfontein, in the District of Johannesburg Central, the accused did unlawfully and intentionally kill Mthokozisi Edwin Ntumba by shooting him.
 - b) Attempted Murder: In that upon or about the date and place mentioned in count 1, the accused did unlawfully and intentionally attempt to kill Masiu Oarabile Lefa, an adult male by shooting at him.
 - c) Attempted Murder: In that upon or about the date and place mentioned in count 1, the accused did unlawfully and intentionally attempt to kill Siphesihle Mtshweni, an adult male by shooting at him.
 - d) Attempted Murder: In that upon or about the date and place mentioned in count 1, the accused did unlawfully and intentionally attempt to kill Nikiwe Rasmeni, an adult female by shooting at her.
3. All the accused persons pleaded not guilty to all the respective counts and they all elected to remain silent.

4. The State led a number of various witnesses, presented some exhibits including a video footage of the scene as evidence. Immediately after the closure of the State's case, the legal representatives for all the accused persons applied for a discharge of all accused persons in terms of section 174 of the Criminal Procedure Act 51 of Act 1977. The State is objecting to the application. All parties filed heads of arguments and further presented oral arguments.

THE LEGAL POSITION

5. The test in an application in terms of section 174 was put as follows by Willis J in *State Versus Ndlangamandla & Another* 1999(1) SACR 391(W)

"If, at the close of the case for the Prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty"
6. This section allows a court to exercise its judicial discretion. The learned author Professor Skeen in "The decision to discharge an accused at the conclusion of the State case: A critical analysis" (1985) 102 (2) South African law Journal 290 stated that "...it is an improper exercise of a judicial discretion to put a accused on his defence where a *prima facie* case has not been established "
7. Every accused has a right to a fair trial. Section 35 (3) of South African Constitution Act 108 of 1996 states that every accused person has a right to a fair trial, which includes the right- (h) to be presumed innocent, to remain silent and not to testify during the proceedings, (j) not to be compelled to give self-incriminating evidence.

8. In an application of this nature, the leading case is *S v Lubaxa*¹ where the Supreme Court of Appeal held as follows: “[18] *I have no doubt that an accused person (whether or not he is represented) is entitled to be discharge at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence.*[19] *the right to be discharged at that stage of trials does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated (BECKENSTRATER V ROTTCHER AND THE UNNISSEN 1955(1) SA 129 (A) AT 135 C-E) and the constitutional protection afforded to dignity and personal freedom (S10 and S12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by S10 and S12.”*
9. It has been held that the credibility of state witnesses at this stage of the proceedings only plays a very limited role. In *S v Swartz*² It was held that

¹ *S v Lubaxa* 2001 (2) SACR 703 (SCA)

² *S v Swartz* 2001 (1) SACR 334(WLD) 335 e-f,

“Credibility, in an application for a discharge under S174, is one of the features to which the court can have regard but it plays “only a very limited role”. It is one of the factors to which the court can have regard in the assessment of the quality of the evidence. The contextual scene, the evidence given in the case that conflicts with other evidence which renders such evidence irreconcilable and unacceptable, all go towards determining the quality of evidence”

10. In *S V Mpetha and Others* ³, Williamson J held that “relevant evidence can only be ignored if “it is of such poor quality that no reasonable person could possibly accept it”

11. In simple terms when considering a s174 application, the court in *S v Dewani* ⁴ stated that “to therefore summarise the legal position regarding application in terms of section 174:

- a) An accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of conviction other than if he enters the witness box and incriminates himself;
- b) In deciding whether an accused person is entitled to be discharged at the close of the state’s case, the court may take into account the credibility of the state witnesses, even if only to a limited extent;
- c) Where the evidence of the state witnesses implicating the accused is of such poor quality that it cannot safely be relied upon, and there is accordingly no credible evidence upon which a court, acting carefully, may convict, an application for discharge should be granted”

12. I accordingly summarize the State’s evidence.

Lerato Mokoena

³ *S V Mpetha and Others* 1983(4) SA 262

⁴ *S v Dewani* [2014] JOL 32655 (WCC)

13. She is employed at 27 DE BEER Street as a Practice Manager. The place where she works is called My Clinic. On the 10th March 2021, the deceased (Mr Mthokozisi Ntumba) visited the clinic as a patient. After having seen the doctor he went out. She heard some gunshots and when she looked outside, she saw the deceased lying down on the ground. She ran towards him and took everything important from him. She then went inside her workplace to call the doctor who later attended the deceased. She could not tell as to how the deceased got injured.

14. From the cross-examination by legal representatives it was clear that accused person deny having shot the deceased.

Dr Tebogo Sedibe

15. He is a professional Doctor at My Clinic. He saw the deceased on that day as a patient. After he had left the surgery, he heard a loud sound, sounding like a firearm. Whilst proceeding to see outside as to what was happening, he met with Ms Lerato Mokoena who told him that the deceased was lying outside. He went to where deceased was, found him gasping. He had a stain of blood on the shirt he was wearing. He had a wound on the face and open wound on the left chest area. He performed what is called CRP on the person of the deceased. He could feel no pulse and no heart activity meaning that the heart had stopped further meaning that he has died. Paramedics arrived and he was certified dead.

16. During cross- examination by legal representatives, it was put to him that whilst performing CPR, he could damage the ribs and lungs. And it was also clear that he did not see who shot the deceased.

MLUNGISI MFUNISENI HLELA

17. He is working as a security officer at Johannesburg Institute of Engineering and Technology. On the 10th of March 2021, he was on duty at 27 De Beer Street in Braamfontein and it was between 9-10 am. At his workplace, there are 2 (two) gates (Main entrance and inside entrance). The main entrance is always open but second entrance is accessible through access card. So one who would access would have to wait for him to open it. Whilst busy registering a visitor, he heard a gunshot, saw students outside running to the main gate.
18. He went to investigate and saw Police Officers shooting at the students. He saw one Police Officer grabbing the student trying to take her to their vehicle. He told the police that these students were waiting for a bus to take them to their workshop. The Police Officer in question listened and released the students. There were 3 (three) Police Officer firing shots at students. He noticed someone lying on the ground, he got closer to that person, saw blood on his right side of the chest. The receptionist of My Clinic came and took the plastic bag of that person and further called the Doctor.
19. He cannot tell as to how that person got injured. Some students showed him injuries they sustained and he took them to the doctor's surgery. They claimed to have been shot by Police.
20. Under cross – examination by the legal representatives, it was clear that he did not see who injured the deceased but stated that the students were injured by police but cannot point out those police officers. He was also asked about difference between his police statement and his evidence in chief, it was also put to him that the accused persons did not fire any shot.

Judy Twala

21. She stated that she is employed by IPID (Independent Police Investigative Directorate). On the 10 march 2021, she was on standby duties and received a call from Hilbrow police station informing her about a crime scene of murder at Braamfontein CBD. She attended the scene and found captain Redgar who advised her that 3 (three) students were shot by police and also a by stander was also shot. He pointed out the deceased person, it was an African male lying on the pavement. He was later identified to her as Mthokozisi Ntumba, who was a patient at My Clinic.
22. She took over the investigation of the crime scene. The position where the deceased was lying, she found 6 (six) plastic cartridges that are used by police. She went to the doctor's surgery to interview Dr Sedibe. The Doctor confirmed that Mr Ntumba was his patient and that he was shot after he left the surgery. She also obtained statements of 3 (three) victims after they were discharged by the doctor on the 12 march 2021. The victims submitted to her their J88 reports together with their photos.
23. She also obtained a video footage on the 12th of March 2021 from Dr Sedibe and viewed it in his office as he also had a video system. Warrant officer Wood from the Provincial Criminal Record Centre took photos of the deceased and also collected the cartridges. She went to Betha Street to approach the public police unit that had an operation on the day. She spoke to captains Moeketsi and Shange. They both indicated that they were not aware of the police officers involved in the shooting. Captain Moeketsi said its metro police or security guards involved in the shooting. Such piece of evidence was provisionally admitted as it was hearsay. She informed them that she viewed a video footage at the Doctor's surgery. She made appointment with Uniform Commanders to view the footages on the following

day. Then the following day, Unit Commanders of Public Order Policing arrived at her offices and the footage was played for them. Captain Shange identified the Nyala as the vehicle used on that day. He further identified the 4 (four) police officers in the Nyala with their names.

24. She then requested the logbook (SAP15) for the Nyala. The SAP13 showed the crew members in that Nyala. The SAP15 indicated that the driver was accused 3 (Mr Lekgodi). It had information about accused 1 and 2 and another person by the name of Mashamba. Mr Mashamba made a statement that he was not in the Nyala at the time of the incident. From the pocket book of accused 1, 2 and 3 there was no information about the incident at De Beer Street. However, the pocket book of accused 4 corroborates the contents of a video footage. She attended at the mortuary when the post mortem was conducted. She was with warrant Officer Wood and Ballistic Expert (Colonel Mangena). The post mortem was done by Dr Mahuluhulu.
25. During cross- examination by legal representatives, accused persons denied ever shooting at the deceased and having shot and injured any student. It was also put to her that their visit during post mortem impair the pathologist in doing her job as their visit there being uninvited influenced the pathologist. Further put to her that a rubber bullet is regarded as a nonlethal weapon. It was put to her that it was not accused 4 who wrote about the incident on the occurrence book.

Colonel Jacob Johannes Beeslaar

26. He stated that he has 38 years of service. On the 10th March 2021 at 11H30, he was driving to Johannesburg CBD and heard from Police Radio that a person was shot during protest. The previous day, there were protests at the Empire road. He confirmed having watched the video footage. From that footage, he saw Nyala reaching the scene, there were members of the public on the pavement. The Nyala vehicle stopped on the right lane close to the members of the public. They used shot guns. He only recognized Mr Mohammed. He testified at length on how to deal with crowd management. He further mentioned that the accused persons did receive training on crowd management.
27. Under cross – examination, he stated that he only viewed the video clip but could not see clearly who shot there as he was not there. He described the white bullet given to members as a very weak one. In his experience, he never met or came across of a weak white bullet killing a person. It was put to him that accused did not kill the deceased.

Captain Bongiwe Claudia Gqotso

28. She is a captain from South African Police Services attached to forensic Lab in Pretoria. She works as an image analysis dealing with CCTV footages. At forensic section, there are different sections for example the admin component receives all cases from the investigating officers. The admin will then distribute it to relevant sections. Whenever she receives an exhibit for analysis, she first checks if what is in the covering letter corresponds with the exhibit and further check if the exhibit has not been contaminated with. So in respect of this case, all the exhibits she received were intact and not tempered with.

29. On the 23 of March 2021, she received exhibit bags. The first bag had a USB with its number being EA 5002710318, second evidence bag contained a memory stick, its number being PA 5002661677, third bag also containing a memory stick, its number being PA50026616 and the fourth bag containing a DVD with its number being PA 5002661685. She marked the exhibits with unique numbers. The first memory stick was marked T 388/1, second one was marked T 388/3 and the DVD was marked as T 388/4.
30. From there, she used a skill image to view the footages. She was also requested to do photo album and make copies. She sealed all the copies in one bag marked PA5002727444 and later handed them to forensic admin staff until the Investigating Officer came to collect them.
31. During cross examination by legal representatives of accused persons, she stated that she enhanced the photos following the instructions or request was, how was the by stander killed. She indicated that there was no tempering with exhibits. She cannot say that the video footage was authenticated. She did not do the downloading of the footage by herself.

Colonel Busisiwe Moeketsi

32. She works for the Public Order Police based in Diepkloof. On the 10th of March 2021, she reported for duty at 6H00 and to knock off at 18H00. She was an operational Commander. Captain Shange was a platoon commander under her. Since there were on going protest at Wits, she issued instructions that captain Shange should report for duty at 4am. Around 9H50, she overheard from the police radio that Wits students were getting ready to exit the campus. After some few minutes, she overheard that they were exiting, going towards Jorrison Street so

she proceeded to Jorrison Street. She found the road being blocked with stones, yellow dustbins and tyres. She spoke with Captain Shange to send Police Members with a Nyala. The Nyala came, she boarded into it and it was driven by accused 3. Inside the Nyala, it was herself, accused 1 and 3, and behind them was a small vehicle with accused 2 and Constable Mashaba. Upon reaching Jorrison Street, they all alighted from motor vehicle. The objective was to engage with the protestors. Accused 3 was in possession of a camera, taking or capturing the video. As they got closer to students, the students started pelting stones. She then asked accused 1 to throw a stun grenade. Students ran away taking different directions but they regrouped again and further threw stones. She then issued instructions to use shot guns with rubber bullets. Indeed the students dispersed and the members of the public helped in removing the barricades. Seeing that the mission was accomplished and the street now open, she called back the members into the nyala. So the aim was to patrol. In the nyala, it was accused 1, and Constable Mashamba. She then proceeded to Jorrison Street where she found other members on standby. Whilst still there, the nyala arrived, accused 4 and 3 alighted and advised her that they have arrested four students. She told accused 4 to take the arrested people to the police station. The media personnel told her that Police had killed a person. She tried to solicit information about that but could not get it, until she knocked off duty. Then the following day whilst still busy trying to write a report, accused 4 came having a video that depicts a nyala and police in possession of pumps. (Shot guns)). She then received a call that they should report at IPID Offices. On arrival there, they were shown a video footage, the people depicted there were pointed by captain Shange. After that investigations continued.

33. Under cross examination, the following cropped out: that her police statement was not commissioned, that according to the information she received there was a person lying on the ground allegedly shot by police. She proceeded to the scene to get more information but could not reach the scene as students were angry. She stated that she did not know that their members shot an innocent bystander, such information came from IPID Investigating Officer. Even at this stage, she cannot say it was their members who had shot the deceased. She was asked a lot about commands she issued at Jorrison Street. She further stated that the white rubber bullet they used is weak, she knows no incident wherein the white rubber bullet killed a person.

Captain Mkhanyiseli Shange

34. He stated that he has been a member of South African Police Service for 35 years. He works for Public Order Policing in Johannesburg. On the 10th of March 2021, he reported on duty with accused persons and he was their commander. On that day, his members were 21(twenty) inclusive of accused persons. Around 9am, he and captain Moeketsi received a message or a communication that Wits students were moving towards Jorrison Street. He then instructed the four accused to take Nyala. Accused 3 was the driver and also a camera man. His aim was that accused 3 would be capturing the occurrence of that day as according to SAPS Policy, records of any incidents should be kept. From there, they left with captain Moeketsi to the other side of the road and he remained at Empire road and later moved to Jorrison Street where he met Colonel Beslaar.

35. Colonel Beslaar requested himself and accused 4 to monitor the other side. He ended up on the other side as he was about to knock off. Then Colonel Beslaar

later released him and accused 4. He was shocked when he was called by IPID detective to view the video footage. After he had viewed the video clip, he saw the accused persons in the video clip and it was said they were involved in a shooting. He had no knowledge of a shooting and did not receive any report of shooting.

Cross examination by Legal Representatives

36. He was asked about the contents of his police statement, and further about the courses he attended. He stated that in his experience, he never heard of a weak white rubber bullet killing a person and that it does not kill. He agreed that 10th of March was not a normal or usual day, there were various protests and students were moving up and down so police had to react immediately. There was another nyala that was driven by Phakathi. In that nyala, he remembers Sergeant Serabe and Lephane. He instructed his members to hand over the shot guns as it was said that they were involved in a shooting.

Dumisani Sydweel Mashamba

37. He is a police constable based at Diepkloof under Public Order Policing. On the 10th of March 2021 he was on duty at Johannesburg CBD. He attended a complaint wherein students had blocked the road. He was with accused 1, 2 and 3. They were dispersing students, another Nyala came, and he cannot tell who was driving it as accused 3 was busy taking videos. Accused 1, 2, 3 and 4 left with the nyala but after a while, returned having arrested students. They all went to the police station to take down statements. They then all went back to Braamfontein. They found colonel Beslaar and many police officers. Colonel Beslaar instructed them to return the shot guns and they complied.

Cross-Examination by Legal Representatives

38. He said that it was not only POP dealing with these unrest in Johannesburg and Braamfontein. There was a security company with firearms. Those security officers were also patrolling, arresting people and handing them to police. He further stated that there was a security officer who chased a student. He was riding a bike and he is the one who took a statement to that effect. He also saw Metro Police Officers. He further stated that whilst in the nyala, he overheard colonel Moeketsi calling accused 3 and after their conversation, accused 3 enquired if they knew about the student who was shot and killed and they told him that they had no knowledge of that.

Siphesihle Mthandeni Mtsweni (for count 3)

39. He was a student at Johannesburg Institute of Technology and Engineering. On the 10th of March 2021 he came out of the class so as to attend in another campus. It was time for him to change the periods. He was from Debeer Street to Station Street together with his friend. He noticed that there was a strike and he was far away from it Whilst in Station Street, he heard a siren from a motor vehicle then saw a big police truck travelling on the oncoming road. It stopped in front of him. Police without saying anything shot at him and left. He suffered injuries next to his ear and right side of the lower cheek. He became dizzy and fell down.

40. He later stood up and went to the reception of the campus. The receptionist took his picture from her cellphone and sent it to the principal. He also took his picture using his cellphone. He went to the clinic but did not get assistance from the

clinic as they were still busy with the dead person who was lying on the ground. He devised means to get a clinic in Soweto where he was assisted.

Cross-Examination by Legal Representatives

41. It was put to him that the nyala that was used by accused person did not have a siren so he was not shot by police who were in nyala. He stated that he later saw the same police truck that shot at him at De Beer Street. It transpired that he did not take photos by himself but were taken by his friend Brendon. He mentioned that he was shot at Station Street. It was put to him that their Nyala was never at Station Street.

Nikiwe Rasmen (Count 4)

42. On the 10 of March 2021, she finished attending classes from South Campus to main Campus so she was waiting for a bus to transport her to Brixton for a workshop. She left other students waiting and went to pay for a work suit at the reception. After having paid, she went back to join other students. After some time, a nyala came and police started shooting. Students started running, she ran towards the revolving gate and students got stuck and she was behind them. They pushed that revolving gate until it malfunctioned and she went to reception. She asked students to take her photo that is where she realized that she was shot twice at the back. After the police officers had left, she then went to clinic and was later transported to Hillbrow hospital. At the hospital, her wounds were dressed and she was given medication.

Cross – Examination by legal Representatives.

43. She was asked about paragraph 8 of J88 that says Dr concluded that she was allegedly shot with rubber bullets during the protest and she said that is not true. It was also put to her that the photo she was referring to does not have her face. She was also asked about the difference between her police statement and oral evidence. In the statement (paragraph 2), she said she took her picture whereas in court she said someone took photos of herself. It was further put to her that she alleged that she was shot by police officers but does not know who shot her. She agreed and it was put to her that she was not shot at De Beer Street.

Lefa Oarabie Masiu (Count 2)

44. On the 10th of March 2021, he was waiting outside the school for a bus to take him home in Brixton as he was done with his classes. There was a strike in another side of the street, students came to their side, screaming and making noise. An armour police van appeared and police just opened fire without any warning. He got shot at her right hand and right bottom of the chest. One of the teachers saw that she was injured, took her to other students who were also injured. He was taken to the clinic and there was no doctor, ambulance came and they were taken to the hospital, check -ups were done on the wound and it was patched.

Cross-examination by legal representatives

45. It was put to him that the doctor wrote on the J88 that he was shot during a protest with a rubber bullet on the chest and arm. He answered by saying he did not tell the doctor that, what the doctor wrote there was false. It was further put to him that Mr Hlela said the police officer he spoke to was not in possession of the firearm. He said he was in possession of firearm. He further said he was not sure

as to when he was he shot. It was denied that he was shot by accused persons.

It was put to him that he was not shot at school but somewhere else.

46. Chain evidence as to how the exhibits landed in forensic laboratory was not in a dispute so evidence in that regard was exhibited by consent.

Harry Davis Redgard

47. He is a captain in SAPS stationed at Hillbrow Police Station. He is a duty commander from Monday to Monday. His duty involves attending serious crimes for example, murder, robbery, car hijacking if members of SAPS are involved. On the 10th of March 2021, he attended a scene at De Beer Street in Braamfontein where there was a shooting during a protest. On his arrival there, he found a black male lying on the pavement. Upon enquiries to the doctor whom he found there, he explained that police were shooting rubber bullets. He saw some 7 (seven) spent cartridges next to the deceased. He immediately contacted IPID and Ms Thwala and photographers of crime scene came. Whilst still on the scene, there were 3 (Three) students who claimed to have been injured. He then went back to the police station and later received a call to the effect that the 4(four) police officers involved in the scene were at the police station. He then took their shot guns and booked them in the SAP13.

Cross-examination by Legal Representatives

48. It was put to him that once you fire a shot from a shot gun, the cartridge falls down next to the person shooting and he agreed. You observed these seven (7) cartridges around the body of the deceased, what would that imply. His answer was that as to how they got there (around the corpse) he bears no knowledge.

He stated that the cartridges were taken by a person from LCRC. It was put to him that the accused persons were never at the scene where deceased was lying and further that the cartridges around the deceased were placed mysteriously by unknown person with a view to strategically falsely implicate them. Accused deny having shot at the three (3) students. It was further put to him that according to evidence of Lerato and Dr Sedibe, next to the deceased there was nothing unusual, that is no cartridges. It was put to him that warrant officer Wood referred to Six (6) cartridges. He was further asked about his police statement for example that he did not record that he found cartridges from the crime scene and further that he did not write that he met the students.

Chantel Wood

49. She is employed as a crime scene Investigator around Gauteng. On the 10th of March 2021, she attended a crime scene at De Beer Street where there was a dead person. The crime scene was pointed to her by Captain Molefe as he was the one in charge of the crime scene. She took photos of the scene, collected evidence and put it on evidence bag. At the crime scene, he found a black man lying on the ground and further found 6(six) cartridges. She put each one on a separate bag. She photographed each bag individually and then put all the bags into one bag and sealed it. She took the bags back to her offices; placed them on the safe and further took them to Forensic section in Pretoria.

Cross-examination by legal representatives

50. She indicated that nobody told her about another scene, she was only called to investigate the scene of the death of the deceased. If there were other shootings,

she would have been told. It was put to her that she was not told about other shootings because that never happened. It was put to her that captain Regard mentioned 7 (seven) cartridges whereas she mentioned 6 (six) cartridges. She stated that the crime scene was tempered with before she arrived. When put to her that the first three (3) witnesses to arrive at the scene did not see the cartridges around the deceased, she said she had no comment. She denied having received any cartridges from Ms Judy Thwala. She stated that other cartridges found from the school were never brought to her attention. It was put to her that at the college on the 12th of March 2021, they discovered plastic cartridges and students going in and out of the college. If that was a crime scene and they allowed people to come in and out, was that not contamination of the scene and she said it was.

Dr Thandi Mahuluhulu

51 She stated that she is a professional doctor and she mentioned her qualifications together with institutions from where she obtained such qualifications. She is a forensic pathologist specialising in Johannesburg Centre of Pathologists. On the 12 of March 2021, she was allocated a case of a gunshot and she conducted autopsy. In this case, circumstances leading to the death were mentioned in SAP180. The body had bruises on face, shoulder and knee. There were wounds on the chest and signs that he was resuscitated at the scene. The wound was from left side to the right side of the chest. Rib 5 on the left was broken to both sides. Just below the segment of that broken rib, there was a sack that covers heart, it was not broken but completely full of blood. She found a tear or laceration on the heart. There was a second wound from outside

to the inside and it had no relationship with the inner part. In respect of wound 3, there were abrasions meaning that the upper skin had superficial injuries.

51. The injury to the heart was caused by the impact on the rib. That is, the effect from the projectile hit the rib and the rib hit the heart. Her conclusion was that the cause of death was a firearm related injury to the chest.

Cross-examination by legal representatives

52. It was put to her that the experienced police officials and commanders of accused persons who gave evidence in these proceedings said they never heard any experience of anyone dying from the type of bullets issued to accused. It was further put to her that the doctor who did the first aid pressed on the chest so the compression on the chest could result in injuries. Her response was that it could highly be impossible in this case. Basically a doctor could not cause such injuries. In CPR you use a palm of the hand so that could not cause any injury. The doctor could not compress where there is a wound.

53. Then the State applied for admissibility of a video footage. All the legal representatives objected to the admissibility of that video footage. This application led to a trial within a trial and this court at the end gave a judgement or ruling in favour of the admissibility of the video footage.

54. The video footage was viewed inside the court room and this court made the following observations:

- 1) Three (3) unidentified Police Official in uniform alighting from the nyala.
- 2) The other one was seen inside the nyala (did not alight)
- 3) Only two (2) were carrying firearms in a shooting position.
- 4) The court did not see them shooting or no shots seen been fired.

- 5) Deceased was seen falling down on the pavement facing up.
- 6) A male and female persons performed CPR interchangeably on the deceased.
- 7) After the deceased had fallen down, a female person was seen collecting his items, the other female wearing a dress having ANC colours knelt next to his head. There was another gentleman who touched his legs.
- 8) Before the arrival of the ambulance, there were people who were running and others leaning on the wall close to the pavement.
- 9) Paramedics arrived, two people covered the body of the deceased with a silver foil like plastic.

55. There was a further application by State to exhibit photos of the video footage. Such application was opposed by legal representatives for accused persons but later granted by this court.

Colonel Christiaan Mangena

56. He is a forensic ballistic analyst based in Silverton. He placed on record the trainings and courses he attended for him to be called a forensic expert. On the 12th of March 2021, he was requested to attend a post mortem by IPID Investigator and Dr Mahuluhulu. The reason for attendance was to reconstruct a crime scene to determine bullet trajectory and terminal ballistics. He first examined the body of the deceased and found it to have sustained 2 (two) gunshot wounds. He marked the first wound on the left chest of the deceased as (1) and on this one there was penetration. On the wound marked (2), it was positioned on the left side of the deceased and there was no penetration in this one. During post

mortem on wound 1, penetration was on the chest area not inside. The projectile fractured the 5th rib and caused injury to the heart. Wound marked (2) was just an abrasion, there was no penetration.

57. He then requested Ms Thwala to take him to the crime scene where the incident occurred. Upon arrival at the crime scene, Ms Thwala pointed out where the whole incident occurred. He could not pick up any exhibits but measure the distance between nyala and the deceased as being 4 to 6 meters. The information he received was that the shots were fired from nyala to where the deceased was. Whilst still standing there, security officer told them that there were cartridges inside the college, he went there and found three (3) plastic cartridges. He collected them as part of the evidence from shots that were fired. He knows the shot guns so he realised that they came from the shot guns. On the 16th of March, he received five(5) sealed evidence bag containing one (1) fired 12 gauge calibre cartridge case and seal bags containing 5 (five) X 12 gauge calibre Musgrave model musler 12 pump action shotgun. He had examined the fired cartridges case and test and found that it cannot be determined in which one of the shotguns was the cartridge case fired due to lack of sufficient marks used for identification purpose. He concluded that the deceased was hit by a single ball and a plastic wad and most likely from the same shot on the left side of the upper body. Based on the injury sustained, he is of the opinion that the wound was inflicted by one of the high velocity ammunition as indicated in paragraph 16 (of his report), with high kinetic energy transferred to the body which may cause serious injuries or death at a close range.

Cross-examination by legal representatives

58. He confirmed having not received 6 (six) cartridges collected by warrant officer Wood. When asked about his view about the cartridges he collected if they were planted there, his response was that they may have been footed or kicked by students. What he can say is that they were fired from shot guns. He agreed that white rubber bullets are less lethal.

Arthur Roberts Stephanus

59. He is a captain within SAPS, working in the Western Cape Public Order Policing. His duty includes training managers, training of Public order Policing and presenting a training of students at Police Colleges. He detailed at length on how the rubber bullets are used. He stated that there are cases wherein people have been killed due to incorrect use of the rubber bullets. He made example of Herman in Western Cape, saying there was also incorrect use of rubber bullet wherein people have been injured. He also told the court about command, for example when it starts and ceases.

Cross-examination by legal representatives

60. He agreed that he does not have an expert report and that he never trained the accused persons. It was put to him that the white bullet is weak and cannot kill a person, his answer is that it is regarded as less lethal

61. The following were exhibited:

- 1) Statement of Mr Mlungisi Mfuniseni Hlela as "A"
- 2) Statements by Ms Judy Tinyiko Thwala (A63/1 and 107/1 "B and "C" respectively.

- 3) Non-commissioned statement of Ms Busisiwe Florence Moeketsi as "D"
- 4) Statement of Colonel Jacob Johannes Beeslaar as "E"
- 5) Statements of Mr Mkhanyiseli Alson Shange as "F" and "G" respectively.
- 6) Photos A91/2 and A91/3 were exhibited "H" and "I".
- 7) Ms Rasmeni's photos being A90/21 and A90/2 as "J" and "H" respectively.
- 8) Statement of Ms Nikiwe Rasmeni as "L"
- 9) J88 in the names of Ms Rasmeni Nikiwe, Mr Mtsweni Siphesihle and Mr Masiu Oarabile (complaints) as exhibits "M", "N" and "O" respectively.
- 10) Document titled: Acknowledgement of receipt by Mr Aphane T.P 16/3/2021 as "P"
- 11) 212 Statements by Ms Steyn Anna Cathrine and Mr Aphane Tshupo Petrus with a printout underneath as "Q" and "R" respectively.
- 12) SAP 69 (Document indicating that accused persons did attend courses) as "S".
- 13) Statement of Mr Redgard Harry Davis as "T"
- 14) Photo album compiled by Warrant Officer Wood as "U"
- 15) Document titled: Declaration of death as "V"
- 16) Police report accompanying body to forensic pathology services mortuary as "W".

- 17) Document by Ms Ntumba Thandi Florence (identification of the body) as "X"
- 18) Post Mortem report Compiled by Dr. Mahuluhulu Thandi as "Z"
- 19) The video footage as "I"
- 20) Photo album as "Z"
- 21) Affidavit by Mangena Christian as "AA"
- 22) Statement of Captain Stephan's as exhibit "AC"

62. The state case was then closed.

Evaluation of State case.

63. In these proceedings, there is no direct evidence in the form of eye witness/s. I mean to say that there is no person to say he or she saw the accused persons or any of them committing the offences in question. The State's case is premised from circumstantial evidence being the video footage in the main. In an application in terms of s174 of Act 51 of 1977, a discharge is to be refused where there is more than one inference to be drawn in terms of circumstantial evidence. In *S v Faku and others*⁵, it was stated that the words "no evidence" have on numerous occasions, been interpreted to mean no evidence, upon which a reasonable man, acting carefully may convict. Circumstantial evidence consists of facts from which a fact in dispute may be inferred. It has been held that where the uncontradicted evidence of the State is circumstantial and more than one inference may be drawn, a discharge should be refused. The general rule regarding the drawing of inferences is that a court may only draw inferences that

⁵ *S v Faku and others* (2004) 3 ALL SA 501(CK) at 504 i-j

are consistent with all the proven facts, and where one or more are possible, it must satisfy itself that the inference sought to be drawn is the only most probable inference. In *R v Blom* ⁶, Watermeyer JA set out two “cardinal rules of reasoning” to be considered when reasoning by inference in criminal trials: (1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

64. When it comes to inferential reasoning, evidence should not be approached in a piece meal manner. In *S v Lachman* ⁷ the Supreme Court of Appeal held: “.....that circumstantial evidence should never be approached in a piece meal fashion. The court should not 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.” ⁸

65. I am alive to the fact that each case has to be dealt with on its own merits.

Whether to grant or refuse an s174 application, the court has an overriding discretion. Such a discretion has to be exercised judicially. The crisp issue to be determined is, is there any *prima facie* evidence linking the accused persons to firing a shot against the deceased thereby causing his death and further firing shot/s against the complainants in counts 2 – 4 thereby injuring them. The key and primary source of these charges being levelled against accused persons is

⁶ *R v Blom* 1939 AD188 at 202

⁷ *S v Lachman* 2010(2) SACR 52 (SCA)

⁸ *Ibid* para 4

according to Ms Judy Thwala (the IPID investigator) the video footage that was viewed by the commanders and through that viewing, Captain Shange identified the accused persons. I have taken note of the fact that during cross examination of Captain Shange, it was clear that from his statements that were exhibited as "F and G" nowhere he mentioned having identified the accused persons on the video footage.

70 I really cannot tell as to which video footage was viewed by Captain Shange so as to advise or inform Ms Thwala that the people appearing there are accused persons. I further cannot tell as to which one was viewed by colonel Mangena. In his report on page 13, paragraph 10.4 he wrote as follows *"I had the opportunity to view the footage of the incident as it happen and from the footage it appears that the shot was fired from the police nyala"*

71 I am of the view that the video footage viewed by this court is far different from the one viewed by Captain Shange and Colonel Mangena in that from the one viewed by this court, the identity of the police officials who were in the nyala is unknown as they were wearing mask and in police uniform. When the video footage was played, no one identified amongst the police Officials appearing there as to which one was accused 1, 2, 3 and 4. Secondly, during this video footage, this court could not see any of the police Officials firing or shooting and further did not see deceased being shot.

72 Evidence of captain Shange and Ms Thwala conflicts with evidence of Colonel Moeketsi. The latter said she did not know that their members shot an innocent bystander, such information came from IPID investigating Officer. Even at this stage, she cannot say it was their members who had shot the deceased. The evidence of colonel Moeketsi is a clear indication that she was not satisfied that

their members were involved in the alleged incidents even after watching the video footage. If really, from watching the video footage, Captain Shange identified the members as accused persons, the question is what could be the reason for colonel Moeketsi to doubt, considering the fact that both are commanders so surely their capacity of knowing accused persons is the same.

73 One would expect Colonel Mangena's evidence to further the State's case since he is a ballistic expert who analysed the firearm. However, his evidence did not help the State's case. Firstly, there is evidence that there were cartridges that were retrieved next to the body of the deceased (regardless of contradictions in terms of their number) but he never received such cartridges so as to make a comparison during analysis between them and firearms that were carried by accused persons so as to establish if there was any link. Instead Colonel Mangena analysed the one (1) fired 12 gauge calibre cartridge as stated in paragraph 11. 1.1 On page 13 of his report. This court does not know the origin of that cartridge and in fact it adds no value in this case. It does not tell from which firearm was it fired. Colonel Mangena in paragraph 14.1 on page 14 of the same report, recorded that it cannot be determined in which one of the shot guns mentioned in paragraph 10 was the cartridge case mentioned in 11.1.1 fired due to lack of sufficient marks used in identification purpose. Even in his conclusion, Colonel Mangena does not say which firearm was used in killing the deceased. To say that the wound was inflicted by one of the high velocity ammunition as indicated in paragraph 16, with high kinetic energy transferred to the body which may cause serious injuries or death at a close range does not bring or provide the solution to the State's case in respect of count 1. Even Dr. Mahuluhulu's conclusion does not place accused persons on crime scene. She concluded that

the cause of death was a firearm related injury to the chest. I say this considering the fact that according to Captain Shange, there were 21 (twenty one) Police officials on duty on that day. Their main aim was to defuse students' strike. There is no evidence that the four (4) accused persons were given different ammunition and firearms from their other colleagues. The firearm and ammunition mentioned to be in use on that day are shot guns and white rubber bullets.

74 On those grounds, ballistic analysis of firearms by Colonel Mangena was not supposed to be confined on accused persons' firearms only but to be applied to all the 21 (twenty one) members ,equally. Not forgetting that the duty or power to charge is vested with the National Prosecuting Authority, I do not understand as to why these 4 (four) accused persons, the only ones charged.

75 The evidence of complainant in count 3 is relevant to count 1. This complainant stated that he later saw the same Police truck that fired at him at Station Street at De Beer Street. This means that at De Beer street, there were 2 (two) Police trucks. This alone is an indication that there were more than 4 (four) Police Officers at De Beer street. This complainant is a single witness whose evidence has to be treated with caution. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused person may be convicted of any offence on the single evidence of any competent witness provided that such evidence is satisfactory in all material aspects. This witness's evidence does not place the accused persons to any scene, either at Station or De Beer streets. His evidence therefore lacks reliability in all aspects and as such is not satisfactory.

76 This crime scene at De Beer Street was contaminated in that when the first people namely Ms Lerato Mokoena, Dr Sedibe and Mr Hlela reached the scene,

they could not see any cartridges around the deceased. When the video footage was viewed by this court, there were no cartridges seen next to deceased.

However, there is evidence from different police officers to the effect that there were cartridges next to the deceased. Warrant officer Wood indicated that they were 6 (Six) and the other one (Captain Harry Davis Redgard) said they were 7 (seven). These were not analysed including the ones retrieved from the school by Colonel Mangena and the one that was found under the car by Lerato. No reason/s advanced as to why analysis was not effected. Lerato found the one under the car a day after the alleged incidents and the ones found by Colonel Mangena (after being shown to him by Mr Hlela) was 2 (two) days after the incidents. All these discoveries do not prima facie link accused persons to any of the offences.

77 The evidence of Mr Hlela and complainants in counts 2, 3 and 4 is similar in that they could not tell as to which Police Officials shot at the complainants except that Mr Hlela saw Police Officer firing shots at the students and the students said that they were shot by Police Officials.

78 These charges are interlinked or related. This is evidenced in the fashion the charges have been phrased by the State. Date and place of the incidents are mentioned in count 1. Date and place in counts 2, 3 and 4 are referred to as in count 1. None of the complainants in attempted murder charges testified to the effect that they were shot at by accused persons or any of the accused persons. Mr Hlela who claims to have witnessed the shooting could not link any of the accused persons. Complainant's medical reports and photos that were submitted do not link the accused persons to the shooting. I indicated that Mr Shange had 21(twenty one) members on duty on that day. So it cannot be inferred that

accused persons are the ones who committed these offences taking also into account that the video footage that the State relies on does not show the accused persons as being the ones on the crime scene.

79 From the evidence of complainant in count 3, it is clear that he was not shot at De Beer Street but only at the Station Street and that Police officials who shot at him were travelling in a police truck that had a siren. Accused persons put to him that they were not travelling in a police truck having a siren. This latter evidence was not taken further by the State.

80 Complainants in counts 2 and 4 stated that they did not tell the doctors who examined them that they were shot during the protests. The doctors in exhibits M and O recorded that the victims were shot at during the protests. If this was not said by them, who else could have told the Doctors. And this evidence is in line with the version of accused persons that was put to them being that if they were shot at, they were shot somewhere else but not at De Beer Street.

81 There is exhibit AB, alleged to be a pocket book of accused 4. This piece of evidence cropped out during testimony of Ms Thwala. During her cross examination by legal representative of accused 4, it was put to her that it was not accused 4 who wrote there. Her answer was that she asked captain Moeketsi as to who wrote that entry, she said accused 4. Colonel Moeketsi never testified about this issue, meaning that what was said by Ms Thwala was never corroborated. It is clear that the so called author of this pocket book disputes having made an entry on it. The State failed to prove authenticity in the form of for example expert evidence. so this issue remains hearsay. This court does not have any reason to attach any weight on exhibit AB.

82 All the exhibits presented before this court do not implicate the accused persons to the commission of the offences. There is argument that written statements contradict with oral testimonies. I do not regard that as contradictions. A contradiction is something said differently, for example oral version of the same witness differs with its written version and the vice versa. But when something has been said orally and not recorded in a written statement and vice versa, the argument should be based on omission not on contradiction because what has been said does not conflict with anything and vice versa. Exhibit D (being statement of Busisiwe Florence Moeketsi) is not an affidavit at all as it was not commissioned. Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation (the Regulations) which were made by the Minister of Justice in terms s10(1)(b) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 requires that a deponent shall sign the declaration in the presence of the commissioner.

83 I have noted the inconsistencies on the evidence of State witnesses when it comes to the effect of the white rubber bullet when used against a human being. Colonels Jacob Johannes Beeslaar, Moeketsi and Captain Shange hold the view that it is weak and nonlethal whereas Captain Stephanus and Colonel Mangena are of the view that it is lethal if used at close range.

84 On the evidence presented by the State in its entirety, there is no credible evidence upon which this court acting carefully may convict. If I refuse this application, I will be promoting or allowing what is discouraged in *S v Lubaxa* supra to stand. It is not permissible in terms of the law to refuse 174 application with the hope that an accused person may incriminate himself or herself. In

essence, the State's case should stand on its own without being assisted or supplemented by the defence's evidence.

85 Fortunately, courts do not base their decisions on public opinions and or media reports but on what has been presented before them.

86 I therefore issue the following order;

- (1) The application in terms of s174 of Criminal Procedure Act 51 of 1977 is granted.
- (2) All accused persons are found not guilty and discharged in respect of all counts.

A handwritten signature in dark ink, appearing to read 'M. Malangeni', is written over a horizontal line.

M MALANGENI

ACTING JUDGE OF THE HIGH COURT (Johannesburg)

APPEARANCES

For the State : Advocate Moseki Khumalo

First accused: Mr Mohope

Second accused: Mr Netshipise

Third accused : Mr Ndaba

Fourth accused: Mr Vilakazi

