



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. CC29/2021

In the matter between:

THE STATE

vs

MANDISI MAKHANDA

Accused

JUDGMENT

JOLWANA J:

Introduction.

[1] The charges preferred by the State against the accused relate to a shooting incident which occurred on 4 October 2018 at Mafini Administrative Area in Ngqeleni (Mafini) in which three people were shot and subsequently died. He is before court on one count of aggravated robbery, three counts of murder, one count of attempted murder, one count of unlawful possession of a firearm, one count of conspiracy to commit robbery. He is also charged with unlawful possession of a firearm and ammunition on 7 November 2018 at or near Circus Triangle in Mthatha.

[2] The accused pleaded not guilty to all the charges. His legal representative indicated to the court that the accused would not be making any plea explanation.

The evidence of the State.

[3] The first witness for the State was Mrs Mbuzo. She testified that on the 4 October 2018 she had visited the deceased in count 2, Novangeli Patience Nomqonde (Novangeli) in her spaza shop (the Nomqonde spaza shop) when at about 19:00 a young man entered the shop. Inside the shop there were other young men who were already there when this young man arrived. The light inside the shop was provided by an electric light that was on. Novangeli was on the other side of the counter attending to customers. The young man ordered everybody in the shop to lie down and keep quiet. She did not immediately realize what was going on and tried to reprimand that young man assuming him to be a drunk person. She was alerted to the impending danger by one of the people who were inside the shop who pulled her down saying that she was putting them in danger. Without even looking at the said young man she sat on a beer crate that was on the floor.

[4] This young man got inside the counter where Novangeli was. She heard him demanding money from Novangeli. Novangeli pointed him to a bag which apparently had money and pleaded with him not to take a cellphone that was there which she said belonged to another person and it had been brought there to be charged. She thereafter heard two gunshot sounds after which the young man got out. At some point she realized that Novangeli had been shot and had fallen down. She also noticed that Fezile Willard Nomqonde (Fezile), the deceased in count 3 was bleeding and his eye had come out as a result of his injuries. She later learned that one of the other young men who had also been in the spaza shop had been shot and injured. She could not identify the young man who arrived at the spaza shop and attacked people there. She testified that when the attacker arrived there were about seven people inside the shop including Novangeli.

[5] Fezile Jonga, another State witness testified that at about 19:00 on 4 October 2018 he was at the Nomqonde spaza shop with others consuming liquor. The people inside the shop were Fezile Nomqonde, Khayalakhe Nkawu, Zalisile Nomqonde, Mrs Mbuzo, Siyabonga, another young man he did not know and the owner of the spaza shop, Novangeli. An electric light was on providing light inside the spaza shop. Novangeli was on the other side of the counter while he and the other customers

were on the customer's side of the counter. He and these other young men were sitting in the form of a circle on beer crates when an unknown young man arrived at the shop, turned around and faced them instead of facing the counter. He looked at him and his face was not covered. This young man looked at them and moved towards a hole in the counter which is used to serve customers and pulled out a firearm from the front part of his waist. He ordered everybody to lie down. They complied but as he was lying down his face protruded between the beer crates on which they had been sitting. In that position he could still see the assailant.

[6] This person got inside the counter and demanded money from Novangeli. Novangeli took the money and gave it to him. He then came out of the counter but when he noticed a cellphone he went back in and took it. Novangeli asked him not to take it saying it was not hers. Fezile, the deceased in count 3 also said to the said young man that he got the money, he must leave the cellphone. As he was about to leave the counter but still inside, he commented that he should do what he was sent to do because of Novangeli's big mouth. He then fired a shot at Novangeli. As he was leaving, the deceased in count 3, Fezile tried to grab the assailant and he, Fezile Jonga, heard a second and a third gunshot sound. Thereafter, the assailant left the spaza shop. In that shooting Fezile Nomqonde and Zalisile Nomqonde, were also shot and injured.

[7] On the 15 October 2018 which was a day for grave digging, he and Makawusi as well as Vukile were sent to Libode to buy alcohol for the men who were digging the graves. They went to Tops Spar to wait for Vukile who was queuing at an FNB ATM. Across Tops Spar is Spar Supermarket. He noticed a person near Spar Supermarket who looked familiar. It occurred to him that that person was the young man who had shot people at Nomqonde spaza shop and was in fact wearing the same attire he was wearing on the day of the attack. This young man was standing there with Xolelwa whom he already knew. He came close to speak to Xolelwa. As he was talking to Xolelwa, Jay Gidla whom he also already knew came out of Spar Supermarket and greeted him. Jay Gidla joined that young man and Xolelwa and the three of them left together.

[8] He, together Makawusi and Vukile went into Tops Spar. They bought liquor at Tops Spar and returned to the locality. On the way back to the locality he told Makawusi that he had seen the young man who attacked people at Nomqonde spaza shop. At the locality he also told the grave diggers that he saw the attacker at Libode. He also told one Sakhe who was a police officer in King William's Town that he had seen the young man who shot people at Nomqonde spaza shop with Xolelwa and Jay Gidla. Sakhe later told him that that young man was Xolelwa's boyfriend. He had seen the young man for the first time on the day of the incident at Nomqonde spaza shop. On that day the said young man was wearing a pair of jean trousers, a red hood and a khaki jacket which were the same clothes he was wearing in Libode on the 15 October 2018. He looked the same as on the day of the incident except that he had shaved his beard when he saw him in Libode. He testified that that person was the accused.

[9] Under cross-examination he testified that he was interviewed by the police on the day of the incident and he told them that the attacker was unknown in the area. He was a bit slender and light in complexion. He testified that he only told Makawusi that he had seen the attacker when they were in the vehicle on the way back to the locality. He did not think of immediately going to the police or even later as he was still in shock. It was put to him that the accused did not deny that he was next to Libode Spar Supermarket with his girl-friend Xolelwa at some stage but he was unable to say that it was on the 15 October 2018. Fezile Jonga maintained that it was on the 15 October 2018 when he saw them and denied being mistaken about the identity of the attacker. It was put to him that the accused denied being the attacker as he was never at that crime scene on that day. Fezile Jonga explained that he saw the accused on that day of the incident for the first time and he was the attacker who shot and killed people there.

[10] The next witness for the State was sergeant Lokhwe. He testified that on the 7 November 2018 he was on duty in Mthatha when he received information that the accused was at Circus Triangle in Mthatha. They had been looking for him in connection with escaping from lawful custody. He asked for a backup from his colleagues in the flying squad to go with him to Circus Triangle. He had the description of the attire the accused was wearing and his exact location at Circus

Triangle as he did not know him. He saw the accused going to the toilets. They followed him and when he got out of the toilet they arrested him. He searched him and found a firearm on the front part of his waist. He asked him for a licence for the said firearm which the accused said he did not have. He then told him that he was arresting him for escaping from lawful custody in Mahikeng and for the unlawful possession of the firearm. They also found a firearm magazine in his bag which did not have ammunition. The magazine that was in the firearm contained 14 live rounds of ammunition. They took the accused to Madeira Police Station. Under cross-examination he explained that from Circus Triangle to Madeira Police Station the firearm they found in possession of the accused was with him. He disputed the accused's version that he was shown the firearm for the first time at Madeira Police Station.

[11] The State called constable Maqokolo who testified that he was in the flying squad at Madeira Police Station. He was on duty on the 7 November 2018 when he received a request for a backup from sergeant Lokhwe. They went to Circus Triangle and saw the accused based on the description they had been given, going to the toilets. When he came out of the toilet they arrested him for escaping from lawful custody. Sergeant Lokhwe searched the accused and found a 9mm Z88 Parabellum Pistol on the front part of his waist under the clothing he was wearing. The firearm had a magazine with 14 live rounds of ammunition. On further searching his bag they found an empty magazine. They asked for a licence for the firearm and he said did not have one. They told the accused that he was also being arrested for being in possession of a firearm without a licence. They took him to Madeira Police Station where he was charged for unlawful possession of a firearm and ammunition as well as for escaping from lawful custody. He testified that they had been looking for the accused for escaping from lawful custody when they coincidentally found a firearm on his body.

[12] The next witness for the State was warrant officer Ngumbela who is a member of the SAPS stationed at the Mthatha Local Criminal Record Centre. He testified that on the 4 October 2018 at about 22:20 he attended a crime scene at Mafini. He found constable Majeke already there and he showed him the crime scene. He observed the crime scene and inside the shop he recovered two empty cartridges of a pistol on

the customer's side. He was told that the people who had been shot and injured had been taken to hospital. He packed the cartridges separately in envelopes and placed them in an exhibit bag. He also took crime scene photographs. He then went to St Barnabas Hospital where the injured persons had been taken to. At hospital he was shown two deceased persons being male and female persons and he took photographs of the deceased persons. He went home with the crime scene exhibits and the following day he went to his office where he entered the exhibits in the exhibit register.

[13] The next witness was sergeant Rozani who testified that on the 28 January 2019 she was on duty at Maderia Police Station. She took an exhibit to Port Elizabeth for Forensic Laboratory in connection with this case being CAS 72/11/2018. That exhibit bag in which the exhibit was contained was sealed. She handed the sealed exhibit bag to the person who attended her at the Port Elizabeth Forensic Laboratory.

[14] The next witness for the State was warrant officer Rayibo. He testified that he was attached to the Provincial Organised Crime Unit in Zwelitsha. On the 09 July 2019 he drove from Zwelitsha to Mthatha to collect a firearm at Madeira Police Station for purposes of taking it to Port Elizabeth for ballistic testing. The said firearm was in a sealed exhibit bag. He kept the said firearm in a safe in Zwelitsha and the following day he, together with the late sergeant Dastile, took it to the forensic laboratory in Port Elizabeth for ballistic testing. It was the late sergeant Dastile who handed the firearm in and received an acknowledgement of receipt in respect thereof.

[15] The State called Mr Khayalekhe Nkawu (Khayalekhe), a resident of Mafini. His evidence was that on 04 October 2018 he was at the Nomqonde spaza shop when a slender young man entered the shop. At that time, he was with Fezile Jonga, Siyabonga Makhuphula, Fezile Nomqonde, Novangeli Nomqonde, Gitla Nomqonde and Mrs Mbuzo. It was at about 19:00 and they were sitting in the spaza shop drinking beer. He was not drunk as he was still drinking the first beer which he was sharing with another person. Novangeli was on the other side of the counter counting money. The young man who entered the spaza shop pulled out a firearm and

ordered them to keep quiet. This person was with another person who stood at the door, also carrying a firearm. The one who had entered got inside the counter and demanded money. After he got the money and as he was about to leave he made a comment that Novangeli was being cheeky. This person gave the money to the one at the door way. Fezile Nomqonde got up and as he was getting up the said young man shot Novangeli and Fezile Nomqonde. Thereafter the two men left. He realized that three people were shot being Novangeli, Fezile Nomqonde and Zalisile Nomqonde. The attacker who entered the spaza shop, robbed and shot people did not cover his face.

[16] After some time after the incident he saw the young man who had shot people at the Nomqonde spaza shop at Ash Inn Tavern in Libode leaving as he was entering. He did not tell anyone that he had seen him and did not do anything about it. He further testified that that person was still wearing the same jacket he was wearing on the day of the incident at the spaza shop. He pointed at the accused as the person who had attacked people at Nomqonde spaza shop.

[17] Under cross examination Khayalekhe's attention was drawn to a statement he made to the police on 27 March 2019 in which he said that he had seen the attacker at Ash Inn Tavern in Libode on two occasions after the incident. The second occasion was in February 2019 at the same tavern.

[18] I pause now to point out that the evidence of the police officers who arrested the accused was that they arrested him on 7 November 2018. It is not in dispute that the accused has been in custody since his arrest on 7 November 2018. I will deal with Khayalakhe's evidence again when I analyse the evidence as a whole. Suffice it to say now that under cross-examination Khayalakhe insisted that he was not mistaken about the identity of the person who shot people at Nomqonde spaza shop. He also insisted that the person he saw in Libode was the same person he saw shooting Novangeli and that that person is the accused before court.

[19] The State called sergeant Manakaza. His evidence was that he is attached to the Provincial Organised Crime Investigation Team based in Zwelitsha. On 6 July 2021 he travelled to the SAPS Forensic Ballistic Laboratory in Silverton, Pretoria. He

was with the late sergeant Dastile taking the firearm in respect of Madeira Police Station CAS 72/11/2018 to that laboratory. The firearm was a 9mm pistol with a magazine and 9 live rounds of ammunition. The said firearm was in a sealed bag. They booked in the said firearm at the ballistic laboratory in Pretoria and received an acknowledgment of receipt.

[20] The State then called constable Majeke, also a member of the SAPS stationed at Ngqeleni Police Station. His evidence was that on 4 October 2018 he attended the crime scene in respect of this case at Mafini. He was with constable Sogoni. On arrival at the crime scene there were family members and other members of the community already there. He saw two empty cartridges of a 9mm pistol in a two roomed flat structure. There was also blood inside the room. They were told that the three people who had been injured from the shooting which had occurred had been taken to St Barnabas Hospital. The two empty cartridges were taken by warrant officer Ngumbela who attended the crime scene and also took crime scene photographs.

[21] The next witness was Xolelwa Nogemane (Xolelwa). Her evidence was that she resides in Libode and is employed as an administration clerk at a junior primary school. She started a love relationship with the accused in 2018. The accused stayed at Megacom in Libode. She also got to know Jay Gidla because the latter was usually in the company of the accused and sometimes the three of them would be in town in Libode together. The last time she saw the accused was near Libode Spar Supermarket and even on that day the accused was with Jay Gidla. On that day the three of them were at the tables in front of Libode Spar Supermarket.

[22] Under cross-examination Xolelwa testified that she did not know when her relationship with the accused actually started but she thought that it might have started in August or September 2018. She last saw the accused during the last week of October 2018. It was put to Xolelwa that the accused says that his relationship with her started around July 2018. Xolelwa said that she did not recall when her relationship with the accused started. It was further put to her that the accused did not deny that at some point he was with her and Jay Gidla near Libode Spar

Supermarket. However, he did not recall when that was but did not deny being with her and Jay Gidla there.

[23] The State called Brigadier Ngculu. Her evidence was that she is the head of the Provincial Organised Crime Unit in Zwelitsha. Her team investigated both cases, CAS 31/10/2018, Ngqeleni and CAS 72/11/2018, Madeira. In respect of the Madeira case a firearm was recovered by the police from the accused. It was taken to Port Elizabeth Forensic Laboratory for ballistic testing. The said firearm was found to be in a working condition. In respect of the Ngqeleni case three people were shot and subsequently died. Empty cartridges were picked up at the crime scene. She instructed her team of investigators that the Ngqeleni crime scene empty cartridges and the firearm in the Madeira case should be tested ballistically and compared. The results of the said comparison were that the firearm in the Madeira case and the empty cartridges picked up in the Ngqeleni case were linked. However, the firearm's serial number had been erased. As a result, it could not be ascertained where that firearm came from.

[24] Police investigations established that the accused who was arrested in respect of the Madeira case had escaped from lawful custody from the Rooigrond Correctional Centre in Mahikeng in the North West. During the escape in Mahikeng shots were fired and empty cartridges in respect of that crime scene were recovered. She then asked for the empty cartridges in respect of the Mahikeng and Ngqeleni cases as well as the firearm in respect of the Madeira case to be subjected to ballistic analysis and comparison. The results linked all three incidents. In other words, the firearm recovered from the accused in respect of the Madeira case was ballistically linked with the empty cartridges in respect of the Mahikeng shooting incident and the Ngqeleni shooting incident.

[25] The State called Colonel Mgwadleka who is working at the ballistic unit in Port Elizabeth Forensic Laboratory as a chief forensic analyst. He testified that on 5 July 2019 upon being requested to do so, he did a ballistic comparison between the Ngqeleni and Madeira cases. He therefore, did a comparison and analysis between case file with reference number LAB31819/19 (Madeira CAS 72/11/2018) and case file with reference number LAB 371021/18 (Ngqeleni CAS 31/10/18). LAB371021/18

A and B contained two 9mm parabellum empty cartridges. There were also two 9mm cartridge fired bullets which were marked 371021/18A1 and A2. The above exhibits were contained in individually sealed exhibit bags.

[26] He also received a sealed evidence bag containing two 9mm parabellum calibre fired test cartridge cases marked 819 TC1-TC2, two 9mm calibre fired test bullets marked 819 TB1 – TB2 and five 9mm parabellum calibre fired cartridges marked 31819/19 B-F. He further received another sealed evidence bag which was in respect of the Madeira CAS 72/11/2018 which contained:

1. One 9mm Parabellum Calibre Vector/Lew Model Z88 semi-automatic pistol marked 31819/19A in which two tests marked 819 TC3 – TC4 and 819 TB3 – TB4 were discharged for comparison purposes and one magazine.

2. Nine 9mm Parabellum calibre cartridges which were not marked.

[27] The scope and intention of the forensic examination was the microscopic individualisation of the fired bullets and the cartridge cases. He examined the fired bullets and compared the individual and class characteristic markings transferred to them by firearm components during the firing process using a comparison microscope. His findings were that the two 9mm parabellum calibre fired cartridge cases marked 371021/18 A and B were fired with the 9mm Parabellum Calibre Vector/Lew Model Z88 semi-automatic pistol marked 31819/19A. However, it could not be determined if the 9mm calibre fired bullet marked 371021/18A1 was or was not fired from the above mentioned firearm. The 9mm calibre fired bullet marked 371021/18 A2 was found to be unsuitable for microscopic comparison due to damage.

[28] The State also submitted a report compiled by warrant officer Roelofse who is a forensic analyst working as such at the Silverton Forensic Science Laboratory in Pretoria which was admitted into the record in terms of section 212 of the Criminal Procedure Act. This report was a comparison analysis of the empty cartridges picked up at the Mahikeng crime scene in respect of Mahikeng CAS 167/05/2018 and the firearm recovered in respect of the Madeira CAS 72/11/2018. It appears from the

said report that in respect of the Madeira case warrant officer Roelofse received a 9mm Parabellum Calibre Vector Model Z88 Semi-Automatic Pistol marked 31819/19A and 9mm parabellum calibre cartridges. He also received one 9mm parabellum cartridge fired cartridge case marked 197082/18A. He found that the said firearm functioned normally with no obvious defects. He also found that the ammunition used for test purposes marked 819ATC1 and 819ATC2 in respect of the cartridge case and 819ATB1 and 819ATB2 for bullets were also fired in the 9mm Parabellum Calibre Vector Model Z88 Semi -Automatic Pistol marked 31819/19A. He also found that the one 9mm parabellum calibre fired cartridge marked 197082/18A and the ammunition used for test purposes marked 819ATC1 and 819ATC2 and 819ATB1 and 819ATB2 were all fired from the same firearm referred to above.

[29] The last witness for the State was Ida Mathule, an officer at Rooigrond Correctional Services Centre in Mahikeng. Her evidence was that on 09 May 2018 she was on duty. Five inmates who were playing soccer on a soccer field made a daring escape. They used an opportunity created by an Eskom vehicle for which a gate had been opened. They fought with the correctional services officers on guard and managed to escape and fled to a nearby homestead. As the officers were looking for the inmates, there was a sound of gun fire. It transpired that one of the inmates snatched a firearm from one officer who was also looking for the escapees. One officer was shot and injured with a gunshot wound on the shoulder. That firearm had 15 rounds of ammunition and it was not recovered. It had been assigned to an officer who worked at Rooigrond Correctional Centre and it belonged to the Correctional Services Department. It was a 9mm pistol with 15 rounds of ammunition. Ms Mathule testified that she knows the accused as he was one of the inmates at the Rooigrond Correctional Centre in Mahikeng. She described the accused as being one of the inmates who escaped on 9 May 2018.

[30] Formal admissions relating to the three deceased persons and the post mortem reports in respect of their examinations were admitted into the record. These formal admissions also confirmed the identity of the three deceased persons, the date of death and the fact that all three of them sustained fatal gunshot wounds on 04 October 2018 during the shooting that occurred on that day. It is further recorded therein that all three deceased persons, Novangeli Patience Nomqonde, Fezile

Willard Nomqonde and Zalisile Nomqonde succumbed to death consequent upon the injuries they sustained during the Mafini shooting incident which took place on 4 October 2018.

After the evidence of Ida Mathule, the State closed its case.

The evidence of the accused.

[31] The accused testified in his defence. He testified that he did not fire the shots that killed people at Mafini on 4 October 2018 as he was not there. He described as lies the witness testimony that he was the assailant who entered the Nomqonde spaza shop and fired the shots that killed the three deceased persons there. He denied being there, demanding money and shooting people in that incident. He confirmed that he did usually go to the area around Spar Supermarket in Libode but would not confirm Fezile Jonga's evidence that he saw him and Xolelwa and Jay Gidla on the day he said he saw them in his evidence. He confirmed that he usually met with Xolelwa next to Spar Supermarket in Libode and therefore it was possible that she was correct in her evidence in that regard. He also confirmed that he was in a love relationship with Xolelwa. The accused testified that he could not recall where he was on 4 October 2018 but he confirmed that he was within the Province of the Eastern Cape.

[32] The accused confirmed the evidence given by the police that on 7 November 2018 he was arrested at Circus Triangle. He, however, disputed that he was found in possession of a firearm with a magazine with 14 rounds of live ammunition and another magazine. He testified that when he was arrested he had a bag hanging on his shoulder which had clothes in it but he had no firearm in his possession. He testified that the only firearms he saw on the day of his arrest were those that were carried by the police officers who arrested him. With regard to the firearm that was allegedly found in his possession the accused testified that he first saw it at Madeira Police Station. He explained that on his arrival there with the police after his arrest he was first asked if he knew that he had escaped from lawful custody and he said yes he was aware of that. He was then also informed by those police officers that he was also being charged for a firearm which the police said was found in his

possession. He thereupon told the police officers who charged him that the police officers who arrested him did not find any firearm in his possession.

[33] With regards to the evidence of Ida Mathule the accused testified that he could not dispute her evidence that she knew him from the Rooigrond Correctional Centre in Mahikeng because he was indeed incarcerated in that centre where he was serving a sentence. He was however, never charged for being in unlawful possession of a firearm in respect of the Mahikeng incident. Even the offence of escaping from lawful custody from there never got anywhere.

[34] He denied robbing Novangeli of her cash and a cellphone on 4 October 2018 and testified that he was not involved in the killing of the deceased persons in that incident as he was not there. He denied that at any stage in or during September to October 2018 he conspired with anyone to commit robbery at the Nomqonde spaza shop. He denied that on 4 October 2018 he was in possession of a firearm and ammunition. He denied being in possession of a firearm with a magazine containing 14 live rounds of ammunition on 7 November 2018. He testified that he was never in possession of a firearm and ammunition. In respect of the count of the attempted murder of Fezile Jonga the accused testified that he was not at the Nomqonde spaza shop where the shooting allegedly took place. He denied firing any shots at Fezile Jonga. He added that even when Fezile Jonga testified he did not say that shots were fired at him.

[35] Under cross-examination by the prosecutor the accused confirmed that indeed Ida Mathule was correct in her evidence that he served a sentence at the Rooigrond Correctional Centre in Mahikeng and escaped from that centre. He testified that he did not know about the shooting during that escape at Rooigrond Correctional Centre and the taking of a firearm from a correctional officer. He further testified that Ida Mathule did not say in her evidence that he was the one who took the firearm during that incident. She merely said that a firearm was taken. He was not the one or part of those who took the said firearm. He admitted being part of escaping, but denied being involved in the taking of the firearm.

[36] The accused further testified that when Fezile Jonga made a statement to the police he did not tell the police what he was wearing. He confirmed that in court Fezile Jonga did say that he told the police that the assailant was light in complexion, was slender and that he also gave the police, the description of the clothes the person was wearing. He however, maintained that Fezile Jonga's description of the assailant was not contained in his statement he made to the police as regards the attire. He confirmed that in court Fezile Jonga had testified that on that day the person who entered into the spaza shop and shot people was wearing jean trousers, a khaki jacket and a red hood but maintained that the description of the attire was not contained in his statement.

[37] He disputed the evidence of the police that when he was arrested at Circus Triangle he was found in possession of a firearm. When it was put to him that the police testified that they asked him for a licence for the said firearm and that that evidence was never challenged, he testified that maybe in saying that they asked for a firearm licence, the police were talking about what they normally did when arresting a person found in possession of a firearm. However, at the time of his arrest the police asked for his name and he told them his name but they never asked for a licence as he was not in possession of a firearm. The police then asked if he knew that he had escaped from a prison in Mahikeng and he said he knew that. Then the police said that they were therefore arresting him for escaping from lawful custody. He testified that he remembered that the police officers testified that the firearm was found in the front part of his waist. They also said he was in possession of a bag with another firearm magazine.

[38] He, however testified that the police did not mention the clothes that were in that bag on that day. He further said that he would not have carried just a firearm magazine in a bag of the size he was carrying on that day. He added that all he had were his clothes in that bag. He testified that he heard the evidence of the State witnesses that the empty cartridges recovered at the Mafini crime scene were compared with and linked to the firearm which was allegedly found in his possession as were the cartridges that were fired at Mahikeng during the escape. He disputed Khayalakhe's evidence that he saw him at or near Ash Inn Tavern in Libode and identified him as being the person he saw at the crime scene firing shots at the

people there. He pointed out that Khayalakhe also testified that he saw him on two occasions after the incident. He said he saw him during November 2018 and he also saw him in February 2019. He pointed out that on the second occasion when Khayalakhe said he saw him for the second time at Ash Inn Tavern he was already in custody. The accused added that he was never charged with robbing a firearm in Mahikeng or for the shooting that took place there. He emphasized that he was only charged for escaping from lawful custody.

[39] He denied being at Mafini on 4 October 2018, committing robbery and shooting people there. He denied that he was found in possession of a firearm at Circus Triangle on 7 November 2018. He further said that about the firearm that was, according to the police, found in his possession, his fingerprints were not found on that firearm. The case for the accused was closed without calling any other witness.

The analysis.

[40] It is common cause that all three deceased persons died as a result of gunshot wounds following a shooting that took place at the Nomqonde spaza shop on 4 October 2018. The only issue is the identity of the person who robbed and fired shots at and thus causing the death of the deceased persons in that incident. On the basis of the evidence led, the State argued that the person responsible for the death of the deceased is the accused. The accused's defence is very simple. It is that he was simply not at Mafini on 4 October 2018. He, therefore, did not and could not have been responsible for the robbery and the shooting and the consequent death of the deceased. He admitted upfront, that he was indeed in the Eastern Cape during the period in question. He however, could not remember where he was saying it was a long time ago. The fact that the accused could not remember where he was on that day, is in my view, at best, a neutral factor. It would be wrong to conclude that because he could not remember where he was on that day, he therefore must have been at Mafini at the time of the incident. The accused has no obligation to remember his exact whereabouts and nothing can be read into the fact that he could not remember where he was. It is the State that must prove that he was not only at the crime scene but also he was the one who robbed and also shot the deceased persons there.

[41] Some of the evidence of the State is direct in the sense that at least two witnesses gave evidence that they saw the person who entered the spaza shop, robbed and shot people there and that that person was the accused before court. Their evidence was that his face was not covered and he had nothing on his head. The room in which the shooting took place was well lit with an electric light. They again saw the assailant in town in Libode and identified him as the person they had seen on the date and time of the incident. Some of the evidence of the State is circumstantial. All of the evidence of the State has to be examined carefully and dispassionately to establish if, in light of the defence proffered by the accused, the State has discharged the onus resting upon it to prove its case beyond reasonable doubt. Again the accused has no obligation to prove his innocence whatsoever.

[42] In *Shackell*¹ some of the principles of our law as they relate to the assessment of the evidence against an accused person were explained by Brand AJA as follows:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

The evidence of Khayalakhe Nkawu.

[43] Guided by these trite principles of our law, I turn now to examine closely the evidence of the two witnesses who testified that they saw the accused at the crime scene shooting people there and saw him later after that incident in Libode in town. The evidence of Khayalakhe which I consider necessary to repeat was that he was

¹ S v Shackell 2001 (2) SACR 185 (SCA) at 194 g-h

at the Nomqonde spaza shop on the 4 October 2018 with Fezile Jonga, Zalisile Nomqonde, Siyabonga Makupula, Fezile Nomqonde and Novangeli Nomqonde. Gitla Nomqonde and the first State witness, Mrs Mbuzo were also there. The time was about 19:00 in the evening. An electric light provided light inside the spaza shop. They were drinking alcohol but he was not drunk as he was still drinking his first beer which he was sharing with another person.

[44] A young man entered inside the spaza shop and ordered them to keep quiet. This person took out a firearm and went inside the counter where Novangeli was seated. The person who entered the shop was with another person. This other person did not enter the shop but remained in the door way and was also carrying a firearm. The person who went inside the counter demanded money from Novangeli and she gave him the money. As he was about to leave, he turned to Novangeli and said that she was being cheeky. This person gave the money he had taken from Novangeli to the one who was at the doorway. He also wanted to search Novangeli but she refused. It was at that stage that Fezile Nomqonde got up. When Fezile Nomqonde got up this person started firing shots at Fezile and Novangeli. Thereafter the two assailants left the spaza shop. Three people were shot during the incident. They were Novangeli Nomqonde, Zalisile Nomqonde and Fezile Nomqonde.

[45] After some time and as he was entering Ash Inn Tavern in Libode one day, he again saw the person who had entered the Nomqonde spaza shop, took money and shot people. That person was leaving Ash Inn Tavern when he saw him. However, he never told anyone about having seen the said person and he did not do anything about that. When he saw that person again at Ash Inn Tavern he was still wearing the same jacket he was wearing at the Nomqonde spaza shop. He had seen this person for the first time on the day of the incident and he pointed at the accused as the person he saw at the Nomqonde spaza shop robbing and shooting people there.

[46] Under cross-examination Khayalakhe testified that he made a statement to the police but he never told the police that he had seen the assailant at Ash Inn Tavern. He explained that when the police came to him and he made a statement he had not yet seen this person at Ash Inn Tavern. He could not recall if he had made another statement to the police in 2019 but he did have an interview with the police in 2019.

He further testified that during the 2019 interview with the police he told them that he had seen the attacker in November 2018. He also told them that he saw this person again in February 2019. When it was brought to his attention that he could not have seen the accused in February 2019 because he was arrested on 7 November 2018, he insisted that he had seen him in February 2019. When it was put to him that he could be making a mistake in saying that he saw the accused on 4 October 2018 at the Nomqonde spaza shop, he insisted that he had seen him. He went on to say that he was sure that it was the accused person he saw at the Nomqonde spaza shop and he was sure that the person he saw again in February 2019 was the accused.

[47] At some point during the cross-examination his evidence changed slightly to be that perhaps during the month of February 2019 he did not take a proper look at that person but he had seen him on 4 October 2018. He seemed to concede that in February 2019 he might have seen somebody he mistook to be the person who attacked people at the Nomqonde spaza shop. Very strangely, he went on to say that he could not make a mistake about the identity of the attacker and insisted that it was the accused who shot the deceased persons there.

The evidence of identification.

[48] The evidence of identification must be approach with extreme caution. In *Maradu*² the court stated that the evidence of identification based upon a witness' recollections of a person's appearance is dangerously unreliable and must be approached with caution. In addition to the need for Khayalakhe's evidence to be approached with caution like that of Fezile Jonga and indeed generally all evidence of identification, there are some serious difficulties with Khayalakhe's evidence. His evidence tended to be contradictory and confusing in some of the material respects as it related to the identity of the person who shot and killed people at the Nomqonde spaza shop. Khayalakhe made a statement on 27 March 2019 to the police in which he said that a few weeks after the incident in November 2018 he saw the man who shot people at Nomqonde spaza shop at Ash Inn Tavern in Libode. He again saw that same man in February 2019 again at Ash Inn Tavern. Therein lies the problem. The accused was already in custody in February 2019 and therefore, he could not

² S v Maradu 1994 (2) SACR 410 (W)

have been the person Khayalakhe saw there. However, this does not mean that he did not see a person he thought was the accused.

[49] During his evidence Khayalakhe persisted with this notion that he saw the accused even in February 2019 which was breathtakingly impossible. Therefore, his evidence on the identity of the person who attacked people at Nomqonde spaza shop is indeed difficult to understand and therefore dangerously unreliable.

[50] It is even worse that he was present when the shooting occurred and he could have died there. Yet when he again saw the person he said was the attacker in Libode he did not tell anyone. He did not tell even a single person about having seen the attacker. This is highly improbable if, when he saw the person he said was the assailant, he actually thought that it was indeed the assailant. He testified that he again saw the attacker in February 2019. In court he identified that person as having been the accused. He struggled to explain how it could be the accused that he saw in February 2019 when the accused was already in custody at that time. He, however, vacillated between conceding that he could be making a mistake and insisting that the person he saw was the accused and therefore he was not making mistake. In short, there were serious short comings in his evidence about the identity of the assailant.

[51] However, the evidence of Fezile Jonga stands on a different footing on credibility. First, on the day he saw the person he thought was the attacker on 15 October 2018 standing with Xolelwa near Spar Supermarket in Libode, he told Makawusi about it on the way to the locality. Second, when he arrived at the grave digging site he told the grave diggers that he had seen the attacker. He also told Sakhe, a police officer who worked in King William's Town at the time, who was present in the locality. Sakhe did his own investigations and established that the said person was Xolelwa's boyfriend. Xolelwa testified and confirmed her love relationship with the accused and that during October 2018 he was with the accused and Jay Gidla near Libode Spar Supermarket. The accused did also confirm his love relationship with Xolelwa. He also did not deny being around Spar Supermarket even though he could not remember the date.

[52] Like that of Khayalakhe, Fezile Jonga's evidence must be treated with caution. There are many reasons why a witness' evidence of identification must be approached with caution. Some of the reasons were clearly articulated in *Mthethwa*³ exactly fifty years ago by Holmes JA where the learned Judge of Appeal said:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene; corroboration, suggestibility, the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in the particular case, are not individually decisive, but must be weighed one against the other in the light of the totality of the evidence and probabilities.”

[53] The evidence of Fezile Jonga is not only credible but also fits very well and neatly so with the above legal principles. Not only did he do something about the person he saw near Libode Spar Supermarket who looked familiar. He also went closer and chatted with Xolelwa whom he already knew from drinking places around Libode. This evidently gave him an opportunity to look at this person closely hence he referred to the fact that he had shaved his beard. He told Makawusi about having seen the attacker on their way back to the locality. He also told the grave diggers and Sakhe. Sakhe's investigations, which seem to have been informal as he was not investigating the case, established that Xolelwa and the accused were in a love relationship. This was confirmed by Xolelwa and the accused himself. Fezile Jonga's evidence included the fact that he saw the accused with Xolelwa and Jay Gidla near Libode Spar Supermarket. Xolelwa also testified that the accused would often be in the company of Jay Gidla.

³ S v Mthethwa 1972 (3) SA 766 (A) at 768 A-L

[54] The evidence of the State also included the fact that on 9 May 2018 five inmates including the accused escaped from Rooigrond Correctional Centre in Mahikeng. The evidence of the accused was that on 4 October 2018 he was in the Eastern Cape Province but he could not recall where he was in the Eastern Cape. His version put to Xolelwa as it related to his relationship with her was that it started around July 2018. What this means is that not only did the accused escape from prison in Mahikeng, he was already in the Eastern Cape and in particular, in the Libode area from July 2018 or thereabout. The evidence of Fezile Jonga is free from the ever present danger of an honest, sincere but dangerously erroneous evidence of an identifying witness which the court also described as a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence in *Mehlape*⁴.

The murder weapon.

[55] The State's case does not end with the evidence of identification. It also does not end with the accused having escaped from Mahikeng. There is also the evidence relating to the murder weapon which implicates the accused. I turn now to focus on that evidence. I should start by pointing out that all the chain evidence relating to the murder weapon and the empty cartridges was not challenged and is not, in my view, seriously questionable in any event. The evidence relating to the murder weapon is of a circumstantial nature. The State's case as it related to the firearm that it contends, was found in possession of the accused, is that it is the murder weapon used to kill the three deceased persons at the Nomqonde spaza shop on 4 October 2018. In proving its case in this regard the State relied on the evidence of Ida Mathule and the comparison and analysis reports compiled by its forensic ballistic analysts.

[56] The evidence if Ida Mathule was that on the 9 May 2018 five inmates including the accused escaped from the Rooigrond Correctional Centre in Mahikeng. During that escape a firearm belonging to that facility was taken away from one of their members. Some shots were fired and one member sustained an injury. The accused admits having been an inmate in that facility. He further admits that he did escape

⁴ S v Mehlape 1963 (2) SA 29 (A) at 32 F-G

from lawful custody in that facility. What the accused disputes is that he had anything to do with the shooting that took place or dispossessing a member of that centre of his firearm during the escape. As I understand it, his contention is that it might have been anyone of the other four escapees who was involved in the dispossession of the member of that facility of his issued firearm and the shooting that took place. The evidence of the State was that a 9mm parabellum calibre fired cartridge case was picked up from that crime scene. The State also relies on the results of the tests and comparisons conducted by its forensic ballistic analysts to contend that the firearm taken away during the shooting at Rooigrond Correctional Centre is the firearm that was used to kill people at Mafini.

The arrest of the accused.

[57] This brings me to the events of the 7 November 2018. The evidence of the State is that police received a tip-off from an informer that a person they were looking for was at Circus Triangle in Mthatha. Police from Madeira Police Station, having been given a description of the accused's person as they did not know him, proceeded to Circus Triangle. They spotted him at Circus Triangle. He went to ablution facilities there. Unbeknown to the accused, they followed him to the toilets. After he had finished using the toilets they approached him. They searched him and found, in the front part of his waist, a firearm with 14 live rounds of ammunition. They asked him for a licence for it. He said he did not have it. They then informed him that they were also arresting him for unlawful possession of a firearm and ammunition in addition to arresting him for escaping from lawful custody at Rooigrond Correctional Centre in Mahikeng. The accused's case was that he was not found with a firearm at the time of his arrest at Circus Triangle. His version was that when he was arrested there for escaping from lawful custody, he was taken to Madeira Police Station. It was at Madeira Police Station that the police produced a firearm claiming that it was found in his possession. He saw that firearm for the first time at Madeira Police Station. Furthermore, when he was eventually taken to the North West Province, he was only charged for escaping from lawful custody at the Rooigrond Correctional Centre and nothing was said about a firearm or even a shooting. He was never charged in connection with a firearm at all there.

[58] The credible evidence of the two police officers who testified about the arrest of the accused was that they were looking for him in connection with escaping from lawful custody. They searched him in the process of arresting him for escaping from lawful custody and fortuitously, they found a firearm in his possession in the front part of his waist under his clothing. That firearm was at some point taken to the SAPS Forensic Science Laboratory in Port Elizabeth and Pretoria. It was tested and found to be functioning normally without any obvious defects. A comparison analysis was done to establish if the empty cartridge case found at the Rooigrond Correctional Centre was fired from that firearm. The results were that the empty cartridge case picked up at the Rooigrond Correctional Centre was indeed fired from the firearm they said was found on the body of the accused at the time of his arrest on 7 November 2018.

[59] Some of the evidence of the State as it relates to the crime scene at Mafini was that police picked up two empty cartridge cases at that crime scene. These are the cartridge cases that colonel Mgwadleka, who is a chief forensic analyst, testified about. His evidence was that the cartridge cases which police had picked up at the Mafini crime scene and the firearm that came from Madeira Police Station were given to him for forensic examination to test if those cartridge cases were fired from the said firearm. His conclusion was that indeed those cartridge cases were fired from the said firearm.

[60] It must be remembered that the accused disputed that that firearm was found in his possession saying that he saw it for the first time when the police suddenly produced it when he was already at Madeira Police Station. I find it difficult to understand the accused's version in this regard. What it postulates is that when the police received a tip-off that he was at Circus Triangle on 7 November 2018, they already had the firearm which was used in shooting people at Mafini which they then falsely claimed to have found in his possession. The evidence of the police that when they arrested him and found a firearm in his possession after searching him, they asked him for a licence was never challenged. His evidence that the police only produced the firearm at Madeira Police Station is so far-fetched and so improbable as to be false. It is all falsehoods and an attempt by the accused to distance himself from that firearm while admitting that he escaped from the Rooigrond Correctional

Centre where that firearm was evidently taken during the escape on the 9 May 2018. He did this because this was the firearm the State contended, had been used to murder three people during the Mafini incident. Fezile Jonga's evidence about what took place at the Nomqonde spaza shop 4 October 2018 was that the person who shot the deceased persons pulled a firearm from the front part of his waist. This is the same place which the police said they found that firearm on the accused's body about a month or so after the shooting on 7 November 2018.

[61] The evidence of the accused largely consisted of bare denials and tended to be argumentative without dispelling or casting serious doubts on the many things that linked him to the crimes that were committed at Mafini on 4 October 2018. First, a shooting occurred at Rooigrond Correctional Centre where he was detained. He was one of the inmates who escaped from that facility. He was found in possession of the firearm that was used during the shooting at that facility a little more than five months after he and four others escaped. That firearm which was found in his possession was ballistically linked to a cartridge case picked up at Rooigrond Correctional Centre. The cartridge cases picked up at the Mafini crime scene were ballistically linked to the firearm that was found in his possession.

[62] Whether or not he was the one who did the shooting at Rooigrond Correctional Centre is irrelevant. After all, he is not facing the charges relating to that incident in this case. What is clear is that he got possession of the firearm which was dispossessed from a member of the Rooigrond Correctional Centre during the escape which he admitted to having been part of. The clear evidence of Fezile Jonga was that he saw him at the Mafini crime scene and he was the one who shot people there. The clear evidence of the police who arrested him at Circus Triangle on 7 November 2018 was that they found a firearm in his possession. That firearm was ballistically identified as the firearm that was used to shoot people during that incident. All the evidence of the State considered in its totality and considered with that of the accused leaves no possibility other than that it was the accused who shot and killed the three deceased persons on 4 October 2018 at the Nomqonde spaza shop.

[63] The Supreme Court of Appeal explained in some detail the correct approach in dealing with the evidence in a criminal case in *Chabalala*⁵. In *Chabalala* Heher AJA expressed himself as follows:

“The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.”

[64] Having followed the approach set out in *Chabalala* and other cases, I have come to the conclusion that the State has proved its case against the accused beyond reasonable doubt. There is no possibility, on the proper assessment of all the evidence including that of the accused, that the person who shot and killed the three deceased persons at the Nomqonde spaza shop was not the accused. The State witnesses largely gave evidence that was very credible and reliable which, when considered together and taking into account his own evidence, all points to the guilt of the accused.

[65] Having said that, I must point out that there was no evidence whatsoever, of any shot having been fired in the direction of and/or towards Fezile Jonga. It is not clear why the accused was charged with the attempted murder of Fezile Jonga specifically. There was nothing in Fezile Jonga’s evidence that suggested that the person who fired shots in that spaza shop during the attack made any attempt to

⁵ *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139 para 15.

shoot him or that he was shot and injured. His only connection with the shooting is that he was present in that small room, but so were Mrs Mbuzo and a few other persons in addition to the deceased persons.

[66] The evidence of the State has established the guilt of the accused beyond reasonable doubt in respect of the robbery, the murder charges and of course the unlawful possession of a firearm and ammunition. I turn now to look closely at the conspiracy charge. The trite legal position is that it would not be correct to convict an accused person for what is said to have taken place or been done in connection with the offence for which he is convicted before it was actually committed. Once the main charge is proved, the conspiracy which led to the commission of the main charge should fall away. That is why normally, where a person is charged with conspiracy to commit an offence together with that offence, conspiracy becomes an alternative charge and not in addition to the main charge.

[67] In *Gcam-Gcam*⁶ Cachalia JA dealt with this trite legal position as follows:

“What remains is the conspiracy charge. The high court found all the accused, including the appellant, guilty of both conspiracy to commit robbery and robbery on the basis of a common purpose. In this regard it erred because once a person conspires to commit a crime and then commits the crime he cannot be found guilty of both since the two crimes merge. By convicting the accused, including the appellant, of both crimes the high court incorrectly duplicated the convictions. I have held that the robbery conviction cannot stand. So it is necessary to consider whether the evidence established a conspiracy to commit robbery.”

Was the robbery premeditated?

[68] It is not clear why the accused went to rob, shot and killed Novangeli who ran a small rural spaza shop which probably had very little income and also shot and killed the two other deceased persons. The State did make a submission which in essence, was that when the accused armed himself and proceeded to commit

⁶ *Gcam-Gcam v S* 2015 (2) SACR 501 (SCA) para 37.

robbery at Nomqonde spaza shop, he had planned the robbery which was therefore premeditated and not a spare of the moment and opportunistic crime. It is not very clear from the evidence that the robbery was in fact premeditated. It is not clear where the accused came from when he was seen for the first time at Mafini on the day of the incident. While he was armed it is not clear where he was going to and the possibility of the accused going somewhere else for whatever reason when he saw an easy target, the Nomqonde spaza shop, cannot lightly be excluded. The evidence of conspiracy was both weak and speculative which also did not help on the issue of premeditation. The utterances about Novangeli being cheeky or having a bad attitude, even if they were indeed made, are not clear evidence of premeditation or prior planning.

[69] Premeditation, like the evidence of the guilt of the accused, cannot be assumed. If it is to be based on inferential reasoning, there must be a legally sound basis for making such inference informed by the evidence. The reason for this is not far to seek. Once premeditation is established it has serious implications for an accused person in that it triggers the minimum sentence regime should the accused be convicted. In this case the evidence of the State on premeditation was simply weak at best.

Were the murders of the deceased committed in execution of a common purpose?

[70] While these are not sentence proceedings, I consider it necessary to examine in some detail, the minimum sentence legal framework. I do so because findings of the court on premeditation and common purpose, like other findings that trigger the minimum sentence regime must be made on the evidence led by the State about the guilt of the accused. Such findings should not be made during the sentencing proceedings. In *Baloyi*⁷ the Supreme Court of Appeal dealt with this very issue recently where Makaula AJA had this to say:

“Failure to make a pronouncement at the verdict stage as to which of the provisions of Part 1 of Schedule 2 of Act 51 (1) of the CLAA are applicable to the accused’s conviction constitutes a misdirection in every case it occurs.

⁷ *Baloyi v S* 2022 (1) SACR 557 (SCA) paras 22 and 23.

However, such a failure will not always prejudicially affect the accused to the extent that the accused will avoid being sentenced to the minimum sentence of life imprisonment. If that were to be the case, it would result in a miscarriage of justice.

There will undoubtedly be cases where the proved facts compellingly and ineluctably point to premeditation. In such a case there cannot be any conceivable prejudice to an accused person if the minimum sentence is imposed despite the fact that a finding regarding premeditation had not been made prior to conviction. In my view, this is such a case. The accused was duly warned of the applicability of the minimum sentencing legislation on the basis of premeditation and, as I have said previously, the proved facts incontrovertibly established that the murder was premeditated. Accordingly, there can be no conceivable basis on which he can complain about the fairness of the trial.”

[71] The State invoked the provisions of section 51(1) of Act 105 of 1997, (the Act) indicating its intention to apply to the court that the accused be sentenced to life imprisonment, if convicted. This was on the basis that the murders were committed in execution of a common purpose. Section 51(1) of the Act reads:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.”

Schedule 2 makes reference to murder and, for the purposes of this case the State based its reliance on section 51 (1) in the indictment on the doctrine of common purpose. Schedule 2 (d) reads:

“The offence [murder] was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.”

[72] During his evidence Khayalakhe did mention a second person whom he said was with the accused. His evidence was that that person did not enter the spaza shop. He remained at the doorway. He did not give any description of this person in any form whatsoever except for indicating that he was also carrying a firearm. There is no evidence of this person saying or doing anything save for receiving the money from the accused. Amongst the people who were in the spaza shop only Khayalakhe testified to having seen this person. Fezile Jonga made it clear that he did not see any other person. Applying the cautionary rules of evidence as I must, to the evidence of Khayalakhe as a single witness with regard to the presence of the second person, I have come to the conclusion that Khayalakhe's evidence in this regard is vague and unsatisfactory. When the State addressed the court in terms of section 150 of the CPA, an indication was made that Siyabonga Makhuphula, who was also present inside the spaza shop at the time of the attack would be called as a witness. However, he was not called to testify. According to the section 150 address, he would have testified about having seen the second person who was allegedly also armed but was outside the spaza shop. As I said earlier, Siyabonga was not called by the State and therefore the vague and unreliable evidence of Khayalakhe was not corroborated. Therefore, the evidence of the accused acting in furtherance of a common purpose with anyone is unreliable.

[73] All that having been said, the State has established beyond reasonable doubt that it was the accused who entered the Nomqonde spaza shop, ordered everybody to lie down, robbed Novangeli of the money and the cellphone after which he shot and killed her, Fezile Nomqonde and Zalisile Nomqonde. During the shooting he was in unlawful possession of the 9mm Z88 Parabellum Pistol which is a semi-automatic firearm referred to in Schedule 2, Part II of section 51 of Act 105 of 1997. The said firearm was evidently dispossessed from a correctional services officer at Rooigrond Correctional Centre in Mahikeng. It was the same firearm that the police found in his possession on 7 November 2018. He admitted to being one of the inmates who escaped during that incident.

[74] Therefore, the State has proved the guilt of the accused beyond reasonable doubt in respect of counts 1, 2, 3, 4, 7, 8 and 9. No case has been proved by the State in respect of count 5, the attempted murder of Fezile Jonga. The State, having

proved its case in respect of robbery, the legal position is that the charge of conspiracy to commit robbery, which is count 6 must fall away in the circumstances as I said before.

[75] In the result, the verdict is as follows:

1. The accused is found not guilty in respect of count 5, the attempted murder of Fezile Jonga.
2. The accused is found not guilty in respect of count 6, conspiracy to commit robbery.
3. The accused is found guilty in respect of counts 1, 2, 3, 4, 7, 8 and 9.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: M.F Mzila

Instructed by: Director of Public Prosecutions

MTHATHA

Counsel for the Accused: A. Nohiya

Instructed by: Legal Aid South Africa

MTHATHA

Heard on : 03 June 2022

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