

IN THE HIGH COURT

(BISHO)

CASE NO.: CC32/03

DATE: 13 MAY 2003

In the matter between:

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THE STATE

versus

ENOCH MABONA DYANOPU

JUDGMENT:

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EBRAHIM J:

This matter was remanded until today to enable the Court to deliver judgment and I proceed therewith.

The accused, Enoch Mabona Dyanopu has been charged with one count of malicious injury to property; two counts of murder, and one count of attempted murder. He pleaded not guilty to all these charges and elected not to disclose the basis of his defence. His election not to disclose the basis of his defence was conveyed to the Court by

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Mr Gabelana, who appears for him, and this the accused himself confirmed. I need to record that prior to the accused being called upon to plead, the State had applied for and had been granted certain amendments in respect of the summary of substantial facts which are annexed to the indictment. These concerned incorrect references to the particular counts and specifically in respect of count 2 and count 3.

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Mr Sotenjwa, who appears for the State, handed in with the consent of the defence a post-mortem report, namely **EXHIBIT "A"**, relating to the death of the deceased in count 2. The deceased in this

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count is Ndileka Mxoli. Similarly in respect of count 3, in respect of which the name of the deceased is Nolido Ngweventssha, the State also handed in a post-mortem report with the consent of the defence and this is **EXHIBIT "B"**. The defence confirmed that it accepted the contents of these reports and the findings arrived at by the doctor who had conducted the post-mortem examinations.

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The first witness to testify for the State was Mr Wilson Gcebe. He testified in respect of certain events which occurred on 15 November 2001. He stated that on that day he was seated in the dining room of his home with his wife and two other individuals, namely Mathemba Maci and Siviwe Maci. While they were sitting and conversing there the front door opened and the deceased in count 2, namely Ndileka Mxoli, entered. When the deceased tried to close the door he observed that someone was trying to push the door open. This person succeeded in doing so and also entered the house. The individual was the accused whom he knew as Malombo. Immediately after he entered the accused said to the deceased: "You take me for granted." With this Mathemba Maci asked what was happening and the accused then ordered her to move back and as a result of that Mathemba Maci ran away. He then observed that the accused was drawing a gun from the front of his trousers and at the same time the deceased was moving towards the kitchen. Mr Gcebe immediately got up and went to the accused and grabbed his jacket and arm. The accused ordered the witness to leave him alone and pointed the firearm over the shoulder of the witness and fired. Mr Gcebe was unable to say how many shots were fired by the accused. From what he observed the shots were aimed at the deceased and he then saw the deceased falling. He also noticed that she was bleeding. After firing the

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shots the accused ran off. The deceased was lying on the floor next to the kitchen door. Later the police arrived and removed the body of the deceased.

Cross-examination by Mr Gabelana revealed that when the accused fired the gun his arm was pointed over the shoulder of the witness. He had not pointed the firearm at the witness himself, nor had the accused shot at the witness. Mr Gcebe also said that when the accused and the deceased entered the house he had not seen anything in either of their hands. It was after the deceased had been shot that he saw that she had injuries to her thigh and head. He stated further that the police had gathered up spent cartridge cases and had removed these. The police also found a magazine in the deceased's hand which was under her head.

In reply to questions from the Court Mr Gcebe said he had not told anyone that the accused had shot at him. The accused had been about 3 or 4 metres away from the deceased when he shot at her. The deceased had not threatened the accused at all. Further the only person who had discharged the firearm in the house was the accused.

Kholeka Iris Mlilwana testified that she was the wife of Mr Wilson Gcebe. She knew both the accused and the deceased. She confirmed her husband's testimony that she and her husband and Mathemba and Siviwe Maci had been sitting in the home talking to each other. At the time that the front door opened and the deceased entered, this witness was in the kitchen. She saw the deceased trying to close the front door. It was also apparent to her that someone was pushing against the door from the other side. Finally the door was forced opened and the accused entered. She saw the accused draw a gun from the front

of his trousers and heard him saying to the deceased: "You take me for granted." He then fired towards the deceased. She heard three shots and closed the kitchen door and ran to another room. After the shooting she heard her husband call to her to come to the dining room. She responded and on her way there she saw the deceased lying on the floor 5 in between the doors to the kitchen and dining room. She also noticed that there were cartridge cases scattered on the floor. At that stage the accused was no longer there. She remembers that he wore a brown raincoat which was a three-quarter length raincoat. When the police arrived they collected the cartridge cases. They also took a shiny object 10 from the deceased's hand. This object had bullets in it and they said it was a magazine.

During cross-examination she said that when the shots were fired she closed the door and did not see anything further thereafter. She did not see the deceased and accused fighting. She had only seen the 15 deceased struggling to close the door when the accused was pushing against it from outside.

In reply to the Court's questions she said that she did not hear anyone else besides the accused speak to the deceased. To her knowledge the two of them had not lived together. 20

Mathemba Maci testified that she knew both the deceased and the accused. She confirmed that she, Siviwe Maci and Kholeka Mlilwana and Wilson Gcebe were in the house on 15 November 2001. The deceased had entered through the front door and the accused had forced the door open and also entered. When the accused drew a gun she got 25 up. The accused told her to move away and started shooting at the deceased. The deceased was trying to hide behind Mr Gcebe. This

witness then ran outside and heard further shots being fired. Once the firing had stopped Mr Gcebe called to her to come back inside. She and Siviwe Maci entered and saw the deceased lying on the two steps which led to the kitchen. The deceased was bleeding from wounds in her thigh and head. The police arrived, collected the cartridge cases and took photographs. She had seen the police take something from the deceased's hand and heard them saying it was a magazine. She described the coat which the accused had worn as one which is similar to coats worn by soldiers.

Siviwe Maci testified in regard to what happened on 15 November 2001 and confirmed that the deceased and the accused entered through the front door. Her version was similar to that of the other witnesses. She had seen the accused draw a gun and shoot at the deceased. She had then run outside and heard further shots from inside the house. After the accused left the house Mr Gcebe shouted that he had finished. However, she did not go back inside the house. She said that the accused had worn a raincoat which was similar to that worn by soldiers.

The only questions asked of her related to the raincoat that the accused had worn. She said she did not know if all soldiers wore raincoats but that this particular one had been brown.

Nomakula Nzimela testified that she resided in Sipozana Street at Freshwater in the Ndikana Administrative area. She occupied both a rondavel and a two-roomed house. Nolido Ngweventsha, the deceased in count 3, had resided in a house across the street. On 15 November 2001, although it was raining heavily, she was busy doing her washing at the rondavel. At some stage she went to fetch water from the house and then heard footsteps. She looked around and saw the accused

whom she knew. She saw the accused entering the grounds of the deceased's house through the gate. The accused then opened the door of the house and entered. Thereafter she heard a gunshot and thought that it had come from the back of the deceased's house. She also heard a second shot which she thought came from inside the house. She then shouted. Her neighbour, Mzayipheli Jini appeared and asked her why she was shouting. She replied that she had heard a shot from the deceased's home. Mr Jini had a blanket wrapped around him and returned to his house and re-emerged without it. Three other people, Xambekwana Nontshinga, Mavuka Mpotulo and Bonikosi Mbokwe arrived and went into the deceased's house. Mr Nontshinga emerged a little later. After this she and a few women entered the deceased's house and saw the deceased lying on the floor on her stomach. She was still alive. Mr Nontshinga had asked the deceased what had happened to which the deceased replied that Malombo had shot her. Later the police and an ambulance arrived and the deceased was taken away. She did not see the accused again after he had entered the deceased's house. She said the accused had worn a dark rain suit.

During cross-examination she said that she had known the accused for about a year before the shooting. The raincoat was one that was worn by soldiers. It had a hood and it was tightly fastened around his neck. She had nevertheless seen his face. The coat also stretched to below his knees. The accused was about 15 paces away from her when she heard the footsteps. She then looked at him and saw who it was. Her house was opposite to that of the deceased's. When she was questioned about a statement she had made to the police, she said she could not recall if she had told the police that Malombo had entered

the deceased's house. In this statement she had not said that she had seen the accused as she was afraid. She was confronted with the fact that she had not in her statement stated that she had seen the accused. It was also put to her that she had not indicated in the statement that Xambekwana Nontshinga had asked the deceased what had happened. 5
In reply thereto she said that she could not remember if she had said so in her statement. She denied that she was falsely implicating the accused. It was also put to her that the accused denied being there as at the time he was in prison. Her reply to this was that she was describing what she had seen and she insisted that the accused was 10
there.

When questioned by the Court she said she could not remember if she had told the police that she had seen the accused enter the deceased's house. She claimed that she had been afraid to tell the police. Even though she overcame her fear about a month later she did 15
not then go to the police to tell them that she had seen the accused enter the deceased's house. She had not told counsel for the State that she had been afraid to tell the police.

Jacob Henry Davis is a member of the South African Police Services. His testimony related to photographs he had taken of the 20
scene of the shooting in respect of count 2, that is the shooting of Ndileka Mxoli. These photographs show, *inter alia*, where the deceased was lying; a cartridge from a gun with six live rounds, which was in her hand; two bullet heads; and a few spent cartridges which were all lying on the floor. There was also a photograph of a spent cartridge case 25
which had been found under the deceased's body. He collected these cartridge cases and bullets and later sent these to the Forensic Science

Laboratory in Port Elizabeth for analysis.

Cross-examined he stated that he had received a firearm which was at the Frankfort Police Station and had also sent this to the Forensic Science Laboratory. He did not know if any of the spent cartridge cases had been fired from another firearm.

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In reply to a question from the Court he said that the two bullet heads had markings on them, indicating that they had been fired from a gun.

Mzayipheli Ellis Jini testified that he knew the deceased Nolido Ngweventssha, he also knew the accused and said he was Malombo Dyanopu. On 15 November 2001 he was asleep in his house. He awoke and heard his neighbour, Mrs Nzimela, shouting. It was raining. He put on a lumber jacket and went outside. Mrs Nzimela told him that a man was shooting at the back and pointed at a man who had come out of the house. The witness then entered the house of the deceased, Nolido Ngweventssha, and found the deceased lying on her stomach. She asked him to call an ambulance as the bullet was burning. He left to do so and when he returned he found the ambulance there and they were removing the deceased.

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It emerged during cross-examination that when he came out of his house he had not covered himself with a blanket. While he was waiting for the man to come out of the house, he and Mrs Nzimela were in the street. The person was wearing a darkish brown dust coat. He did not at that stage notice if Mrs Nzimela was still there. Earlier she had not pointed the man out but had merely said it was Malombo. He, however, had not seen Malombo.

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Replying to the Court's questions he said that this was the only

incident of shooting he had been involved with. When he left to arrange for an ambulance the deceased Nolido Ngweventssha was the only person still in the house. On his return, however, he found a number of people there. The deceased had not told him who the person was who had shot her. She had only said that the bullet was burning. He had not looked to see where she had been shot.

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The next witness was Foto Witness Mongoliso an inspector in the South African Police Services and stationed at Frankfort. He was the investigating officer and said that he visited the scenes of both shootings. At the house where Nolido Ngweventssha had been shot he had found a cartridge case under a chair. He had taken this to the police station and entered it in the SAP 13 exhibits register. This cartridge case was only sent to the Forensic Science Laboratory for analysis the previous day, that is the day before he testified. It had not been sent away prior to this as he had waited on a firearm to be sent back by the Forensic Science Laboratory. As there were two murder scenes, the cartridges from both scenes could not be sent off together.

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The firearm had only been returned in October or November 2002, but from then he had been off sick until January 2003 and did not, therefore, send the cartridge case off for analysis. He had received the report on the results of the test and this he had also received the day before his testimony. He had received the report on the same day that he had sent the cartridge and firearm off to the Forensic Science Laboratory. This report is **EXHIBIT "D"**. The firearm that he had sent off belonged to the accused and the accused had a licence to possess this firearm. The firearm was a 9mm Norinco and its serial number was 21028632. It was **EXHIBIT No. 1**. He had also received a ballistic report relating to

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count 2 and this was **EXHIBIT "E"**. All together he had been handed
17 rounds of life 9mm ammunition and this was **EXHIBIT No. 2**.

When questioned during cross-examination on why he had delayed
in sending away the cartridge case to the Forensic Science Laboratory for
analysis he claimed that it would have caused confusion if he had sent
the cartridge cases from both crime scenes to the laboratory at the same
time.

When asked by the Court why it could not have been marked
separately he was unable to provide a cogent reply. Finally he admitted
that the reason for the delay in sending off the cartridge case was
because he had forgotten about sending it off. This cartridge case
related to the shooting in respect of count 3.

This concluded the State case.

The defence then closed its case without tendering any evidence.

Both Mr Sotenjwa and Mr Gabelana addressed the Court on the
merits. I do not deem it necessary to detail the arguments they have
addressed to the Court.

I proceed to an assessment of the evidence. In respect of count
1, which is the charge of malicious injury to property, Mr Sotenjwa has
conceded on behalf of the State that there is no evidence which links the
accused to the charge. He concedes further that in these circumstances
the accused is entitled to be acquitted on this charge. Needless to say
Mr Gabelana's contentions were of a similar nature.

In respect of count 4, which is the charge of attempted murder,
the position is no different. Both Mr Sotenjwa and Mr Gabelana in their
submissions recognised that the evidence does not show that the
accused attempted to kill Mr Wilson Gcebe. In respect of this charge,

too, the State has conceded that the accused is entitled to be acquitted.

In respect of count 2, which is the charge that the accused murdered Ndileka Mxoli, Mr Gabelana has conceded that the State has proved the guilt of the accused. This concession has rightly been made.

The evidence presented by the State proves beyond a reasonable doubt that the accused fired various shots at the deceased, thereby fatally wounding her. The State has also established that the accused's actions in shooting the deceased, Ndileka Mxoli, were unlawful and intentional.

The State witnesses, Wilson Mio Gcebe and Kholeka Iris Mlilwana, as well as Mathemba Maci and Siviwe Maci all identified the accused as the person who followed the deceased, Ndileka Mxoli, into the house of Mr Gcebe. These witnesses then saw the accused draw a firearm and fired a number of shots towards the deceased. This has not been placed in dispute by the defence. It has also not been placed in dispute that the deceased died as a result of wounds which were sustained from the shots fired by the accused. The unlawfulness of his actions and the fact that he intended to kill the deceased have similarly not been placed in dispute. In short, the accused has not disputed that he fired at the deceased and fatally wounded her. The evidence that he murdered Ndileka Mxoli is overwhelming. In the face of this evidence the accused elected not to testify and the only version of what transpired is that presented by the State witnesses. Each of these witnesses was credible and honest and the evidence of each witness was reliable. They were completely truthful in what they had observed and I accept their evidence.

While the evidence establishes beyond a reasonable doubt that the

accused murdered the deceased, the evidence does not reveal whether the murder was premeditated or that the accused had planned to murder the deceased. On the contrary, the evidence is such that it is reasonable to conclude that the shooting flowed from some argument that had taken place between the deceased and the accused. It is clear 5 that the accused was angry at the deceased and that this anger led to him drawing his firearm and firing numerous shots at her. The State has not shown, therefore, that the accused's conduct was premeditated or planned. Mr Soteniwa has in fact conceded that this is so.

In respect of count 3, which is the murder of Nolido Ngweventssha, 10 the State has not adduced the evidence of any witness who saw the accused shooting the deceased. The evidence upon which the State relies in order to secure a conviction on this charge is the testimony of Nomakula Nzimela and Mzayipheli Ellis Jini. The State also relies on certain ballistic evidence relating to a spent cartridge case which it is 15 alleged was found at the scene of the shooting.

Mrs Nzimela's testimony was to the effect that she had recognised the person who had entered the home of the deceased as being the accused. Further after he had entered she heard gunshots from the direction of the house. During cross-examination it emerged that in the 20 statement she had made to the police she did not say that she had seen the accused, nor had she said that she had seen him enter the deceased's house. The explanation she offered for not having said so was because she was afraid. When asked about this by the Court she said that even though she had later overcame her fear she did not then 25 approach the police to tell them that she had seen the person or the accused enter the house. Her reason for failing to tell the police, she

claims, was because she did not know how the police functioned and had never dealt with the police before. She also testified that shortly after the shooting she and some other women entered the house and found the deceased still alive on the floor. She claimed that a Mr Xambekwana Nontshinga was also present and had asked the deceased 5 what had happened to which the deceased had replied that Malombo had shot her. Her averments in this respect stand unsubstantiated. Mr Nontshinga was never called by the State to testify. Moreover, her evidence in this respect amounts to hearsay. It is clearly not corroborated by any of the other evidence tendered by the State. Indeed 10 the testimony of Mr Jini does not provide support for the averments made by Mrs Nzimela. He says that he spoke to the deceased when she was lying on the floor, but she never said that the accused had shot her. Mr Jini also testified that Mrs Nzimela was not present at that stage.

This evidence in regard to the deceased apparently identifying the 15 accused as her assailant is crucial to the State's case. It appears that there were other individuals also in the house, none of them have been called to testify. Most importantly the individual who Mrs Nzimela claims had spoken to the deceased, namely Mr Nontshinga was also, as I have already observed, not called to testify. I must, therefore, assess 20 this bit of evidence in relation to my overall assessment of Mrs Nzimela as a witness and in this regard I am also confronted with the evidence of Mr Jini which, as I have indicated, contradicts her evidence. I will return to this aspect a little later.

Insofar as the ballistic evidence is concerned the Court is called 25 upon to rely solely on the testimony of Inspector Mongoliso. I refer to the ballistic evidence in respect of count 3. He stated that the day

following the shooting, that is 16 November 2001, he visited the murder scene and recovered a spent cartridge case under a chair. He had then taken this to the police station and entered it in the SAP 13 exhibit's register. However, it is only on the 26 March 2003, over 16 months later, that he sent the cartridge case to the Forensic Science Laboratory for analysis. At first he claimed that the delay in sending off the cartridge case to the laboratory was because he had to wait on the return of a firearm. This firearm he said had been with the Forensic Science Laboratory for testing in respect of the shooting which had occurred in regard to count 2. However, even when this firearm was returned to him in October or November 2002, he then again did not send off the cartridge case and claimed that it was because he was ill until January 2003. The delay between January 2003 and the day before he testified when he actually sent off the cartridge case has been left unexplained. To compound matters, during cross-examination he finally admitted that he had not sent it off earlier because he had forgotten.

Mrs Nzimela was an unsatisfactory witness. During cross-examination she contradicted her evidence-in-chief. Her evidence was also contradicted by Mr Jini in many respects. On her own admission her testimony was at variance to what she had said to the police in a statement she made shortly after the shooting. If she had recognised the person as the accused she would certainly have told the police that. This was crucial evidence. If she had seen the person entering the house she would also surely have told the police of this in her statement. This similarly was crucial evidence. Her explanation as to why she had not told the police is implausible to say the least. It is clear to me that her identification of the accused as the person that she saw that day is

something which has come to her mind only at the stage that she testified. It is more than 18 months since those events occurred and it seems to me improbable that one's memory would have improved with the passage of time instead of diminishing. I am not suggesting a person cannot remember something later which one forgot earlier. But, there is nothing in her evidence to indicate that her memory has been jogged by some event that has now caused her to remember what she had forgotten earlier. I do not find her identification of the accused as the person who entered the house of the deceased as being reliable. She obviously did not tell the police this as she did not recognise the person. Mrs Nzimela's evidence in regard to the type of raincoat that the person wore does not permit one to draw the conclusion that it was the accused. Her description of the raincoat is not similar to that of the other witnesses. She also speaks about it being tightly tied around his neck and it having a hood. I should just observe that if the person had the hood on this would have hampered her identification further. In the final analysis her identification of the person is unreliable and cannot be accepted by the Court as being honest.

In regard to the ballistic evidence it is evident that Inspector Mongoliso was by no means honest and frank with the Court. In truth he tried to mislead the Court. At first he claimed that the delay in sending off the spent cartridge case for analysis was due to him waiting for a firearm to be returned. Then, even when it was returned, he claimed he could not send it off as he was sick. Still later he finally admitted that he had forgotten to send it off. His reasons for not sending off the cartridge case at the same time are spurious. The cartridge cases could easily have been labeled separately to indicate that

t was a cartridge case found in respect of a different crime scene than that in respect of count 2. It forces one to question whether in fact the cartridge case was indeed found at the second murder scene. There was absolutely no reason for him not to open and truthful with the Court. It is an absolutely crucial bit of evidence. Since, if the State could show beyond a reasonable doubt that the cartridge case had been recovered at the second murder scene the accused would then have been called upon to answer how it was possible that his gun could have been fired in the house, if he was not present.

The lack of honesty on the part of Inspector Mongoliso is disturbing and casts a shadow of doubt over his testimony as a whole. A further problem is that the State has failed to establish that this cartridge was indeed found at the murder scene in respect of count 3. I have difficulty in understanding why it was only found on the following day. What it indicates to me is that there was a failure to properly investigate the scene of the crime on the day that the shooting took place. Inspector Mongoliso says he found it under a chair. It does not appear from his evidence that it was particularly concealed from sight. If he had carried out his duties properly surely he would have found that on the first day. It leaves me wholly uncomfortable to accept that his testimony overall has been truthful in regard to the finding of the spent cartridge case. He claimed that he entered it in the exhibit register, that is the SAP 13 register. This has not been produced by the State, nor has any other evidence been led in regard to where the cartridge case was kept and in whose custody it was for the past 14 months.

The evidence does not even establish whether the cartridge case that was sent off is the same one that was tested by the Forensic

Science Laboratory. The affidavit of Victor Jakobus van der Merwe, which has been tendered in evidence in terms of section 212(4)(a) and section 212(8)(a) of the Criminal Procedure Act, 51 of 1977 reflects that a cartridge case was received in an envelope marked *inter alia* "Frankfort CR 11/11/2001" and that it was sealed with an official police seal number A1632. There is no corresponding evidence on the part of the State which establishes that this indeed is the cartridge case that was sent off under that particular seal number. It is a crucial lacuna, that is a gap, in the State evidence. On that evidence depends whether a person should be convicted of the crime of murder or not. This Court cannot be called upon to speculate in that regard. This Court is not prepared to assume simply that it is the same cartridge case. Even if I were able to accept this, and I were to accept that it was fired from the accused's firearm, the limited evidence before me does not enable me to draw the reasonable conclusion that it is the accused who fired the shot.

There also has to be a nexus between the spent cartridge case and this shot, or shots, that killed Nolido Ngweventsha. The Court has to rely on circumstantial evidence and in these circumstances it appears to me to be dangerous to simply draw the conclusion that the person who entered the house was the accused and that he is the person who then fired the shots that killed the deceased, Nolido Ngweventsha. There are far too many unanswered questions in regard to the State's case in respect of count 3. There is a strong suspicion that the person who killed Nolido Ngweventsha may have been the accused, but suspicion does not amount to proof beyond a reasonable doubt. The fact that the accused did not testify does not in this instance strengthen the State's case. The doubts that the Court has must weigh in favour of the

accused. This Court cannot lower the standard of proof necessary upon which to base a conviction.

I find it necessary to comment on the standard of police investigation in relation to count 3. There was clearly a lack of professionalism and a failure to display due diligence in respect of what appears to have been vital evidence. The murder scene does not appear to have been subjected to proper investigation. Indeed, Inspector Mongoliso testified he only conducted a search on the next day, that is the second day, and he then supposedly found a spent cartridge case under a chair. This reflects shoddy police work to say the least. Added to this is his failure to send off the cartridge case immediately for forensic analysis. Such conduct is inexcusable to put it mildly. Moreover, no attempt was made to provide the Court with photographs of the crime scene or the location of the house, nor even a sketch plan which would have assisted the Court. This level of police investigative work is wholly unacceptable and cannot be countenanced. I trust that the Director of Public Prosecutions Office will take note of my comments and take such steps as may be required in this particular instance in addition to ensuring that there is no recurrence in future. It is self-evident that murder trials are cases of an extremely serious nature. The administration of justice requires that such cases be thoroughly and professionally investigated and that all the relevant evidence be properly secured and guarded until the trial takes place. Moreover, whatever ancillary forensic work and tests that have to be conducted must be done in a manner which displays the necessary professionalism. Evidence which is sent to the Forensic Science Laboratory must be properly secured and timeously sent off and returned and the results of such tests

be made available to the Prosecution staff at an early stage. I cannot stress sufficiently the need for this to be done. It is difficult for justice to prevail where the Court is presented with the bare minimum of evidence and the investigation of the crime falls well below acceptable standards. I appreciate that the police are under pressure. I appreciate that they are understaffed. But that is still no excuse for rendering police investigation of a substandard level. It is of concern to this Court that innocent people may be wrongly convicted and those who should rightly be convicted are set free because of such a poor standard of investigative work.

I am equally concerned that it appears to me that the Prosecution may not have been concerned at this situation. At the stage that the accused was indicted no-one seemed to have become aware that ballistic tests had not been conducted in respect of a spent cartridge case which was supposedly found at the murder scene in respect of count 3. Whoever was entrusted with all the records of the investigation in respect of this murder should, at an early stage already have been able to ascertain that these tests had not been conducted. That process could have been initiated at a far earlier stage and not on the day before Inspector Mongoliso testified before this Court. I find this lack of attention to detail disturbing. The Office of the Director of Public Prosecution cannot escape some of the blame in this regard. Again I trust that steps will be taken, as required, to ensure that there is no recurrence in future.

In consequence of all this the State has failed to prove the guilt of the accused beyond a reasonable doubt in respect of the offence in count 3 of the indictment.

In the result the accused is found guilty of the murder of Ndileka Mxoli, that is count 2 of the indictment. In respect of count 1, namely the offence of malicious injury to property and count 3, the offence of the murder of Nolido Ngwenventsha, and count 4, the attempted murder of Wilson Gcebe the accused is found not guilty and discharged.

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Y EBRAHIM

JUDGE, BISHO HIGH COURT

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