

REPUBLIC OF SOUTH AFRICA



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

CASE NO: S030/2020

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

24 June and 4 July 2022

In the matter between:

THE STATE

and

MONAHENG TLADI

ACCUSED 1

KHUMALO NTOKOZO

ACCUSED 2

BUTHELEZI KHULULEKANI

ACCUSED 3

BEME XOLANI MOSES

ACCUSED 4

MABANGA KENNETH

ACCUSED 5

TSOTETSI PULE

ACCUSED 6

BUTHELEZI BHEKIZENZO

ACCUSED 7

JUDGMENT

MOLELEKI AJ:

- [1] The seven accused in this case were arraigned for trial before this court on a total of eleven counts: three counts of robbery with aggravating circumstances (counts 1, 5 and 6); two counts of murder (counts 2 and 3); one count of attempted murder (count 4); three counts of Contravention of Section 4 of The Firearms Control Act 60 of 2000, unlawful possession of firearms alternatively Contravention of Section 3 of the same Act; and two counts of Contravention of Section 90 of Act 60 of 2000, unlawful possession of ammunition.

The State alleges that the robberies were committed with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 and that the robbery and the murder counts are read with the provisions of Section 51 of The Criminal Law Amendment Act 105 of 1997

- [2] The accused were legally represented throughout the proceedings by Advocate Ntando (accused 1), Advocate Madyibi (accused 2,5 and 6) and Adv Lekgethwane (accused 3,4 and 7) and later on Advocate Ntando and Mr Makgale took over, all instructed by the Legal Aid South Africa, Johannesburg. Before they pleaded to the charges, the import and implications of the provisions of Sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 as well as competent verdicts were fully explained and they understood.

Plea:

- [3] The accused pleaded not guilty in respect of all the counts and the alternatives. They elected not to make any statements in terms of the provisions of section 115 of The Criminal Procedure Act 51 of 1977, (herein after called "the Act").

Admissions:

- [4] The accused made several admissions which were, with their consent recorded as formal admissions in terms of section 220 of the Act and marked Exhibit "A".

Essentially, all the accused made the usual admissions:

- Regarding the identity of both deceased persons and that they died on 1 June 2019;
- That Gift Mpho Moyo died as a result of multiple perforating gunshot wounds to the chest and body;
- That Engelina Mamotsoso Mosuoie died of a penetrating gunshot wound of the upper back and neck;
- That the deceased received no further injuries until the autopsy was conducted;
- That the post-mortem reports on SAP 378 marked Exhibits "B" and "C" respectively, containing the analysis and findings of Doctor Molefe Isaac Kolodi in respect of both deceased persons are correct; and
- That the photo album as well as the sketch and key plans compiled by Constable Simphiwe Nicephorus Zulu marked Exhibit "D", correctly depicted the crime scene.
- On 11 September 2020 Warrant Officer Tsakani Mofokeng compiled a set of control photo album marked Exhibit "F" the correctness of which is admitted
- The identification parade of 5 March 2020

[5] The accused further admitted that Constable Zulu gathered eight (8) cartridge cases and three (3) projectile from the scene, marked them accordingly, packed and sealed them in separate forensic bags and stored them until 12 July 2019 when they were forwarded to the Ballistic Section of The Forensic Science Laboratory by Warrant Officer Jacobus Johannes Theunissen. The video footage chain in that the video recording system at Spar supermarket was operative on 1 June 2019 and that it recorded accurately from 16h09 to 16h55 and from 16h23:38 to 16h23:58; that the respective video recordings were transferred to two separate USB (San Disk Cruzer Blade) also known as Memory Sticks by an employee of Spar Group, Isaac Kwadwo Ampomah and Anna Durant an employee of Veggieland Shopping Complex without changing, manipulating or deleting any data. The USB were kept under lock and key at all material times and were sent to the Forensic Science Laboratory for analysis. On 30 September 2019 Warrant Officer Zamagatsheni Ayanda Kutumela analysed the USB and recorded her findings on Exhibit "E", the correctness of which is accepted accused 1.

The thrust of the State's case is as follows:

[6] On the afternoon of Saturday 1 June 2019, Spar Supermarket at Veggieland shopping complex in Rondebult, Germiston was entered by several robbers, some of whom were armed with loaded firearms. Inside the supermarket there were customers some of whom were ordering cooked food and cashiers were manning the tills and assisting customers who were paying for their groceries. A barrage of shots were fired and two customers, Mr Gift Mpho Moyo and Ms Engeline Mamotsoso Mosuoie sustained fatal gunshot wounds. The robbers took cash amounting to R18 161.87, Vodacom airtime vouchers to the value of R4 000 as well as cigarettes, the value of which is between R20 000 and R30 000.

Immediately thereafter, the robbers exited the store onto the parking area and gunshots continued to be fired. During the shoot –out, a security guard on duty posted on the main tower in the parking area was shot at.

The robbers proceeded to take a Volkswagen Polo and a Renault Stepway motor vehicles belonging to members of the public where after they fled the scene.

[7] The State called a total of close to 40 witnesses some of whom testified more than once. The court will refer to some of the witnesses by their first names as it is convenient to do so. The evidence will be summarised in an order different from that in which witnesses testified as it is convenient to do so as well. Employees of Spar Supermarket, Hlumisa Thonga, Nosiphiwo Mlandezwa, Catherine Hanyane Phutinyane, Pretty Nqobile Masondo and Christiaan Johannes Jacobs, gave evidence as summarised above.

[8] Douglas Maleka Mmotla testified that he was employed by SBV (Standard Barclays Volkskas) Security Company as a protection officer. His duties at SBV included protecting cash in transit to ATM' (Automated Teller Machines) and servicing the ATM'.

On 1 June 2019 he was on duty with his friend and colleague of six years, Gift Moyo. They were wearing uniform and he had his bullet proof vest on. He and Gift Moyo were at a Sasol filling station repairing an ATM. Thereafter they drove to a Spar Supermarket to buy food. Inside the shopping complex he, being the driver parked directly to the entrance door of Spar but the vehicle was facing away from the door at a distance of about 7 to 10 meters away. Gift Moyo alighted and went into Spar. Whilst he remained in the vehicle heard three to four gunshots. He looked through the rear view mirror of his motor vehicle. Two men exited from Spar. They were wearing hoodies on their heads and were holding handguns. He did not get an opportunity to look at them so as to be able to identify them. These two men immediately went back in to Spar and more shots were fired inside the store. Two to three people were at the tills removing money. At the parking lot there were two other men holding firearms pacing up and down. He decided to drive off the premises and parked his vehicle outside. He took off the bullet proof vest so that the robbers could not see him as a threat as he walked back into the premises of Spar so as to go and look for his friend and colleague. As he

approached he noticed one of the men that he saw at the parking lot firing shots at a security officer who was inside a security guard tower that was situated at the parking lot of the shopping complex.

[9] Two to three gunshots went off again and this time around people were screaming that the men were stealing cars. He was walking further towards Spar when he was approached by an unknown woman who hugged and informed him that his colleague had been shot. This woman associated him with Gift Moyo who had been shot inside the store because of the uniform. At this point in time police officers were starting to flock in. He was denied entry into Spar by security officers and the management of Spar. Instead he called his Managing Supervisor at SBV, Fanie Maluleka who came to the scene and identified Gift Moyo.

[10] Phillemon Selatole Mampana was at Spar together with his girlfriend of five years, Engelina Mamotsoso Mosuoe to do groceries. He and Engelina were at the food counter ordering food with Gift Moyo standing next to Engelina. He noticed about four men enter the store one of whom, who was wearing a hat and a pair of jeans firing shots. Engelina and Gift Moyo were shot at and they lay of the floor. Then a white man was pushed towards an office inside the store whilst the men demanded the key from him and made him lie on the ground. The man who shot the two deceased made a comment to the effect that he shot at the woman by mistake. However, at that point in time Gift Moyo was still alive but the said man went towards Gift Moyo and fired three more shots at close range. The robbers ran out the store. Police officers and paramedics arrived at the scene. He was denied an opportunity to get close to Engelina by the security guards. The next time he saw Engelina was when he went to the mortuary to identify her.

According to Mampana the incident had an impact on him which he could not describe. He suffered from depression and kept on asking himself as to why Engelina was taken away from him in this manner. They did not have children together but they each had children from previous relationships. Engelina had three children who were aged 23, 18 and 10 years old respectively at the time

of the incident. The older brother had to take over and raise his younger siblings. Mampana maintains a good relationship with the children to this day.

- [11] Sergeant Nicholas Mashele testified that he is attached to the visible policing unit at Elsburg police station. His duties include attending to complaints from members of the public that are received through the police crime reporting call centre (10111). On 1 June 2019 around 17h00 he was on duty with his colleague, Constable Silinda. They had just attended to a complaint at Rondebult Flee Market which is situate behind Rondebult Spar when they received information that there had been a shooting at Rondebult Spar. Just as he drove into the premises he was informed by a member of the public that the robbers, who were travelling in a Quantum vehicle drove towards the direction of Vosloorus. He proceeded to Spar and met with the manager outside of the store and the manager explained as to what transpired and that an undisclosed amount of cash as well as cash vouchers had been stolen during the robbery. Inside the store he was shown the bodies of the deceased. He further noted seven cartridges lying on the floor of the store. In order to secure the cartridges he placed disposable cups over each one of them. He contacted other role players, paramedics, detectives and photographers. The detective on duty was sergeant Khoza and the photographer was Constable Zulu.
- [12] Constable Simphiwe Nicephorus Zulu, a member of the SAPS attached to the Local Criminal Record Centre as a photographer, conducted his photographic investigations of the crime scene on 1 June 2019 at approximately 17h45. He collected three projectiles and eight cartridge cases from the floor of the store. He compiled the photo album as well as the sketch and key plans, marked as Exhibit "D". The exhibits were placed in separate envelopes and then put into a forensic evidence bag and kept under lock and key. At the scene there were two deceased persons, a male and a female who were covered by foils.
- [13] Isaac Kwado Ampomah testified that during 2019 he was employed by the Martin Group of Companies as a Close Circuit Television (CCTV) camera operator. By 2019 he had been with the Martin Group for three years. His

duties included monitoring the CCTV camera system, servicing it on a weekly basis, downloading footages and viewing footages where there was an incident necessitating such. In respect of his qualifications, Isaac stated that after completing grade 12 he studied for two years towards a certificate in CCTV Camera, which qualification he obtained at J and T Electronics in Ghana. The training he received was in respect of both analogue and digital systems. As at 2019 he had 5 years' experience in the field.

[14] He went further to state that the CCTV cameras at Rondebult Spar were installed by a company called Plug and Play and that it was an analogue system. A total of 18 cameras were installed inside and outside the store. All the cameras were then connected to a hard drive (a component that records and stores the content). Once the content is recorded it remains for a period of three months in the system where after it automatically gets deleted. However, in the event there is a need to keep the content long term it would have to be saved in the hard drive. The system was designed to record night and day non-stop. There was also a computer monitor, usually referred to as a computer screen whose purpose was to depict information in pictorial form. In the event there was a fault with any of the cameras, the screen would go blank. In that event, the store manager at Rondebult Spar would contact him to have a look at the system and determine if the problem is one that could be resolved by him personally. If not, then the company that was responsible for the installation of the system, Plug and Play would be contacted in order to attend to the issue.

The testimony by Isaac was that there was no way of tampering with the recordings as the hardware and the monitor were kept in the dark room which was an office with limited access. It was only Himself, Chris and the supervisors who had access to the dark room. Furthermore, he had a password which he was using to access the system.

[15] The last time he serviced the CCTV cameras was on 27 March 2019 after which he went on leave. However, from the period 27 March to 1 June 2019

when the store was robbed, there had been no reports of problems with the system.

The day following the robbery, on 2 June 2019 he went to Rondebult Spar where he viewed the CCTV recordings. He then transferred the recordings on to an 8 gigabyte USB (Universal Serial Bus), the brand name of which was San Disk Cruzer Blade. In the process of transferring the recordings he did not in any way manipulate or delete any data. He then went to the Martin Group head office in Elsburg where he kept the USB under lock and key inside a safe until it was handed over to Warrant Officer Langa of the SAPS on 3 June 2019. Upon receiving the USB Warrant Officer Langa let him place it in a forensic bag and sealed it.

- [16] Lekotse Terris Kola testified that on 1 June 2019 at around 16h30 he, together with his wife and three-year-old daughter drove to Spar supermarket for shopping. He was the driver and he parked in front of the entrance door at Spar, next to a red motor vehicle. As he was about to alight from his motor vehicle to go into the store, the lady in the red motor vehicle he parked next to, alerted him to a robbery that was unfolding inside Spar and warned him not to enter. Kola noticed that motor vehicles were driving out of the shopping complex and he decided to follow suit. As soon as he drove off, he heard gunshots emanating from inside Spar. Whilst approaching the entrance gate of the shopping complex he noticed a man whom he described as dark and short whose one eye had no eyeball (the one eyed man) shooting at a security guard who was inside the security tower. At the gate, he was confronted by another man who stood in front of his motor vehicle at a distance of about 2 meters, pointing a firearm at him through the windscreen of the motor vehicle and instructed him to alight from the vehicle. He sat in the vehicle frozen for two to three minutes, whilst at the same time he stared at this man. Seeing that Kola was not responding, the man walked to the driver's side and knocked on the window with the firearm persisting that Kola should alight from the vehicle. As soon as Kola alighted the man instructed him to throw the car keys to the ground and lie down. He lay in a prone position facing towards the entrance of Spar.

- [17] The one eyed man approached and instructed Kola's wife to alight from the vehicle as well. At this point, their daughter, who was seated at the backseat of the vehicle was screaming. The one eyed man instructed the wife to take the daughter out of the vehicle and for both of them to lie on the ground as well.
- [18] Whilst he lay on the ground, Kola observed other robbers holding firearms moving around inside of Spar. As he looked on, a couple that was travelling in a blue Renault Stepway motor vehicle were made to lie down by other men. The said men got into the Renault and took off at a high speed heading towards the gate. Kola stood from the ground where he was lying very quickly to avoid being collided into by the Renault as it exited through the gate of the complex. Shortly thereafter the one eyed man and the man that pointed a firearm at him jumped into his Volkswagen Polo and followed the Renault.

According to Kola, he had an opportunity to observe the man that stood in front of his vehicle and instructed him out. His description of this man was that this man was taller than Kola himself, was dark in complexion, had a big nose, big ears and was wearing a pair of jeans and a black top. Kola identified this man as accused number 4. He even pointed him out during the identification parade on 25 July 2019.

Kola's motor vehicle was recovered a month after the incident with the help of a vehicle tracking company. However, his tools including his specialised tools which he uses as a motor vehicle technician as well as the diagnostics laptop were never recovered.

- [19] Siphamandla Benjamin Shongwe testified that on 14 June 2019 he had a conversation with his childhood friend, Thembinkosi informing Thembinkosi of his intentions to purchase a motor vehicle. Thembinkosi offered to sell a Volkswagen Polo to Shongwe. Thembinkosi introduced two other men to Shongwe, one of whom was said to be owning a dealership. The purchase price agreed to was R45 000 and arrangements were made for change of

ownership of the said motor vehicle into Shongwe's names. Shongwe was given vehicle registration certificate bearing Shongwe's personal details. Upon receipt of thereof Shongwe was satisfied and he electronically transferred the purchase price into the banking details of one of the men and the vehicle was handed over to him officially. However, on 4 July 2019 he was approached by the police officers who informed him that the vehicle was in fact stolen. It was as a result thereof, taken away from him. According to Shongwe none of the men involved in the sale of the motor vehicle, including Thembinkosi were before court.

- [20] Bongani Petrus Ndzukula and his wife travelled to Vegiland shopping complex with the intention to go to an ATM thereat. He parked his blue Renault Stepway motor vehicle facing towards the entrance of Spar although he was about three parking bays away from the entrance of Spar. He alighted leaving his wife inside the vehicle and soon thereafter he heard the sound of gunshots emanating from inside Spar. People started running from the surroundings of the shopping complex and he ran back to his vehicle. He started his vehicle intending to reverse so as to leave the place. However, due to the number of people that had gathered around the parking area, he was unable to reverse out. Two men approached from the direction of Spar armed with firearms. They split when they reached his vehicle. One of them went to the driver side where he was seated with the vehicle idling. Although he did not pay attention as to where the other man went to when they split, it later became apparent that the other man went to the front passenger side where his wife was seated. He paid attention to the man that approached the driver's side. However, he was not in a position to observe him as he avoided eye contact and the man had in any event covered his face from the nose down to the neck. The man instructed him out of the vehicle and pointed him to go to the back of the vehicle. He found his wife at the back of the vehicle as well and he held her by his hand. However, the man that went to the left side of their vehicle pulled his wife away and he did not know where his wife was taken to. The man that approached the driver's side, instructed him further to sit down and then to lie down behind the vehicle. He then noticed his vehicle take off at a high speed heading towards the entrance gate which was by then closed.

After his vehicle took off he stood up to look towards the direction of the entrance gate. He noticed a Volkswagen Polo stationary at the gate. The gate was opened for his Renault to drive out.

[21] There was a couple and their little child in the Polo. The driver of the Polo was made to alight and so was his wife. The wife went around the vehicle and one of the men handed the baby to her. The two men jumped into the Polo and drove off. Two other men came through the gate. One of the men pointed a firearm at the security tower. As soon as Ndzukula noticed this man holding a firearm he lay on the ground once again. Shots were fired at the security guard who was inside the security tower. When it became silent he stood up and shortly thereafter four men emerged from inside Spar, one carrying a plastic bag, the other holding a firearm. He, for the third time lay on the ground until these four men went past.

[22] It became apparent that the robbers had left as people started talking. He stood up and headed straight to the entrance gate trying to figure out as to where his wife was as he was concerned that the robbers may have taken her with. To his relief, his wife approached from the direction of Spar. Only then did he start making enquiries regarding the availability of a motor vehicle tracking device in the motor vehicle and then making arrangements for the vehicle to be tracked. Police officers ascended to the scene and they took a statement from him. During that process the tracking company called to inform that the vehicle had been traced to a location in Vosloorus.

Inside the motor vehicle when it was robbed from him, were the following items: his wallet containing bank cards, a driver's licence and R500 cash; his wife's handbag containing her purse, a Vodacom Tablet as well as a Vodacom pocket router. Upon recovery of the motor vehicle, the handbag Tablet and router as well as the R500 in cash were never recovered. The vehicle was still in a good condition save that the arm rest was damaged.

[23] Sergeant Alfred Gracian Gama, a member of the SAPS Flying Squad testified that at around 17h15 on 1 June 2019, a message came through police radio

control concerning a hijacked blue Renault motor vehicle that had been located in Vosloorus. With the GPS Co-Ordinates that had been provided, the Renault was located at Delangazi Street, Vosloorus. It was parked with the doors closed but not locked and there were no occupants. On the front passenger side there was a registration plate lying face up on the floor. Upon verification of the said registration plate, it turned out to be the registration of a different motor vehicle, a Ford Laser. The Renault was towed to a police pound in Benoni and fingerprints were uplifted at a later stage.

- [24] Dorothy Motatinyane, the girlfriend of accused number 5 testified that, she was staying with accused 5 at her house in Dalpark, Boksburg. She is the owner of a Ford Tourneo motor vehicle of which accused number 5 was the regular driver. The vehicle was fitted with a motor vehicle tracking device.

On 1 June 2019 accused 5 was in control of and driving the vehicle as usual. He left the house around 8h00 in the morning and returned home between 13h30 and 14h00, had a meal and left once again only to return again around 17h00. Accused 5 left the house yet again only to return in the early hours of the morning of 2 June 2019. The police officers arrived at the house, arrested accused 5 and impounded the motor vehicle.

- [25] Pieter Andries Oosthuizen, an employee at Tracker Connect (PTY) Ltd, a motor vehicle tracking company, testified that he is employed as a Law Enforcement Liaison Officer in the operations department of the said company. His duties are to handle internal and external investigations, insurance claims as well as to assist police officers during their investigations.

During August 2020 he was approached by the investigating officer, Warrant Officer Langa who furnished him with a subpoena issued in terms section 205 of the Criminal Procedure Act requiring a detailed trip log in respect of a Ford Tourneo belonging to Sehopotso Wandile Motatinyane Trust. The trip log required was for the period 1 June 2019 from 8h00 in the morning to 2 June 2019 at 8h00 in the morning.

When a vehicle is fitted with a tracking device, a Global Positions System (GPS) is used to show a pin point position that is accurate for a five-meter radius to give information as to the location of the vehicle. This information is relayed back to a computer server and it is stored therein.

- [26] According to Oosthuizen, the tracking device fitted in this Ford Tourneo is known as a Skytrack System and it captures the location, time, date, speed and odometer reading of the vehicle. This data would then be generated through mapping it System.

When he was required to generate data in respect of this motor vehicle he used his password to access the system, entered the details of the motor vehicle and the period which he wanted the report to cover. Thereafter, a print-out was generated with the relevant information. Oosthuizen stated that this information is generated by merely pushing a button and without any further human intervention.

- [27] Warrant Officer Zamagatsheni Ayanda Kutumela of the Scientific analysis Section of the Forensic Science Laboratory testified that she received a sealed evidence bag containing one SanDisk Cruze Blade 8 GB memory stick. She was requested to compile a photo album, supply a working copy of the captured images for purposes of facial comparison as well as generate working copies of the video footage. She therefore made working copies in the form of DVD and loaded it onto the working station from which she could play the footage. Having viewed the video footage, she developed images, thus compiling a photo album and DVD marked Exhibit E2 and E3 respectively.

According to her evidence, she was not in a position to improve the quality of the video footage due to the camera angles, poor lighting as well as the distance of the cameras from the subject matter. Image enhancement were performed in an attempt to make the original footage look better. However, none of these processes tampered with the original footage. Warrant Officer

Kutumela stated that at all material times the original footage as well as working copies were kept under lock and key.

[28] Photographs of accused 1 were taken at the Johannesburg High Court cells and a set of control photo album was compiled by Warrant Officer Tsakani Mofokeng on 11 September 2020 and it was handed in as Exhibit "F". The said photographs were sealed and kept by Warrant Officer Langa under lock and key until Warrant officer Michelle Modau received them on 1 October 2020. The control photographs were analysed by Warrant Officer Miranda Maromeng Michelle Modau, now Nkwe. She testified that she received two evidence bags, one containing a CD and the other containing control photos. She then compared the facial features and landmarks and these are features unique to a person. To do this, she used images from the CCTV footage and control photos where after she prepared a court chart. Warrant Officer Modau marked out points of similarities and dissimilarities.

[29] The points of similarities were the inner corner of the left eye, prominence of the left cheekbone; front-view, shape and angle of the nasal body; shape of the nasal tip; similar shape of the right nasal opening; similar shape and protrusion of the upper lip; similar thickness and shape of the right ale (alae means(the outer part of the nose/nostril) ; similar shape, depth and length of the nasal root; prominence of the right cheekbone; similar location and indented area on the right side of the face- indented could be a mark, scar or a mole) in this instance on the right there is a mark, which is not a mole.

The points of dissimilarities were the different clothing he was wearing. In the image from the CCTV footage he is wearing a hat but on control photo he is not wearing anything/ no hat. The findings according to the Morphological Assessment was the different facial expression.

[30] The court viewed the video footage with the assistance of the investigating officer, Warrant Officer Isaac Lamola Langa who placed on record the events as they were unfolding from 16h09 to 16h23:58.

The arrest

- [31] The testimony by members of the trio Task Team was to the effect they investigate specific serious crimes such as business robberies, house robberies and vehicle hijackings. The practice at their unit is to meet every morning before they disperse to attend to their daily duties. At these meetings, information will be shared regarding cases that are being investigated by members of their unit, which suspects to look out for and who the investigating officers of such cases are. It is also at these meetings that new cases are allocated. This keeps them informed of all the cases relating to their unit. As detectives of this unit, they assist one another in tracing suspects or for purposes of back-up.
- [32] Warrant Officer Langa testified that he is attached to the Ekurhuleni West Trio task team (Trio Task Team). He is the investigating officer in this matter. Throughout his investigations he would receive information which he would follow up on. In so doing, he would seek the assistance of members of his unit and brief them in respect of the information at hand. During these briefings, he informed his colleagues that the suspects were said to be armed with firearms. From 9 July 2019, which is more than a month after the robbery at Spar, he received information relating thereto and embarked on operations to arrest the suspects. He also involved members of the Police Flying Squad as well as members of Ekurhuleni District Trio Operational Tactical Team. The arrests spanned the period 9 to 12 July 2019. In all the instances, the information was received in the evening and there was no time to apply for warrants of arrest.
- [33] On 9 July 2019 at approximately 20h00 he met with his colleagues at a Sasol filling station at Buhle Park, Elsburg where he briefed them about the names and the addresses of the suspects who were to be arrested. On 9 July three suspects were arrested, that is, accused 1, 2 and 3. One firearm was seized from under a pillow of the bed where accused 2 was sleeping alone and two firearms from accused 3, one under a pillow and the other on his waist.

[34] Arrangements were once again made for another operation from the evening of 11 July to the early hours of 12 July 2019 to arrest outstanding suspects as co-ordinated by Warrant Officer Langa. A substantial number of police officers met at Elsburg Traffic Department and were briefed of the names and addresses of three suspects. Members of the Ekurhuleni Tracing Team (Flying Squad and Tactical team) were asked to avail themselves to help find these addresses and to provide cover. Three addresses were visited. As a result, accused 4 and 5 were arrested and evidence in the form of (a firearm) a motor vehicle belonging to accused 5's girlfriend, a copy of an identification document belonging to accused 6 and registration numbers of his motor vehicle were seized. Accused 6 was not arrested on the said night as he was said to have left shortly before the police officers arrived. He was instead arrested by Sergeant Mhlongo on 3 August 2019, upon Sergeant Mhlongo recognising the vehicle whose registration numbers he took down whilst they went searching for accused 6. Sergeant Mhlongo called for back-up from other police officers, the accused's vehicle was searched and nothing was found. He confirmed that the copy of the identity document that Sergeant Mhlongo produced was his. Upon further questioning, accused 6 informed Sergeant Mhlongo that his paternal uncle, Teboho Tsotetsi had the firearm. Accused 6 was therefore placed under arrest and his rights were explained to him. Accused 7 on the other hand was arrested by Captain Johan Hendrik Ndzinisa on 18 December 2019 at Nguni hostel following information by one of the sources within the hostel that there was a plot to kill accused 7 and that he was involved in a case of Elsburg business robbery which Warrant officer Langa was investigating. Captain Ndzinisa confirmed the latter information with Warrant Officer Langa. He therefore detained accused 7 in respect of the said robbery case and as a way of protecting him from the planned assassination. His rights were explained and he remained in custody until Warrant Officer Langa arrived.

[35] Teboho Tsotetsi was called to testify as a State witness. He is the paternal uncle of accused 6. It became apparent during his testimony that he was deviating from the statement he had previously made to the police to the effect that accused 6 had given the firearm to him for safe-keeping. The

essence of his evidence was whether he received the firearm in question from accused 6. The State asked that the statement be proved and that Tsotetsi be declared a hostile witness. Since Tsotetsi was denying that he made the statement, Sergeant Mhlongo had to be recalled in order to lay the basis to the effect that Tsotetsi did in fact make the statement. The court declared him a hostile witness and he was subjected to cross-examination by the State. The essence of his statement was placed on record by Sergeant Mhlongo who reduced it to writing. In court, Tsotetsi testified that he and accused 6 were arrested by the police officers and that they were severely assaulted by the police officers demanding the firearm. He stated that he informed the police officers that the firearm belonged to his deceased brother. Sergeant Mhlongo on the other hand testified that Tsotetsi was arrested on 3 August 2019 and on 5 August 2019 he appeared before a Magistrate. It was on this day that Tebogo Tsotetsi deposed to the statement in which he indicated that he received the firearm from accused 6. In his evidence, Tebogo Tsotetsi did not mention that he was assaulted on 5 August 2019 whilst attending court during his first appearance, which is the day on which the statement is said to have been deposed to.

- [36] Sergeant Mhlongo testified that having discussed the case docket with the Senior Public Prosecutor, he approached Tsotetsi and asked if he was willing to depose to a statement regarding the firearm. Sergeant Mhlongo indicated that he communicated with Tsotetsi in Sesotho but that the statement was reduced to writing in English. On completing the statement, he gave it to Tsotetsi to read himself and Sergeant Mhlongo also read it back and interpreted it to Tsotetsi who in turn confirmed the correctness of the contents thereof. Both pages of the statement were signed by Tsotetsi and he confirmed in the presence of the commissioner of oaths that he understood the contents and that he appended his signature to the statement. This statement was handed in and marked as Exhibit "O".

The identification parades

[37] Following the arrest of the accused, four separate identification parades were held.

Warrant Officer Vincent Musawenkosi Khumalo attached to the Trio Task Team, with 29 years of service testified that he was requested by Warrant Officer Langa, the investigating officer in this matter to hold identification parades relating to this matter. The first identification parade was conducted on 25 July 2019 and the second on 5 March 2020. In both these parades he was the officer in charge. However, all the arrangements relating to both parades, as to the venue and officers who will assist were made by the investigating officer. The investigating officer had also furnished him with pro-forma forms respectively which were for information as to what he, as the investigating officer had done in preparation for the parades (information document) as well as form SAPS 329 which he would use to record what transpired at the parades. Both these parades were held at Boksburg prison.

The identification of 25 July 2019

[38] He received instructions from the investigating officer on 22 July 2019 to conduct the parade on 25 July 2019. On the morning of the identification parade the investigating officer handed the pro-forma forms to him after their usual meeting at Germiston police station. In the information document the investigating officer had noted that the suspects had been informed of their right to legal representation. Upon his arrival at Boksburg prison where the parade was going to be held, he waited for all those who would be participating in the parade, including the photographer to arrive before they could proceed to the parade room. He was assisted by Sergeant N S Nene who was the photographer, Sergeant Masindi who guarded witnesses in room 1 prior to them identifying the suspects, Sergeant Mbele was responsible to escort the witnesses to and from the parade room as well as Sergeant Khoza who guarded the witnesses in room 3 after they had identified the suspects.

[39] As per the information document completed by Warrant officer Langa the accused's rights to legal representation had been explained and their legal

representative was Mr Khumalo. He also explained the right to legal representation and asked the accused as to the whereabouts of their legal representative. The accused gave permission for the parade to proceed in the absence of their legal representative. He explained the procedures to the accused in IsiZulu, including the purpose of the parade, the right to choose positions they preferred in the line-up as well as the right to change positions whenever they wished and the right to make any reasonable requests. All these rights he explained as per the prescribed SAP 329 form used in identification parades which he completed.

- [40] There were twenty participants who constituted the line-up including the accused. Half of them were not wearing prison pants. However, all of them had prison jackets.

Five witnesses partook in the parade. They were brought into the parade room in reverse, procedures were explained to them; to point out only those they believed to have been present during the commission of the crimes by touching their shoulders and that photographs will be taken. The first witness, Terris Kola identified accused 4, prior to the next witness being called in, accused 4 changed the number placard as well as position. The second witness, Chris Jacobs positively identified accused 5, 1, 4 and 3 respectively but he also had two negative identifications. The third witness, Pretty Masondo positively identified accused 3 and she also had one negative identification. Prior to the fourth witness being called in, accused 1 and 3 changed number placards and position respectively. The witness, Catherine Phutinyane positively identified accused 2, 1 and 4 respectively. The accused changed positions but the fifth witness, Hlumisa Thonga was unable to identify any of the suspects.

- [41] The police officers who assisted Warrant officer Khumalo also testified in respect of the roles they played during the parade. Sergeant Thapelo Prince Masindi guarded the witnesses prior to them going into the parade room. None of the witnesses communicated with each other in his presence. Warrant officer Nqobi Sylvia Nene took the photographs. Sergeant Surprise

Khoza guarded the witnesses after the parade and Sergeant Mbuso Gabriel Mbele escorted the witnesses to and from the identification parade room.

The identification of 11 October 2019

[42] Warrant officer Kenneth Nicholas Laubscher was the officer in charge. He testified that he had not received any information document from Warrant officer Langa regarding the rights explained to accused. He however explained the rights and procedures to accused 6 who was the only suspect at the time. Everything was interpreted by Sergeant Molefe. Sergeant Ngqoleka guarded the witnesses prior the parade, Constable Bilankulu escorted the witnesses, Swhilst Sergeant Nuba guarded the witness after identifying. Photographs were taken by Sergeant Mohlabya. All the police officers who assisted Warrant officer Laubscher testified and explained the procedure followed.

Identification parade of 5 March 2020

[43] On 20 February 2020 Warrant Officer Gilbert Magane had been requested by Warrant Officer Langa to hold an identification parade in which accused 7 was the suspect. However, accused 7 refused that the identification parade should proceed at the advice of his legal representative. Photographs of those who participated in the line-up were taken and the parade was called off. Another parade was set up for 5 March 2020. During this parade, there were eight participants and one suspect, accused 7 who was legally represented. He was assisted by Sergeant S M Mathobisa who took the photographs and compiled a photo album marked Exhibit "J2". It was admitted by accused 7 as depicting what transpired during the parade. It was further admitted that Constable T M Zwane duly guarded the witness prior to the identification. Sergeant Surprise Khoza was assigned to escort witnesses to and from the identification room. Sergeant Khanya guarded the witnesses after they had identified. The procedure as explained above was followed. Chris Jacobs identified accused 7 whilst Hlumisa Thonga was unable to identify anyone.

[44] That concluded the case for the State. At a later stage the State applied to reopen its case to lead the evidence of Mr Zanoxolo Charlie in order to challenge the evidence led by accused 4.

[45] Accused 1 elected not to take the witness stand. Accused 2 to 7 on the other hand testified and accused 4, 6 and 7 called witnesses. Against the overwhelming evidence presented by the State, the accused pleaded a bare denial. The evidence of the accused and that of their witnesses, in respect of those who called witnesses was deliberately created. Their evidence was intended to negate everything the State witnesses placed on record. In particular, they placed blame on the Investigating officer and suggested that he was out to implicate them falsely. In some instances, the accused did not follow through with their respective versions. They demonstrated an ability to tailor their evidence as the trial proceeded. However, this did not help as it ended up in their credibility being questionable. A number of issues of importance were not asserted to the State witnesses whilst they were testifying so that the State witnesses could deal with them. Instead, the said issues came up when the accused were giving evidence. A demonstration in this regard will be dealt with below.

[46] The evidence of the accused is implausible, contradictory and improbable. Witnesses for the State as shall be shown below, testified clearly and logically and were not shown to have been untruthful. Where their evidence differed, the evidence of the State must be accepted and that of the accused be rejected as not being reasonable possibly true.

Witnesses

[47] Although there are discrepancies in the evidence of the State, in particular that of Chris Jacobs, when the evidence is taken together and assessed as a whole, such contradictions are not material and they diminish into insignificance. Chris may have been mistaken as to the sequence of events or may even have forgotten some of the details. This is understandable in the

circumstances, taking into account that two men had placed firearms on both sides of his ribs, he was assaulted with the butt of a firearm and kicked and also because he testified almost two years after the incident. It is trite that the court does not take the evidence in isolation. The conclusion the court comes to, must account for all the evidence.

Discrepancies

[48] These discrepancies by the State witnesses related to whether the deceased were lying in a prone or supine position, whether following the robbery Catherine found Pretty leaning on the table crying. Chris on the hand had initially identified the men who grabbed hold of him as accused 2 and 4. It became apparent that Chris was struggling with his eyesight. He was allowed to walk closer to the accused dock. Only then did he notice one of the men was not before court. According to Chris, the man that grabbed him on the right side was accused 3. Pretty in her testimony stated that accused 3 had a neatly trimmed beard whereas Chris described accused 6 as the man with neatly trimmed beard. Hlumisa Thonga saw Chris approaching the cash office from the direction of the front line tills grabbed from behind by an unknown man who held a firearm in his hand. This man fired two gunshots. Chris denied ever entering the cash office. Hlumisa stated that Chris opened the door to the cash office using the remote control devise but Chris denies ever opening the cash office.

[49] From the video footage Chris is seen opening the cash office door with a remote control devise. According to Hlumisa, the man instructed them both (Hlumisa and Chris) to enter into the cash office and demanded the keys to the safe. Chris did not testify about this as he was adamant that he never reached the cash office. Hlumisa's evidence is supported by the video footage. Hlumisa observed Pretty running up the stairs at the time when Hlumisa and Chris were forced into the cash office by the unknown man. Pretty on the other hand did not see Hlumisa, Chris and the unknown man. This is probable as Pretty was running up the stairs to go hide in the dark room when she realised that there was a robbery unfolding. Pretty stated that

she observed the man wearing a bucket hat, accused 1 removing cigarette from the cigarette counter and that he was shouting at Catherine to print airtime voucher for him. This is contrary to what Catherine stated as well as what is depicted in the video footage. Although accused 1 was removing the cigarette from the shelves, he did not at any stage shout at Catherine. It is not in dispute that Pretty was in the cash office and as already stated above, it is clear from the video footage that Hlumisa and Chris went into the cash office. Mampana observed Chris being pushed towards the cash office by men who were demanding keys from him. The men made Chris to lie down on the ground. Mampana' evidence corroborates that of Chris. The video footage does show Gift Moyo (the deceased in count 2) being shot at, at close range. This corroborates Chris' evidence as well as that of Mampana.

- [50] There was further contradiction between the evidence of Sergeant Mashele and Constable Zulu. Sergeant Mashele stated that he secured the exhibits, that is, the cartridges and the projectiles that were at the scene by using disposable cups. Constable Zulu on the other hand did not see the cups but said the exhibits were pointed out to him by Sergeant Mashele.

Chris Jacobs as a witness

- [51] He testified coherently about the events on the day of the robbery. When it came to pointing out the accused in court, he did not fare well at first. He denied ever opening or even entering the cash office. However, Hlumisa and Mampana testified that he did enter the cash office. Corroboration may be found in independent evidence as well. The fact that he entered the cash office as testified by Hlumisa is apparent from the video footage as well as from the still photographs from the video footage. The contradiction and discrepancies, in the court's view are not so material as to render his evidence unreliable. These discrepancies were not as a result of him being a dishonest witness, nor can it be said that he misled the court deliberately. The court attributes his confusion about the events to the trauma. He was pointed with firearms by the two men that accosted him, he was kicked and hit by a

firearm on the face. In so far as the confusion during the dock identification, that is attributed to poor eyesight. He was hit by the butt of a firearm on the left eye and had to start wearing prescription glasses. By the time he testified in court, almost two years had elapsed after the incident, he had already changed the prescription glasses due to the deterioration of the left eye. The defence counsels emphasised that he must have been traumatised by the events, which he conceded. Surely, he must have been traumatised. That being so, it cannot however be said that he did not have sufficient opportunity to observe his attackers and what was unfolding in his surroundings. To expect him to give a clear and meticulous account of where he was taken to whilst at the same time he was being assaulted, is to expect the impossible. His confusion is understandable.

[52] However, during the identification parade Chris was able to point out four of the accused and that was approximately a month after the incident. Six months later, in December 2019 he identified accused 7. Chris impressed the court as a person whose evidence may be believed. He was credible despite the discrepancies. There were no intrinsic improbabilities in his evidence. His evidence was corroborated by other State witnesses as well as by the objective evidence in the form of the video footage. His contradictions and those of other witnesses were not material. It could not have been easy for the witnesses to recall all the details taking into account that almost two years had passed since the incident. Contradictions and discrepancies are to be expected under the circumstances.

Arrest without warrant

[53] Section 40(1)(b) of The Act provides that a peace officer may without a warrant, arrest any person, who he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. Of significance to note in so far as this provision is concerned is that, the arresting officer is not obliged to arrest, but has a discretion to do so. The said discretion must be exercised in good faith, rationally and not arbitrarily. Grounds of suspicion are not necessarily limited to those that can

be proved in court. Meaning, the information at the disposal of the arresting officers need not be of sufficiently high quality and cogency for an arrest to be effected. Therefore, arrest on reasonable suspicion can be made even if the intention of the arrestor is first to conduct an investigation for as long as there are solid grounds to do so.

[54] The contention by the defence is that the arrests, searches and seizures should only have taken place after warrants have been obtained. Section 22(a) of The Act however, entitles the police to search persons and or their premises and arrest without a warrant if the person concerned gives consent to the search and seizure. The evidence by the police officers is to the effect that the information given by the informers related to the names and addresses of the suspects. Therefore, the operation by the police officers as co-ordinated by Warrant officer Langa, was to trace and arrest the suspects. They could not have been expected to apply for search warrants as search and seizure was not what they set out to go and do. With regards the arrest of the suspects without warrants of arrest, the explanation was that information reached them outside of working hours and therefore, had they waited to obtain warrants of arrest, the delay would have defeated the object. They were understandably eager to arrest and in the process of arresting they conducted the searches. In respect of all the arrests, the evidence of the police officers was that consent to search was given. Since firearms were used during the commission of the robbery, they must have had reasonable suspicion that the firearms used could have been in possession of the accused. The court is of the view that in conducting the searches without warrants, they did so carefully without infringing the right to privacy of the accused.

[55] This is shown by the fact that, the houses they went to were not searched indiscriminately. The house where accused 1 was arrested from was not searched; only accused 2' person and the room in which was sleeping was searched; accused 3 was searched and a firearm was found on his waist and subsequent thereto the room in which he was sleeping was searched and another firearm was retrieved under a pillow; accused 4 was called from the

bedroom by two elderly people who opened for the police officers. His house was not searched at all; accused 5 was arrested at the door. Neither the house nor the vehicle was searched until at the police station following questioning by police officers. Only then was the vehicle searched and a firearm retrieved, accused 6 and the occupants of his vehicle were searched and accused 6 led the police to his uncle who handed the firearm freely and no search was conducted at the uncle's house. Finally, accused 7 was searched and taken to the police station.

[56] Although it is desirable to obtain search warrants, it is not however, proposed that every search conducted other than in terms of a warrant is unlawful or in breach of the constitutional rights of the accused.

[57] The accused further contended that during their arrest they were assaulted. The police officers denied these allegations. Correctly so, the police officers indicated that when the accused were arrested, there were other occupants within the premises where they were arrested. In respect of accused 1, the mother in-law opened for the police, accused 2' girlfriend is the one who allowed the police officers in, although accused 3 was alone in the room, there is no suggestion that the main house had no occupants, in respect of accused 4, Warrant Officer Langa knocked at the door and two elderly people opened. Accused 5 did not only allege that he was assaulted brutally but he mentioned that the gate of the premises was broken open as well. The house from which accused 5 was arrested belonged to his girlfriend, Dorothy Motatinyane who testified for the State. However, his version as to the breaking of the gate and the assault was not put to her and this could have bolstered his version. Clearly, this was just an after-thought.

[58] The court, therefore prefers the version of the police officers. It is found that none of the accused were assaulted upon their respective arrest as alleged.

Ballistic evidence

[59] The version of the accused in whose possession the State alleges firearms were found is that nothing was found in their possession. In accordance with the evidence of Constable Simphiwe Nicepherus Zulu, a member of the SAPS attached to the Local Criminal Record Centre, three projectiles and eight cartridge cases were collected from the floor of the store. However, none of the firearms said to have been found in possession of accused 2, 3 and 5 were linked to the crime scene. This evidence therefore does not take the State's case any further in relation to the robbery and murders. However, with regards the firearms and ammunition found in the respective possessions of accused 2, 3 and 5, it is not in dispute that they are in fact firearms. The accused however, are merely denying that firearms and ammunition were found in their possession. With this court accepting the evidence of the State, it makes sense therefore, to hold that there was unlawful possession in the absence of evidence indicating that there was authorisation to possess.

Identification evidence

[60] It is trite that identification by a witness is to be approached with caution and this is due to the fallibility of human observation. Identification depends on factors such as, lighting, eyesight, visibility, proximity and prior knowledge of the suspect by the witness. This list is of course not exhaustive. Therefore, evidence of this nature has to be scrutinised closely. **S v Mthethwa** 1972(3) SA 766 (A).

[61] The defence indicated there was issue relating to the exercise of the rights of the accused during the identification parade. The issues were that; the accused were not informed of their rights to legal representation, they were not addressed in the languages they understood, witnesses could see through the identification parade room prior to them identifying them, the investigating officer was at the identification parade probably to influence the witnesses and were made to dress differently from those they were in the line-up with.

[62] In respect of the identification parade held by Warrant officer Khumalo on 25 July 2019 as the officer in charge, he testified that he received information

document from Warrant officer Langa in which it was indicated that rights to legal representation were explained two days prior the parade. He also explained the rights prior to proceeding with the parade. The accused gave him permission to proceed in the absence of a legal representative. Had they requested otherwise, he would not have proceeded with the identification parade.

[63] In respect of accused 7 in particular, Warrant Officer Magane postponed the identification of 20 February 2020 when the accused informed that he was not willing to proceed in the absence of his legal representative. It was for this reason that accused 7's legal representative was present on 5 March 2020.

[64] Although Warrant Officer Laubscher stated that he had not received information document from Warrant officer Langa indicating that the rights were explained to the accused, he personally explained the rights and procedures prior to him proceeding with the parade and an interpreter was used.

[65] The power to hold identification parades is provided for in Section 37(1)(b) of The Criminal Procedure Act 51 of 1977 and those identified to participate in the parade cannot refuse to do so. The provisions of section 37(1)(b) empowers any police official to make an arrested person available or cause such person to be made available as the police officer may determine for an identification parade in such condition, position as the police officer may determine. See **S v Sibanda and Others** 1969 (2) SA 345 (T).

[66] Clearly, a legal representative, even when present at the identification parade cannot advise the accused not to participate, nor can he make suggestions as to the position the accused might take in the line-up, what clothing to wear, unless permitted to do so by the officer in charge.

[67] From the evidence presented to the court, the officers in charge of the identification parades kept notes of the procedures followed at the parades in the SAP 329 Forms and all the police officers who officiated also testified as to the role they played and the procedures followed. Witnesses who attended

the parade also testified and were clear on the procedures followed. Photographs which were taken during the parade were also presented and they were of great assistance in determining where the accused were placed in the line-up as well as to show the general appearance of those amongst whom they were placed so as to determine whether there was resemblance or not. Even though the defence attempted to raise doubt as to whether the line-up was properly constituted, the photographs eliminated same.

[68] All the identification parades were held at Boksburg prison. Even though Warrant Officer Khumalo was not certain as to the presence of windows, all the other witnesses were certain that there were no windows on the side of the passage where witnesses were walking which could have made it possible for anyone to see through the parade room. The photographs depicted small windows at the back of the parade room which were situated above the head level. Therefore, the suggestion that the investigating officer was seen walking down the passage is rejected as false. The police officers who were part of the parade were adamant that Warrant Officer Langa was not part of the process.

[69] There are certain rules that have been developed to ensure fairness. However, these rules should not be regarded as rigid requirements but rather as guidelines to be used to ensure fairness. Non-compliance of the rules will not necessarily affect admissibility of the parade, but would at the most affect the weight to be attached to the parade as well as the weight to be attached to the identification of the witness.

[70] The witnesses were questioned as to the observations they made. There is no suggestion that, even if they may have communicated with one another, they discussed who to point out. All the witnesses who testified as to the identification parades were clear and coherent and no material contradictions could be elicited from their evidence. Catherine was adamant that she was not mistaken when identifying the three accused that she identified. She held firm to her evidence that even though she did not give a description of the suspects in her statement, she informed the police that she could identify the

suspects. She described accused 1 as having scruffy beard and accused 4 as having a dimple on the cheek. It is important to mention that during court proceedings accused 1 did not have any beard and all the accused were wearing face masks. Therefore, it cannot be said she gave the description due to her seeing the accused in the dock. Although it took seconds to observe accused 1 and 4 at the scene, accused 2 is the one with whom she spent the longest time. The court is cognisant of the fact that she (Catherine) was seeing the accused for the first time, she was frightened, it was a moving scene, however the court is of the view that her observation was good and had an independent recollection of the incident. Same would apply to other witnesses as to their observation whilst the incident was unfolding.

Close circuit television visuals

[71] In respect of accused 1, the close circuit television cameras located at the Spar Supermarket was a silent witness. The visuals on the video footage depict the following: At around 16h09 a cashier was assisting customers at the Cigarette Counter. A group of men enter the store using both the entrance and exit doors. One of the cashiers, whom Warrant Officer Langa identified as Hlumisa is seen cashing up, placed the money inside a floating bag and headed towards the cash office. Catherine was serving customers when she was approached by two men one of whom was wearing a blue bucket hat. Two male persons approached the cashier at the Cigarette Counter and there was a sound of gunshots emanating from the hot food counter. The cashier goes down to hide and people are seen running out of the store. Later a man is seen removing money from the Lotto machine situated at the Cigarette Counter and placing it inside a float bag, then uses his t-shirt to wipe fingerprints off the said till. He then takes an empty crate, places it on the floor and removes cigarettes from the shelves into the said crate. This man is wearing a blue bucket hat. Another man joins the man with the bucket hat and helps to place the cigarettes into the crate, goes out and brings a plastic bag inside of which he places more cigarettes. There are various men walking inside the store busy with various activities.

- [72] Almost everything that happens from 16h09 to 16h24 is recorded and it depicts the evidence as proffered by the witnesses and more. All the perpetrators of these actions appear to be male as testified by the witnesses.
- [73] Catherine's identification of accused 1 does not only corroborate that of Chris Jacobs both of whom pointed accused 1 out at the identification parade and Pretty Masondo who observed a man wearing a bucket hat at the Cigarette Counter, but rather also by the objective evidence presented by Warrant officer Modau who conducted facial comparison. She compared the facial features and landmarks unique to accused 1. The authenticity of the video footage, the method used to download it, the manner in which it was preserved were not in issue. According to Isaac Ampomah, the cameras were fully operational as at the time of the incident. The court therefore, finds that it has been established that the video footage has not been altered, that it depicts the scene of the crime and it is admissible and relevant evidence.
- [74] The degree of clarity of the video footage, particularly in identifying the perpetrators, save for accused 1, was not perfect. However, the visuals depicted a group of men entering Spar Supermarket, some armed with what appeared to be firearms and robbing the cashiers of the cash and assaulting others. Two people were shot at and killed by one of them. Although the faces of the robbers are unclear, the scene itself is clearly depicted. The evidence of the employees of Spar is certainly not invented as it is corroborated by the video footage.
- [75] Catherine's evidence in respect of accused 2 was to the effect that, whilst serving customers at till number 1 of the frontline tills, she was approached by two men, one of whom was accused 1. Accused 1's companion was aggressive towards her and she resorted to keeping calm and addressed accused 1 instead. This man, lifted the t-shirt he was wearing and exposed a firearm. It then dawned on her that there was a robbery unfolding. She decided to open the till and shortly thereafter she heard several gunshots. She knelt down in between the tills. She was approached by accused 2 who demanded a plastic bag from her. She stood up, gave accused 2 a plastic bag

and opened the three other tills for him. She moved from one till to another with accused 2 whilst he removed money from each of the four tills, placing it inside the said plastic bag. Accused 2 demanded airtime vouchers. He aggressively pulled her to the Cigarette Counter as she could only be able to print R1000 airtime voucher which accused 2 was demanding from the cigarette counter. She stated that she spent between five to ten minutes with accused 2. Whilst she was printing airtime vouchers for accused 2, then accused 4 approached and demanded three more vouchers of a R1 000 each. She therefore printed R4 000 worth of airtime vouchers and handed all of them to accused 4. She was able to observe accused 4 for at least one minute whilst he stood in front of her. Catherine was able to point out accused 1 as stated above as well as accused 2 and 4 at the identification parade.

[76] Catherine's identification of accused 4 corroborates that of Terries Kola and Chris Jacobs. When Catherine identified accused 4 at the identification parade, accused 4 had been afforded an opportunity to change positions in the line-up. Therefore, it cannot be said that any of the identifying witnesses (Terris Kola and Chris Jacobs) that went in before Catherine could have advised her where accused 4 was positioned in the line-up. It is not in dispute that accused 4 has a dimple as was mentioned by Catherine. This is a highly identifiable facial feature. This strengthens the probability that his identification is reliable as the dimple is objectively obvious for all to see.

[77] Chris Jacobs, a manager at Spar, stated that he felt two people grab him from either side of his arms. He did not see these men approach. He however looked at each one of them as he was trying to figure out what was going on. They each had a 9mm firearm and they placed the firearms on either side of his ribs demanding cash and keys to the safe. They were at the same time pushing him towards the direction of the cash office and it appeared to him they knew where the cash office was situate. The men turned him around to face the cigarette counter and asked if the cigarettes on the shelves were the only ones they had. He informed the men it was the only cigarettes the store had. It was at this stage that he observed four men enter the store in haste, all

dressed in jeans, t-shirts, tekkies and hoodies. Each one of the four men had a 9mm firearms in hand.

[78] What Chris observed about the man on his right side was the pink t-shirt that he was wearing and that he was medium built. Although Chris could not add more to this man's features, his image was however imprinted on his mind, he said. The man on the left was wearing a green t-shirt and he was adamant he could also identify him as well. When he was requested to do a dock identification, he initially pointed these two men who grabbed hold of him as accused 2 and 4. It became apparent that he had vision problems. He was allowed to go closer and identified these two men as accused 3 and the other man who is not before court. Of the four men he saw enter the store in haste, two went to the cigarette counter and the other to the frontline tills. The two at the cigarette he identified as accused 1 and 7. One of them was wearing a cap, had a flat nose and wide nostrils. The other was wearing a hoodie and had a round face and ears that were sticking out. What they did is that, they pushed the cigarettes off the shelves and collected them. The other two, accused 2 and 3 went to the frontline tills and they cleared the cash drawers of the money that was in there. Accused 4 and 5 were initially in between the isles and they went to the frontline tills as well to take the money out. Chris stated that he was assaulted by being hit with the butt of a firearm on the eye, fell to the ground and was kicked by the men who grabbed him. Whilst he lay on the floor, another suspect demanded a firearm from Gift Moyo, a security officer who was a customer. Gift Moyo refused and was shot three times at close range. A female customer who was close by attempted to run away and she also was shot at.

[79] At the identification parades, Chris pointed out accused 1, 3, 4, 5 and 7. Accused 3 he managed to see whilst he was grabbing hold of him. His identification of accused 3 was corroborated by Catherine and Pretty. Chris identified accused 6 by his clean-shaven beard. This is however description given by Pretty in respect of accused 3. This discrepancy has already been dealt with above. According to Pretty, she was in the cash office when she heard a banging sound which she thought to have been a pot that may have

been dropped by the kitchen staff. Only when she heard a second bang and a smell of something burning (sulphurous) did she go to the door of the cash office and peeped through a hole on the door. She noticed customers and colleagues running. She moved away from the door and ascended the staircase to go to an office upstairs to hide. This office she described as a dark office because the lights thereat are never switched on. In this office there is a one-way fixed glass window with which one can see into the store. That is when she observed a man fitting the description of accused 1 at the cigarette counter and accused 3 at the frontline tills. Pretty pointed accused 3 at the identification parade.

- [80] Certain documentary evidence relating to the vehicle that was said to have been used in the commission of the offence was handed in following evidence by Pieter Andries Oosthuizen of Tracker Connect. The Skytrack is a live system that shows a pin point position that is accurate for about five meters. It records the location, time, date, the speed at which the vehicle is travelling as well as the status of the motor vehicle as to whether it is moving or stationary.
- [81] The police informant gave details regarding the motor vehicle that was used during the robbery to Warrant officer Langa, such as that it is driven by accused 5 and gave the address. Once that had been verified, objective evidence in the form of the vehicle tracker report in respect of the tracking device that was fitted in the said vehicle was obtained. The detailed tracker trip log reflects the vehicle stationary under cover where accused 5 resides at around 14h43:55. It started moving at 14h50:34 and travelled along the streets where the residential places of accused 1, 2, 4 and 6 reside. The vehicle then followed the route heading to Heidelberg Road which is the area where Spar Rondebult is situated. It remained stationary there for approximately twenty minutes. The incident on the video footage occurred in a period of approximately nineteen minutes. The court is cognisant of the fact that tracker time was not synchronised with that of the cameras at Spar.
- [82] When looking into the totality of the case, the court is of the view that there is so much that gives credence to the evidence of the State. The reliability of the

identifying witnesses, the legitimacy of the identification parade and the fact that they corroborated each other, the court is of the view that the provisions of section 37(1)(b) were fully complied with. Even though the witnesses were kept in one room prior to the identification, they did not discuss the case and there was a police officer present to ensure compliance thereof. This excludes the suggestion amongst the witnesses as to whom to point out at the parade.

[83] In accordance with the tracker report, the vehicle was at Boekenhout Street, Dalpark where accused 5 resides at 14h43:55 and started moving at 14h50:34. At 15h12:35 it was at Luthando Street, Roodekop where accused 1 resides, then to Ndiphe Street where accused 6 was residing with his girlfriend, back to Luthando at 15h26 and then to Keranatela at 15h32: where accused 4 was residing. At 15h49:30 it was at Irhamba/ Hamba Street where accused 2 was residing. By 16h13:41 the vehicle was travelling along M35, Heidelberg Road and stopped around Heidelberg Road which is the vicinity wherein Rondebult Spar was situate. At 16h28:05 the vehicle was travelling on Heidelberg Road and returned to some of the streets it initially stopped at, the first of which was Irhamba (accused 2) Street where it remained stationary under cover for about thirty-five minutes. It then proceeded to Karanatela Street (accused 4) and ultimately back to accused 5's place in Dalpark, Brakpan.

[84] The accuracy of the tracker report was not in dispute. The vehicle is registered in the names of the girlfriend of accused 5 and it is not in dispute that he was the regular driver thereof. In fact, on the day in question accused 5 was the driver as confirmed by his girlfriend. Oosthuizen was an excellent witness. He displayed great insight and experience in GPS technology. The evidence established the various locations of the vehicle on the day of the incident. Taking into account that the motor vehicle was stationary in the Rondebult area for approximately the same period of time as the recorded time captured by the Close Circuit Television at Spar, the evidence is irrefutable. It establishes that the vehicle was used in the commission of the offences.

- [85] The court in **S v Sauls and Others** 1981 (3) SA 172 (A) at 180 G made it clear that the exercise of caution must not be allowed to displace the exercise of common sense. When applying common sense and logic, the analysis of the tracker report and the video footage justify as the only reasonable inference that, when the vehicle was travelling along the streets where accused 1,2,4 and 6 reside, accused 5 was there to collect them prior to the commission of the robberies and murders and that he dropped them off thereafter.
- [86] The State must prove the guilt of the accused beyond a reasonable doubt. There is no duty on an accused person to prove his innocence. An accused should be acquitted if there exists a reasonable possibility that his evidence may be true.
- [87] The accused denied ever being anywhere near Spar Supermarket on 1 June 2019. It was stated in **S v Khumalo** 1991 (4) SA 310 (A) at 327 that the correct approach is to consider the alibi against the totality of the evidence and the court's impression of the witnesses. The court must apply its mind not only to the merits and demerits of the State witnesses and the defence witnesses, but also to the probabilities of the case. See **S v Singh** 1975(1) SA 227 (N).
- [88] The accused as witnesses were not impressive. The core of their evidence was not asserted to the State witnesses. Their evidence was marred with inconsistencies and improbabilities. They adjusted their respective versions as the trial proceeded. The version of accused 2, 6 and 7 was that their photographs were taken following their arrest. According to accused 7 the photographs he refers to were those taken during the identification parade that was called off on 20 February 2020. This evidence was presented to imply that their photographs were shown to the witnesses in order to assist the witnesses in identifying them at the identification parade. The witnesses themselves testified that nothing untoward happened during the parade. The identification of accused 1, 3 and 4 by more than one witness is a factor which weighs heavily against the assumption of incorrect identification.

Accused 1

- [89] The state unleashed solid evidence against accused 1 but he elected not to testify. The State relied on the evidence of Catherine and Pretty, both of whom were employed as cashiers, the evidence of Chris, the identification parade and the video footage taken by CCTV cameras which were in place at Spar during the robbery. Accused 1 was identified by Catherine and Pretty who described the clothing he was wearing. The description was that he was wearing a blue jacket and a blue bucket hat. Catherine first saw him when he approached her at till number 1 of the frontline tills in the company of another man who was loud and aggressive. She looked at accused 1 for at least 15 seconds at this point in time. She once again observed accused 1 when she was heading to the cigarette counter and accused 1 was placing cigarettes inside a plastic crate. On the other hand, whilst Pretty was looking into the store from the dark room, she also observed a man wearing a blue jacket and a blue bucket hat placing cigarettes inside the plastic crate. He is shown wearing the clothing as described in the still photographs that were generated from the video footage.
- [90] The evidence led by the State cumulatively established that accused 1 was at the scene of the crime beyond reasonable doubt. In **S v Mthetwa** 1972(3) SA 766 (A) and quoted with approval in **S v Chabalala** 2003(1) SACR 134 (SCA) the court stated “Where, however, there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general *ipso facto* tends to strengthen the state case, because there is then nothing go gainsay it, and therefore less reason for doubting its credibility or reliability”. This principle was clearly set out in **S v Boesak** 2001(1) SACR 1 (CC) at 24. Failure to testify has its own consequences and risks. The CCTV footage, still photographs and the evidence of facial comparison carry great evidential value as it forms a thread of prima facie case against accused 1. There is direct evidence by Catherine, Pretty and Chris as well, implicating him and placing him at the scene. He was pointed out by Catherine and Chris at the

identification parade of 25 July 2019. The State's case is strengthened when such evidence is not refuted due to the accused's failure to testify.

Accused 2

[91] Accused 2 does not deny that Sergeant Bowker effected the arrest but denies that his rights were explained to him. He testified that when the police officers knocked he opened the door, they demanded a firearm from him, cuffed him and assaulted him in the presence of his wife and children. Whilst in a cell alone, he was approached by two police officers who took his photographs. He was later taken to hospital where the medical staff noticed soft tissue injuries. The accused handed the medical report in as Exhibit provisionally with the intention of calling the medical staff who treated him. However, the medical report was retracted and the doctor was not called. His evidence had inconsistencies. It was initially asserted to Sergeant Bowker that when the police arrived at his house he was watching television. This was later changed to say he was in fact sleeping with his wife and child. When confronted with the discrepancy he stated that there was a misunderstanding by his legal representative as what he meant was that they slept with the television set on. In response to the assault allegation, Warrant officer Langa denied it and propositioned that accused 2 may have been assaulted by other inmates. Based on this response, the accused in his evidence in chief stated that he was kept in the cells alone. This was not put to either Sergeant Bowker or Warrant officer Langa. He stated that his medical report was used during the bail application, however, he moved away from this version by stating that the medical report was given to a nurse in prison and that he merely informed his legal representative of the assault. Although it was indicated that proceedings of the bail application will be furnished to the court, this was not to be.

Accused 3

[92] The evidence of accused 3 was that he was at Marikana on 1 June 2019 having left in the early morning, only to return around 20h00 and 21h00. He stated that he travelled to Marikana in a Corsa Lite motor vehicle belonging to

his friend, Lucky whose surname he does not recall. To Warrant officer Langa his version was that he had travelled together with the said Lucky. In his evidence in chief, the version changed further as he said he had travelled with Mr Siyabonga Sidwell Nxusa. However, this alibi version was not put to the arresting officer, Sergeant Masemola. According to accused 3, the police officers asked to search his room and he gave them permission but nothing was found. He stated that he was assaulted. With regards the assault it was put to Warrant officer Langa that he was taken to a river where he was assaulted grievously by Warrant officer Langa and other police officers. This version was not put to Sergeant Masemola. However, the police officers testified that two firearms were retrieved. One firearms was on his waist and the other under a pillow. Whilst testifying, Sergeant Masemola stated that he knocked at the door of the room and when accused 3 opened, he went in with Sergeant Khanye and members of the flying squad whilst Warrant Officer Langa remained outside. The accused's version to Sergeant Masemola was that Warrant Officer Langa entered the room but this was not put to Warrant officer Langa who maintained that he was one meter away from the room and was able to hear what was being said. The version that Warrant Officer Langa took his identity document and four of his cellphones was also not put to the witnesses.

Accused 4

- [93] The evidence of Warrant Officer Langa is that when he knocked at the door at Karanatela Street, Vosloorus, two elderly people opened the door. Accused 4 was called from the bedroom, informed of the reasons the police officers were looking for him. He was then arrested. Although his version is that he was in the Eastern Cape from 30 May to 3 June 2019, it was not put to Catherine, Chris and Terries Kola, the three witnesses who did not only place him at the scene but who pointed him out at the identification parade. He purported to lead evidence regarding the list of passengers in the two respective taxis he boarded to and from the Eastern Cape as well as call his sister, Ntombekhaya, as an alibi witness. According to accused 4, he travelled with his sister to and fro. However, such evidence was discredited by Mr Zanoxolo

Charlie, a queue Marshall for Ezibeleni Taxi Association, under which taxis travelling between Germiston and Sterkspruit belong. Mr Charlie pointed the discrepancies in the copies that accused 4 had attempted to use as evidence, which evidence he ultimately abandoned.

Accused 5

[94] Accused 5 was arrested by Warrant Officer James Barry Kruger on 11 July 2019 at an address in Boekenhout Street where he was staying with his girlfriend. He stated that he was assaulted by the police officers at the police station. Three plastic bags full of water were put around his head. He denied ever pointing a firearm out to the police officers upon their arrival at the police station. He instead says a police officer came with a firearm and said it was from his vehicle. This evidence was not put to any of the State witnesses. It was put to some of the witnesses that the police entered into the house and remained therein for a considerable period of time. His girlfriend, Dorothy testified in court but did not raise these allegations with her under cross-examination nor was his version regarding the damage caused to the gate and his assault put at the house to her. The allegations on the assault was not substantiated by evidence. There are a lot of inconsistencies and improbabilities in his evidence. Better still, he could have used an opportunity to corroborate his version when his girlfriend was testifying on behalf of the State. His version that the firearm was brought to him by one of the police officers and that he was assaulted at the police station is far-fetched, improbable and actually ridiculous. His version is untruthful and unreliable. He adjusted his version throughout the trial.

[95] The State brought it to the attention of the defence that it intended to lead evidence of pointing out by accused 5. The defence was afforded an opportunity to address the court on the issue of admissibility of such evidence. The defence elected to deal with the issue during cross-examination of the witnesses. The pointing out was disputed on the ground that it was never made. The State led evidence to the effect that following his arrest the Ford Tourneo that was used during the commission of the offences was

confiscated. Whilst being interviewed by the police officers at the police station, accused 5 voluntarily proceeded with the police officers to the said motor vehicle which was parked in the premises of the police station and retrieved a 9 mm firearm from the cabin of the motor vehicle. This evidence was denied by the accused and he stated that the firearm was brought to him. His constitutional rights were explained by Warrant officer Langa upon his arrest at his place of residence and once again when the firearm was retrieved. His version to the contrary is rejected. The court is satisfied that the evidence of the State witnesses is truthful, reliable and probable.

[96] The court therefore prefers the evidence of the police officers that accused 5 was arrested at the door of his residential place and that at the police station he voluntarily pointed out to the police officers a firearm which he had hidden inside the motor vehicle referred to above, while in his sound and sober senses and without undue influence. The court is equally satisfied that accused 5 is the person who drove the vehicle that was used in the commission of the offences. In his evidence he did not dispute he was the driver.

Accused 6

[97] In respect of accused 6 it was Sergeant Mhlongo who effected the arrest on 3 August 2019 following the absence of accused 6 at his girlfriend's place of residence during the police operation. The accused was arrested along Khumalo Street in Thokoza after Sergeant Mhlongo recognised the vehicle registration numbers of his vehicle. When the police were conducting their operation they went to an address at Ndiphe Street where the accused's girlfriend is said to have been residing. She gave the police officers a copy of the accused's identity document and Sergeant Mhlongo took the registration numbers of the motor vehicle down after he had confirmed with the girlfriend that it belonged to accused 6. Upon his arrest the vehicle was searched but nothing was found. When asked about a firearm as the allegations were that firearms were used during the robbery, accused 6 informed the police officers and took them to his paternal uncle's place where he said he had left his

firearm. This uncle is Tebogo Tsotetsi whom the State had him declared a hostile witness. Upon the arrest of Tebogo Tsotetsi the police took a statement from him with the view of using him as a State witness in the case of unlawful possession of a firearm which is not related to the case before court, and this is the statement from which he detracted.

[98] The accused stated in his evidence in chief that he was the driver of the vehicle on the day of his arrest and that he was in the company of Tebogo and two other occupants. This is contrary to the version that was asserted to the witnesses that Tebogo was the driver and that it was only the two of them. Accused's version was that he was running a business with his father and he believes that on the day of the robbery he was at a family business which opens at 8h00 and closes at 18h00. His father, with whom he says he runs the business was called as a witness but he was not of any assistance to the court as he could not account for the whereabouts of accused 6 on 1 June 2019 when the offences were committed. Tebogo's version in court was that the firearm that he had in his possession belonged to his deceased brother and denied that he ever told the police officers that it belonged to accused 6. The version that was put to Sergeant Mhlongo that upon their arrest, Tebogo who was by then driving was ordered to alight from the vehicle and lie on the ground and slapped with open hands was not repeated under oath.

[99] The court weighed the probabilities and improbabilities of the evidence by the State and by Tsotetsi. Tsotetsi's credibility was taken into account. Having heard the evidence as a whole, the court has to decide whether previous inconsistent statement by a hostile witness has any probative value worth of consideration in the evaluation of the evidence. If so, then the court has to determine the value to be attached thereto. In this instance, the witness was declared a hostile witness for giving evidence adverse to the State and which was inconsistent to the statement he made to the police. The State laid a proper basis for the said statement. This statement was used to discredit Tsotetsi as a witness. The court therefore will weigh up the previous inconsistent statement against the oral evidence and decide whether it was

reliable or not and whether the truth had been told. See **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA) at 584.

[100] Tsotetsi denied ever making a statement and stated that since he was under arrest, he found himself signing several documents which he had no idea as to what they were about. In the statement to the police it was stated that Tsotetsi was keeping the firearm safe for accused 6 (having received it from accused 6). According to Sergeant Mhlongo, it is accused 6 who took the police officers to Tsotetsi's place. The police officers would not have known of Tsotetsi had they not been taken there by accused 6 who was a suspect in an armed robbery case. This firearm was not linked in the commission of the said robbery and there is therefore no reason to insist that it was given to Tsotetsi by accused 6. The police would not have known of the whereabouts of the firearm unless they were informed by accused 6 himself, as testified by Sergeant Mhlongo. The only reasonable inference to be drawn is that Tsotetsi narrated the information that is contained in the statement.

[101] As regards whether the statement was made freely and voluntarily, Tsotetsi did not indicate that prior to signing any document he was unduly influenced or even assaulted. Although he was charged, when he made this statement, he was making it with a view that he was going to be a witness in a completely unrelated case. The court does find that the statement has a probative value as it supports the reasoning by inference that accused 6 is the one who informed the police officers of the firearm and where it was being kept. The intention was to determine whether the said firearm could be linked to the robberies and murders at Rondebult Spar. There is no violation of the constitutional rights of Tsotetsi. The defence was afforded an opportunity to cross-examine Tsotetsi but did not have any questions for him. It cannot be said the constitutional rights of accused 6 had been violated either. With regards the alleged assault by the police, Tsotetsi did not mention in his evidence and through questioning by court that he informed the Magistrate or his attorney until the proposition was made by the State. In any event, this assault, from the evidence of Tsotetsi is not even related to the taking down of the statement.

[102] The Court is of the view that Tsotetsi made the statement as indicated by Sergeant Mhlongo and the court has no reason to disbelieve him. Tsotetsi on the other hand was unimpressive as a witness who manufactured his evidence as the case proceeded. His refusal to acknowledge the statement was a mere after after-thought. The statement is admissible as it was made by him freely and voluntarily and without any undue influence, pressure or threats. Therefore, the previous inconsistent statement has probative value worth consideration during evaluation and assessment of evidence by the court. However, this firearm was not linked to the offences herein.

Accused 7

[103] Captain Johan Hendrik Ndzinisa of the Organised Crime Unit testified that he received information on 18 December 2019 from one of his sources of information within Thokoza hostel relating to accused 7. He proceeded to the hostel and found accused 7 with several other men. He placed accused 7 under arrest as he was a suspect in a robbery case that was being investigated by Warrant Officer Langa. However, it was also as a measure of protection since the information was to the effect that there was a plot for him to be killed due to faction fights within the hostel. He explained all of this to accused 7. Captain Ndzinisa confirmed with Warrant Officer Langa that accused 7 was in fact a suspect, thereafter he incarcerated him.

[104] Accused 7 in his evidence stated that he was in Kwa Zulu Natal from 30 May to 8 June 2019. He does concede Captain Ndzinisa informed him of the information from an informer and that he asked him of his involvement in the robbery at Spar. What he refutes is that he was placed under arrest with regards the robbery. Accused 7 called his brother as a witness to confirm that he was in fact in Kwa Zulu Natal. The accused stated that he had travelled back home three times during the month of May 2019, on 2, 10 and 30 May. However, what the court finds strange is that accused 7's brother did not mention that the accused had to travel with their nephew's body on 10 May 2019, whose burial was to be on 11 May 2019. When the accused testified on

this issue he appeared emotional as his testimony was that his nephew was shot dead due to the factional fights at the hostel. The brother on the other hand, was adamant that the accused only went home on 30 May 2019 and stayed at home for a few days. Taking into account the version by the accused of how the nephew died, it makes no sense that it is an event his own brother could have forgotten about.

[105] As already stated above, the accused and their witnesses were untruthful, their evidence is not reliable and is full of inconsistencies. The witnesses called as alibi witnesses were not impartial. The body of evidence led by the State, as already pointed out was met by a bare denial. The Court does not only look at the evidence implicating the accused in isolation in determining whether there was proof beyond reasonable doubt. The question is whether in the light of all the evidence adduced, the guilt of the accused was established beyond reasonable doubt. They were convoluted in their defense and continued to introduce evidence as the trial proceeded. They stuck to their defense of bare denial even though it was clear that they were lying blatantly. The accused' bare denial cannot stand and it falls to be rejected as false save where corroborated by one or more of the State witnesses or other objective evidence.

Common Purpose

[106] It has to be determined whether the accused had common purpose to rob and murder. This requires investigation into their intention. The doctrine of common purpose has been defined as follows: "... if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others." *Snyman*,¹

[107] It is trite that the basis of common purpose can be by way of prior agreement which may be express or implied. It may also be by association between the co-perpetrators and it is not necessary to show that the participation of the co-

¹ *Snyman Criminal Law* 4th ed at 261.

perpetrators was causally connected to the consequent crimes. It is sufficient for the State to prove that one of the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants. **S v Le Roux and Others** 2010 (2) SACR 11 (SCA).

[108] The State would therefore have to prove beyond a reasonable doubt that each of the participants intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue. **S v Thebus** 2003 (2) SACR 319 (CC).

[109] From the evidence before court it is apparent that there was planning. Accused 5 collected some of his co-accused from various locations and returned them after the robbery as shown by the tracker report. Both the deceased persons were shot at, cash amounting to R18 000 and airtime voucher and cigarettes were taken, two motor vehicles belonging to members of the public were hijacked and a security officer who was inside a security tower was shot at. All the robbers were present when these offences were committed. From the video footage, some of the robbers can be seen wielding what appears to be firearms. Surely, the accused and their companions went to Rondebult Spar aware that some, if not all of them were in possession of firearms. One of them fired shots at the deceased and another at the security officer who was inside the tower. It is not required that the accused should have known or foreseen every detail of how the robbery would be brought about. It is also not a requirement for them to have participated in every unlawful act in which each one of them would engage whilst carrying out the objectives of common purpose.

[110] The accused were therefore, aware of the reasonable likelihood that firearms may be used and the reason there were firearms involved is because they anticipated resistance. The logical inference is that the accused made common purpose with each other to execute the robbery and they foresaw the possibility of shooting or killing. That being so, they went ahead with their plan

to rob Rondebult Spar with this foresight, thus, reconciling themselves with that possibility. When the accused and their companions went to Spar Supermarket to commit a robbery, they knew that they would have to attack and overpower anyone who attempted to thwart or foil the robbery. They must have known that their attack on any such person could lead to anybody being killed, including innocent bystanders or customers at the said supermarket.

[111] The deceased Gift Moyo died of multiple perforating gunshot wounds to the chest, whereas Ms Engelina Mosuoie died of penetrating gunshot wounds of the upper back and neck. Throughout the evidence, the accused never placed in issue the fact that there was a security officer inside the security tower. The unchallenged evidence of the State is that shots were fired towards the tower by one of the robbers. In the court's view the said robber was aware that it was occupied hence he fired shots thereat. Alternatively, he should reasonably have foreseen that it was occupied and he reconciled himself with that possibility. Although the complainant or witness in the count of attempted murder did not testify, the evidence indicates that the security officer who was in the security tower was the direct target of the shooting by one of the robbers. Bullet holes were also observed at the said tower by Constable Zulu.

[112] Although no firearms linked to the shooting were found, cartridge cases and projectiles were collected from the scene. It is no doubt that the deceased were killed and shots were fired at the security officer inside the security tower with firearms the make and calibre of which are unknown. Admissions were made as to the truthfulness and correctness of the affidavit deposed to by Constable Simphiwe Nicepherous Zulu nor was there any evidence refuting it by the rest of the accused. The evidence supports the court's deduction that the weapon used had the requisite muzzle energy and was designed to propel a bullet through a barrel or cylinder. The accused are therefore guilty of two counts of murder and attempted murder on the basis of having formed the requisite intention, in the form of *dolus eventualis* and having reconciled themselves with the ensuing result.

[113] The murders fall under the ambit of Section 51(1) of Act 105 of 1997 as they were committed by a group of people acting in the execution or furtherance of a common purpose.

[114] In respect of the three counts of robbery, witnesses were shown or pointed with what appeared to be firearms and they actually believed that the objects they were pointed with were firearms. They were threatened so as to overcome, forestall or prevent resistance and induce submission to taking of their property and such threats were closely connected with the robberies. That constitutes aggravating circumstances within the meaning of Section 1 of Act 51 of 1977.

Unlawful Possession of firearms and ammunition

[115] The evidence of the State shows that only accused 2, 3 and 5 were found with firearms and ammunition upon their arrest. Upon ballistic examination, they all were found to be functional.

The verdict

[116] Accordingly, accused 1 to 7 are found guilty of:

- a. Three counts of robbery read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997
- b. Two counts of murder in respect of Mr Mpho Gift Moyo and Ms Engelina Mamotsoso Mosouoe read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997' and
- c. One count of attempted murder of Mr Victor Ohentse Smith.

[117] Accused 2 is convicted of unlawful possession of a 9mm Semi-Automatic pistol and 12 rounds of 9mm Parabellum Calibre Arcus cartridges in contravention of Sections 4 and 90 of the Firearms Control Act 60 of 2000 (counts 7 and 8).

[118] Accused 3 is convicted of unlawful possession of a 9mm Parabellum Calibre Taurus model PT 92 Semi-Automatic pistol and 17 rounds of 9mm Parabellum Calibre cartridges and a 9mm short Calibre CZ Model 83 Semi-Automatic pistol and 9mm short Calibre cartridges in contravention of Section 4 and 90 of Act 60 of 2000. (Counts 9 and 10).

[119] Accused 5 is convicted of unlawful of possession of a 9mm Parabellum Calibre Norinco Model 213 Semi-Automatic pistol, in contravention of Section 4 and of Act 60 of 2000. (Count 11).

[120] Accused 1, 4, 6 and 7 are acquitted in respect of counts 7 to 11 and the alternative counts thereof. Accused 2, 3 and 5 are acquitted in respect of the alternative counts relating to the firearms and ammunition.

M Moleleki
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 22 Apr 21, 23 Apr 21, 26 Apr 21, 28 Apr 21, 29 Apr 21, 3 May 21, 4 May 21, 5 May 21, 6 May 21, 7 May 21, 11 May 21, 17 May 21, 18 May 21, 19 May 21, 21 May 21, 24 May 21, 25 May 21, 31 May 21, 1 June 21, 2 June 21, 3 June 21, 7 June 21, 8 June 21, 9 Jun 21, 10 Jun 21, 11 Jun 21, 22 July 21, 23 July 21, 26 July 21, 2 Aug 21, 3 Aug 21, 4 Aug 21, 5 Aug 21, 6 Aug 21, 10 Aug 21, 11 Aug 21, 12 Aug 21, 6 Sep 21, 7 Sep 21, 16 Sep 21, 17 Sep 21, 6 Jan 22, 7 Jan 22, 10 Jan 22, 11 Jan 22, 12 Jan 22, 28 Mar 22, 29 Mar 22, 30 Mar 22, 1 Apr 22, 4 Apr 22, 5 Apr 22, 8 Apr 22, 20 Jun 22, 22 Jun 22, 23 Jun 22, 24 Jun 22, 4 July 22

Date of judgment: 24 June and 4 July 2022

Appearances:

On behalf of the State:
Instructed by: Adv LR Surendra & Adv Kau
National Prosecuting Authority

On behalf of Accused 2,5 & 6:
Instructed by: Mr R Makgale
Legal Aid South Africa

On behalf of Accused 1,3,4 & 7:
Instructed by: Adv LV Ntando
Legal Aid South Africa