IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/0009/18**

In the matter between:

REX

Vs

NO. 10534/10362 P/C DLAMINI MOEKETSI

NO.74001/45808 P/C MONAHENG 'MUSI

NO.6752 SUPT. TLALI PHATELA

NO. 9202/9237 S/INSP. THAELE RAMAJOE

Neutral Citation: Rex vs No. 10534/10362 P/C Dlamini Moeketsi and 3 Others CRI/T/0009/18) [2020] LSHC 12

JUDGMENT

CORAM: MOKHESI J

DATE OF HEARING: 12th, 13th,16th/11/2018, 18th,20th/02/2020, 10th,/03/2020, 01st , 02nd /10/2020, 09th /11/2020

DATE OF JUDGMENT: 07TH DECEMBER 2020 and 13TH JANUARY 2021

SUMMARY

CRIMINAL LAW: Murder *dolus eventualis*-

ANNOTATIONS:

STATUTES:

Criminal Procedure and Evidence Act 1981

CASES:

S v Francis 1991 (1) SACR 198 (A)

R v Mlambo 1957 (4) SA 727 (A)

Moshephi and others v R LAC (1980 – 1984) 57

S v Kubeka 1982 (1) SA 534 (W)

S v Chabalala 2003 (1) SACR 134 (SCA)

Maqubela v the State [2017] ZASCA 137; 2017 (2) SACR (SCA) 690

Director of Public Prosecutions, Gauteng v Pistorius [2015] ZASCA 204; [2016] 1 ALL SA 346 (SCA)

S v Reddy and others 1996 (2) SACR 1 (A)

R v Nhleko 1960 (4) SA 712

R v Ncanana 1948 (4) SA 399 (A)

S v Gentle, 2005 (1) SACR 420 (SCA)

Firestone South Africa (PTY) Ltd. v Gentiruco AG 1977 (4) SA 298 (A)

S v Wells 1990 (1) SA 816

Seatle v Protea Assurance Co. Ltd 1984 (2) 537 SA (CPD)

S v Letšolo 1970 (3) SA 476 (A)

Letuka v R LAC (1995 – 1999) 405

Chabeli v R LAC (2007 – 2008) 213

S v Seegers 1970 (2) SA 506 (A)

S v Matyityi [2010] ZASCA 127 (30 September 2010)

Phaloane v R LAC (1980 – 1984) 72

[MOKHESI J]

[1] **INTRODUCTION**

The accused are police officers. They are charged with the crime of murder which occurred on the 06th February 2017, and malicious damage to property. It is alleged that the accused on the date mentioned, at or near Maseru West in the district of Maseru, sharing a common purpose or intention to pursue an unlawful act together and in pursuit of such act, did perform an unlawful act or omission with the intention of causing death of Thibello Nteso, that the said accused did commit the offence of murder of the said Thibello Nteso such death resulting from their act or omission. In respect of Count 2, it is alleged that the said accused on the date and place mentioned above, sharing a common purpose or intention to pursue an unlawful act together and in the pursuit of such act did without lawful excuse shoot with the intention of damaging the car, Mercedes Benz Maroon in colour singly or jointly owned or possessed by Thibello Nteso and thereby commit the offence of malicious damage to property.

[2] The Crown case is anchored on the evidence of ten (10) witnesses and admitted statements, *viz,* Mrs. Nikiwe Phinda-Setšabi (PW1), Mr. Mokete Sello (PW2), Mr. Habofanoe Tlebere(PW3), Mr. Thabo Ratalane (PW4), No.9355 Sergeant Ralitau (PW5), No. 10581 Police Constable Lethaha (PW6), Lance Sergeant Seeko (PW7), No. 6796 Inspector Motanya (PW8), Sergeant Tamako (W9), Dr. S. R. Naidoo (PW10), statement of arrest by N0. 52728 D/L/SGT Nkeane marked 'Exhibit D', Crime Scene reconstruction report of N0.11415 D/P/C Seutloali marked 'Exhibit E', ballistics report marked 'Exhibit F' which confirmed that a 9mm shell found next to the pool of blood was fired from the deceased's firearm, and further, that the other five shells found at the scene were fired from one of the AK47 rifles A1 and A2 were using. The ballistic report could not

however, establish whether the dead bullet found under the driver's seat of the deceased's car was fired from either of the two rifles used by the accused; Autopsy radiography and vehicle examination album marked EXH. F, Post-mortem report by Dr. Moorosi marked EXH.G – in which he opined that the deceased's cause of death was due to severe loss of blood consistent with gunshot wounds, Supplementary report of Dr. Naidoo marked EXH. The accused pleaded not guilty to all the charges.

[3] The deceased was an employee of the Lesotho Electricity Company (L.E.C.). He was an Internal Auditor thereat. On the fateful day, he had visited a female colleague of his, Mrs. Nikiwe Phinda-Setšabi (PW1), who was L.E.C Company Secretary. The purpose of the visit according to PW1 was so that she and the deceased would finalize a pending work-related assignment. PW1 stayed at L.E.C. Staff Quarters located at Maseru West. Adjacent to these quarters are the official residences of the Commissioner of Police (COMPOL). The deceased arrived at dusk and left at around 21hrs 25. When the he arrived at the said L.E.C village, he did not park his vehicle inside the yard, but instead had left if outside next to COMPOL's yard; to be precise about three paces from COMPOL's gate. The vehicle did not obstruct entry into COMPOL's residences.

[4] When the deceased left Pw1's residences after concluding his business, he refused an offer from the latter to see him out of the door. After the deceased had gone through the door, PW1 went upstairs to change into night gear. It was when she was coming down the stairs into the lounge that she heard rapid gun report which sounded too close for comfort, to the extent that she thought her vehicle was being shot at. After the shooting had died out, she went outside and to the main gate where she peeked through the hole on the gate. What prompted her to do this was that after

the shooting had died down, she called the deceased's phone, but it rang until the line was cut. She said this got her to be suspicious, hence the decision to go out to investigate. Outside it was dark and the rain was drizzling. She peeked through a hole on the wooden gate as she could hear the sound she suspected to be that of the deceased's car. She said the deceased's car had a distinctive sound.

[5] When peeped through the opening at the gate, she was shocked to see that the deceased's car had veered off the road, was idling and had its headlights on. She ran towards the vehicle to see what was happening. Upon arrival the deceased was not inside the vehicle. There were blood stains on the driver's seat. On investigating the surroundings in a frenzy, and hysterically calling out for help, and in the direction where the vehicle seemed to have come from, two figures stood in the cover of darkness, and naturally she cried out for help as she walked towards the two camouflaged individuals. It is common ground that the two individuals were Dlamini Moeketsi (A1) and Monaheng 'Musi (A2). She told the court that one of the two men asked her whether she knew the deceased, to which she replied they were colleagues. The police officer then showed her the firearm tucked to his waist saying it was found on the person of the deceased. At the time her eyes fell on the figure which was lying down in the road. The figure lying down was immobile and facing upwards. This figure was the deceased. The deceased was lying about 18 paces from where the police officers were. PW1 was able to see the deceased because of the illumination provided by the headlights of one vehicle which was parked nearby. That vehicle was occupied by Pw3 and Pw4. PW1's cross-examination was geared at establishing that she was not present when the shooting occurred, to which she answered in the affirmative.

[6] At the time the shooting was going on, Mr. Habofanoe Tlebere (PW3) and Mr. Thabo Ratalane (PW4) were on a night-duty-patrol. They both worked in private security at Security Unlimited. They were doing roving patrol at the United States of America Ambassador's residence when they had gun report. The Ambassador's residences are situated a street above where the scene of the crime was. They both said they heard sound of "big guns", and as PW 4 was the one driving, PW3 directed him to go to the area where the gun reports were coming from. Upon the approaching the scene, PW3, disembarked from the vehicle and walked alongside it as it was being driven slowly. As they were approaching, he saw "something which was put on the road which seemed like a bag." And on coming closer he realized that it was actually a human being lying down with two members of Special Operation Unit (S.O.U) standing next to the person. The individual was lying in a pool of blood. Thereafter a lady came out crying hysterically (PW1) asking why the deceased was shot. The illuminating light with which PW1 came to see the deceased came from the vehicle driven by PW3 and PW4. Cross-examination of both witnesses was aimed at showing that A1 and A2 acted in self-defence, and that A3 and A4 were not on the scene of crime at the time of shooting. Both witnesses admitted that they were not on the scene at the time of shooting.

[7] At the time of the shooting Mr Mokete Sello (PW2) was visiting his brother who stays at the L.E.C staff village. When the shooting took place, they were having supper. After the gunfire had subsided, he went to the upper floor of the house, and from the vantage point of the floor, peeked through the window. He saw S.O.U members *gathering* at the COMPOL's residence, and when he looked closely he could see someone lying prostrate on the ground, and that "after a little time a vehicle moved from that place and approached the building of L.E.C in a hurry. I saw the car.

It was parked there and there came out someone wearing S.O.U uniform from therein." It is PW 2's evidence that the police officer left the vehicle idling with its lights on, and the driver's door open, and "went back in a hurry back to those police officers who were gathering next to somebody who was lying down. That was when I observed as his back turned, I could see the buttocks." PW2 says that from his position he could see as one of the officers turned around that his trousers were darkened as if wet. He says that after a 4x4 vehicle had taken away the individual lying on the road, a water cannon arrived. As people were gathering PW2 decided to go there, and that is when he discovered that the person who was shot was his neighbour. His observations on the vehicle are the same as other witnesses: It had a lot of bullet holes and a lot of blood on the driver's seat. PW2 says he suspected that the water cannon was washing blood on the ground. The police officers also appeared to be picking something on the ground.

[8] Cross-examination by Mr Nthontho for Accused 3, was directed at exposing inconsistences in the witness's' testimony and the statement he made at the police station. In his testimony the witness testified that he saw the police officers picking something on the ground, but this aspect was not present in his statement made to the police. His response to the apparent inconsistency was that his statement was taken long after the occurrences.

[9] Mr Mafaesa's cross-examination (for the 4th accused) was short and was directed at showing that A4 was not present when the shooting took place. Mr Ramakhula, for A1 and A2, took the witness to task on a number of fronts. PW2's cross-examination established that; At the scene of crime there were streetlights, but they were not on, and the rain was drizzling.

PW2's quality of observations was also put into sharp focus, and this is the exchange between him and counsel:

> "D.C: You remember your statement was read to you, you remember you said you saw one gentleman had blood stains?
>
> Pw2: I said so
>
> D.C: But when you were led in evidence you said you saw blood on the buttocks?
>
> PW2: That is what I saw.
>
> D.C: It was drizzling, and we can't rule out that somebody walking in the rain can be wet?
>
> PW2: Yes it was drizzling
>
> D.C: Somebody out in the drizzling rain could be wet?
>
> PW2: He was wet on the buttocks. I said I saw some residue on the buttocks.
>
> D.C: I put to you that you're fabricating a story?
>
> PW2: It is not so.
>
> D.C: Because obviously and common sense will dictate that somebody standing in the rain will become wet?
>
> PW2: I saw residue on the buttocks of the person.
>
> D.C: Common sense will dictate that you cannot distinguish blood and water?
>
> PW2: Hence why I said residue."

[10] PW5 was N0. 9355 Sergeant Lebohang Ralitau. He got a call from PW9 (Sergeant Tamako) about a car which was parked near COMPOL's gate.

The report was to the effect that inside the said vehicle there was a gun holster and a bundle of keys on the passenger and driver's sides, respectively. It is common cause that the vehicle belonged to the deceased. He went to COMPOL's place and discovered that the vehicle was parked about three paces (3) from COMPOL's gate. Upon inspecting the vehicle, below the steering wheel he saw a gun holster and a bundle of keys on the passenger seat. He went back to report about the presence of the vehicle to his superiors and to the unit which is responsible for dealing with robberies and car theft. He said after five (5) minutes of arriving at the Police Headquarters, he received a phone call from A4 ordering him to attend to COMPOL's residence as there was a shooting. In the company of three police officers he immediately went back to COMPOL's place. Upon approaching COMPOL's, and near the gate, he saw a person lying on the road. He said it was dark and raining. Next to the person were A1, A2 and a lady (PW1). A1 and A2 told him that there was an exchange of fire between them and the deceased. As the accused reckoned the deceased could still be alive, he put on the gloves to administer first aid and to ascertain whether he was still alive. The person was in a pool of blood. He said the deceased was still breathing when he touched him on the neck and heart, although he could not respond when being spoken to. PW5 ordered his officers to load the deceased into the back of the van and took him to Tśepong Hospital. At T'sepong, post their arrival the doctor on duty only attended to them after thirty to forty minutes, and when he did, he certified the deceased to have probably died twenty minutes earlier. In cross-examination PW5 stuck to his story that the deceased was lying in the middle of the road, within the area where the car had been parked, and this is the exchange:

"D.C: How was this man lying down on the ground?

PW5: He was lying Supine with his hands on his sides.

D.C: Was he at the place where the car was parked?

PW5: It was within the same area but in the middle of the road.

[11] PW6, NO.10581 P/C Lethaha attended the scene of crime on the same night. At the scene he found all the accused except A4. One Senior Superintendent Letsie was also at the scene of crime. Upon investigating the scene of crime, he observed a lot of blood on the road and a maroon Mercedez Benz Reg. 300 NTE FS. Next to the pool of blood, as the deceased had already been taken to the mortuary, about a pace away a 9mm shell was discovered, and on the shoulder of the road four (4) AK47 shells were also discovered. From the pool of blood to where AK47 shells were discovered was ten (10) paces. From the pool of blood to where the vehicle rested, it was sixty (60) paces. The vehicle was on the left side of the road facing in the direction of the Boarder gate. Upon inspecting the vehicle, he saw eight (8) bullet holes on the rear bumper; On the right side of the vehicle there was a bullet holes on the driver's door; and two bullet holes behind the driver's door on the hind panel. PW6 testified that the distance between the pool of blood and COMPOL's gate was twenty-five (25) paces. Examination of the deceased at the mortuary revealed that the deceased had two wounds on the right thigh and two wounds on the left thigh. He took Four AK47 shells and a 9mm shell for ballistic examination. Cross-examination of the witness did not reveal anything other than what was said in chief.

[12] Pw7 was No. 10495 Detective Lance Sergeant Seeko. He was part of the investigating team and was posted in the Serious Crimes Unit. He went to the Police Headquarters to examine the deceased's vehicle. Upon its

examination, the external observations were similar to that of PW6. Inside the car, on the driver's seat there was a pool of blood and on the floor. On the floor mat there was a 9mm dead bullet. There were two holes which seemed to proceed from outside the driver's door into car radio and the cash board. He took the dead bullet together with a firearm which was found on the deceased and handed over to him by Detective Motanya (PW8) for ballistic examination. PW7 was not cross-examined. PW8 was Detective Motanya. Detective Motanya received the firearms, two AK47 rifles and one Arcus pistol and forwarded them for ballistic examination. PW8's cross-examination revealed that when the deceased's firearm was handed over to him by A3 it was not loaded, which is a standard procedure.

[13] Sergeant Tamako (N0. 8705) was the Crown's ninth witness (PW9). Before he could testify the court was advised that he was an accomplice witness, and necessary warnings in terms of section 239 of the **Criminal Procedure and Evidence Act 1981** were administered. The nub of his testimony is the following: His workstation together with A1 and A2 was COMPOL's residences, and that on the fateful day he was on a day duty. He knocked off at 18hrs00 and was relieved by A1 and A2. But before A1 and A2 could take over, the former alerted him to the presence of a vehicle which was parked near their workstation. He went out of the yard to investigate and found that it was a maroon Mercedes Benz Reg. 300 NTE FS. Inside, on the passenger seat was a bundle of keys and a gun holster on the driver's side. Various reporting procedures were triggered as they felt the vehicle posed a security threat. At around 22hrs00 PW9 received a phone call from Phatela (A3) instructing him to go his workstation as there was exchange of fire involving A1 and A2. He immediately proceeded thereto and upon arrival he found some police officers already gathered. He observed that the Mercedes Benz he had left next to

COMPOL'S place had moved further ahead, and had its doors opened, and stood on the edge of the road facing west. He further observed that there was blood on the road adjacent to where the vehicle was initially parked.

[14] He sought explanation from both accused as to what happened to which A1 explained that the deceased ignored him when he tried to talk to him and boarded his vehicle, started the engine and the vehicle started moving. That both accused shot at the vehicle as a result of which it derailed after the deceased fell off. A2 handed over the deceased's firearm to PW9. The firearm was a 9mm pistol with 4 rounds. PW9 approached A3 and A4 as his seniors who were present at the scene to tell them about the discovery of the 9mm. After a short meeting A4 called him and they went to where A3 was. He said at this point A3 "ordered me in the way that I could not refuse. He said he had agreed with Senior Inspector Ramajoe that I should go fire the gun which I took from Accused 1. He said after firing I should bring back the shell to him and Accused 4."

[15] PW9 said the motive for doing this was to cover up for the accused to make it appear as though the deceased had fired at them. PW9 went to the far-removed area next to railway station. He accordingly fired the firearm and brought the shell back to A3 to plant at the scene of crime. He said he kept the firearm after giving A3 the shell.

[16] As it was to be expected, as a key witness, PW9's cross-examination was much more intense and protracted. It emerged during cross-examination that PW9 appeared before a team of investigators on a number of occasions before he prepared an affidavit implicating A3 and A4 in the manner alluded to in the preceding paragraph, when A1 and A2 were only called once to appear before the same investigators. PW9 also acknowledged that

he sought the services of a lawyer as he was a person of interest in the matter. He acknowledged that he appeared before the investigators more than six times, however, he denied that the reason for that was to force him to become an accomplice. He confirmed under cross-examination that he fired the deceased's firearm to stage an exchange of fire. And further that he only made the statement after 8 months of the shooting.

[17] PW10 was Dr. S.R Naidoo, a forensic pathologist, who conducted post-mortem examination on the corpse of the deceased, together with Dr. Moorosi. Dr. Naidoo testified that the deceased must have experienced the "greatest shock" while in the driver's seat due to high loss of blood. This he deduced from the heavily blood-stained driver's seat and the floor. He observed that there were no injuries apart from the wounds on the thighs. He opined that due to high velocity of the bullet, it entered the right thigh exited it and entered the left thigh and exited it, rupturing in the process, the main artery supplying blood to the left leg, resulting in a severe loss of blood, about 25% of it. He said the deceased died as a result of severe loss of blood.

[18] Under cross-examination PW10 when Mr. Ramakhula posed a question to him that the accused was aiming at the lower part of the body, Pw10 seemed to suggest that the deceased was shot while sitting in the vehicle. PW10 refuted a suggestion that the deceased could have reached Tśepong still alive given the state of shock he could have been in as a result of severe loss of blood.

Before the Crown could close its case, certain admissions were made in terms of section 273 of the **Criminal Procedure and Evidence Act 1981:**

(i) Autopsy radiography and vehicle examination album marked EXH. F

(ii) Post-mortem report by Dr. Moorosi marked EXH.G – in which he opined that the deceased's cause of death was due to severe loss of blood consistent with gunshot wounds.

(iii) Supplementary report of Dr. Naidoo marked EXH. H

[19] After PW10's testimony the Crown closed its case. At the close of the crown's case Accused3 and 4 applied to be discharged in terms of section 175 (3) of the **Criminal Procedure and Evidence Act 1981**. Accused 1 and 2 intimated that they would testify in their own defence as the only witnesses. After hearing arguments from counsel A3 and 4 were discharged.

[20] **<u>DEFENCE'S CASE:</u>**

DLAMINI MOEKETSI's VERSION.

Both accused pleaded self-defence. Accused 1's version on the presence of the deceased's vehicle next to COMPOL's place tallies with that of PW9 (Sergeant Tamako). It is what happened under the cover of darkness which is in contention. It is PW1's evidence that his sense of alertness was aroused by the presence of gun holster below the deceased's vehicle and the presence of keys on the passenger seat and foreign registration numbers of the car. He testified further that his heightened sense of alertness was further aroused by PW9's prior warning to them (A1 and A2) that a social media phenomenon known as *'Makhaola Qalo'* had intimidated that they should stay alert at all times as they would be attacked. That PW9 showed them this social media communication where it was said the police officers guarding COMPOL "should wear iron armour because he was coming that night." It is common cause that both A1 and A2 were armed only with AK4 rifles.

[21] As they were apprehensive, they agreed with PW9 to go to Police Head Quarters to get a tow car to remove the deceased's vehicle. A tow car did not arrive, and as it was impossible to get personnel backup from the police and it was getting late, the two accused decided to go outside COMPOL's yard to keep guard taking positions at two different points. A2 remained at COMPOL's gate while A1 crossed the road to the other side of the road, but as he said, they could see each other. As the two accused were keeping guard, A1 saw the vehicle's lights flicker as though an immobilizer had been pressed, and in front of the vehicle, when the deceased was about four to give paces from the it, A1 shouted at him "Sir, I am the officer Moeketsi we are guarding this place you should not temper with this car of yours because now it is under arrest." A1 says the deceased kept on approaching the vehicle, and he shouted him again "your vehicle has caused an obstruction and I am saying you should not temper with it because it is now under arrest, we have even reported to the Headquarters that we have been intimidated by the presence of your vehicle."

[22] A1 informed the court that the deceased proceeded to the vehicle nonetheless and had opened its door and started the engine while standing between the open door and the vehicle. A1 says while aligning himself with the parameter wall of the yard, he approached the deceased. He says he got the impression that the deceased stood up in order to hear what he was saying. A1 says the deceased replied that this car was not under arrest, and that accompanying this statement was a gun report. A1 says that he immediately shot in the direction of the deceased while taking cover. It was at this point that he realised that A2 was also shooting. He says the vehicle moved forward and the deceased fell off while it moved on and veered off to the right side of the road and stopped. He says after the deceased had fallen off, he stopped shooting and approached him as he laid

on the road. The deceased fell and laid "prostrate forward facing the right pavement". He testified that he did not touch the deceased at all. It is untrue that the deceased was not touched because there is an uncontroverted evidence of Sergeant Ralitau that when he arrived, he found the deceased lying supine. If the deceased had fallen in the manner described by A1 it suggests that he was handled to be positioned in the manner described by Ralitau when arrived. In fact this consistent with Tlebere's (pw3) unchallenged evidence when he and pw4 arrived at the scene they found a member of S.O.U standing next to the deceased and as the deceased "…saying 'hey man wake up'….As his head was being shaken it was swaying side by (sic) side, he was in a pool of blood". A1 then asked the deceased for the firearm that he was shooting with. The deceased said it was on his waist. He realised that the firearm had fallen on the right side to where the deceased lay. He immediately called for assistance from Sergeant Ralitau (PW5), who arrived after five minutes. At that point the deceased could not respond when being spoken to. When PW5 arrived, the deceased was taken to hospital. A1 says they did not touch the deceased while he lay on the road. A1 denied that a water canon ever arrived to wash away blood on the road.

[23] Under cross-examination it emerged that the area where the deceased had left his vehicle is not marked as a 'no-parking-allowed zone'; and that as they shot at the deceased while driving away not into (COMPOL's residences; that the vehicle was parked three (3) paces from COMPOL's gate; and this notwithstanding, A1 conceded that the presence of the deceased's car at that place did not break any law.

[24] **<u>MONAHENG 'MUSI's VERSION</u>**

This Accused's version of events is on all fours with that of A1. A2 told the court as they were keeping guard, he saw the deceased's vehicle flicker hazard lights and as he could not see the owner from where he was taking cover he stepped onto the road as A1 was shouting instructions at the deceased. He only saw the deceased when he was near the car after he had opened its door. The deceased had started the engine. A2 like his colleague barked instructions to the deceased not to temper with the car. He says the deceased "stopped for few minutes," and he (A2) approached him thinking that he understood the instructions. He said the deceased angrily replied that his car was not under arrest, and that immediately a gun shot rang out from the deceased. A2 immediately took cover while shooting at the deceased's vehicle. The vehicle moved on for a short distance when the deceased fell off it, and that is when he stopped shooting. He said he approached the deceased where he had fallen and saw the firearm "in front of his rights hand." A2 seized the firearm. A2 told the court that he did not see where the deceased was coming from.

[25] Under cross-examination A2 admitted that the deceased's vehicle was moving away from COMPOL's gate as they were firing shots at it. He said the reason they continued firing at the vehicle even when it was moving away was so as to arrest the deceased for shooting at them. A2 intimated that when he shot at the vehicle his intention was not to kill the deceased but to stop the vehicle. A2 intimated that they fired at the deceased when he was standing between the vehicle door and the vehicle. He did not see the deceased enter the vehicle, because he took cover after the deceased had fired a shot.

[26] **<u>EVALUATION OF EVIDENCE AND DISCUSSION</u>**

The Crown case is based on both circumstantial and direct evidence. In evaluating evidence, the court is guided by the following principles: In criminal proceedings the duty is on the crown to prove its case against the accused beyond a reasonable doubt. That the crown has a duty to prove a case against the accused beyond reasonable doubt does not mean that it must "…close every avenue of escape which may be said to be open to an accused…" ***R v Mlambo 1957 (4) SA 727 (A) at 738 A - C.***

[27] It is not correct to approach the evidence on the basis that because the court is satisfied with the credibility and reliability of crown's witness, then *ipso facto*, the accused's version should be rejected. The correct approach is rather:

> *…whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against tendency to focus too intently upon separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the work for the trees.* ***Moshephi and others v R LAC (1980 – 1984) 57 at 59 F – H.***

Equally trite is the principle that there is no onus on the accused to prove the truthfulness of his version, so long as his version is reasonably possibly true, he must be acquitted:

> *"Whether I subjectively disbelieved him is, however, not the test. I need not even reject the State case in order to acquit him…I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."* ***S v Kubeka 1982 (1) SA 534 (W) at 537F–H.***

In ***S v Chabalala 2003 (1) SACR 134 (SCA)*** at para. 15, the court said the following of the approach to evaluating evidence:

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

[28] **<u>NIKIWE PHINDA – SETŠABI</u>**

Mrs. Setšabi (pw1) was the deceased's colleague whom the latter had paid a visit on the fateful day. She related the events which led her to go out of

the L.E.C. staff village precincts. Upon going out of the yard she made a gruesome discovery of the body of the deceased lying on the tarmac with two police officers standing by. It is common cause that the two officers are the accused. The deceased's car had veered off the road. She had some conversation with the accused seeking their explanation as to what had happened. One of the accused had replied that the deceased was being sought after by the police and was armed, to which she retorted the deceased's firearm was licenced. PW1's cross-examination did not shake her. I am satisfied that her testimony is truthful and reliable.

[29] <u>MR. MOKETE SELLO</u>

Mr. Sello (pw2), on the fateful night had visited his brother who stays in the L.E.C. staff lodgings. Just like PW1, he testified that the tranquillity of that rainy night was disturbed by a litany of a rapid gun fire, which after it had died down, prompted him to go to the upper section of the house, and with the benefit of its vantage position was able to peek through the window onto the road nearby. It was dark and raining at the same time, but Mr Sello was able, from that far, to see that the S.O.U. member he says drove the deceased's car was wet on the buttocks. He said the water cannon arrived. It is at this point that he decided to go to the scene. It emerged during cross-examination that Mr Sello was not so sure whether he saw a water cannon or firefighter, and this was after Mr. Ramakhula pointed out to him that in the statement he made to the police he mentioned a firefighter not water cannon. His response was that the vehicle he saw was used both as a water cannon and firefighter. But noting turns on this, what I find problematic was his suggestion that the vehicle was used to wash blood on the road. That cannot be true as P/C Lethaha, as the investigator, when he arrived a short while later, found the pool of blood on the road, so it cannot be true that blood was washed off. The impression I got of Mr. Sello was

that he was ready to lean towards embellishing his evidence, and this can be demonstrated by his assertion that from the distance he was in the dark and in drizzling rain he was able to see that a member of S.O.U. was wet on the buttocks. Even the assertion that the vehicle was driven by the S.O.U member is not supported by evidence. I found Mr. Sello to be an unreliable and untrustworthy witness.

[30] Mr. Habofane Tlebere arrived on the scene with his colleague Thabo Ratalane following the dying down of heavy gunfire. At the scene they found two police officers with a woman who was crying bitterly. A person was lying in a pool of blood nearby. I found both witnesses to be credible and reliable. They were unshaken in their cross-examination.

[31] Sergeant Ralitau (pw5) had earlier in the day received a call from Sergeant Tamako (pw9) when he knocked off from duty, that there was a suspicious car parked next to COMPOL's place. He went there with two of his colleagues. His evidence was that the vehicle was parked three (3) paces from COMPOL's gate. It was still visible at that time. Later in the night he received a call from Phatela (A3) that there was a shooting at COMPOL's place. It was around 21hours00. He took the deceased to hospital. The deceased was unresponsive when he arrived, but when he felt his heartbeat, he concluded that he was still alive. The deceased was rushed to hospital where he was attended after 45 minutes of waiting. The deceased was certified dead probably twenty minutes (20) minutes prior to being attended by the doctor. I found Ralitau to be a credible and reliable witness. He emerged unscathed from cross-examaination.

[32] P/C Lethaha (pw6) was the lead investigator in the matter. He was alerted about the shooting at COMPOL's residences. He arrived much later than

Ralitau, but on arrival as he had already been told that the deceased had passed away and was at the mortuary. He observed a pool of blood and next to it a 9 mm shell, and four (4) paces from the pool of blood he picked up four (4) AK47 shells. He said the distance from the pool of blood to COMPOL's gate was 25 paces. The distance from the pool of blood to the deceased's car was 60 paces. I found this witness to be credible and reliable. He was unshaken under cross-examination. The same conclusion goes for Lance Sergeant Seeko and Inspector Motanya, who examined the vehicle and discovered a ricochet bullet, and received firearms for onward transmission to ballistic examination, respectively.

[33] **<u>DR. NAIDOO</u>**

Dr. Naidoo was a forensic pathologist who conducted post-mortem examination on the corpse of the deceased. He opined that given the velocity of the injury the deceased could have experienced great shock while in the driver's seat due to severe loss of blood. He deduced this conclusion due to blood-stained driver's seat and a pool of blood on the floor mat. In his testimony he seemed to harbour the view that the deceased was fatally shot while sitting in the driver's seat, and this line of thinking was persisted on by Adv. Nku in her questions to the accused. Given the circumstances of this case I do not think that the deceased was fatally shot while firmly sitting in the driver's seat. This witness in my considered view seemed to have ventured too far in giving evidence. His was only to give expert opinion not a conclusion on factual probabilities. The role of the court and that of experts should be appreciated. The expert's measure of proof is the ascertainment of scientific certainty while the courts measure of proof is in assessing probabilities. ***Maqubela v the State [2017] ZASCA 137; 2017 (2) SACR (SCA) 690*** *at para. 5.*

[34] In my view the deceased was fatally shot while attempting to get into the driver's seat. This is given the entry and exit points of the bullet hole on the driver's door and its entry on the deceased's thigh. The entry point of the fatal bullet is slightly below the driver's door handle while its exit is even lower. The trajectory of the bullet from its exit on the door into the body of the deceased would suggest that the door was not wide open. In all probability it had been pulled towards the deceased when the bullet was fired. Any suggestion that the bullet was fired when the door was open, with the deceased standing between the door and the car, would create a distortion in the trajectory of the bullet and would not tally with the proven facts.

[35] What needs to be determined at this point is whether the Crown has proved its case against the accused beyond a reasonable doubt. The crime of murder consists in the unlawful and intentional killing of another human being. The intention (*mens rea*) required must either be *directus, eventualis, indeterminatus* etc. Direct intention to kill is much easier to discern. I however feel that the present case is one in which the intention was to kill was *dolus eventualis*. This form of intention manifests itself in the following manner, as articulated in ***Director of Public Prosecutions, Gauteng v Pistorius*** **[2015] ZASCA 204; [2016] 1 ALL SA 346 (SCA**) at para. 26 the court said the following:

> *[A] person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in*

various ways. For example, it has been said that the person must act "reckless as to the consequences" (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been "reconciled" with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. ***It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent. (emphasis added.)***

[36] <u>DIRECT EVIDENCE</u>

The State's case rests on a combination of direct and circumstantial evidence. It is common ground that the deceased was fatally shot by the accused that night on his return from visiting a female colleague at the company's staff quarters. AK47 assault rifles were used in the shooting of the deceased. Earlier, the deceased had parked his vehicle about 3 paces from COMPOL's gate. The vehicle was not blocking access to COMPOL's premises. During that fateful night it was dark, and the rain was drizzling.

[37] <u>CIRCUMSTANTIAL EVIDENCE</u>

When dealing with circumstantial evidence the court must heed the warnings as aptly articulated in ***S v Reddy and others 1996 (2) SACR 1 (A) 8C–E,*** the court said:

In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only

then that one can apply the opt-quoted dictum in ***R v Blom 1939 AD 188 at 202-3,*** *where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.*

[38] **SERGEANT TAMAKO**

As already seen, there is evidence that the deceased was fatally shot by the accused, what remains to be determined is whether the shooting was legally justified. Both accused are pleading self-defence. It is the nature of this case that a corridor to the accused's liability is through this witness's evidence and circumstantial evidence. Sergeant Tamako's evidence and its value is an important piece to understanding the puzzle that is Thibello Nteso's death. Before I deal with evidence of this witness it needs to be stated that even though he was declared to be an accomplice witness he is not such a witness but an accessory after the fact. The law regarding how the court should approach the evidence of both an accomplice and accessory after the fact witnesses is the same. Although an accessory after the fact is not an accomplice it is an established principle of our law that their evidence should be approached with caution, and this was stated in ***R v Nhleko 1960 (4) SA 712 at 722 D – F***, where Schreiner J.A said:

In the present case the position is entirely different. There are two witnesses both of whom are accessories after the fact. In ***R v Mbonambi, 1957 (3) S.A 232 (A.D),*** *Fagan, C.J., giving the judgement of this court, said at p. 233 that it was unnecessary to decide whether the cautionary rule about accomplices was applicable to one who was only an accessory after the fact.*

*In England it does apply in such cases (see **Davies v D.P.P., 1954 A.C** 378 at 385). Although the question does not fall under the provisions of sec. 292, since it does not relate to admissibility of evidence or the competency of witnesses, it is allied to those subjects and there is no good reason why we should not follow the English practice, based as it is on a wealth of experience in such matters. An accessory after the fact **ex hypothesi** has identified himself with the actual perpetrator and probably has learned from him the circumstances of the crime. Most, if not all, of the considerations that lead to caution in the one case apply in the other, and in my view, we should accept the position that a warning is required in the case of accessories after the fact.*

[39] The caution with which the evidence of an accomplice witness is to be approached rests on the considerations that:

*...[A]n accomplice witness is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; .... The risk that he will be convicted... will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. **R v Ncanana 1948 (4) SA 399 (A)** at 405.*

And in ***S v Gentle, 2005 (1) SACR 420 (SCA) at 430***, it was said:

"It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complaint, and

which renders the evidence of the accused less probable, on the issues in dispute."

[40] Sergeant Tamako testified that he was posted on the same workstation as A1 and A2. PW9 was on a day guard duty while A1 and A2 were to be on the night duty. When A1 and A2 reported for duty they noticed the deceased vehicle parked next to COMPOL's gate with no occupants inside. They both alerted PW9 to this reality as he ought to have been aware of the car. But as it turned out PW9 was not aware of it. From that point on A1 and A2 were on a heightened state of alert as the vehicle had a gun holster below the driver's seat. When the deceased returned to his car at around 21hrs30, shooting ensued, which A1 and A2 explain on the basis of self-defence. PW9 had already knocked off from duty when the incident occurred and had to be ordered back by A3 to go and ascertain what was happening.

[41] Upon arrival at the scene of crime PW9 found his colleagues already gathered, among whom was A3. It appeared A4 arrived a little later. PW9 sought an explanation from A1 and A2 as to what happened. A2 handed over to him a 9mm auto pistol which he said was found on the deceased. PW9 went to A3 as his superior, who this time was with A4, to tell them about the presence of the firearm. He told the court that A3 and A4 requested that they be given a moment to hold some discussion. After holding the discussion A4 reverted to him and summoned him to where A3 was. It is at this point that, according to PW9, A3 gave him an order in the manner he says he could not refuse, to go and fire the deceased's firearm and bring back the shell so that it could be planted on the scene of crime to

create an impression that there was an exchange of fire between the deceased and the accused (A1 and A2).

[42] He said he went and fired the gun at the far-removed area of town (railway station) and brought back the shell to A3 to plant at the scene. He said A3 instructed him to keep the firearm overnight for handover the next day which he says he did. PW9 said when the instruction was issued A4 was present. There is no other evidence against A3 and A4 except PW9's testimony. PW9 being an accessory after the fact, his testimony should be approached with the same caution as that of an accomplice witness. There is no other evidence implicating the two accused (A3 and A4) apart from PW9's evidence. PW9 says A3 gave him an order to go and fire the firearm in a manner he could not refuse. When dealing with evidence of accomplice witness/accessory after the fact it is not necessary that their evidence will be wholly consistent and wholly reliable or even truthful:

> *"The ultimate test is whether, after due consideration of the accomplice's evidence with the caution which the law enjoins, the court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one."* ***S v Francis 1991 (1) SACR 198 (A) at 205 E – G***

[43] Sergeant Tamako's assertion that when he went and fired the deceased's firearm in order to stage an exchange of fire, it was on the stern orders of Phatela (A3). However, whether in chief or under cross- examination Pw9 could not explain the manner the order was issued to him to suggest that he had no other option but to oblige. He said he went and fired the gun at the far-removed area of town and brought back the shell to A3 to plant at the scene. He said A3 instructed him to keep the firearm overnight for hand over the next day. I have already discharged A3 and A4 on the basis

that there is no evidence implicating them other the uncorroborated evidence of pw9.

[44] At the scene that night was a senior police officer responsible for Maseru Urban, Senior Sup. Letsie, but Tamako did not bother reporting to him that Phatela had given him unlawful orders under duress to cover up the commission of crime. He instead went and fired the firearm and brought back the shell. I find it improbable that Tamako would go that extra mile without reporting this illegality to his superior present on the scene, only to return and give the shell to Phatela for planting at the scene. To me that was the easiest thing for Tamako to do as it meant only dropping it where he wanted. My view is that Tamako planted the shell himself. It is improbable that he was given the orders as alleged and that it was Phatela who planted the shell at the scene. I am not saying that PW9's testimony is wholly untruthful, but on this aspect, it is my considered view, in the absence of corroboration and the improbability alluded to in the preceding discussion, that PW9 was ordered by Accused 3 to go and fire the deceased's firearm and to bring back the shell. That the discussion ever occurred is unconvincing to me. I now turn to show that indeed it is true that the shell was planted on the scene.

[46] It is an uncontroverted evidence of PW5 (Sergeant Ralitau) that when he first arrived late in the afternoon to make personal observation of the suspicious vehicle which was parked next to COMPOL's place, his observation was that it was parked about three (3) paces from COMPOL's gate. It is further an uncontroverted evidence of PW6 P/C Lethaha, who is the lead investigator in this matter, that when he arrived at the scene the deceased had already been taken to the hospital and ultimately to the mortuary. Lethaha observed a pool of blood on the road, and a maroon

Mercedez Benz. Next to the pool of blood, about a pace away, there was a 9mm shell and on the shoulder of the same road four AK47 shells were recovered. From the pool of blood to where the vehicle was, it was sixty (60) paces. The distance from the pool of blood to COMPOL's gate was twenty-five (25) paces.

[47] What sticks out like a sore thumb from the testimony of Lethaha is the presence of the 9mm shell at the place where the deceased had fallen. How did this shell get to be twenty-five paces from COMPOL's gate where the deceased allegedly fired the shot, and none was found where the deceased allegedly fired the shot? This in my view is consistent with Tamako's version that the shell was planted at the scene, although he seemed desperately to want to connect Phatela with the planting, he is the one who actually planted it, as already said. It is evidence of both accused that as the deceased's vehicle moved forward, they fired shots at it until the deceased fell off it while it moved forward until it stopped on the shoulder of the road about sixty paces away. If it common cause that the deceased fell off a moving car, it is difficult to fathom how the deceased could have fired a shot in that moment. The presence of the shell next to the pool of blood can only be explained on the basis of Tamako's version; that shell was planted. Despite shortcomings of Tamako's evidence I am convinced that he has told the truth regarding how the deceased was killed and the presence of a 9mm shell on the scene of crime.

[48] **<u>ACCUSED'S EXPLANATION</u>**

Both accused persons' explanation for the shooting of the deceased is based on self-defence. The accused's version is that when the deceased returned and had pressed his car immobiliser, they took turns to shout at him not to temper with the vehicle, but the deceased went on until he

opened its door. He started the car's engine while standing between it and the open door. According to 'Musi (A2), the deceased stood for "few minutes" and he ('Musi) "approached him with the understanding that he heard what we said…" A2 said the deceased angrily replied that his vehicle "is not under arrest." Given that A2 could see the deceased as he said his position was illuminated by the light on the door, the court was not told how the deceased suddenly pulled out his gun. Both accused seemed to suggest that out of the blue the deceased fired. It is not the evidence of the accused persons that the deceased untucked his firearm from whatever position and aimed it at them. Both accused would have seen this move. In fact, he stood for a few minutes to pay attention to what the officers were saying. It needs to be recalled that A2 would not have attempted to approach the deceased if the latter had acted in the manner which suggested that he was intent on acting in the manner inconsistent with their safety. The car was parked 3 paces from COMPOL's gate where A2 was positioned. When the deceased approached, A2 stepped into the road. He was much closer to the deceased and could have seen if he acted in the manner which might endanger him. It needs to be recalled that both accused were aware that the deceased may possibly be armed, A2 approached him, nonetheless. It is improbable that the deceased faced with armed police officers who were interchangeably barking orders at him would be so foolhardy to fire shots at them. In fact, the intention on the part of the deceased to do so is not consistent with the narration of the facts by the accused persons. The accused's version of the events is so improbable that it should be rejected as false. It is not reasonably possibly true.

[49] The inference I am drawing from the conspectus all the evidence is that the deceased was shot not in self-defence. This inference is consistent with the following proven facts:

(i) (a) The deceased's car was initially parked 3 paces from COMPOL's gate.

(b) The deceased fell off the moving vehicle 25 paces from COMPOL's gate and next to where he fell a 9mm shell was discovered.

(c) No 9mm shell was discovered at the place where he allegedly fired a shot at the accused.

(d) At the time the deceased fell off the moving vehicle he was not shooting, he fell off because the was fatally shot and was heavily bleeding. He was essentially experiencing initial stages of shock. And this consistent with uncontroverted evidence of Tlebere who together with Ratalana arrived at scene a few minutes after the shooting. They found the accused with the deceased, and one of them was talking to him asking him to wake up. The deceased's head was swaying from side to side, while lying supine, upon being shaken by one of the accused.

(e) Tamako went to the railway station to fire the deceased's firearm and planted the shell on the scene.

(ii) The next question to be answered is whether the above proven facts are such that they exclude the inference of self-defence save the one which says they shot the deceased in cold blood. In my view this factual

scenario excludes the inference that the deceased fired at the accused persons. The presence of a 9mm shell on the scene was planted to give an impression of exchange of fire. Tamako's testimony that when he enquired from the accused as to what led to the shooting, the latter told him that the deceased ignored them when they shouted orders at him, started his engine and drove off, and as a result of which they fired shots at him, is actually the true version of what actually transpired on that fateful night. The deceased was shot as he was about to fully enter his vehicle. This is confirmed by the entry and trajectory of the bullet when it entered the driver's door and the deceased's right thigh. The fatal bullet entry hole was slightly below the door handle and even lower when it exited the door for entry into the deceased's right thigh. It is abundantly clear that the deceased was shot when he was about to fully enter the vehicle and had pulled the door towards him. The reconstruction figures.46 and 48 in the Vehicle Examination Album submitted by Dr. Naidoo shows that when a driver is seated, the bullet misses the driver's thighs by some margin. He could not have been shot while standing and the door open as the trajectory of the bullet would have been different. Given this scenario, it is clear that the deceased in a panic, upon realising that he was under fire, nonetheless fully entered his car and drove off as at the time the engine was already running, *alas*, it was too late for him as he was bleeding profusely and shock already in overdrive, hence he fell off. This version is supported even by the accused's version that when the deceased emerged, each one of them took turns to warn him not to temper with the vehicle but he proceeded to it, opened the driver's door and started the engine while standing between the door and the vehicle. We now know even from the accused themselves that there was no legal basis for wanting to restrict the deceased access to his car. The presence of the gun holster and the social

media fear-stoking misinformation may have contributed to this fictitiously heightened sense of vulnerability, and hence their acting in this fashion. I, however, do not think that the deceased's death was premeditated.

[50] Having dealt with the merits and demerits of the versions of both the crown and the accused persons together with the probabilities and improbabilities of each version, I am of the view that I am justified in concluding as follows:

a) Both accused persons are guilty of murder.
b) Both accused persons are guilty as charged of malicious damage to property.

My Assessors agree.

_____

MOKHESI J

FOR THE CROWN: ADV. N. Nku

FOR THE ACCUSED 1 and 2: ADV. L. Ramakhula

JUDGMENT ON SENTENCE

[51] On the 10th December 2020 I delivered a verdict on the accused's guilt, but after I had done so, and after I had stepped down from the bench, realised that erroneously, an unedited order which should not have made any pronouncement on the extenuating circumstances was read. On the 15th

*December 2020 I made this fact known to both counsel and acc*ordingly amended the order removing the pronouncement on the extenuating circumstances. It is a general rule of our law that once the court has delivered its verdict it is ordinarily *functus officio.*

[52] This rule is, however, not absolute as it subject to four common law exceptions as stated in the case of ***Firestone South Africa (PTY) Ltd. v Gentiruco AG 1977 (4) SA 298 (A)*** where **Trollip JA** said, at 306 F – 307G:

> *"the general principle now well established in our law; is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased…*
>
> *There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement in it one or more of the following cases:*
>
> *(i) the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant ….*
>
> *(ii) the court may clarify its judgment or order, if, of a proper interpretation, the meaning thereof remains obscure ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance of the judgment or order….*
>
> *(iii) the court may correct a clerical arithmetical other error in its judgment or order so as to give effect to its true intention… this exception is confined to the mere correctio of an error in expressing the judgment or order, it does not extend to altering its intended sense or substance ….*
>
> *(iv) where counsel has argued the merits and not the costs of a case ….but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order."*

(See also: ***S v Wells 1990 (1) SA 816 at 820 C – G).***

Rule 45 (1) (b) of the High Court Rules 1980 is a re-statement of exception (iii) above, and it provides that:

> *"**45(1)** The court may, in addition to any other powers it may have mero motu or upon application of any party affected rescind or vary –*
>
> *(a) ....*
> *(b) an order or judgment in which there is an ambiguity or **a patent error** or omission, but only to the extent of such ambiguity, error or omission;*
> *(c) ....." (*emphasis added)

A parent error envisaged in **Rule 45 (1) (b)** is one "as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it" **(*Seatle v Protea Assurance Co. Ltd 1984 (2) 537 SA (CPD) at 541 (B – C).***

[53] In the judgment I had made a conclusion that the deceased's murder was not pre-planned hence the result that they were guilty of murder *dolus eventualis.* I had not made a reasoned finding on the extenuating circumstances as is required and had planned to give the defence counsel an opportunity to address the court on the extenuating factors although the accused is not duty-bound to so. The finding that the deceased's murder was not planned, which together with other factors in our law, does constitute an extenuating factor clearly could not have justified an inexplicable finding that the accused were guilty of murder *dolus – eventualis* without extenuating circumstances. This was clearly a patent error not reflective of my intention in this regard. I therefore made it known that I corrected the order to say "the accused are guilty of murder" without any pronouncement on extenuating circumstances. On the 15th December 2020, I gave defence counsel Adv. Ramakhula an opportunity to address me regarding extenuating

circumstances, though as I said earlier, an accused is not duty-bound to do so, but as a matter of common practice in this jurisdiction, which practice I have religiously followed when presiding over cases of this nature.

EXTENUATING CIRCUMSTANCES

[54] Extenuating factors are facts which reduce moral blameworthiness of the accused, separate from his legal culpability on the charge. It is trite that the accused does not have the onus placed on him to place facts reducing his moral blameworthiness nor does the prosecution have to negative their existence. It is rather a duty cast on the court, dispassionately, to examine the facts of the case and uncover circumstances which are capable of reducing the accused's moral blameworthiness. In the famous decision of ***S v Letšolo 1970 (3) SA 476 (A)*** the court enjoined the courts in determining the existence of extenuating factors to consider:

> *"(a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);*
>
> *(b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;*
>
> *(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.*
>
> *In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."*

[55] The decision was followed in ***Letuka v R LAC (1995 – 1999) 405*** **at 417.** In ***Letuka*** (ibid) the court listed some of the factors (which list is not exhaustive) which may be considered extenuating taken together with others. Those are : youthfulness, liquor consumption, emotional conflict, the nature of the motive, provocation, sub-normal intelligence, general

background to the case, impulsiveness, a lesser contribution in the commission of murder, absence of a direct intention to kill, belief in witchcraft, absence of premeditation, accused's rage.

[56] The deceased had visited a female colleague and had parked his vehicle next to COMPOL's gate and below the driver's seat was a gun holster. This fact might have aroused the accused's sense of alertness and a feeling of insecurity, and when the deceased returned later in the night at around 21hrs30, their approach to the deceased even though unjustified as there was no need for it, was of persons who were nervous knowing fully well that the deceased might be armed. When the deceased ignored their orders not to approach his vehicle and started its engine nonetheless, they were reckless in firing at him. They continued firing at him in reckless disregard that they might kill him. They reconciled themselves with this eventuality and continued firing at him until he fell off his car. They were thus guilty of murder *dolus eventualis*. Depending on the circumstances of each case, a finding that an accused person acted with *dolus eventualis* can reduce moral blameworthiness, taken together with other factors. Given that the accused were trained at utilization of firearms they should not have acted so impulsively and unreasonably. The deceased was driving away and not endangering their lives in anyway. In my view the fact that the accused acted impulsively though recklessly, in circumstances where they should not have done so, taken together with the fact that they were on a heightened state of alert as they were on guard at COMPOL's place and were aware that the deceased was possibly armed, cumulatively, these factors probably had an effect on the accused's state of mind to a larger degree and so serves to reduce their moral blameworthiness, quite apart from their legal blameworthiness.

[57] **MITIGATION AND SENTENCE**

Sentencing is pre-eminently a matter which falls within the court's discretion, which discretion should be exercised judicially upon consideration of all factors. In ***Chabeli v R LAC (2007 – 2008) 213 at 218*** **para 15** it was said that the law views crime of murder in such a serious light that a substantial custodial sentence should be imposed once the accused is adjudged to have committed it. But the seriousness of crime is not the only factor to be considered in determining the appropriate sentence: other factors such as the interests of the society in wanting to see persons found guilty of murder duly punished, and the interests of the accused play a very vital role in determining the appropriate sentence to be meted out. It is a balancing act which should at all costs which should be exercised. Placing too much emphasis on one factor over others should be avoided. In mitigation of sentence, Adv. Ramakhula submitted on behalf of A1 that he is married with three children who are entirely dependent on him for survival. That, A1 is sorry for having shot the deceased and that the level of his remorsefulness was on display as he broke down when giving evidence. He said on the 30th August 2014 A1 was attacked by soldiers while on patrol in the Naleli area while on patrol at the late Maaparankoe Mahao's place and that, that case is still pending. He said A1 was never given counselling for that attack and that since then he has been on a heightened alert while on guard fearing that something similar might happen to him again. He submitted that as a sign that A1 was remorseful for what he did he has been attending remands and trial religiously until his conviction, and that they helped load the deceased onto the vehicle for transportation to hospital after shooting him.

[58] In mitigation for A2, Adv. Ramakhula submitted that he is married with two children and has parents who are entirely dependent on him for

survival. He submitted that A2 is remorseful for what he did and to show this he attended remands and trial without fail.

[59] **REMORSEFULNESS**

It was submitted on behalf of the A1 that as a sign of remorse he attended remands and trial religiously while out on bail and that he helped load the deceased onto the vehicle for transportation to hospital. I do not consider this last item as a sign of remorse because under cross-examination, Sergeant Ralitau told the court that he ordered the two accused and other officers to help him load the deceased onto the van. It needs to be appreciated what is meant my remorse. In ***S v Seegers 1970 (2) SA 506 (A)*** Rumpff JA at 511 G – H said the following about remorse being a mitigating factor:

> *"Remorse, as an indication that the office will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere, and the accused must take the court into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined."*

Also in ***S v Matyityi [2010] ZASCA 127 (30 September 2010)*** Ponnan JA at para. 13 said:

> *".... Contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look ..."*

[60] In the present matter I consider that both accused showed remorse by not absconding while on bail and were religious in attending their trial to the end. A1 even broke down in court while recounting the events of the fateful day. I do consider that they showed remorse for what they did.

Both accused are family men with dependants, although this aspect does not count for much in mitigation. I am satisfied that the accused have shown an indication that they will not re-offend in future. Both accused are first offenders and so I consider that there is a possibility of rehabilitation.

[61] As already said, murder is a serious offence which must be dealt with as such. Consequently, the court's sentence must send a message of disapproval to the accused and the would-be offenders that the society places high a premium on the sanctity of life that whoever wantonly takes it away must meet full might of the law. This is especially more pronounced where, as in this case, the accused are police officers who are trained in the use of firearms and self-restrain. A police officer must not act impulsively and irrationally like the accused did in this case, where there was no need at all to have shot at the deceased. I have already found that the deceased posed no threat to the accused. The deceased was merely killed for ignoring unlawful orders of the accused not to access his car. The seriousness with which the courts should deal with murder case when it concerns law-enforcement officers was highlighted in the case of ***Phaloane v R LAC (1980 – 1984) 72 at 88C*** **where Maisels P said:**

> **"***The court is concerned in the present case with the Head of Criminal Investigation Department who in the presence of a large number of subordinates presence of a large number of subordinates and of laymen has been found guilty of conduct which shows an utter contempt for the law and for his duties as a police officer. He murdered a defenceless man, albeit one bad character, who was in custody. As was stated by Roper P in giving the judgment of this Court of Appeal in Samuel Motlomelo v R 1967-70 LLR 70 at 80, his action is calculated to shake the confidence of the public in the police as their protectors under the law and, on grounds of public policy, it is necessary that*

conduct by a member of the police force such as that of the appellant shall not be treated lightly…."

[62] The circumstances of this case are disturbing and disheartening. The offence was committed by law enforcement officers in circumstances, which quite frankly were unwarranted. The deceased had parked his vehicle next to their duty station without blocking entrance thereto. It was only the accused's unwarranted sense of nervousness and a feeling of insecurity that led to their callous acts. It was unwarranted because they were fully armed and could have easily defended themselves against an attack, but they allowed themselves to act amateurishly. The deceased was not a threat to them. The deceased's only crime was his ignoring the accused's unlawful orders for him not to access his car. They were helped in the process by one of their colleagues in creating an aura of exchange of fire between themselves and the deceased. It is possible that they were not aware of this chicanery on the part of Tamako, but be that as it may, their feeble attempts at creating an impression that they acted in self-defence is not borne out by evidence. The impact this callous murder must have had and continue to have on the deceased's young family is immeasurable. It is not an insignificant thing to lose one's parent at this young age and in circumstances such as of this case. A deep emotional scar this murder should have had on the deceased's wife and children and his immediate family is bound to last for a considerable time.

[63] In the result, the appropriate sentence which takes care of both charges in my considered view is the following:

a) Moeketsi Dlamini is sentenced to imprisonment for a period of twenty years without an option of a fine.

b) Monaheng `Musi is sentenced to imprisonment for a period of twenty years without an option of a fine.

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MOKHESI J

FOR THE CROWN: **ADV. N. Nku**

FOR THE ACCUSED 1 and 2: ADV. L. Ramakhula