Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: SS83/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

16 August 2023 .....
DATE SIGNATURE

In the matter between:

THE STATE

versus

NENE REATILE	**ACCUSED 1**
	(section 204[1] witness)
M[...] K[...]	**ACCUSED 2**
	(child in conflict with the law)
HLUBI THABISO	**ACCUSED 3**
SITHOLE ANDILE	**ACCUSED 4**
SITHOLE AYANDA	**ACCUSED 5**

[1] Criminal Procedure Act ("CPA") 51 of 1977.

Court proceedings in camera

Child in conflict with the law assisted by guardian: Yunis Sekeleni (grandmother)

JUDGMENT

AFRICA AJ:

[1] **INTRODUCTION**

Mr. **NENE, REATILE** a 21 year old male person ("hereinafter referred to as Nene"); **M[...], K[...]** *a child in conflict with the law*, a 16 year old male person ("hereinafter referred to as accused 2"); Mr. **HLUBI, THABISO KUHLE (MJEZA),** a 20 year old male person ("hereinafter referred to as accused 3"); Mr. **SITHOLE, ANDILE** a 21 year old male person ("hereinafter referred to as accused 4"); Mr. **SITHOLE, AYANDA** a 21 year old male person ("hereinafter referred to as accused 5") stands arraigned on the following charges:

AD COUNT 1: [ALL ACCUSED]

Murder[2],

In that on or about **28 August 2019** and at or near Naledi in the district of Johannesburg West, the accused did unlawfully and intentionally kill **Refilwe Katlego Mphahlele** an adult female.

AD COUNT 2: [ALL ACCUSED]

Robbery with Aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 51 of 1977[3],

In that on or about the date and at or near the place mentioned in count 1, the accused did unlawfully and intentionally assault and/or threaten to assault **Refilwe Katlego Mphahlele** and did then and there and with force take from her, her handbag, being her property or property in her lawful possession and did thereby rob

[2] Read with section 51(1) of the Criminal Law Amendment Act ("CLAA") 105 of 1997, as mentioned in Part 1 of Schedule 2 and further read with sections 92(2) and 270 of the CPA 51 of 1977 as amended.

[3] Read with section 260 of Act 51 of 1977, and further read with section 52(2) of the CLAA 105 of 1997, as amended.

her of the same, aggravating circumstances being present, firearm and knife were wielded and grievous bodily harm was threatened.

AD COUNT 3: [ALL ACCUSED]

Robbery with Aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 51 of 1977[4],

In that on or about the date and at or near the place mentioned in count 1, the accused did unlawfully and intentionally assault and/or threaten to assault **Tshepo Malebye** and did then and there and with force take from him, his cell phone, being his property or property in his lawful possession and did thereby rob him of the same, aggravating circumstances being present, firearm and knife were wielded and grievous bodily harm was threatened.

AD COUNT 4: [ALL ACCUSED]

Unlawful possession of a firearm[5],

In that on or about the date and at or near the place mentioned in count 1, the accused did unlawfully and intentionally have in their possession a firearm, which the make and model are unknown to the state, without being in possession of a licence, permit or authorization issued in terms of the provisions of Act 60 of 2000 to possess such firearm.

AD COUNT 5: [ALL ACCUSED]

Unlawful possession of ammunition[6],

In that during the period and at or near the place mentioned in count 1, the accused did unlawfully have in their possession ammunition of which the total is unknown to the state, without being the holders of:

a) a licence in respect of a firearm capable of discharging that ammunition
b) a permit to possess ammunition

[4] Read with section 260 of Act 51 of 1977, and further read with section 52(2) of the CLAA 105 of 1997, as amended.
[5] Contravening section 3 read with section 120(1) and 121 read with Schedule 4 of the Firearms Control Act ("FCA") 60 of 2000.
[6] Contravening section 90 read with section 120(1) and 121 read with Schedule 4 of the FCA 60 of 2000.

c) a dealer's licence, manufacturer's licence, gunsmith licence, import, export or in transit permit or transporter's permit issued in terms of Act 60 of 2000 or were otherwise being authorised to possess such ammunition.

AD COUNT 6: [ACCUSED 3 ONLY]

Unlawful possession of a firearm[7],

In that on or about 3 October 2019, and at or near Emdeni, in the district of Johannesburg West, the accused did unlawfully and intentionally have in his possession a firearm, to wit a 9mm Parabellum Calibre Beretta Model 77B Semi-Automatic Pistol with serial numbers 0303302 and WR234962, without being in possession of a licence, permit or authorization issued in terms of the provisions of Act 60 of 2000 to possess such firearm.

AD COUNT 7: [ACCUSED 3 ONLY]

Unlawful possession of ammunition[8],

In that during the period and at or near the place mentioned in count 6, the accused did unlawfully have in his possession ammunition to wit 9mm Parabellum ammunition, of which the total number is unknown to the state, without being the holder of:

a) a licence in respect of a firearm capable of discharging that ammunition
b) a permit to possess ammunition
c) a dealer's licence, manufacturer's licence, gunsmith licence, import, export or in transit permit or transporter's permit issued in terms of Act 60 of 2000 or were otherwise being authorised to possess such ammunition.

[2] State is represented by: Adv. Sinthumule

Nene is represented by: Adv. NA Mohomane

Accused 2 is represented by: Adv. S Taunyane

Accused 3 is represented by: Adv. Moleme

[7] Contravening section 3 read with section 120(1) and 121 read with Schedule 4 of the FCA 60 of 2000.
[8] Contravening section 90 read with section 120(1) and 121 read with Schedule 4 of the FCA 60 of 2000.

Accused 4 is represented by: Adv. Phakula

Accused 5 is represented by: Adv. Mavatha from Legal Aid South Africa.

[3] The provisions of section 51(1) as mentioned in Part 1 of Schedule 2; Section 52(2) as mentioned in Part 2 of Schedule 2 and Section 51(3)(a) of the CLAA 105 1997, as amended; The applicability of Competent verdicts in terms of sections 262, 260, 270, 92 (2), 264 of the CPA 51 of 1977; were all explained to the accused and they indicated that they understood. The state indicated that they would place reliance on the doctrine of common purpose. The defence also confirmed that they fully explained the abovementioned provisions and sections to the accused, and that they understood.

Accused 2 to 5 indicated that they understood the charges proffered against them and pleaded not guilty thereto.

[4] Before the trial commenced the charges were withdrawn against Nene ("accused 1"), in terms of section 6(1) (a) of the CPA 51 of 1977. The prosecutor informed the court that Nene will be called as a witness in terms of the provisions of section 204 of the CPA and will he be required by the prosecution to answer questions, which may incriminate him in the specified offences.

[5] Accused 2 to 5 elected not to give a plea explanation in terms of section 115 of the CPA 51 of 1977 and the state was called upon to prove each and every element of the alleged offences.

[6] The evidential material consisted of the *viva voce* evidence of a number of witnesses in a trial-within-a-trial and the main trial. The accused testified in their own defence and an *alibi* witness was called.

[7] The documentary evidence consisted of:

EXHIBIT A: Admissions in terms of section 220[9];

EXHIBIT B: PM Report and chain statements;

EXHIBIT C1: Sketch plan, photographs of the scene;

[9] CPA 51 of 1977.

EXHIBIT C2: Photographs depicting the house where the firearm was recovered;

EXHIBIT D: Opening address in terms of section 150[10];

EXHIBIT E: J88;

EXHIBIT F: Confession Pro-Forma: Accused 3;

EXHIBIT G: Certificate by interpreter;

EXHIBIT H1: Affidavit in terms of section 212[11];

EXHIBIT H2: Affidavit in terms of section 212[12];

EXHIBIT J: Worksheet;

EXHIBIT K: State: Arguments on admissibility of Confession and Pointing out;

EXHIBIT L: Confession written portion: Accused 3;

EXHIBIT M: Notes on Pointing Out: Accused 3;

EXHIBIT N: Photos 1-17;

EXHIBIT O: Confession: Accused 2;

EXHIBIT P: Acknowledgement of receipt;

EXHIBIT Q: Accused 5: Section 174 Arguments;

EXHIBIT R: State: Section 174 Arguments;

EXHIBIT X: Section 204-witness statement;

EXHIBIT OOO: State: Heads of argument;

EXHIBIT PPP: Section 204-witness: Heads of argument;

EXHIBIT QQQ: Accused 2: Heads of argument;

[10] CPA 51 of 1977.
[11] CPA 51 of 1977.
[12] CPA 51 of 1977.

EXHIBIT RRR: Accused 3: Heads of argument;

EXHIBIT SSS: Accused 4: Heads of argument;

EXHIBIT TTT: Accused 5: Heads of argument;

EXHIBIT TTT1: Case law.

SUMMARY OF EVIDENCE

[8] **LERATO MPHAHLELE** ("Lerato") testified under oath that Refilwe, the deceased was her sister. On the night in question, after 21h00, she went to fetch the deceased on foot, as she usually does. The deceased, who was from work, was in the company of a friend named Tshepo. They accompanied the deceased to withdraw money at the Engen Garage and they stopped at the Tuck-shop, to buy noodles.

[9] Whilst walking home, a Silver VW Polo stopped in front of them. When Lerato heard the sound of a gun being cocked, she knew it was trouble and tried pulling her sister to safety. She does not know where Tshepo ended up, but she managed to run into a nearby yard. Her sister by then had slipped loose of her grip.

By the time Lerato went to look for her sister, she found her unresponsive, lying face down just a few meters from the yard Lerato had run into. Lerato summoned help from her friend's dad, and they rushed the deceased to hospital. On their way, her sister was pronounced dead.

Lerato said that before the deceased was mugged, she was holding her handbag containing her lip-balm, body spray, purse, books and noodles. In her pocket, the deceased still had the R200 withdrawn from the ATM and her bankcard. A broken piece of the deceased handbag-handle was found on the scene.

Lerato said that she would not be able to identify any of the occupants of the VW Polo.

[10] **TSHEPO MALEBYE** ("Tshepo") testified under oath that he is a friend of the deceased and on the night in question; he met the deceased, when she came from work. Prior to asking Tshepo to accompany her to the garage to withdraw money, the deceased had phoned her sister Lerato, to meet them. Together they all walked to the garage to withdraw money. On their way home, they stopped at a Spaza shop to buy snacks.

[11] Approximately two (2) blocks from Engen garage, a Silver VW Polo came pass, and stopped in front of them. Tshepo heard the sound of a firearm being cocked, when the rear right-hand passenger door opened. The deceased was grabbed and Tshepo tried running away, but the assailant in possession of a knife was chasing him. Tshepo's phone and wallet was demanded. The assailant unzipped the front pocket of Tshepo's jacket and took his cell phone. Tshepo heard a gunshot being fired from the direction where the deceased and the one carrying a firearm was. The one, who had the firearm, had the handbag of the deceased. The assailants ran to the vehicle and drove off. Tshepo managed to take down the registration number of the vehicle.

[12] Tshepo and Lerato went to where the deceased was, and they found her lying face down. She was shot on her upper body (chest). Lerato contacted an uncle and they arranged for transport to the hospital. Tshepo remained on the scene and provided the police with the registration number he took down.

Tshepo said that he had seen three (3) people alight from the vehicle; one chased him, one grab the deceased and one chased Lerato. Tshepo said that he does not know the value of his Samsung Galaxy Prime, as it was a gift from his cousin. In 2020, detective Masuku came with three (3) cell phones and asked him to point out his cellphone. He said that the screen of his cellphone had a crack, which it did not have at the time of the robbery. He said that he managed to identify his phone because of the scratch marks on both sides of the phone. Tshepo said that the registration number he recorded in his statement was DC49DFGP.

[13] During cross-examination on behalf of accused 2, Tshepo said that the description he gave the police of his cell phone was the colour and model of the phone, not the IMEI number.

[14] **MUZIKAYISE KHOSA** ("Muzikayise") testified under oath that he knows accused 4 (Andile) and 5 (Ayanda), as they reside in the same vicinity. He cannot recall the date, in September 2019, between 8h00 and 9h00 in the morning; he was driving towards White City when he met Andile and Ayanda, in the company of a friend. They stopped him and asked to borrow R600. They then took out a cellphone-handset, saying that it will serve as security for the money borrowed. They said that they will come fetch the phone once they got money and asked if he is heading in the direction of the Mall. Muzikayise told them that he would drop them at the Mall.

[15] After some time, the police came looking for him. Investigating officer Masuku told him that the said phone was stolen. Masuku enquired about the phone and whether it is still available. Muzikayise was taken to the police station and charged for being in possession of a suspected stolen cell phone. He told the police where he got the phone from and described the phone as a Samsung Galaxy Prime. He said the phone had marks and the screen was cracked. Muzikayise said that Andile, Ayanda and their friend did not come back to reclaim their phone.

[16] During cross-examination on behalf of accused 2, Muzikayise said that all of them did the talking but it was the friend who was in possession of the phone. He pointed accused 2 as the friend who was in the company of accused 4 and 5. Muzikayise confirmed that the phone contained photographs of accused 2.

During cross-examination on behalf of accused 4, Muzikayise confirmed that he was running a loan-shark business and sometimes borrowed people money. It was put to Muzikayise that accused 4 will deny that they borrowed money from him, but sold the phone to him for R600. Muzikayise denied this, saying that the phone was given as security because he did not know their friend (accused 2). Muzikayise also denied that the reason that they did not come back for the phone was because it was sold and not given as security.

During cross-examination on behalf of accused 5, it was put that the phone was sold to him, which was denied by Muzikayise. He said that Ayanda (accused 5) said that they will pay him back and he trusted them because he still had the phone.

[17] Muzikayise said that he told them that if they do not bring his money, he would sell the phone. He said that he trusted accused 4 and 5 because he normally borrows them money. In the past, he borrowed them R200, maybe two or three times. He said that his sibling Sophie was using the handset as it was just sitting there.

When asked on what basis he would borrow the phone to his sister if the phone did not belong to him, Muzikayise said that she would have given the phone back, if they had come for it.

[18] **REATILE NENE** ("Nene") testified after being warned in terms of section 204 of Act 51 of 1977. Nene confirmed that he made a section 204 statement, through his legal representative. He said that on the day of the incident around 20h00 to 21h00 in the evening, he, accused 2, 4, and 5, were seated at Ayanda's (accused 5) place at Jabulani, smoking marijuana. Whilst there, accused 4 requested him to fetch his friend at Zola 2. They were driving in a Polo, with registration number DC49DFGP.

[19] When they arrived there, they met accused 4' friend, named Mjeza. He got into the vehicle and Andile said, "here is Mjeza, the one I told you about". Thereafter they left for Junior's (accused 2) place, to fetch a jersey. Whilst waiting for accused 2, they continued smoking marijuana. Mjeza is accused 3 before court and he sat in the front passenger seat. Nene then wanted to go visit his friend Katlego, but he was not home. Nene decided that they must go back to Jabulani. On their way, they stopped at a shop in Naledi to buy cigarettes. Accused 3 told Nene not to drive fast and he also requested to swop seats with accused 5. Nene saw a firearm in possession of accused 3, which he cocked. The occupants on the backseat, being accused 2, 3 and 4 alighted from the vehicle. Nene said that he did not wait for them.

[20] As he was changing from first into second gear, he heard a gunshot. Nene said that prior to alighting the vehicle, he saw three (3) people walking together, a male and 2 females. He did not notice what was in their possession but when he heard the gunshot, he became frightened. As he looked in his side-mirror, accused 5 requested him not to leave his twin brother behind. After he stopped the car, accused 2, 3 and 4 came running to

the car, telling Nene to drive away at a high speed. When they returned to the vehicle, accused 2 had a cellphone and accused 3 had a lady's handbag, black in colour.

[21] Nene said that he did not ask where they got the handbag from because he saw what transpired. Nene said that he did not see where the handbag ended up or who alighted with the cellphone, as he was alone in the vehicle after dropping everyone off.

The next morning, accused 4 and accused 2 fetched him, saying they must go to Shoprite Liquor store. They met up with Accused 3 and went to buy liquor. When he asked where they got the money from to buy the liquor, they said it is the money from yesterday's phone. Before going to the park to drink, they fetched accused 5.

[22] After some days, he received a phone call, informing him that his stepfather was arrested. The police fetched him and when they arrived at the police station, was he arrested for Murder. Nene was interrogated and gave a statement mentioning the names of accused 4, 5 and the others he was with. When accused 4 and 5 were arrested, were they all put in the same police vehicle, but he cannot recall where accused 4 sat when he gave the police directions to accused 3.

[23] During cross-examination on behalf of accused 2, Nene confirmed that the VW Polo belonged to his stepfather. He described his relationship with accused 2 as not being close friends but he knows accused 2 through accused 5. He knows accused 2 since 2017 and often met accused 2, when visiting accused 5. Despite knowing where accused 2 resides at Zola 1, Nene said that he only pointed out to the police, where accused 4 and 5 stayed.

When asked what he did on the day of the robbery when he heard the gunshot, Nene said that he drove off slowly because he was frightened and Accused 5 told him not to leave his twin brother behind. It was put to Nene that he was not instructed by anyone to drive slowly and that his oral evidence and his statement are vastly different. It was put to Nene that in his oral evidence, he portrays the picture of being coerced into driving at a certain

pace. Nene responded that he was told to but never forced. It was put to Nene that he only made a statement after his stepfather was arrested, to which Nene conceded. It was put to Nene that he was trying to exonerate his stepfather, who was the person initially arrested with regard to robbery, as his vehicle was used to commit robberies. Nene said that his stepfather was at work at the time of the incident and that he did not tell anyone of what transpired that night, until his arrest. Nene was asked why he waited until his arrest to divulge the information, whereas he clearly heard a gunshot and suspected a robbery, on the night in question. Nene responded that he did not know that someone died on that day as he had a suspicion about the robbery but not the murder. It was put to Nene that accused 2 would deny being in his presence on either 28 or 29 August 2019. Nene responded that they were together. Nene said that accused 2 came with accused 4 on 29 August, knocked at his gate and said, “let’s go and drink”. Accused 2 and 4 waited for him to clean up, and then they went to the liquor store where they met up with accused 3.

[24] It was put to Nene that according to Muzakayise, the cellphone was sold in September 2019. Nene confirmed that when he met the accused on 29 August 2019, he asked them where they got the money from to buy the liquor and accused 4 said from yesterday’s phone.

[25] During cross-examination on behalf of accused 3 Nene was asked to describe his state of sobriety on the day of the incident. He responded that they smoked two (2) zols and he felt tipsy. When asked how sure he was that it was accused 3 that was with him on the day in question, Nene said that he drank with accused 3 on 29 August 2019, that accused 3 sat next to him in the passenger seat and he saw accused 3 for a long time, on the night in question. It was put to Nene that accused 3 does not know him and was not with him on the day in question or drank liquor with him on 29 August 2019. Nene said that it was for the first time to meet accused 3, but that he was definitely with him, on the day in question.

During cross-examination on behalf of accused 4, Nene said that he did not ask accused 3 why he had to drive slowly because they were smoking in the

vehicle, maybe the windows were open and the wind finished the cigarette quickly or since accused 3 was seated behind him, maybe the cigarette ash got onto him. Nene said that his attention was drawn to the 2 females and one male on the street, as he turned onto the street, as they were the only people walking on the driver's side. Nene said the vehicle door was being opened whilst the vehicle was in motion. It was put to Nene that this is new evidence, which contradicts his evidence in chief that he stopped the vehicle and the occupants alighted. Nene responded that he stopped the vehicle when he heard the door handle.

[26] When asked if Tshepo's evidence was incorrect when he said that 2 occupants alighted for the rear and one from the front-passenger, Nene responded that both rear doors were opened. When asked why he did not ask why accused 3 is swopping seats, Nene responded that he thought that maybe it is because they were dropping accused 2, 3 and 4 at Naledi and he and accused 5, will go to the lokasie (location).

[27] When asked if he felt comfortable when he heard accused 3 cock the firearm in his vehicle. Nene said that he thought that they were dropping off accused 2, 3 and 4 at the place where they alighted.

It was put to Nene that Tshepo testified that when the robbery took place, the vehicle "waited" for the perpetrators, before driving off. Nene said that he never waited for them. Nene said that accused 2 was the one who opened the handbag, though he never saw who entered the vehicle with the handbag or where the handbag ended up.

[28] During cross-examination on behalf of accused 5, it was put to Nene that his stepfather was released after he made a statement to the police and Nene will do anything to keep himself out of jail. This was confirmed by Nene, but he denied that he was fabricating a version against the other accused.

[29] Nene disagreed that during his evidence in chief, he attempted to distance himself from what transpired. Nene was then referred to his statement, where it reads, and "*I drove slowly next to the garage*". When asked why he decided to drive slowly after seeing the females in the company of the male; Nene

responded that he was going to buy cigarettes on the other side of the garage and coming out of the garage, one needs to drive slow. Nene said that he did not ask anything after seeing the firearm, because the other occupants in the vehicle was quiet. When asked why he sped off after hearing the gunshot, if he was not a part of the robbery? Nene responded that he did not want to find himself in an area where they knew him. When asked why he nonetheless stayed and enjoyed the proceeds of crime, after being told about the cellphone. Nene said that the accused are his friends, and he was not concerned about the proceeds of crime. When asked whether he asked anything, after he heard the gunshot and saw the others returning to the vehicle in possession of the cellphone and handbag. Nene said that they came running fast and it only just then clicked, that something had happened.

[30] **NKULULEKO MALINDISO** "(Malindiso") testified under oath that Reatile Nene is his son. He was in the employment of Multi-Choice, on 28 August 2019, as an IT Specialist. He confirms that he is the owner of a VW Polo with registration number DC49DFGP, silver in colour. On the 28th of August 2019, he reported on duty at 6h00 in the evening, until he knocked off at 6h00, the following morning. On that day, his sister was to give birth and he left his vehicle at home. Bonkinksoi, who is Reatile Nene, was asked to take his aunt to Zola clinic and the vehicle was left with Nene, in case he had to collect her after she had given birth.

[31] Malindiso said that he was arrested on 1 November 2019, when he was stopped by the police and questioned in connection with a shooting where his vehicle was involved.

Malindiso said that he was shocked and told the police that it may have been one of his friends that he used to travel with. He was then told that the incident happened on 28 August 2019, and he informed the police that his son should be able to explain what happened as he (Malindiso) was at work and his son drove the vehicle, on the day in question. Malindiso said that he was released once the accused before court was arrested.

[32] During cross-examination on behalf of accused 2, Malindiso confirmed that he did not bother to go and find out from the police why they were looking for him

because according to him, he was not aware of any murder that he committed. Malindiso said that he was not evading the police but conceded that his car has been involved in the commission of robberies, but no murder was committed on his watch.

During cross-examination on behalf of accused 3, he said that the police did confirm that he was at work on the day in question. Malindiso said that he is aware that his son uses dagga because he can smell it when he comes home.

During cross-examination on behalf of accused 4, Malindiso said that over weekends, he would pick up his friend who possesses a firearm, they will drive around, and his friend will just tell him to stop the vehicle. Only one robbery was committed in his presence, prior July 2019 and he does not know of any woman that was shot and killed whilst he was in the car.

[33] **Adv. Sinthumule for the state during the course of the main trial indicated that he wants to present evidence of an extra-curial Confession in respect of accused 2; and a Pointing out and a Confession in respect of accused 3, respectively. Both Adv. Taunyane (on behalf of accused 2) and Adv. Moleme (on behalf of accused 3) raised an objection against the admissibility of such evidence.**

JUDGMENT: TRIAL WITHIN A TRIAL

REASONS FOR ADMISSION OF CONFESSION BY ACCUSED 2 AND ADMISSION OF CONFESSION AND POINTING OUT BY ACCUSED 3

[34] The grounds of objection raised by accused 2 were:

1. Constitutional rights were not properly explained;
2. The Confession was not made freely and voluntarily.

[35] The grounds of objection raised by accused 3 were:

1. Accused 3 was assaulted for three (3) days, with a plastic bag, pepper sprayed and woken in the middle of the night to make a Confession;
2. On the day of the pointing out (6 October 2019), accused 3 was made to point out, with a photographer standing behind him, taking photos. He only made the pointing out because of the beatings (assault).
3. Accused 3 was never informed of his Constitutional rights.

LEGISLATIVE FRAMEWORK

[36] Section 217 (1) of the Criminal Procedure Act 51 of 1977 (CPA) provides as follows:

> "(1) Evidence of any confession made by any accused person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence:.."[13]

[13] Provided–(a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or a justice; and

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question –

(i) be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of

[37] Pointings-out is referred to in section 218 of the CPA 51 of 1977 as follows:

218. Admissibility of facts discovered by means of inadmissible confession

(1)[14] …

(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

[38] In the case of *S v Sheehama*[15] the Supreme Court of Appeal stated that Pointings-out were to be considered admissions by conduct and that their admissibility was accordingly governed by the provisions of section 217 and 219A. Pointings-out must therefore be freely and voluntarily made as required by section 219A of the CPA 51 of 1977.

[39] Section 219A [16]…

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a

---

his ability with regard to the contents of the confession and any question put to such person by the magistrate; and (ii)…

[14] Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.

[15] 1991 (2) SA 860 (A).

[16] Criminal Procedure Act 51 of 1977 (CPA).

> confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-

[40] Section 35 of the Constitution provides *inter alia* that an arrested person should be informed of his right to legal representation, the right to remain silent and the possible consequences if he elects to make a statement. If these rights are not explained to an accused and he makes a confession or admission, the question arises whether the admission or confession should be excluded. Section 35(5) provides that evidence obtained in a manner, which violates the rights of an accused, should be excluded if the admission thereof would render the trial unfair or would otherwise be detrimental to the administration of Justice. There is therefore no rigid rule of inclusion or exclusion.[17]

[41] The defence raised no objection that the evidence of the Main trial be incorporated in the trial-within-a-trial.

IN RESPECT OF ACCUSED 3, THE TRIAL-WITHIN-A-TRIAL THROUGH THE EVIDENCE OF A NUMBER OF WITNESSES CAN BE SUMMARISED CHRONOLOGICALLY:

[42] **SIBUSISO WALTER MOKGATLA (MASUKU)** ("Masuku") testified under oath that he is a constable within the South African Police Service ("SAPS") with 10

[17] Key v Attorney General 1996 (2) SACR 113 (CC).

years' experience. He is the investigating officer in this case of Nene & Others.

He confirms that accused 3 was arrested and made a confession and pointing out. Masuku said that in respect of accused 3 he visited the cell and during the interview, accused 3 indicated that he wishes to make a confession and give a statement of what happened. He then explained the accused' right to legal representation or if he has no funds, then he may be assisted by legal aid. Masuku informed accused 3 that arrangements would be made.

Masuku contacted his superior and informed accused 3 accordingly of his rights[18].

[43] Accused 3 elected that he wants to give a statement of what transpired, and he will not be requiring legal representation. Masuku then immediately telephoned his commander, Colonel **Tshabalala** and told her to arrange for accused 3 to be collected.

[44] Masuku also telephoned Constable **Moloto** to assist with the transportation, as Moloto had no interest in the matter. Moloto collected accused 3 and he was taken to Captain **Mabaso** at Protea. Masuku denies threatening or assaulting accused 3 at the cells and intimated that accused 3 spoke voluntarily out of his own free will. Accused 3 did not mention to him that he was assaulted or threaten or promised anything, by anyone else and Masuku did not notice any injuries on accused 3. Masuku said that accused 3 proceeded to make a statement, which was subsequently handed to him. He booked the suspect back into the cells. Accused 3 also indicated that he wishes to make a pointing out. Accused 3 confirmed that he is willing to point out where the incident took place. Masuku liaised with Tshabalala to arrange

---

18

- He has the right not to implicate himself.
- He has the right not to disclose anything.
- He has the right to legal representation.
- If he cannot afford a private lawyer, the state can arrange for an attorney, which he need not pay for.

a person to assist with the pointing out and the confession. Accused 3 was explained of his rights[19].

[45] Tshabalala made arrangements with Colonel **Sereo** of Lenasia SAPS. Masuku arranged with an independent person to transport the accused from the cells. Constable **Mathebula** book the suspect from the cells for the pointing out, as he is familiar with the procedure.

Masuku stated that if accused 3 opted for legal assistance then he would have ascertained what the right procedure was to follow. However, in this case accused 3 chose not to appoint an attorney and chose to make a disclosure.

[46] Masuku said that there is a Directive to say that an accused must be taken to hospital prior to making a pointing out, but it's not necessary when making a confession.

[47] Masuku said that he met accused 3 during the morning, with regard to the making of the confession, but cannot recall the exact time. Masuku said that he bears no knowledge of accused 3 being pepper sprayed in the early morning hours and accused 3 will be lying if he says that he was assaulted to sign a blank page. Masuku said that he does not recall captain Mabaso contacting him.

Masuku confirmed that the firearm seized, were a Norinco and he will not know why the forensic report refers to a Berretta, as he is not an expert. Masuku denied assaulting accused 3 in the early hours before making the statement. He denied suffocating and placing water in a plastic bag and pepper spraying accused 3 before taking him to hospital.

[48] On the courts' question, that accused 3 will say that many officers were involved in the assault on him and he cannot identify anyone specifically,

---

19

- He has the right to remain silent.
- He has the right not to disclose anything or if he wishes to make a disclosure.
- He has the right to an attorney and if he cannot afford one, the state can provide one.
- If he discloses anything, that piece of information may be used against him.

Masuku responded that he could obtain a duty list as most of the time only two officer's work at the cells.

WITNESSES IN RESPECT OF POINTING OUT REGARDING ACCUSED 3

[49] **ANDREW SEREO** ("Sereo") testified under oath that he is a Colonel with 28 years' service, stationed at the Lenasia SAPS Detective Unit. On the 5th of October 2019, he held a Pointing Out as Colonel Tshabalala requested him to. He arrived at Naledi SAPS in the afternoon. After he booked on duty, constable Mathebula brought a suspect to him, in office. He introduced himself to the suspect, explained that he is a commissioned officer, and not involved in the case in any way. He noticed that the suspect is Zulu speaking and Constable **Mazibuko** interpreted everything. Present in the office was himself, Mazibuko, and **Mahlangu** the photographer.

The interview was to inform the suspects of his rights[20] and the suspect elected to continue, without legal representation.

[50] After all the explanations, the suspect chose to go and show where the incident occurred.

[51] During cross-examination on behalf of accused 3, Sereo confirmed that accused 3 made the pointing out freely and voluntarily and that he was taken to hospital before the pointing out as it is Standard Procedure. He stated that these procedures emanated from Directives, stating that a suspect must be taken to be examined by a doctor, prior a pointing out.

20

- He has the right to remain silent.
- He was told the implications of saying anything.
- He was warned again that anything he said might be used against him.
- He has the right to be represented by a lawyer of his choice or if he has no funds, one be appointed by the state.
- He was informed that he is not forced to make a confession.
- He was told that he is not forced to show or point out the place where the incident occurred.
- He was informed that if he elect to continue then it wil were written down and may be used against him as evidence in court.
- If he choose to point out places, then a photo may be taken and used in court.

Sereo confirmed that the notes from the interview was recorded on a form and read back to the accused and interpreted in Zulu.

It was put to Sereo that the pointing out occurred on 6 October 2019 and accused 3 was due to appear in court on 7 October and therefor the police were under pressure. Sereo said that he was just asked to assist in the pointing out.

It was further put to Sereo that it is strange that accused 3 will opt for legal aid at his first appearance in court but opt to proceed without a lawyer on 6 October. Sereo responded that he is not surprised because suspects will say one thing now and something else another time.

It was also put to Sereo that as the accused was arrested on 2 October and his statement taken on 6 October, would he not be in a position to say if accused 3 was assaulted until the 6th of October. Sereo denied this version saying that the accused would have told him that he was assaulted and that he would have recorded it.

[52] Sereo said that no suspicion was aroused when accused 3 was taken to the hospital because the doctor must confirm if the suspect is assaulted and note down his findings.

Sereo said that **Mathebula** was at the office during the interview as he stood guard at the door but outside. Mathebula was also the person who brought the suspect and **Mazibuko** was the interpreter. When it was put to Sereo that Mathebula said that he left the suspect with him, Sereo said that when he interviews the suspect, he is with him inside the office and the person who brings the suspect knows his responsibilities as the suspect can be dangerous. Sereo says that when he closes the door, he does not know if the person on guard stands outside or leaves that area.

[53] Sereo said that he would not be in a position to see if a suspect was pepper sprayed or suffocated, unless the suspect tells him what had happened.

[54] **OTIS MATHEBULA** (“Mathebula”) testified under oath that he is a member of the SAPS, with nine (9) years’ service and stationed at Naledi. On 6 October

2019, he received a call from Masuku and was informed that there is someone at the cells who wished to make a pointing out. Mathebula was asked to fetch the said person and take him to Chiawelo Clinic to be examined for any injuries. He was further told that the suspect must thereafter be taken to Sereo at Naledi police station. Mathebula was handed a J88, which was completed by the doctor. Mathebula did not notice any injuries on the suspect and took him to Naledi, where he left the suspect with Sereo.

[55] During cross-examination, Mathebula said that a person could not see if someone was suffocated unless his eyes are red. It was put to Mathebula that the reason why accused 3 was taken to the Clinic was that he was assaulted. Mathebula said that it is procedure that if a person wishes to make a confession or pointing out, that he be taken to a doctor, prior. Mathebula said that this is done because some suspects will lie about being assaulted or placed under duress, and the police wants to eliminate this.

It was put to Mathebula that accused 3 was taken to the Clinic because he could not breathe. Mathebula intimated that if indeed accused 3 were assaulted, then the officers at Jabulani police station would have taken him to hospital.

[56] When asked with whom the suspect was left, Mathebula said that it was Sereo and Mazibuko. Mathebula said that he did not discuss the case with the investigating officer or Sereo and he does not know what happened after he left the suspect with Sereo.

It was put to Mathebula that he would not know if accused 3 was assaulted from 2 to 6 October or whether he was suffocated, even on 6 October. Mathebula said that he explained to the suspect the reason why he is being taken to the Clinic, which is to be examined prior to the pointing out. Had the suspect been assaulted, he would have told Mathebula so and a record is made at the cells, when you book out a suspect.

[57] **DUMISANI MAZIBUKO** (“Mazibuko”) testified under oath that he is a constable within the SAPS with 15 years’ service and stationed at Naledi. His mother tongue is Zulu, and he confirms being on duty on 6 October 2019.

Mazibuko confirmed that the document shown to him was a Certificate for the Interpreter and that his name appears thereon. He confirms that he signed the certificate and that he assisted in interpreting for Thabo Hlubi, accused 3 on that day but that he did not speak to him much. He confirmed that he assisted to interpret for Sereo, in the Zulu language. Mazibuko said that he went to an office and Sereo was there, with the suspect. He was told to keep quiet and then he went to the scene. They drove in a vehicle to the scene of incident. From the office to the scene, he escorted the suspect. Mazibuko said that he was an interpreter where the evidence was tendered but he was not rendering a service.

Mazibuko was warned in respect of being declared a hostile witness, in terms of section 190 (1) CPA 51 of 1977.

[58] During cross-examination by the state, Mazibuko was shown photo 7, which depicted himself with the suspect. Mazibuko confirmed that he walked next to the suspect because he was interpreting in Zulu. When asked why he earlier deviated from his statement as he is even now confirming that he interpreted for the accused, Mazibuko said that he was called to interpret for the accused in Zulu. He said that he was doing the talking and accused 3 said nothing. He interpreted for accused 3 and told him that they are going to the scene.

[59] During cross examination on behalf of accused 3, Mazibuko said that Mathebula was the one driving and turning where he was supposed to. Mazibuko said that he did not hear accused 3 say anything but Mathebula was the one who drove to the scene. He said that the photographer was also present and that he was just asked to come and interpret. When the vehicle stopped, they alighted and the suspect went to stand at the scene and said this is where it happened. Mazibuko did not know what the suspect was referring to, as the only thing he did was to interpret and nothing else.

[60] Mazibuko confirms that in photo 10 the suspect is pointing voluntarily but do not know what the suspect is pointing at. Mazibuko said that Sereo did not force him to sign the certificate and that he only told the accused what Sereo was saying.

WITNESSES IN RESPECT OF CONFESSION REGARDING ACCUSED 3

[61] **REFILOE TSHABALALA** ("Tshabalala") testified under oath that she is a Lieutenant Colonel within the SAPS, stationed at Naledi with 26 years' service. She confirms that on 5 October 2019 at 7h30 in the morning, she called **Sereo**, with regard to a pointing out in respect of accused 3. Sereo agreed for the pointing out to be done on 6 October 2019. She said that she was not involved in the pointing out and that accused 3, on 3 October 2019, made a confession to Captain **Mabaso.**

Masuku informed her on 3 October 2019, that accused 3 wanted to make a confession. She then contacted Mabaso, and she agreed to help. Tshabalala was not involved thereafter.

[62] During cross-examination on behalf of accused 3, Tshabalala confirmed that she could not confirm whether accused 3 was assaulted or whether his rights were explained, as she was not involved. She said that she was not aware that accused 3 had legal aid by 6 October but that there is a Directive that states that an accused must be taken to hospital before a pointing out.

Tshabalala was questioned whether the document headed "Learning Program" was a Directive by the SAPS. Tshabalala said that it was an instruction to be complied with, as this Module will give direction on how to perform your duties. The relevance of the document is that before a pointing out is conducted; they have to *via* the district surgeon.

[63] **MAVIS MOLOTO** ("Moloto") testified under oath that she is a sergeant, with 13 years' service, within the SAPS, stationed at Naledi. She was on duty on the 3rd of October 2019 and was doing preliminary investigations. On the said day, she received a request from Masuku to assist in fetching a suspect from Jabulani Police station. The time was around 13h30 and he informed her that the suspect must be taken to Protea Glen Police station, as he wishes to make a confession.

She bore no knowledge of the case and proceeded to Jabulani police station. She booked out the suspect and took him to Protea Glen police station, where

she removed the suspect's handcuffs and handed him over to **Captain Mabaso**.

[64] The name of the suspect is Thabiso Hlubi, but she will not be able to recognize that person in court. She said that she had no communication with the suspect whilst transporting him and she does not know what happened to the suspect after she left. Later, she took him back to Jabulani Police station and booked him back into the cells. The suspect did not complain of being threatened or assaulted by any other person.

[65] During cross examination on behalf of accused 3, Moloto conceded that she did not inquire from accused 3 if he was assaulted and she did not record how long after she left him at Protea Glen, did she fetch him to take him back to Jabulani.

Moloto said that accused 3 had no visible injuries when she later fetched him. When asked if the suspect was interviewed in her presence, Moloto said no, but his rights were read to him because she was standing just outside by the door, as she had not left the building. Moloto said that she does not know who took the accused to Chiawelo Clinic.

[66] **DORCAS YUNIS MABASO** ("Mabaso") testified under oath that she is a Captain with the SAPS, stationed at Protea Glen, with 30 years' service. She confirms that on 3 October 2019, she took a confession from accused 3, as requested by Tshabalala.

She waited for the suspect who was brought to her office by female constable **Moloto.** She was alone with the suspect and he appeared well dressed, clean with no injuries.

Mabaso read the Pro-Forma into the record.

[67] During cross-examination, Mabaso was asked why the suspect was not taken to the hospital prior to the taking down of the confession. Mabaso said that when Tshabalala requested her for assistance, she took for granted that it was done because she asked whether everything was done in preparation for her to take down the confession and she did ask the accused whether he had

any injuries and he said no. Mabaso confirmed that there is a Directive stating that a suspect must be taken to hospital prior an interview. She said that the person seized with the case must ensure that everything is done.

It was put to Mabaso that she was misled, if Tshabalala and Masuku told her that the accused was taken to hospital. Mabaso said that this is the first time for her to hear that.

[68] When asked if she employed the services of an interpreter, Mabaso said that she speaks Zulu but her mother tongue is Tswana. She said that they spoke Zulu on the day in question; it is township Zulu, not KZN or rural- Zulu.

It was put to Mabaso that accused 3 speaks deep rural Zulu as he emanates from KZN. Mabaso said that she spoke Zulu to him as is spoken in Soweto and he understood. She said that Soweto Zulu is mixed with tsotsi-taal and they understood each other and she reduced it to writing.

[69] When asked where Moloto was when she read out the accused rights in terms of section 35, Mabaso said that Moloto was in the process of leaving the office and she told her to put a sign on the door saying, *"not to be disturbed*".

When asked if accused appeared to be shaken when brought to her, Mabaso said that his face looked troubled but not scared. When asked if it did not arouse suspicion within her that an 18-year-old may have been assaulted. Mabaso responded that the accused told her that he was born in 1999 and he was 20.

[70] She said that she would have stopped if accused 3 had requested the services of an attorney. Mabaso said that her job was to take down a confession from accused 3 and not to prove whether this or that was done. She said that because accused 3 told her that he was not assaulted, she took down his statement. She said that of all the rights read, there is no right that states that an accused person must be taken to hospital.

She informed him that he must not be coerced, threatened or influenced in any way to give a statement; that he has the right to instruct a legal

representative; that everything he say will be written down and may be used in court; that he has the right not to say anything.

Mabaso said that she regards her interpretation as Soweto Zulu and do not agree that there was a language barrier because they understood each other. When asked whether she would be able to see visible injures if the accused 3 was suffocated with pepper spray, Mabaso said no.

[71] During re-examination when asked whether accused 3 at any stage told her that he does not understand her, Mabaso said “no, never”.

[72] **BHEKI MSIBI** (“Msibi”) testified under oath that he is a Warrant Officer within the SAPS, with 29 years’ service, stationed at Jabulani. He confirms that he reported on duty on the 3rd of October 2019 at 5h45 in the morning. He was assigned to work at the cells, giving the detainees food, and booking them in and out of the cells. Msibi said that on the day in question, he proceeded to the cells and received no complainants from accused 3 of being assaulted or a fight inside cells. Around 7h00, Masuku booked out a suspect for investigation and around 12h00 constable Shayi booked out a suspect for further investigation. The suspect booked out was Ayanda Sithole. Msibi knocked off at 18h00.

[73] During cross examination it was put to Msibi that he infact worked at the charge office that day and therefor will not know whether accused 3 were assaulted on the 1st and the 2nd in order to make a Confession on the 3rd of October. Msibi said that he worked at the cells with Maluleke and that when he arrived at 6h00 in the morning, no one indicated to him anything about an assault.

Msibi showed and read into the record, the entry in the Occurrence Book he made in this regard.

IN RESPECT OF ACCUSED 2, THE TRIAL-WITHIN-A-TRIAL THROUGH THE EVIDENCE OF A NUMBER OF WITNESSES CAN BE SUMMARISED CHRONOLOGICALLY.

[74] **S[...] (N[...]) S[...]** (“S[...]”) testified under oath that accused 2 is his brother’s son and they reside together. He confirms that he acted as the legal guardian of accused 2, during October 2019. S[...] confirms that accused 2 made a statement upon his arrest and that he (S[...]) was present. He intimated that accused 2 made the statement to a lady and that he was never assaulted in his presence. S[...] confirmed that accused 2 made the statement freely and voluntarily, as he was not forced to do so.

[75] During cross-examination S[...] stated that he did not look at the time when the statement was made, and he will not argue if it is said that the statement was made in the afternoon. He said that the police arrived between 10h00 and 11h00 in the morning and he followed them to Jabulani Police station by car but did not find them and then drove to Naledi. Upon his arrival, they said that accused 2 wanted to make a statement because his friends made a statement. S[...] found accused 2 with Masuku and they were taken to an office where they were left in the presence of a lady.

S[...] said that he understood that accused 2 wanted to say what transpired on the day in question. He said that accused 2 was not afforded an opportunity to consult with him first, separately. S[...] said that everything he and accused 2 spoke of was done in the presence of the police.

[76] S[...] reiterated that accused 2 was never assaulted in his presence and that he made the statement freely and voluntarily because he never said anything about being assaulted or forced.

S[...] said that accused 2 wanted to give his statement in English, even when S[...] specifically told him to stop speaking English and to speak Zulu instead. He said that accused 2 was narrating whilst that lady was writing down the story.

When asked if the lady spoke Zulu fluently when posing the questions to accused 2, S[...] responded that in their vicinity, they are multi-cultured and he understood how the lady spoke, and that they all understood each other.

[77] It was put to S[...] that accused 2 would say that there was no clear understanding between them as the lady spoke Tswana, which he did not

understand. S[...] responded that where they are from there are many races and he could see that it was difficult for accused 2 to understand English.

S[...] cannot remember if the statement was read back to them but he remembers signing at the police station.

[78] **SIBUSISO WALTER MOKHATLA-MASUKU** ("Masuku") testified under oath that he already testified in respect of accused 3. He holds the rank of constable, stationed at Naledi. He is the investigating officer in this case and confirms that accused 2 made a statement on 3 October 2019.

On the 3rd of October 2019, he was busy investigating this case, and went to an address in Mofolo. Upon his arrival, he found people inside the yard and introduced himself. He gave the reason for him being there and informed them that he was looking for a boy named K[...] Junior M[...]. A man by the name of N[...] brought accused 2 and informed Masuku, that his age is 16. Masuku requested the guardian to accompany them to the police station in Naledi. Upon arrival at the office, Masuku enquired from accused 2 whether he had any knowledge of the case, which he is investigating. He proceeded to read the accused rights[21] in Zulu:

Accused 2 indicated that he preferred that his guardian be present. N[...] S[...] arrived and in the presence of the guardian, accused 2 wanted to give a statement voluntarily regarding the case that was being investigated. He said that he wanted to speak the truth, as he was not aware that someone lost their life in this instance.

Accused 2 was taken to colonel Tshabalala to take down his statement in the presence of N[...], his guardian.

[79] During cross-examination on behalf of accused 2, Masuku said that he informed the guardian that he is the investigating officer in a case of robbery and murder. Masuku said when accused 2 informed him in the office that he

21

- He has the right to remain silent.
- He has the right to have his parents or guardian present.
- He has the right to legal representation and if he cannot afford one, the state can arrange an attorney for him.

wanted his guardian present; Masuku did not proceed with his investigation but waited for the guardian.

Masuku said that he could not recall what time exactly the guardian arrived, but it was still in the morning, wherafter he contacted colonel Tshabalala.

[80] Masuku denied that he questioned accused 2 about a firearm, or that accused 2 and his guardian was not given an opportunity to consult. When asked why the time on the statement reflected **21h14**, if the guardian arrived when it was still morning, Masuku said that Tshabalala would be the person to answer that as he left them with her in the morning.

Masuku denied that he and Tshabalala made verbal threats at accused 2 in the absence of his guardian, which caused him to make a statement.

[81] **REFILOE TSHABALALA** ("Tshabalala") confirmed that she is a Lt. Colonel and the Branch Commander at Naledi Police Station. She took down the statement of K[...] M[...], accused 2 on 3 October 2019. Investigating officer Masuku, who requested her to assist, informed her that accused 2 is a juvenile and he has a guardian.

Tshabalala said that the time reflected on the statement as **21h14** is an error, as it should reflect **12h14.** They were brought to her office, the guardian gave an explanation that accused 2 wanted to narrate his story of what had happened. She asked accused 2 if he wishes to relay his story of what transpired, and he agreed. When she asked why he wish to make a statement, accused 2 said that he heard that there was a murder that happened and that he was not involved in that murder. After ensuring that he wanted to give and explanation, Tshabalala proceeded to explain his rights[22]:

22

- He has the right to remain silent.
- Whatever he say may be used against him in court.
- He has the right to legal representation.

[82] Tshabalala confirmed that she completed the statement and that her signature appears on it and that of accused 2 at the bottom of page 3. Tshabalala read the statement as from page 3 into the record. She stated that accused 2 indicated that he understands the purpose of the interview and that he is still willing to proceed with the interview. His guardian was present throughout and the accused was not threatened or assaulted.

Tshabalala said that many cases pass through the branch detectives, but she did not discuss this case with Masuku prior.

[83] During cross examination on behalf of accused 2, Tshabalala said that the taking down of the statement took a lengthy time and it does not indicate a commencement time or the time it ended.

[84] When asked what the consequences will be if she did not follow the guidelines set down for the taking of a statement. Tshabalala said that the court would decide whether it would accept such a document or not. Tshabalala was refereed to (e) on the document, which states that if the suspect is a child, then every page must be signed by the guardian. Tshabalala said that the document itself does not make provision for the signature of the guardian on every page. Tshabalala said that she realizes that where she made an “X”, the guardian did not sign. It was further put to Tshabalala that the suspect and the guardian must sign every deletion. Tshabalala conceded that since she was the one writing the statement, she appended her signature when she made a mistake. She said the time recorded as 21h14 as opposed to 12h14, was a human error.

[85] Tshabalala said that accused 2 and his guardian was afforded an opportunity to consult and she enquired from the guardian whether the child is sure that he wanted to make a statement. Tshabalala said that had the guardian and the child not have a discussion, then the child would not have proceeded to make a statement. She said that no parent will put his own child in trouble and when brought to her, they had an opportunity to speak to her. She said that they were all conversing and if the child did not understand something, the parent will explain. Tshabalala said that the purpose of the parent being there

was to oversee that the child does the right thing, and that the child is not forced to do something he did not wish.

[86] Tshabalala stated that her mother tongue is Sotho, but they all spoke Zulu, as she also speaks Zulu at home. Tshabalala was requested to translate page 2 at paragraph 4. *In her translation, Tshabalala mixed Zulu and English, but the correct content was there.*

Tshabalala said that the guardian was present throughout and if someone had hurt or threatened accused 2, he surely would have told his guardian so.

[87] During re-examination, Tshabalala read the certification of correctness into the record, appearing on the last page of the statement. She said it carries the signature of both accused 2 and his guardian.

THAT CONCLUDED THE STATE'S CASE IN A TRIAL-WITHIN-A-TRIAL

[88] **K[...] M[...]**[23] ("accused 2) testified under oath that he had arrested him on the 3rd of October 2019. Masuku asked him about a firearm and by then no rights were explained to him, as he was still at home. Masuku thereafter asked him how old he is, and someone went to fetch his birth certificate.

Again, at the police station, Masuku asked him about a firearm and it was only after his guardian arrived that Masuku learnt of his age. He was then told that they want to hear his side of the story. He did not agree because at that time he was still confused. Accused 2 said that he eventually made a statement because he was threatened and told to do so whilst in the office with Masuku and Zwane, who threatened that his day was going to be long.

[89] Accused 2 said that the taking of the statement took about five hours wherafter he was transported back to Walter Sisulu, around 2h00, in the early hours. Accused 2 said that Tshabalala was not present when he was threatened and he was never afforded a private space to consult with his guardian. He said that he could not say if he and Tshabalala fully understood each other.

[23] Court in Camera and Yunis Sekelepi, guardian.

Accused 2 maintained that he was not the one who signed the statement. When he was asked to sign on a separate piece of paper to compare the handwriting, it appeared to be the same handwriting.

[90] During cross-examination, accused 2 said that Masuku told him that his friends said that the firearm was with him. When asked why this version was not put to Masuku, accused 2 said that maybe he did not tell his counsel everything because he does not remember everything clearly.

When asked if his constitutional rights were explained at any stage, accused 2 said that his rights were never explained to him. Accused 2 said that he does not know whether Masuku got his birth certificate before they left for the police station. He said that Masuku waited for his guardian to come with his birth certificate.

[91] Accused 2 said that at the office, he found inspector Zwane and Accused 5. He said that it was maybe a mistake that this version was not put to Masuku. Accused 2 said that Accused 5 pointed out his place to the police. He and Masuku left Zwane's office leaving Accused 5 behind and when they returned Accused 5 was no longer there. Accused 2 said that when he and Masuku left the office he was told that he will be taken to Colonel to make a statement. He said that he did not agree with Masuku to make a statement as he was waiting for his guardian and Masuku agreed to his request.

[92] It was put to accused 2 that when they arrived at the police station his rights were explained and he opted to wait for his guardian. Accused 2 said that he made a statement because he was threatened by the manner in which Masuku was talking to him and the words used. It was put to accused 2 that his version differs from that in chief, where he intimated that both Masuku and Zwane threatened him. Accused 2 responded that he still stands by that version.

Accused 2 said that Masuku spoke to his guardian and when they came back, he was taken to make a statement. Accused 2 said that he agrees with his guardian that he did say yes to making the statement, but he did so after he

was informed to do so, and he could not tell his guardian that he was threatened by Masuku's words.

[93] When asked what statement did, he agree to make when he indicated to his guardian that he wanted to make a statement, accused 2 said that he wanted to indicate where he was on that day. Masuku took him to Tshabalala's office and his guardian was already present. Tshabalala asked him to narrate the manner in which the ordeal happened. Accused 2 cannot recall Tshabalala introducing herself, but he does recall her not reading his rights. It was put to him that Tshabalala testified that she both introduced herself and she read him his rights. Accused 2 said that he does not agree because he would have remembered. It was put to him that in his testimony he said that there are some things he cannot remember. Accused 2 responded that he remembers what he said in his statement and then he signed it, because he was requested to do so. Asked how many times his signature appears on the statement, accused 2 said eleven (11) times and he concedes that his signature appears clearly on the certificate of correctness. It was pointed out that he previously said that he did not sign the statement and only signed his guardian's name whereas now he testifies that he indeed signed. Accused 2 said that maybe there was a misunderstanding. Accused 2 said that he was also threatened in Tshabalala's office through her questioning as she insisted that he make a statement. It was put to accused 2 that by then he already agreed in front of his guardian to make a statement, so why will Tshabalala threaten him to make a statement, more so because this version was never put to her. Accused 2 remained quiet.

[94] It was put to accused 2 that just as he is answering questions put to him in English before they are interpreted, so too did he freely and voluntarily narrate his story without being threatened as confirmed by his guardian. Accused 2 said that this was not his view, and he does not agree with his guardian who said that he understood Tshabalala as they live amongst different cultures.

[95] When asked whether Tshabalala wrote down everything he said, accused 2 said that he will say so but maybe she added things. When asked whether he narrated the whole story or did she stop and asked questions. Accused 2 said

that Tshabalala would ask a question, he would respond and she will write down but she did not give him the statement to read.

[96] When asked what time the statement was made, accused 2 said that it was at night even though he was in a room where he was unable to see. When it was put to accused 2 that his guardian said that the police arrived at their home between 9h00 and 10h00 in the morning and he arrived at the police station 45minutes later, accused 2 said that he heard that.

[97] **KUHLE THABISO HLUBI** ("Accused 3") testified under oath that on the 3rd of October 2019, at 13h45, he was given a document to sign. He said that on that day he was fetched by Moloto in the company of Thabo who was the driver and then taken to Captain Mabaso. She asked him why he is crying and he informed her that his eyes are bloodshot because he was pepper sprayed in the morning, before being fetched. Pages was taken out and then he was told to sign. Mabaso informed him that Masuku already told her what happened and then she asked accused 3 if a firearm was found at his place. He told her that the firearm found belongs to his brother, because two days prior his brother came home with it. Accused 3 said that Bahulo and Makhubela came to the police station at night and told him to show where his brothers' friends are residing. They assaulted him with open hands.

[98] Whilst being seated opposite Mabaso, she started writing and when she finished, she called for Moloto to fetch accused 3. He said that he was only able to understand Mabaso *a little* and he was not told of his rights only that he must sign.

[99] The pepper spray incident happened in the early morning hours, when Masuku, Thabo and Bahulo returned in the company of another police officer, wearing a bulletproof vest, who assaulted him more forcefully. Accused 3 was assaulted in the face and pepper spray was sprayed into a transparent bag and placed over his head whilst lying on the ground. Thabo told him that if he continued denying the allegations, then they will continue assaulting him. Accused 3 started losing breath and he was given water. Again, he was told that if he admits then they would stop the assault.

[100] Accused 3 said that he was taken to the Clinic, maybe because of the assault on him with open hands the previous day. After they left the Clinic they went to a location, he did not know. They stopped the vehicle close to a corner and said that this is where the Murder had happened. At that place, accused 3 was instructed to point at a place whilst Sereo was there with a camera.

Back at the police station, Sereo found him inside the office and introduced himself and no rights were read to him. There was also no one interpreting as he was seated with Mazibuko. They got back into the vehicle and went back to the location where they were before. Mathebula then instructed him to point when Sereo was present.

[101] During cross-examination accused 3 confirmed that he was taken to point out his brothers' friends as they said that he was in their company when another offence was committed. Accused 3 said that he was taken because they could not find his brother and he was assaulted in the early hours of 3 October 2019, to point out his brothers' friends. It was put to accused 3 that the version put by his lawyer was that he was assaulted for three (3) days, to make a confession. Accused 3 responded that he could not recall because he was confused because of the assault. It was then put to accused 3 that he was arrested on 3 October and made his confession on the same day, hence he could not have been assaulted for there (3) days, in order to make the confession. Accused 3 said that at Jabulani police station, he was placed inside an empty cell and then Masuku, Thabo, Bahulo and a stout person, assaulted him, before making the confession.

[102] It was put to accused 3 that this version was never put to Masuku when he testified and the reason why these names were never mentioned was because it never happened. In fact, the version put was that many unknown officers assaulted him. Accused 3 agreed and stated that he only learnt their names later on, when they were calling each other and that Masuku will not admit to assaulting him.

[103] It was put to accused 3 that as his lawyer is learned, he would not have forgotten to put the specific names to Masuku in order for those responsible, to be called. Accused 3 said that he told his lawyer about Thabo and that

Bahulo fetching him to point out his brothers' friends and that they assaulted him.

It was put to accused 3 that Moloto said that she removed his handcuffs and left him with Mabaso. Accused 3 said that Moloto left to fetch Thabo to remove his handcuffs and Thabo was the one who verbally threatened him in the car, on their way to Mabaso. Accused 3 said that the reason why he did not mention this before, was because some of the things he had forgotten.

[104] Accused 3 said that when captain Mabaso introduced herself, she told him that Masuku already told her what happened, but he does not know why this version was not put to Mabaso. He said that Mabaso thereafter gave him blank documents to sign but she did not tell him why and neither did he ask why. He told her that he was assaulted when she asked why he was crying.

Accused 3 confirmed that Exhibit "F" contains his signature but stated that the entire document was blank when he signed it. When asked if the document was typed, accused 3 said that he could not remember therefor he cannot dispute it. It was put to accused 3 that if he cannot recall if the document was typed then he could not say that the document was blank. Accused 3 said that Mabaso pointed out where he had to sign.

[105] Asked who gave Mabaso his name as appearing on page 1, accused 3 said that he did but he does not know whether she wrote it down. Accused 3 confirmed that he also gave the rest of the information appearing, such as his address, which school he attends and DOB. When it was pointed out that, the page also refers to his constitutional rights, which shows that his rights were read. Accused 3 responded that Mabaso did not read his rights, she did not ask any of the yes or no questions, none of the questions on page 2 was asked and he does not know where she got the information from, on page 3.

[106] When accused 3 was reminded that his version was that he was given a blank document to sign but now he states that he does not know if anything was written on it, accused 3 responded "I do not know". Accused 3 confirms that his signature appears five (5) times on that document.

When asked who fetch him from the cells for the pointing out on 6 October 2019, accused 3 said that it was Mathebula and a short guy. It was pointed out that it is for the first time to hear of a second person. Accused 3 said that Mathebula and the other person said that Masuku instructed them to fetch him, and they threatened him in the manner that they spoke, saying that if he continues to deny, Masuku will deal with him. It was put to accused 3 that Mathebula said that he never threatened him and that he knew nothing of this case. Accused 3 said that Mathebula was lying and that there are certain things he did not tell his lawyer because he wanted to personally tell the court, as he is doing now.

[107] Accused 3 said that he was taken to the Clinic after the pointing out. When it was pointed out that Mathebula testified that he took him to Chiawelo Clinic before the pointing out, accused 3 said that he was taken from Jabulani to Naledi to Chiawelo Clinic, then back to Jabulani. Accused 3 said that he does not know why Mathebula's evidence was not challenged in this regard.

It was put to accused 3 that the version put by his attorney was that he was taken to the Clinic because he was assaulted. Accused 3 said that he was not assaulted then, only at the time of his arrest and maybe his lawyer is confusing things. It was further put that even Sereo said that accused 3 was brought to him after being taken to the Clinic. Accused 3 said that he does not know how to answer and what is he supposed to say. It was put to accused 3 that he is confused because he did not sustain any injuries that day. Accused 3 said that his injuries were not visible, except for the marks from the handcuffs and the injury from being slapped. It was put to accused 3 that there would be no reason to take him to the doctor after the pointing out.

[108] Accused 3 does not know where photo 4 and 6 is taken but photo 7 is at the police station. He could not remember whether his picture was taken in the office of Sereo because he was so badly assaulted and he was confused. Accused 3 said that he was taken from Jabulani police station, and they passed some place when he was told that this is the place he must point out when the cameraperson is present. Then they went to Naledi where they waited for Sereo to arrive. Thereafter he was taken back to the scene and told

to point at the corner, which he did, and a photo was taken. Thereafter he was taken to Naledi and then to Chiawelo Clinic.

[109] It was put to accused 3 that this is the first time to hear this version as it was never put to Sereo, Mathebula or Mazibuko. Accused 3 said that maybe it was an oversight not to mention it to his lawyer. When asked if he ever spoke to Sereo in an office. Accused 3 said that Sereo spoke a language he did not understand, and present was Mathebula, and Mazibuko. Accused 3 said that he could not remember whether Sereo wrote anything, he could not remember if there was any document in front of Sereo and he cannot remember signing any document.

Accused 3 said that the signature on the Pointing Out Document, looks like his but he cannot remember signing it. He does not know whose signature appears on pages 2, 3, 4, 5, 6. On the deponent-page, accused 3 said that he cannot see his signature and he cannot remember signing.

[110] In photo 10, accused 3 said that he, Sereo and the one in uniform are present. He said that Mathebula took the camera, instructed him to point out and took the photos, not Mahlangu. Accused 3 said that similarly, in photo 11 the same people appears, and he is pointing, where Mathebula earlier told him to point. When asked why he is pointing at different spots in photos 10 and 11, accused 3 said that he is pointing at the same place. *(Accused 3 is warned again to wait for the interpretation before answering.)*

THAT CONCLUDED THE DEFENCE CASE IN A TRIAL-WITHIN-A-TRIAL

THE STATE MADE SUBMISSIONS[24] AND ON BEHALF OF ACCUSED 2 AND 3, ORAL ARGUMENTS WERE TENDERED.

Generally, a- trial- within- a- trial should be held once a dispute about the admissibility of evidence arises.[25] A so-called trial-within-a-trial was held, after which this court provisionally ruled both the confessions and pointing out, admissible and, ordered that it be admitted into evidence. At the time, this court did not provide any reasons for the decision. **These are my reasons.**

[24] State's written Heads of argument in opposition Exhibit "K".
[25] Ntzweli 2001 (2) SACR 361 (C).

[111] The evidence for the state is that accused 2 and 3, after being informed of their Constitutional rights, and questioned, respectively made a Confession (in respect of accused 2 and 3) and a pointing out (in respect of accused 3, only), ostensibly freely and voluntarily and without having been unduly influenced thereto, and while being of sound and sober senses. Further, that the requirements of section 217(1) and 219A of the CPA have been met and that the confessions and pointing out should be allowed into evidence.

[112] Every one of the officers involved in respect of accused 2 and 3 respectively vehemently denied that they threatened assaulted or failed to inform the accused of their constitutional rights.

The evidence of Mabaso in respect of accused 3 was that she took down the confession, on 3 October 2019, when the suspect appeared in front of her, well dressed, clean and free of injuries.

During cross-examination, the defence attempted to assail the confession based on a number of issues.

[113] Mabaso's understanding of the Zulu language was challenged and was it put to her that there was a language barrier because accused 3 speaks deep rural-Zulu as he emanated from KZN. She maintained that the Zulu spoken in the township is a mixture of languages, which accused 3, clearly understood.

[114] Noteworthy is the fact that at the time of arrest, accused 3 was in matric, residing in Soweto. He impressed on this court as intellectually perceptive, which was evident when he answered questions posed, without waiting for an interpretation. Mabaso said that accused 3 at no stage informed her that he does not understand her. The accused on his own version said that he understood Mabaso, a little. This court is inclined to believe the version of Mabaso, as accused 3 throughout this trial, had no apprehension to say when something was not clear to him. On that score, does this court find it difficult to believe that he would not have drawn Mabaso's attention to the fact that there was a language barrier? Indicative of this audacious mannerism exhibited by accused 3 in court, was when he even requested that the interpreter be changed because the interpreter posed the questions, with an attitude.

[115] Another ground raised to attack the confession, was that accused 3 was assaulted for three (3) days from the date of his arrest (3 October 2019) until the day of the pointing out. (6 October 2019).

However, during cross-examination, accused 3 said that he was assaulted *only* in the early morning hours of 3 October, because the police could not find his brother (pertaining another offence) and he had to point out his brother's friends. When it was pointed out that he could therefore not have been assaulted for three (3) days to make the confession, as he made the confession on the same day as his arrest (3 October 2019) accused 3 responded rather evasively, that he was confused because of the assault. He said that Masuku, Thabo, Bahulo and a stout officer, assaulted him before making the confession. When it was put to accused three (3) that this version was never put to Masuku. In fact, the version put was that unknown officers assaulted him. Accused 3 conceded and said that he only learnt their names, later. Upon scrutiny of this version is it clear that accused 3 is in fact saying that he was assaulted to point out his brother's friends as opposed to making a Confession. Upon realizing this calamity, does accused 3 change his version again, saying that he was verbally threatened by Thabo, on his way to Mabaso's office. When confronted about this new version, accused 3 said that he had forgotten some of the things. This visibly demonstrates the ability of accused 3 to amend his version when the probability and reliability of his evidence is tested.

[116] Msibi testified that he reported on duty at 5h45, on 3 October 2019 and accused 3 made no report to him of any assault in the early morning hours. He read his entry from the Occurrence Book, into the record, confirming same. This court is satisfied that accused 3 were at no stage threatened or assaulted to make the said confession, as borne out by the occurrence book, bearing in mind that Msibi (state had to re-open its case) did not know that he would be called upon to testify, let alone be requested to present the original occurrence book. The evidence in this regard is therefore reliable and trustworthy. The version of accused 3 that he told Mabaso that he was assaulted, when she apparently asked if he was crying, is rejected as a fabrication and afterthought.

[117] Accused 3 confirms that exhibit “F” contains his signature, which he appended no less than five times. He confirmed that he gave Mabaso the information that appears on page 1, but he does not recall if she wrote it down or if the document was, (pre)typed. When he was reminded that his version is that the document was blank, accused 3 responded that he does not know if anything was written on it. He can however recall that no rights were explained to him. What is the probability that accused 3 will append his signature no less than five times to a document, headed Confession and Admission, armed with the knowledge that Mabaso just told him that the investigating officer already told her everything and he must just sign? According to accused 3, Mabaso even started writing on this document, whilst he was seated opposite her, though he did not know what she wrote, which contradicts his version that he cannot recall if the document was blank or had typing on which further contradicts his version that he signed before she started writing on the document. Accused 3 could not keep up with his dishonesties.

[118] Accused 3 further intimated that when he was fetched from the cells for the pointing out (6 October 2019) Mathebula and a short person, threatened him, in the manner that they spoke to him, saying that Masuku will deal with him. When it was pointed out that this is new evidence, accused 3 said that there are certain things he did not tell his lawyer because he wanted to personally tell the court.

Accused 3 said that he was taken to Chiawelo clinic after the pointing out. Again, accused 3 was reminded that this version was also not put to Mathebula because what will the purpose be of taking him to the doctor *after* the pointing out. Accused 3 said that he does not know why the evidence of Mathebula was not challenged. When it was further pointed out that the version put by his attorney was that he was taken to the Clinic precisely because of this brutal assault on him, which lasted for apparently three (3) days. Accused 3 remained silent and it was put to him that the reason he is confused is because he was never assaulted or sustained any injuries. This court is inclined to agree with this line of reasoning, more so because if accused 3 were so badly assaulted by a group of officers, over a period of three (3) days, then surely the medical examination would have stated so.

Instead, the J88 indicates under medical history that: "…*Patient denies any form of physical assault during arrest. Speaks English fluently*." This corroborates the version of the state witness that accused 3 was at no stage assaulted. The version accused 3 concocted that he was taken to the Clinic after the pointing out, was a last-minute attempt to attack the medical findings, which evidently does not bear out his version of a brutal attack. As correctly asserted by the state, what the reason will be for taking accused 3 for a medical examination, after the pointing out. The J88 states the time of examination at 12h30 and the time of the Pointing out is stated as 13:30; evidently, after the medical examination was conducted. The multiple versions as presented by accused 3, is both a fabrication and inherently so improbable to be rejected as false.

[119] Accused 3 said that on the day of the pointing out, he was taken pass a certain place and told that this is the place he must point out, thereafter they went to Naledi, where Sereo was waiting for him. Thereafter he was taken back to the scene and told to point at the corner, which he did and a photo was taken. The state correctly points out that this version in its entirety was never put to Sereo, Mathebula or Mazibuko. In his response, accused 3 simply says that this was an oversight, in not mentioning it to his lawyer.

From there on, accused 3 became visibly agitated when he said that the signatures on the Pointing out document looks like his, but he cannot remember signing it. Then he said that he does not recognise the signatures appearing on pages 2, 3, 4, 5, and 6, without looking at the document. Then he said that he could not see his signature on the deponent's page, as he cannot recall signing. This is clearly lies upon lies.

[120] Accused 3 said that Mathebula was the one who instructed him to point, and he (Mathebula) took the photos, not Mahlangu. Apart from the fact that this version was never put to Mathebula, accused 3 disingenuously said that in photo 10 and 11 he is pointing at the same spot, when the photos clearly illustrate differently.

[121] It is the view of this court that Accused 3 is an untrustworthy witness who materially contradicted himself. The state's witnesses and their evidence

came across as credible, trustworthy and reliable. Accused 3, to the contrary, clearly concocted his version of being assaulted, threatened and that his Constitutional rights were not explained to him. Noteworthy is the fact that a substantial portion of the version of accused 3 was never put to the witnesses. This court heeds the case of *Boesak*[26], as it concisely summarizes the view supported by this court, as follows:

> "It is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush." As a rule, the institution of cross-examination not only constitutes a right, it also imposes certain obligations."[27]

[122] This court, as at the time of my interlocutory ruling, is presently still of the opinion that the state succeeded in establishing that the Confession and Pointing Out, was made freely and voluntarily by accused 3, while in his sound and sober senses and without having been unduly influenced thereto and that accused 3 confessed, reliably, as reflected in his statement.

[123] Accused 2 assails the Confession on the basis that no Constitutional rights were read to him and that it was not made freely and voluntarily.

Accused 2 said that he made a statement because Masuku and Zwane threatened him by saying that his day is going to be long. He further said that the statement was taken down at night and it took about five (5) hours, hence he was transported back to Walter Sisulu, around 1h00 – 2h00, in the early morning hours.

When Tshabalala testified, she said that the time reflected on the statement as 21:14 was a human error and should reflect 12:14. She was then criticised and suspected of having had a discussion with the prosecution, before her testimony about the issue of time. The frustration exhibited by the defence in this regard is understandable because the incorrect time of 21:14 would have supported their version that Masuku threatened accused 2, by making his day long. However, when the court have regard to page 5 of the statement, then

[26] 2000 (1) SACR 633 (SCA).
[27] President of the Republic of South Africa and Others v SARFU and Others (1) SA 1 (CC).

the time reflected there is 17:05, which is the time the deponent acknowledged that he knows and understands the content of his statement. This supports the version of Tshabalala that the commencement time is 12:14, coinciding with the version that it took about five (5) hours to take down the statement. This further coincides with the version of Masuku that accused 2 was fetched from his house in the morning, around 10h00 and the guardian arrived ±45 minutes later, which accords with the version of Tshabalala that the statement was taken at 12:14. The version of accused 2 that the statement was taken at night is a fabrication. When asked by the court, why, during the course of about five (5) hours, he never mention to his guardian that he was threatened to make a statement. Accused 2 said that he did not have time to and that he was under pressure to make the statement. This version of accused 2 is highly improbable when considering that Masuku was the one who indicated and agreed that the guardian must be present, before accused 2 made a statement.

[124] The version of Tshabalala is credible, in that she took her time to make accused 2 feel relaxed and that the purpose of the guardian being present is to ensure that the child is not forced and that if the guardian noticed something, the child and guardian would discuss it. The version of S[...], the guardian is that accused 2 and Tshabalala understood each other. Noteworthy is the fact that the guardian was adamant in cross-examination that accused 2 was never assaulted in his presence, that accused 2 made the statement freely and voluntarily because he never said anything to S[...] about being assaulted or forced. The multiple versions of accused 2 as to how he was possibly threatened by the words of Masuku or by Masuku and Zwane is a fabrication and rejected as inherently false.

[125] This court finds it surprising that if indeed it was the intention of Masuku, to extract a statement from accused 2 (through threats/assault), one would have expected a written statement, to that effect. Meaning, one would have expected a more detailed statement setting out the conduct of accused 2 on the scene, as opposed to painting accused 2 as a scared bystander. This in itself casts serious doubt on the version of accused 2, and does his version stands to be rejected as inherently false.

[126] This court accordingly allowed the Confessions (made by accused 2 and 3 respectively) and the Pointing Out made by accused 3, which proved to have been freely and voluntarily made, without any undue influence and in sound and sober senses, into evidence and, as I was not swayed to come to a contrary conclusion, the interlocutory ruling to admit the confessions and pointing out becomes a final ruling and it will be assessed together with all the other relevant evidence on the merits.

JUDGMENT IN THE MAIN TRIAL

---

[127] **DORCAS YUNIS MABASO** ("Mabaso") testified under oath that she previously testified in the proceedings. She confirms that she has taken down a Confession from accused 3, Thabiso Hlubi and proceeded to read the statement as taken from Accused 3 into the record.

[128] **ANDREW SEREO** ("Sereo") testified under oath that he is a colonel within the SAPS and conducted a pointing out in respect of accused 3. He said that accused 3 was brought to his office and after he established what language he speaks, he showed him his appointment certificate and read his rights. They proceeded outside and the accused was directing him where to go.

Mathebula was the driver. Accused 3 pointed opposite house number 1087 and indicated that is where he shot the deceased. A short distance away, accused 3 also pointed where he and his accomplices robbed the victims.

Back at the station, Sereo read back his notes to accused 3, being assisted by the interpreter. They all signed the pro-forma. Sereo said that photo 10 depicts himself, accused 3 and the interpreter and accused 3 points to where he shot the deceased. In photo 11, that is where accused 3 pointed, where the other victims were robbed.

[129] **REFILOE TSHABALALA** ("Tshabalala") testified under oath that she previously testified that she is a Lt. Colonel, who took a statement from

accused 2, K[...] Junior M[...]. She then proceeded to read the statement into the record.

[130] **SOLLY BALOYI** ("Baloyi") testified under oath that that he is a constable within the SAPS, stationed at Naledi, with 11 years' service. He was present on 1 October 2019, when accused 3 was arrested. He reported on duty and they were doing suspect raiding. There were two suspects arrested on that day, who led them to accused 3. They proceeded to house number 2865B Nare Street. By then they were already informed that the person they are looking for is nicknamed "Mjeza" and he resides in the garage.

[131] Upon arrival, they knocked and introduced themselves as police officers. Whilst knocking they already noticed that the garage door was closed, using a sock and that the television was on. There was a burglar door on the inside, which was locked. They could see the shadow of a person pacing up and down inside the garage.

When his mother heard what was happening outside, she got up. They introduced themselves and showed their appointment cards. They informed her of the reason for them being there and it surprised her when she heard that they were looking for Mjeza. She said that it is the first time to hear that her son is called by that name. She opened the burglar door for the police.

[132] They found accused 3 standing inside the room (garage) and informed his mother that accused 3 was a suspect in a murder case. Masuku informed him of his rights and enquired if the accused knew anything about a firearm. Accused 3 did not waste any time and said there is the firearm, pointing at the window. Masuku proceeded to the window and Baloyi followed.

On the window hung a curtain and the firearm was placed between the window and the curtain. The curtain was open, and they observed a black firearm, with a magazine next to it. Masuku informed the suspect that he is placed under arrest for possession of an unlicensed firearm. Photos was taken of the firearm as well as swabs taken, which is when they learnt that the magazine had eight (8) rounds.

[133] The firearm had a serial number. The suspect's mother was in shock, and she cried as it scared her that her son had a firearm and that he was a suspect in a murder case. The mother was present in the room as a parent, whilst everything was happening, and the accused was never coerced or assaulted to point out the firearm.

The firearm was packaged and sealed, booked into SAP13 781/2019. They proceeded to Naledi and a case of possession of unlicensed firearm was opened. The accused was detained at Jabulani, and he was never assaulted in the presence of Baloyi, and was free of injuries.

[134] The firearm was a Norinco Pistol and Baloyi was allowed to refresh his memory in respect of the serial number: RR234962 sealed in forensic bag PAD001161234. Baloyi said that the other two suspects who helped to point out accused 3, are twin brothers, pointing at accused 4 and 5.

Baloyi explained what EXHIBIT C2 depicted[28]:

[135] During cross-examination on behalf of accused 3, it was put that the section 212 statement states that the firearm was a Beretta, Baloyi said that he believes that the firearm found was a Norinco and the Laboratory can say why they refer to it as a Beretta. It was put to Baloyi that a Beretta is Italian, a Norinco is Chinese, and these can never be similar firearms. Baloyi responded that forensics would be in a better position to explain as they deal with these things.

[136] Baloyi said that he knows that accused 4 and 5 were present outside when accused 3 was arrested but as several suspects were arrested, is it possible

---

28

Photos 1 and 2:Depicts a house and car and he recognize the house as number 2865B, where accused 3 was arrested.

Photos 7 and 8:	Depicts the outside rooms, where the accused were found.
Photo 18:	Depicts a black firearm and magazine on the side.
Photo 18, 19, 20:	Depicts where the firearm was found on the "vensterbank".
Photo 21:	Depicts a black firearm with eight (8) bullets loaded.

that Nene *(204 witness)* may have been present. Baloyi said that Masuku read section 35 to accused 3 before he pointed the firearm, and he believes that Masuku would have recorded that in his statement.

Baloyi confirmed that photos 13 and 14 depicts a bed on either side and said that this incident happened a long time ago. Baloyi dispute the version of accused 3 that he told the police that his brother owns the firearm and that he has left two days prior. Baloyi said that even the mother of accused 3 was surprised and he never mentioned anything about his brother. Baloyi further disputed the version of accused 3 that he never pointed out the firearm because he was instructed to lie on the ground by the police. Baloyi said that Photo 21 and 22 depicts a pistol and that a Norinco and Beretta are both pistols.

[137] **MATOME JOHANNES MATJILA** ("Matjila") testified under oath that he is employed within the SAPS as a ballistic expert at the Forensic Laboratory. His qualifications are set out as per the section 212 statement, marked Exhibit "H1"

He confirms that on 21 April 2020, he was on duty and received exhibit bag PAD001161234, Naledi CAS: 182/08/2019, with the exhibits as mentioned in paragraphs 3.1 and 3.2. Matjila said that the 212 statement contains a typing error, as the firearm he received was a Norinco with serial numbers 0303302 and WR234962, with one (1) magazine and eight (8) cartridges.

Matjila said that he prepared a supplementary affidavit, changing the name Beretta to Norinco, which is the manufacturer. He said that neither the serial number nor the model number changed, only the name of the manufacturer. Matjila said that he only realised the error the day prior, whilst doing his court preparation. He went through his examination worksheet and saw that he typed Beretta instead on Norinco.

[138] Matjila, who read from the worksheet confirmed that he recorded the Lab number and the police station being LAB#311232/19 Naledi CAS 182/08/19. He also recorded the exhibits he received on the worksheet: PAD001161234,

Calibre Norinco. He said that he prepared the Ballistic Report on 21 April 2020, and he signed the worksheet at the bottom.

Matjila read the supplementary affidavit into the record. He said by merely looking at Exhibit “C2”, a Beretta and Norinco looks similar and to differentiate between the firearms you have to look at the design, the length of the barrel, overall shape, markings, symbols and how the firearm is cocked.

[139] During cross-examination on behalf of accused 3, Matjila was asked how the court will know if he in fact completed the worksheet on 21 April 2020, because he could simply have printed it out earlier and fill it in by pen. Matjila responded that you need to physically have the exhibit on order to measure it and record the serial number and he only had the exhibit for one day in his possession.

It was put to Matjila that Baloyi only mentioned one serial number. Matjila responded that the serial number makes the firearm unique but then the firearm registry can issue a second serial number, which according to Matjila is visible on the firearm.

It was put to Matjila that his worksheet is vague because the firearm that he examined was in fact a Beretta. Matjila denied this.

[140] On Application the section 212 statement, which upon its mere production is admissible, was handed in with the supplementary affidavit, to be marked as an exhibit. (“H1 and H2”)

[141] **SIBUSISO WALTER MAKGATHLA-MASUKU** (“Masuku”) testified under oath that he is the investigating officer in Naledi CAS 182/8/2019. He said that he received this case docket in August 2019, in order to investigate a case of murder, where the deceased, a female went to withdraw money at an ATM at the Engen garage. A witness took down the registration of the vehicle that was driven by the accused.

Masuku went to the garage, watched the CCTV footage, which he requested to load onto a memory stick. He sent the stick to Pretoria in order to obtain

still-photos, to obtain the registration number, which corresponded with the registration number as given by the witness.

[142] The vehicle was a silver Polo, with registration number DC49DFGP. Masuku circulated the registration number, which is how he learnt the name of the owner. On the 1st of October 2019, driving on Elias Motswaledi, he passed a vehicle bearing that registration number. He stopped the vehicle and the driver introduced himself as Nkululeko Malindiso. Masuku introduced himself and requested Malindiso to accompany him to the police station, where he was briefed on the investigation.

[143] Malindiso initially informed that he could not remember his whereabouts on 28 August 2019 but is willing to give a statement. Subsequently, Malindiso remembered that he was at work on that day and that his stepson, Reatile Nene, drove the vehicle in question. Malindiso was detained because he also admitted that his vehicle was previously used in the commission of robberies. On the 2nd of October 2019, Masuku went to look for Nene and requested him to accompany him to the police station. Nene agreed and upon being questioned, Nene pronounced that he knew nothing. When he was informed of the footage, Nene said that he is willing to make a statement. It was arranged for the statement to be taken. Nene was detained after his rights were read.

[144] On the same day, Nene was booked out to locate the other suspects and they proceeded to the place of accused 4 and 5. Arriving at Jabulani, they proceeded to the backrooms, knocked and introduced themselves. Accused 4 and 5, were asleep with their mother, who was informed of the investigations. They got dressed and their rights were explained. Accused 4 and 5 indicated that they are willing to assist. The information obtained from them, led the police to Emdeni, Nare Street. They followed up the lead of a suspect by the name of Mjeza, as directed by accused 4 and 5, who said that Mjeza sleeps in the garage.

[145] Mjeza is known as Thabiso Hlubi, and they could see the garage door being slightly open and tied with a sock. They proceeded to knock. They could see that the television was playing. He could see a man pacing up and down

inside. The man called for his mother who was asleep in another room, and she came and opened for them. Masuku introduced himself and told her that he is investigating a murder and robbery case.

[146] Accused 3 was given his constitutional rights and questioned about his knowledge of a firearm. In the presence of his mother, accused 3 voluntarily, without being influenced, said that the firearm is on the window. Masuku went to the window to check for the firearm. When he moved the curtain, he saw the firearm with a magazine. LCRC was called in to take photos and the firearm was packaged. Again, accused 3 was given his constitutional rights and informed that he is placed under arrest for the possession of unlicensed firearm and ammunition. The firearm was placed in forensic bag with number PAD001161234; with SAP13 number 781/2019.

[147] During cross-examination on behalf of accused 2, Masuku said that he received the information regarding the registration of the vehicle on the 29th of August, a day after the incident. When asked how Masuku linked the (Engen) garage, from where he obtained the footage, to the shooting, Masuku said that Tshepo mentioned that the deceased went to the garage to withdraw money. When asked what exactly the footage revealed, Masuku said that he saw the vehicle bearing the registration number as stated by Tshepo, which led to the still photos. According to the footage, the vehicle was parked at the garage, changed position, parked again and then followed the victims. When asked why the owner of the vehicle was not arrested immediately, Masuku said that he had to put his informants and sources out in order to proceed.

Masuku confirmed that the arrest of the other accused stem from the statement made by Nene. Masuku said that from the footage, he could not see who the occupants of the vehicle were.

[148] During cross-examination on behalf of accused 3, Masuku said that accused 3 did not indicate where he found the firearm. Masuku confirmed that in the statement made by accused 3, a person by the name of Koni is mentioned but that he bears no knowledge of it. When asked how many serial numbers the firearm had, that was discovered, Masuku said that they found one serial number as written in his statement but conceded that he is not an expert.

[149] It was put that accused 3 will deny that his mother was present, when the firearm was discovered. Masuku said that accused 3 is not telling the truth. It was put that the firearm belonged to the brother of accused 3. Masuku said that the information he received, stated that the firearm was with accused 3 and not his brother with whom he allegedly shared a room.

[150] During cross-examination on behalf of accused 4, Masuku stated that he did follow up with the supervisor of Malindiso, that he was indeed at work on the day in question. It was put to Masuku that accused 4 took him to where Mjeza (accused 3) stayed because he was told to do so by Masuku. Masuku denied this.

During cross-examination on behalf of accused 5, it was put to Masuku that accused 4 was instructed to sit in front and accused 5 was seated at the back. Masuku said that they were both placed in the Sedan, leading and directing the police, rendering assistance. It was put to Masuku that he was the only person having had the benefit of viewing the footage. Masuku said that it was decided that the still-photos of the footage would be used instead. Masuku said that it is his opinion that when the vehicle drove off, it drove in the direction the victims took. He thus assumed that the Polo was following the victims. It was put to Masuku that his conclusion in this regard is not supported.

[151] During re-examination, Masuku said that Exhibit "C3" depicts the Engen garage at Naledi. It further depicts the Polo, silver-grey in colour with registration number DC49DFGF. Photos 1-2, depicts the bank (ATM) and the vehicle, showing the direction that the victims headed towards. Photo 3 depicts the entrance and exit of the garage and photo 4 depicts the registration number of vehicle, the time (21h17) and date (2019/08/28).

[152] **THE DEFENCE ON BEHALF OF ACCUSED 4[29] AND 5[30], LAUNCHED AN APPLICATION IN TERMS OF SECTION 174 OF THE CPA 51 OF 1977, PREMISED ON THE FOLLOWING:**

On behalf of accused 4: The credibility of the section204- witness was challenged.

[29] Oral submissions made.
[30] Written heads of argument Exhibit R.

On behalf of accused 5; All the accused denied being in the company of Nene and based on the evidence adduced, there is no version or statement by any of the witnesses or any of the accused, implicating one another. The witnesses did not identify accused 5 as a perpetrator. The only evidence against accused 5, was that he was seated in the car. No common purpose or joint possession was established. The confessions and or pointing out are inadmissible against a co-accused, only admissible against the maker.

[153] Legal principles through case law referred to[31]

It is argued that the state failed dismally to prove or establish a *prima facie* case against the accused and no reasonable court acting carefully could convict on the evidence adduced thus far.

[154] The said application was vehemently opposed by the state and assailed as follows:

The evidence of Nene materially corroborates the evidence of Lerato and Tshepo, in that three people alighted from the VW Polo, which according to Nene, was accused 2, 3 and 4. Tshepo testified that the three people who alighted from the vehicle started chasing them, the one with the knife chased after him and the one with the firearm chased the deceased and the other chased Lerato. Tshepo further testified that when his cellphone was taken, he heard a gunshot coming from the direction of the deceased. He further

31

1) S v Ndlangamandla and another 1999 (1) SACR 391 (W).
2) S v Lubaxa 2001 (4) SA (SCA).
3) S v Shupping 1983 (2) SA 119 (B).
4) S v Maliga 2015 (2) SACR (SCA) @ [18].
5) S v Agliotti 2011 (2) SACR 437 (GSJ).
6) S v Dewani (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC).
7) S v Zulu 1990 (1) SA 655 (T).
8) S v Nkosi & another 2011 (2) SACR 482 (SCA).
9) S v Mthembu & Others 2011 SACR 286 (GSJ) @ [37].
10) Sithole and Another v S (A777/15)[2017]ZAGPPHC 169.

testified that after he heard the gunshot, all three males ran back to the VW Polo and it drove off at a high speed, but he managed to get the vehicle's registration number. Tshepo then realized that the deceased was shot, and her handbag taken.

The state argues that it is clear that the people, who took the cellphone from Tshepo and the handbag of the deceased, were accused 2, 3 and 4. That they came running back to the vehicle, in possession of the said cellphone and lady's handbag.

[155] That the only reasonable inference that can be drawn from the proved facts is that all the accused had a prior agreement to commit this offence. That accused 4 had prior knowledge of committing this offence because immediately after the vehicle stopped, he too alighted from the vehicle.

Further, at the time when accused 3 cocked the firearm, he asked to swap seats with accused 5, who went to sit in the front passenger seat.

Muzikayise testified that accused 2, 4 and 5 are the ones who gave him a Samsung Galaxy cellphone as surety to borrow R600. Tshepo identified the phone that was robbed from him on 28 August 2019, as his property.

[156] The state in conclusion argued that with reference to *Snyman*, 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.

[157] This court is mindful that it is trite that "no evidence" does not mean that there is literally no evidence, but rather that there is a lack of evidence on which a reasonable court, acting carefully, would convict the accused.[32] Whether or not a discharge should be granted at this stage is a decision that falls in the ambit of the trial court's discretion. This discretionary power is one that must be, self-evidently, judicially exercised.[33]

[32] S v Lubaxa 2001(2) SACR 703 (SCA).
[33] S v Dewani 2014 (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC)) at para 8.

If in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward, and the accused may not be discharged, the trial must continue to its end.

It is foremost the view of this court that the credibility of Nene cannot be said to be of such a poor quality, that no reasonable person could possibly accept it. It is not in dispute that Nene, accused 4 and 5 are known to each other. In turn, it is not in dispute that Muzikayise, accused 4 and 5 are known to each other.

In order for a court to arrive at a decision whether or not the state adduced evidence upon which a reasonable court may convict, it must have regard to the cogency of the evidence adduced.[34] It must be noted that relevant evidence can only be ignored if it is of such a poor quality that no reasonable person could possibly accept it.

It is trite that a prior agreement may be expressed or implied, or by way of association between co-perpetrators. Evidently, a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.[35]

[158] It is the view of this court that a *prima facie* case was made out against accused 4 and 5, in that there is sufficient independent evidence that calls for an answer.

THE APPLICATION BY ACCUSED 4 AND 5 TO BE DISCHARGED IN TERMS OF SECTION 174, IS ACCORDINGLY REFUSED.

[159] **K[...] JUNIOR M[...]** ("accused 2") testified under oath that he is 18 years old and was doing grade 10 at Lavela Senior Secondary, at the time of the incident. He knows Nene through accused 4 and 5 and they are not friends. He knows accused 3 from school but does not know where he stays. He

[34] S v Mpetha and Others, supra at page 265 "Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown"
[35] Lubaxa, supra at 707h – 708b:

knows accused 4, through his brother (accused 5), as they reside in the same house.

[160] On 28 August 2019, he was at home doing his Economics and PPE homework but cannot recall what the abbreviation stands for. This was in preparation of his exams, and he is certain of this. He was not part of a group who robbed or murdered; he was nowhere near the Engen garage, and he was not in the company of accused 1, 3, 4 or 5. Accused 2 said that he never owned or possessed a firearm, and he has an alibi witness, **F[...] M[...].**

[161] During cross-examination by the state, accused 2 said that 28 August 2019 was on a Thursday. He is sure of this because he went to school on that day. When it was put to him that 28 August 2019, was infact on a Wednesday, accused 2 said that he can say nothing about that but he did his homework on 28 August 2019. It was put to accused 2 that his version proves that on Wednesday, he was in fact in the company of accused 1, 3, 4 and 5 as he was doing homework on the Thursday. Accused 2 denied this.

When asked what time he started his homework on the Thursday, accused 2 said that between 5h00 and 6h00. Accused 2 denied ever talking to Nene, as he would only see him on his way to accused 5, driving a car or being seated at the shop. He mostly saw Nene driving an iI20 or a Polo, grey in colour.

[162] Accused 2 said that he was never introduced to Nene, and that accused 4 and 5 will only tell him that this is so and so and this is what he does. Accused 2 suspects that accused 4 and 5 grew up with Nene.

Accused 2 said that he will sometimes sit with accused 3 during lunch break at school and he knows accused 5 through his friend, accused 4. He knew that accused 3 was called Mjeza at school but did not know where he resides. Accused 2 thinks that on that Thursday when he was doing homework, accused 5 was at school because they were all preparing for exams, as he did not see him during the day. On that Thursday, he stopped doing his homework between 21h00 and 22h00 and he does not know where accused 3, 4 and 5 was at that time. Accused 2 said that he also does not know where they were on the Wednesday.

It was put to accused 2 that Nene will say that he was in the company of accused 2 on 28 August 2019 and Tshepo said that whilst in the company of the deceased on 28 August 2019, this incident happened. Accused 2 said that he cannot recall when he was with Nene. It was put to accused 2 that the fact that he cannot recall what type of PPE homework he did, could be that he did not even do homework on that Thursday.

[163] When asked what he understood by "your statement" accused 2 said that the police said that it is the statement he gave them. It was put to accused 2 that this statement allegedly made by him states that "*so myself, Andile, Thabiso accosted….the African female…*" and that this corresponds with Nene's testimony that accused 2 were with him on the day in question. Further, that Muzakayise Khoza said that accused 2 was in possession of a cellphone he pledged for R600, and it is alleged that the said cellphone belongs to Tshepo, the witness. Accused 2 said that he got the cellphone from an Indian shop and not from criminal activities. Nene's testimony was put to accused 2, which he denied.

[164] Accused 2 responded that what made him depose to the statement was because he was threatened to make it and the police told him that they knew everything about the incident. Accused 2 conceded that he made a statement but that the statement the police read back to him did not contain what he said. Accused 2 said that the statement he gave was that he was not with Nene on the day in question.

Accused 2 confirmed that he testified that the reason he gave a statement was that he was threatened to give a statement, which placed him on the scene.

[165] During re-examination, accused 2 were asked whether he made a statement because the police threatened him or because he was just asked to sign. Accused 2 responded that the police came with a statement already written.

[166] **P[...] F[...] M[...]** ("F[...]") testified under oath that accused 2 is her grandchild and she resided with him as from June 2019. She confirms that at the time of the incident, accused 2 was doing grade 10.

F[...] said that when she came home on 28 August 2019 around 19h00, she found accused 2 and Nkululeko at home studying together. She recalls this because she was working and were paid on the 25th or 26th. On Friday, 23 August, she told them that whoever got the better marks, would receive a present.

The whole week of the 28th, they were home, studying. She prepares the food and if they want to leave, they have to pass her in the kitchen, for the key, in order to exit the gate. On the day of his arrest 3 October, accused 2 was at his uncle's place. She was told that accused 2 was with his friends in a particular car but she does not know what happened.

[167] During cross- examination by the state, F[...] was asked why did she not think it crucial to go to the police as she had information about the whereabouts of accused 2, on 28 August 2019. F[...] said that no one came to her, and she did not know what accused 2 was arrested for. She only learnt when he was at Walter Sisulu and accused 2 said that he was asked to make a confession and he cried and asked her forgiveness for disappointing the family and for the people he associated with. When asked how she links the co-accused of accused 2 as bad company when she does not even know them, F[...] said that Mjeza (accused 3) said that accused 2 must confess to the crime because he is the youngest and he will get a lesser sentence.

[168] When asked why she remembered what happened on 28 August, if accused 2 was arrested 1 month and three (3) days after the incident. F[...] responded that they were preparing for exams that whole week and that she said whoever passes well, will get a present.

It was put to F[...] that accused 2 said that he was doing homework on the Thursday, not the Wednesday. F[...] said that when she went into the bedroom, he was busy studying Tourism.

[169] On the court's question, when it was put that accused 2 said that he was not studying that whole week, F[...] responded that he may be telling the truth because he was also assisting Nkululeko. When it was put that accused 2

said that he was doing chores on the 30th, F[...] said that she does all chores and maybe accused 2 were fooling her.

[170] **HLUBI THABISO KHUHLE** ("accused 3") testified under oath that he knows nothing of the allegations against him. If memory serves him, then he was busy with preliminary tests for grade 12. He denies the allegation by Nene that they were together on 28 August, as he does not know him.

On the day of his arrest, he was kept at the police station and whilst there, he was continuously assaulted. He knows nothing of a confession as he was assaulted and forced to admit to the charges.

He said that he was fetched in the early morning hours and taken to a location and told that this is where the incident took place. From the scene, they drove back to the police station to fetch the photographer and then went back to the scene, where he was instructed to alight from the vehicle and point out. Photos were then taken and from there they drove to Chiawelo Clinic and back to the police station. Accused 3 denies giving the police directions to the scene.

[171] Accused 3 stated that the firearm that was found on the windowsill, was nearer to where his brother sleeps, the firearm belongs to his brother. He was assaulted when he tried to give an explanation.

During cross-examination by the state, accused 3 confirmed that his nickname is Mjeza. He said that he does not know Nene, but he knows accused 2 and 5 by sight from school and he met accused 4 at the police station. It was put to accused 3 that it was never disputed that accused 4 and 5 directed the police to his residence. Accused 3 said that he bears no knowledge about that neither does he bear knowledge of Nene knowing accused 2, 4 and 5.

[172] It was further put that Nene testified that on 28 August, he was seated with accused 2, 4 and 5 smoking marijuana, when accused 4 requested Nene to fetch his friend at Zola and they all left in the Polo and met up with him. Arriving at the place, accused 4 introduced his friend as Mjeza and he sat in

the front seat. Accused 3 denied Nene's version of events and said that the statement made by Nene was his way of protecting himself.

[173] It was put to accused 3 that the eyewitness confirms Nene's version that 3 people alighted from the vehicle, thus validating the version of Nene. Accused 3 said that these are false allegations against him as he was not there.

It was put to accused 3 that Exhibit "L" was not copied from Nene's statement, as the statement of accused 3 mentions specifically the name "Voog". Accused 3 responded that he knows nothing.

[174] The entire content of his statement was put to him and accused 3 responded that he does not know where the police got the information from. It was put to accused 3 that certain aspects of his evidence the police could not possibly fabricate, as Nene's statement does not similarly mention those aspects. Further, that the confession of accused 3 from there in fact confirms Tshepo's evidence about how the cellphone was taken from him and the handbag from the deceased. Accused 3 replied that he knows nothing about that.

It was put to accused 3 that it is not in dispute that a cellphone was later sold to Muzikayise, later identified by Tshepo as his cellphone. That accused 3, in his confession, mentions that his friends sold a cellphone. Accused 3 responded that he knows nothing about that.

[175] It was put to accused 3 that his statement mentions that the firearm was found on the windowsill. Accused 3 said that he was not aware of a firearm because as he was about to step out of the door, the police said that they found a firearm on the windowsill. Accused 3 said that he does not know the name Koni as it appears in his statement, as he was never given a chance to explain.

[176] It was put to accused 3 that the firearm found belongs to him because it was not found hidden, and he was the only person in that room. Accused 3 disagreed stating that no evidence of his fingerprints were found. Asked whether he told his mother that the firearm belonged to his brother, Lunga, accused 3 said that he was not allowed to talk to her. Accused 3 said that

there are many things including the date and time of the incident that he cannot remember because he has been incarcerated since 2019.

Asked whether he was taken to the office of Sereo, accused 3 said that he was taken to many offices and he cannot recall the day of the pointing out. Accused 3 could not dispute that photo 3 depicted an office and confirmed that photos were taken during the pointing out but that he was told that this is the place where the crime took place, and he was shown two spots on the same road.

Accused 3 recognize Sereo from photo 8 as the person called to take the photographs. When it was pointed out that in photos 7, 8 and 10, someone else had to take those photos in which Sereo appeared and it was never disputed in the trial-within-a-trial that Mahlangu was the photographer. Accused 3 said that he does not know how to respond as he was just told where to point.

[177] **ANDILE SITHOLE** ("accused 4") testified under oath that 28 August 2019 was a normal day. Between 18h00 to 19h00, he went to see his girlfriend, Amanda and he normally sits with her for an hour. From there, he went back to his place at Jabulani, where he found his twin brother at the shop, busy selling. They locked-up the shop at 21h00 and went to sit in the yard with their friends Simphiwe and Sithembiso, to smoke marijuana. They separated ways after 30 minutes and accused 4 and his brother went to sleep around 22h00. Besides accused 5, did accused 4 not see any of the other accused that night.

On 3 October 2019, the police came looking for him and his brother. His mother opened and the police said that they are looking for Ayanda and Andile, and it's alleged that they were present during the commission of the crime.

[178] Outside, accused 4 found his friend (Nene), who brought the police to his house. As they entered the police vehicle, the police informed them that they are going to Mjeza's house. Nene was travelling in the 1st vehicle, leading and directing the way. When they stopped, the police enquired from Nene if that was the residence of Mjeza, and he said yes. When asked how he

remembers what happened on 28 August 2019, accused 4 said that his arrest was hurtful and he recalled it, when accused 2 took the witness stand. Accused 4 said that Nene is lying when he said that they were together on 28 August 2019, when these crimes were committed.

[179] During cross examination on behalf of accused 3, accused 4 said that the reason he thought Nene knew where accused 3 stayed was because Nene was driving in the vehicle upfront.

During cross examination by the state, accused 4 concedes that he knows accused 2 by sight as his brother (accused 5) and accused 2 attends at the same school and he knows Nene as they reside in the same township.

[180] Accused 4 said that during one morning in August 2019, his mother sent him and accused 5 to buy stock and accused 2, accompanied them. When leaving the yard, Muzikayise approached, driving a car. They asked for a lift, and he took them to the mall. On their way, accused 2 took out a cellphone and told Muzikayise that he is selling that phone. As it appeared that Muzikayise liked the phone, he told accused 2 that when he comes back from work, they could talk about the phone. Arriving at the mall, Muzikayise gave accused 2, R200 in the meantime.

Accused 4 said that he does not know accused 3 and only learnt of the name Mjeza in 2019 on 4 October, at Jabulani police station. It was put to accused 4 that the testimony that Nene took the police to the address of accused 4 and 5 and in turn, accused 4 and 5 directed the police to Mjeza's place and that was never challenged. Moreover, that even Masuku testified that accused 4 and 5 directed the police to Mjeza place and this evidence too was left unchallenged. Accused 4 said that he informed his lawyer, and he did not know it was allowed for him to raise his hand. It was also pointed that when cross- examined by Adv. Moleme, accused 4 said that he was not sure if Nene directed the police to Mjeza's place as he was just there in the front vehicle. Accused 4 responded that it was just something he was thinking.

[181] When asked why he did not see it necessary to ask Nene, his friend, why he brought the police to his house, implicating him in a crime? Accused 4

responded that there was no time in the cells to have such lengthy discussions and that it is possible that Nene who was arrested, just decided to point some of his friends.

Accused 4 confirmed that he, at some point in time smoked marijuana with Nene. When asked what else makes him remember the date of 28 August 2019, except for the testimony of Junior (accused 2) that jolted his memory, accused 4 responded that on that day, he had broken up with his girlfriend.

When asked what exactly about accused 2' evidence made him remember, accused 4 said that he remembered because accused 2 mentioned doing homework. When it was pointed out that doing homework could not assist accused 4 to remember the date of 28 August more so because Nene testified long before accused 2, yet a version was put to Nene, ostensibly on instruction by accused 4. Accused 4 said that he does not know how to answer anymore but he denies that he and accused 2 discussed giving this version.

[182] It was put to accused 4 that his friend Nene said that after they smoked marijuana together, it was accused 4 who suggested that they fetch his friend Mjeza and that accused 4 showed them where he stayed and introduced Mjeza to them. Accused 4 responded that Nene's version of events is a lie, as he was not with him.

It was put to accused 4 that if Nene wanted to falsely implicate him, he could have said that he (accused4) had the firearm or the knife but instead he said accused 4 carried nothing. Accused 4 said that he does not know how to respond.

[183] It was put to accused 4 that the eyewitnesses saw three people alighting from the vehicle, in-line with the version of Nene, showing a common purpose to commit robbery and murder because each of them chased one of the witnesses. Accused 4 said that he bears no knowledge of this, and Nene is just accusing him falsely.

When asked where he was on 29 August 2019, accused 4 said that if memory serves, his mother send him and Ayanda to the mall to buy stock and that was

the day they asked Muzikayise for a lift and Junior (accused 2) was in possession of a cellphone. Accused 4 disputes the evidence of Nene that they were all five together on that day, drinking liquor in the park and when he (Nene) asked where they got the money from, accused 4 said it was from yesterday's phone.

[184] It was put to accused 4 that he said that accused 2 sold that phone on 29 August whereas accused 2 said he got that phone during September, making their evidence contradictory. Accused 4 initially said that maybe he made a mistake, then changed his version and said that he is telling the truth.

It was put to accused 4 that he said that accused 2 sold the phone for R200, whereas the phone was sold for R600. Accused 4 responded that he does not know the agreed price and that the R200 was given as security. It was pointed out that the version put was that "they" (referring to accused 2, 4 and 5) sold the phone, not accused 2. Accused 4 said that his lawyer made a mistake putting that version. It was put to accused 4 that his version put was that the phone was sold and not given as security.

[185] It was put to accused 4 that on the night in question, they planned to go and terrorize the community, including the place where the incident happened. Accused 4 disagreed.

[186] **AYANDA SITHOLE** ("Accused 5") testified under oath that he and accused 4 are brothers. He knowns Nene from the area, who resides two streets from him. He knows accused 2 from school and they are not friends as they are not in the same class.

He said that on 28 August 2019, he was home, where they operate a shop. They closed the shop at 21h00 and he was with accused 4. Thereafter he, accused 4 and Sithembiso, smoked a zol of marijuana; thereafter they parted ways and went off to bed. He never left his house that night and he was not with accused 2, 3 or Nene.

Accused 5 said that Nene's version that he was driving with him, accused 2, 3 and 4 on the night in question is a lie. He bears no knowledge of any robbery or murder, and he does not know why Nene will fabricate this version.

Accused 5 said that he never had a close relationship with Nene, as they were not friends.

[187] Accused 5 said that he knows Muzikayise as they reside in the same vicinity. On the 29th of August, being in the company of accused 2 and 4, they met Muzikayise. They were sent to the wholesalers to buy stock for the shop. They ask Muzikayise for a lift to the mall and they all sat in the back of the vehicle. Accused 2 was listening to music on his phone and when Muzikayise complained about not having a phone, accused 2 said that he has a phone to sell. They alighted at the gate of the mall and Muzikayise gave accused 2 some money. Accused 5 said that he did not hear the arrangement between accused 2 and Muzikayise, only that accused 2 wanted to sell the phone. Accused 5 initially denied saying anything to Muzikayise about the phone as he bears no knowledge of the phone been given as security, thereafter he changed his version, saying that the phone was sold to Muzikayise.

[188] Accused 5 denied all the allegations against him and said that Nene's statement does not disclose that this incident was discussed and planned.

[189] During cross- examination by the state, accused 5 was asked why he states that he does not know whether the phone was being sold or not, when he earlier said that accused 2 sold the phone to Muzikayise and accused 2 was given R200. Accused 5 said that he saw money, but he now knows that the phone was a loan, as accused 2 testified, and that he believe accused 2. When asked whether he believe accused 4, who said that the phone was sold, accused 5 said that maybe accused 4 also did not hear right.

[190] Accused 5 said that he, accused 4 and Sithembiso smoked a marijuana zol after they closed the shop. When asked if Simphiwe was present, accused 5 said that he cannot recall but if accused 4 included Simphiwe, then that is true.

It was put to accused 5 that if he cannot dispute whether Simphiwe was present, then likewise he cannot dispute that Nene and accused 2 were present, smoking dagga (marijuana) with them on 28 August 2019. Accused 5 said that he is sure that that is a lie because he has never smoked with Nene

and because accused 2 does not smoke dagga (marijuana) and he resides in Jabulani. When it was put to accused 5 that accused 4 testified that there was a time when they sat together and smoked with Nene, accused 5 said that there was a time during the day when he, Nene and accused 4 sat together, but they did not smoke dagga at night and disputes what accused 4 said.

[191] Accused 5 said that he knows accused 2 from school and they sometimes sit together at school. Accused 4 knows accused 2 through him as they walked to school during the week. Accused 5 conceded that 29 August 2019 was on Thursday during the week and confirmed that accused 2 accompanied him to the shop. When asked why he did not mention this, instead of saying that accused 2 only pass by his house when they go to school? Accused 5 said that he responded to when accused 2 visited him and not what they did. It was put to accused 5 that he is giving conflicting versions which is a consequence of lying and fabricating.

[192] It was put to accused 5 that Muzikayise testified that he was stopped around 8h00 in the morning, on the day in question. Accused 5 said that they were crossing the main road when the car stopped at the stop street, Muzikayise ask where they were going and they asked him for a lift. Accused 5 denied that they stopped the vehicle to borrow R600 and giving the phone as security. It was put to accused 5 that Muzikayise agreed to give the R600 because he knew him and accused 4. Accused 5 said that he does not recall borrowing money from Muzikayise in the past. It was further put that *after* he gave the R600 and accused 2 gave him the phone, only then was he asked if he is going in the direction of the mall.

[193] Accused 5 confirmed that he knows Mjeza from school but they were not in the same grade. He knows Nene from around the township and he will sometimes come and buy at the shop. Accused 5 denies that accused 2 knows Nene through him and accused 4, as he never introduced them.

When asked how he knows that accused 3 is known as Mjeza if he only knows him by sight. Accused 5 said that at school people call him Mjeza and he has known him for a few months.

[194] Accused 5 said that Nene's version of events are lies, and he bears no knowledge of it. It was put to accused 5 that immediately when Nene made his statement, he mentioned specific names and what each one did. Nene did not have a chance to go and think out a story as alleged by accused 5.

It was put to accused 5 that he specifically asked Nene to stop the car and not to leave his twin brother behind, thus all acting with a common purpose. Accused 5 said that he bears no knowledge of it.

When asked what happened after their arrest, accused 5 said that he, accused 4 and Nene, were all placed alone in different police Bakkies. When asked how Nene knew where he slept, if they were not friends. Accused 5 said that Nene would see him moving in and out of his room.

THAT CONCLUDED THE EVIDENCE FOR THE DEFENCE.

THE STATE ARGUED FOR A CONVICTION[36] AND THE DEFENCE[37] ARGUED FOR AN ACQUITTAL.

EVALUATION

[195] **A CAREFUL CONSPECTUS OF THE EVIDENCE DEMONSTRATES THAT THE FOLLOWING ASPECTS OF EVIDENCE ARE IN DISPUTE.**

Whether the state has proved beyond a reasonable doubt that the accused were present on the scene, on 28 August 2019, and that they unlawfully and intentionally killed the deceased, as envisaged in terms of section 51(1) [38]and further robbed the complainants, as defined in section 1 of Act 51 of 1977, aggravating circumstances being present were the wielding of a firearm and knife; and grievous bodily harm being threatened. Reliance is placed on the doctrine of common purpose.

[196] This court is guided, in the final analysis of all the evidence before the Court, by various legal principles to determine whether the charges against the accused have been proven beyond reasonable doubt.

In *S v Shackell*[39] the court states:

[36] Written submission "OOO".
[37] Written submissions "PPP, QQQ, RRR, TTT, TTT1".
[38] CLAA 105 of 1997.
[39] 2001 (2) SACR 185 (SCA) at 194.

> "…It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide that matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. However, it cannot be rejected merely because it is improbable; it can only be rejected based on inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true".

[197] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt, nor is it an imaginary or frivolous doubt. This standard must be met by the State's evidence in a criminal prosecution.

[198] In *R v De Villiers,*[40] it was held that a Court should not consider each circumstance in isolation and drawn inferences from each single circumstance. The onus on the State is not to prove that each separate item of evidence is inconsistent with the innocence of the accused, but that taken as a whole, the evidence is beyond reasonable doubt inconsistent with such innocence.

[199] The state called a number of witnesses in an attempt to prove their case against the accused, and setting up a factual matrix why it argues, that the guilt of the accused had been proven beyond a reasonable doubt.

Juxtaposed hereto, the defence argued that the number of contradictions in the version of the state's case must point to a finding, favouring the version of the accused.

[200] It is argued **in respect of accused 2** that in the absence of the evidence of Nene does the state does not have sufficient evidence to prove its case against accused 2 beyond a reasonable doubt. It is further argued that none of the witnesses identified the perpetrators, except for the evidence of Nene,

[40] 1944 AD 493 at 508 – 9.

which this court must treat with caution, considering how he turned into a section 204-witness and that Nene only made a statement to exonerate his stepfather who was by then in police custody, as he (stepfather) has admitted that his vehicle was used to in the commission of robberies, around the area of Soweto.

[201] When assessing the evidence, the court must in the ultimate analysis look at the evidence holistically. It is common cause that Nene knows accused 2, 3, 4 and 5; whether they are friends, is a point of contention. Accused 2 wants this court to believe that on the day in question, which to his mind was a Thursday, he was doing homework. When it was pointed out that the day in question was in fact Wednesday, he maintained that on that day he was not in the presence of Nene and his co-accused, which version can be corroborated by his alibi witness.

Where an alibi is raised there is no onus on the accused to establish it and that if it might reasonably be true he must be acquitted, with reference to the case *R v Hlongwane*.[41] Placing reliance on Hlongwane *(supra)* the alibi of an accused should not be considered in isolation but should be viewed in the light of the totality of the evidence of the particular matter and the court's impression of the witnesses. On the version of F[...] (the alibi), she found accused 2 studying with her son Nkululeko, on 28 August 2019, the Wednesday. This, to the mind of the court, is an outright fabrication because, on the version of accused 2, he was doing homework on the Thursday, and he does not mention being in the company of Nkululeko or that they were studying in the hope of being incentivized for achieving good grades. This court pauses to mention that it is rather peculiar why F[...] deemed it necessary to mention to this court that accused 3 said that accused 2 must confess to the crime because he is the youngest and will get a lesser sentence. This court finds that the alibi of accused 2, being assessed against the totality of all the evidence presented by the state, could not stand and that despite her objection, her main objective was to present a version favourable to accused 2. She ultimately conceded that maybe she too was fooled by accused 2.

[41] 1959 (3) SA 337 AD at page 340H.

It is the view of this court that if on the totality of the evidence there is not a reasonable possibility that this alibi is true, then the converse means that there is a possibility that accused 2 was present on the scene. The alibi defence is accordingly rejected as false.

[202] Further, the presence of accused 2 at the scene, is confirmed and detailed, as relayed in his Confession statement. Not unexpectedly, the statement of Nene and that of accused 2, overlap to a large extend. This court finds the similarity of random information in the respective statements, significant.

[203] Notwithstanding the fact that Malindiso conceded that his vehicle has previously been used in the commission of robberies, the argument on behalf of accused 2 that Nene falsely incriminated him to exonerate his stepfather is without merit, as it was confirmed by the investigating officer that Malindiso, was at work on the day in question.

Accused 2 wants this court to believe that the cellphone given by him as surety was not the cellphone robbed from Tshepo and that he found the said phone on the counter of a Pakistani or Indian shop. His evidence of pawning his phone somewhere is September, is a fabrication because on the version of accused 4 and 5, did accused 2 sell his phone on 29 August 2019, the day they were sent by their mother to buy stock. Accused 2 was simply trying to mislead this court when he attempted to distance himself and the cellphone from the fateful events that unfolded on the night of 28 August 2019.

[204] The argument **on behalf of accused 3** is that he is a young scholar, who is not prone to violence and that the version of accused 3 is reasonably possibly true. The impression of accused 3 by this court, is that of a person who gave no thought to brazenly overplaying his hand in describing an exaggerated brutal assault on his person, whereas in truth the J88 and the evidence adduced by the state, overwhelmingly shows that accused 3 is a deceitful fabricator.

The admitted Confession by accused 3 gives a detailed portrayal of his role, on that fateful night. This description to a large extend overlap with the statement as given by Nene, and supported by the evidence of Tshepo, especially, resulting in the inescapable conclusion not only that Nene and

accused 3 was on the scene but that their individual accounts which was given independently, is not a fabrication. Accused 3, addressing Nene as "Voog" in his statement is clearly indicative of their relationship of familiarity.

[205] Accused 3 could visibly not keep up with his own lies. He wanted this court to believe that the firearm so found at his home, belonged to his brother, yet in his statement, he alluded to the fact that the firearm was given to him for safekeeping, by a certain Koni. Not surprisingly is the fact that he now denies knowing this person. He contradicted himself as to how this firearm was uncovered, firstly he said that the firearm was found lying openly, on the windowsill closer to where his brother sleeps, thereafter he changed his version saying that he was told that a firearm was found, as he left the room. This court is mindful that there is no onus on the accused to prove his innocence but the case of *S v Teixeira*[42] comes to mind where the Court stated that the failure to call an available witness might not be without consequences. This court would be justified to infer that the failure by accused 3 to call his mother, who on the state's version, was present from the time the police arrived, is possibly because she may have contradicted the testimony of the accused in this regard. I pause to mention that the evidence of Baloyi and that of the expert, Matjila specifically, who impressed this court as a person with sound skill, knowledge and experience; is accepted as reliable as trustworthy, despite rigorous cross-examination. This court finds that a human error is just that, it can most certainly not lead to a rejection of a witness's evidence in totality.

Concerning the Confession and Pointing out; this court already ruled on the admissibility thereof and maintains the view that Accused 3 is an untrustworthy witness who materially contradicted himself.

[206] In **respect of accused 4**, is it not in dispute that he 4 knows Nene from the area and that they are friends. The version of Nene is that accused 4 directed the police to the residence of Accused 3. Remarkably, this evidence was never challenged in cross-examination. When accused 4 testified, he stated as a fact that Nene was travelling in the first vehicle directing the way to the house of accused 3. When accused 4 was however cross-examined by Adv.

[42] S v Teixeira 1980 (3) SA 755 (A).

Moleme in this regard, he (accused 4) again changed his version, saying that he is not sure if Nene directed the police, he was only thinking it. To the mind of this court, the only reason why accused 4 persists that he (accused 4) did not direct the police to the residence of accused 3, is because it will be another indicator that he knows accused 3, and that he knows him well; despite accused 4 wanting this court to believe that he only knows accused 3 by sight from school and that he learnt the nickname Mjeza, at the police station.

[207] Further, what possible reason could accused 2 have, when he said that he knows Nene, through accused 4 and 5. Accused 4 was a mendacious witness, who amended his version throughout. Accused 4 said that he remembers the events of 28 August 2019, because his memory was triggered, when accused 2 took the witness stand and mentioned doing homework. When asked how it is possible for his memory to be jolted, based on the version of accused 2, he (accused 4) said that he does not know how to answer anymore. The state rightfully argued that considering the fact that the defence for accused 4 already put his (accused 4) version to Nene, that the version of accused 4, in chief is therefore a pure fabrication.

Accused 4 also fabricated a version when it was pointed out that his version that Muzikayise gave accused 2, R200 contradicts the evidence of accused 2 that the phone was sold for R600. Ironically, it was Muzikayise who first mentioned that he in the past had borrowed R200, to accused 4 and 5, whom he trusted. Accused 4 is clearly confusing the times when he and accused 5 borrowed money from Muzikayise, with the present matter, giving credence to the version of Muzikayise that he is a loan shark, who engaged with accused 2, only on the basis that he trusted accused 4 and 5, based on prior their engagements. The evidence of accused 4 as a whole shows that he is not a credible, reliable and trustworthy witness.

[208] **Accused 5** readily changed his version when confronted with contradictions between his version and that of his cohorts. His evidence is marked with inconsistencies and inherent improbabilities. He testified that despite staying in the same vicinity as Nene, they were not friends. However, against the background that accused 4 has been friends with Nene, for about 6 years, does this assertion on the part accused 5 only knowing Nene by sight,

becomes improbable. Accused 5 testified that Nene showed the police where he was sleeping. When asked how Nene will know where he sleeps if they are not friends and Nene was never inside their house? Accused 5 said that Nene had been to his house to buy at the Spaza-shop. It was pointed out that because Nene bought from the shop does not make it obvious that Nene will know where he (accused 5) was sleeping. Accused 5 then amended his version and said that Nene will see him moving from the shop to their (accused 4 and 5) room. When it was again pointed out that seeing a person moving from one room to another, does not make it obvious that Nene knew where he (accused 5) was sleeping. It was justifiably put to accused 5 that the only reason Nene was able to point out to the police where he was sleeping in the early hours of the morning, is because they are friends, and that Nene has previously been in his bedroom. The half-baked attempts on the part of accused 5 to distance himself from a friendship with Nene, is an obvious ploy to escape Nene's version that they were together on the night in question.

Accused 5 attempted to do the same, in sketching a platonic friendship with accused 2. He wants this court to believe that he only interacted with accused 2 when they sat together at school and when they walked to school together. Initially, accused 5 strangely maintained that he was not with accused 2 on 29 August 2019, despite the evidence of accused 4 that they went to buy stock on that day. Only later does accused 5 concedes.

[209] When it was put to accused 5 that they stopped Muzikayise on that day, to borrow money and give the phone as security; accused 5 said that the vehicle of Muzikayise was already stationery at the stop street, when he (Muzikayise) enquired where they were going. Oddly, Muzikayise' version in this regard was never challenged. It is the view of this court that the only reason why accused 5 persists that they did not stop Muzikayise, is because that will imply that both accused 4 and accused 5, had to have prior knowledge of the plan that the cellphone would be given as security, in lieu of the R600; as oppose to the version of accused 4 and 5 that the issue of the cellphone only came to the fore, whilst driving on their way to the mall. Again, this was a last-minute attempt on the part of accused 5 to distance him from the version of Nene, that he was informed that the money used to buy the alcohol, comes from the selling of a cellphone that was robbed the previous day.

The version of accused 5 that they were all seated at the back of the vehicle, when accused 2 was listening to music on his phone and said that he has a phone that he is selling because Muzikayise said that he does not have a phone, is a fabrication. The version of accused 4, in contradiction thereto is that accused 2 said that he is selling the phone and that Muzikayise appeared to like the phone, and offered accused 2, R200 in the meantime.

These diverse versions of accused 2, 4 and 5, as to the events surrounding the cellphone, is interspersed with inherent improbabilities and seen against the factual matrix of the matter, falls to be rejected as not being reasonably possibly true. The version of Muzikayise that he borrowed them the money because he knows accused 4 and 5, based on prior dealings, is therefore plausible and accepted as trustworthy.

[210] As far as the accused and witness' demeanour during their testimony, it must be borne in mind that it is seldom ever decisive in determining the outcome of a case. On its own, findings of demeanour have limited value. Demeanour should be considered with all other factors, including the probability of the witness' story, the reasonableness of his conduct, his memory, the consistency of his version and his interest in the matter. The risks of accepting demeanour evidence is diminished if the evidence accords with the inherent probabilities, is corroborated, is not contradicted, or if it is contradicted, then only by evidence of a poor quality. The demeanour of the accused should be measured against adequate facts and tested against probabilities and improbabilities of the case as a whole.[43]

The evidence of Nene is essentially that of a single eyewitness[44], placing the accused on the scene, on that dreadful night. This court to alive to the fact that section 208 of Act 51 of 1977 embodies the principle the Court must apply caution to the evidence of a single witness, in this regard. This requires that the evidence of Nene must be satisfactory in all material respects. The cautionary rule is a matter of common sense, as enunciated in In *Modiga v The State*[45].

[43] S v Shaw 2011 JDR 0934 (KZP).

[44] Equally important is the sentiments of the Court in *S v Sauls*, that there is no rule of thumb test or formula to apply when it comes to consideration of the credibility of the single witness. The Court must consider the merits and demerits of the testimony and having done so, will decide whether it is trustworthy and whether, despite that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.

[45] (20738/14) [2015] ZASCA 94 (01 June 2015), at para 32.

[211] The evidence of Nene, as already mentioned, is materially corroborated by the evidence of Lerato and Tshepo. The statement as given by Nene overlaps materially with the confession statements as made by accused 2 and 3, and the pointing out made by accused 3, respectively. The court is satisfied that the truth was told in identifying the accused before court, as the perpetrators present on the scene on the night in question.

LEGISLATIVE FRAMEWORK: COMMON PURPOSE

[212] It is argued specifically in relation to accused 5 that the evidence tendered by the state did not satisfy the requirements as set out in *Mgedezi*[46]in order for the doctrine of common purpose to be invoked successfully. It is argued that none of the state witnesses has implicated accused 5 as he had played no role in the planning and commission of the offences proffered.

This court is alive to the fact that the extra curial confessions and pointing out as made by accused 2 and 3 respectively, cannot be utilized to implicate their co-accused. The Constitutional Court confirmed the common law position that admissions tendered by an accused against his or her co-accused are not admissible.[47] That Court went on to state that section 219A of the Criminal Procedure Act expressly provides that an admission can be admitted only against its maker and that the section did not contemplate extra-curial admissions being tendered as evidence against another person.[48]

The operation of the doctrine of common purpose does not require each participant to know or foresee in detail the exact manner in which the unlawful act and consequence will occur.[49] The doctrine of common purpose in our law is clear.

[213] In *Mgedezi*, the Supreme Court of Appeal stated:

> "In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates. Thirdly, he must have intended to have common cause with those who were actually perpetrating the assault. Fourthly, he must have

[46] 1989 (1) SA 687 (A).
[47] S v Mhlongo; S v Nkosi [2015] ZACC 19; 2015 (8) BCLR 887 (CC) (Mhlongo).
[48] See Mhlongo above n 1 at para 30. See also S v Litako and Others [2014] ZASCA 54; 2015 (3) SA 287 (SCA) at para 54.
[49] S v Molimi [2006] ZASCA 43 (Molimi) at para 33.

> manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea."[50]

In *Thebus*, the Constitutional Court reiterated the principle of common purpose and explained what the "requisite mens rea" entails if the prosecution relies on this doctrine. The Court stated:

> "If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have 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."[51]

[214] Finally, in *Dewnath* it was held:

> "The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime."[52]

[215] In the case of *Makhubela v S, Matjeke v S*[53], Makhubela challenged the admissibility of the statements that were used as evidence against him. He placed reliance on *Mhlongo.* He submits that, if the extra curial admissions of his co-accused are not utilized to implicate him, then the only remaining evidence is his own oral testimony and his exculpatory pre-trial statement. There, he stated that he had played no role in the planning and commission of the offences. He submits that his convictions and sentences ought to be set aside.

[216] On the other hand, the State submits that other evidence exists that implicates Makhubela notwithstanding his exculpating assertions: the fact that he was in the company of the robbers from the outset, travelled with them to the scene and was aware of the firearms in the possession of the other

[50] S v Mgedezi 1989 (1) SA 687(A) (Mgedezi) at 705I-6C.
[51] Thebus above n 18 at para 49.
[52] Dewnath v S [2014] ZASCA 57 at para 15
[53] (CCT216/15, CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) (29 September 2017).

accused. The State therefore submits that Makhubela was correctly convicted.

[217] Matjeke did not rely on *Mhlongo*; however, he still challenged the admissibility of the statements made by him and the pointing out. He submits that his statements and the pointing out were not made freely and voluntarily. Furthermore, he submits that the State did not prove the truthfulness of the statements and the pointing out. He further disputes the allegation that he spoke to the investigating officer with the intention of making a confession.

When applying the principles enunciated in *Mhlongo* to the facts in *Makhubela v S, Matjeke v S*, it follows that the Constitutional Court has to determine these applications without any reference to the statements by Matjeke and Makhubela's co-accused where they implicated them. In doing so, it must have regard to the circumstances surrounding the commission of the offences, and Matjeke and Makhubela's statements as well as their oral evidence and determine whether there is sufficient evidence outside the extra-curial statements made by their co-accused to warrant their convictions in accordance with the doctrine of common purpose.

[218] Both Matjeke and Makhubela admitted to being part of the group but deny any involvement in the commission of the offences and on that basis submit that they could not be associated with the murder on the evening of 3 August 2002. The court held that that submission is without merit. The conclusion is supported by Makhubela's conduct and what transpired once they left Matjeke's home. On the day of the incident, Matjeke spent the afternoon with Makhubela. They also left with their co-accused in the same car and travelled together to Mothotlung. They spent time at the same tavern upon their arrival. Finally, they placed themselves at the scene of the crime with their co-accused who, they knew, had firearms. Therefore, the fact that Matjeke and Makhubela were at the scene of the crime was no chance event and suggests that it was coordinated.

[219] Moreover, there is no evidence that Matjeke and Makhubela were at any stage coerced to travel and remain with the group. If they had not known about the plan or had not intended to be involved in any manner, then they should have enquired from their co-accused what their intentions were when they parked

the vehicle at a distance from the scene of the fatal shooting. Or, at least, they should have raised questions once they became aware that their co-accused had been carrying firearms and when the armed men had alighted and proceeded to the house. In that case, they should have distanced themselves from their co-accused. They did not do so but remained at the scene with the other accused waiting for the armed robbers to return. After hearing the gunshots, they did not question the actions of their co accused, nor did they flee or disassociate themselves from them in any way. Upon their return, they did not ask why the vehicle had to be driven at a very high speed from the scene or where the extra firearm had come from. They claim they merely boarded the vehicle and waited for their co-accused to return. Instead, they cooperated with their co-accused. The fact that they were not under duress and had every chance to object or leave suggests that they had an understanding with their co-accused to participate in criminal activity. Therefore, it is reasonable to infer that Matjeke and Makhubela, far from being caught up unawares in illicit conduct, had an intention to commit a crime with their co-accused.

[220] The evidence shows that the requirements for a conviction based on common purpose set out in *Mgedezi* have been met in relation to the charge of armed robbery. It is clear that the applicants were present at the scene of the crime and were aware of the armed robbery. They, therefore, made common cause with those committing the armed robbery. The applicants manifested their sharing of a common purpose with the perpetrators of the armed robbery by performing an act of association with the conduct of the others in the form of travelling with them to and away from the scene of the crime, and they had the requisite mens rea to commit the armed robbery. It follows that their convictions in respect of the robbery charge must stand.

[221] The same applies in the case of the murder charge. On the issue of mens rea in the case of the murder charge, the requirement that they must have had the requisite mens rea as set out in *Thebus* above has been met. The applicants may not have intended the criminal result of murder, but they must have "foreseen the possibility of the criminal result [of murder] ensuing. This is by virtue of the fact that the other perpetrators were carrying firearms, which they must have known would be used if the plan went awry, yet they nonetheless

actively associated themselves with criminal acts. It follows that their convictions in respect of the murder charge must also stand. The appeal against these convictions therefore fails.

[222] This court, in the present matter relies expansively on the aforementioned reasoning, as set out in the case of *Makhubela v S, Matjeke v S* (supra). The facts in the present matter is distinguishable for the following reasons. Accused 4 and 5 did not make any statement where they placed themselves on the scene; Accused 4 and 5 in their oral evidence denies any involvement in the offence. The only evidence linking them to the offence is that of Nene (204-witness). Nene said that when accused 3 cocked the firearm, he requested to swap seats with accused 5, who went and sat in the front passenger seat. Accused 3, who now sat behind the driver in possession of the cocked firearm, alighted the vehicle with accused 2 and 4. Accused 5 requested Nene not to drive fast and leave his twin brother behind. Thereafter, Nene heard a gunshot; accused 2, 3 and 4 came back to the car running, in possession of a cellphone and a lady's handbag.

Importantly, this court accepted the evidence of Nene, in this regard. When employing the reasoning as set out in *Makhubela v S, Matjeke v S* (supra), then it is clear that all the accused were present at the scene of the crime and were aware of the ensuing armed robbery. They, therefore, made common cause with those committing the armed robbery. They manifested their sharing of a common purpose with the perpetrators of the armed robbery by performing an act of association with the conduct of the others. All the accused performed an act of association through their conduct and must have "foreseen the possibility of the criminal result [of murder] ensuing. This is by virtue of the fact that accused 3 carried a firearm, which they must have known would be used if the plan went awry, yet they nonetheless actively associated themselves with the criminal acts.

[223] After hearing the gunshots, neither Nene nor accused 5, questioned the actions of their co accused, nor did they flee or disassociate themselves from them in any way. Upon their return, they did not ask why the vehicle had to be driven at a very high speed from the scene or where the cellphone or handbag came from.

[224] The test for establishing liability for the possession of firearms and ammunition was established in *S v Nkosi*[54] as follows:

> "The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

[225] This test has since been cited with approval in numerous judgments. *Mbuli*[55]emphasized that unlawful possession of a firearm is a circumstance (or state of affairs) crime, that possession had to be personal or joint and that it is not enough to establish joint possession that the firearm was possessed by only one member in a criminal group in furtherance of a criminal purpose with others. Nugent JA in *Mbuli* did not accept the reasoning of the Supreme Court of Appeal in *Khambule* and emphasized that a common intention to possess a firearm intentionally can only be inferred when the group had the intention (animus) to exercise possession of the firearm through the actual detentor and the actual detentor had the intention to hold the firearm on behalf of the group the test set out in *S v Nkosi*.

[226] In the present matter, it is common cause that none of the accused (except accused 3 to whom I will momentarily revert), had physical possession of the firearm, themselves, on the scene. The State sought to base their argument premised on the fact that the common intention to possess firearms jointly may be inferred in the circumstances of a particular case. It follows that *Khambule* was overruled by *Mbuli* and is no longer good law. The State's reliance on it is therefore misplaced. What the SCA held in *S v Kwanda*[56] is

[54] S v Nkosi 1998 (1) SACR 284 (W) at 286H-I.
[55] [2002] ZASCA 78.
[56] 2011 JDR 0287 (SCA).

apposite.

"The fact that appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused".

Further, the Court in *Dingaan*[57] endorsed *Mbuli*, applying the test as set out in *Nkosi* and similarly stating expressly "acquiescence in [the firearm's] use for fulfilling the common purpose of robbery is not sufficient to establish liability as a joint possessor.

Having failed to meet the requirements as stated in *Nkosi*, the State had not established any basis for a conviction to follow in respect of accused 2, 4 and 5, in relation to counts 4 and 5.

[227] The same reasoning cannot be employed in respect of accused 3, who by virtue of his confession, admitted to firing the fatal shot. The postmortem report[58] confirms the cause of death to be a perforating gunshot to the chest.

Invoking the two cardinal rules of logic as enunciated in the classic case of *R v Blom*[59] *1939 AD 188*, firstly, the inference that the accused committed the offence must be consistent with all the proved facts. If not, the inference cannot be drawn. Secondly, the proved facts should be such that they exclude every reasonable inference from them save that it is the accused who was the perpetrator. In the absence of the firearm being found, the only inference to be drawn it that the firearm possessed by accused 3, as per his confession, is the same firearm used to discharge the fatal shot.

LEGISLATIVE FRAMEWORK: PLANNED OR REMEDITATED MURDER

[57] [2012] ZAECGHC 42.

[58] Exhibit B.

[59] The S v Reddy & Others [108] the court held that:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the off-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic, which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn".

[228] The concept of a planned or premeditated murder is not statutorily defined.[60] The court in the case of *Raath*[61] relied on the Concise Oxford English Dictionary[62] for the meaning of the concept planned and premeditated;

> "to think out or plan beforehand", whilst "to plan" is given as meaning to decide on, arrange in advance, make preparations for an anticipated event or time".

In the case of *S v PM*[63] the court defined premediated as 'something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension'. Whereas planned has been described as a 'scheme, design or method of acting, doing, proceeding or making, which is developed in advance as a process, calculated to optimally achieve a goal'.

What is clear from the above-mentioned definitions is that there is a thought process involved and the act is therefore not by accident or mistake, but deliberate.

[229] The evidence of Lerato and Tshepo was that the deceased went to withdraw money at the garage and Nene confirmed that he was aware of the said ATM[64]. The still-photos (Exhibit C3) handed in places the vehicle driven by Nene and occupied by his co-accused, at the same garage where the deceased withdrew money shortly before the attack. To the mind of this court, it is by no means a coincidence that the deceased was attacked shortly after having withdrawn money. The inference to be drawn is that the accused saw the deceased utilizing the ATM and followed them. Clearly, these actions on the part of the accused and suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment as argued by the defence.

[230] This court infers from the surrounding facts that the actions of the accused were premeditated.

---

[60] S v Raath 2009 (2) SACR 46 (C) in para 16:
[61] Supra.
[62] 10 ed, revised
[63] 2014 (2) SACR 481 (GP) at paras 35-36.
[64] Automatic teller machine.

In *S v Kubeka*[65], the Court held concerning the version of the accused:

> "Whether I subjectively disbelieved him is, however, not the test. I need not even reject the State case in order to acquit him. . . I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

[231] In *State v Hadebe and others,*[66] the Court enunciated the correct approach for evaluating evidence with reference to *Moshephi and Others v R*[67]as follows:

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

[232] This court makes the following findings, in considering the mosaic of evidence, as a whole:

1) In accord with the evidence of Nene, on 28 August 2019 around 21h30, he was in the company of accused 2, 4 and 5, they were smoking marijuana.
2) Accused 4 requested him to fetch his friend, accused 3, known as Mjeza.
3) They all drove in the Polo VW with registration number DC49DFGP, belonging to Nene's stepfather.
4) In accord with the statement of accused 2, he fetched a firearm from home.

[65] 1982 (1) SA 534 (W) at 537 F-H.
[66] 1998 (1) SACR 422 (SCA) at 426 E-H.
[67] (1980 – 1984) LAC 57 at 59F-H.

5) In accord with the evidence of Nene, they drove to Engen garage.
6) In accord with the evidence of Lerato and Tshepo, the deceased withdrew money at the ATM, situated at the Engen garage, moments before the incident.
7) In accord with the evidence of Nene, he noticed the two females and one male walking on the street.
8) In accord with the evidence of Nene, accused 3 swopped seats with accused 5.
9) In accord with the evidence of Nene, accused 2, 3 and 4 alighted from the vehicle.
10) The evidence of Tshepo corroborates this evidence of three people alighting from the vehicle.
11) In accord with the statement of accused 3, he immediately cocked the firearm, pressed the trigger and the bullet went out.
12) In accord with the pointing outs made by accused 3, he was undeniably on the scene, on the night in question.
13) In accord with the Postmortem Report, the deceased died of a perforating gunshot wound to the chest.
14) In accord with the evidence of Nene, accused 2, 3 and 4 returned to the vehicle in possession of a cellphone and lady's handbag.
15) In accord with the evidence of Nene, accused 5 told him not to drive fast and leave his twin brother behind.
16) In accord with the evidence of Nene, he was told to drive away at a high speed.
17) In accord with the evidence of Tshepo, he recorded the registration number of the VW Polo, as DC49DFGP.
18) In accord with the evidence of Nene, liquor was bought the next day, using the sale of the cellphone that was robbed, the previous day.
19) In accord with the evidence of Tshepo, his Samsung Galaxy cellphone was robbed from him, at knifepoint.
20) In accord with the evidence of Muzikayise, a Samsung Galaxy cellphone was given to him, in lieu of a cash amount of R600, because he knows accused 4 and 5 well, as he, as a loan shark, had dealings with them in the past.

21) This court finds that the Samsung Galaxy cellphone robbed from Tshepo, is undoubtedly the same cellphone that was retrieved from Muzikayise, the loan shark.

22) This court finds that the accused are known to each other.

23) This court finds that the evidence shows that the requirements for a conviction based on common purpose set out in *Mgedezi*, have been met in relation to the charge of armed robbery; and on the issue of mens rea in the case of the murder charge, the requirement that they must have had the requisite mens rea as set out in *Thebus*, above has been met.

[233] This court is satisfied therefore, taking into account the entire conspectus of the evidence that the State had discharged the onus resting upon it to prove the guilt of the accused beyond reasonable doubt. The accused's version cannot reasonably possibly be true and is accordingly rejected as false beyond a reasonable doubt.

[234] **THIS COURT ACCORDINGLY FINDS AS FOLLOWS:**

ACCUSED 2

GUILTY:

Count 1: Murder[68] ***(required form of intention: dolus eventualis)***

Count 2: Robbery with aggravating circumstances[69]

Count 3: Robbery with aggravating circumstances[70]

NOT GUILTY:

Count 4: Unlawful possession of a firearm[71]

Count 5: Unlawful possession of ammunition[72]

ACCUSED 3

GUILTY:

[68] Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

[69] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[70] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[71] Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 0f 2000.

[72] Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

Count 1: Murder[73] ***(required form of intention: dolus directus)***

Count 2: Robbery with aggravating circumstances[74]

Count 3: Robbery with aggravating circumstances[75]

Count 4: Unlawful possession of a firearm[76]

Count 5: Unlawful possession of ammunition[77]

Count 6: Unlawful possession of a firearm[78]

Count 7: Unlawful possession of ammunition[79]

ACCUSED 4

GUILTY

Count 1: Murder[80] ***(required form of intention: dolus eventualis)***

Count 2: Robbery with aggravating circumstances[81]

Count 3: Robbery with aggravating circumstances[82]

NOT GUILTY

Count 4: Unlawful possession of a firearm[83]

Count 5: Unlawful possession of ammunition[84]

ACCUSED 5

GUILTY

Count 1: Murder[85] ***(required form of intention: dolus eventualis)***

Count 2: Robbery with aggravating circumstances[86]

Count 3: Robbery with aggravating circumstances[87]

NOT GUILTY

[73] Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

[74] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[75] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[76] Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 0f 2000.

[77] Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

[78] Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 0f 2000.

[79] Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

[80] Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2.

[81] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[82] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[83] Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 0f 2000.

[84] Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

[85] Read with section 51(1) of the CLAA 105 of 1977, as mentioned in Part 1 of Schedule 2

[86] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

[87] As intended in section 1 of the CPA 51 of 1977, Read with section 51(2) of the CLAA 105 of 1997, aggravated circumstances firearm and knife were wielded and grievous bodily harm threatened.

Count 4: Unlawful possession of a firearm[88]

Count 5: Unlawful possession of ammunition[89]

RULING 204-WITNESS

---

[235] The subsequent issue for adjudication is the discharge from prosecution in terms of section 204(2) of the Criminal Procedure Act 51 of 1977.

RELEVANT LEGISLATION:

s204 (1) …[90]

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

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

(b) The court shall cause such discharge to be entered on the

[88] Contravening section 3 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 0f 2000.

[89] Contravening section 90 read with section 120 (1) and 121 read with schedule 4 of the FCA 60 of 2000.

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

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

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

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

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

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

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

record of the proceedings in question.

(3) …[91]

(4) … [92]

[236] As a point of departure it is pertinent to bear in mind that there is a definite dissimilarity in the law of evidence between the evaluation of the evidence of a 204-witness on merits in the main trial,[93] and the evaluation of the evidence of a 204-witness for indemnity.[94] The indemnity enquiry does not require the 204-witness to convince the presiding officer that the evaluation in the main trial was flawed; only that his evidence was frank and honest.

[237] In the indemnity enquiry, the test is for *all* questions to be answered honestly and frankly not just some. In the main trial, the evidence of a 204-witness need not be accepted in totality to carry weight. Frankly and honestly on all questions, stands against trite law that in the decision-making process as to whether or not to accept the evidence of a 204-witness, it is not expected of the witness that his testimony is wholly truthful in all he says. His testimony would suffice if it were largely truthful and sufficient corroboration thereof exists.[95]

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

The test for veracity of the evidence in the main trial against the witness is objective against all the evidence adduced. The test for indemnity is subjective; the witness must testify to the best of his ability in the

[91] The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

[92] (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.
(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

[93] S v Trainor 2003 (1) SACR 35 SCA.

[94] S v Banda: In re Zikhali 1972 (4) SA 707 (NC).

[95] S v Ndawonde 2013 (2) SACR 192 (KZD).

circumstances that prevailed.

[239] Judgment of the evidence of the 204-witness on the merits in the main trial was, that Nene did indeed answer properly to some questions and assisted the State to prove the case against the other accused to a certain extent. Nene, however, imperiled the case for the state and the administration of justice, with blatant lies to some questions and vagueness in respect of others. His testimony in the main trial is only accepted as far as it is corroborated by other evidence and facts.

[240] It is argued on behalf of Nene that he was always truthful and disclosed all the information to the alleged offence without coercion or being unduly influenced. Further,- that Nene may have painted a picture of lack of association or knowledge, which the court may frown upon, but the court must have regard to Nene's youthfulness, anxiety and fear of the courtroom. Further, Nene testified to the best of his ability in the circumstances that prevailed.

[241] To the mind of this court, the aspects of Nene's evidence in chief, which was not frankly and honestly answered in cross-examination, is as follows:

1) Accused 3 told Nene not to drive fast when he asked to swap seats with accused 5. Nene did not question this.
2) Accused 3 had a firearm, which he cocked before he alighted from the vehicle. Nene did not question this.
3) Accused 3 being in possession of the cocked firearm, alighted the vehicle in the company of accused 2 and 4. Nene did not question this.
4) Nene became frightened only after he heard the gunshot?
5) Accused 5 requested Nene not to drive fast and leave his twin brother behind. Nene did not question this.
6) Nene stopped the vehicle and accused 2, 3 and 4 came running to the vehicle, in possession of a cellphone and a lady's handbag. Nene did not question this.

[242] The argument raised that due to Nene's youthfulness, he painted a picture of lack of association and knowledge can most certainly not imply that Nene

could not appreciate the difference between honesty and deceit, in relation to the aforementioned aspects.

[243] Nene, who was legally represented, who had ample opportunity to ponder questions and answers, never displayed any sign of anxiousness, as a possible reason for the manner in which he answered certain questions. Quite the contrary, Nene came across as self-assured and nonetheless elected to lie with regards certain issues as highlighted above, evidently to serve his own agenda for indemnity.

[244] Nene did not answer all questions frankly and honestly but endeavored to disassociate and absolve himself from any wrongdoing. Discharge from prosecution is consequently denied.

ORDER

[245] The witness is not discharged from prosecution in respect of counts 1, 2, 3, 4, and 5 and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offences so specified.

_____

AFRICA A
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the State: Adv. Sinthumule

Instructed by: The Director of Public Prosecutions, Johannesburg.

For the section 204 witness: Adv. Mohomane.

For accused 2: Adv. Taunyane, Judicare.

For accused 3: Adv. Moleme, Judicare.

For accused 4: Adv. Phakula, Judicare

For accused 5: Adv. Mavatha Instructed by Legal Aid South Africa

Dates of hearing: 26,27,28 January 2021, 01,02,04,05,12,17,19,22,23,26 February 2021,02,10,11,12 March 2021, 05,07 July 2021,13 December 2021, 04,05, April 2022, 26,27,28, September 2022, 10 January 2023, 02 March 2023, 27 June 2023.

Date of judgment: 16 August 2023.