

IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: CC299/2007

DATE: 5/12/2007

NOT REPORTABLE

IN THE MATTER BETWEEN

STATE

AND

KHULANI SHEZI

JEFFRY LUKHELE

JUDGMENT

MAKHAFOLA, AJ

The accused were arraigned in this court for the murder of Phiwayinkosi Themba Sibiya, for the possession of unlicensed firearm and for the unlawful possession of ammunition. The offences were committed on or about 3 February 2005 at or near Finetown, Grasmere.

The accused were represented by counsel. They pleaded not guilty to all counts and exercised their right not to give any plea-explanation by remaining silent.

The following exhibits were handed in by agreement:

Exhibits A-D embodied the following:

Section 220 of Act 51 of 1977 admissions were made as follows:

- (i) the deceased is Phiwayinkosi Themba Sibiya;
- (ii) findings in the post-mortem report are correct;
- (iii) causes of the deceased's death are "multiple gunshot wounds";
- (iv) after death the body of the deceased did not receive further injuries;
- (v) the photo-album of the scene is not in dispute;
- (vi) the photo-album depicting the deceased's body is not in dispute.

Exhibit "E" embodies a photo-album depicting a motor vehicle.

Exhibit "F" sketch or map drawn by Mr Thamae to indicate his house, the deceased's house and the spot where he observed the motor vehicle in exhibit "E" in a stationary position.

Exhibit "G" a police statement by Mr Mothibe Azael Thamae .

Exhibit "H" is SAP329 identification parade form.

Exhibit "J" embodies identification parade photographs.

Exhibit "K" police statement of and by Constable Tshabalala.

Exhibit "L" police statement of and by Theophilus Tshangela Kaka.

The case for the state

The state called as its first witness Mothibe Azael Thamae. He testified that he resides at FT.1407 Finetown, Grasmere. He does not know the two accused before court. He is seeing them for the first time in court. He has come to court in relation to an incident that had occurred at about 18:00 on 3 February 2005.

He was at his home watering the lawn outside when he saw a car from the side. He does not know if it was a Mazda or Bantam but it had tinted windows. Its colour looked white. This car drove twice down and back again slowly. When he looked at it again it came to a stop straight to where he was watering.

The car was about 25-30 metres away from him to where it came to stop. He saw two persons alighting from the said motor vehicle and opening the front. Whilst the car's bonnet was so opened he saw the two persons who are males getting inside the vehicle.

At a later stage one person alighted from the passenger door and came approaching his home. He had thought the car should be having a problem and that the person was coming to seek help because he could have seen a car parked in his yard.

He did not take much notice about what he was wearing. But he remembers as if he was wearing a top which could have been maroon, orange or lemon in colour and was wearing short pants.

He saw that person go to his neighbours' house, that of the deceased. Because there was a Combi parked outside next to the gate he was unable to see if that person had entered the gate or not. The Combi which was facing the gate was being washed by a small boy.

There is only one house between his house and that of the deceased. When he was busy rolling up a hosepipe he heard a cricket-like sound and he proceeded to a window to look. He heard gunshots coming from the house of the deceased, from there he went outside.

He looked to the direction of the deceased's house and he saw that very same person who came from the parked van going to it. He came walking normally but ran when he arrived at the corner of the street as depicted on exhibit "F". On his left hand next to his thighs he appeared to have been holding an object. This person got inside the car then the car drove away fast into the other street.

There are about four houses that face the house of the deceased. He knows the deceased to own a transport business. He the deceased goes around on foot. His two taxis are driven by two taxi-drivers.

People gathered at the deceased's house after the sounds of gunshots. The deceased was bleeding. There were empty cartridges found on the ground. The deceased

was taken to the hospital and the police had also arrived.

He testified further that from the gate of the deceased one could not see where this van was because of the other houses facing the deceased's house. The van could be seen clearly from his house because there were no obstructions.

On the following day he saw the deceased's wife with her children and the eldest son of the deceased one Siphhelele who was crying bitterly. He later made a statement to the police about the incident. Visibility had been good on that day as the sun had not set but was setting.

Mr A

Before the deceased's son who testified under a pseudo-name Mr A the prosecution made an application that the proceedings be held in camera. The application was opposed by the defence. The court granted the application and Mr A testified also through a closed circuit television.

Mr A is 17 years old and at the time of the incident he was 15 years of age. On 3 February 2005 he left home to visit a friend who stays in the first street. He was going to do a school project with his friend.

After finishing the project he and his friend went to sit outside under a tree. He

left at some stage because he had to go and wash his father's taxi which is an E20 Nissan Combi at his home. The car was parked outside because he had earlier on in the morning agreed with its driver that he would wash it on his return.

Whilst he was busy washing the Combi a friend of his staying in another street called him whilst the friend was at a corner of a street. Whilst he and his friend were there speaking about him going to a soccer training session he saw a man standing at the same corner dressed in black clothes.

When he went back to wash the car he noticed the same person who had been standing at the street corner going up the street. He noticed that this person was now standing facing the direction of his street. He completed the washing and took the washing apparatus inside the yard. He told his father that he had finished washing the car. His father had been inside the house. He said he did not look at the watch at the time but it was about 2:30pm when he started washing the car. He finished at about 3:30pm. His father told him to go and pull the hosepipe into the yard.

Thereafter, his father went into the motor vehicle, started it to warm it up. He stayed for a while in it apparently speaking on the telephone. He was pulling the hosepipe in front of the garage door at the time.

There is a wall around the yard. That man he had seen standing at the street

corner approached the motor vehicle and stood where the yard wall starts. He, Mr A, was standing next to the tap at the garage door about three metres from this man who had arrived. This man was busy looking around towards him and the car and what was happening. He, Mr A, was standing at the wall looking at him. Visibility was good as the sun was still shining.

This man was wearing a tracksuit top or jacket and was busy placing his right hand and touching his side body where the pocket is. At this time the deceased was inside the combi still parked where he had washed it. Then the deceased reversed the car until it was straight with the gate facing the gate. The deceased reversed the combi near the house on the opposite side.

This man started to walk towards the combi and he appeared to walk past it. The deceased said to this man I will wait for you to go past first. And this man told the deceased that he the deceased can move first. When the combi moved forward this man opened his jacket, turned around in the direction from which he came and pulled out a firearm. Mr A then shouted "father, father look there" and at this moment the combi was about to enter the gate. This man turned the gun and pointed at him. He Mr A then lied down. This man started shooting at the combi. He did not count the shots but the shooting was more than eight times, firing repeatedly.

He then heard the deceased shouting "shembe shembe" meaning Lord help me.

Then this man shouted "die you dog, die". Mr A then crawled on his knees up to the pillar of the wall next to the gate and he was looking at what was happening through the holes on the wall.

After the shooting had stopped he, Mr A, ran towards the combi and this man started running towards the corner next to Thamae's house. This man who shot the deceased had been on the driver's side of the combi. After turning at the corner of the street the van which was parked there left in a matter of seconds at a high speed.

He shouted for help, and as the passenger door was slightly opened he opened it and he shook the deceased saying "father wake up, wake up" but he was not moving. Mr A spent about 5-7 minutes observing this man at the start of the wall. When he saw him he appeared as if he wanted to hijack the combi, because he was staring at the combi and inside the combi.

This person was a bit tall wearing a tracksuit, a cap and white tekkies. The cap was about black, the tracksuit was dark blue.

At the hospital they placed the deceased on the stretcher and pushed him. Later it was said that he had passed away because of the bullet at the navel.

He attended an identification parade. He was first fetched from home to point out

a car he had seen from which this man alighted who shot his father. The car was at a police station. At a later stage he was fetched from school to the identification parade held at Eldorado Park Police Station. He was told to go and point out the people he saw commit the offence.

He waited in an office whose door was closed. Whilst there, he did not speak to anyone and nobody spoke to him. A police officer was waiting outside the door. He was then called to an office where other people were present and this office was a bit of a distance away. When taken to where the people were, he could not see them where they were.

Where he was standing it was dark and there was a glass. Where the people were standing was bright, he was able to see them but they were not able to see him. He was told to point out the people he had seen and he pointed out two persons.

He had known "SBU" before and he had also pointed out the other person who had shot the deceased because he remembered his face. He pointed out accused 2 because he is the person who drove the car which stood at the street. He had known accused 2 because he used to see him at the taxi-rank when he used to go with his father there. If accused 2 were not driving the van he would be driving a white combi.

The van which accused 2 would be driving has tinted windows with the top part

which is shining. This is the van he pointed out at Lenasia South Police Station as the van he knows and had seen accused 2 driving. Even on the day of the shooting he had seen accused 2 driving it. The photos in exhibit "E" depict the van he is referring to.

The said van he had seen when he left his friend's home and he walked past it on the driver's door. There were two occupants in the motor vehicle. He did not clearly see the passenger. He saw clearly the person sitting behind the steering wheel and this person is "SBU". He had earlier prior to the shooting seen this van driving slowly where the street makes an "L" formation. Inside this bakkie he had seen accused 1 wearing a sort of a jacket, blue in colour but could not see what he had been wearing on his head.

When Mr A was requested to come inside the court to point at the people he saw inside the bakkie on the day in question he pointed out accused 2 as "SBU" and accused 1 as the person who had shot the deceased. He had known accused 2 for a year and had seen him many times because he would find him together with other students at a bus stop when they came from school and would transport them.

Bhekikhaya Nazo

He is a captain in SAPS. He has been a police officer for nineteen years. He is the one who was asked by the investigating officer to conduct an identification parade.

He completed the SAP329. He has held about ten parades a year for fifteen years

he had been a detective. He completed the rest of the points in the form and the investigating officer completed points 2-8 because they relate to the particulars of the case which he does not have.

Point 9 relates to a legal representative. He asked both accused if they had been informed of this right. They said they had been told but they did not require a legal representative. He then completed point 9 and the form, and continued to hold the parade.

Apart from the accused there were other participants on the parade from Eldorado Park and Protea Police Stations. The participants were thirteen in number. For this parade only Jacob Sibiya was the witness. Other witnesses had come for other cases.

Ramaditsi Lazarus Mokoena

Testified that he is a member of SAPS and has been a member for fifteen years. He is attached to the local criminal centre in Soweto. His rank is that of an inspector and is a photographer and draws sketch plans.

He is the one who prepared exhibit "J". He took the photographs of the parade after he had been called by Inspector Matlali to assist. He took the photographs at Eldorado Park Police Station on 10 March 2005 where he was with Inspector Nazo. They entered the parade room by different doors because the suspects were not supposed

to be seen by the witnesses.

Inspector Nazo was on the side where the witnesses were, whereas he was where the suspects were. Whilst he was there Inspector Nazo would shout that number 10 should step forward and he would take a photo.

He was not aware who the suspects were. He only saw what their numbers were. He did not know who the witnesses were. He does not know with whom Inspector Nazo was. Apart from this parade he did not participate in any parade where Inspector Nazo was.

Nakedi William Ramushu

Is a police officer in SAPS and has been in the Service for two years now. He is a constable. He was called by Inspector Nazo who is currently a captain to the parade to do guard duty. He found three people there waiting and they were not speaking to each other.

He guarded room A16 where people were waiting and it was closed. He did not see these people after they had left room A16. He cannot recall the day on which the said parade was held.

Xavier Myron Thomas

He is employed at the Johannesburg Metro Police as a police officer for eight years. He was on duty on 5 March 2005 and at about 7:30 whilst he was driving on the Golden High Way North to South direction and at Wembelton he noticed a cream white Bantam bakkie disobeying a red robot. Its number plate is NWR006 GP. He pulled it off the road. He was from dropping a colleague when this happened.

The driver of the bakkie stopped and ran to him before he could open the door of his motor vehicle. He discovered that it was Jeffrey Lukhele who is in court as accused 2.

He asked for his driver's licence in order to charge him for disobeying a red robot. He said he had forgotten it at home and suggested that they should talk. He refused to talk to accused 2 and told him to produce his identity so that he could issue him with a ticket otherwise he was going to lock him up.

Without notification accused 2 ran to the passenger side of the bakkie where there was a passenger who he came to know later. He immediately proceeded behind accused 2 and on arrival at the bakkie he noticed they were "fumbling" something. Accused 2 bent forward in a crouching position. He then noticed that the said passenger had a firearm in his hands. Without any hesitation he drew his own firearm fearing for his safety. He warned them that if they were going to use that firearm he was going to use his. He ordered them to lie down. He used accused 2 as his shield against being shot by

his friend. A motorist arrived and assisted him.

He took the firearm from the passenger. With the help of a colleague they transported both accused to Lenasia South Police Station. The firearm had one round of ammunition in the chamber and the magazine had fifteen rounds. He entered the firearm in the SAP13. He confiscated one pair of handcuffs with SAP markings on them.

When he initially stopped the bakkie accused 2 told him that it belongs to his uncle and that he was on his way to a funeral. At the police station he did a vehicle registration check on a two-way radio and it showed the bakkie was not stolen. It was in the name of one Theophilus Kaka of Zacharia Park which is about three kilometres from where he had arrested the accused. Both accused did not have a licence for the said firearm.

Khangela Christian Tshabalala

He is a police constable in SAPS who is stationed at OR Thambo Airport. He has been in SAPS for four years now. Before being stationed at the airport he had been at Eldorado Park Police Station.

On 10 March 2005 he was on duty at the CSC and he was approached by a police officer who asked him to assist in an identification parade. He obtained permission from Inspector Kotelo.

He was escorting witnesses from room B16 one by one to the parade door and back again, and he would wait outside. These witnesses were guarded by Constable Ramushu. After they had finished he would take them outside the police station.

The witnesses in the room were not able to see the people to be pointed out. The distance between the guard room and parade room was about 40-80 metres. He did not know the witnesses and he did not know the cases they came for. He did not speak to the witnesses when he was escorting them to the parade room. Additions were made to his police statement after he had signed, but he does not know who made them.

Gideon Mabuza

He is a police officer in SAPS for seventeen years. He is attached to the Innerdale Detectives where he is a detective inspector. He is the present investigating officer in the case against the accused. He started investigating this case during 2005. The case was first investigated by Inspector Horn.

He took over the case when it was discovered that it was connected to taxi violence because at the time he was working at the Provincial taxi violence task team in Gauteng. He relates this case to the taxi violence because the accused work at the taxis. Accused 1 is a taxi driver and accused 2 is a taxi owner. Further investigations showed that accused 1 was operating a taxi under somebody's name but actually the taxi belonged

to him.

Further investigations revealed that at Lawley Taxi Association for a new member to join, a person had to be killed to create space. Accused 2 was also operating taxis on the De Deur and Johannesburg line.

He testified that he had struggled to get witnesses for this case because some would run away when he went to the taxi rank to talk to them, others feared to be killed whilst others said they cannot be witnesses. He also lacked time because he would sit in the bail applications during the day and would only do investigations in the evenings.

During his investigations he had interviewed the late Theophilus Tshangela Kaka about his bakkie which was being driven by accused 2. He had taken a statement from Mr Kaka relating to the car in question. He was investigating the ownership of the said bakkie when he interviewed Mr Kaka.

This motor vehicle was identified by Jacob Sibiya the son of the deceased in this matter as the one which was used by the assailants of his father. He drove around with Mr A in the Lenasia South Police Station where there were many motor vehicles. He pointed the bakkie in exhibit "E" as the car which was used by the accused.

He also investigated to find out if the accused had possessed licenced firearms.

He found out that they did not. Accused 1 had applied for a firearm on 3 January 2002 and accused 2 on 23 June 1997 but both applications were refused.

He does not know who made an insertion in the police statement of Constable Tshabalala because he did not take that statement. He remembers having made insertions in the police statement of Mr Thamae which is exhibit "G". He made these insertions because after the statement had been signed he revised it and realised that the English was not up to scratch. He went back to Mr Thamae for him to initial the insertions but did find him because most of the times he looked for him, Mr Thamae was working at night and in the meantime the dockets had already been submitted to the office of the Director of Public Prosecutions.

Case for the defence

Accused 1

Testified that he went to school as far as standard 6. He raised the defence of an *alibi* and mistaken identity because he was not at the scene of the crime on that day.

He does not know the deceased. The parade he participated in, count 1 was not in issue. He was charged by Mabuza on 18 May 2006 after he had attended the parade. Mabuza did not inform him particularly that he was charging him for a case at Fine Town. He had informed his legal representative then one Mr Thamaga that Inspector Mabuza had charged them.

He did not see Inspector Nazo conducting a parade on 10 March 2005. He knew the vehicle in exhibit "E" at the end of February 2005. He did not know to whom it belonged but he knew the person who used it. On 3 February 2005 he was not inside the said motor vehicle. When he was charged in this case he was attending court in Vereeniging in another matter. He was informed by the court about the present charges when he was applying for bail in other matters.

Accused 2

He testified that the purchase price of the bakkie appearing in exhibit "E" was R12 000,00. He first paid the amount of R5 000,00 but did not take possession of the motor vehicle. The balance was not paid. Another amount of R5 400,00 was paid to Mr Kaka on 17 February 2005 from whom he bought the bakkie. The remaining balance to date is R1 600,00.

Before 17 February 2005 the motor vehicle had been at Mr Kaka's house. Mr A is making a mistake if he says he has seen him driving the said motor vehicle on 3 February 2005. On that date he was in Aikenhoff ferrying people because that is the work he is doing.

He denied having been pointed out at the parade on 10 March 2005 by Mr A. He knows Mr Kaka who was a member of the Lawley Taxi Association. He denies ever

acting in common purpose in the shooting of the deceased because he was never there at the scene of the incident. He had known the deceased but not Mr A. He was working with the deceased. He does not remember all the people he transports including Mr A. He started knowing accused 1 on or about 1 or 2 March 2005.

The law

Onus

The *onus* in criminal proceedings is borne by the state to prove its case against the accused beyond a reasonable doubt. This entails proving all elements of the crime with which the accused is charged.

In *R v Difford* 1937 AD 370 at 381 WATERMEYER AJA states the following:

"For these reasons I am of the opinion that a reasonable man who remembered the *onus* of proof of law on the Crown and that no *onus* lay upon the accused and that the accused was entitled to be acquitted if the Crown failed to discharge the *onus* of proof could not on the evidence in this case have found a verdict of guilty against the accused."

Prima facie evidence

It is trite that where the state has laid *prima facie* evidence before the court that the accused may be the perpetrator then he is required to answer by evidence in rebuttal of such evidence. *Vide: R v Jacobson and Levy* 1931 AD 466 at 478; *S v Alexander* (2)

1965 2 SA 818 (C).

The alibi defence

Where the accused raises a defence of *alibi* he is essentially denying the prosecution's case on the issue of identity. The accused does not bear the *onus* of proving his *alibi*. The state must disprove his *alibi*. *Vide: R v Biya* 1952 4 SA 514 (A); *S v Khumalo en Andere* 1991 4 SA 310 (A) at 327G-I.

But again the Appellate Division has said in *R v Hlongwane* 1959 3 SA 337 (A) at 341A that the correct approach to consider the defence of an *alibi* is in the light of the totality of the evidence before court and the court's impression of the witnesses. The court should not consider the probability of the *alibi* in isolation.

In *S v Van der Meyden* 1999 2 SA 79 (W) NUGENT J stated that both inculpatory and exculpatory evidence should not be considered in isolation. *Vide* also *S v Van Aswegen* 2001(2) SACR 97 (SCA) at 98b.

Identification parade

SCHREINER JA in *R v Kola* 1949(1) PH H 100 (A) had the following to say regarding parades:

"Unsatisfactory as it may be to rely on the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested

by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hallmark of such a test if in fact the hallmark is spurious. Of course an identification parade is not necessarily useless because it is imperfect. In some respects the quality of the parade must necessarily be a question of degree."

Section 208 of Act 51 of 1977

The principle here is that the accused may be convicted on the evidence of a single witness if such evidence is satisfactory and clear in every material respect. *Vide: R v Mokoena* 1932 OPD 79 at 80.

The cautionary rule also comes into play where the evidence of a single witness is the only one implicating the accused. In *S v Artman and Another* 1968 3 SA 339 (A) at 341B the learned Judge of Appeal HOLMES stated the following:

"While there is always need for caution in such cases, the ultimate requirement is proof beyond a reasonable doubt; and the courts must guard against their reasoning tending to become stifled by formalism. In other words the exercise of caution must not be allowed to displace the exercise of common sense."

In this case the only witness implicating the accused was a girl aged 16.

In dealing with section 208, DIEMONT JA said in *S v Sauls and Others* 1981 3 SA 172 (A) at 180E-G:

"There is no rule of thumb test or formula to apply when it comes to a

consideration of the credibility of the single witness (see remarks of RUMPFF JA in *S v Webber* 1971 3 SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

Direct evidence

If there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him or her to show that he or she could not have committed the offence because he or she was somewhere else at the relevant time. *Vide: The South African Law of Evidence* at p151 by D T Zeffertt, A P Paizes & A St Q Skeen.

Contradictory versions

In *S v Mafaladiso en Andere* 2003(1) SACR 583 (SCA) the court dealt with and addressed circumstances under which such versions were made. The position where there are discrepancies between previous statements, contradictions, their actual effect and non-material deviations were properly dealt with and a guideline was set.

In the final step the trial court had a duty and this was stated as follows:

"Lastly, there is the final task of trial Judge, namely to weigh up the previous

statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told despite any shortcomings."

Section 174 application

Both accused applied to be discharged in terms of section 174 of Act 51 of 1977 because the state evidence at the close of the state case did not require an answer by them. I refused the application and said I would give reasons at a later stage. My view is that at the end of the state case a *prima facie* case was made by the state which required the accused to answer. Mr A's evidence placed both accuseds at the vicinity of the scene of the accident, the motor vehicle they used was also placed at the vicinity of the incident as well as accused 1 who was directly implicated as the person who pulled the trigger of the firearm directed at the deceased. With this evidence by the state both accused had the duty to rebut it.

Evidence analysis

Mr Thamae's evidence places the motor vehicle possessed and used by accused 2 around the vicinity of the house of the deceased indirectly. His description of the said motor vehicle, and his seeing it after the shooting being approached by the same person who had alighted from it previously requires corroboration to render it reliable.

The evidence of Bhekikhaya Nazo about the manner in which he had conducted

the identification parade cannot be faulted. The conduct of the parade has, to a large extent, been confirmed and corroborated by the evidence of Inspector Mokoena and Constables Ramushu and Tshabalala. That the parade was held on 10 March 2005 is further corroborated by exhibit "H" the completed identification parade form which lists the names of three suspects who had participated in the said parade. In this form accused 1 at paragraph 22 is suspect (6) whereas accused 2 is recorded as suspect (4).

On the strength of this there is no doubt that, despite the denials that they did not attend any parade on 10 March 2005, they did attend it on that date. Apart from that the accused have no rebuttal of the said date by proof that they did not attend, and/or alternatively that there was a parade on 17 March 2005. The court accepts that there is enough proof on the part of the state that they had attended a parade on the said date. The court rejects their denials as false.

The accused were pointed out by Mr A at the parade. According to paragraph 24 on the parade form accused 1 was suspect (6) with tag number 10 and accused 2 was suspect (4) with tag number 5. Mr A took three minutes to point them out. Those who were pointed out looked angry and had no comments to make when asked to do so. This pointing out by Mr A of the persons he saw on the day of the shooting in the motor vehicle, his prior knowledge about accused 2 by sight, his subsequent pointing out of the motor vehicle at the police station, the pointing out of the accused amongst two other persons in the dock serve as caution for accepting his evidence of identifying the accused

as the alleged perpetrators.

The accuseds' denials that they were not pointed out at the parade as the perpetrators in this case are to be rejected in the face of the evidence by Mr A and recordings in exhibit "H". Any evidence by the accused in regard to being not pointed out is palpably false.

The evidence of Xavier Myron Thomas that on 5 March 2005 he had stopped accused 2 driving motor vehicle depicted in exhibit "E" after it had jumped a red robot is accepted. He knows the accused from that date and he had arrested them. His evidence confirms the fact that by March 2005 accused 2 was in possession of and using the said bakkie.

The police statement of Theophilus Tshangela Kaka relating to the said motor vehicle in possession by accused 2 says that it was sold to accused 2 in August 2004 for the amount of R9 000,00 which was paid in instalments of R2 000,00. Accused 2 paid a total amount of R6 000,00 but has failed to pay the balance until he was arrested in March 2005.

On his own version in his testimony-in-chief accused 2 says he had bought from Kaka the said bakkie between 16-20 December 2004. The purchase price was R12 000,00 with instalments of R5 000,00, and R5 400,00 the latter amount having been

paid on 17 February 2005.

The evidence of Gideon Mabuza who is the present investigating officer is of a general nature and does not implicate the accuseds in the offences. Of importance is his explanations for insertions made in the police statement of Mr Thamae after it had been signed. Regard being had to the sentiments and remarks made in *S v Mafaladiso (supra)* the explanations are sound and not misplaced. In addition, the evidence of and by Mr Thamae does not implicate the accuseds in any way except to say it gives the court what he observed on that day. His *viva voce* evidence in court weighed up against this statement and all other evidence relating to the motor vehicle is accepted as reliable and truthful despite the shortcomings in the police statement which are immaterial.

Mr A is the principal witness for the state. He tendered direct evidence about the bakkie and the shooting incident. His police statement had shown some discrepancies during cross-examination, but he was able to explain them. After the explanations given by him I find the discrepancies not going to the root of his credibility because they are non-material.

The identity of accused 2 as far as Mr A is concerned cannot be doubted not to be known well. He had seen him several times before the incident driving the said vehicle. Accused 1 was seen prior to the incident inside the bakkie though not for a long time. At the shooting spot he had been observed when visibility was clear. He was observed as a

person who looked like a hijacker and he was finally pointed out at the parade and in the dock.

Mr A made a good impression on the court in the following manner:

- (a) he answered the questions directly without being evasive;
- (b) he spoke up although he testified by means of a closed circuit television set;
- (c) he was bold and courageous in the manner he testified and answered questions;
- (d) he appeared to know what he is talking about and that he had come to court to tell just that.

It is only in few instances where he would stray but these are insignificant to discredit him. He was told by the defence to leave conclusions to the court. He conceded his mistakes and apologised. Even when he sometimes answered before the interpretations were done by the interpreter, he acceded to the admonition by the defence.

His evidence implicates the accuseds directly. His evidence in court, his pointing out of the accuseds as the perpetrators, his identifying the bakkie fits in well with the evidence he gave.

The *alibi* defences of the accuseds are untenable because by their denials they

also conceded under cross-examination that they did not know where they were on 3 February 2005. They both say as taxi drivers they were doing daily duties. Accused 2 could not deny Mr A knows him, and that prior to the incident he was seen at the taxi rank driving the said bakkie. Since he does not know Mr A he could not deny having ferried him and other students from school when he found them at a bus stop.

These defences considered in the totality of the evidence before court cannot pass the probabilities in their favour. These defences are improbable and fail to assist the accuseds weighed against the prosecution's case. In the premises the defences have failed to rebut the *prima facie* case of the state. The defences are rejected as fanciful and cosmetic because they do not challenge the state case. These defences are bare denials with no substance to meet and rebut the allegations and evidence tendered by the state. In the result they are false.

I also take into account, in the totality of the evidence before court, that Mr A underwent a lengthy piercing cross-examination. He fared pretty well and reiterated in the main his evidence-in-chief with minor non-material faults. Even then he answered questions satisfactorily.

Withdrawal of mandate by accused 2

After argument by the state on the merits but before the defence could so address court the defence informed the court that accused 2 had terminated his mandate and as a

result he was only going to argue on behalf of accused 1.

The court realising the predicament the defence faced then spoke to accused 2 directly to find out if that were true, what his intentions were and the reasons for the termination.

The court had to consider the prejudice to be suffered by accused 1; Mr A who has been under the witness protection program for more than two years; the finality of the matter and the interests of justice. Accused 2 was requesting to be given an opportunity to find a new legal representative, but he did not have the funds which he said his family may be able to find. He also could not give a satisfactory answer as to why in the first place he had utilised legal aid if he could afford a legal representative of his choice.

He asked the court to postpone the case until the year 2008 without assuring it when he would have obtained the services of another legal representative. He criticised his present legal representative for not putting his case in a satisfactory manner and also for not calling the panel-beaters to come and testify on his behalf.

After this enquiry the court was of the view that accused 2 was playing for time regard being had that the case for the state and the defence was closed.

The court then allowed the defence to argue on behalf of accused 1 who had

confirmed his mandate to the defence and thereafter the defence should argue *amicus curiae* for accused 2 on what is before court.

When the defence was to begin to argue it requested a short adjournment which was granted. Before the defence could argue *amicus curiae* and on behalf of accused 1 the defence counsel informed the court that his mandate had been restored to him by accused 2.

In the circumstances the defence counsel argued on behalf of both the accuseds with their full mandate. The *amicus curiae* appointment was not utilised and had fallen away.

At a later stage the court requested the defence counsel to place on record whether to reinstate him was done freely and voluntarily by accused 2. This was confirmed and the proceedings proceeded normally with full mandate to the defence counsel. There was no influence by the defence and the court, the defence counsel submitted.

Application of the law

Once the state has discharged its *onus* of proving the guilt of the accused beyond a reasonable doubt then the court must convict. If the evidence of the accused is reasonably possibly true or a doubt is created in the state evidence as a whole, then the court must acquit.

When the state presents evidence that disproves the *alibi* defences of the accused then there remains no defences at all. Alternatively, if the defences raised do not rebut the state evidence then the state evidence remains unchallenged and it should be accepted by the court. Before the *alibi* defences are rejected by the court they have to be considered in the totality of all the evidence before court as I have done.

I now make the following findings:

- (a) The evidence of Mr A is satisfactory in all material respects and is consistent with the deceased having been shot several times.
- (b) Accused 2 has for all intents and purposes been in possession of the motor vehicle with registration letters and numbers NRW006 GP on the day of 3 February 2005.
- (c) Whilst the said motor vehicle was parked in the street in direct opposite of Mr Thamae's house the two occupants seen by Mr A are accused 1 and 2.
- (d) Mr A did not make a mistake by identifying accused 2 at any given moment before and after the shooting incident because he had known him by sight prior to the shooting incident.
- (e) The *alibi* defences of both the accuseds are false for the reasons already stated above and are, therefore, rejected.
- (f) Mr A and his family did not have any problem with the accuseds prior to the shooting incident to found a motive to falsely implicate them.

- (g) The investigating officer has not implicated any of the accuseds in the commission of any of the offences with which they had been charged.
- (h) Inferring from the totality of the evidence the murder was pre-planned.
- (i) The state has discharged its *onus* of proving the guilt of the accused beyond a reasonable doubt.

In the result I find both accuseds guilty as charged.

Sentence

The infliction of punishment is pre-eminently a matter for the discretion of the trial court. *Vide: S v Toms and S v Bruce* 1990 2 SA 802 (A) at 806H-I.

"Where section 51(1) of Act 105 of 1997 applies, the accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate grounds, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment simply because such circumstances are, unwarrantedly, held to be present."

This was stated in the case of *Rammoko v Director of Public Prosecutions* 2003(1) SACR 200 (SCA).

The personal circumstances of an accused person are a facet of the triad and they are as follows:

Accused 1 was –

- (1) born on 6 June 1974 and he is currently 31 years old;
- (2) at the time of the commission of the crime he was 29 years old;
- (3) at the time of his arrest he was employed as a taxi driver earning R500,00 per week;
- (4) he is unmarried but has five children with different women and these children stay with their mothers and are maintained by him;
- (5) he is the eldest child amongst four children in his family;
- (6) his father passed away when he was still very young doing standard 6 at school;
- (7) what stopped him from continuing with schooling was lack of funds from his family. His mother is still alive;
- (8) he has acknowledged his previous convictions.

Accused 2 –

- (1) was born on 11 May 1977 and he is currently 30 years old;
- (2) he is a taxi owner and taxi driver and he generates ± R2 500,00 per week from his taxi business;
- (3) he is unmarried and has three children with different mothers. The said children depend on him for maintenance;
- (4) he does no longer have a mother because she has passed away in June 2004, whereas his father is an old pensioner;

- (5) at school he managed to go up to standard 8 and he dropped out for lack of funds.

Remorse

The accused are not remorseful because they maintain their plea of innocence as they have done throughout the trial. The state has submitted that there exists no substantial and compelling circumstances whilst the defence argued their presence. It is of importance to source guidance from decided cases which are instructive in the application of section 51(1) of Act 105 of 1997 as intended by the legislature. *Vide: S v Malgas* 2001(1) SACR 409 (SCA); *S v Mahomotsa* 2002(2) SACR 435 (SCA); *S v Malan en 'n Ander* 2004(1) SACR 264 (T).

Accused 1 has two previous convictions relating to unlawful possession of a firearm and ammunition which were taken as one for the purposes of sentence way back in 1994. Although previous convictions fall away automatically after the lapse of ten years, they cannot be ignored at all as they assist the court to show if the accused has an urge to lawlessness. *Vide: section 271A Act 51 of 1977; S v Zondi* 1995(1) SACR 18 (A).

Accused 2 has a clean slate criminally. He qualifies to be regarded as a first offender with the attendant benefits just as accused 1. On the one hand the state led the evidence of Mmapula Patricia Sibiyi in aggravation of sentence. She was married to the

deceased in 1989. In this marriage four children were born, two girls and two boys. All the children are minors and the last child is four years old. The eldest child is twenty years of age whereas the second born child is sixteen years of age and the third child is eleven years of age. Those who are still attending school are three that is Jacob, Lefa and Nhlonipho who is at a creche.

According to her testimony the deceased owned three taxis which were operated by drivers. The deceased had depended on the income from the taxis and he had no other source of income. Whilst she was still employed she used to assist him. At the present moment these taxis are no longer operating because they have mechanical problems. She is now doing sewing for a living from which she earns ± R400,00 to R500,00 per month.

The death of the deceased has greatly affected her family because her eldest son would have been studying at a university. She has been depending also on child grants and the grant of the child placed under the witness program.

The murder having been planned and premeditated on account of the manner it had been executed coupled with the fact that both accuseds acted in common purpose destroys the presence of substantial and compelling circumstances. In the last analysis I find no substantial and compelling circumstances.

The accuseds have been found guilty of serious offences. The murder was carried

out with a meticulous precision making certain that the deceased should no longer see the sun rise and set. The number of shots and the wounds on the body of the deceased are indicative of an intention to kill without looking back to appreciate the ghastly consequences to his dependents.

The deceased's life was terminated under the circumstances which were watched by his 15 year old child who later had to testify in court to relive the events of that fateful day. This murder is heinous, ghastly, callous, uncouth, cruel, barbaric and senseless to the highest order. It was committed in the presence of the deceased's minor child who had observed the conduct of accused 1 prior to and after the fatal shooting. His son was bound to listen to his father shouting "shembe, shembe" meaning Lord help me. He was further bound to hear accused 1 reply to the exclamations of his father thus "die you dog, die".

This kind of terminal violence gives this court a fierce impetus to meet out stern appropriate sentences within the context of the traditional triad to deter, retribute and safeguard the legitimate interests of society.

Consequently, I sentence both of you as follows:

Count 1: Murder: life imprisonment.

Count 2: Possession of unlicensed firearm: twelve months imprisonment.

Count 3: Possession of unlicensed ammunition: twelve months imprisonment.

Sentences in counts 2 and 3 are to run concurrently with the life imprisonment in count 1.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

CC299-2007