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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **25<sup>th</sup> AUGUST 2017** Signature: \_\_\_\_\_

**CASE NO: 171/2016**

**DPP REF: 10/2/1-165/2016**

In the matter between:

**THE STATE**

and

**M, M**

Accused

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**JUDGMENT**

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**ADAMS J:**

[1]. This criminal trial relates to the death of a young man, an innocent bystander, who was literally caught in the cross – fire between his mother and her husband. The incident happened on Thursday, the 22<sup>nd</sup> of September 2016 – another day ... another senseless killing in the Republic.

[2]. Mr Mandla George M ('Mr M') is a 34 year old man, who is charged with a first count of murder, read with section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that on or about the 22<sup>nd</sup> September 2016 and at or near Doornkop, Soweto, he unlawfully and intentionally killed S X ('the deceased'), a minor male. There is no allegation in the indictment or the summary of the substantial facts that the murder was planned or premeditated. Mr M pleaded not guilty to this charge and, through Mr Pillay, who appeared on his behalf in this matter, gave an explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977 (*the Act*), which disclosed the basis of his defence. I shall return to that s 115 statement shortly. By virtue of the provisions of s 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997, there is applicable a minimum sentence of imprisonment for life in the event of Mr M being convicted of pre – meditated murder as contemplated in the aforesaid s 51(1)(a) of the said Act. If it is found that that the murder was not planned or premeditated than there is also applicable a minimum sentence in terms of s 51(2).

[3]. The second count against Mr M is that of unlawful possession of a firearm, in contravention of s 3 read with s 120(1) and 121, read with schedule 4 of the Firearms Control Act 60 of 2000 and s 250 of the Act, in that on or about the 22<sup>nd</sup> of September 2016 and at or near Doornkop Mr M did unlawfully have in his possession a firearm, the calibre of which is unknown to the State, without being the holder of a valid licence, permit or authorization to possess such a firearm. Mr M pleaded guilty to this charge, and although he did not give a

written statement in terms of s 112(2) of the Act, Mr Pillay confirmed that the plea of guilty was in accordance with his instructions. Furthermore, and in response to questions by me, Mr M confirmed that he understood the nature of the charge against him and that he pleaded guilty freely and voluntarily. On the basis of his plea of guilty and his s 112(2) explanation, I am satisfied that Mr M is guilty on count 2 and he stands to be convicted accordingly.

[4]. Count 3 is that of unlawful possession of ammunition, in contravention of s 90 read with s 120(1) and 121, read with schedule 4 of the Firearms Control Act 60 of 2000 and s 250 of the Act, in that on or about the 22<sup>nd</sup> of September 2016 and at or near Doornkop Mr M did unlawfully have in his possession ammunition, the calibre and quantity of which are unknown to the State, without being the holder of: (a) a valid licence in respect of a firearm capable of discharging that ammunition; (b) a permit to possess ammunition; (c) a dealer's licence, a manufacturer's licence, gunsmith licence, import, export or transit permit or transporter's permit issued in terms of Act 60 of 2000, or being otherwise authorised to possess such ammunition. Mr M also pleaded guilty to this charge, and again he did not give a written statement in terms of s 112(2) of the Act. However, Mr Pillay confirmed that the plea of guilty in respect of this charge was in accordance with his instructions. Furthermore, and in response to questions by me, Mr M confirmed that he understood the nature of the charge against him and that he pleaded guilty freely and voluntarily. On the basis of his plea of guilty and his s 112(2) explanation, I am satisfied that Mr M is guilty on count 3 and he stands to be convicted accordingly.

[5]. The plea of not – guilty in respect of the charge of murder was confirmed by Mr Pillay as being in accordance with his instructions. The s 115 explanation was tendered orally from the bar by Mr Pillay on behalf of Mr M, who admits that he shot and killed the deceased whilst under the influence of alcohol, he having consumed seven 'quarts' (750ml) of 'Hansa' beers during the course of the day. He was extremely depressed after he had been involved in a fight with his wife.

He also indicated that he made a statement to a Colonel Duma shortly after the incident in question, but he had never had sight of the statement until it was shown to him by Mr Pillay on the 15<sup>th</sup> May 2017. Up to and until then, he had never seen that statement, although he admits having signed it. He denies that the statement correctly records what he told Colonel Duma on the day the statement was made by him. What he narrated to Colonel Duma and what the statement conveys as what he told Duma are not the same. The statement was never read back to him and the contents thereof never confirmed with him. In conclusion it was confirmed by Mr M, via Mr Pillay, that he was extremely sorry for what he had done. It was never his intention to do what he did.

[6]. Mr M made a number of admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 and these admissions were recorded by me as such with the consent of Mr M. These admissions are contained in exhibits 'A', which incorporated by reference exhibits 'B' to 'E'. In summary, Mr M admitted that S X is the deceased person mentioned in the indictment, and that he died on or about the 22<sup>nd</sup> September 2016 at or near Doornkop. He also admits that the body of the deceased sustained no further injuries from the time he sustained the injuries inflicted on or about the 22<sup>nd</sup> September 2016 until the post – mortem examination was conducted by Dr P J Klepp on the 22<sup>nd</sup> September 2016. Mr M also admits that the findings and observations of Dr Klepp as recorded in his post – mortem report dated the 22<sup>nd</sup> of September 2016, are all correct. The autopsy and related admissions are contained in exhibit 'B'. Exhibit 'C' is a photo album, compiled by Warrant Officer Isaiah Mahlangu, containing photographs depicting the scene of the crime where the body was found, including some pictures depicting the body of the deceased as found on the scene, and Mr M admits the truth and contents thereof. It is also admitted by Mr M that on the 22<sup>nd</sup> September 2016 Ms N X retrieved a spent bullet from the inside of a pillow on which the head of the deceased was resting at the time he was killed. On the 23<sup>rd</sup> September 2016 she handed this bullet to the investigating officer, Constable Motha, who, in turn, sealed the bullet into a seal bag no PA5001750053 and booked same into SAP13 no 2465/16. Exhibit 'D' is

a copy of SAP 13. Mr M furthermore admits that on the 12<sup>th</sup> October 2016 Constable Motha forwarded the bullet in the sealed bag under seal no PA5001750053, to the Forensic Science Laboratory for analysis, and that this exhibit was not tampered with from the time it was received by Constable Motha until the time it was handed in for analysis at the Forensic Science Laboratory.

[7]. It is further admitted by Mr M that on the 8<sup>th</sup> of November 2016 Warrant Officer Jason Errol Van Eeden, a Forensic Analyst, conducted an examination and identification of the bullet, pursuant where to he prepared and compiled a Ballistic Report, which was exhibit 'E'. The correctness and truth of the said report are admitted by Mr M, which includes a finding that the spent bullet found at the scene was of a 9mm calibre.

[8]. The net effect of these latter admissions is that, by agreement between the State and the Defence, it became common cause that the deceased died from a single gunshot wound to the head, fired by Mr M.

[9]. In substantiation of the charges against Mr M the State had tendered the evidence of four witnesses, namely: Ms T N (*'T'*), N X (*'N'*), Warrant Officer Siphso Mdletshe (*'Mdletshe'*) and Lieutenant Colonel Duma (*'Duma'*). What follows are summaries of the pertinent and relevant details that emerged from the evidence in chief and cross – examination of each witness.

[10]. T was the first witness called by the state. She is sixteen years old, and she is the 'adopted daughter' of the wife of Mr M, that being N. She is presently in grade 11 at school. I questioned her with a view to satisfying myself that she understood the importance and the seriousness of the oath, and after hearing her responses to my questions I was satisfied that she indeed appreciated the exigency of giving truthful evidence after having taken the oath.

[11]. She confirmed that the deceased was known to her, and explained that he was the eldest son of the person whom she regards as her mother, that being N. She also knows Mr M as the husband of her mother, but she does not regard him as her father.

[12]. She testified that before Thursday, the 22<sup>nd</sup> of September, 2016, the last time that she had seen the deceased alive was on the previous evening of Wednesday, the 21<sup>st</sup> September 2016, shortly before he went to sleep, which was at about after 22H00. At that stage the deceased was busy listening to music and sitting in the dining room, whilst she was busy washing dishes in the kitchen. At some point at about the same time Mr M came home, did not greet any of them and went straight to the bedroom. Shortly thereafter he left again after slamming the door shut on his way out. She thought that he was angry as he did not greet them, which is what he normally did when he was angry

[13]. After Mr M had stormed out the house, the deceased went to sleep in the lounge where he had made a bed on the floor. The witness finished washing the dishes, and by about 24H00 she also went to bed. By then the deceased was busy sleeping on the floor in the lounge on his makeshift bed.

[14]. About ten minutes after she had gone to bed, the witness heard someone entering the house. Immediately thereafter she heard the sound of a gunshot, whereafter she heard this person leaving the house again. At some stage whilst he was leaving T heard this person use an expletive, suggesting that he was angry. The witness then went to the lounge, where she found the deceased bleeding from a head wound and she said that by then he was dead. She found him in the same place where she had left him sleeping earlier on in the evening. After seeing the deceased lying there, the witness took her phone and went back to the bedroom. She attempted to communicate with her mother by sending her a message, to which she did not receive a reply. At this stage

the witness did not know where her mother was. She then started praying. At some point she again came out of the bedroom and, after she jumped over the body of the deceased, she went out of the house through the kitchen door to the house of their next – door neighbours. From there she called the police and then again tried contacting her mother, who she was then able to make contact with. The police arrived after a short while and her mother thereafter. When she went to the house of the neighbours, she did not see Mr M or his vehicle anywhere.

[15]. She confirmed that the Mr M had been known to her for a long time, ever since when she was younger. She explained that when Mr M arrived home at about 22H00 'he did not seem okay'. It looked like he was angry. She noted that he was angry because he was the type of person, when angry, he would not greet them. She expressed the view that he was seemingly walking okay, implying that he was not disorientated or particularly drunk. She explained that when she went to bed at about 24H00 the doors of the house were not locked. This was so because, at that stage, Mr M was not home yet, and usually when he was not home, they did not lock the doors. When Mr M arrived home after midnight, she was of the view that he had left the car outside the yard. When she went to the neighbours she couldn't see either Mr M or the car.

[16]. The witness explained that when Mr M came back the second time at about 24h00 there was no communication between him and the deceased as the deceased was asleep at that stage. There was no noise emanating from the lounge / dining room where the deceased was fast asleep. If they had been communicating, she would have heard them from the bedroom where she was sleeping, but she heard nothing. With reference to the photographs in the exhibit 'C' T confirmed that these photographs depict the deceased after he had been shot by Mr M.

[17]. Under cross examination, the witness confirmed that the last time she saw her mother was on the Monday night of the 19<sup>th</sup> of September 2016. The incident happened on the Thursday, the 22<sup>nd</sup> September 2016. She could not tell where her mother had been on the Tuesday. On a question whether it was usual for her mother to be absent from home for long periods of time, she responded that it did happen from time to time that her mother would leave them, including the small children, and disappear for a period of time without telling anybody where she had gone to. Sometimes, according to the witness, her mother would go to other towns in order to buy stock, that is clothing to be sold in her clothing business. The witness confirmed that her mother did not sleep at home on the Monday before the incident neither on the preceding weekend. She saw her the last time on Monday, thereafter she left with the little one, the one year old child.

[18]. As far as the relationship between Mr M and her mother is concerned, the witness indicated that it looked like there was tension between them and they were not on good terms. She confirmed that she was expecting her mother to return home on the Monday. She also confirmed that on the evening of the incident in question, that being the Wednesday, the 21<sup>st</sup> of September 2016, she went to bed late at only about 24H00. She confirmed that her mother had phoned her on the Wednesday morning, that being on the 21<sup>st</sup> September 2016, and requested her to go and collect the infant from the crèche in the afternoon. However before that, she was supposed to check whether Mr M had collected the baby from the crèche, and if not, she was supposed to go and collect the child. She did not ask her mother where she was at that stage.

[19]. She reiterated under cross – examination that at about 22H00 on that fateful evening when Mr M came home, the deceased was sitting in the dining room and she (T) was in the kitchen washing the dishes. Mr M was angry and he did not greet those of them he found at home when he arrived there. She further testified that at some stage she heard him leave the house.

[20]. It was put to the witness that Mr M will say that he came home at about 20H00, and enquired from the witness whether the small child had been fed. Her response to this proposition was that Mr M did not speak to her at all. In any event, so the evidence of the witness went, the baby had been fed shortly after she had been dropped off by Mr M at about 20H00. On a question by the court, T indicated that on the night of the shooting she could not see whether Mr M was drunk or not.

[21]. The next witness for the State was N X. She confirmed that the previous witness, T, she regards as her child, although she is not her biological mother. She explained that after T's mother passed away, she took her in and she had been living with her since then. She took T in during 2014. The witness confirmed that Mr M is her husband and that they have been together since 2004. They were renting an RDP house at R1500 per month. She explained that they stayed there with their five children, whose names are the following: the deceased, T, Surprise, Nobelo and Molebule.

[22]. She confirmed that, but for T (T), the other four were all her children. On a question as to where she was on the night of the 21<sup>st</sup> September, 2016, she confirmed that she was in Nancefield in Soweto, staying at a friend's place. She explained that before then, she had gone to Vryheid, and on her way home she went via Witbank and from there to Nancefield. She arrived in Nancefield on Monday, the 19<sup>th</sup> September 2016, in the afternoon and at about 18H00 she went home in Snake Park in Soweto. From there she left and went back to Nancefield. After she arrived in Nancefield, she switched her phone off so that Mr M could not reach her.

[23]. When she woke up the next morning she received messages from Mr M, accusing her of having taken the child, which, according to him, meant that he was not the father of that child and that she had taken the child to her real

father. She also testified that Mr M was cheating on her and that was why, so she explained, she was not prepared to sleep at home. His cheating made her so mad and she left home because of that. She explained that when she left home in that way, it would be Mr M who would look after the children.

[24]. She found out about the shooting of her son when her daughter, T, called her and explained to her that she needed to come home because Mr M had killed the deceased. She went home, and on her arrival, there were many people milling around her house, including the police officers, and they would not let her into the house. They did however require the birth certificate of the deceased, and to enable her to retrieve the certificate they let her into the house. That was when she saw her son, the deceased, for the first time after his death.

[25]. Shortly thereafter her daughter, T, gave a statement to the police officers who were on the scene. After that the SAPS Pathologist vehicle came and collected the body of the deceased and removed same. They were taken to the Police Station, where it was suggested by the police that they should be taken to a place of safety, as, according to the police it was not safe for them. The witness asked the police not to be taken to a place of safety as she was the only one who could and needed to make funeral arrangements. They thereafter went to collect the deceased's clothes and went to Sebokeng. At some point, whilst in Sebokeng, she discovered a bullet in the pillow on which the deceased's head had rested when he was shot. She handed the bullet to the police.

[26]. Thereafter, whilst the witness was busy arranging the funeral, she constantly received threatening messages from Mr M. The first message, which was in Afrikaans, suggested that she (the witness) would be the next one whose brains would be splattered. The second message said that Mr M needed

his car, which was worth R20 000 and, and if she did not give him his car she then would also be on my way. The witness did not know the whereabouts of Mr M at that stage. He was however arrested after the funeral.

[27]. On a question relating to the relationship between her and Mr M, the witness indicated that from her side it was alright. The problem, so she said, was from the side of Mr M who was cheating on her with other women, some of whom she had confronted on occasion. She had spoken to Mr M about his infidelity on many occasion, but to no avail.

[28]. N confirmed that she has five children of her own, including the deceased, T and the three fathered by Mr M. Mr M himself had three other biological children of his own. The deceased was her biological child, her first born, and the first witness was her adopted daughter. She confirmed that the deceased had his own biological father, and she started being romantically involved with Mr M when the deceased was still very young. At the time he was killed, the deceased was 16 years old.

[29]. She confirmed that, as far as she could see, the deceased did not have a problem with Mr M. However, Mr M seemingly had a difficulty with the deceased. For example, from time to time Mr M would insist on watching his own TV programmes whilst the deceased was busy watching his. She also recalled an incident where the deceased and the cousin of Mr M were involved in an accident, which caused unpleasantness in the family as Mr M had to pay the damages of the owner of the other vehicle involved in the accident.

[30]. Mr M did not like the deceased. It got to a point where Mr M suggested to her that they arrange for the deceased to live on his own by organising a room

for him to stay in outside of their home. The witness would however have none of this

[31]. Under cross – examination the witness confirmed that at the time of the incident she was 32 years old, and that she gave birth to the deceased when she was only fourteen years old. She met Mr M during 2002 and, at that time, he was still in a relationship with another woman, one S, with whom he has children. During 2005 the witness and Mr M moved in together and he broke off the relationship with S. Subsequently, they got married although Mr M did not pay labola for her. He had however paid labola for S. She confirmed that there were problems in the marriage, but denied that they separated during the marriage. They did however separate before they got married. During 2016 she received an sms on her cell phone, which Mr M saw. She denied however that it read, as it was put to her by Mr Pillay on instructions from Mr M: 'Are you coming to sleep with me today?', or words to that effect. The sms simply enquired from her whether she was going to Mpumalanga so that she could meet the sender of the message. She confirmed that shortly thereafter she left Mr M by driving off, leaving him behind. She went to Nancefield at her friend, Ntombi's place. Thereafter, Mr M met with her friend, Ntombi, and her brother, Kenny, and the dispute between them were resolved or so it seemed. They thereafter continued their relationship. During September 2016 she went to Vryheid. She denied that she was supposed to return on the 18<sup>th</sup> September. She always use to go away and she did not see a reason why she should tell Mr M when she would return. She had gone to Vryheid to buy clothes from the Chinese shops, but she could not remember the names of those shops. She denied that she was going to steal clothes from those shops. She went with three other persons on her shopping trip to Vryheid. She stayed in Vryheid for five days, and thereafter went to Witbank. In Vryheid they stayed in a hotel, but she was not able to recall the name thereof. She went to Witbank because in Vryheid she had not been able to acquire enough stock. She stayed in Witbank for six days. During that time she called Mr M and explained to him where she was and what her plans were. She came back on the 20<sup>th</sup> September 2016. In

the evening of Tuesday, the 20<sup>th</sup> September, she went to collect her small child from home and went with him to Nancefield. She reiterated that she came back to Johannesburg on Tuesday, the 20<sup>th</sup> September 2016, and went home on the same evening only to return to Nancefield with her youngest child. She did not stay home on that day as she had already lost interest as she had been hurt by the sms's she had seen on his phone. She confirmed that, in response to his message accusing her of taking the small child to her real father, she sent a message to him saying that he should go and collect his belongings and his dogs and leave the house. She confirmed that the deceased would stay with Mr M when she was on her trips outside of Gauteng not at home.

[32]. The witness confirmed the incident of the car accident, but denies that Mr M had to pay the other party for his damages. She was the one who paid the damages. She confirmed that on the 26<sup>th</sup> September 2016 she made a statement to police, in which she explained what had happened. It was also put to the witness that Mr M will testify that because he thought she was sleeping with another man, he became very depressed on the 21<sup>st</sup> September and he started drinking. Her response was that there was no other person. She stated that she went to the house on the 20<sup>th</sup> September and he was there. It was put to the witness that it was the intention of Mr M to kill her (the witness) and then himself, and that it was never his intention to harm the deceased.

[33]. The next witness on behalf of the State was Warrant Officer Siphon Mdletshe (*'Mdletshe'*) from the Tracing Unit of the South African Police Services. N and her family are known to him, and he realised that when she came to the Police Station a few days after the shooting of the deceased. Mr M and his family, in particular his parents, were also well – known to the witness. His evidence in a nutshell was that, after some diligent police detective work, he tracked down and arrested Mr M on or about the 1<sup>st</sup> of October 2016 at an address in Dobsonville. On the day, although Mr M was caught unaware by the presence of the witness, he offered no resistance to the arrest. He did

seemingly avoid the witness prior to being arrested as the witness had at some point before then made telephonic contact with him and had arranged to take him to the police himself. However, Mr M subsequently avoided his further phone calls.

[34]. The last witness for the State was Lieutenant Colonel Duma, who gave evidence in the trial – within – a – trial as well as in the main trial. In the trial – within – the – trial he testified that he was not involved in the investigation of the charge of murder against Mr M, and that on the 3<sup>rd</sup> of October 2016 he obtained from him a confession / admission, which Mr M gave freely and voluntarily. The main portion of the statement reads as follows:

‘On 2016.09.21 at about 22:00 at Snake Park Block residential address unknown to me, there was a quarrel between S X, my stepson, because of his evil behaviour. It was on 2016.09.20 at about 19:30 to 20:00 where he used abusive language to me, I became furious. I decided to hire a firearm to kill myself and my wife, but it did not work. I decided to shoot my stepson because of his evil behaviour. I was depressed by my wife who ordered me to go and take my children, and I go and fired one shot towards him on the head. He passed away. I moved out. I took back the firearm to Thapelo – surname unknown to me. Stays at Snake Park Block 4 House no unknown to me, but I knew the place. I went to Saulsville. On 2016.10.01 at about 16:00 I was arrested at Jabulani SAPS and I was detained at Dobsonville SAPS. That is all I have to say.’

[35]. Under cross – examination during the trial within the trial, it was put to the witness that at no stage did he read back the statement to Mr M after it was completed. He denied this and was adamant that what was contained in the statement was what he was told by Mr M. It was also put to the witness that Mr M denies that he said that he decided to hire a gun to shoot his stepson because of his evil behaviour. The witness remained adamant that that is what Mr M told him.

[36]. Mr M, the accused, thereafter gave evidence first in the trial – within – a – trial and then in the main trial. He confirmed that he was taken to Colonel Duma to make the statement, and that it is his signature at the bottom of each page and at the end of the document. He confirms that he explained to Colonel Duma that he had consumed alcohol but this important fact was not recorded in the statement. He also denies that he told the Colonel he decided to hire a firearm to shoot his stepson because of his evil behaviour.

[37]. Under cross – examination in the trial – within – a – trial, he admitted that he mentioned to the Colonel that the deceased used abusive words towards him. Except, so he testified, it would have been in the context of the deceased not have gotten the kids ready for school on the morning of the Wednesday, 21<sup>st</sup> September, and not on Tuesday, the 20<sup>th</sup> September.

[38]. Mr M also gave evidence in his defence in the main trial. He confirmed that the deceased was his stepson. He also confirmed that N is his wife, and they have three children together, namely a 9 year old, a 7 year old and a 1 year old toddler. During August 2016, whilst they were sleeping at home, he noticed a message received on his wife's phone which was to the effect that the person sending the message to his wife enquired from her as follows: 'I thought that you were coming to sleep over. Why did you not come?' This was of concern to him, but the next day before he had a chance to confront his wife about the message she left him after driving off with his car. This issue was however sorted out shortly thereafter with the intervention of the brother of his wife and her friend. Thereafter the relationship was good.

[39]. During September there was another incident. His wife went to Mpumalanga and said that she would return on Sunday, the 18<sup>th</sup> September. She didn't. Instead she informed him that she would be coming home on the Monday, the 19<sup>th</sup> September 2016, but again on that day she informed him that

she would only be returning on Tuesday, the 20<sup>th</sup> September 2016. She also said that when she came home she would not be staying there as she needed to take the baby to their family home, which is in fact what she did on the 20<sup>th</sup> September – she arrived home, took some clothes and the baby and left again. Mr M was at home then. She confirmed to him that she still loves him. At about 22H30 that night he received a call from N who wanted to know from him why he always had a problem with her visiting her family. The call got cut, and he went looking for her at the house of her parents and also at her friend's house. She was not there. He then went home. It was the morning of Wednesday, the 21<sup>st</sup> September. When he arrived home the kids were not ready for school yet, and he asked the deceased why this was so. The deceased's response was that he was sleeping and what was he supposed to do. In the end the kids did not go to school. Mr M left and returned home later after he had gone to transport other children to school.

[40]. In the afternoon he received a message from his wife saying that he should collect their baby from the crèche. Immediately thereafter she sent a further message asking him exactly what it was that he wanted from her. This was seemingly in response to his attempts to contact her during the course of that day. His response was that he wanted his car. A further message then followed from the wife to the effect that she was still with her boyfriend and that he (Mr M) should just collect his belongings and his dogs from their home and leave. He did not respond to this message. This made him very angry, and he wanted to kill himself. This was the fourth time that the woman he loves, his wife, had gone to another man.

[41]. Thereafter, he did the afternoon transporting of the children, whereafter he drove around aimlessly. He also consumed alcohol – in total seven quartz (750ml) of 'Hansa' beers. At about 20H00 he went home to check on the children and to see whether they had eaten yet. Thereafter he went in search of the firearm, which he was able to obtain and he then returned home at about

22H00. He went into the house 'roughly', by which I assume he meant somewhat aggressively. This, according to Mr M irritated the deceased, who was lying on the sofa in the lounge. Mr M testified that at that stage his state of sobriety was such that he could not even control himself. On Mr M entering the house, the deceased, clearly annoyed, clicked his tongue to show his annoyance, and Mr M told him not to do that. He was still his father, so Mr M reprimanded him. He then approached the deceased, gun in hand, and that was when the gun mysteriously went off and hit the deceased in the head. Mr M then explained that, although he is not knowledgeable about firearms, the gun in his hand was not in a safe mode. The one thing he did wrong, according to Mr M, was that he took out the gun when he approached the deceased. He did not want to shoot the deceased. There was nothing the deceased did to him that would have made him want to kill him.

[42]. Mr M denies that in the days following the death of the deceased he had sent threatening messages to the N. He does not even know Afrikaans. When he went home on the night of Wednesday, the 21<sup>st</sup> September 2016, he was expecting that his wife would be home. He would then have shot her and then himself. Mr M also testified about the incident during December 2015 when the deceased and the cousin of Mr M had been involved in an accident with Mr M's car. He was thereafter required to pay the damages of the owner of the other car. The deceased then smashed his car, which angered Mr M and this led to tension with the deceased. In the end, he agreed to live with the deceased. He did not intend to kill the deceased. He was his child and he had known him since he was three years old. He still hurts, because 'he was also my child'.

[43]. Under cross – examination Mr M denied that the relationship between him and the deceased was strained. He even taught the deceased to drive a car. He also denied that he took the deceased's life because of his 'clicking his tongue' when Mr M arrived home. He also denies that he went looking for his wife when he went home the second time. He went home to sleep. The first

time he had gone home to make sure that the baby had been fed. He confirmed that the deceased had nothing to do with the problems between him and his wife.

[44]. After the shooting, Mr M returned the firearm to its owner, a friend of Thapelo, who in turn was a friend of his. He felt obligated to return the firearm because the owner and his cronies made it quite clear to him that if he did not return the firearm he would be killed. He confirmed that he had driven to and from the friend of Thapelo before and after the incident, and it was suggested to him by Mr Makua, who appeared for the State, that he was still very much in control of his actions. This then prompted Mr M to retort that in fact it was a struggle driving to and from the firearm people. He confirmed that the fact that he acquired the firearm showed clearly that he had planned and had the intention to kill. He emphatically qualified this proposition by saying that the intention was to kill his wife and then himself. He also states that when he arrived home the deceased was on the sofa and not sleeping on the floor as testified to by T. He persisted with this version despite being confronted with the evidence of the photographs depicted the deceased on the floor after he had been shot. According to him, T was lying about this.

[45]. Mr M also explained that the reason why the firearm was in his hand was because he was expecting his wife to be home, and he was intending to shoot her. The deceased was shot by mistake. All Mr M wanted to do was to warn him, and the firearm mistakenly discharged itself.

[46]. It was furthermore put to Mr M it seems strange that if the firearm discharged by mistake that the bullet hit the deceased in the head. His response was to the effect that that was just bad luck. Also, his explanation for having the presence of mind to return the firearm after the shooting, having regard to his claim that his mind was not clear, was to reiterate that he was not

thinking clearly. Also, so he was asked under cross – examination, if the shooting was a mistake, why disappear for days afterwards? Again, his response was that he was confused.

[47]. As far as the confession / admission before Colonel Duma is concerned, he denied that portion where he is alleged to have said that he decided to kill the deceased because of his evil behaviour. He also confirmed that he was ‘tipsy’ but not drunk at the time of the shooting. He could however not think clearly.

[48]. After the evidence in the trial – within – a – trial was concluded both counsel for the state and for the defence addressed argument to the Court. After considering the evidence and arguments that had been presented I ruled that the statement made by Mr M before Colonel Duma on the 3<sup>rd</sup> October 2016 was admissible in evidence against him. The reasons for my findings were to be provided when I delivered judgment in the main trial. These reasons now follow.

[49]. Colonel Duma created a very favourable impression when he testified. Although there were minor discrepancies in his version, these were not of such a material nature as to detract from his credibility. The attack on the confession / admission was aimed primarily against the recordal of the statement. In particular Mr M denied that portion of the statement which says that he allegedly stated that he decided to shoot his stepson because of his evil behaviour. The rest of the statement is confirmed by Mr M albeit that there is a difference relating to the date and time when certain incidents occurred.

[50]. The state has proved beyond a reasonable doubt that the confession / admission was that made by Mr M to Colonel Duma freely and voluntarily in his

sound and sober senses and without being unduly influenced thereto, and that the contents were as stated by Mr M to the Colonel.

## **Findings**

[51]. Having considered all the evidence and the admissions made by Mr M in terms of s 220 of the Criminal Procedure Act, I am of the view that the salient facts of this matter are the following.

[52]. Mr M and his wife, N, who have three children together, have been married since during or about 2005. The deceased was the eldest son of N from a previous relationship. Their marriage was not as smooth sailing as it should have been and was characterised by numerous arguments, accusations of infidelity from both sides and at least one or two break – ups. To describe theirs as somewhat of a tumultuous relationship would not be that far of the mark.

[53]. There was also tension from time to time between Mr M and his stepson, the deceased, but nothing serious which would have caused and / or motivated Mr M to want to take the life of the young man. The big problem in their household appears to have been between the husband and the wife, and the kids were just caught in the middle. The constant bickering and the continuous fights may very well have culminated in the text message from N on Wednesday, the 21<sup>st</sup> September 2016, when she told Mr M to take his bags and leave.

[54]. This, coupled with the fact that in his mind at least his wife was cheating on him and had found another man, angered Mr M to the point that he made a conscious decision to end the life of his wife and thereafter to commit suicide. To that end he decided that he would obtain a firearm and use it to shoot and

kill first his wife and then himself. In order to give himself some Dutch courage he then consumed copious quantities of alcohol in the course of the afternoon and the evening before the shooting. This, although it made him tipsy, did not make him drunk to the point where he was not in control of his actions.

[55]. At about 24H00 on the morning of Thursday, the 22<sup>nd</sup> September 2016, Mr M went home armed with a firearm, intending to shoot and kill his wife and then himself. Although she was not home when he had been there earlier at about 22H00, he was hoping that by the time he gets home the next time, which would have been at 24H00, she would have returned home. As it turned out, this was not to be. When he got home, his wife was still not home, and this sent him into a rage and made him extremely infuriated. He then vented that anger on the deceased who was fast asleep on the floor in the dining room / lounge, blissfully unaware of the terror which was about to be unleashed on him.

[56]. After having shot the deceased Mr M then left the scene in his car, drove back to the place of the friend of Thapelo, and returned the firearm. Thereafter, he evaded arrest for approximately nine days, whereafter he was arrested.

[57]. Mr M's version of events on that fateful night accords in the main with my factual findings above, with the significant exception being that he denies that he deliberately shot the deceased. As indicated above, his version is that the firearm discharged accidentally and by itself.

[58]. This version is not reasonably possibly true. By all accounts, Mr M, when he arrived home at approximately 24H00 was very upset. His infuriation probably caused him to shoot the deceased as his perverted way of getting to the object of his rage, that being his wife. To say that the firearm went off by accident is highly improbable and so far – fetched that it borders on the

ridiculous. What is also telling in that regard is what happened after the fact. Mr M fled the scene of the shooting immediately thereafter and evaded the police for approximately nine days. This, in my view, are not the actions of a person who accidentally shot and killed someone. As rightly submitted by Mr Makua, the fact that a single fatal shot was fired to the head of the deceased suggests that it was deliberately fired and belies the version of Mr M that out of the blue a shot went off. I reiterate my view that, in the context of all of the facts in this matter, the crucial part of the version of Mr M, is highly improbable.

[59]. I also have no hesitation in rejecting Mr M's version of the events on the basis that he was an extremely poor witness and on numerous occasions tried to correct his evidence when he realised his answers were incriminating. In his evidence there were contradictions, inconsistencies and other improbabilities. Most notably is the fact that in his s 115 plea explanation he had stated that the reason why he shot and killed the deceased was because he was under the influence of alcohol, coupled with the fact that due to his wife's behaviour he was depressed and emotional. This is in direct contradiction to his evidence that the gun went off accidentally, with the bullet hitting the deceased in the head because of 'bad luck'. This is a material contradiction in the version of Mr M.

[60]. I am therefore satisfied that, all things considered, the irresistible conclusion to be drawn from all the proven facts is that Mr M intentionally killed the deceased.

[61]. In drawing these conclusions I am fully aware of the warning by Smalberger AJA in *S v Mtsweni*, 1985(1) SA 590 AD at 593I – 594D against inferring guilt necessarily from dishonest testimony by Mr M. However, Mr M's version is so unsustainable and his evidence of such poor quality that the conclusion can, in my judgment, be safely drawn,

[62]. In *R v Blom*, 1939 AD 188 at 202 – 203 it was held that when reasoning by inference the inference sought to be drawn must be consistent with all the proved facts and these facts must be such that they exclude every reasonable inference from them save the one sought to be drawn. By no stretch of the imagination is Mr M's guilt inconsistent with any proven fact. In my view, no reasonable inference may be drawn from any proven fact which points to his innocence. In that regard what weighs heavily on my mind is the evidence relating to single fatal gunshot wound to the head of the deceased, which appears to have been inflicted quite deliberately and goal driven.

[63]. I am therefore satisfied that the State has proven beyond a reasonable doubt that Mr M had the intention to and in fact did kill the deceased.

[64]. I now consider the likelihood that the murder was planned or premeditated.

[65]. As indicated, I am satisfied that the evidence adduced by the State proves beyond a reasonable doubt that Mr M is guilty of the crime of murder. However, the evidence falls short of proving that he acted with premeditation or had planned the murder. Mr M had clearly planned to shoot and kill his wife, and if he had succeeded in doing that he would no doubt have been guilty of premeditated murder. However, when he could not find her, his intentions and anger were soon directed at the deceased. The question is can this planning and premeditation be attributed to Mr M in relation to his shooting of the deceased. The answer, in my view, is no. The requirement of premeditation must be specifically directed at a particular act.

[66]. It appears that Mr M may have acted on the spur of the moment because of the circumstances. He was furious with his wife for her behaviour towards him. His anger reached a boiling point by her telling him to move out of

the house, and was aggravated by the consumption of alcohol. It was also argued by the State that the premeditation is also proven by his statement to Colonel Duma that Mr M decided to shoot his stepson because of his evil behaviour. However, this statement should be read in the context of the sentence immediately preceding this averment. The important part reads thus: 'I decided to hire a firearm to kill myself and my wife, but it did not work. I decided to shoot my stepson because of his evil behaviour'. My view is that a proper reading of this statement is corroboration for my view that, when Mr M did not find his wife home, he on the spur of the moment decided to shoot and kill the deceased.

[67]. It is by no means enough for there to be a suspicion in regard to whether he acted in a premeditated manner or not. The onus rests on the State to prove this beyond a reasonable doubt. I do not consider that the evidence goes far enough in this respect and I therefore cannot find that the murder was either planned or premeditated.

[68]. On the second charge of unlawful possession of a firearm, I have already indicated above that, on the basis of Mr M's plea of guilty and his s 112(2) plea explanation, I am satisfied that he is guilty of this offence. The evidence led during the trial has also confirmed the guilt of Mr M beyond a reasonable doubt. He had acquired the firearm from a friend of Thapelo and he used it to shoot the deceased shortly after midnight on Thursday, the 22<sup>nd</sup> September 2016.

[69]. The same applies to count 3, that being unlawful possession of ammunition.

[70]. I am therefore satisfied that Mr M is guilty beyond a reasonable doubt of all three charges against him.

**ORDER**

In the result, my verdict is as follows:-

1. Count 1 – The murder of S X, read with section 51(2) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 : **Guilty**.
2. Count 2 – Unlawful possession of a firearm: **Guilty**.
3. Count 4 – Unlawful possession of ammunition: **Guilty**.

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**L ADAMS**  
*Judge of the High Court*  
*Gauteng Local Division, Johannesburg*

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HEARD ON: 16<sup>th</sup> – 19<sup>th</sup> May 2017 & 21<sup>st</sup> – 24<sup>th</sup> August 2017

JUDGMENT DATE: 25<sup>th</sup> August 2017

FOR THE STATE: Adv Makua

INSTRUCTED BY: Office of the National Director of Public Prosecutions,  
Gauteng Local Division, Johannesburg

FOR THE  
DEFENDANT: Adv Pillay

INSTRUCTED BY: Legal Aid South Africa