



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: CCD11/2019**

In the matter between:

**THE STATE**

and

**GOODBOY BHOKO SIBIYA**

**ACCUSED 1**

**MDELISENI MVIKENI MATHONSI**

**ACCUSED 2**

**SIPHAMAMDLA ZITHATHELE MATHONSI**

**ACCUSED 3**

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**JUDGMENT**

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**BEZUIDENHOUT AJ**

[1] On Friday, 23 February 2018, shortly after four in the afternoon three men entered the Build It store in Maphumulo, KwaZulu-Natal. They were armed and proceeded to rob, at gun point, two cashiers. They proceeded to the Spar supermarket adjacent to Build It where an off duty police officer, Leonard Dumisani Mhlanzi, was robbed of his firearm and shot shortly thereafter. They made their escape. Mr Mhlanzi died in the hospital a short while later.

[2] Subsequently, and on 7 March 2018, accused 1 and 2 were arrested. Accused 3 was arrested on 12 June 2019.

[3] The accused stood trial on the following charges:

3.1 Count 1 – *Robbery with aggravating circumstances* in respect of Delisile Lydia Ndlovu from whom was robbed an amount of cash. The provisions of section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable.

3.2 Count 2 – *Robbery with aggravating circumstances* in respect of Zwakele Khuzwayo from whom was robbed an amount of cash, a cellular phone and tablet. The provisions of section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are likewise applicable

3.3 Count 3 – *Murder* in respect of Leonard Dumisani Mhlanzi (hereinafter referred to as “the deceased”). The provisions of section 51 and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable.

3.4 Count 4 – *Robbery with aggravating circumstances* in respect of the deceased, from whom was robbed his firearm. The provisions of section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable.

3.5 Count 5 – *Attempted murder* in respect of Sethabile Prudence Khuzwayo. The provisions of section 51 and Part IV of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable.

3.6 Count 6 – In respect of Accused 3 only, the unlawful possession of a firearm with the serial number changed or removed, being a 9 mm CZ semi-automatic firearm. The provisions of section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable.

3.7 Count 7 – In respect of Accused 3 only, the unlawful possession of ammunition, being 27 rounds of 9mm calibre ammunition

[4] The aforementioned charges as contained in the indictment were put to the three accused who all pleaded not guilty to all counts. None of the accused disclosed any particular defences, electing to remain silent or plead a so called bare denial.

[5] All three accused were represented by counsel who confirmed that they had explained the provisions of the Criminal Law Amendment Act 105 of 1997- the so

called Minimum Sentences Act- to their clients and that it was not necessary for me to repeat the provisions.

[6] The State called numerous witnesses whose evidence is a matter of record. I will only deal with those witnesses who are crucial to the specific counts and to the pertinent issues that arose during the trial. A number of exhibits were handed in but I will likewise only deal with the relevant ones.

[7] Most of the events of 23 February 2018 which lead to the charges described herein above, were captured by various close circuit television cameras and stored on digital video recorders, so called DVR's, on the premises of the Spar supermarket.

[8] Colonel Aubrey Maimela testified that during 2018 he was attached to the Digital Forensic Unit of the SAPS in Durban. He attended various courses in cyber related crime and was competent to examine and download CCTV footage. At the request of the investing officer, Captain Hlongwa, as he then was, Colonel Maimela attended at the Spar supermarket at Maphumulo in order to download the CCTV footage of the events of 23 February 2018.

[9] Colonel Maimela inspected the DVR's, and found that they were recording and in good working order. After being given the time of the offences committed, he inserted an eight gigabyte Verbatim USB flash drive device, where after he exported the relevant data onto the USB device.

[10] According to Colonel Maimela, the surveillance system used by Spar supermarket continuously records data that is being observed by the various cameras. All the data is captured and saved on the hard drives of the DVR's. There is furthermore no human intervention, it records what is observed by the cameras and is accordingly a true reflection of what happened on the day.

[11] As far as the admissibility of video recordings is concerned, Milne JP held in *S v Ramgobin and Others* 1986 (4) SA 117 (N) that the State had to prove the following facts beyond a reasonable doubt:

a) Originality;

- b) That no interference had taken place;
- c) That they related to the incident in question;
- d) That the recording was faithful;
- e) That the identity of the speakers was identified (this particular requirement is not relevant to the present matter);
- f) That the recordings were sufficiently intelligible.

[12] Colonel Maimela kept the USB device in a lockable steel cabinet until he had the opportunity to look at the downloaded footage. He took snapshots of the video footage and compiled a photo album of the snapshots which was handed in as Exhibit "B". He did not encounter any difficulty in retrieving the data at the store and at his office. The USB device was handed in as Exhibit "I".

[13] Colonel Maimela proceeded to play the footage recorded by the various DVR's on a big screen, set up in court.

[14] I find it necessary to briefly deal with what was captured by the respective cameras as it sets the scene, so to speak, for what is to follow.

[15] The footage of camera 10 was the first to be shown. It had the date of 23 February 2018 embedded in the footage together with the time stamp, on the top left hand corner, and focused on the outside of the shopping centre. It showed a white Toyota Corolla entering the Spar shopping centre at 16:09:41.

[16] The footage of camera 07, also situated outside, showed the same vehicle going past and proceeding to the main entrance of Build It. It also showed a male person dressed in a white t-shirt and khaki pants taking up a position next to a pole, close to the exit at the Spar supermarket. A short while later another male dressed in a blue long sleeve shirt, khaki pants and hat, carrying a small maroon towel or cloth, is seen approaching from the direction of Build It on foot. He is seen looking at the person with the white t-shirt, who is now leaning against the pole. The person with the blue shirt is observed turning around and walking back from where he came.

[17] Approximately two minutes later the person in the white t-shirt is observed making a sudden jerking movement, as if startled, and immediately removes something from the front of his pants, where after he runs into the Spar supermarket.

[18] People are observed running out of the Spar and a few seconds later the person wearing the white t-shirt, the person wearing the blue shirt and a person wearing a black t-shirt are also seen emerging from the Spar. They proceed straight to the white Toyota Corolla, observed earlier, and get in, where after the vehicle leaves the area.

[19] Camera 9 was situated inside the Build It store, focusing on the entrance. It showed three male persons (whom we referred to during the trial as suspects 1, 2 and 3) entering the store, one after the other. The first suspect to enter wore a light blueish grey t-shirt and a white hat. He appeared to have long hair tied in a ponytail. The second suspect to enter was the same person observed outside wearing a blue long sleeve shirt, khaki pants and a hat and was still carrying the maroon cloth. The third suspect to enter wore a dark or black t-shirt, blue jeans and a dark hat.

[20] Photo 13 of exhibit "B" is a screenshot of camera 9 showing the three suspects as they entered the store. Two other persons are observed at the entrance, a male and a female. The male person, wearing a white short sleeve shirt, is Mr Philani Mathonsi, a state witness whose evidence will be dealt with later together with the portions of the camera footage relating to his evidence.

[21] Camera 8 was situated above the door through which the three suspects entered and clearly showed them entering the store. It also showed the location of the cashiers, to the left of the picture as well as the security guard on duty in the store. Photo 15 of exhibit "B" is a screenshot of camera 8 and shows suspect 1 shortly after he entered the store. Shortly after coming into view on camera 8, suspect 1 is seen pulling out a firearm from his pants. Suspect 2 is also observed pulling out a firearm where after he grabs the security guard and pulls him into a shopping aisle.

[22] Photos 16 and 17 of exhibit "B" are also screenshots of camera 8 and shows the positions of the first two suspects before suspect 2 pulled the security guard away. Suspect 2 is still seen carrying his maroon cloth.

[23] Shortly thereafter suspect 1 is seen jumping over the counter. Suspect 3 also comes into view and is seen pointing his firearm at the cashier, where after he starts taking money from the till and then takes a green moneybag from the cashier.

[24] A few seconds later suspects 2 and 3 are seen walking towards the Spar supermarket, which could be reached through an interleading door between Build It and the Spar supermarket. Suspect 1 is seen coming back into the picture. He jumps back over the counter and disappears from the view of camera 8.

[25] Camera 11 was likewise situated inside Build It, almost directly opposite the entrance and clearly showed, albeit from another angle, the suspects entering the store as well as the position of the cashiers and their tills behind a counter on the right hand side of the recorded images.

[26] The three suspects are seen entering the store. Suspect 1 is seen jumping over the counter, suspect 2 is seen taking the security guard into the shopping aisle and suspect 3 is seen going to the counter, all three of them pointing firearms. All three disappear from the view when leaving to go to the Spar next door.

[27] Photo 26 of exhibit "B" is a screenshot of camera 11 and shows suspect 1 behind the counter holding a green money bag with the cashier putting money inside whilst suspect 3 is seen in front of the counter, busy with the other cashier.

[28] Camera 12 is situated inside the Spar supermarket and is situated almost directly above the cashier behind the counter at the Money Market section. A male person is seen arriving at the counter, wearing a grey t-shirt. It was the deceased. The cashier proceeded to serve him. A while later suspect 2 comes into view and is seen approaching the deceased from behind and then lifting the deceased's t-shirt whilst pointing his firearm in his other hand. A second later suspect 3 comes into view. He is however behind the counter and behind the back of the cashier, and also seen pointing his firearm at the deceased.

[29] Suspect 2 is seen pulling on the deceased trying to get hold of the deceased's firearm, being carried on his right hip. Suspect 3's firearm makes contact with the deceased's back but shortly thereafter a white muzzle flash is seen from suspect 2's firearm, at very close range to the deceased. The deceased is seen going down onto the floor turning onto his side with his left hand outstretched towards suspect 2. Suspect 2 is seen taking the deceased's firearm. Suspect 2 thereafter fires another shot at close range at the deceased. Suspects 2 and 3 are seen fleeing the scene.

[30] Photo 31 of exhibit "B" is a screenshot of camera 12 and shows the position of suspect 2 as he points his firearm at the deceased and reaches for his firearm. The maroon cloth is still visible hanging from his pants on his left hip. Suspect 3 is seen behind the counter pointing his firearm at the deceased.

[31] Photo 34 of exhibit "B", also a screenshot of camera 12, shows the deceased down on the floor after the first shot, raising his hands shortly before he was shot for the second time.

[32] Photo 33 of exhibit "B", another screenshot of camera 12, shows suspect 2 now in possession of the deceased's firearm, and suspect 3 leaving the scene.

[33] Colonel Maimela concluded his evidence by stating that he did not edit, alter or change any of the data or images on the CCTV footage and that everything shown was a true reflection of what was contained on the CCTV footage. He also expressed an opinion that the quality of the images of the video footage was good and gave it a score of 9 out of 10.

[34] This portion of his evidence was disputed by accused 1, whose counsel put it to Colonel Maimela that it was in fact of poor quality.

[35] After having viewed the footage in court numerous times as certain scenes were played and replayed many times, I share Colonel Maimela's view that the images recorded were indeed of good quality.

[36] The State called the complainant in respect of count 1, Ms Delisile Lydia Ndlovu, who was one of the cashiers at Build It on the day in question. She related the events of the day and thereafter was shown the video footage for the first time.

This was a useful tool to gauge the reliability and accuracy of her evidence regarding the incident. She was shown the footage of cameras 8 and 9 and became extremely upset when seeing the footage of the actual robbery on camera 8. The court had to adjourn to give her an opportunity to compose herself. She was clearly still traumatised by the events.

[37] She confirmed that suspect 1 was the one who jumped over the counter and threatened her with his firearm while demanding money from her till. Despite the indictment referring to only cash being stolen from her, Ms Ndlovu testified that suspect 1 had also taken her cellphone. Cash in the amount of between R2000 and R3000 was taken. She was asked by suspect 1 as to why there was such a small amount of cash in her till and she replied that her supervisor had been there earlier to do a pickup of the cash in her till. He also asked for directions to the Spar supermarket next door. She was unable to identify any of the suspects as she did not look at them.

[38] Ms Ndlovu confirmed that the video footage shown to her correctly reflected what happened to her on the day in question. Her evidence given prior to the viewing of the footage was also in accordance with what was depicted in the video footage.

[39] The complainant in respect of count 2, Ms Zwakele Khuzwayo, likewise testified regarding the events and thereafter was shown some of the screenshots contained in Exhibit "B". She was also a cashier but working at the till for the Caltex Fuel Station which was situated directly outside the Build It and Spar supermarket. An amount of approximately R2000 was stolen from her till as well as two cellphones and a small tablet.

[40] Ms Khuzwayo was unable to describe any of the suspects but did state that the suspect who jumped over the counter, suspect 1, had a dreadlock hairstyle with hair hanging down his back, which she noticed when he turned away from her. After being shown photo 13 in exhibit "B" she confirmed that the person in front, being suspect 1, was the one with the dreadlock hairstyle who robbed her and her colleague.



[41] Ms Khuzwayo's evidence and description of the events were in accordance with what was depicted in the video footage.

[42] Mrs Nonhlanhla Shezi testified that on the day in question she was on duty as a cashier at the Instant Money counter inside the Spar. She knew the deceased very well as he was a Captain in the Police Service stationed at Maphumulo SAPS. He approached the counter and had his young son with him, whom he then sent away elsewhere. Before the child could return she heard a male voice saying "I'll shoot you" in IsiZulu. Thereafter swearwords were uttered followed by shots being fired. She got off her chair and laid down on the floor and a while later ran away further into the store. She later heard that the deceased had been shot. She did not see him getting shot nor did she see any of the suspects. It is clear from the footage that her back was turned to them.

[43] Mrs Shezi also became quite distressed whilst giving evidence and had to compose herself. She was shown the video footage of camera 12 and confirmed that it depicted exactly what happened on the day in question. When asked as to whether she had seen the deceased's firearm, she stated that she noticed it upon his arrival on his waist under his t-shirt.

[44] Her evidence corresponded with what was depicted on the video footage.

[45] The complainant in respect of count 5, Ms Sethabile Khuzwayo, testified regarding the events of the day in question and the injuries she sustained. The State has conceded that there is no evidence that her injury was inflicted by a firearm during the robbery as alleged in the indictment. Nothing further needs to be said in this regard.

[46] The State also called Mr Thulasizwe Sibonelo Mhlongo, who also uses the surname "Mathonsi". He is an important witness and his evidence will be dealt with in more detail.

[47] At the time of the incident he was employed at the Build It in customer services.

[48] He knows accused 2, Mdeliseni Mathonsi, who is his step-brother. They have the same fathers but different mothers. He also knows accused 3, Siphamandla Mathonsi, who is his cousin as their fathers are brothers. He refers to both of them as his brothers.

[49] Mr Mhlongo testified that he had last seen accused 2 the day before the incident when accused 2 had arrived at his home at around 7:30 in the evening. Accused 2 had apparently arrived in a white Toyota Corolla, which he had seen parked above his house. Accused 2 was going to stay overnight.

[50] According to Mr Mhlongo, accused 2 was wearing a white t-shirt with a blackish stripe across the chest and cargo pants with pockets next to the knees. As they prepared to go to sleep he saw accused 2 draw a firearm from the front of his waist and put it under his pillow.

[51] Accused 2 had been asked about his destination and mentioned that he would be going to Mr Mhlongo's place of employment the next day. When asked why he would be doing so, he told Mr Mhlongo "to be free". Later, under cross-examination, Mr Mhlongo conceded that this was not true and that accused 2 had told him that they were coming to rob the shop.

[52] Mr Mhlongo also testified that accused 2 had on a previous occasion asked him questions about his place of work, enquiring about things relating to where the money was being kept and when the cash in transit vehicle was coming. Mr Mhlongo would simply not tell him the truth.

[53] On the morning of 23 February 2018 when Mr Mhlongo left for work, accused 2 was still asleep and the white Toyota Corolla was still parked outside where it was the previous evening.

[54] According to Mr Mhlongo he was inside Build It when at around 16h20, he saw his brother, accused 3, enter the shop followed by another male person he did not know. He saw them draw firearms where after he dropped what he had in his hands and ran outside. A short while later he heard two gunshots as he was running

towards the receiving area. He and some other staff members, who had also run away, returned to the store about an hour later.

[55] Mr Mhlongo testified that he recognised accused 3 by his general appearance and because he knows him as he is family. He also identified him by his dreadlocks, which hairstyle accused 3 had been wearing from quite some time.

[56] Mr Mhlongo did not tell anyone about what accused 2 had told him the previous evening or that he recognised accused 3 coming into the shop. A few weeks later he was arrested by the SAPS and interviewed by the investigating officer, Colonel Hlongwa. Colonel Hlongwa subsequently took a so called 'section 204 statement' from him before releasing him. More about this later.

[57] Mr Mhlongo was shown the video footage of various cameras. When shown the footage of cameras 7 and 10, the outside cameras, he stated that the white Toyota Corolla depicted was similar to the vehicle accused 2 was travelling in on the previous evening.

[58] When shown the footage of camera 7, showing a person who was wearing a white t-shirt in front of the Spar, he was asked if he recognised this person. He spontaneously answered that it was his brother, accused 2. When asked why he was saying that, he answered that he recognised him by his clothing. Accused 2 was dressed in the same manner when he came to his house the evening before. Under cross-examination by accused 2's counsel, he was adamant that it was accused 2 as he knew him. When asked if he was 100% sure that it was accused 2, his answer was yes.

[59] When shown a white t-shirt with a black stripe across the chest as well as a graphic print of a skull on the front, which would later be formally handed in as exhibit "III", Mr Mhlongo identified it as similar to what accused 2 was wearing the previous evening. He himself did not see accused 2 at Build It on the day in question.

[60] Mr Mhlongo was also shown footage from cameras 8 and 9 and identified suspect 1 as accused 3, his brother. He confirmed that the footage he was shown was correct and in line with what he saw when accused 3 entered the store.

[61] When asked again what enabled him to recognise accused 3 he replied that they were family and that they always spoke to each other at family functions. He also recognised accused 3 by his dreadlocks.

[62] Mr Mhlongo was also shown a pair of khaki cargo pants handed in as exhibit "II" and confirmed that it was the type accused 2 was wearing when he saw him on the evening before.

[63] Mr Mhlongo was clearly not happy to give evidence against his relatives. He stated that it was going to affect his relationship with the Mathonsi family and he would never be happy about what has happened. He was also left traumatised as to what happened at his place of employment and a lot was said to him after it became known that a 'Mathonsi' was involved. I will address aspects of his cross-examination later.

[64] Mr Philani Mathonsi testified that he was employed and on duty inside the Build It store on the day of the incident. He is not related to accused's 2 and 3 or Mr Mhlongo for that matter. He did not see suspect 1 enter the shop but did notice suspects 2 and 3 come into the shop. He saw suspect 3 draw his firearm and shortly thereafter suspect 2 followed suit. He was ordered by suspect 2 to lie down next to the security guard, Mr Biyela, when suspect 2 had taken him into a shopping aisle. After taking money from the cashiers, all three suspects left and subsequently shots were heard.

[65] He described suspect 2 as wearing a khakish hat and a blueish t-shirt with khakish pants. He had greeted him after he entered the shop but before he could complete his greeting, he saw suspect 3 pull out his firearm. Suspect 2 was light in complexion and had a small chin beard and moustache. Whilst he and Mr Biyela were lying down on the floor, he also turned around and looked at suspect 2 again whilst he was asking Mr Biyela where the money was. Suspect 2 also searched both of them.

[66] Mr Mathonsi was shown video footage from camera 9 and recognised himself and a lady, Ms Nontobeko Biyela, who was standing with her back to the entrance. He was then shown the footage of camera 8 which showed himself, Ms Biyela and

the security guard, Mr Biyela. He is seen suddenly turning to his right which was as a result of noticing suspect 3 drawing his firearm. He turned towards suspect 2 and testified that he intended to push the firearm but then saw that suspect 2 was pointing the firearm directly at him. He lifted up his hands.

[67] Mr Mathonsi was also shown the footage of camera 10 situated inside Build It (as opposed to camera 10 on the outside referred to earlier) which showed another angle of him running toward suspect 2 who is seen pulling the security guard into the shopping aisle. On at least two occasions Mr Mathonsi is seen looking directly at suspect 2 and he in fact testified that he wanted to have a look at suspect 2's face to see who exactly he was. When asked about the fact that suspect 2 was wearing a hat, he stated that the hat only covered suspect 2's head and forehead and that he could still see his face. He later estimated that he had seen suspect 2's face for 20 to 30 seconds. He was adamant that he would be able to recognise him again.

[68] Mr Mathonsi was shown photo 13 of exhibit "B", which was a screenshot of camera 9, and confirmed the position of himself in relation to the suspects as they entered the door. He did not initially see suspect 1 as his back was turned to him.

[69] Mr Mathonsi confirmed that what was depicted in the video footage was accurate and in line with what happened on the day in question. The video footage was also in line with his description of the events prior to the viewing of the footage.

[70] Mr Mathonsi was shown the footage of camera 12 inside Spar, above the Instant Money counter. He recognised suspect 2 as the same person that he faced at Build It. He had seen all three suspects proceed to Spar from Build It.

[71] On 18 September 2018, Mr Mathonsi attended an identity parade at Inanda Police Station. He identified a person on the identity parade standing at position no.12 as suspect 2, whom he then pointed out in court as accused 1. He testified that he recognised his face and although suspect 2 no longer had a beard, he could see the beard mark on his chin. It later emerged that the person at position no.12 was in fact accused 1.

[72] Mr Mathonsi was shown exhibit “F” which contained photos taken at the identity parade. Photos 1 and 2 shows the line up of persons taking part in the parade. Mr Mathonsi was referred to photos 3 and 4, which were close-ups of the person at position no.12, accused 1. Mr Mathonsi conceded that accused 1 actually had a moustache and chin beard as opposed to the beard mark he had testified about earlier. He ascribed this error to the fact that the identity parade was held a long time ago and that it was darkish when he looked at him.

[73] Mr Mathonsi also pointed out a person who stood at position no.9. He thought it might have been the suspect who entered the door and pulled the firearm first, but he realised soon thereafter that he had made a mistake. Unfortunately, Mr Mathonsi did not inform anyone of his misidentification. The person at position no.9 was not one of the suspects or accused before the court.

[74] During cross-examination, Mr Mathonsi testified that he had been taken in for questioning by the police after the incident, ostensibly because his surname was similar to that of some of the suspects at the time. He was not happy about it and ended up making a statement to the investigating officer Colonel Hlongwa. He was cross examined on certain discrepancies between his evidence and what is contained in the statement. It is unclear as to when the statement was taken but it later appeared that the statement might only have been taken on 7 August 2018, as emerged from the cross-examination of Colonel Hlongwa by accused 3’s counsel.

[75] Not surprisingly an amount of time was spent on his identification of suspect 2 as accused 1 before court. He admitted that the events were traumatising and that he found himself in a life threatening situation. The evaluation of his identification will follow later.

[76] Sergeant Mchunu stationed at the Inanda SAPS was in charge of the identity parade held on 18 September 2018. He completed a form SAPS 329 which was handed in as exhibit “H”. Both accused 1 and 2 took part in the parade and was represented by Advocate Ndwandwe, who was present throughout the proceedings. At no stage were any concerns raised about how he conducted the parade.

[77] Sergeant Mchunu recorded that Mr Mathonsi was the third witness to inspect the parade and that within one minute he pointed out number 12 by audibly shouting the number. Thereafter he pointed out no.9. No remarks are recorded on the form.

[78] It was put to Mr Mathonsi by accused's 1 counsel that according to accused 1, Mr Mathonsi, as the third witness at the parade, at first could not point out anyone and was given a second opportunity to look and was only able to then call out number 12. Sergeant Mchunu testified that Mr Mathonsi had at no stage told him that he was unable to identify anyone. If he had done so, he would have told him to leave the parade and he would have recorded it as he had done with the first two witnesses who attended the parade.

[79] When this was put to Sergeant Mchunu during cross-examination he was adamant that he would have made a note of Mr Mathonsi's inability to identify anyone. He remarked that Advocate Ndwandwe would also have said something about it. It was also put to Sergeant Mchunu that Mr Mathonsi took five minutes on the second occasion to point out no.12 which was denied by him. He stood by what was recorded in exhibit "H", namely that the witness took one minute to point out no.12.

[80] It is common cause that accused 1 was arrested on 7 March 2018, by members of the National Intervention Unit, outside King Edward hospital as a result of information received by Colonel Hlongwa. Captain Bhengu, the arresting officer testified that a few hours after accused 1's arrest, the same members proceeded to a men's hostel in KwaMashu to effect further arrests. At the room shown to them, they came under fire from inside and returned fire, killing all the occupants in the room. They found three firearms, one of them being a Z88 firearm with its serial number obliterated. He was of the view that it was a police firearm because he carried the same type of firearm.

[81] Even later that evening the same members proceeded to the Ntuzuma area where they arrested accused 2. Both accused 1 and 2 were handed over to Colonel Hlongwa as Captain Bhengu's task was only to apprehend and then hand over.

[82] Accused 3 was arrested quite some time later, in the Mayville area, on 12 June 2019 by Warrant Officer Lunguza, also attached to the National Intervention Unit of the SAPS. The arrest took place some time after 10 in the evening. Warrant Officer Lunguza testified that as they approached the shack pointed out, his colleague made a noise and he heard a male voice inside the shack asking 'what was that' in IsiZulu. He then heard the cocking of a firearm. They decided to kick open the door and he and Warrant Officer Nkomo proceeded inside where he found accused 3 on the bed with his left hand under the pillow. He instructed him to stop what he was doing and shortly thereafter he heard the sound of something falling down. Warrant Officer Lunguza asked accused 3 what had dropped over the bed but he did not respond. He asked accused 3's permission to search the house. Accused 3 responded by saying there was nothing. He then consented to the search and when Warrant Officer Lunguza pulled the bed away, he saw a 9mm firearm on the floor near the top corner of the bed. No license was produced to possess the firearm. When Warrant Officer Lunguza picked up the firearm it was ready to fire a shot. He made it safe and found 14 live rounds in the magazine and one live round in the chamber. The search also yielded an ice cream container which contained another 12 rounds of live 9mm ammunition.

[83] According to Warrant Officer Lunguza, accused 3 had dreadlocks at the time of his arrest.

[84] Accused 3 denied that the firearm was found in his house or in his possession and claimed that he was already at the police vehicles after his arrest when someone came out with the firearm in a plastic exhibit bag.

[85] Colonel Hlongwa testified that as the investigating officer he received the video footage from Colonel Maimela, which enabled him to further investigate the matter as all the suspects were clearly visible – their actions as well as the clothes that they were wearing. When he first saw accused 2 after his arrest, he noticed that the t-shirt he was wearing was the very same one he had seen on the video footage of the incident. He was shown exhibit "III" and confirmed it was the same t-shirt he saw. He gave instructions to have the t-shirt taken from accused 2 at his first appearance, which was duly done.



[86] Colonel Hlongwa further testified that on 5 March 2018, two days before the arrest of accused 2, he had gone to accused 2's rural home in the Mphofani area, the Mathonsi homestead. He conducted a search of accused 2's room after being granted permission to do so by one Siphamandla Mathonsi who, according to him, was accused 2's younger brother. In accused 2's wardrobe he found a pair of khaki trousers which had the same features as the one worn by accused 2 on the video footage. He took the trousers which were handed in and entered into the SAPS 13 register at the kwaDukuza SAPS. Colonel Hlongwa was shown exhibit "II" and confirmed that it was the same pair of trousers that he found.

[87] The lawfulness of this search and seizure was disputed by accused 2 and he also denied that the white t-shirt, exhibit "III", was the one that he was wearing at the time of his arrest and which was taken from him at his first appearance.

[88] Colonel Hlongwa was shown the footage of camera 7 which depicts accused 2, who according to Thulasizwe Mhlongo's identification was, standing outside the Spar against the pole and wearing the white t-shirt. He pointed out that on the right sleeve of the white t-shirt there were three black stars or crosses visible, which was also on the sleeve of exhibit "III". The parallel black stripes across the chest and lower down was clearly visible on the footage as well as exhibit "III". Although the graphic is faintly visible on the footage, it is very similar to the graphic of a skull on exhibit "III".

[89] Colonel Hlongwa also pointed to suspect 2 on the footage, now identified by Mr. Mathonsi as accused 1, who came walking towards accused 2, wearing khaki pants and importantly, carrying 'something like a handkerchief or towel' which, according to Colonel Hlongwa's observation, suspect 2 was using as if he was trying to get fresh air.

[90] Captain Hlongwa was presented with a pair of khaki pants, later handed in as exhibit "IV". These pants were worn by accused 1 at the time of his arrest and when he was brought to Colonel Hlongwa. He thought that the pants had been worn at the time of the commission of the crimes as seen on the video footage. He also gave

instructions for the pants to be seized at accused 1's first appearance, which was done.

[91] Colonel Hlongwa was shown video footage of camera 10 and indicated that the pants worn by suspect 2 had the same drawstrings and pockets as the pair of pants accused 1 was wearing at his arrest and which was now before court as exhibit "IV".

[92] Colonel Hlongwa was asked about the delay in the holding of the identity parade more than six months after the incident. He explained that each time a date was set for the parade, the accused's defence attorney failed to arrive and it was only after the intervention of the prosecutor and the magistrate that Advocate Ndwandwe was subsequently instructed to attend. This was denied by accused 1.

[93] Colonel Hlongwa was also asked if the deceased's firearm was recovered. He testified that the deceased had a Z88 Vector pistol and that a firearm matching that description was found in possession of one of the suspects killed in the room at the men's hostel in KwaMashu on the same day that accused 1 was arrested. The serial number had however been erased and the firearm therefore cannot be identified.

[94] All three accused made formal admissions in terms of the provisions of section 220 of the Criminal Procedure Act 51 of 1977, relating to *inter alia* the identification of the deceased, the transport of his body and the findings contained in a post-mortem examination. Accused 1 admitted the contents and correctness of the identification parade photo album, exhibit "F". Accused 3 admitted that the CZ 9mm semi-automatic pistol handed in by Warrant Officer Lunguza was correctly packed and forwarded to the Ballistics Unit in Amanzimtoti where Warrant Officer Pillay examined it and recorded her findings in a section 214 (4)(c) statement, the correctness and contents thereof undisputed.

[95] The signed list of admissions were handed in as exhibit "J" and confirmed by the accused. The post-mortem was handed in as exhibit "K" and the section 214 (4)(a) statement as exhibit "L".

[96] Accused 1 testified in his own defence. He claimed that he could not recall his whereabouts on 23 February 2018. His defence was in essence a blank denial. On the day of his arrest he was due to be picked up at the hospital by Siphamandla Sibiya, whom he referred to as his brother, because they share the same surname. Both of them were arrested and handed over to Colonel Hlongwa's team. He claimed to have been severely assaulted by members of the Hawks before being taken to Colonel Hlongwa. He testified that Colonel Hlongwa further showed him a photograph on his cellphone and claimed that Siphamandla had identified him as the person depicted on the photo. Accused 1 denied that he was the person described in court as suspect2 seen on the video footage of the incident. He denied that he was at Maphumulo Build It on 23 February 2018.

[97] Accused 1 did not repeat in his evidence what was put to Mr Philani Mathonsi regarding his failure to identify someone at first and only on the second attempt pointing him out at position no.12 during the identity parade.

[98] During cross-examination accused 1's movements during February 2018 were probed in more detail. He testified that his family home was in Nkandla. At the time of his arrest he had been visiting in KwaMashu. He had come to visit his aunt Gladness Sibiya in mid-February in order to bring her money so that she could go to the hospital. He stayed behind in the area to wait for someone to deliver rice he had ordered for his spaza shop back home in Nkandla. He stayed over with whom he referred to as "the Ntanzi boys"- three young men who resided in a room in the men's hostel in KwaMashu. Two of them worked during the day but the third who was disabled stayed at home during the day. Accused 1 apparently spent a lot of time with him.

[99] Unfortunately this last mentioned Ntanzi boy was killed by the police in the aforementioned incident on the evening of 7 March 2018 after the arrest of accused 1 and in the shoot-out between the police and the suspects at the hostel in KwaMashu.

[100] Counsel for the State asked accused 1 about a small maroon towel or cloth, slightly bigger than a washcloth which he was holding in his left hand whilst testifying.

He was observed at times waving the cloth and wrapping it around his hand. Accused 1 claimed that he used it to wipe his seat in the truck transporting him from prison or back to prison. Despite it being extremely hot in court, he claimed to not use it to cool himself down. Accused 1 was later referred to exhibit “B”, in particular photos 16 and 17, and agreed that suspect 2 could be seen with a maroon towel in his left hand. It was put to him that it was similar to the one he had in court and his reply was that he obtained “this one in December”.

[101] Accused 1 denied knowing accused 2 prior to being taken to Maphumulo court for their first appearance. He testified that his and accused 2’s clothing were removed prior to their first appearance which lead to the magistrate sending them back to get dressed properly. His mother went and bought accused 2 a new t-shirt to wear for his first appearance. It was put to accused 1 that this was an indication that his mother had known accused 2 prior to their appearance. This led to some manoeuvring with accused 1 changing his evidence that their clothes were only taken away during their third appearance.

[102] Accused 1 called no witnesses.

[103] Accused 2 also testified in his own defence. He stated that he had never met accused 1 before this incident and confirmed that he was related to accused 3 as their fathers are brothers. He claimed that on the day of his arrest and when he was taken to meet Colonel Hlongwa, he was wearing a white t-shirt with a blue line on top and a black line on the bottom with a number 9 at the back of the t-shirt. It was this t-shirt that was seized from him before his first appearance in court. He denied that he was wearing the t-shirt, exhibit “III”, on the day of his arrest. He confirmed that he knew the witness, Thulasizwe Mhlongo, and that they were related. They saw each other at least three times a year when he visited him at his home.

[104] Accused 2 denied that he had been at Mr Mhlongo’s house on the evening of 22 February and that he possessed a firearm. He claimed that he knew nothing of the robbery and murder at Build It. He could not remember where he was on 23 February 2018.

[105] He denied that he had cargo pants and also denied that he had given Colonel Hlongwa permission to search at his homestead. He claimed that according to his knowledge the police woke up a neighbour, one “Pa” Mthethwa and took him to the Mathonsi homestead as no one else was there. They then entered the house and seized certain items. He also testified that he only came to know accused 1’s mother when she bought him a t-shirt after his t-shirt was seized by the police before his appearance in court.

[106] During cross-examination he repeated what accused 1 said regarding the removal of the clothing at the Magistrate’s court and that it only occurred at the third appearance. His counsel however put to Colonel Hlongwa that the t-shirt was removed by D. Govender at his first appearance. Accused 1 was also not questioned about this issue by accused 2’s counsel.

[107] Accused 2 agreed that according to the video footage shown, the person keeping guard outside the store was wearing a t-shirt similar to the one handed in as exhibit “III”.

[108] When questioned about his movements around the time of the incident, accused 2 testified that he resided in Ntuzuma and had been residing there since 2017. He worked as a labourer, assisting a builder, Mr Gumede in building homes around Ntuzuma and was so employed until the time of his arrest. He did not know if Mr Gumede kept record of when he worked. He was adamant that although it was possible that he could have been working on 23 February 2018, he could not remember. It was clear that he had made no effort to contact Mr Gumede to obtain certainty regarding his movements on that day. He also never told his attorney or Colonel Hlongwa about this issue.

[109] Accused 2 also testified that Mr Mhlongo had apparently told his relatives, which included accused 3, at a gathering after a family funeral, that he (Mr Mhlongo) had been told by the police to cause him – being accused 2 to be arrested. He claimed that Mr Mhlongo had been promised something to have him arrested. These issues were only put to Mr Mhlongo by accused 3’s counsel and not by accused 2’s counsel. Although accused 2 did not dispute that Mr Mhlongo was unknown to

Colonel Hlongwa prior to this incident, he stated the police colluded with Mr Mhlongo to fabricate this case against him. None of this was put to Colonel Hlongwa by accused 2's counsel. Accused 2 also called no witnesses.

[110] Accused 3 testified that at the time of his arrest he was employed at Kayster Lodge in Durban. He knew nothing about this incident and was unable to recall where he was on 23 February 2018, although he thought he might have been at work. It was subsequently established and placed on record that his employer, who kept proper records, confirmed that he was not at work on the day in question. He however maintained that he was in the greater Durban area on that day.

[111] He testified regarding the circumstances of his arrest and the discovery of the 9mm semi-automatic pistol. Nothing more will be said about this as accused 3's counsel conceded during argument that the State's evidence regarding counts 6 and 7 appeared to be probable. I agree fully.

[112] Accused 3 confirmed that he had a Rasta hairstyle at the time of his arrest and had it since he matriculated in 2006.

[113] Accused 3 denied that he knew accused 1.

[114] He confirmed his relationship with accused 2 and described him as his brother, whom he saw on a monthly basis. When asked about Mr Mhlongo, he stated that he first got to know him when he (Mr Mhlongo) was about 17 -18 years old and that he only saw him once or twice a year at family functions. He did not socialise with him.

[115] He further testified that he last saw Mr Mhlongo on 9 June 2019 at a funeral, a few days before his arrest. Apparently after the funeral, the Mathonsi brothers gathered together and wanted to know from Mr Mhlongo why accused 2 was arrested and thereafter why he was also arrested. Mr Mhlongo explained that he was arrested, assaulted and forced to admit that he was the one who called accused 2 to come to the store. Three days after this meeting, accused 3 was arrested. Mr Mhlongo said nothing at the meeting of accused 3's involvement.

[116] This particular aspect was dealt with extensively in accused 3's cross-examination and he was able to elaborate on what was said at the meeting. Mr Mhlongo apparently said that whilst he was being assaulted by the police, he was forced to admit that accused 2 had been called by him to come to the store to commit the robbery. He later met Colonel Hlongwa who told him he was going to take his statement. When asked at the meeting whether he knew anything regarding this matter as his statement had been obtained, Mr Mhlongo told the Mathonsi relatives that he knew nothing. He told them that after Colonel Hlongwa had taken his statement he had warned him severely not to tell anyone what they had just done.

[117] Mr Mhlongo was asked if he was going to give evidence and he said no, he was not going to go to court to give evidence as he knew nothing about what was written by Colonel Hlongwa in his statement.

[118] When pressed further about the meeting, accused 3 stated that they actually only wanted to know why Mr Mhlongo was arrested as they already knew what charges accused 2 was facing. They wanted to know if he was involved and if so, how come he was released later on. During further cross-examination accused 3 testified that it was actually Mr Mhlongo who indicated that there was something that was bothering him, which led to the meeting after the funeral. This contradicted his previous evidence and was not put to Mr Mhlongo.

[119] Accused 3 was adamant that Mr Mhlongo did not know him well and that they did not see each other often, only at family functions. These functions usually lasted a day and a half. When put to accused 3 that Mr Mhlongo would have seen him over an extended period at these functions, accused 3 replied that Mr Mhlongo was not an outgoing person and would not attend family functions often. This was not put to Mr Mhlongo and this raises the question as to how accused 3 knew this about Mr Mhlongo if he claims that they did not know each other well. Accused 3 persisted that Mr Mhlongo did not know his features well and had hardly seen him. Accused 3 likewise did not call any witnesses.

[120] After the conclusion of all the evidence I was provided with heads or arguments by all counsel involved, which were very helpful and for which I am grateful.

[121] It is clear that in respect of accused 1, the direct evidence implicating him is that of a single witness and the issue to be determined is whether he was correctly identified by Mr Philani Mathonsi. The same can be said for accused 2 and 3 who were implicated by Mr Thulasizwe Mhlongo.

[122] There are numerous authorities regarding the cautionary approach to the evidence of a single witness. (In this regard see *S v Sauls and Others* 1981 (3) SA 172 (AD)).

[123] Evidence of identification must also be approached with caution. In *S v Mthethwa* 1972 (3) SA 766 (A) the following was said at page 768 A – C:

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in 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.’

The factors mentioned above are a useful tool when cross-examining a witness but is unfortunately not always utilised by defence counsel.

[124] When it comes to the identification of someone known to the witness the following was said in *R v Dladla* 1962 (1) SA 307 (A) where the Appellate court quoted the trial court with approval at page 310 C – E:

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness” previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be



accurate is substantially increased . . . What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.”

[125] Counsel for both accused 2 and 3 was of the view that Mr Mhlongo was an accomplice and that the cautionary rule in that regard should also be applied. I however share the view of the counsel for the State in that although Mr Mhlongo was aware of the robbery prior to the day in question, he had no legal obligation to report or disclose this information to his employer or the police. I will however still approach his evidence with a measure of caution.

[126] Earlier in my judgement I referred to the decision of *Ramgobin* and the requirements for the admissibility of video recordings. In my view, the State has proved beyond a reasonable doubt all the factors mentioned and required by Milne JP.

[127] In respect of accused 1 and the evaluation of the evidence against him the following has been considered and taken into account:

a) The evidence of Mr Philani Mathonsi – I am satisfied that he was a credible witness, bearing in mind the totality of his evidence and his demeanour in court. He was consistent in his evidence regarding his identification of accused 1 and it accords with his statement to the police that he would be able to identify the suspect again. It was clear from the video footage that he had sufficient opportunity to observe accused 1's face from a very close proximity in conditions where lighting was good. His description of suspect 2 having a moustache and a chin beard is supported by the blown up image of suspect 2 as it appears on photo 24, exhibit “B”, which clearly shows a moustache and chin beard. I do not agree with the submissions made by counsel for accused 1, that Mr Mathonsi's evidence was full of contradictions, discrepancies and inconsistencies. As far as criticisms against his police statement are concerned, it may be that it lacks detail, but this situation is often encountered with when statements are taken down by the police. We are fortunate that the video footage provided a useful tool to gauge the reliability of the state witness's evidence. Mr Mathonsi passed this test with flying colours. It is so that Mr Mathonsi also identified an incorrect suspect at the identity parade. In *S Thebus*

*and Another* 2002 (2) SACR 566 SCA, the court was faced with a similar situation. The following was said by Lewis AJA at para 14:

'In my view, therefore, the evidence of Kiel identifying the first appellant as a participant in the crimes of murder and attempted murder is reliable and compelling. That he *may* have been mistaken in identifying the second and third accused as participants in the shooting spree does not detract from his clear identification of the other two accused. Kiel's evidence is supported, moreover, by the patent fabrication of an alibi by the first appellant. Accordingly there is no reasonable doubt, in my mind, that the first appellant was correctly convicted by the trial Court.'

I find Mr Mathonsi to be an honest witness and also accept his identification of accused 1 as reliable. Even if the identification evidence could be considered insufficient on its own to establish guilt beyond reasonable doubt, it should be borne in mind that circumstantial evidence connecting an accused to the crime and inconsistencies in his evidence could have the effect that the identification evidence may be hardened into proof beyond a reasonable doubt. In this regard see *Dweba v The State* [2004] 4 All SA 1 SCA at 9.

b) Accused 1 was seen in court, whilst giving evidence, in possession of a maroon cloth or towel in his hand and this maroon cloth and what he did with it bore an uncanny resemblance to the actions of the person referred to in court as suspect 2 on the video footage when he was seen walking past the front of the Spar supermarket towards the person with the white t-shirt standing next to the pole. This is something that cannot be ignored.

c) As far as accused 1's version is concerned, there were numerous inconsistencies in his evidence, especially with regard to his whereabouts on the day of the incident, which was not put to Colonel Hlongwa.

d) Then there is the issue of the Ntanzi boys. Accused 1 admitted to staying with them in the room at the men's hostel in KwaMashu. This was the same room where the police went looking for suspects connected to the incident. A shoot out followed and a firearm was found in the room which was similar in all respects to that of the deceased, except for the fact that the serial number had been obliterated. It is highly

improbable that accused 1 was not involved. I cannot find that there is a reasonable possibility of accused 1's version being true. I was not impressed by accused 1's demeanour and he did not strike me as an honest witness.

[127] In respect of accused 2, I took the following into account:

a) Accused 2 was recognised by Mr Thulasizwe Mhlongo after viewing the video footage and according to him, he was still wearing the same clothes he had on when he last saw him on the evening before when accused 2 slept over at his house. Mr Mhlongo came across as a shy person and I agree with accused 3's remark that he was not an outgoing person. He testified with humility and was clearly not happy about having to give evidence against his relatives. A lot was made of discrepancies between his evidence and what was contained in the so called section 204 statement taken by Colonel Hlongwa. His explanations for those discrepancies were acceptable and when it came to the implication of accused 2 apparently entering the store behind accused 3, the video footage clarified the issue. His description of accused 2's clothing was accurate and consistent with the exhibits handed in. I do not agree with the submissions made by counsel for accused 2 that Mr Mhlongo was not a good witness and that his evidence had a lot of inconsistencies and contradictions. The record clearly shows otherwise, the only contradiction of relevance is the issue about his knowing of accused 2 coming to his place of employment with the intention to rob the store. I agree with counsel for the State that Mr Mhlongo attempted to minimise accused 2's liability in order to protect him. He testified that his evidence would never bring him happiness and that the family will always ask questions about him testifying. Mr Mhlongo furthermore testified whilst being cross-examined by counsel for accused 3 that the police had told him that accused 2 had told them that he had spent the night at his (Mr Mhlongo's) house and had given them the information that lead to the robbery. This was not denied by accused 2 and not even challenged when Colonel Hlongwa testified. I found Mr Mhlongo to be a reliable witness and his demeanour cannot be faulted despite him testifying under trying conditions over three days. I accordingly accept his evidence.

b) Accused 2 was found wearing exhibit "III" on the day of his arrest. In my view, it is clear from the footage that the t-shirt bears a striking resemblance to exhibit "III".

Accused 2's version that he was arrested wearing a different t-shirt immediately begs the question as to why Colonel Hlongwa would go to all the trouble of instructing someone to seize the t-shirt if it was a completely different one. Accused 2 in any event agreed under cross-examination that exhibit "III" was similar to what was seen on the video footage.

c) Accused 2 disputed the lawfulness of Colonel Hlongwa's search at his family home and the subsequent seizure of his pants. It was submitted that Colonel Hlongwa should have obtained his consent. How he was supposed to do that when accused 2 was still at large at the time, was clearly not taken into consideration. According to Colonel Hlongwa, he obtained permission, and even if he did not have the permission, the search would have been justified given the circumstances.

d) Accused 2 could not account for his whereabouts despite only being arrested 12 days after the incident. He bears no onus but it can never be sufficient to simply say that you don't know where you were. I would expect that someone facing such serious charges would put in more effort to trace his whereabouts. This actually applies to all three accused.

e) A lot was made during the trial about the 'person in the white t-shirt' not participating in the robbery and murder. It is clear, in my view, that accused 2 was armed and after hearing the shots inside the Spar he ran into the store, clearly to attempt to assist his fellow associates. Based on Mr Mhlongo's evidence, the robbery had in any event already been planned the evening before.

f) Accused 2's evidence was unsatisfactory and it emerged that various issues were not put to witnesses such as Mr Mhlongo and Colonel Hlongwa. He did not impress me as an honest witness.

[128] As far as accused 3 is concerned, I took the following into account:

a) He was likewise implicated by Mr Mhlongo who identified him as he walked into the store and thereafter saw him pulling out a firearm whereafter he (Mr Mhlongo) then ran away. Mr Mhlongo was steadfast in his identification of accused 3 and recognised him because of his knowing him coupled with the fact that he saw

accused 3's dreadlocks. The dreadlocks, clearly visible on the video footage, were tied in a ponytail. Mr Mhlongo's cross-examination regarding his identification was unfortunately limited to questions about how long they had known each other and the possibility that it could have been one of the other Mathonsi boys with dreadlocks who he saw at the store. He remained consistent in his identification. I do not agree with the submissions made by counsel for accused 3 that the video footage showed a ponytail and not dreadlocks, this was in any event not put to Mr Mhlongo at any stage. It is further clear from accused 3's own evidence that he knew Mr Mhlongo well enough to describe him as not being an outgoing person. I also do not agree with the submission that the appearance of Mr Mhlongo as a good witness, evaporated when he was confronted with his section 204 statement taken by Colonel Hlongwa. I have already dealt with these issues and will not repeat it save to say that I stand by my view of Mr Mhlongo being a reliable witness whose evidence I accept.

b) Accused 3 had no alibi and was not at work on the day in question. He claims to have been in the greater Durban area. His evidence regarding what happened at the gathering after the funeral changed and various aspects were not put to Mr Mhlongo.

c) Accused 3's evidence regarding the events during his arrest and the subsequent discovery of the firearm was not truthful. As mentioned before it was conceded during argument that the evidence of the State in this regard was probable and contained few contradictions. I cannot agree more, which means that accused 3 was clearly lying about the events of the day of his arrest. I am of the view that he was not a truthful witness and I was likewise not impressed by his demeanour in court.

[130] It is trite that the State must prove the guilt of an accused beyond a reasonable doubt. The State relied on a combination of direct and circumstantial evidence. As far as circumstantial evidence is concerned, the following was said in *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8:

'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 at 202-3, where reference is made to two cardinal

rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1994 AD 493 at 508-9:

'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. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'

[131] Accused 2 and 3 are implicated in the murder of the deceased by virtue of the doctrine of common purpose. The doctrine has been discussed in various decisions and has passed constitutional muster. In this regard see *S v Thebus* [2003] JOL 11400 (CC) wherein the classic case of *S v Mgedezi and Others* 1989 (1) SA 687 (A) was referred to. In my view, all three accused clearly associated themselves with the acts of each other.

[132] Taking into account all of the above I am satisfied that the State has proved its case beyond reasonable doubt in respect of counts 1, 2, 3, 4, 6, and 7.

[133] I accordingly convict accused 1 on counts 1, 2, 3, and 4. I convict accused 2 on counts 1, 2, 3, and 4. I convict accused 3 on counts 1, 2, 3, 4, 6, and 7.

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**BEZUIDENHOUT AJ**

Date of delivery: 18 August 2020