IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

Case No. CC10/2017

In the matter between:

THE STATE

and

PHIWOKUHLE MSUTHU	**Accused No. 1**
THANDISIZWE NTUMBUKANA	**Accused No. 2**
WANELE NDLEBE	**Accused No. 3**
MCEBISI POYO	**Accused No. 4**
LUNDI GUMENGE	**Accused No. 5**
WONKE NDLEBE	**Accused No. 6**

JUDGMENT

JOLWANA J

Introduction

[1] The accused were arraigned before this Court on multiple counts of aggravated robberies, murders, attempted murders, unlawful possession of firearms and unlawful possession of ammunition. All the accused pleaded not guilty to all the charges preferred against them save for accused no.4 who had passed on. The State presented its case calling various witnesses until it exhausted all its witnesses and closed the case for the prosecution. At the close of the case for the prosecution all the accused applied to be discharged in terms of s174 of the Criminal Procedure Act 51 of 1977 (the CPA). Accused no. 1, 2 and 5 applied for their discharge on some of

the charges whilst accused no. 3 and 6 applied for their discharge on all the charges preferred against them. All the accused were legally represented throughout the proceedings even though legal representation changed from time to time.

[2] In providing for the consideration of a discharge of an accused person after the case for the prosecution has been closed s174 of the CPA reads:

> "If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

It is on the basis of these provisions that the accused moved their applications. I turn now to consider the evidence led by the State in respect of each count against each accused but only in respect of the counts for which such applications have been made.

The evidence for the State against accused no.1

[3] Accused No.1 has been charged on all the counts for which the State alleges, were committed by some or all the accused. He only applied for a discharge only in respect of counts 3, 4, 5, 6, 10, 11, 16 and 17. The State did not oppose the application for his discharge in respect of counts 3, 4, 5, 6, 10 and 11. It only opposed the application for his discharge in respect of counts 16 and 17.

Counts 3, 4, 5 and 6.

[4] Only accused no.1 is charged for these counts. In summary the indictment is to the effect that the murders were committed on 1 November 2015 at what is presumably a drinking establishment, if the name, So-What Lounge is anything to go by. It is alleged that accused no.1 killed Mr Kuzo Andrea Mapipa and Mr Yamkela Zoya. Count 3 relates to the murder of Mr Mapipa and count 4 is in respect of the murder of Mr Zoya. Both of them were allegedly killed on the same date, at the same time and

place. Counts 5 and 6 are in respect of the unlawful possession of an unspecified type of a firearm and an unspecified type and quantity of ammunition which accused no.1 allegedly possessed when he allegedly committed the murders in counts 3 and 4.

[5] The only light into what the case of the State is against accused no.1 is shed by what is contained in the summary of substantial facts attached to the indictment and provided to the accused in term of s144(3) of the CPA. In respect of these murders the State's allegations are as follows:

> "4. During 01 November 2015 accused No.1 and his friends were at So-What Lounge, Mthatha. Accused No.1 took out a firearm and fired several shots to the deceased in count 3 and 4. After that they left the scene. Cartridge cases were found on the scene and sent to the Laboratory for analysis. Deceased in count 3 died as a result of "Thoraco-abdominal injuries and cervical spine fracture secondary to gunshot." Deceased in count 4 died as a result of "Head-thoracic injuries–gunshot."

[6] The only evidence led by the State in connection with these charges was that of warrant officer Vutu, a member of the SAPS attached to the Local Criminal Record Centre in Mthatha. He was called to the crime scene and took photographs of the two bodies of Mr Mapipa and Mr Zoya and collected some exhibits. His evidence, as would be expected, was not that accused no.1 was there or that he committed the offences. His evidence related to the undisputed fact that the two deceased died at the alleged crime scene having sustained gunshot wounds. It is not clear to me why accused no.1 was even charged for these offences which were never withdrawn nor was any evidence against him led. When the State closed its case it had not called a single witness or led any evidence for purposes of proving that the person who mercilessly murdered the deceased was accused no.1. This is not a case of insufficient evidence as there was no evidence at all. There is nothing to suggest that the unfortunate and murderous loss of the two lives was ever investigated or if investigated what sort of

evidence was considered by the State when it decided to charge accused no.1 with their murders. Even worse, the State proceeded with the charges against him even when it must have been clear to the State that there was no evidence whatsoever. Therefore, whether it was accused no.1 or not, who killed the deceased will never be known.

Counts 10 and 11.

[7] Accused no.1 has not applied for a discharge in respect of count 7. However, he has made such application in respect of counts 10 and 11. In order for these charges to be fully understood, I consider it necessary to make reference to count 7 to the extent necessary as counts 10 and 11 were allegedly committed at the same crime scene and at the same time and place as count 7. Count 7 is in respect of the robbery of a cash conveyance vehicle of Fidelity Security Services on the 2 November 2015 at St Barnabas Hospital, in Ngqeleni. Count 10 is in respect of the unlawful possession of a firearm and count 11 is in respect of the unlawful possession of ammunition. The State did not oppose the discharge application by accused no.1 in respect of counts 10 and 11.

[8] It appears that to a great degree the case of the State against accused no.1 relies on the statement he made to Brigadier Manyana which is exhibit “E” of the record. While he places himself at the crime scene in respect of count 7 in that statement, the closest he comes to implicating himself in respect of counts 10 and 11 is in one sentence in which he says “we fired some shots to it”. That sentence must be with reference to the shots that were fired at the Fidelity Security Services vehicle which was the target of the armed robbery. In order to contextualise that single sentence, it is necessary to have regard to accused no.1’s statement where it refers to the robbery

mentioned in count 7. It appears from his statement that he was with about twelve other people mentioned in the statement on the day before the said robbery. They were armed with rifles and pistols that were intended to be used during the robbery. On that day accused no.1 was himself carrying a rifle. However, on that day they aborted the attack on the Fidelity Security Services vehicle.

[9] On the following day the attack on that vehicle was carried out and all the people who were present the previous day were present including accused no.1 himself except one person. There is no evidence of accused no.1 carrying any firearm on the second day. The closest he comes to mentioning the assailants using firearms when shots were fired is where he says in the statement, "we fired some shots to it". The question that follows logically is that when he was with over ten other people and he said "*we fired some shots to it*," did he necessarily mean that he himself was in possession of a firearm and ammunition? The importance of this question lies in the fact that I do not think that it would have been totally out of place for him to say "*we fired some shots to it*" when he neither possessed a firearm nor fired any shots himself personally. The fact of the matter is that there is no evidence of accused no.1 being in possession of firearms and ammunition on the day of the attack on the Fidelity Security Services vehicle at St Barnabas Hospital. On the evidence of the State, accused no.1's presence at the crime scene during the attack and participation in the attack, even if it were to be accepted as established, does not mean that he was in possession of firearms and ammunition. In my view, there are many other inferences that can be drawn from those words. In those circumstances the law is clear that the drawing of the inference the State wants this Court to draw where there are other inferences that can be drawn from those words is unsustainable.

[10] As far as I could understand it from the heads of argument, the main basis for the application for the discharge of accused no.1 on counts 16 and 17 is that the State did not produce any evidence describing the firearms and/or ammunition the accused were alleged to have been in possession of. I do not think that that contention is sufficient for his discharge in terms of section 174 at this stage of the trial. The fact of the matter is that he made a statement before colonel Manyana in which he mentions some firearms and that statement was ruled admissible by this Court. In the Tsitsa bridge robbery the evidence of the State was that firearms were used in shooting the vehicle and the employees of Fidelity Security Services. In addition to that Mr Nqetho was shot and killed in that robbery and other people sustained gunshot wounds and had to be treated in medical facilities. I do not think that it can be said that there is no evidence on which a reasonable court acting carefully can convict the accused on the charge of unlawful possession of firearms and ammunition in respect of counts 16 and 17. Only accused no.1 and 6 were charged in respect of the St Barnabas Hospital robbery and related charges. I consider it convenient to also deal with the State's case against accused no.6 before I deal with the applications of other accused.

The State's case against on accused no.6 on counts 7, 8, 9, 10 and 11

[11] Accused no.6 is only charged in respect of counts 7 to 17 and he applied for his discharge in terms of s174 in respect of all of them. However, the State did not oppose his discharge application in respect of counts 12, 13, 14, 15, 16 and 17. However, the State opposed his application in respect of counts 7, 8, 9, 10 and 11. I will start with the application in respect of which there is no opposition. All these five counts are interrelated and are in respect of the St Barnabas Hospital robbery. Count 7 is in respect of the armed robbery, counts 8 and 9 are the attempted murders of Mr

Kwanele Vapi and Mr Mphumezi Mlenga respectively. Counts 10 and 11 are in respect of the unlawful possession of firearms and ammunition.

[12] Mr Kwanele Vapi's evidence was that on 02 November 2015 he was on duty as an employee of Fidelity Security Services where he was employed as a technical support officer. However, on the day in question he was tasked with driving their cash conveyance vehicle because the regular driver was not on duty. Their vehicle was branded with his company's branding and logo. He was with his colleague Mphumezi Mlenga who was his crewman and they were tasked with loading cash into Nedbank automatic teller machines (ATM) in Mthatha, Libode, Ntlaza and Lusikisiki. They attended to the last ATMs in Lusikisiki at 16h00 after which they headed back to their company's office in Mthatha using the R61 route which goes towards Port St Johns. When they were at Ntlaza location near St Barnabas Hospital the road was under construction and detoured into a gravel road. Their vehicle's head lamps were on. The vehicle in front of their vehicle switched on its hazard lights and then stopped. Another vehicle which was a golf vehicle was facing the direction of Port St Johns which was the opposite direction. It had its bonnet open as if it had a mechanical problem. Eventually shots were fired at their vehicle by the people from those vehicles with one shot hitting him. They managed to drive away and were chased into St Barnabas Hospital where they tried to seek refuge.

[13] Initially they stopped near the reception area in the hospital but they struggled to open their doors. They again heard the sound of rifle shots. Mr Vapi then drove the vehicle further into the back of the hospital yard. He could see a Toyota Fortuner chasing them inside the hospital premises. As he was driving inside the hospital the road suddenly ended and he could not drive any further. He had at that stage switched on the lights of his vehicle at the time he was near the reception as he had at some

stage switched them off. When he realized that the road ended and he could not drive forward he reversed into the Toyota Fortuner and hit it on the driver's side with his rear bumper. When he realized that he could not move his vehicle he switched off his ignition but left the lights on. The assailants appeared shooting at his side demanding that they should get out. The attackers shot at both sides of the vehicle until his passenger Mr Mlenga was hit by a bullet.

[14] He then decided to open the rear door of the vehicle which could be opened from the driver's seat and they stopped shooting. He tried to open the gun port in order to shoot one of the attackers. He told Mr Mlenga to keep an eye on the attacker he was going to shoot. That attacker ran away in front of the vehicle. He ran about five metres away and then came back walking fast. When he came back the mask that that assailant was initially wearing on his face had fallen and it was hanging on his chest. That assailant came towards him and at some stage he was about two meters away. He could see him clearly as he had nothing on his head. He was moving towards him with his firearm pointing at them. The source of light was their vehicle lights which were still on and some hospital lights not far away. He described that man as having sharp ears that were bigger and facing upwards and was light in complexion. He did not see that man again after he walked past his vehicle. He identified that man as accused no.6. After he had walked past him he heard the assailants saying to each other that they should leave before police arrived. The assailants' motor vehicle drove away. He and his colleague waited for about 15 minutes for the assailants to go away and thereafter he opened his door. Eventually they went into the hospital to seek medical attention. At some stage he was referred to Nelson Mandela Hospital by his personal doctor where the bullet was ultimately removed from him.

[15] Under cross examination he testified that gun shots were fired at his vehicle for about 10 minutes. One of the men moved from his side of the vehicle and ran to the front and the lights of his vehicle were on. When that man came back he was not running but was walking fast. He looked at that man as he was approaching. He testified that the time it took that man to run from his side of the vehicle and coming back walking fast might have been about half a minute. He noticed his features at the time he was standing there with his mask hanging on his chest. It was that time that took half a minute and going to the front of the vehicle and coming back would have taken about a minute. When that same man was standing there still with his mask on he could see only a portion of his face but after the mask had fallen to his chest it was then that he saw him clearly. It is the same man that he aimed at with his firearm and told his colleague Mr Mlenga that he was going to shoot him. He testified that the time it took him to look at accused no.6 was more than a minute because at some stage he stood in front of the vehicle and at some stage he aimed at him with his firearm.

[16] He testified that on that day it was the first time that he saw accused no.6 and he identified him with his light complexion and the shape of his ears. He never saw him again until this trial started. He made a statement to the police but that statement was never read back to him. He confirmed that in the statement which was shown to him during cross-examination it was not stated that he could identify the person he had seen at the crime scene. This, he testified, was surprising to him, because he had told the police everything. He had sufficient light from his vehicle and a light provided by construction lights as the hospital was undergoing renovations. He explained that on that day accused no.6 was wearing the type of masks normally worn by doctors when they go to theatre. After the bullet was removed from his body he went to see the

investigating officer to give him that bullet but they did not discuss the case. He was never called to an identification parade.

[17] There was no other evidence of whatever nature or form presented by the State against accused no.6 in respect of counts 7, 8, 9, 10 and 11. Therefore the State's case against accused no.6 depends entirely on the evidence of Mr Vapi on identification. Mr Mpumezi Mlenga, the second State witness in that robbery did not add anything on the crucial issue of the identity of the assailants. He was a crewman and therefore in the same vehicle as Mr Vapi during the attack. He was a passenger in the front seat while Mr Vapi was the driver. He was the one who was asked by Mr Vapi to keep an eye on that assailant that Mr Vapi was trying to aim at with his firearm. However, he said nothing about having been able to see and could identify one of the assailants, even the one he had been asked by his colleague Mr Vapi to watch whose mask had fallen to his chest. He never even mentioned being told later by Mr Vapi that he was able to identify one of the assailants. I will deal with the approach to the evidence of identification in our law later.

The State's case against accused No.2

[18] Accused no.2 has been charged with count 1, the robbery of the sum of R2.5 million from a Fidelity Security Services cash vehicle, two cellphones, one 9mm pistol and an LM5 rifle with serial number GLN 04030 on 14 September 2015 on the R61 road in Lusikisiki which were at the time in the lawful possession of Fikile Pumelo and Bongile Mjungula as employees of Fidelity Security Services. There is also an alternative count of conspiracy to count 1, it being alleged that prior to and including the 14 September 2015 at or near Norwood the accused together with others conspired to commit the robbery referred to in count 1. He is also charged with count

2, the unlawful possession of firearms at the time and place mentioned in count 1. He also faces count 12, the robbery at Tsitsa bridge on 4 November 2015 in which employees of Fidelity Security Services, Mr Zola Mphako and Mr Vuyisile Mandoyi were robbed of a pistol and a rifle, count 13, the murder of Mr Mnikelo Nqetho during the commission of the Tsitsa bridge robbery, count 14, the attempted murder of Mr Yolisa Mlungwana on the same date and time mentioned in count 12, count 15, the robbery of a Mercedes Benz vehicle from Mr & Mrs Jama at or near Tsitsa bridge, count 16, the unlawful possession of firearms during the robbery at Tsitsa bridge, Count 17, the unlawful possession of ammunition when the Tsitsa bridge robbery was committed and Mr and Mrs Jama were robbed of their vehicle.

[19] He has applied for a discharge in terms of section 174 in respect of all counts save for the alternative charge to count 1, that being the conspiracy to commit the Lusikisiki robbery. The State did not oppose his discharge application in respect of counts 1, 2, 14, 15, 16 and 17. However, it opposed the application in respect of counts 12 and 13. There is simply no evidence implicating accused no.2 in the Lusikisiki robbery and the robbery of the Mercedes Benz from Mr & Mrs Jama on 4 November 2015. There is also no evidence of accused no.2 being there and being in possession of firearms and ammunition and ultimately when Mr & Mrs Jama were robbed of their vehicle. Therefore the concession by the State in respect of counts 1, 2, 14, 15, 16 and 17 is well made as the State has not produced any evidence against him whatsoever. I turn now to look at the State's case against accused no.2 in respect of counts 12 and 13. In opposing the discharge application the State indicated that it would rely on the evidence of constable Clint Africa.

[20] Constable Africa's evidence was that on 13 November 2015 he was on duty with sergeant Cornelius doing crime prevention duties as members of the canine unit based

at Maitland in Cape Town. When they were in the Ruitewacht area they decided to do a random test on a white VW Golf 6 vehicle that they saw on the road to check if it was registered and it turned out that that vehicle was not registered. They decided to pull it over. They switched on the blue lights and siren of their marked police vehicle. The VW Golf vehicle speed away from them, driving recklessly by forcing its way between other vehicles and thus damaging them, and jumping red robots. They gave chase and also called for backup. When they were at Valhalla Drive the boot of that vehicle opened and one male person fired shots at them with an assault rifle and he returned fire. At some point at Jacaranda Road the occupants of the said vehicle jumped off and ran across an open field on foot.

[21] Their back up colleagues were also assisting in chasing the suspects on foot. The suspects ran into a house at Rose Street. He and his colleagues entered that house through a garage but he first fired a stun grenade into the garage. He noticed a dustbin on his left and as he entered he saw a front part of a shoe sticking out in front of the dustbin. He shouted for the suspect to come out. He also saw the front barrel of a firearm pointing at him. He then fired shots towards the dustbin. The gun fell from the suspect and he ran over and arrested him. He noticed that the suspect was injured. He pointed at accused no.2 as the suspect he arrested during that incident. The said firearm was taken away by members of the Local Criminal Records Centre and eventually entered in the SAP13 register of exhibits. That firearm was a black Taurus Arcus firearm.

[22] The State also called Mr Simon Mathebe who testified that in February 2016 he was the branch manager of Fidelity Security Services in Mthatha. On 29 February 2016 he received a phone call from warrant officer Mdepa who was working for the Organised Crime Unit. He told him that certain suspects had been arrested in Cape

Town and a firearm was recovered from them and he was required to come and identify it. He took their firearm scanner with him and proceeded to see Mr Mdepa. The serial number of the said firearm was filed off but because their firearms are implanted with a micro-chip, their scanner was able to pick up its serial number as 31FG501016. That firearm had been robbed from Fikile Mpumelo, their employee during the cash in transit robbery in Lusikisiki on 14 September 2015.

[23] The evidence of Mr Bongile Mjungula was that on 14 September 2015 he was a rifle man to keep guard on his colleague Mr Fikile Mpumelo who was collecting cash from businesses between Flagstaff and Mthatha as employees of Fidelity Security Services. Their driver was Anele Gqwetha. They were robbed between Lusikisiki and Port St Johns and R2.4 million in cash as well as a black LM5 rifle with serial number GLN04030 and a pistol were robbed from them. The said rifle was in his possession and a pistol which was in the possession of his colleague Mr Fikile Mpumelo was also taken away.

[24] As far as the State's case is concerned with regard to the pistol and the rifle which were robbed from Mr Zola Mphako and Mr Vuyisile Mandoyi at Tsitsa bridge on 04 November 2015 during which Mr Mnikelo Nqetho was murdered and an attempt was made to kill Mr Yolisa Mlungwana there is no evidence of accused no.2's involvement in that crime nor was he implicated in anyway. The firearms recovered in Cape Town on 13 November 2015 even if it were to be so that they evidently belong to Fidelity Security Services and they had previously been robbed during the Tsitsa bridge robbery or the Lusikisiki robbery do not help the State's case against accused no.2. The evidence of the 9mm Arcus pistol having been allegedly recovered from accused no.2 indicates that it might indeed have been robbed from the Fidelity Security Employees with other firearms during one of those robberies. However, that does not,

without more, mean that accused no.2 was involved in the robberies themselves. What it does mean is that he was found in Cape Town in unlawful possession of that firearm. Without him being implicated in the robberies it cannot be assumed that because a firearm robbed during one of those robberies was recovered from him he was therefore involved in those robberies and the other crimes committed there on that day. More evidence was required from the State and the State failed to produce the required evidence. The short shrift approach to the evidence of the State in respect of counts 12 and 13 is that there is no evidence that accused no.2 took part in that robbery and murdered Mr Nqetho.

Evidence of the State against accused no.3.

[25] Accused no.3 is charged in respect of counts 1, 2, 12, 13, 14, 15, 16 and 17. He has brought an application for his discharge in terms of s 174 in respect of all the charges. The State is not opposing his application in respect of counts 1, 2, 14, 15, 16 and 17. The State is opposing accused no.3's discharge application only in respect of counts 12 and 13. I will start with the counts for which the discharge application is not opposed by the State.

Counts 1, 2, 14, 15, 16 and 17.

[26] Counts 1 and 2 are in respect of the Lusikisiki robbery. There is simply no evidence led by the State against accused no.3 in respect of counts 1 and 2. No evidence at all. Counts 14, 15, 16 and 17 suffer the same fate as counts 1 and 2 in that no evidence at all was led by the State pointing to accused no.3's involvement in those offences. It is therefore hardly surprising that the State did not oppose the application for his discharge in respect of counts 1, 2, 14, 15, 16 and 17. This brings

me to counts 12 and 13 in respect of which, as indicated before, the State opposed accused no.3's application to be discharged in terms of section 174.

Counts 12 and 13

[27] These counts are in respect of the robbery of a Fidelity Security Services cash vehicle at or near Tsitsa bridge in Tsolo on the 4 November 2015 and the murder of Mr Mnkilelo Nqetho. The State indicated that it opposed accused no.3's application in respect of counts 12 and 13. In opposing the application the State indicated that it relied on the evidence of Mr Vuyisile Mandoyi. Mr Mandoyi's evidence was that in November 2015 he was working for Fidelity Security Services and their main business was to collect cash from businesses. On the 4 November 2015 he and his colleagues were assigned to collect money from businesses in Ntabankulu, Mount Ayliff, Mount Frere and Qumbu. He was with two of his colleagues Mr Mnikelo Nqetho and Mr Zola Mphako. They were travelling in a vehicle branded with Fidelity Security Services branding and logo. They finished collecting money between 17:00 and 18:00 in the early evening after which they proceeded to their Mthatha offices using the N2 national road.

[28] When they were crossing Tsita bridge or thereabout his colleague Mr Mphako who was the driver said that their vehicle was being shot at. He then saw a Toyota Fortuner whose occupants were shooting at their vehicle. At that time he was sitting between the driver Mr Mphako and Mr Nqetho. While that was happening he noticed a white Hyundai pickup truck in front of them standing at a bus stop on the side of the road. The Hyundai vehicle slowly drove into the road. Mr Mphako had to drive on the side of the oncoming traffic but their vehicle was losing power and it eventually stopped. When it stopped the Hyundai vehicle reversed towards their vehicle and

stopped in front of their vehicle. Two men alighted from the Hyundai vehicle carrying a 5 litre petrol container and a rifle. Those two men instructed them to alight. At that stage the driver, Mr Mphako had already been shot on the hip. Mr Nqetho who was on the passenger seat alighted and ran across the road. The assailants shot Mr Nqetho and he fell across the road. He also alighted and leaned against their vehicle. Mr Mphako had also alighted, at some point he had fallen somewhere in front of the Hyundai.

[29] Three men came towards him and instructed him to open the vehicle. He went to the driver's door and tried to open it. When he could not open it he turned around to the passenger side and opened the driver's door from inside. After opening it they returned to the driver's side and pressed a button to open the rear door. One of the robbers got inside the back of the vehicle where the vault was located. He later said that he was unable to open the vault. This was because the vault could only be opened with a code that they had to obtain from their office. It was Mr Mphako who could ask their office for the code to open the vault. Other assailants went to fetch Mr Mphako from where he had fallen and one remained guarding him. The man who was left with him shot him in the leg.

[30] When the assailants brought Mr Mphako they instructed him to phone the office and ask for the code to open the vault. The office gave him a wrong code which could not open the vault. When the robbery was taking place the Toyota Fortuner was standing behind their vehicle providing light to them. He managed to see one of the assailants. The one who shot at him was light in complexion but he could not notice his height. That man's face was not covered and he had nothing on his head. However, there was no particular distinguishing feature that he noticed about that man other than the complexion. He added that he could identify that particular assailant

because at some point he was about two and a half metres from him when he noticed him. When this person shot him he was standing waiting for the others to return with Mr Mphako as they had gone to fetch him so that he could ask for the code from their office to open the vault. That assailant was facing the Toyota Fortuner when he shot him while he was between that assailant and the Fortuner and its lights were on facing this person. He pointed at accused no.3 as the man who shot him on the 4 November 2015 during that robbery. He testified that police came to him at Dr Malizo Mpehle Hospital and took his statement and he told them that he could identify the person who shot him during that robbery. He remained in hospital for about two months.

[31] Under cross-examination he maintained that when the other attackers left to fetch Mr Mphako the one remaining with him shot him. However, he would not say how much time he had of looking at the person who shot him. The only time he saw him was when he shot him. It was at about 20:00 that evening when the robbery took place and it was dark. The Toyota Fortuner that provided light was standing five to six metres behind the Fidelity Security Services vehicle. He was leaning against the side of their vehicle. He insisted that the Fortuner provided sufficient light for him to be able to identify the man who shot him. It was the first time that he saw that person at that moment in his life. He never saw that person again. Although he could identify him he was never called to an identification parade by the police even though he had told them that he could identify him.

[32] The next State witness was Mr Zola Mphako. He was the colleague of Mr Mandoyi and he confirmed all his evidence on issues that were in any event not disputed on behalf of the accused. His evidence did not add anything on the crucial issue of the identity of the assailants. Therefore, Mr Mandoyi's evidence is the only one on the basis of which the State contended that accused no.3's application to be discharged

in terms of section 174 should be refused. Count 12 is in respect of the Tsitsa bridge robbery. Count 13 is in respect of the murder of Mr Mnikelo Nqetho who was shot and killed during that robbery. Count 14 is the attempted murder of one Yolisa Mlungwana about whom nothing was said at all when the State witnesses gave evidence. He also was not called to testify. Count 15 is in respect of the robbery of a Mercedes Benz vehicle from Mr and Mrs Jama. Mrs Jama's evidence did not contribute anything in identifying any of the assailants. Counts 16 and 17 are in respect of the unlawful possession of firearms and ammunition during the robbery of Mr and Mrs Jama's vehicle. The only evidence especially about who the perpetrators were is that of Mr Mandoyi. Nothing else links accused no.3 to the incidents of the 4 November 2015 at or near Tsitsa bridge other than Mr Mandoyi's evidence. The State's case in respect of accused no.3 must therefore be determined on the issue of identification. More about that later.

Accused No.5

[33] Accused no.5 has been indicted for a number of counts. He only applied to be discharged in terms of section 174 in respect of counts 12, 13, 14, 15, 16 and 17. The State opposed his application in respect of all these counts. In opposing accused no.3's application the State relied on a statement he made to Major Mtirara which this Court had, at the end of a trial-within-a-trial, ruled to be admissible. All these counts are in respect of the Tsitsa bridge robbery on the 4 November 2015. Accused no.5 made a statement about that robbery to Major Mtirara. That statement, in my view constitutes evidence against him. Counts 16 and 17 are in respect of unlawful possession of firearms and ammunition during the robbery at Tsitsa bridge on 4 November 2015 during which Mr & Mrs Jama's Mercedes Benz vehicle was robbed from them and used as a get-away vehicle. There is evidence given by State

witnesses that firearms were used during the Tsita bridge robbery. That said, I do not think that he has met the criterion for a discharge set out in section 174, namely that there is no evidence on which he could be convicted if regard is had to his statement.

The evidence of identification in respect of accused no.3 and 6.

[34] The evidence implicating accused no.3 and 6 in the Tsitsa bridge robbery and St Barnabas Hospital robbery respectively is not without problems. The first problem is less about whether or not Mr Mandoyi and Mr Vapi were reliable witnesses, an issue I do not have to determine at this stage. It might even very well be that when they saw the two accused for the first time almost four years later in this Court it occurred to them that these were the men who were part of the group that fired shots at their vehicles and attempted to kill them during those robberies. The issue is not whether one has reason to doubt their honesty or not. The issue is whether that evidence, standing alone without any form of corroboration whatsoever, can be said to be sufficient for this Court to say that it is the evidence on which, in the words of section 174 of the CPA it is "of the opinion that the accused committed the offences referred to in the charge or any offence of which they may be convicted on the charge." In order for the legal position on identification to be understood it behoves of this Court to look at the relevant case law. I will do so hereunder.

[35] In this case the relevant State witnesses testified that they last saw the assailants on the day and at the time and under the circumstances described earlier which were prevailing during the attack almost four years before they testified in this Court. They also testified that they were never called to an identification parade. The second time they saw the accused was when the accused were in the dock, and they did the so-called dock identification.

[36] In *S v T* 2005 (2) SACR 318 (E) Plasket J, as he then was, had this to say on identification:

> "[11] Because of the ever-present possibility of honest mistakes being made, evidence of identification has to be treated with caution. In *S v Mthetwa* Holmes JA set out the proper approach as follows:
>
> > '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, 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; see cases such as *R v Masemang* 1950 (2) SA 488 (A); *R v Dladla and Others* 1962 (1) SA 307 (A) at 310C; *S v Mehlape* 1963 (2) SA 29 (A).'
>
> [12] In these circumstances, the identification parade is often of crucial importance. The police officials who conduct identification parades should comply with a range of basic procedures so that the fairness of the identification parade itself as an investigative process, and the reliability of the resulting identifying evidence, can be guaranteed. In *R v Kola* Schreimer JA held as follows in this regard:
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> > 'But an identification parade though it ought to be a most important aid to the administration of justice may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course an identification parade is not necessarily useless because it is

imperfect. In some respects the quality of the parade must necessarily be a question of degree.'"

[37] In this case no identification parade was conducted by the police for whatever reasons. This is both in respect of the Tsitsa bridge robbery and the St Barnabas Hospital robbery of the Fidelity Security Services vehicles. If it is indeed so that Mr Mandoyi and Mr Vapi respectively, clearly saw accused no.3 and 6 as they testified in their evidence, it follows that they should have told the police who interviewed them shortly thereafter. If they told the police that they could identify the assailants they were able to see, an identification parade was, in my view, the most logical step soon after the accused were arrested. To the extent that it was suggested on behalf of the State during submissions in opposing the section 174 applications, that an identification parade could not be held because Mr Mandoyi spent some time in hospital, photo identification was clearly an available option with all its imperfections. This was also not done. Surely this would have been better than nothing. The results of such photo identification could be weighed together with the rest of the evidence tendered by the State.

[38] In addition to both the identification parade and the photo identification not having been conducted, the State wants this Court to accept as sufficient Mr Vapi's identification of accused no.6 in the St Barnabas Hospital robbery by referring to his ears and complexion. In the case of the Tsitsa bridge robbery Mr Mandoyi did no more than referring to accused no.3's complexion, nothing more. This manner of identifying a person who was seen in circumstances in which the witnesses were under gun fire is fraught with obvious dangers that need no elaboration. Furthermore, the five accused before this Court were not the only ones who were allegedly there during those robberies on some of the evidence tendered by the State. This raises the

possibility that had other assailants been apprehended and charged with the five accused Mr Mandoyi and Mr Vapi might very well have pointed at other persons depending on the shape of their ears and their complexion. The evidence of identification of accused no.3 and 6 by these State witnesses is clearly unreliable in my view.

[39] The approach to a section 174 application has been commented upon and authoritatively decided and firmly established by our courts. In *S v Lubaxa* 2001(2) SACR 703 (SCA) Nugent AJA, as he then was, stated the legal position as follows:

> "[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.
>
> [19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C – E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, should at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (Skeen (op cit at 293)) that need not always be the case."

[40] On a proper analysis of the relevant case law it is wrong, unusual and a matter of grave concern to this Court that in respect of some of the charges in this matter an indictment was prepared obviously following the investigation of those charges by the police which led to the arrest of the accused. All most four years after the crimes were committed charges were put to the accused. The State simply closed its case without calling a single witness on such serious charges as the murders referred to in counts 3 and 4 which according to the indictment, where committed in a public place. The prosecution clearly decided not to withdraw those charges because in the words of Supreme Court of Appeal exactly twenty years ago in *Lubaxa*, "*a prosecution is not to be commenced without that minimum of evidence…."*

[41] It is trite that once the accused pleads to the charges the case can no longer be withdrawn and the accused must be acquitted if the evidence falls below the minimum threshold for charging him in the first place. In this case in respect of the murders in counts 3 and 4 in particular, it is not even a question of evidence having been led and evaluated by this Court and found to be insufficient or weak for a conviction. It is a case of no evidence being led at all. Courts must not be placed in an invidious position of acquitting an accused who should not have been charged or against whom charges ought to have been withdrawn at the appropriate stage. Why those charges were not properly investigated or why the accused was required to plead when the prosecution

ought to have known that there was no evidence at all is mind-boggling. The nagging feeling that in putting the charges to the accused the prosecution was going through the motions becomes unavoidable in the circumstances.

[42] In the result and on the trite principles of our law on the approach to a discharge application in terms of section 174 of the CPA some of the accuseds' applications must succeed and some must fail as set out below.

[43] Therefore I make the following orders:

1. Accused no.1

1.1 Accused no.1's application to be discharged in terms of s 174 of the CPA in respect of count 3, the murder of Mr Kuzo Andrea Mapipa, count 4, the murder of Mr Yamkela Zoya, count 5, the unlawful possession of firearms during the commission of count 3 and count 4, count 6, the unlawful possession of ammunition when count 3 and count 4 were committed, count 8, the attempted murder of Mr Kwanele Vapi, count 9, the attempted murder of Mr Mpumezi Mlenga, count 10, the unlawful possession of firearms when the St Barnabas Hospital robbery was committed and count 11, the unlawful possession of ammunition when the St Barnabas Hospital robbery was committed is granted.

1.2 The application of accused no.1 for his discharge in terms of section 174 of the CPA in respect of counts 16 and 17, the unlawful possession of firearms and ammunition when the Tsitsa bridge robbery was committed during which Mr and Mrs Jama were also robbed of their vehicle is refused.

2. The application by accused no.2 to be discharged in terms of section 174 of the CPA in respect of counts 1, 2, 12, 13, 14, 15, 16 and 17 is granted.

3. The application by accused no.3 for his discharge in terms of section 174 of the CPA in respect of counts 1, 2, 12, 13, 14, 15, 16 and 17 is granted.

4. The application by accused no.5 to be discharged in terms of section 174 of the CPA in respect of counts 12, 13, 14, 15, 16 and 17 is refused.

5. The application by accused no.6 to be discharged in terms of section 174 of the CPA in respect of counts 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 is granted.

6. The matter is postponed to the 17 January 2022 at 09h00 in Butterworth circuit court.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: M.L. MAKUBALO

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MTHATHA

Counsel for Accused No.1 and 6: H.J. PORTGIETER

Instructed by : GROENEWALD ATTORNEYS

GAUTENG

Counsel for Accused No. 2: S. KEKANA

Instructed by : LEGAL AID BOARD

MTHATHA

Counsel for Accused No.3 : M. SAKWE

Instructed by : LEGAL AID BOARD

MTHATHA

Counsel for Accused No. 5: F. NGXUKUMESHE

Instructed by: LEGAL AID BOARD

MTHATHA

Heard on : 06 August 2021

Delivered on : 17 September 2021