IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE LOCAL DIVISION, PARYS (CIRCUIT COURT)

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 72/2016

In the matter between:

THE STATE Plaintiff

and

GERT VAN DER WESTHUIZEN Accused 1

ANTON LOGGENBERG Accused 2

HENDRIK JACOBUS PRINSLOO Accused 3

CORNELIUS ANDRIES LOGGENBERG Accused 4

LODEWIKUS VAN DER WESTHUIZEN Accused 5

GERT JOHANNES VAN VUUREN Accused 6

CORAM: VAN ZYL, J

HEARD ON: 18 SEPTEMBER 2023; 5 DECEMBER 2023; 9 JANUARY 2024

DELIVERED ON: 15 JANUARY 2024

[1] This is an inquiry in terms of section 204 of the Criminal Procedure Act, 51 of 1977 ("the Act"), to determine whether the State witnesses who were called as witnesses on behalf of the prosecution should be discharged from prosecution in terms of section 204(2) of the Act.

[2] The relevant parts of Section 204 of the Act determine as follows:

"**204. Incriminating evidence by witness for prosecution.**

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

(*a*) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) t**hat if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution** with regard to the offence so specified and with regard to

any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(*b*) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) **If a witness** referred to in subsection (1), **in the opinion of the court, answers frankly and honestly all questions put to him**—

(*a*) **such witness shall**, subject to the provisions of subsection (3), **be discharged from prosecution** for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(*b*) **the court shall cause such discharge to be entered on the record of the proceedings in question**.

(3) …" [My emphasis]

Background:

[3] In the trial all six accused were charged on two counts of murder, in which Tumelo Simon Jubeba is the deceased in count 1 and Samuel Tjixa is the deceased in count 2. Accused 1 and 5 were

also charged on one count of defeating the course of justice, which was count 3.

[4] All six the accused pleaded not guilty on all the relevant counts. They tendered no plea explanations and placed all the elements of the respective charges in dispute.

[5] Many witnesses were called by the prosecution as state witnesses. Amongst these witnesses were six witnesses who were called in terms of section 204 of the Act, namely Gawie Coetzer ("Gawie"), Fanie Oosthuizen ("Fanie"), Wikus van der Westhuizen ("Wikus"), Müller van der Westhuizen ("Müller"), Wian van der Westhuizen ("Wian") and Johan Oosthuizen ("Johan"). I will jointly refer to them as "the 204-witnesses".

[6] At the end of a long and demanding trial I concluded and ordered as follows at paragraph [1043] of my judgment on the merits:

"[1043] I consequently find and order as follows:

ACCUSED 1:

Count 1: Guilty of assault with the intent to do grievous bodily harm.

Count 2: Guilty of assault (common).

Count 3: Not guilty and acquitted.

ACCUSED 2:

Count 1: Guilty of assault (common).

Count 2: Guilty of assault with the intent to do grievous bodily harm.

ACCUSED 3:

Count 1: Not guilty and acquitted.

Count 2: Not guilty and acquitted.

ACCUSED 4:

Count 1: Not guilty and acquitted.

Count 2: Guilty of assault with the intent to do grievous bodily harm.

ACCUSED 5:

Count 1: Guilty of assault with the intent to do grievous bodily harm.

Count 2: Guilty of assault with the intent to do grievous bodily harm.

Count 3: Guilty.

ACCUSED 6:

Count 1: Guilty of assault with the intent to do grievous bodily harm.

Count 2: Not guilty and acquitted.

[7] After judgment on the merits of the trial, both the prosecution and the defence requested that the inquiry in terms of section 204 of the Act stands over until the conclusion of the trial. The trial concluded on a Friday afternoon, later than normal court hours, which Friday was also the last day for which the trial had been set down. Subsequent thereto the State filed an application for the

reservation of questions of law and also an application for leave to appeal against the respective sentences. I dismissed both the applications. It was only after the dismissal of the aforesaid applications that a date was arranged for this inquiry. Five of the six 204-witnesses, excluding Gawie, were subpoenaed to appear in court at Parys on 18 September 2023. Due to an oversight Gawie was not subpoenaed to appear in court on the said date. The accused, excluding accused 3, who had been acquitted, also appeared in court. An attorney, Mr Ellis (Jnr), appeared on behalf of all five the section 204-witnesses who were present, which was in accordance with their right to legal representation as determined in the judgment of **S v Kuyler** 2016 (2) SACR 563 (FB). Mr Mthethwa, who formed part of the prosecution team during the trial, appeared on behalf of the State. Mr Reyneke, who appeared on behalf of accused 4 and 5 (and the acquitted accused 3) during the later stages of the trial, appeared on behalf of accused 4 and 5. He also stood in as legal representative on behalf of accused 1 and 6 in the stead of their respective legal representatives. Accused 2 appeared in person. Mr Ellis (Jnr) indicated that he is not ready to start with the inquiry since he was not in possession of the trial record, the relevant exhibits, the judgment on merits and the judgment on sentence. Arrangements were made that Mr Reyneke would assist Mr Ellis (Jnr) to obtain same. The parties were consequently in agreement that the inquiry had to be postponed in order to grant Mr Ellis (Jnr) the opportunity to properly prepare for the inquiry and also for Gawie to be present. The first available date to which the inquiry could be postponed was 5 December 2023. Arrangements were also made that Gawie would in the meantime

be subpoenaed for 5 December 2023 and that he would also be informed of his right to legal representation by the other 204-witnesses. Mr Reyneke indicated that accused 1, 5 and 6 would be filing notices to abide by the decision of the court in the proposed inquiry and he requested that they be excused from further attendance, which request I granted. The inquiry was consequently postponed to 5 December 2023.

[8] On 5 December 2023 all six the 204-witnesses were present. Mr Ellis (Snr), the father of Mr Ellis (Jnr), appeared on behalf of five of the six 204-witnesses (excluding Gawie). I advised Gawie of his right to legal representation, but he indicated that he will be representing himself. Mr Mthethwa again appeared on behalf of the State and Mr Reyneke again appeared on behalf of accused 4. Accused 2, after I also advised him of his right to legal representation, indicated that he will be representing himself. Before the inquiry could commence, Mr Ellis (Snr) confirmed that he has in the meantime received the trial record and the other relevant documents from Mr Ellis (Jnr), who received them from Mr Reyneke. He further confirmed that he had perused the said record and documents, but indicated that although he was properly prepared and ready to continue with the inquiry, he deems it appropriate and in fact considers himself obliged to withdraw as legal representative on behalf of the relevant five 204-witnesses. He based his submission on the fact that he represented the 204-witnesses during the relevant bail proceedings and also during the process which led to them becoming 204-witnesses. In light of some of the evidence which was presented during the trial in relation to the aforesaid

processes and certain findings I made in respect thereof, he submitted that he is compelled to withdraw from the inquiry due to ethical reasons and requested that I excuse him from further attendance. In the circumstances Mr Reyneke, correctly so, understood the predicament in which Mr Ellis (Snr) found himself and did not object to the request that Mr Ellis (Snr) be excused from further attendance. This necessitated that the inquiry again had to be postponed in order to grant the relevant five 204-witnesses the opportunity to obtain new legal representation. The inquiry was subsequently postponed to the first available date, being 9 January 2024.

[9] On the last-mentioned date Mr Le Grange, an attorney, appeared on behalf of the said five 204-witnesses. Gawie again represented himself. Mrs Mkhobela stood in for Mr Mthethwa on behalf of the State, which request was made earlier after Mr Ryneke did not object thereto and I conceded to the arrangement. Accused 2 represented himself. Mr Reyneke appeared on behalf of accused 4. However, for the sake of completeness, I have to indicate that arrangements were made with me, by agreement between the parties, prior to 9 January 2024 to excuse accused 4 from being present at the inquiry, since he was to attend the funeral of his present employer and his employer's wife after they succumbed due to a light aircraft accident. I conceded to the request.

[10] Both Mr Le Grange and Mr Reyneke filed detailed and properly researched heads of argument, for which I extend my appreciation.

***In limine*:**

[11] Mr Le Grange raised a point *in limine*, both in his heads of argument and during oral argument, to the effect that the accused has no *locus standi* in the section 204-inquiry. He submitted that the view of the accused is irrelevant to the said proceedings. Gawie supported the stance of Mr Le Grange. Accused 2 and Mr Reyneke opposed the point *in limine*. Mrs Mkhobela indicated that the State leaves the issue in the hands of the court. After having entertained arguments on the said point *in limine,* I dismissed it without having advanced reasons for my decision at the time. I consequently herewith provide the reasons for my ruling.

[12] Mr Le Grange, *inter alia*, submitted that it would be unfair to the 204-witnesses should the accused also be granted the right to address the court on the issue of the discharge of the said witnesses. In this regard he submitted that an accused and/or his/her legal representative has the advantage of being present during the entire trial and therefore enjoys the opportunity to listen to all the evidence and can therefore base his/her submissions regarding the issue of indemnity, on the totality of the evidence. Contrary thereto, a 204-witness is not entitled to be present during the evidence of the other witnesses which is presented before the 204-witness himself/herself testifies. This causes a

204-witness to be disadvantaged *vis-à-vis* the position of an accused.

[13] I cannot agree with the aforesaid submission. Dealing with this particular matter one has to be mindful of the fact that there is a transcribed record of the totality of the trial, which record was made available to the legal representative of the 204-witnesses. The judgments on the merits and on the sentence were also provided to the said legal representative. Mr Le Grange and Gawie therefore had the opportunity to properly consider all the evidence, similarly to the opportunity which the accused had during the trial. There is consequently no unfairness towards the 204-witnesses by providing the accused an opportunity to also address the issue whether the 204-witnesses should be discharged from prosecution, or not.

[14] Mr Le Grange furthermore relied on the following dicta at paragraph [50] of the **Kuyler**-judgment:

> [50] The court may never allow the absurdity, that a witness be given the opportunity, in the main case, to have *locus standi*, to address its own credibility. The State is *dominus litis* at this stage: the *lis* is between the State and the accused. It is not between the witness and the accused or the witness and the State." [My emphasis]

[15] In my view Mr Le Grange`s reliance on the aforesaid paragraph is misplaced. Firstly, the said paragraph deals with the principle that the section 204-inquiry should, at the earliest, be held after judgment on the merits of the trial and not during the trial ("*the*

main case"). Secondly, the statement that "*the lis is between the State and the accused*" and that it is not "*between the witness and the accused or the witness and the State*" is again with reference to the position during the trial. In my view it can therefore not be relied upon for purposes of the section 204-inquiry.

[16] Mr Le Grange also relied on the aforesaid paragraph [50] for his argument that it is absurd that the accused be granted an opportunity to address the court, since they then address their own credibility. In my view this argument can also not hold water. Firstly, once again, paragraph [50] deals with the position during the trial. Secondly, if it is considered to be an absurdity for an accused to address the court during a 204-inquiry on the issue of his/her own credibility (the credibility of the accused), it should *mutatis mutandis* be considered an absurdity for a 204-witness to address the court during a section 204-enquiry on his/her own credibility (the credibility of the 204-witness), the last-mentioned which we know is not an absurdity.

[17] Lastly, Mr Le Grange also relied for purposes of his argument on paragraphs [53] (e) and (f) of the **Kuyler**-judgment, where the following principles are stated:

> "(e) The witness must therefore be allowed to advance reasons and/or present evidence to justify his discharge from prosecution.

(f) The State has an interest in the inquiry and *locus standi* for as far as it is the representative of the National Prosecutorial Authority, to advance reasons and adduce evidence." [My emphasis]

[18] In my view the aforesaid paragraphs do not explicitly exclude the *locus standi* of an accused to address the court during a section 204-inquiry. However, insofar as it was the intention of the court to find that an accused has no such *locus standi*, the said judgment is, in my view, with respect, wrong and I therefore do not consider myself to be bound by it in this respect. In a trial there are three participating parties, namely the State, the defence (the accused) and the witnesses. I can see no rational basis for a view that in a subsequent section 204-inquiry, the defence's (the accused's) entitlement to participate in the proceedings comes to an end. The *lis* between an accused, the State and a 204-witness, in my view, persists just as much as it did during the trial. Furthermore, I have never come across a situation in this division of the High Court that when a section 204-inquiry is held immediately after the judgment on the merits or immediately after the judgment on sentence, an accused and/or his/her legal representative is excused before the inquiry is proceeded with. To the contrary, an accused or his/her legal representative is, in my experience, always requested to also address the court on the question of whether the relevant 204-witness is to be discharged from prosecution, or not.

[19] For the aforesaid reasons I made the following order on 8 January 2024:

"1. The point *in limine* is dismissed.

2. Accused 2, who is unrepresented, and counsel for accused 4 are entitled to address the court in the section 204-inquiry."

Ad merits:

[20] The parties are relatively *ad idem* with regard to the principles (excluding the point *in limine* dealt with above) and approach to be followed during a section 204-inquiry.

[21] The 204-witnesses has a right to be heard on the question whether they should be discharged from prosecution for the offences specified and the failure to give such a witness a hearing would amount to a gross irregularity. They are also entitled to legal representation. See **Mahomed v Attorney-General** 1996 (1) SACR 139 (N) at 145 D and 145 H. See also **S v Kuyler** *supra*, at para [36]

[22] A section 204-inquiry is *sui generis* and is analogous to inquiries in terms of section 103 of the Firearms Control Act, 60 of 2000.

[23] The trial against an accused and the section 204-inquiry are two separate and distinct proceedings. The section 204-inquiry is to be held only at the end of the trial, at the earliest after judgment on the merits. **S v Kuyler**, *supra,* at para [52]

[24] In terms of section 204(2) the test to be applied when determining during a section 204-inquiry whether such a witness is to be discharged from prosecution, is whether the witness, "*in the*

opinion of the court, answers frankly and honestly all questions put to him…" The words "*in the opinion of the court*" is indicative of the subjective nature of the investigation. In this regard the following is stated in **Mahomed v Attorney-General (Natal)** [1997] 4 All SA 599 N at 606 - 607:

> "In my view, questions of onus and degree of proof have nothing to do with the inquiry with which the learned Magistrate was concerned. Considerations of onus and degree of proof are pertinent to inquiries where the presiding officer must adopt an objective approach and where a 'higher forum' can interfere with his decision on the basis of its own views. The words 'in the opinion of the court' emphasise the subjective nature of the investigation envisaged in section 204(2). That the presiding officer holds a *bona fide* opinion which is not the result of any gross irregularity in the proceedings culminating in a formation of that opinion, is all that is necessary for the purposes of section 204(2). The circumstance that another presiding officer, or a higher tribunal, might not agree with the opinion has no effect whatsoever on its propriety or acceptability. The situation envisaged in section 204(2) is not one on which the presiding officer is called upon to exercise a discretion as to whether the witness should be granted a discharge from prosecution: If he holds the opinion that the witness has answered all questions frankly and honestly, the presiding officer is obliged to grant a discharge."

[25] Contrary to the aforesaid *dicta* that there are "*no questions of onus and degree of proof*", the court in the **Kuyler**-judgment found at paragraph [40] thereof that a section 204-inquiry is to establish on a balance of probabilities whether the witness answered all questions frankly and honestly. The **Kuyler**-judgment therefore requires a more stringent approach. In my

view paragraphs [43] to [46] in the **Kuyler**-judgment are to be read in conjunction with the aforesaid dicta:

"[43] As stated, the two processes are irrelevant to each other. The indemnity enquiry does not require the witness to convince the presiding officer that the evaluation in the main trial was erroneous, **it is to convince him that his evidence was frank and honest** and on a completely different platform. The test to be applied is different.

[44] In the **indemnity enquiry** the test is for **all questions** to be answered honestly and frankly. **Not just some.** In the **main trial** the evidence of a witness **need not be accepted in totality to carry weight.** 'Frankly and honestly all questions' stands against trite law that, in the decision-making process as to whether or not to accept the evidence of an accomplice who testifies under the auspices of s 204 on the merits in the main trial, it is not expected of the accomplice that his testimony is wholly truthful in all he says. His testimony would suffice if it is to a large extent truthful and sufficient corroboration therefor exists. 14

[45] There is a difference between 'honestly and frankly', and 'trustworthy'. A witness **may answer, subjectively, honestly and frankly, but may make a mistake. If he made a bona fide mistake he might not be refused indemnity**, but his same evidence must be rejected in the main trial if it is material to the issues.

[46] The test for veracity of the evidence in the main trial against the accused is objective against all the evidence adduced. **The test for indemnity is subjective; the witness must testify to the best of his ability in the circumstances that prevailed**. Circumstances such as personal, intellectual and emotional intelligence, fear, perceptions of intimidation, ignorance of the legal system and more may come into play when the indemnity enquiry is held." [My emphasis]

[26] In my consideration of the question whether the 204-witnesses are to be discharged from prosecution, I am acutely aware that the said witnesses are not required to convince me that the evaluation in the main trial was erroneous. However, I deem it necessary to refer to certain findings I made in the judgment on the merits of the case. In this regard I wish to refer to the following paragraphs:

"[750] It will not only be a mammoth but an almost impossible task to evaluate the evidence of each State witness who testified regarding the events at the arrest scene. I have consequently summarised the evidence of the respective witnesses in extreme detail and in such a manner that the quality of the evidence is evident from a mere proper reading of the summarised evidence.

[811] From an initial reading of the evidence it appears at face value to be similar evidence presented by each of the section 204-witnesses. They described, although not exactly the same, similar conduct by the respective accused. However, when one evaluates the evidence properly, it is in my view evident that they contradicted themselves in court. They furthermore contradicted certain essential parts of their respective section 204-witness statements. Also, when their evidence is compared to the affidavits they filed in support of their bail applications, there are huge differences. They also contradicted each other in material respects. All of the aforesaid is evident from the summarised evidence earlier in this judgment, read in conjunction with the additional summary of the "*alleged acts of assault by accused 1, 2, 4, 5 and 6"* and the "*alleged acts of assault by the respective section 204-witnesses and other accomplices*".

[815] During the cross-examination of the section 204-witnesses, some of them were confronted with aspects of their evidence that differ from

the section 150-opening address. For example, in his cross-examination Müller confirmed that he never saw accused 5 hitting one of the suspects on his head with the monkey wrench, but only that accused 5 hit next to the suspect`s head with it. Contrary thereto, it was stated at p.9, paragraph 21, of exhibit "C" that Müller would testify that he saw accused 5 hitting one of the suspects on the head with the monkey wrench.

[816] In my view and as also submitted by the defence, there appears to be a golden thread that runs through the evidence to the effect that the section 204-witnesses attempt to downplay the nature and seriousness of their own assaults, whilst exaggerating the nature and seriousness of the assaults by the accused. This was also very evident from the evidence of the section 204-witnesses whose voice notes were played in court. Their conduct which they described in their respective voice notes were very different from what they described in their own evidence in court. Once again they downplayed the contents of their respective voice notes by alleging that they boasted about their conduct, but that it was not a true version of the events. However, the evidence of some of the section 204-witnesses actually corresponds to a great extent with conduct described in the voice notes. For example, Müller himself, Wikus and Wian testified that Müller picked up the one suspect to waist height and then either dropped him to the ground or forcefully pushed him down on the ground (they differ as to how the suspect got to the ground again), which act is very similar to what Müller, *inter alia*, described in his one voice note when he said "*ek het* ***hom…opgetel en…miershoop neergedoos".***

[820] The background to and the manner in which the section 204-witness statements were "created" in the present case is in vast contrast to the usual manner in which witness statements are taken done by the police. In my view the case law regarding the effect of contradictions to and deviations from "normal" police statements are not directly

applicable to this case. In this case much more weight is to be attached to contradictions between and deviations from the section 204-witness statements.

[821] In addition to the aforesaid, it is evident from the record that Adv De Bruyn and especially Adv Dreyer on numerous occasions during cross-examination made the statement to the section 204-witnesses that it is evident from their evidence that when questions are restricted to exactly what is contained in their respective statements, they are able to respond to those questions. However, the moment a question goes beyond the parameters of their respective statements, they are unable to respond with a proper and credible answer. The witnesses also very often responded with explanations to the effect that they are in court to tell the truth. In my view this scenario is an alarming second golden thread that runs through the evidence of the section 204-witnesses. I have to agree with the submissions of the defence team that this is strongly indicative of collusion against the accused and of witnesses who were coached regarding the contents of their respective witness statements. (This is not any reflection on the State`s legal team.) Some examples are the following: ...

[822] Considering the cautionary rule applicable to the evidence of accomplices, I am unable to convict accused 1, 2, 4, 5 and 6 based on the evidence of the section 204-witnesses with regard to the alleged acts of assault by the accused on the suspects in the absence of corroboration by independent evidence.

[1006] Based on the findings I have already made with regard to the case of accused 1, I am satisfied that he is to be convicted based on his own admissions which he made during the presentation of his evidence concerning his acts of assault on the suspects.

[1007] With regard to accused 2, 4, 5 and 6 I am satisfied that they are to be convicted based on the formal admissions they made with regard

to their respective acts of assault on the suspects." [My emphasis – not in my original judgment]]

[27] Mr Le Grange submitted that for purposes of the section 204-inquiry, the totality of the evidence should be considered holistically. He submitted that when this is done, it is evident that the evidence of the 204-witnesseses confirms that the accused, excluding accused 3, indeed assaulted the deceased persons, which corresponds with my findings that the accused in fact assaulted one or both of the deceased persons and consequently convicted them on that basis. He therefore submitted that although the evidence of the 204-witnesses was not particularly good, they answered frankly and honestly to an extend which was sufficient for the purpose for which the State called them. I posed it to Mr Le Grange that the accused were not convicted based on the evidence of the 204-witnesses, but based on their own evidence and/or their own admissions and/or their own versions which were put to the 204-witnesses, as is evident, *inter alia,* from paragraphs [822], [1006] and [1007] quoted above from my judgment on the merits. Mr Le Grange thereupon submitted that the section 204-witnesses answered frankly and honestly enough to have compelled the accused to make their respective admissions.

[28] I cannot agree with the aforesaid contentions by Mr Le Grange. As correctly pointed out by Mr Reyneke, the requirement is that all questions put to the 204-witnesses were to be answered not only honestly, but also frankly, which they failed to do.

[29] "*Frank*" is defined, *inter alia*, as "*open, honest and direct*", "*candid*", "*sincere*" and "*forthright*". It is evident that the 204-witnesses, excluding Gawie, blatantly lied with regard to the alleged actions of the accused. They shifted the blame for the serious injuries which the deceased suffered away from themselves to the accused, not only protecting themselves, but also protecting each other. That was the "*golden thread"* which I dealt with and referred to in paragraph [816] quoted above from my judgment on the merits.

[30] There is in my view absolutely no manner in or basis upon which I can form the opinion that the section 204-witnesses answered frankly and honestly all questions put to them. I cannot even form the opinion that they answered most of the questions posed to them frankly and honestly. The differences and contradictions not only in their own evidence, but also between the evidence of the respective 204-witnesses, between their evidence and their statements and between their evidence and the opening statement, cannot be explained on the basis of the "*fallibility of human observation*", as Mr Le Grange submitted with reference to **S v Mthetwa** 1972 (3) SA 766 (AD) at 768 A – C. The said differences and contradictions, in my opinion, can definitely also not be ascribed to mere mistakes in the evidence of the 204-witnesses (excluding the evidence of Gawie).

[31] In my view this matter is similar to the contents of the dicta stated in the 1997 **Mahomed**-judgment at 606:

> "… Indeed, it seems to me that any reasonable judicial officer, faced with the evidence that was before the Magistrate in this case, would have come to the conclusion that the applicant was not being "frank and honest". Apart from the contradiction which the learned Magistrate emphasised when he announced his decision not to grant the discharge, it is perfectly clear from the record that the applicant was consistently underplaying her role in the transaction and there are a number of passages in her evidence … which are inherently incredible. In my view there is nothing whatsoever to support the contention that the learned Magistrate's opinion to the effect that the applicant had not answered all questions frankly and honestly was the result of anything other than a proper application of his mind to the issues with which he was called upon to deal."

[32] When I consider the totality of the evidence of the 204-witnesses subjectively, even without the objective medical evidence, I cannot opine that they answered all questions frankly and honestly. This is my opinion even without applying the more stringent approach of requiring proof on a balance of probabilities.

[33] In my view the 204-witnesses, excluding Gawie, can consequently not be discharged from prosecution on the respective main counts, nor from any offence in respect of which a verdict of guilty would be competent upon a charge relating to the said offences.

[33] With regard to Gawie, there were also contradictions in his evidence, specifically with regard to how, when and by whom his statement(s) were taken. He was also confronted with the sequence of events which differed between his statement and his evidence in court. He also contradicted himself between explaining whether accused 1 kicked the one suspect or whether

he trampled on him. However, as correctly conceded by Mr Reyneke already in his heads of argument, Gawie, at least to a certain extent, took responsibility for the glaring mistakes in his evidence and/or his statement. Although his evidence was definitely not perfect, it, in my opinion, can be categorized as him having been frank and honest with the court and probably gave a version which was the closest to the truth in comparison with the evidence of the other 204-witnesses.

[34] Gawie should consequently be discharged from prosecution.

[35] I consequently make the following order:

1. The witnesses Fanie Oosthuizen, Wikus van der Westhuizen, Müller van der Westhuizen, Wian van der Westhuizen and Johan Oosthuizen, who were called as witnesses in terms of section 204 of the Criminal Procedure Act, 51 of 1977, are not discharged from prosecution in respect of the two offences of murder and the one offence of defeating the ends of justice, as specified in the indictment in the present matter, and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offences so specified.

2. The witness, Gawie Coetzer, who was called as a witness in terms of section 204 of the Criminal Procedure Act, 51 of 1977, is discharged from prosecution in respect of the two offences of murder and the one offence of defeating the ends of justice, as specified in the indictment in the present matter,

and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offences so specified.

_____

C. VAN ZYL, J

On behalf of the section 204-witnesses (excluding Mr Gawie Coetzer):	Mr JJP Le Grange Instructed by: Johan Le Grange Attorneys POTCHEFSTROOM
Mr Gawie Coetzer	In person
On behalf of the State:	Adv L Mkhobela/ Adv S Mthethwa Instructed by: Director of Public Prosecutions BLOEMFONTEIN
On behalf of Accused 1, 5 and 6:	Notices to abide
On behalf of Accused 2:	In person
On behalf of accused 4:	Mr JD Ryneke Instructed by: Legal Aid SA Bloemfontein Local Office Bloemfontein