

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NUMBER: 158/2016
DPP REF: JPV 162/16

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

26/01/2018
DATE

.....
SIGNATURE

In the matter between:

THE STATE

and

SENZO MZIKAWUPHELI NKOMO

ACCUSED

J U D G M E N T

MATSHITSE AJ

THE CHARGES

[1] Mr Senzo Mzikawupheli Nkomo, (accused) is an adult male of 28 years old, who was originally charged with 4 counts, however at the beginning of the trial the State withdrew first Count that is of Murder due to witnesses and he is now facing three charges which are:

[1.1] Second count of murder, read with section 51(1) of Act 105 of 1997 in that he murdered Mandla Mavela Mduli on or about 27 July 2016 at or near Shop 2 Winston Court, Corner Plein and Banket Streets in Johannesburg. There is no reference to section 51(1)(a) rather than simply to section 51(1). The State has made an allegation in the summary of substantial facts that the murder was planned;

[1.2] Third count of Contravening the provisions of section 3 of the Firearms Control Act, Act 60 of 2000, in that on the above date and at or near the place mentioned above, in count 2, accused was unlawfully found in possession 9mm calibre firearm particulars of which are unknown to the State, without holding a licence, permit or authorisation issued in terms of the Act to possess that firearm;

[1.3] Fourth count of Contravening the provisions of section 90 of the Firearms Control Act, Act 60 of 2000, in that on the above date, and at or near the place mentioned above in count 2, accused did unlawfully possess at least three rounds of 9mm calibre ammunition, without a licence, or permit, or dealers, or manufactures, or gunsmith, licence or import or export or in-transit permit or authorised thereto in terms of the Act or authorised to do so.

[2] Adv Byker appeared for the DPP and Adv Xamsana appeared on behalf of Mr Nkomo up to the end of State's case, after which he indicated that he was not happy

with the way his counsel, Adv Xamsana, represented him or conducted his defence in this case, and as such, he requested that he be represented by another legal representative, then Mr Khumalo took over and represented him from defence case. Mr Nkomo pleaded not guilty to all three counts and in terms of the provisions of Section 115 of the Criminal Procedure Act 51 of 1977 ("CPA") elected not to give any plea explanation, that is, he excised his right to remain silent.

ADMISSIONS

[3] The defence made a number of admissions recorded by me as such under section 220 of the Criminal Procedure Act 51 of 1977 with the consent of Mr Nkomo. These admissions are contained in Exhibit "A", which incorporated Exhibits "B-F".

[3.1] In short, it was admitted that Mandla Mavela Mdluli is the deceased, he died on 27 July 2016 of Multiple Gun wounds, which he sustained at Shop 2 Winston Court Cnr Plein and Banket Streets Johannesburg being Exhibit "B" Post-mortem report

[3.2] Dr Shirley Faith Angela Portia Moeng conducted the post mortem examination on the deceased.

[3.3] The facts and findings of post mortem examination recorded by Dr Shirley Faith Angela Portia Moeng are true and correct.

[3.4] Crime Scene Photographs compiled by Constable Lucky Kewu being Exhibit "C",

[3.5] Affidavit in terms of Section 212 of the Criminal Procedure Act being: -
Ballistic Reports, Exhibit "D" (fired cartridges) Compiled by Captain Retha
Viljoen

[3.6] Identity parade photographs album compiled by Warrant Officer
Daphney Matsepe being Exhibit "F"

ISSUES IN DISPUTE

[4] In the case of S v Scott-Crossley¹ at paragraph [18] it was stated that ... "the fact that the version of an accused coincides with that of a State witness on a particular point does not provide corroboration for the latter's evidence... Matters which are common cause between the State and the accused cannot provide corroboration for matters in dispute". The sole issue for determination by this court is the identity of the perpetrator of the crimes that Mr Nkomo is charged with or is Mr Nkomo being falsely implicated for the death of Mandla Mavela Mdluli, the deceased. The fact that the deceased was shot with a firearm and died as a result of the said shooting at shop number 2 at Winston Court, corner Plain and Banket Streets Johannesburg, together with 3 cartridges which have been found at the crime scene (shop) as depicted on exhibit "C", is not been disputed and can be accepted as common cause.

THE EVIDENCE FOR THE STATE

[5] Before the State could call its first witnesses brought an application in terms of the provisions of section 153 (2) of the CPA to have the testimony of the three State witness to testify in camera, as it believes that their lives will be in danger should they testify in an open court. The defence did not oppose the said application and

¹ 2008 (1) SACR 223 (SCA) [17]

the court granted the State its application and the court was held in camera without any members of the public.

[6] The evidence of the three State witnesses called, being, Messrs Phumlani Norman Majola (Majola), Muzi Magwaza (Magwaza) and Mthokozisi Mkhize (Mkhize) is similar in all material respect, and as such the Court will not summarise individually their evidence but will summarise it in totality. In accordance with the decision of *S v Bhengu*² “the court will give the summary of facts as opposed to repeating the evidence”.

[7] All three witnesses testified that they were all seated together, including the deceased, Messrs Mandla Mavela Mduli (deceased) and Mbuso Ntuli (who also has since passed on), at Majola’s Shop number 2, situated at corner Plein and Bunket Streets Johannesburg. Majola was seated behind the counter, while Magwaza, and Mkize were seated on the bench on the left-hand side as you enter the shop, Magwazwa was at the beginning of the bench as you enter the shop, and on the right-hand side it, was Ntuli, as you enter the shop, and next to the counter on the car seat it was the deceased.

[8] At around 18h30 and 19h00 two gentlemen entered the shop. One of them is accused before court, and he was in the company of one person who was light in complexion.

[9] Upon entering Magwaza greeted accused, since he knew him, and he wanted to give him space where he was seated on a bench together with Mr Mkize.

[10] That person, who was in the company of accused, pointed at the deceased and said “he is the one” accused then replied by saying “oohh I know this man, how can a beautiful man like you do such things?”. All the witnesses spoke

² 1998 (2) SACR 231 (N),

simultaneously and ask "what did he do?" The person who pointed out the deceased exited the shop immediately after pointing out the deceased

[11] At the same time accused then pulled out a firearm from his waist in the front of his pants and ordered them not to move. He then shot the deceased three to four times, the deceased tried jumping over the counter and he fell on to the other side wherein Majola was seated.

[12] Accused then retreated backwards, and exited the shop, at the same time, Magwaza tried following him and he ask accused what he was doing, accused raised a hand gesturing him to go away he then disappeared.

[13] Majola and Mkhize then went to check upon the deceased, they saw him bleeding profusely, having difficulty in breathing. An ambulance was called but it delayed in coming they then decided to lift him up, took him into Majola's Toyota Quantum motor vehicle, wherein Mkize and Magwaza accompanied him to Johannesburg General Hospital.

[14] At the hospital, after about 10 to 15 minutes medical staff came and informed them that the deceased has died passed on due to his injuries that he sustained as a result of being shoot at. They then returned back to Majola's shop. They found the police and statements were made.

[15] On the 13th August 2016 they all attended and identity parade at the Johannesburg central police station. Upon arriving at Johannesburg Central police station, they were meet by two police officers. They were informed how identity parades are conducted. They were taken by lift to another floor. They were put in one room and thereafter taken to another room one by one, which contained a mirror, they could see people line-up against a wall holding numbers against their chests.

[16] They were told that when they see the person whom they belief had committed the alleged offence, shooting of the deceased, they must call up the number he is holding and not his name.

[17] Magwaza was the first one to enter the identification room, he pointed out accused while he was holding number 6 against his chest. Next to follow was Mkhize and last to go was Majola, both of them pointed out accused while he was holding number 13.

[18] They were crossed examined and among others it was put to them that accused will come and testify that he knew all of them and he used to visit, frequent, Majola's shop.

[19] Majola testified that he knew accused by site and also as a dancer, as they used to hold traditional dancing competition which was performed by group of people who will form a dancing group and they will be coming from the same village, he did not know his names. Mogwaza testified that yes, he knew accused even his name, he used to hang around with "boy" who were coming from accused village and they will call his name, that is how he came to know his name, other than that he used to meet him in Hilbrow and greeted him.

[20] Mkhize denied ever knowing accused he first saw him on the day, night of the incident. He only came to know his name before he came and testify in court, he heard the name throw the State advocate. Accused insisted that Mkhize knew him, because he was a sibling to Khethani Mkhize. During Mkhize's testimony he was referred to what he had stated in his statement and it was mentioned that he did not refer to Majola and Magwaza and further that Senzo Maphalala was also present in his company at the time of the incident.

[21] He testified that during the time he was making that statement he was confused and scarred, but it was clear that accused was of medium height, light in complexion, wearing a red top with black jeans. He testified that the police officer who took his statement made a mistake, and he did not know how to correct the mistake he had to made.

[22] They all denied that accused used to frequent or visit Majola's shop. It was further put to Majola and Magwaza that they are only framing accused, because one day he, accused, belief he saw Magwaza shooting one taxi owner at corner Plein and Kock Streets, when he confronted them, Majola and Magwaza, said he should not involve himself on the matters of the taxi owners. Both witnesses denied any knowledge of that fact.

[23] Beside the three witnesses that I have referred to above the State called **Captain Dawood Hendricks** to testify. He testified that he is a member of the South African Police services, currently stationed at Moffatview police station. On the 13 August 2016 he was still stationed at Johannesburg Central Police Station.

[24] In short, he testified through the reading of SAP 329 form, that is, the "Identification parade form" which he personally completed. He was asked/requested by Constable Mbatha on the 10 August 2016 to assist in the identification parade which was to be held on the 13 August 2016, which involved a case of murder and the suspect was Mr Nkomo that is accused before court. Accused was informed by Ms Mbatha about it on the 08 August 2016.

[25] Accused was informed about his legal rights, he had a right to have an attorney/legal representative to be present during the holding of the identification parade. However, accused had indicated that the identification parade can proceed without his legal representative.

[26] The identification parade was held at Johannesburg Central Police Station, in the cells. There is a room specifically dedicated for holding of identification parades. Next to it there are two rooms on the either sides but if you are in one room you would not be able to can see what is happening inside the identification parade and the said rooms are not just next to each other.

[27] On this day he made sure that that there were about 18 males who were of the same height, age, and or complexion as that of accused. A photographer was arranged to be present during the identification parade.

[28] Before the beginning of the identification parade he informed accused of his rights and among those rights he had the right to stand anywhere in the line-up, to can change his clothes, change numbers and also change to any position on the line-up before the next witness is called in.

[29] He testified that when the first witness came inside the identification parade room accused was holding number 6 and standing as number 5 on the line-up. Thereafter he changed his number to 13 and also, he changed his clothes by putting something which was bluish in colour before the next two witnesses came in, and he was number 3 on the line-up, both pointed him out while he was holding number 13.

[30] He was cross examined and it was put to him that accused denies that he was informed about his legal rights (representations). He was only informed about the reason of the identification parade, being that of murder, by a police officer at the time of the parade, he was only informed about the charge of robbery wherein he and his co-accused was one Sbusiso Shilembe and he was never pointed out with regard to that charge.

[31] Captain Hendricks testified that he did not have any knowledge of accused being on the identification parade involving a charge of robbery, but what he can recall is that there were supposed to be additional identity parades on that day.

And that was the State case

THE DEFENCE CASE

[32] At the end of the State's case accused applied for his discharge in terms of the provisions of Section 174 of the Criminal Procedure Act 51 of 1977. For reasons that I gave at the time, I refused that application. In summary I considered that there was a prima facie case against the accused.

[34] Further before accused could take a stand and testify he brought two applications: one was to the effect that since he was not satisfied with the way his previous counsel conducted his defence, in that she did not properly carry out his instructions, he wanted the court to recall the three witnesses who testified earlier, being Majola, Magwaza and Mkhize, in order that that they should come and explain why they did not state in their statement that they knew him and they also knew where he resides, also since they knew him why did they have to attend the identity parade.

[36] The State indicated that all the three witnesses cannot be traced since they have relocated to Kwa-Zulu Natal as they were fearing for their lives, since three family members of one of them have been killed they are no longer willing to come and testify or cannot be traced. The said application was refused and the reasons were given during the time that it was refusal.

[37] Thereafter accused brought the second application that since the court refused his application for the recall of the witnesses, he is no longer having confidence on the court and applies for the recusal of the court and the matter be referred to another court. The said application was also refused since it did not have any merits on it. Reasons were also given during the refusal of the application

[38] Thereafter, Mr Nkomo, the accused, testified in short, that, sometime back, he cannot recall when did this happen, he was at a salon on a que waiting to cut his hair when the police came and arrested him.

[39] From the salon they proceeded to his flat wherein he resides with his three brothers. Upon getting to his flat the police demanded a firearm, he told them that he does not own any firearm and he has never applied for any fire arm licence and he knows nothing about the alleged firearm, they then started assaulting him.

[40] They confiscated his two cell phones and his brothers cell phones. From his Flat they proceeded to Hilbrow Police Station, however they did not stay long from there they proceeded to Brixton area, not at the Brixton Police Station. At that area he was also subjected to more assaults and he was even "Tubed" that is the Police put a plastic bag over his head to make him suffocate.

[41] After the second Tubing they realise that he was about to die they poured water over him and one police officer, whom has a nick name of Quality told the other police officers that they should stop assaulting him.

[42] He was later taken to Brixton Police Station where he was detained. He was later taken from Brixton Police Station to Johannesburg Central Police Station (John Voster) by a female and one male police officers.

[43] Later an Identity parade was held, and he was informed that the said identity parade was held in connection with robbery offence, all five witnesses who came to the parade pointed different people they did not point him out.

[44] He was surprised when he was informed that another identity parade will be held involving him with regard to a murder charge. In all the identity parades which

was held he was informed that he can change numbers, or even changed position including clothes.

[45] He was pointed out by three people, witnesses and every time he was pointed out and his picture(photograph) was taken. He did not understand why the three-state witness would attend an identity parade to come and point him out since they knew him very well, and further since they knew him why they didn't state so in their statement to the police.

[46] He testified in great details how he knows the three State witnesses he even used to find them at Majola's shop number 2 which is commonly referred to or called Eskepeni, which is a shop that sells some motor vehicle parts.

[47] He further testified that the three State witnesses namely Messrs Majola, Magwaza and Mkhize are false implicating him in this offence he does not know anything about the shooting of the deceased. As much as he does not have any reason why they should come and false testify that they saw him shooting the deceased he thinks that it was due to the fact that, there was once an incident that took place at Kock street wherein he heard a sound of a firearm, and he saw people looking through the windows of a motor vehicle from which the sound of a firearm came from, and he also saw Magwaza standing next to that motor vehicle and he started walking away from it while limping. He called Magwaza by his name but he, Magwaza, ignored him.

[48] A Lady came out from the said motor vehicle holding her hand on her head and she fell down next to the said motor vehicle, and that someone was killed inside the said motor vehicle.

[49] Later on that day as he was playing a game of dice not far from Eskepeni, Magwaza came and called him, they went to Majola's shop, Majola then reprimanded him that he should not involve or concern himself with matters that

involve business of the taxi owners he does not own any taxi. And further that he, Majola, believes that he was a spy and he should stop that if he does not want to die.

[50] During his cross examination he testified that he had not given his previous counsel instructions that Majola once ask him and one Njabulo to go and rob an indian shop, since they were no longer paying protection fee. His instructions were that had informed his counsel that he heard Njabulo saying Majola had ask him to go and robbed the Indian shop which was situated next door to his shop. He advised Njabulo not to do that since he, Njabulo, was a friend to the security personal who was working at that Indian shop

And that was the defence case

SECTION 186 WITNESS (COURT WITNESS)

[51] The court then called Sergeant Masandi Earnest Skape as a witness in terms of the provisions of Section 186 of the CPA.

[52] In short, he testified that he is a police officer, with a rank of sergeant station at Provincial Tracing Unit of SAPS. He has 14 years' experience being a police officer. Among their duties in the tracing unit is to trace and arrest people who have committed offences and cannot be located or traced. They also have informers who will give them information about a suspect whom they are tracing.

[53] On the 05th August 2016 he was still attached at the Provincial Tracing Unit and he received an information regarding a suspect who was being traced involving a person who has been shoot at in Johannesburg. By that time a case of murder had already been opened at Johannesburg Central Police Station.

[54] He proceeded to Van Der Merwe street, upon arrival there his informer pointed out that suspect that they were looking for, and he was inside the salon. He

then called back up, upon its arrival they entered the salon approached that person, they introduced themselves to him asked him his name and he informed them that his name is Mzikawupheli Nkomo, who is the accused before court, and he fitted the description and the names of the person whom they were looking for. He then read accused his rights, informed him of the reason of his arrest.

[55] They ask him if he has any knowledge of the alleged case of murder, of which accused replied that he knows about that offence and he was also involved on it. He then stopped him from saying anything further since he was incriminating himself, he further asks him if he is willing to can reduce the said admission down in writing of which accused confirmed that he can do so.

[56] From the salon they proceeded to accused flat, the purpose of going there was to search for a fire arm, since a fire arm was used during the commission of the said murder, and they thought maybe they could find the alleged fire arm at Mr Nkomo's residence. He confirmed that accused had informed them that he does not have the fire arm, in any event they just wanted to make sure that perhaps they might be able to find it at his flat unfortunately, they did not find it. He confiscated two cell phones that belonged to accused, and he took them for purposes of further investigations.

[57] From Accused flat they proceeded to Hilbrow Police Station, from which they contacted the investigating officer and informed her that she sold arrange a person who is authorised to can take down a statement from accused (confession). Thereafter they proceeded with accused to Brixton Police Station wherein he was detained and he left everything in the hands of the investigating officer.

[58] Accused was never assaulted while in his presence he knows nothing about accused being "tubed". He confirmed that there is one police officer with the name Constable Cele, but he does not know any person or if Constable Cele is also called Quality. Constable Cele was never in his presence during the arrest of accused.

FINDINGS

[59] It is common cause that the deceased was shot and killed on the 27th July 2016. The question is who killed the deceased, is it the accused or another person but accused is being wrongly framed by the State witnesses that he is the one who killed the deceased.

[60] Accused want the court to belief that the motive why the State witnesses have conspired together to falsie implicate him for the death of the Mdluli (deceased) is because he belief that he knows that Magwaza was present or he saw Magwaza killing one of the taxi owners (or a person) at corner Plein and Kock Streets Johannesburg.

[61] The facts of this case are such that such conclusion cannot reasonably be true because in the first place accused failed to indicate when did this incident took place and after how many days or months since the occurrence of the said incident did the State witnesses conspired to falsie implicate him, for the shooting of the deceased. That is, what was the period between that incident and the shooting of the deceased.

[62] Secondly probabilities are that the state witnesses should have planned and conspired the shooting of the deceased with another person and reached an agreement to put the whole blame upon the accused, and to frame accused for that crime.

[63] Accused has testified that Majola had told him that should he not stop being a spy he will die. The question then is why implicate him for this offence wherein they will run a bigger risk if he is alive than died, since he will be in the position to can tell about what they did, probabilities are it would have made a better sense just to kill

him rather than implicate him. Lastly since his arrest, what has he done about what he has witnessed Magwaza do, that is, being involved in the killing of another person at Kock street. Why has he not informed the police about this or is it just a fabrication? Therefore, the alleged motive, planning and execution of such plan on the face of the inherent probabilities in this matter are so improbable that it cannot reasonably possible be true and one can reach a conclusion that what accused is alleging is just a fabrication there is no reasonable possibility of any truth on it.

[64] In *S v Trainor*³ the court held that “A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.

[65] All three witnesses testified that accused came into the shop in the company of his companion, that companion pointed out the deceased, they knew accused, why falsie implicate him, out of the people that they know why specifically did they decide to choose to implicate him for this murder. All three witnesses pointed accused out in the identity parade.

[66] Accused testified that there were no bad relationships between himself and all the three witnesses, he even took Magwaza like his elder brother. He was reprimanded for allegedly involving himself on the affairs of the taxi owners, and from there on everything was fine even though he stayed away from going inside Eskepeni. They continued to be in good term.

³ 2003 (1) SACR 35 (SCA) para [9]

[67] When it comes to identification it was held in *S v Mthetwa*⁴ that “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 a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;

[68] At this point it is not in dispute that Majola and Magwaza knew accused, Majola knew him only by sight whereas Magwaza even knew his name, however Mkhize testified that he only saw accused for the first time on the day of the incident. Accused confirmed during their cross examination and also during his testimony that he knew them even their family members and where do they come from at Kwa-Zulu Natal. Accused testified that if really the witnesses had seen that it was him who shoot the deceased, since they knew him and where he resides they could have stated so in their statements to the police and they could have pointed out his place of residence to them, I accept the state witnesses’ explanation that they only knew accused by sight they did not know where he resides, upon his arrest they attended an identity parade in order to identify the person whom they have witness shooting the deceased

[69] As much as it’s been held by decided cases, more *Mthethwa* case, quoted above that the question of identification should be approached with caution I believe that the issue of identification is not in dispute because accused has testified that he used to frequent at Majola’s shop, Eskepeni, and he will find all the witnesses sitting together, whether the witnesses failed to mention in their statement that they knew

⁴ 1972 (3) SA 766 (AD) 768a-c

accused and where he resides and went further to attend an identity parade to point him out it does not take away the fact that all the parties knew each other there was no mistaken identification in this regard. They had prior knowledge of the accused, at the time of the incident, the lights were on at Majola's shop.

[70] The question then is why would the three State witnesses say or alleged that it is the accused who shot the deceased and as a result died of that shooting, or is it as accused want the court to believe that he is falsely being implicated, because he knew that Magwaza was involved in a matter where a taxi owner or a person was shot (killed) at corner Plein and Kock Street in Johannesburg. If he really had this information why did he not approach the police with or even after his arrest, inform the police that, I know who shot or killed a taxi owner at Corner Plein and Kock Streets Johannesburg.

[71] Having considered all the evidence, I am of the view that all the State witnesses were credible and their evidence is reliable. They appeared not to have made up or discussed their evidence before they came and testify. They seemed to answer questions honestly and without any attempt to evade the question. Where there are discrepancies within the evidence of each witness or between these witnesses I put this down to lack of orchestration between them and the ordinary fallibility of honest witnesses.

[72] Accused was properly represented by Adv Xamsana, even during the testimony of witnesses he will raise a hand in order to give his counsel proper instructions, he did not wait whenever he was not satisfied with the way his counsel was asking a question, he will correct him there and there. Even the court did ask him at the end of each witness if he was satisfied and if there was any instructions that he needed to give to his counsel and he will confirm that he was satisfied.

[73] His constitutional rights were never violated at any stage accused was not a truthful witness and as such his evidence stands to be rejected. Therefore, I am of

the view that accused was properly identified by all witnesses as the person who fired and shoot the deceased. The story that Majola and Magwaza are false implicating him it just a fabrication there is no truth to that, it is a made-up story.

[74] It is clear from the evidence that this was an execution which was well planned or premeditated. Accused "partner" pointed out the deceased and accused had to execute his mission, which was to come and shoot to kill the deceased, of which he achieved.

[75] Regarding counts 3 and 4 the State alleges that accused has been "found in possession" of a 9mm calibre firearm and at least three rounds of 9mm calibre ammunition. In proving the above charges State did not present any physical evidence to that effect but relied on the evidence of the three State witnesses who testified that at the time accused was shooting the deceased he was in possession of a firearm, Also, the State is relying upon the spent cartridges that were found at the shop of Majola after the shooting of the deceased and same were sent for ballistic analysis of which Captain Retha Viljoen, submitted his findings and filed as evidence being Affidavit in terms of Section 212 of CPA and filed into record as Exhibit "D" and admitted by accused in terms of Section 220 of CPA.

[76] "Firearm" is defined in the Firearms Control Act 60 of 2000 Act as follows:

"Firearm means any –

- (a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules;*
- (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;*
- (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);*
- (d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6mm (.22 calibre) or higher at a muzzle energy of more than 8*

joules, by means of compressed gas and not by means of burning propellant; or barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d) but does not include any device contemplated in section 5.”

[77] In *S v Filani*⁵ case, which also dealt with the question wherein the State had charge the appellant with unlawful possession of firearm and ammunition which was also not found at the time of the arrest of appellant, the High Court set aside the appellant’s convictions in respect of the unauthorised possession of a firearm and ammunition in contravention of the Firearms Control Act, holding that it had been incumbent on the state to adduce evidence establishing that the device used fulfilled the technical criteria in the definition of ‘firearm’. The court recorded that the evidence in that case had established that when the device had been fired the result had been to leave what a lay witness had described as ‘a little, small hole’ in the wall. Counsel for the state submitted that any weapon capable of having that effect would fall to be recognised as one having sufficient ‘force or velocity’ to qualify in terms of the technical criteria in the definition. Pickering J (Revelas J concurring) rejected the argument, holding (at p.515f-g):

‘... on an acceptance of Ms *Hendricks*’ submission, any weapon which was capable of discharging or propelling a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of ‘firearm’ contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.’

[78] The learned judge highlighted the difference between the current statutory instrument and its predecessor, the Arms and Ammunition Act 75 of 1969, which had not contained a definition of ‘firearm’, with the result, as held, amongst others, in *S v Shezi* 1980 (4) SA 494 (N), that the word had fallen for the purpose of the latter Act to be construed in accordance with its ordinary meaning such as that to be found in

⁵ 2012 (1) SACR 508(ECG)

the *Oxford English Dictionary*, viz. 'a weapon from which missiles are propelled by an explosive, e.g. gunpowder'

[79] The logic of the court's reasoning in *Filani* is difficult to fault on the facts of that case. Depending on the evidence adduced in a particular case it could, however, give rise to uncomfortably anomalous results if applied as a general doctrine⁶. In the current matter, for example, it is plain beyond question that the deceased died as a result of multiple gunshot wounds. It would not make sense of the state of the law if the court were to find the accused guilty of murder committed with the use of a firearm, but be unable to hold that he had possessed the firearm without a licence on the basis that there is no actual firearm which was found in his possession at the time of his arrest notwithstanding the fact that there is evidence that accused was actually seen in possession of the firearm at the time he shot the deceased and cartridges were found after the shooting as depicted on photo 9 to photo 14 of exhibit "C", and same has been confirmed by the expert evidence of Captain Viljoen exhibit "D" that the three bullets that were found at Majola's shop, the scene of the crime, were of 9mm calibre and were fired from the same firearm. Such a result would be especially anomalous in the context of the expressly stated objects of the Firearms Control Act.

[80] The preamble to the Act states that the enactment is directed at the protection of every person's 'right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence from either public or private sources' and acknowledges the duty placed on the state by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights in the context of the contribution of the increased availability and abuse of firearms and ammunition to the high levels of violent crime in our society. It seems to me that it would be inimical to the stated objects of the Act to apply its provisions in such a way as would place a higher burden on the state to successfully procure convictions in respect of the unlawful possession of firearms and ammunition. Certainly, if the

⁶ S v Jordaan and 4 others Case Number CC20/2017 High Court of South Africa Western Cape Division Judgement Delivered on 16 November 2017

language of its substantive provisions were construed to have such an absolute effect, the result would be undermining of the statute's stated objects⁷.

[81] Therefore I come to the conclusion that the State has proved beyond a reasonable doubt that the firearm that accused was seen using to shot the deceased with and the ammunition (cartridges) that was found at the scene of the crime falls under the definition of firearm and ammunition as defined on the Firearms and Controls Act 60 of 2000 and lastly that accused was in possession of the said firearm and ammunition.

VERDICT

As a result, I have reached a conclusion that the State has proved its case against Mr Nkomo beyond a reasonable doubt and Accused is found:

Guilty as charged in respect of: -

Count 2 – Murder premeditated and/or planned read with the provisions of Section 51(1) of Act 105 of 1997

Count 3 – Unlawful possession of a firearm and

Count 4- Unlawful possession of ammunition



CK MATSHITSE

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

On behalf of the State:

Adv Byker

Instructed by:

DPP

⁷ S v Jordaan and 4 others

On behalf of the Accused:	Adv Xamsana and Mr Khumalo
Instructed by:	Legal Aid South Africa
Date of Trial:	21 June 2017 – 26 June 2017, 22-26 January 2018
Date of Judgment:	26 January 2018