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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No:CC 81/2020**

In the matter between

**THE STATE**

AND

**NDUMISO LUTSHETU**

Accused 1

**ASHWIN KENNEDY**

Accused 2

**BONGANI MVAMVEKI**

Accused 3

**MALIBONGWE WITBOOI**

Accused 4

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**JUDGMENT deliver on 13 March 2025**

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## THULARE J

[1] The accused pleaded not guilty to two counts of murder where minimum sentences were applicable, two counts of robbery with aggravating circumstances where minimum sentences were applicable, unlawful possession of firearms and unlawful possession of ammunition. The accused made no plea explanation but made formal admissions which will be dealt with later in the judgment. The charges against the accused arise from a fatal shooting of two law enforcement officers, inside their marked vehicle at Sweet Home Farms in Samora Machel, on the afternoon of 4 September 2019. The State did not have direct evidence of eyewitnesses implicating the accused in the shooting. The State relied on circumstantial evidence on the murder charges.

[2] The accused admitted that on 4 September 2019 two law enforcement vehicles were posted to guard a construction site at Sweet Homes, Samora Machel next to Vukuzenzele. The two vehicles had two officers in each. Koli and Guleni were in one whilst Nieuwenhuys and Nyangiwe were in another. The officers were guarding the site and protecting the workers doing duty for Usher Construction. Nieuwenhuys and Nyangiwe went for lunch at 13H00. They came back after about 30 minutes. A few minutes just after they reported that they were back from lunch, Koli heard gunshots. He saw construction workers running away from the direction where Nieuwenhuys and Nyangiwe were parked. He and Guleni drove to the area and found that their two colleagues had been shot. Nyangiwe was lying next to the vehicle and Koli saw that Nyangiwe's firearm was missing. Nieuwenhuys was still inside the vehicle. Koli did not see who shot or whether the person or person(s) were on foot or driving a vehicle as he and Guleni were on the other side of the construction site at the time of the shooting.

[3] The accused admitted that Jan Nieuwenhuys was the deceased in count 1 and that Simtembile Nyangiwe was the deceased in count 2 in the indictment and that the two officers died as a result of multiple gunshot wounds to the body which were sustained in the scene to which Koli referred. The accused admitted that Dr Kirk examined the bodies of the deceased. From Nieuwenhuys, Dr Kirk recovered bullets from the left side

of his upper back, the right anterior abdominal wall, the left axilla and the left upper arm. From Nyangiwe Dr Kirk recovered a bullet from the brain and one from the mouth.

[2] The accused admitted that Warrant Officer Van Meyeren attended the scene on 4 September 2019 at 15:15 where he took photographs and also prepared a sketch plan and marked all relevant points thereon. The photographs included the Nissan NP300 (the vehicle) which was the vehicle used by the deceased and wherein they were shot. They also included several cartridges collected from the ground next to the vehicle, from the floor at the left front seat under the floor mat. From the left front seat in a credit card booklet inside the vehicle, a bullet and a bullet jacket collected from under the engine of the vehicle and a bullet collected from under the right front seat on the floor of the vehicle. He also used an electronic camera to record the scene and recorded a virtual tour of the scene. The next day Van Meyeren attended again to the vehicle again for further forensic investigation. He also collected further exhibits, to wit, a bullet which he collected from the ground next to the vehicle, another bullet from inside the left front door of the vehicle and a cartridge case from the base of the left front wiper of the vehicle. The exhibits were properly packed, marked and sealed and sent for further forensic investigation.

[3] The accused admitted that Warrant Officer Fish was a forensic ballistic examiner employed by the State and that on 25 September 2019 she received (1) a 9mm Parrabellum calibre Norinco model NP17 semi-automatic pistol with serial number 4[...] on the frame, 6[...] on the barrel and the number erased on the slide, with a magazine, (2) a 9mm Parabellum calibre Glock model 19 semi-automatic pistol with serial number E[...] with a magazine and 15 9mm calibre cartridges, (3) a 9mm Parrabellum calibre Glock model 19 semi-automatic pistol with serial number F[...] with 10 9mm Parabellum calibre cartridges (4) a pistol magazine with 11 9mm Parabellum calibre cartidges (5) a 9mm Parabellum calibre Glock model 19 semi-automatic pistol with serial number erased on the frame, slide and barrel; a pistol magazine; 13 9mm Parrabellum calibre cartidges. He found the cartridges to be manufactured and designed to be fired by a centre-fire firearm and each consisted of a cartridge case, primer and bullet. He found

the pistols functioning normally with no obvious defects, and that they were designed to discharge centre-fire ammunition. He could not determine the serial number on the slide of the Norinco. He determined the serial number on the barrel and slide of the Glock with erased serial numbers as H[...].

[4] The State led the evidence of Captain Bothman who was a forensic analyst in the employ of the State. He examined and compared the individual and class characteristics markings transferred to cartridge cases by firearm components during the firing process. He found 21 cartridges which were collected from the scene which were fired from the 9mm Parabellum calibre Glock model 19 semi-automatic pistol with the serial number erased, which was allegedly recovered from the scene of the arrest. He found that five other cartridges collected from the scene were fired from the same firearm, but it was not the Norinco, the Glock E[...], the Glock F[...] or Glock with the erased serial number. In other words, it was a firearm which was not one of those recovered from the scene of the arrest or in possession of the deceased before their attack. As regards an examination of the bullets and bullet jackets, he found that four of them were fired from the same firearm which was also not one of the four. It could not be determined if five of the bullets found on the scene were fired or were not fired from the same firearm. It could not be determined if these five bullets were fired or not fired from the Glock E[...], Glock F[...] and the Glock with the erased serial numbers but they were not fired from the Norinco. The four bullets which were found to be fired from the same firearm were not fired from the same firearm as the other five bullets. Four other bullets were found to be unsuitable for microscopic examination. Bothman concluded that the bullet that was found in Nieuwenhuys upper arm (PA6004142788 which he marked 255361/19 3A) and the one found in Nyangiwe's mouth (PA6004142794 which he marked 25536119 3F) (para 16.1 read with 16.2 of report) were fired from the same firearm, and it was the firearm that could not be linked to those found. The bullets found in Nyangiwe's brain (para 10 of report) and those found in Nieuwenhuys back and axilla (para 16.3 of his report) could not be determined whether it was fired or not fired from the same firearm. The bullet found in Nieuwenhuys' abdominal wall was unsuitable for microscopic comparison.

[5] Captain Bothman had attended to the scene of the shooting for purposes of crime scene examination, reconstruction and scene photography as well as terminal ballistics. He had observed the Nissan double cab pick-up parked on an open field and observed the multiple cones representing exhibits as collected by Warrant Officer Van Meyeren. He had observed the damage consistent with the appearance of bullet damage to the vehicle. The next day he had also attended to the vehicle which was then at the Stikland Vehicle Safeguarding Section of the SAPS. He had observed damage on the outside and in the inside of the vehicle. His conclusion was that the bullet entrance hole in the front cowl panel on the right side and the bullet entrance hole in the bonnet on the right side were caused by two bullets fired from the front of the vehicle towards the rear of the vehicle. The bullet entrance hole through the centre of the front windscreen was caused by one bullet fired from the front of the vehicle towards the rear, causing damage of two holes with the appearance of bullet holes towards the right of the rear passenger seat. The entrance hole in the centre of the bonnet and the one in the bumper on the left side were caused by bullets fired from the front of the vehicle towards the rear of the vehicle. The outward bulge in the front left passenger door and the bullet hole in the front passenger door were damages caused by one bullet fired from the right of the vehicle towards the left side of the vehicle. The shattered left rear passenger window, the holes on the driver's seat, the hole on the driver's door and the hole in the front left passenger headrest were damages caused by shots fired from the rear left of the vehicle towards the driver's seat and left front passenger seat. The bullet exit hole in the roof on the driver's side was damage caused by one bullet fired from the rear left of the vehicle towards the front right of the vehicle.

[6] On the morning of the incident, Christopher Ranwana and issued the law enforcement officer, Nyangiwe with a Black Glock F[...] and 30 rounds of 9mm Parrabellum rounds of ammunition. Nieuwenhuys had been issued with the Black Glock with serial number E[...] with 30 rounds of 9mm Parrabellum rounds of ammunition by his commander. The two firearms could not be found when the law enforcement agencies arrived on the scene where the two law enforcement officers were killed.

Lieutenant Colonel Naude, the Section Head of the Anti-Gang Unit, Western Cape was alerted to the shooting of two law enforcement officers at around 13:40 and went to the scene. He saw the two officers, dressed in uniform, being attended to by medical personnel. The officers were airlifted for medical attention. He saw the vehicle which was shot multiple times. It was reported that the officers' firearms had been taken by their attackers. He handed the scene to Van Meyeren.

[7] Warrant Officer Nguma has 21 years of experience in the SAPS and was the Commander of the Crime Prevention Unit at Samora Machel SAPS. He was on duty on the day and was alerted to and attended to the scene of the shooting at around 14H15-14H30. He had just left the scene for about five minutes, to drive around to see if they could not see the suspects, when he received a call from his informer of many years who usually provided reliable information. It was an unregistered informer. The information provided by the informer related to that shooting and Nguma arranged to meet the informer. About 10 minutes after the call, they met. The informer told Nguma about the suspects who shot at the law enforcement officers, where the suspects were at the time and that they were armed and that if there was no immediate reaction the suspects may leave the place. Without wasting time, Nguma arranged with his team and the soldiers, who were at the time supporting the police in the area and held a quick briefing at Samora Machel SAPS about his information and the need to urgently attend to a place. The information was that the suspects were in a shack in a squatter camp. There were no street names and addresses so it was necessary for the informer to point out the place which the informer agreed accompany them and do. About 10 police officers and 18 soldiers drove to the place which was at Ramaphosa Squatter Camp. The police contingent comprised of was members of Nguma's team and other members from the Nyanga Cluster.

[8] Nguma did not first apply for a search warrant as he believed that with the information at his disposal, he would have been able to secure one but the information he had required immediate action. The informer pointed out the shack and the police and the soldiers walked to the shack. The soldiers surrounded the shack to secure it,

whilst the police approached the door. His team led the operation, and he was in charge. He was ahead of others when they approached the shack. He was followed by Sergeant Dubula, who was followed by Constable Hawu, behind him was Constable Ngedle and Constable Ngomani followed. The police had their firearms drawn and tactically approached the shack. It was necessary to have an element of surprise as the suspects were allegedly armed. As a result, Nguma did not knock but kicked the door open and the police swiftly went into the shack.

[9] Of the five police officers who entered the shack, only Dubula, who is deceased, did not testify. The version of the police is that after Nguma kicked the door open, they all went inside the shack following each other in the order that they approached the shack. Inside the shack they found three men standing. It was a small shack, one room with little furniture. Nguma saw legs protruding from under a bed and he and Dubula approached the bed. The other colleagues attended to the three standing men. Nguma lifted the bed and there were two men hiding under the bed. Nguma helped one suspect stand up, whilst Dubula also helped the other suspect who was under the bed to stand up. Nguma searched the man that he helped up and found one black Glock firearm with 15 live rounds of ammunition. It was tucked in his waistline on the stomach. Nguma felt that the firearm was still hot. He asked for a license and the suspect could not produce one. He arrested the suspect. The suspect said it was not his firearm. It was accused number 4. He arrested the accused, handcuffed him and detained him. He handed in the firearm as an exhibit. According to the evidence of both Nguma and Asavela Mathe, who was the officer to whom the exhibits were recorded, this was Glock with serial number E[...]. In other words, this was the firearm which had been issued to Nieuwenhuys and went missing when he was shot dead earlier.

[10] It was common practice in the police that when you were in the company of colleagues whilst searching a suspect, you shouted out what you found on the person you were searching, which was unlawful on the face of it. Nguma heard when his colleagues reported also finding firearms on some of the suspects that they were searching and saw what was found. Nguma heard when Dubula shouted out that he

also found a firearm on the person that Dubula was searching. Nguma and the others saw when Dubula arrested accused 1 for unlawful possession of a firearm. It was also a black Glock and had 10 live rounds of ammunition. According to the evidence of Nguma and Mathe, this was the Glock with serial number F[...]. In other words, this was the firearm that had been issued to Nyangiwe that day, and which went missing when he was shot dead. Hawu was in the shack when one of the suspects who were standing in the shack tried to run through the corrugated iron sheet. Hawu grabbed him and felt something around his waistline. He searched him and found a firearm. It was accused 3. According to Hawu and Mathe, this was the Norinco pistol which had an empty magazine with its serial numbers filed off. Ngedle also went for one of the suspects who were standing in the shack who was wearing blue jeans with a blue work suit top. Underneath the work suit in front tucked into the jeans Ngedle found a firearm and ammunition. It was a black Glock with serial numbers filed off, and in the magazine, he found 11 rounds of ammunition. The suspect was Sinelizwi Lujalajala. This was the firearm which Bothman linked to 21 cartridges that were collected on the scene. It was a firearm that was used in the shooting in which Nieuwenhuys and Nyangiwe were killed. Ngomane also approached one of the men who were standing in the shack. She searched him and in the back pocket of his trouser found one magazine with 13 live ammunitions inside. It was accused 2. According to the police, all the suspects resisted arrest and wrestled. The police had to use the necessary force to arrest the accused. All the accused were handcuffed by the officers respectively and taken outside the shack. The police had to use force to subdue the resistance of the accused, when they were taken to where the police van was parked. They drove to Samora Machel SAPS. Accused 4 was arrested at 16H00 by Nguma at Ramaphosa. Nguma completed SAPS 14A when he detained accused 4. The firearms were booked in as exhibits and were received by Mathe.

[11] The State also called Lujalajala as a witness. His testimony was that he was having a bath at midday on the day of the incident. He resided in the same yard as accused 4, whose shack was not far from his as the shacks were closely packed. He saw accused 1 and another person, Shane walking past his shack towards accused 4's shack. He



knew accused 1 as a person who frequently visited the yard coming to accused 4. He heard when they said they wanted guns from accused 4. He heard the discussion between Shane, accused 1 and 4. He heard when Shane and accused 1 borrowed firearms from 4 firearms. He heard their explanation to accused 4 that they wanted to go and take the guns from the law enforcement officers as the law enforcement officers were still new. They referred to the law enforcement officer as 'new coloured guys'. He heard that Shane and accused 1 planned to rob these new coloured guys of their firearms. Shane, accused 1 and 4 all went into accused 4's shack and spent a few minutes inside. When Shane and accused 1 came out and went past his shack on their way from accused 4, he saw that accused 2 was with them. He saw when Shane, accused 1 and 2, left the yard. He was taking a bath as part of his preparation to take an afternoon train to Epping where he was going to look for casual work as it was during holidays as he was a student at Northlink College.

[12] He did not take the train as he ran late and returned to his shack just after 15H00. He then went to Isaac's shack, which is the shack where he was arrested together with the accused, for a drink. He found the four accused inside the shack and Isaac was not there. The four were playing, each, with a firearm in their hands. Amongst others they were removing the magazines from the firearms and re-inserting the magazines again and cocking the firearms. Three of the firearms were the same and the fourth was different. He saw a Coke and asked to pour for himself. He asked where Isaac was. Accused 4 told him that they had sent Isaac to buy food for them. He finished his drink and put his glass back and was about to leave. The soldiers knocked on the door. He opened the door. Malibongwe closed the door. All the other accused jumped, tried to take cover in the house and tried to hide the guns. Others hid under the bed. He was the only one who did not have a firearm on him. The soldiers kicked the door open and entered the shack. The police were behind the soldiers. The soldiers asked where Shane was. The soldiers started assaulting everyone that they found in the shack. The police came in and everyone in the shack was arrested. He disputed that he was found in possession of a firearm and denied any involvement in the shooting of the law enforcement officers. They were amongst others dipped in water during the assault and

were thereafter taken to the police station. At the police station he saw the picture hanging on the wall, with the name "Shane" written on the photo. He realized that this was the person the police were looking for, and it was the person he had seen with accused 1 earlier that day. He told the police about it and that he knew the person but did not know the person's name. He identified the person on the picture as Shane, to the police. He sustained serious injuries including broken ribs on the left and was hospitalized. He was charged with the accused. He was interviewed by the investigating officer and told the investigating officer everything. He was granted bail. The charges against him were withdrawn before the matter came to the High Court.

[13] The accused testified in their defence and did not call any witnesses. Accused 1's testimony was that he lived in Sigalo. On the day of the incident he was with his family which was the mother of his child and his young child. His younger brother was in Primary School. It was after school because his younger brother was back, when he left Sigalo by taxi to Ramaphosa to collect a phone from accused 2 at accused 4's shack. He found accused 4's girlfriend at Ramaphosa in accused 4's shack and was told that accused 4 was in Isaac's shack which was in the same yard close by. He went there and found Lujalajala, accused 2 and 4 there drinking brandy and coke. He asked for his phone, and accused 4 went home and returned with his phone. Accused 4 returned with accused 3 to Isaac's shack. He received his phone, checked that it was right and put it in his pocket. He poured himself cold drink and drank. They continued drinking. He heard a noise from outside. The door was open, and soldiers came inside. The soldier in front instructed them to lie down. The soldiers assaulted them. The soldiers asked where Shane was. They were taken outside the shack and made to lie down and the assault continued. Accused 4 fainted. The soldiers poured some liquid on accused 4 and he came by. The soldiers came inside the shack, not the police. He saw the police when they were outside the shack. He was never searched. They were then taken to the gravel road and put in a puddle of water. He did not know who Shane was and was never with Shane. He never asked for firearms. He came there for the first time at the time leading to his arrest. It was the first time, that day, that he met Lujalajala. He assisted with putting accused 4 and Lujalajala in the police van as they were injured. He

heard from the soldiers, when they were already in the van, that they were accused of killing some police officers. He denied that when Lujalajala arrived in the shack he was having a gun and playing with it. He saw the guns for the first time at the police station. Gun residue was searched from them at the police station. Accused 2 and Lujalajala were taken by ambulance to hospital whilst he, accused 3 and 4 were taken into the cells first at Samora Machel and later at Nyanga. He denied committing any offences.

[14] Accused 1's testimony differed from the version that was put to the State witnesses on his behalf. The version of the accused, which was put to State witnesses, must be accepted as the case as he instructed his legal representative to put forward. According to his testimony he saw the police for the first time when he was taken out of the shack by the soldiers. In cross-examination of the police, accused 1's version was that the police went into the shack first. According to the version put to state witnesses it was the police who asked the occupants of the shack where Shane was and it was the police who instructed the occupants of the shack to lie down inside the shack. It was his version at the time that it was whilst they were lying down, that the soldiers only then came into the shack and started assaulting the people found in the shack. In the version put to the witnesses, it was during the assault outside the shack, that all the accused and Lujalajala heard some voices coming from the shack that guns were found from the shack. His version was further that after they were searched for residue and had their fingerprints taken at the police station, they were once again taken outside the police station and were assaulted again.

[15] Accused 2's testimony was that he was home in Phillip East early on the day of the incident. He had with him a phone which he had fixed, which he had to take to accused 4. He took a taxi to Ramaphosa at around 15H00. When he knocked at accused 4's shack the girlfriend opened the door and was advised that accused 4 was still asleep. He wanted to leave but the girlfriend advised him that he may wake up at any time. He waited and decided to have a smoke. He then went to Isaac's shack. Lujalajala opened the door for him. Isaac was there. Isaac left to fetch someone. The other accused then arrived. Not long thereafter he heard a noise outside, and the soldiers entered the

shack. They were pulled outside and assaulted outside. He was hit with a firearm on his head and sustained an injury. He can't remember if the police were at any time in the shack. He did not know Shane and was not in that yard earlier that day. He never went with Shane to accused 4's shack. They were taken to Samora Machel SAPS and thereafter he and Lujalajala were taken to hospital. A Doctor worked on him for an hour or two and put stitches on him. He did not remember if he was handcuffed that day and prior to that incident he was not someone who easily forgot. Whilst in his testimony accused 2 said he could not remember if the police were at any time in the shack, his version during cross-examination was that it was the police who entered the shack, it was the police who instructed everyone in the shack to go outside, it was the police who searched the shack whilst they were outside. It was the police who after a while told the accused outside that they, being the police, found the firearms inside the shack. He then told the police that he was not in possession of the firearm and he did not know where the firearm came from. It was then that he was assaulted by the soldiers. They were then arrested and taken to the police station. Whilst in his testimony he said that he took a taxi to Ramaphosa, in the version put to Ngedle accused 2 had walked to Ramaphosa from his home, and it took him 10 minutes. When he arrived at accused 4's shack, both accused 4 and accused 4's girlfriend were there. He went with accused 4 to Isaac's shack. The police searched the accused both inside the shack before they were taken out, and also when outside the shack.

[16] Accused 3 testified that he was with his girlfriend earlier that day. The girlfriend passed away in 2022. When he woke up at around 14H00 the girlfriend had gone out to buy food. He went to Ramaphosa to borrow money from her cousin, accused 4's girlfriend. He wanted the money as he did not want to be wholly dependent on his girlfriend who provided for most of the necessities. The walk from Oliver Tambo to Ramaphosa took about 20 minutes. There were no taxis between the two places. Accused 4 answered the door when he arrived and when he asked for his cousin accused 4 told him that she was sleeping. Accused 4 had been listening to music and drinking. He joined accused 4 and they sat and drank for about 15-20 minutes. He and accused 4 went out to smoke. He saw an open shack with people inside, and accused 4

led the way and they went to that shack. They found accused 1, 2 and Lujalajala inside the shack. He knew Lujalajala from seeing him when visiting his cousin. It was the first time he saw accused 1. He knew accused 2 from Acacia. There was cooldrink on the table when he and accused 4 arrived. Before the police arrived, Isaac went outside to answer the phone.

[17] After a few minutes he heard footsteps and some noise outside. He went to open the door and saw policemen and soldiers. They were wearing bulletproof vests. The police pushed the door to open it further and asked for Shane. The police told him to lift his hands and look towards the wall. He was then searched by the police. The soldiers entered the shack. The police found two phones on him, one for making calls and one for making music. He also had a packet of cigarettes. He was dragged outside by the police and the soldiers helped the police. He was assaulted and was asked where Shane was. He was dragged by the soldiers to a puddle of water and made to lie face down in the water. The soldiers assaulted him with rifles. It was during the assault that he heard the police saying that they found firearms. That voice came from the shack where they were removed from. He saw the police lifting a black firearm. It was then that the question changed from where Shane was, to why they killed policemen. He only saw two black firearms when they were being assaulted, and not before, as the police came out of the shack carrying firearms on a number of occasions. They were further assaulted by the soldiers near the army vehicle. Accused 4 was also placed in the puddle of water in the same way. Accused 4 was further assaulted and lost consciousness. Accused 4 was carried by his co-accused into the van. Lujalajala was also badly assaulted and had sustained serious injuries. They were then taken to Samora Machel SAPS. There accused 2 and Lujalajala were taken to hospital. Although accused 3 and 4 were taken to hospital, only Lujalajala was admitted to hospital. Accused 2,3 and 4 were returned to the police station. He saw the firearm allegedly found on him at Samora Machel SAPS. The firearms that he saw at the scene of the arrest were all black, and the one he saw at the police station which was allegedly found on him was silver. He knew nothing about the robbery or murder, and he just happened to be in the shack when the police arrived.

[18] Accused 4 testified that he resided with his girlfriend, Babalwa, who was a cousin of accused 3, in his shack. Lujalajala was his neighbour. He and Lujalajala used to do things together. The previous night he had been drinking with Lujalajala and others. On the day of the incident, he woke up around 13H00-13H30. He was woken by Babalwa and accused 3 was already inside the dining room of the shack. He disputed that he drank with accused 3 in his shack. He wanted an extension from Isaac and that was the reason he walked with accused 3 to Isaac's shack. Isaac was not there when they arrived. He found accused 1, 2, Lujalajala and one Sipho inside the shack. They drank inside Isaac's shack. Sipho left them in the shack. He heard a noise from the community, and some other noise. He opened the door. There were soldiers at the door. A soldier pointed at him with a firearm, pushed him and struck twice across the face with an object he could not identify. He fell. He did not know who else entered the shack as he passed out. He did not know what happened thereafter. He heard from his co-accused that he was carried to the van. He did not know who took him to hospital. He denied being involved in the shooting of the police officers or being found in possession of a forearm. The version put to the witnesses was that they were fabricating evidence to falsely implicate him. In that version, he did not pass out but was dizzy and disoriented. In that version, he was not searched, and no firearm, magazine or ammunition was found on him. He was carried to the van and taken to Samora Machel SAPS. He only regained consciousness after he was taken to hospital.

[19] It is now necessary to step back and consider the mosaic.<sup>1</sup> The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached must account for all the evidence. Some of the

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<sup>1</sup> *Shilakwe v The State* (614/10) [\[2011\] ZASCA 104](#) (1 June 2011); *S v Hadebe* [1998 \(1\) SACR 422](#) at 426g-h.

evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.<sup>2</sup>

[20] The evidence of Koli and Naude established that Nieuwenhuys and Nyangiwe were fatally shot and robbed of their firearms between 13H30 and 13H40 on 4 September 2019 at a construction site next to Vukuzenzele in Sweet Home Farms, Samora Machel, where they were guarding construction workers and the construction site. The evidence of Koli, Van Wyk and Ranwana established that these were law enforcement officers and identified the firearms which were issued to the two officers, to wit the F[...] to Nieuwenhuys and F[...]2 to Nyangiwe, each with 30 rounds of 9mm Parrabellum ammunition. The evidence of Dr Kirk established that the cause of death of the two officers were multiple gunshot wounds. The evidence of Fish and Bothman established that the two firearms which had been issued to the two officers, as well as the other two firearms that Nguma handed to Mathe, a Norinco and a Glock with erased serial numbers, were semi-automatic firearms. They were self-loading, but not capable of discharging more than one shot with a single depression of the trigger and were manufactured and designed to discharge centre-fire ammunition. Bothman's evidence established that the Glock pistol with an erased serial number was used to shoot and discharged cartridges at the scene where the two officers were shot at. The evidence also established that the ammunition handed to Mathe were live rounds of centre-fire ammunition. The evidence also established that of the four firearms handed to Mathe, two were those which had been issued to the deceased officers.

[21] Nguma received a tip-off of the whereabouts of the suspects involved in the shooting of the two law enforcement officers from an informer who was prepared to go and point out the shack where the suspects were, at around 14H30. By around 15H00 Nguma had assembled members of his team with whom he later entered the shack, to wit Dubula, Ngedle, Hawu and Ngomani together with other police members from the Nyanga Cluster as well as soldiers who were at the time supporting the police in the

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<sup>2</sup> *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449J-450B.

area and had a briefing with them at Samora Machel SAPS. Approximately 30 minutes later the police and the soldiers arrived at the shack at Ramaphosa. This was about 5 minutes of briefing time and getting into the vehicles and the driving distance of about 20 minutes between Samora Machel SAPS and the shack at Ramaphosa. I find that the police and soldiers arrived at the shack at approximately 15H30. Besides Nguma who recorded the time of arrest as 16H00, the other police officers who were with him had their statements, as regards specifically the time of arrest poorly recorded. I find that the accused were arrested by the police in the shack where Isaac lived in Ramaphosa at about 16H00 on 4 September 2019. Within approximately 1H50 minutes of the shooting of the two law enforcement officers, the police arrived at the shack where the two firearms that were issued to the two police officers were recovered. All 4 accused did not dispute that the police shouted out that they had found the firearms in the shack that afternoon. It is precisely where the firearms were found, and when the police shouted about the findings of the firearms, that were in dispute. Accused 3 confirmed that he saw three of the four firearms that the police allegedly found in the shack. According to him he saw the two black firearms when he was already outside the shack and a silver one at the police station.

[22] Lujalajala implicated Shane, accused 1, 4 and by implication accused 2 in the planning of the armed robbery of the law enforcement officers. From the evidence of Ngedle, Shane was a notorious figure for alleged serious and violent criminal activities in the area. It is possible that when the police were inside the shack, one of them may have asked who or where was Shane, from the accused. I can take it no further than that because the information from Lujalajala about the role of Shane came after, and not before the police entered the shack. There was a serious physical tussle between the police and those who were arrested in the shack. The accused did not dispute that they had resisted arrest. They were accused of killing law enforcement officers and the police found firearms on them in the shack. Although we should hold our police officers to higher standards than lay people, they remain human and have emotions. South Africans expect those who are accused of killing, especially the killing of those responsible for policing or those raising their arms against the police, and who resist



when being arrested, to be subdued and restrained. The police are duty bound to act to compel observance of and compliance with their instructions and the law. The police execute the rule of law and represent the authority of the State. The message to those who involve themselves in criminal activities, especially serious violent crime, must always be clear and consistent. Through physical violent resistance to an arrest, the accused acquiesced to the risk of injury. I am unable to conclude that the injuries sustained by the accused and Lujalajala at the time of the arrest points to a conspiracy, by the police, to falsely implicate them.

[23] The evidence did not support a police conspiracy against the accused. On the contrary, the evidence pointed to the success of reliable information passed by a member of the public to the police, upon which the police swiftly acted. I find that in the shack Dubula found the firearm which had been issued to Nyangiwe, and live ammunition, on accused 1. Ngomane found a magazine with live rounds of ammunition on accused 2. This must be approached against the background of Lujalajala that when the occupants of the shack realized that it was the police who were entering the shack, they tried to get rid of the firearms on them. Hawu found the Norinco with a filed off serial number as well as live ammunition on accused 3. There was no direct link between the Norinco and the scene. However, one bears in mind that some of the bullets were not determinable, and some were unsuitable for microscopic examination. This does not mean that the Norinco was scientifically excluded from involvement in the shooting of the two officers. Nguma found the firearm which had been issued to Nieuwenhuys with live rounds of ammunition on accused 4. Ngedle found the Glock, with serial numbers filed off and rounds of ammunition on Lujalajala. I accept the evidence of Lujalajala that earlier that day, which according to his statement made six days after the incident, on 10 September 2019, was at around 13H00, Shane and accused 1 had approached accused 4, and that he heard the two asking accused 4 to borrow their firearms. I also accept that he saw the three of them enter accused 4's shack, where accused 2 was at the time. I also accept his evidence that he saw Shane, accused 1 and 2 leave accused 4's shack and the yard together. I am not persuaded that Lujalajala was truthful in his

own role and that of accused 3 and 4 when, and also after Shane, accused 1 and 2 left the yard.

[24] The evidence of Lujalajala, and that of all four accused, was that all five of them arrived at Isaac's shack shortly before the police arrived. None of them was in that shack between 13H30 and 13H40. All of them indicate the time that they had been in the shack to a period that was sufficient to drink one glass, before the police arrived. Although they individually attributed themselves to drinking Coke, their evidence in whole showed that they drank Coke and some alcoholic beverages at the time. The evidence of Lujalajala, in part, is supported by that of the police, that there were four firearms in that shack, which the occupants of the shack had on them. Lujalajala's evidence was that the four accused had the firearms found by the police, in the shack before the police arrived. The evidence of Lujalajala is accepted in part and not in whole. To the extent that it contradicts that of the police, Lujalajala's evidence is rejected. I am not persuaded that the evidence of the police implicating the accused and Lujalajala was false or mistaken.<sup>3</sup>

[25] The evidence of the accused that they were not searched in the shack is false. Police officers are generally well trained to deal with life threatening situations. The police who attended to the shack approached the shack well informed that the occupants thereof were armed and were allegedly involved in the shooting of law enforcement officers and had robbed those officers of their firearms. I accept the version of the police that even their approach to the shack was what they termed a 'tactical approach', which required alertness and the highest consciousness to safety and an element of surprise. It is highly improbable that they would not have searched the accused. The version of the accused changed as it suited them. When the police testified the accused agreed with the police that it was the police who first entered the shack and arrested the accused and took them outside the shack. Opportunistically, when they testified the accused version changed that it was the soldiers who entered the shack first and assaulted the accused first before the police came in. The version of

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<sup>3</sup> *S v Sithole and Others* 1999 (1) SACR 585 (W) at 590g to 591c.

the accused, which implied a false conspiracy by the police to falsely implicate them, is not only highly improbable, but was also beyond reasonable doubt false. There is no reasonable possibility that the accused version may be true.<sup>4</sup> To the extent that the accused case stands in contradistinction to that of the State, it is rejected.

[26] The firearms robbed of the deceased were found on accused 1 and 4 in the shack. The firearm used in the shooting where the officers were shot and robbed was found on Lujalajala, who was present in the shack together with accused 1 and 4. There was more than one firearm used in the shooting where the officers were shot. Accused 3 was found with a Norinco whose serial number had been filed off, and live rounds of ammunition in the shack. Accused 4 was found with a magazine and live rounds. Accused 1, 2 and 4 had been implicated by Lujalajala in the preparation and planning of the robbery of the law enforcement officers. The accused were found in the shack pointed out by an informer as where those who shot at the two law enforcement officers were hiding. The information provided to the police by the informer proved reliable because a firearm used in the shooting and the two firearms robbed of the officers were found in that shack soon after the shooting.<sup>5</sup> All the proved facts exclude any reasonable inference save the inference that the accused are guilty of the two counts of murder, unlawful possession of firearms and unlawful possession of ammunition.<sup>6</sup> There exists no reasonable doubt that the accused committed the crimes charged.<sup>7</sup>

[27] I find that the State had proved its case against all 4 accused beyond reasonable doubt. For these reasons:

(a) Count 1, the murder of Jan Nieuwenhuys read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997, all four accused are found guilty.

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<sup>4</sup> *S v V* 2000 (1) SACR 453 (A) at para 3.

<sup>5</sup> *Mothwa v S* 2016 (2) SACR 489 (SCA) para 8 to 10.

<sup>6</sup> *R v Blom* 1939 AD 188.

<sup>7</sup> *R v Malombo* 1957 (4) SA 727 (A) at 738A-C.

(b) Count 2, the murder of Simtembile Nyangiwe read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997, all four accused are found guilty.

(c) Count 3, Robbery with aggravating circumstances, all four accused are found guilty

(d) Count 4, Robbery with aggravating circumstances, all four accused are found guilty.

(e) Count 5, Unlawful possession of firearms, all four accused found guilty.

(f) Count 6, Unlawful possession of ammunition, all four accused found guilty.

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**DM THULARE**  
**JUDGE OF THE HIGH COURT**