IN THE HIGH COURT OF SOUTH AFRICA;

LIMPOPO DIVISION; POLOKEANE

CASE NO: CC38 /2010

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 29 NOVEMBER 2022 MDHLULI AJ

SIGNATURE: _____

In the matter between:

THE STATE

and

SIZWE SHABANGU AND OTHERS Accused

J U D G M E N T

MDHLULI AJ:

[1] Thank you very much. I am going to be proceeding to give judgment on the application made on behalf of the accused persons respectively. I am not going to be getting into the detailed evidence, long evidence that has been tendered herein, however I will make reference to the evidence where needs be.

[2] When the trial began, we had six accused that were indicted, being Mr Sizwe Shabangu, a 43 year old male as at the time of the indictment, Mr Valley Zwane, a 40 year old man, South African citizen, as well as Mr Prudence Ndala, a 34 year old male, South African, as well as Mr Desmond Vulekani Siyoko, a 25 year old male, South African citizen at the time, as well as Mbusodi Albert Mathemane, as at the time being 35 years old at the time of the indictment, and Mothibedi Africa Malatjie. However, before the trial could start the state made an application for separation of trial for accused number 6 who was at large.

[3] The accused were facing thirty counts, as at the beginning of this trial, with about sixtysix witnesses that were to be called in the state's case. However, the state, before the trial could start, withdrew count number 13 after an argument was made by counsel for accused number 1, and supported by the rest of the counsels, as well as counts 26 to count 30 were

withdrawn, meaning that the accused persons were now left with counts number 1 to 12, as well as counts number 14 to 25, which they faced during their trial.

[4] And the state also made an amendment to the charge sheet, which included some words that had to be added to the charge of murder, with no objection from the counsel, and the charge was thus amended.
10 All the accused respectively understood the charges preferred against them, and after that they were each appraised with the implications of section 51(1) that was applicable to the charge in respect of count 1 of murder in terms of the Criminal Law Amendment Act 105 of 1997, as well as the implications of section 51(2) of the Criminal Law Amendment Act, as some of the charges that they were faced warranted same.

20 [5] The Court also appraised the accused persons of the applicable competent verdicts, as well as the implications of the Firearms Control Act in the event they were found guilty, that they may be declared unfit to possess the firearm, and all accused understood the explanations.

[6] Now before the accused persons could plead, counsel for accused number 1 raised an objection of jurisdiction in respect of count number 16 and 17, as

well as duplication of counts 13 and 14, as well as 26 to 30, and this objection was shared by all the legal representatives of record. They even made submission and amplified the said objection.

[7] In response, and after an involved argument, the advocate on behalf of the state produced an EXHIBIT A, which was accepted provisionally, being the authority that was granted by the DPP, the
10 National Director of Public Prosecutions rather in terms of section 22(3) of the National Prosecuting Authority Act 32 of 1998, read with section 3, 113 of the Criminal Procedure Act 51 of 1977, which was accepted provisionally then at the time of pleading, because it was a copy.

[8] I think it is safe to say that on the 26th of October 2022 the state produced the original copy. Then the exhibit is thus now finally accepted to the
20 proceedings. All accused persons pleaded not guilty to all the charges preferred against them, and elected to remain silent, except for counsel for accused number 2, Advocate Thipe, who over and above pleading not guilty, he pleaded not guilty to the competent verdicts, as well as Ms Campbell on behalf of accused number 4, who raised a defence of alibi. And these were confirmed by all accused persons.

[9] On the 26th of October 2022 as well, there was also exhibits that were accepted on the record with no objection from the counsel for the accused persons, which were EXHIBIT B, which was earlier provisionally admitted, because the compiler of the photograph was to be called to testify, however, same was admitted by all counsels, as well as items that were found on the scene A of the ML(Mercedez Benz). It was found that there is no dispute and they belong to the complainant, being G4S Security Company, as well as EXHIBITS P, Q, R and T. Those were admitted with no objection from all the defence counsels.

[10] Now the accused persons have all brought an application in terms of section 174 that they should be discharged, because there is no evidence upon which a Court acting reasonably can convict the accused persons.

[11] The basis of their application summarily and collectively is that there is no evidence linking any of the accused to the offence. That none of the accused persons have been found in possession of anything that links them to the commission of the offence.

[12] Now for one to arrive at the decision as to whether there is no evidence upon which a Court can

find that the accused are guilty, one needs to go down the evidence that has been tendered before this Court. Now the first witness that was called, a Mr Mankuluman David Mohale, he testified in respect of count 18. He testified that he was on his way home, travelling around half past 6 around the Letsitele area's side, when he met up with the incident of the robbery that was happening at Letsitele. He could not tell this Court about any of the persons that were involved in the commission of the offence.

[13] Actually, they were on their way back to Polokwane, together with his colleague, Colbert Masheu, and Conway Baloyi. That the people that robbed them were wearing balaclavas, and they were having safety vests, and they were armed with firearms. That the people who attacked them bombed the motor vehicle, the G4S truck, made them to lie down, and left with some of the money that he was not aware how much that money was, and none of the people that he was with, including himself, were injured during the incident.

[14] None of the legal representatives cross-examined this witness, except Ms Campbell who only took up an issue of the language that was used.

[15] The second witness was Mr Conway Baloyi, who

was equally in the company of the previous witness. I will not repeat his testimony, safe to say that his testimony differs in the following respect that he said the firearm was literally taken from him, and not from the truck. He did not know what was taken from the truck. He did not know anything else that was taken from the truck, except his 9mm firearm called Norinco. And he did not implicate any of the accused persons before Court.

[16]. During cross-examination he confirmed that none of his crew members were hurt. He did not know who called the police, because none of them called the police. And he also confirmed that the first people to arrive at the scene were the farm watchers. He did not give any description whatsoever to the farm watchers or the police, except that they spoke Zulu, and that the offenders left to Hoedspruit or Letsitele Road, according to him.

[17]. Now the third witness that was called was Mr Theophilus Phalapane Ramatsoma who testified in respect of count number 5 and number 6 – and number 11 rather. That on the day in question he was driving home with a silver Tiida between Tzaneen and Gravelotte in the company of one Valley Machaba. And when they arrived at the place called Lufasi Farm, which was around 18h00 and

19h00 in the evening, they found two cars that were standing, facing each other, as though they had blocked the road, and he thought that there was an accident, and he intended to drive on the side of the road.

[18]. As he was intending to do so, turning his car to where he was coming from, he heard the gunshots, and Valley Machaba told him that he was shot on his leg, and that is when he drove his car fast to Letaba Hospital. Upon arrival at the hospital Valley was admitted, and when he checked his car he found that it was shot on the door, and also on the mirror of the car. However, from there he went home and he never opened any case with the police. And to date his car has not been fixed. He did not know where the shots were coming from as they were being shot, and he knew that the police visited Valley in the hospital, who laid a charge. And he confirmed the EXHIBIT D, being the photo album, portraying that his car in the process.

[19]. Now during cross-examination, he explained the difference in his statement with the time of the incident in his statement being 18h00, as well as in his evidence in court to be between 18h00 and 19h00. He said that he meant that the entire ordeal happened from 6 18h00 to 19h00, and the bullet that had gone through the car was not retrieved as at the

time of his testimony. And he did not implicate any of the accused persons before Court.

[20]. The fourth witness was Phatula Valley Machaba, whose testimony is similar to that of the previous witness, except to the extent that he testified that he did not tell the witness that he was shot. He said he only told him that he was bleeding on his legs. And he was only told at the hospital that he was actually shot, and he stayed for about a period of two weeks in the hospital. The bullet was not retrieved from him, and he did not implicate any of the accused persons before Court.

[21]. Now the fourth witness was Ms Tinette Marule, who testified that she was robbed of her R1.1 million Mercedes Benz EL white 250 at gunpoint while at a women conference in Berea on the 25th of May 2018. It was three men that were involved in the robbery, but only one of them was armed. She did not know any of her perpetrators, however she managed to identify her car at Hoedspruit, and the insurance company has reimbursed her for her loss. They have replaced the car. She was testifying in terms of count number 16, and did not implicate any of the accused persons.

[22]. We had the fifth witness, Ms Baledi Mutu Maramafale who was testifying in respect of count 9,

who was travelling from Tzaneen to Letsitele complex in the company of one Shai around 18h00 on the 5th of June, and it was getting dark, according to her. She was driving a white Isuzu bakkie belonging to her father. Whilst at the robot, she heard gunshots being fired, some towards her direction. She reversed her car and knocked another vehicle in the process, which was behind her. She only managed to see a red Audi and a Ford Ranger motor vehicle at the scene. And she and her occupant were not injured in the process. She has since fixed the damages to the vehicle, amounting to R65 000.00. And the witness did not implicate any of the accused persons before this Court in any way.

[23]. During cross-examination by Advocate Thipe she reiterated that it was dark around 18h00, and she also reiterated that the Audi she saw was red, and could not confirm anything further, as she was concentrating on protecting her life.
During cross-examination by Ms Campbell she could not confirm seeing the condition of the G4S truck. Furthermore, that during cross-examination by Mr Mpaphudi, she reiterated seeing the left Audi on her left-hand side of the road, which was stationary.

[24]. The sixth witness was Frans Matlakala Moremi who testified in respect of count number 18. On the 5th of June 2018 he was from Phalaborwa where he

worked at Foscor. Around half past 6 he heard gunshots. He stopped to see what was happening. He was told to (*phuma*), which means “get out” in Zulu, and told to (*lalapanzi*) which means to lie down by the person unknown to him, who had balaclavas and to get out of his car.

[25]. The seventh witness was Mamalisela Michael Gwapa who testified in respect of the arrest. He said he received a report about cars which fled from the scene. He arrived at Snake Park and took the road to Klassier. When he arrived, it was around 19h35, and he found two ambulances and a Mercedes Benz which was cordoned off with a yellow tape. He continued to testify on hearsay evidence, which was accepted provisionally, pending the evidence of one Captain Ian Du Preez of Acornhoek, who told him that the people who were in the ambulance, he should escort them to the hospital, whose names were Prudence Ndala, accused number 3, to Tintswalo Hospital. He could observe that the said Mr Ndala was injured on his left side from the top down.

[26]. He could not see other African males in the other ambulance, as they were covered with red blankets up to the neck. At this point EXHIBIT E was provisionally accepted, pending the evidence of the compiler. He did not see the deceased lying down,

nor any of the exhibits at the ML (Mercedez Benz) scene.

[27]. As at the time of this judgment, the said Captain Ian Du Preez from Acornhoek has not come before this Court to testify. As a result, the evidence provisionally accepted is excluded.

[28]. During cross-examination this witness testified that he saw the injured African males only at the hospital. He did not see them at the scene. It was put to him to answer the accused number 3's version that he was shot while walking around the area of the scene, but he only got to know about his names and injuries whilst escorting him to Ritavi, to which he denied.

[29]. The eighth witness was Phetuli Elton Senyolo who also escorted the suspects, of whom, according to him, it was Ndala, Shabangu and Mathamane Mbusodi. He did not observe how the suspects were injured, as it was not part of his work. However, during cross-examination it was pointed to him that his statement which was handed in as EXHIBIT F did not have any of the names of the accused persons.

[29]. I intend dealing with the evidence of the following collectively, as they are in one way or the other the same. The evidence of Mr Lafras Tramper,

Mr Jakobus Louis Boshoff, Mr Jakobus Cornelius Lester, Deetleff Siegfried Marais De Vries, Willem De Vries, the dog handler, all of them I intend to deal with them as one, because their evidence is more or less the same, and their involvement on the night in question.

[30]. If it was a movie, this would be the – the star or the staring of the movie in the whole proceedings, because they are the ones who featured mostly in this case that we are dealing with.

[31]. Now Mr Lafras Tramper received a report about the Cash In Transit (CIT) robbery that happened in Letsitele, and assistance was sought from them (farm watch) to assist on the side of Hoedspruit. That was the last request that we heard from their testimony about the involvement of the police.
From then onwards Mr Lafras made it his mission or his point to give directions as to what was to happen, which included amongst others blockading the roads, the first one being where they had closed for the cars to move in, where they saw the bullets coming from the Mercedes and the Audi car. They used the word “muscles”.

[32]. Before they left for the said roadblock, they made sure that they armed themselves with the biggest machines that they had, because they

anticipated that the people that they were going to deal with were equally armed, heavily armed.

[33]. During the first roadblock they put their cars, which were a bit downhill from the cars coming from uphill. There was a civilian car that they opened for to move on that small opening that they had made, and allowed them to be on the side, and they took cover behind their cars when the two motor vehicles were coming. According to his testimony it was the Audi in front with the ML behind.

[34]. According to their testimony is that the people in the cars were firing shots, however none of them – and/or none of their cars were shot in any way, and the two cars were able to pass swiftly and quickly on the opening that they had opened.

[36]. According to their testimony is that immediately when the cars passed, they realised that these were the cars that they were told about, and they began to get into their cars and pursued with guns being fired. This was because when the cars were coming they thought it was the police because of the blue lights. Now as they gave chase, somewhere along the line – the road the ML's tyre burst. There was a whole lot of dust that they could not see anything. The BMW stopped some distance before, just ahead of the ML, and Lafras was the first one to get out, going back to

the ML in the midst of that whole dust that was happening as a result of that tyre bursting from the ML.

[37]. According to them, five people got out of the ML, two from the right-hand side, and three from the left-hand side, and with one coming from the backseat of the ML, armed with a rifle.

[38]. What became apparent during cross-examination is that Mr Lafras shot the deceased first, because he said in his own words that “before he could shoot me, I shot him”.

[39]. The rest of the people that they saw ran, some towards the fence. He had to cut the fence to also gain access into the fence. Those are some of the contradictions that are there. One of the officers said there was no fence that was cut; however, Lafras’ testimony was that he had to cut the fence to gain access into the farm.

[40]. Now he did not spend much time at that scene, because he was on a mission to pursue the Audi where it had gone to. So, he left Sieg in charge of the scene when he left. However, before he could go he wanted to make sure that it was safe, and that anyone that was on the scene did not have firearms that they could be a victim of, so he made sure that

everyone was safe before he could leave. Now he could not tell this Court about any of the people that he arrested, because initially he had said that he was the one that arrested those people. But he could not tell anything about them to the Court. He even said in his own words "if he were to see them, he would not even be able to identify them".

[41]. Now there are issues that I do not intend to deal with in terms of the contamination of the scene, in terms of who was actually managing the scene as at the time of the arrival of the police, and all of those things, because I do not think for the purposes of what I am doing now they are actually relevant. However, they are on record that we have issues as far as the state evidence is concerned about who actually was the scene manager when Lafras left.

[42]. It was said during the testimony that at some time, even during the – the incident in the evening, the police were there on the scene. But it seems that they – the Plaaswag was the ones who were still in charge of things, as they were able to tell the officers what to do and what not to do, and not the other way around.

[43]. Their testimony was also to the effect that during the incident of the ML there were also people that were moving around the scene. That is why

they even had to take one of the cars of the Plaaswag members to try and put on the road, so that people will not be able to walk through the scene, that there were people who were civilians, and people just walking around the area of the of the scene on the night.

[44]. As things stands now, we do not know who the people were that the paramedics transported from the scene to the hospital. I am saying this because the officer who escorted Mr Ndala, allegedly, in his statement, which was done immediately after the incident, did not have the name of Mr Ndala. It was also put to him during cross-examination that he got the name, actually the names of the accused persons when they were escorting them to the Ritavi Court, which version he denied together with Mr Makutu, which evidence I will get to shortly.

[45]. The SAPS in Hoedspruit were rendered redundant on the night in question, in that the report that was received by the Plaaswag, whether it was sent to the Hoedspruit Police Station is not borne by the evidence. However, what we can gather from the evidence that has been tendered is that they were not at the scene of the offence on the night in question.

[46]. We have both Du Preez's, the captain who was

at the scene, as well as the other Sieg Du Preez who arrived, but they came there in their capacity as Plaaswag members, because they got the information from their Whatsapp communication which happens within the Plaaswag community members. Sieg Du Preez, during his testimony, said when he received the call he had just gotten back from work, and he actually wanted to go and put on his uniform before he could go. Down the line of his testimony he went on to say "no, the reason now maybe they could not recognise me is because I was not in uniform, because I do not wear uniform". Yet, when he began his testimony was that when he got the message, he wanted to change and get into his uniform.

[47]. They went to the A4 motor vehicle where they did not find anybody. From there they went to the river with Tramper leading the way, the water going up to his chest when he demonstrated. Actually, it was Louis Boshoff who demonstrated the hight of the water. He is one of the people who really had a hard time in that river because of his height.

[48]. Now during the proceedings of the river, it is clear that even then the Plaaswag were the ones in the lead, because the police officers were lagging behind. And even when they were lagging behind, they could not even pick up or point out the exhibits

that for example Tramper testified about to the effect, for example of the socks, to the effect of the Solomon shoes, to the effect of the blood splatter which he made, in example that it was as big as a R5.00 or R2.00 coin. If they were there during that time, they would have been able to gather that for the benefit of this Court.

[49]. What gets more interesting is that the evidence, as up to this time, tells us that there is four people that have been found at the ML scene. However, Tramper, when he went to the river, he said before they could look for the spoor, he/they saw five prints or five sets of prints, three going one side, and two going the other, and they then decided to follow one path and they left the other one.

[50]. As things stands now, this Court is not clear as to what informed the – the following of one set of prints, as opposed to the other, and what happened to the other sets that was not followed?

[51]. Further down, as they were travelling, he said that he actually told – because he was the one with the torch, the strongest one, he further told the guys that he was with that "these people are not very far, because they are on "*kaalvoet*"". That is the word he used. They are on "*kaalvoet*". Meaning that at the time when he observed, he saw that the people were

on foot, or the person. Now the person who was eventually found, one says was founds in the tree from the police officers' side, and then from what they (farm watch) are saying, they found him in the dam. This was the person who was supposedly wearing Adidas shoes, according to the entry that was made in the police's records of evidence, because that was what was entered by Warrant Officer Shibambu.

[52]. There was a whole lot of shooting that happened from the Plaaswag members, which warranted them that when they made their statements, they even invoked their protection in terms of section 35 of the Constitution, in terms of the exhibits that have been accepted on record.

[53]. Now from the police's side, one Mr Makutu, the investigating officer in this matter, this is one person that the Justice System requires of him to be able to do his utmost best in making sure that justice is not only done, but it seem to be done starting from the investigation point by him, because what is brought before the Courts is what has been found from the police by way of investigations.

[54]. He testified that upon his arrival at Tintswalo he found accused number 1 – Mr Shabangu, accused number 3 – Mr Ndala, accused number 4 – Desmond

Siyoko, accused number 5 – Mbusodi Mathamane, and he showed them his card and informed them that he will be investigating the matter. That is when they told him their names. It was quite disturbing listening to the evidence of this Investigating Officer (IO) with these many years in the in the South African Police Services (SAPS). He had 31 years working in the SAPS, and serving the unit of serious organised crimes.

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[55]. However, there was no seriousness that he engaged in the investigation of this matter, because the only thing that he did was to tell us about the names of the accused persons as he found them at the hospital. What was even worse for him as an officer of the Court, is that even with that, he had already pronounced on the guilt of the suspects then. He believed that the Plaaswag were actually the saviours on the day in question. He even used
20 his native language, "*ba be ba hlomola naga motlwa*" an African phrase, loosely translated meaning that they were saving the community by removing the thorn. He kept on referring to them as "my witnesses". "My witnesses were actually removing a thorn from the land or from the nation."

[56]. From the time he arrived at Letsitele he talked about cartridges that he observed on the scene, but those cartridges were not taken for ballistics. He did

not take any of the firearms that were found in the hands of the Plaaswag members, and or the firearm that was allegedly found with the suspect that was found in the well for ballistic purposes, so that we can be able to get to the bottom of the issues that are in dispute before this Court. In his own words he said “he was not going to trouble his witnesses when they were defending themselves”. He spoke as though he was there as at the time when the incident happened. And the question becomes, which is not borne of evidence, what were his witnesses defending themselves from? Because none of them, as far as the evidence is concerned, have been injured in any way. None of their assets have been damaged in any way.

[57]. Now what makes matters even more worse is that he was part of a group of people who were involved in making a statement. His very own words was that “I was telling them what I wanted them to write, “I wanted them to write what I wanted”.

[58]. In this case somebody died. We do not have it on evidence whether it is somebody’s husband, father or child, or what. We have a person who has died. Mr Makutu tells this Court during his evidence in chief that there is a docket, an inquest docket that he is busy with, that he is waiting for this matter to be finalised. Once he is off the pressure of this

case, he will then attend to the inquest of a person who died in 2018.

[59]. Now during cross-examination by the defence counsels, he said no, actually that docket has been closed, “because these are the culprits” referring to the accused persons. “We are actually not even going to proceed with it, because the culprits are before this Court. So, there is no going back there to that very particular inquest matter”.

[60]. This Court was particularly disturbed about this testimony, especially in the manner in which his demeanour was, even when he was dealing with the matter, because everyone in South Africa has the right to the protection of the law, irrespective of who they are, what they have done, everyone is entitled to be protected. His family needs to know what happened to their child, and there should be closure for them.

[61]. Now the last witness being Mr Shabangu, his testimony is as if he was in a different scene altogether, because his evidence is quite literally different and contradictory to most of the witnesses that testified herein.

[62]. Mr Shabangu, your legal representative argues that none of the witnesses that testified in this case

have implicated you in this case. That Mr Phetuli Elton Senyolo who transported you to hospital by instruction from Captain Du Preez, did not even tell the Court – or that he wrote in his pocketbook about the names, however, he failed to produce the pocketbook to substantiate his evidence.

[63]. I am only going to read things that do not align with what I have already said, for fear of repetition. That Warrant Officer Moosa Shabangu testified that he was involved in the tracing of suspects who travelled in a black Audi during the night, and he was in the company of one Sergeant Lefefe, Sergeant Ranwid and Sergeant Phabuthi. That the person that they identified, they said it was Valley Zwani, who had a firearm wrapped in a cloth next to Hoedspruit SAPS. The witness did not incriminate you as accused number 1, so according to your legal representative none of the witnesses who testified herein incriminated you. That one witness, Gwapa, testified about the injured persons who were transported to hospital. There was one Shabangu. However, your surname is similar to that of accused number 1, and there are many Shabangu's. And the witness did not also point accused number 1 in the dock, nor tell the Court the whereabouts of the mentioned Shabangu.

[64]. And that your legal representative submits that

where the state's case has not been made out, it was held in the case of ***S v Phuravhatha and others*** **1992 (2) SACR 544 (V)** that the state cannot expect accused number 1 to take the stand and build its shattered case. It is not the duty of the defence to tell the Court as to who is this Shabangu.

[65]. Further that the investigating officer, Mr Makutu, did not testify about why were you in the hospital. And what was the cause of your injuries, and safe to say what were the type of injuries that they each sustained. And that you did not make any admissions or any admissions or a confession, and no accused has incriminated you in any way by their plea explanation, or during cross-examination. And you have not been placed on any of the scences from Letsitele to Hoedspruit. And you are not even implicated by any scientific evidence herein.

[66]. Allow me not to get into the accused number 2's submissions, because the state has already even conceded in that regard, that you should be discharged. However, your legal representative has made out a detailed case for you. These heads of arguments will be accepted into the record as exhibits. They will form part of the record.

[67]. Now accused number 3, your legal representative primarily argues the version that was

put to the witnesses that you were shot while passing through the scene, and denied that you were part of the people who robbed the G4S, or was part of the people who were shooting at the members of the farm watch. It is your submission that this version that you have put to the witnesses remains unrebutted by the state, as at now. He continues to submit that there was no evidence in respect of all the counts that have been levelled against you, that you have not been implicated in any way respectively in each of them.

[68]. Accused number 4, your legal representative argues that the state has thus far had not pointed any person to say he is the one who committed any of the alleged crimes or offences. The identities of the alleged people were not proven.

[69]. That the state even failed to reflect on the role of the alleged perpetrators during the commission of the alleged offence. That the scene was contaminated, and some of the evidence was planted, as there was no explanation regarding the exhibits on **EXHIBIT K, photo 1, 2, 3, 4, 5 and 6, and EXHIBIT E photos 91, 92, 93 and 94**, as to who was moving and planting these exhibits around. That there is nothing linking you with the commission of the alleged crime, and that the said firearms that were used by members of the Plaaswag were not

confiscated to be sent for ballistic assessment. And there was just a lot of discrepancies between the versions of the state.

[70]. Equally, Mr Mathamane, your legal representative submits that there is nothing linking you to the alleged offences that are before this Court, and – and as such you should be granted the application as prayed for. And further that there is no evidence at all stating that you directly or indirectly, so whilst acting in common purpose with the other alleged co-accused in this matter, killed the deceased, as stated in count 1, and attempted to kill any of the victims in counts 2 to 8.

[71]. The state vehemently opposes the applications that are made out by the accused persons, except for accused number 2, wherein they have already conceded that he should be acquitted, as the contradictions in their evidence warrants his discharge.

[72]. I find this very somewhat confusing from the state, in that the state relied on the doctrine of common purpose when charging the accused persons. And now by common purpose it means that the action of one is imputed on the other.

[73]. Now if the said contradictions are favourable in

respect of one, why are they not favourable with respect to others, and vice versa?

[74]. Now the state rightfully in their heads of argument submitted that they are dealing herein with circumstantial evidence.

[75]. Now when you deal with circumstantial evidence, you look at the evidence in totality, not necessarily in piece meal to arrive at a conclusion. Now the case that the state has referred to, famously known as ***R v Blom* 1939 (AD) 188 at 202 *to 203***, says:

> *"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 facts proved. And secondly the proved facts should be such that they exclude every reasonable inference from them, safe the one sought to be drawn."*

Now the question that this Court has to ask itself is what has been proved? And what has been proved becomes important, and particular in respect of disputed facts, because that is what proof is required on. You do not need to prove things that are common cause.

[76]. It is not in dispute that the cash-in-transit happened in Letsitele. It is not in dispute that the Farm Watchers made a roadblock. It is not in dispute that there was a chase. It is not in dispute that a whole lot of things happened on the night in question.

[77]. What remains in dispute is who perpetrated these offences?

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[78]. We do not have any evidence from the Plaaswag members as to who were the perpetrators, because they could not identify any of the perpetrators on the night in question, despite them being the arresting persons. We do not have any evidence to prove that the deceased that was murdered on the night in question was murdered by the accused persons before Court.

20 [79]. Actually, when you look at the exhibits where the deceased person is even lying down, you can see that he was shot here (demonstrated by pointing at the back of the neck) on his back, meaning that even at the time when he was shot, he was not a danger to whoever shot him, because he was shot at the back. So, the person that shot him could not have been defending themselves.

[80]. From the evidence that we have on record,

Tramper is the one who shot the deceased, from his own testimony, which we have on record.

[81]. Now in respect of this count the state cannot be correct when it says that they have made a prima facie case in respect of this count. Count 2 until count 8, the attempted murder charges, from the evidence of the Plaaswag members, they alleged in their testimony that they were defending themselves. But when evaluating the evidence that has been tendered, it is clear that there was nothing that they were defending themselves from. Because 1: They were not shot at. And if they were shot at, if they were missed for one reason or the other, their cars would have definitely been shot at.

[82]. Now in respect of count 2 to count 4, the complainants do not even know who shot them. They did not even know where the shots were coming from, to a certain extent. And this will go also to 9 until 12, which is malicious injury to property, because these – their properties were damaged during the course of the shooting of these people that they did not know.

[83]. Now to where we are now, the only thing we know is that the G4S was robbed. What they were robbed of we do not know. By who, we do not know. The only thing we know that is one of the witnesses

says it was three people, and they were speaking Zulu, because they used "*lalapanzi*" and "*phuma*".

[84]. Now we do not have any evidence as of now from the state as to what is it that was found in the possession of the accused persons before Court, be it in terms of explosives, be it in terms of moneys, be it in terms of firearms that were linked to the alleged robbery, as well as to comply with these offences of being in unlawful possession of firearm and ammunition. We do not have that on record as of now.

[85]. In ***R v P*** **(NB) 1994 (1) SACR 555**, as well as in the case of **Noble 1997 (1) SACR 874** that says the following that:

> *"In the Canadian context the prosecution must establish a prima facie case in order to avoid a discharge. A prima facie case is said to be one in which the prosecution case is complete on all elements of the offence, and sufficient in the sense that the reasonable trier of facts could find that evidence comes up to beyond reasonable doubt."*

[86]. I want to bring it home in the case of ***S v Lubaxa*** **2001 (2) SACR 703 (SCA)** where it was held

that:

> *"If there is no sufficient case for the accused to respond to, a refusal to discharge actually amounts to violation of the constitutional rights of the accused person, in particular where that person is a sole accused."*

But it went on further to also talk about wherein there are co-accused, that:

> *"The Court should be very careful when granting a discharge when there are co-accused, because there could be an implication, or the amplification of the state's case by one of the accused."*

[87]. However, that does not find substance in this case, because from the evidence so far during cross-examination and everything else, there was none of the accused persons who implicated one or the other. So that does not find bearing in this case.

Finally on the prima facie definition is that:

> *"If the party on whom lies the burden of proof goes as far as he reasonably can in producing evidence, and that evidence calls for an answer, it is prima facie evidence.*
>
> *In the absence of an answer from the other side, it becomes conclusive."*

This was said by Opperman AJ in ***S v M and others (2/2016 ZAFSHC 41),*** which was decided on the 18th of March 2016.

[88]. Before I conclude this judgment, I deem it necessary to address the following institutions which play a very critical role in our Justice System, and how matters should be dealt with when referred to the institutions.

[89]. I have observed with utter shock how the members of the South African Police Service handled themselves and the investigations, or the lack thereof in this matter. This complacency portrayed itself even during their testimony in court, unfortunately to the detriment of the administration of justice. To say that the SAPS rendered themselves ineffective in this matter is an understatement. And these sentiments are borne from the evidence on record. From the time it was reported to the police that there was a cash-in-transit offence which happened at Letsitele between 18h00 and 18h30, as taken from the evidence of the witnesses herein, the police only arrived at the scene around 23h00 to 23h30, with some witnesses testifying that the farm watchers were the first to arrive at the scene.

[90]. Their late arrival caused the scene to be

compromised, as they only arrived after there had been movement in and out of the scene, according to eyewitnesses. As if this was not enough, at Hoedspruit the Farm watch members were the lords of the ring, in that they, amongst others, conducted roadblocks, using the police tape, which evidence from one of the SAPS officers said it can only be used by them, and that no civilians could use same. They went about on a shooting spree with their firearms, which were not taken for ballistic, as they were forming part of the scene, or the scenes based on the farm watchers' own admission. What is more shocking is when one heard the investigating officer, Mr Makutu, who was an officer tasked with assisting this Court with gathering all the necessary investigations which may be used in court to prove the state's case saying without shame that "he had found the culprits, and would not trouble his witnesses", referring to the Plaaswag, as they helped him in "go hlomola naga motlwa".

[91]. It remains a mystery to this Court as to why did most of the Plaaswag members leave the scene? It leaves a lot of questions in one's mind as well, why did they leave the scene with the firearms, and what else could they have left with on the scene? It is not borne by evidence, but it is a question in this Court's mind.

[92]. Our Constitution, Act number 108 of 1996, section 35(h) provides that everyone is presumed innocent, to remain silent and not to testify during the proceedings. From this witness, Mr Makutu's testimony, he had already pronounced on the guilt of the accused persons, even before they could be prosecuted and trite, a jurisdiction which is left to the Courts of Law. This position which Mr Makutu held is not very helpful to the care, diligence and skill that is required of police officials, in particular investigating officers, in getting to the bottom of matters by conducting independent investigations, which will result in credible evidence, which would assist the Courts in arriving at just decisions.

By doing the above, he lost sight of the crucial matters required before Courts, which is evidence. There was no evidence he gathered which could assist the state in their quest to prove its case beyond reasonable doubt, or let alone a prima facie case for the accused to answer.

[93]. Secondly, I want to deal with the National Prosecuting Authority. Decisions to prosecute are done when there is a prima facie case for one to be made out, for it to come to our Courts. Our Courts are sitting with backlogs. Like I said when I began, I said this matter, we started it in August, the 11th of August 2020 in particular. Our rolls are full of cases that some of which probably deserving should have

been on this Court's roll, however, we sat here at times at pains. This could also be seen, even when the counsels for the defence did not even bother to cross-examine. It was just witness after witness coming in with no cross-examination. And if there was a cross-examination it was one witness, except when we were dealing with the Plaaswag members, who also did not implicate the accused persons in any way.

[94].The accused persons have been in custody since 2018, because this matter happened on the 5th of June 2018. Litigation or legal representation in the high court is quite expensive for anyone in the Republic. One of the accused persons, accused number 4, even had to part ways with his legal representative, because of the full instructions, however, equally received competent legal representation from the Legal Aid via Judicare.I am saying all of these things, because this speaks to the right to access to justice by our people. It is not anything else, or not being petty or personal or anything else, but this speaks to the right to access of our people who will need the services that the Courts render. The days and the time that we have taken in this matter was not warranted, given the circumstances and the evidence in this case.

[95]. As officers of the Court (NPA) it should never

be about just another case. It should be about making sure that we assist the Courts to the best of our abilities in arriving at just decisions, even if it does not favour us. Because what we must place before the Court is what we have within our possession, but to make sure that the Courts arrive at just decisions.

[96]. Before I give my order, I just want to confirm, our last exhibit was EXHIBIT S, right? It was T, oh yes. I want to mark the heads of arguments as exhibits to these proceedings, because they were not read on record, and they remain part of the record of proceedings. The heads of argument by Mr Segodi will be EXHIBIT U. The heads of argument by Advocate Thipe will be EXHIBIT V. W for Mr Nonyane, EXHIBIT W. X for Mr Kubeka. You will be EXHIBIT X. EXHIBIT X. Mr Mpaphudi, you will be EXHIBIT Y.The respondent's heads will be EXHIBIT Z. Okay. It is a beautiful coincidence. So, all the alphabets have been captured.

[97]. Alright. Gentlemen, stand on your feet.
Mr Sizwe Shabangu, Mr Valley Zwani, Mr Prudence Ndala, Mr Desmond Kulekane Siyoko, Mr Mbusodi Albert Mathamane, after having listened carefully to all the evidence led through the eighteen state witnesses herein, and having carefully considered the law and the relevant circumstances and

probabilities, it is my considered view that the question that this Court has to answer itself is that with the evidence that we have as of now, can I convict you?

[98]. If the answer is yes, then a discharge should be denied. If the answer is no, because the responsibility of discharging the onus to make me arrive at your guilt rests squarely on the state, you have no responsibility of assisting the state, then a discharge must be granted.

It is my considered view that finding that the accused herein should not remain in the accused dock longer than this moment, as the state has not led evidence upon which this Court acting carefully can convict you for all the charges that you were facing, unless you each testify and incriminate yourself, and which this Court will not do, because it will be going against the Constitution of the Republic of South Africa, your rights in terms of the Constitution in terms of section 35(3).

[99]. It is further my finding that no accused will be able to make up the state's case by implication either of his co-accused, based from the evidence thus far on record. It is my finding that they will not implicate each other in amplifying the state's case, according to the evidence on record thus far. It is further my finding that the state has not made out a

prima facie case against all of you at the end of its case, and calling for each of you to answer. It is further my finding that the manner in which the investigations and the subsequent prosecution was conducted by the police, as well as the National Prosecuting Authority officials violated your constitutional rights enshrined in the Bill of Rights and to a fair trial.

[100]. Based on the above, gentlemen, you are consequently found not guilty and discharged at this stage of the trial in terms of section 174 of the Criminal Procedure Act 51 of 1977. Your journey ends here.

COURT: I appreciate all the assistance of all the officials, court officials in this court, in particular today. We have not had any break whatsoever. None of you complained. I know it was a stretch, but thank you for making sure that we deliver justice, which must not only be done, but must be seen to be done. Thank you.

MR MABAPA: As the honourable Court pleases.

MR SEGODI: As it pleases the Court.

MR KUBEKA: As it pleases the Court.

MR MPAPHUDI: As it pleases the Court.

MR THIPE: As it pleases the Court.

COURT: The Court shall adjourn. Enjoy your festive seasons, until we meet again.

MR KUBEKA: Enjoy the festive season, M'Lady.

MDHLULI AJ

ACTING JUDGE OF THE HIGH COURT; LIMPOPO

APPEARANCES

COUNSEL FOR THE STATE	**: DPP, MR MABAPA**
COUNSE FOR THE ACCUSED NO: 1	**: MR SEGODI**
COUNSEL FOR THE ACCUSED NO: 2	**: MR KUBEKA**
COUNSEL FOR THE ACCUSED NO: 3	**: MR MPHAHPUDI**
COUNSEL FOR THE ACCUSED NO: 4	**: MR THIPE**
DATE OF THE JUDGMENT AND SENTENCE	**:29 NOVEMBER 2022**