




**IN THE HIGH COURT OF SOUTH  
AFRICA GAUTENG DIVISION  
(VEREENIGING CIRCUIT COURT HELD IN PALM RIDGE)**

**CASE NO: CC2/2020**

(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>NO</b>
(3)	REVISED. ✓✓
	
.....	1....8/1...9 S...
.....	ep...tem...be...r
<b>SIGNATURE</b>	2023
	<b>DATE</b>

In the matter between

**THE STATE**

**v**

**LAWRENCE MABENA**

**ACCUSED 1**

**PATRICK MAGWAZA NGOBENI**

**ACCUSED 2**

**TUMELO TSIKANE**

**ACCUSED 3**

**TEFO KHOZA**

**ACCUSED 4**

**ERICK NKAMBULE**

**ACCUSED 5**

**TSHEPO NTSIKI**

**ACCUSED 6**

**ALBY MTHIMUNYE**

**ACCUSED 7**

---

## JUDGMENT

---

**THOBANE AJ,**

### **Introduction**

[1] The accused have been arraigned before this Court on the following summarised counts;

Count 1, Conspiracy to commit robbery;

Count 2, Murder;

Count 3, Attempted murder;

Count 4, Unlawful possession of a prohibited firearm alternatively, unlawful possession of a firearm;

Count 5, Unlawful possession of ammunition;

Count 6, applicable only to accused 1, reckless or negligent driving.

[2] The accused, enjoyed legal representation throughout the trial proceedings. According to the indictment, in the event of a conviction the Director of Public Prosecution, therefore the State, would pray for sentences which accord with the law, with specific reference to sections 51(1) and 51(2) of the General Law Amendment Act 105 of 1997. Although counsel for the accused confirmed that the accused had been appraised of the law, out of abundance of caution the Court explained those provisions to the accused and they all confirmed that they understood them.

## **Brief summary**

[3] It is proper to set out, again, having done so in the Ruling on Section 174 Application, a very brief summary of what the state factually alleges in its endeavour to establish the case against the accused. This is also set out in the summary of substantial facts in terms of section 144 (3)(a) of the Criminal Procedure Act, 51 of 1977. The state alleges that on 07 June 2019 the police received information that the accused were planning, to be exact, conspiring, to carry out an armed robbery. Unbeknown to the accused, the police observed them in a meeting at Evaton Mall. The accused were seen leaving Evaton Mall in various vehicles, whose description the police had before hand. In order to thwart the planned robbery, an attempt was made stop and thereafter arrest the conspirators. The police were met with gunfire from one of the vehicles of the conspirators, which they returned and which resulted in the death of one of the conspirators, one John Dennis Hlatshwayo. The 7 accused before court were then rounded up and arrested.

## **Plea**

[4] When the charges were presented to the accused all of them pleaded not guilty thereto.

4.1. Accused 2, 3 and 5 elected to exercise their right, enshrined in the Constitution, to remain silent and not to give any plea explanation.

4.2. Accused 1 made the following admissions in terms of section 220 of the Criminal Procedure Act, admitted as exhibit G;

4.2.1. That he is the lawful owner of the Audi S5 with registration letters and numbers HP 42 MH GP referred to in count 6;

4.2.2. That the motor vehicle is owned by a company called Optimar in which company he is a partner;

4.2.3. That on 7 June 2019 he sustained injuries when police fired shots at his vehicle;

4.2.4. That the vehicle caught fire and was damaged as a result;

4.2.5. That on 7 June 2019 he was transported to Sebokeng Hospital where he received medical treatment.

4.3. Accused 4 also made the following admissions in terms of section 220 of the CPA, entered into evidence as exhibit H;

4.3.1. That on 7 June 2019 he was a passenger in a motor vehicle with registration letters and numbers XSN 741 GP, a VW Caravelle minibus silver in colour;

4.3.2. That accused 3, Tumelo Tsikane was the driver thereof.

4.4. On behalf of accused 6 and 7 it was explained that they deny any involvement in the commission of the crimes, they deny possession of any firearms or ammunition and that they deny participating in a conspiracy. It was said on their behalf that they put the State to the proof of the crimes.

### **Section 220 Admissions**

[5] With the concurrence of the defence, the following admissions in summary, were entered into evidence in terms of section 220 of the CPA;

Exhibit A; the signed formal admissions;

Exhibit B; the post mortem report of the deceased John Dennis Hlatshwayo;

Exhibit C; the first photo album and sketch plan depicting the crime scene;

Exhibit D; the second photo album depicting the scene of arrest of accused 3 to 7 as well as where the BMW X1 was found;

Exhibit E; the third photo album containing photos of the deceased captured during his post mortem examination;

Exhibit F; the ballistic report compiled by Warrant Officer Mashilo Elias Shadung.

### **The State case**

[6] Colonel Gabriel Johannes Le Roux, at the time of the hearing a pensioner, testified that at the time of commission of the crimes he was 42 years in the employ of the SAPS. He was at that time an Operations Commander in the Johannesburg North Office, managing intelligence collectors. Intelligence collectors, he explained, are police officers who interact with informers and would from time to time at relevant times gather intelligence about crimes that are yet to be committed or crimes that have already occurred. On 7 June 2019 he received information during the usual police parade. Armed with that information, he contacted Captain Mbalati from the Technical Response Team of the SAPS, (TRT), and briefed him. He then requested assistance from him with a possible preventative operation.

[7] They thereafter all converged outside Tembisa Police Station for a briefing and agreed that they will conduct surveillance on a group of suspects and communicate among themselves. They travelled in 7 cars to Everton Shopping Mall where they observed among others, suspects in an Audi S5 and a BMW X1 interacting with each other. He personally observed the suspects from the BMW X1 removing two black bags and placing them in the boot of the Audi S5. He saw a group of about 12 persons emerge from other vehicles in the parking area, approach and have a discussion with the occupants of the Audi S5 as well as those of the BMW X1. The other vehicles he observed were a silver

VW Combi (also referred in these proceedings as a Transporter or Caravelle), a silver Tata Indica, a white VW Polo and a silver BMW sedan. At the mall where he was surveilling, the BMW sedan was moving constantly in the parking area.

[8] When the BMW sedan left the parking area of the mall, he followed it for approximately 2km in the southern direction on the Golden Highway. He however turned around and returned to the mall where he parked outside the mall next to the Golden Highway and continued to observe the suspects. He observed the group of suspects climb onto their vehicles, form a convoy and drive out of the mall. He followed the convoy onto Moshoeshoe Street. In the meantime the VW Combi which was initially at the front of the convoy, had changed positions and was now at the back thereof. When the convoy stopped, he requested Captain Mbalati to intervene and stop the vehicles. He also stopped momentarily when the VW Combi and Tata Indica was taken down by TRT members. Other vehicles sped off. They were, through all this, communicating through police radio and he was informed, through that medium, that the BMW X1 had executed a u-turn and was headed in his direction. When it drove past where he was, he followed it in his vehicle together with some of his members. The BMW X1 drove deeper into the suburb, drove on the sidewalk and ended up in a ditch where it got stuck.

[9] The occupants of the vehicle exited, jumped over a fence and ran into a veld where there was seemingly a wetland and thick bushes. He could not see anyone. He summoned a police helicopter but the persons who had abandoned the BMW X1 could not be found. He drove back to Moshoeshoe Street, where he was informed that there had been a shooting incident between the SAPS and

occupants of the Audi S5. He observed that the Audi S5 had crashed into a

house and seemingly had burst into flames. He saw a man lying on the ground covered with a blanket and other two men were receiving medical attention. The two men who were receiving medical attention were later loaded onto an ambulance and taken away. He is/was not in a position to identify them. At that scene he was shown two R5 rifles, a black sports bag as well as overalls or work suits.

[10] During cross examination by Ms Dhlakama representing accused 1 and 4, he testified that although he owned a cellphone which was capable of taking videos, he did not use it at Evaton Mall because he believed the footage and photos would be of poor quality owing to the distance from where surveillance occurred. No one from their technical division, was available to take photos and video footage, he further testified. It was put to him that as cash in transit crimes are serious in nature, he ought to have taken photos as well as a video. He indicated that at the time they had limited their intervention to surveillance as well as information gathering.

[11] He was referred to written statements he made in the matter. There were three statements in total. For ease of reference we called them “the original statement” (A31), “the copy” (also A31) and “A86”. The difference between the original statement as well as the copy was that the copy had hand written notes on it. The witness admitted that he made those notes months after he filed his original statement. He expressed surprise that the “copy”, with his handwritten notes, made its way into the docket. He considered it his own draft where he noted issues raised by the investigating officer. For example, the investigating officer asked him if photos or videos were taken during surveillance at Evaton Mall. When he replied no, he was told to make a



statement to that effect. What

he then did, was to make those additions to the body of his already typed original statement thus creating the statement we referred to as the copy. In addition, he made a few additions to his original statement, hence A86. When it was suggested to him that the statements were a fabrication, he denied it.

[12] He testified that before he and his members went to conduct surveillance at Evaton Mall, they were given a set of number plates which he mentioned in his statements. The list included a gold Volvo and a red Fiat. Both vehicles however were not seen at the mall during surveillance. The following version was put to the witness on behalf of accused 1;

12.1. That on 07 June 2019 accused 1 departed from his home in Pretoria and collected accused 2 and his wife. They then proceeded to Tembisa and eventually ended up in Diepkloof where they dropped off accused 2's wife and collected the deceased. The three of them proceeded to Evaton Mall where they purchased Kentucky Fried Chicken. From the mall they drove into Moshoeshoe Street where, according to counsel, suddenly a white unmarked VW Golf 7 whose passengers were clad in civilian clothes, drove parallel to them and the occupants thereof, who were carrying, as it was put, "big guns", waved them off the road and swerved to their lane.

12.2. Accused 1 feared he was being hijacked and picked up speed. He suddenly felt heat/warmth on his face and realised he was bleeding. He got dizzy and lost control of the vehicle which crashed into a house on the opposite side of the road. Shooting continued from the Golf and other vehicles. His vehicle then burst into flames. Col. Le Roux testified, in response to the version put to him, that he did not observe the shooting

and further that he could not testify about the movements of the Audi S5 before he spotted it at Evaton mall.

[13] On behalf of accused 4 the following version was advanced;

That accused 4 left his place at Mofolo, took public transport and eventually ended up at Evaton Mall where he met accused 3, whom he only knew by name and that he hails from Soweto. Accused 3 offered him a lift to Sebokeng. They exited the mall and drove into Moshoeshoe Street. Once there, they encountered a VW Golf 7 whose occupants were clad in civilian clothes. There was in addition a Ford ST that waved or signalled to them to get off the road. They were ordered out of the vehicle and instructed to lie on the ground. Col. Le Roux testified, in response, that he did momentarily observe when the VW Combi was pulled over together with the Tata Indica. He got out of his vehicle momentarily and when he was informed that the BMW X1 was driving towards them, he hastily returned to his vehicle and then chased after the BMW X1.

[14] On behalf of accused 2 it was put to him by Mr Tlouane, that accused 2 was collected by accused 1, they dropped off accuse 2's wife then collected the deceased because they wanted to go and see one Siphso. They proceeded to Evaton Mall to purchase KFC. It was put to him that on the day, accused 2 did not know accused 3 through to 7, and that he was never part of a meeting at the mall. Col. Le Roux indicated that he can not identify any of the accused because he was not close enough to make a proper identification. He also can not say who entered which vehicle before the convoy left the mall. The group of people he saw at the mall were about 10 to 12 in number. He confirmed that at a mall any person can choose any parking bay.

[15] He testified further that when the bags were removed from the BMW X1 to the Audi S5, he suspected that they contained firearms. This he did not know for sure. He testified that he was not present when the forensic people arrived at the scene of the Audi S5 because at that time he was still at the scene where the BMW X1 was. It was only on his return that he saw one black bag with two rifles on top of it as well as work suits. It was put to him that it is not true that there were two bags, as testified to by him, otherwise the forensic people would have found them. He stated that according to occupants of the house where the occupants of the BMW allegedly ran into, they had in their possession a black bag.

[16] During cross examination on behalf of accused 3 by Mr Mohlabane, it was put to him that the VW Combi around 13h00, the time around which Col. Le Roux testified he was conducting surveillance, was driving from Soweto to the Vaal. It only arrived at the mall around 13h20. He testified that he did not see the Combi enter the mall and was therefore not aware if it entered with two passengers. It was put to him that at the mall there were two persons who were busy fixing the mirror of the Combi. These men had offered to fix the broken mirror earlier at an intersection. Further, that the Combi exited the mall to “test the mirror” and returned thereafter. It was also put to him that accused 3 was at the mall to meet customers in connection with his transportation business and that none of the accused were known to him with the exception of accused 4 whom he picked at the mall.

[17] He was referred to paragraph 4 of A86 and told that he made a mistake in recording the registration numbers of the Combi in that instead of writing the registration number as XSN 741 GP he wrote SN 741 GP. He conceded that he

made a mistake. A closer look at the statement however shows that a few lines down, the correct registration number is written in full. Further, that according to A86 there were about 10 men gathered at the so called meeting at the mall, whereas in his evidence in chief he mentioned approximately five, from the two vehicles and a further 12 from surrounding vehicles. The version of accused 3 is that he was in the company of accused 4 and further that they were on their way to fetch customers when they were stopped by an unmarked vehicle whose occupants were clad in civilian clothes. They complied and stopped.

[18] He confirmed when examined on behalf of accused 5 by Mr Fourie that he was not in a position to identify any of the persons who gathered at the mall and was also not in a position to describe any of them. When he saw them gathered at the mall he made the assumption that they were a group. Later, when the shooting ensued the distance between the VW take down scene and the Audi crash scene was about 300 metres. It was put to him that he should have been able to see the shooting incident as it was not that far from where he was. He stated that his main focus was on the VW and the Tata and that although he saw occupants thereof being ordered out of the vehicles, it all happened very fast. It was put to him that accused 5 was on the day given a ride from Everton Mall by accused 7 and 6. Further, that there was no meeting at the mall. They, accused 5, 6 and 7 were on their way to fetch someone who stays just off Moshoeshoe Street on their way to Parys. They observed on Moshoeshoe Street that there was some activity because they saw that already there was some crime scene tapes and that police were diverting traffic.

[19] It was put to him that the accused were arrested elsewhere but later taken to the scene where the Combi was and photos were then taken. It was put to

him further that accused 5 was not part of any conspiracy to commit the crime of cash in transit heist and that no firearm or ammunition was found in his possession. The conclusion he reached, Col. Le Roux, that there was a meeting at Evaton Mall, which led to the arrest was in fact wrong. He stated, in response, that all he did was that he placed the group under surveillance and thereafter followed them to the place where the arrests took place.

[20] He confirmed to counsel for accused 6 and 7, Mr Botha, that he was experienced in field operations and further that although he was personally not involved where the shooting took place, he knew what gunshots sounded like. At Evaton Mall, he testified, he did not know who exactly he was looking for on the part of the conspirators, and stated further that there was no video or audio recording of the meeting. He conceded that the actual observation by him was about 15 minutes because at some point he followed a BMW sedan which drove off the mall. On his return to the mall, which had palisade fencing around it and when the vehicles were about to drive away, he did not notice who went into what vehicle. He assumed that all the vehicles were together because they drove away in a convoy format. Some of his members were still at the mall when they left and once on the road they were among other vehicles but following closely. He confirmed that he was not in a position to say that any of the accused before court were part of the meeting at the mall.

[21] When the take down of the front vehicle took place, he did not see it but heard gunshots. He also did not hear TRT say they were about to execute the take down. It was put to him that given the proximity to the shooting, he should have seen some activity where the shooting took place. When it was suggested to him that given the fact that 54 spent cartridges were found, at the scene, to

claim to not have seen anything, or to not have investigated what happened was odd. He stated that his focus was on the information he received, namely; that the BMW X1 was headed in his direction and besides, he thought his team members were capable enough to take control of the crime scene. As soon as the convoy of the suspects turned right into Moshoeshoe street he saw the Tata and VW combi being pulled over. The occupants were ordered to lie on the ground. There were other vehicles including those of the SAPS on the road which obscured his view. He denied that in his testimony he seems to want to disassociate himself from the scene.

[22] Solly Tloti testified that he is a member of the SAPS stationed within the Johannesburg Flying Squad Unit. He is 14 years in the SAPS with 10 of those within the Flying Squad. On 07 June 2019 he was on duty with Sgt Malebana as his crew. He was driving a VW Golf 7 GTI. It is a state vehicle and was fitted with blue lights on the grille, the back window and the bumper as well as a siren. He attended a briefing at Tembisa and thereafter proceeded towards Evaton Mall but parked approximately a kilometre away and awaited further instructions. It was reported to him that the suspects were having a meeting at the mall which lasted about 30 minutes. They were told that the suspects, who were in a blue Audi S5, a silver VW Caravelle, a Polo, a BMW X1 and a Tata were exiting the mall and were headed to the Golden Highway. From where he was, he drove in the direction of the mall. Once on the highway he drove in the direction of the convoy and before reaching Sebokeng he drove closer to the convoy. As soon as he spotted the vehicles he called for backup. The vehicle he spotted first was the Tata, signalling of course that it was at the back of the convoy while others in the convoy had turned into Moshoeshoe street. Once on Moshoeshoe street he spotted the rest of the vehicles.

[23] When a decision was taken to stop the vehicles. He accelerated to the front of the Audi which was leading the convoy. Another vehicle Ford ST also unmarked, followed. The Audi tried to drive away but he prevented it by blocking its path of travel. From his rear view mirror he could see that the blue lights of the Ford ST were also activated. When the Audi attempted to escape by swerving from left to right and from right to left, he followed its movements while blocking it at the same time. He heard his crew say the Audi was shooting from behind. He heard a gunshot and moved to the right. The Audi passed on the left but before it went past and while the vehicles were parallel, he saw a barrel of a rifle protruding through a window and heard the front left doors window shatter. Sgt Malebane returned fire at the Audi. The Audi lost control and bumped into another vehicle. It hit the middle island, crossed over it, hit children who were pedestrians and crashed into a house. While pressed against the wall of the house the rear wheels of the Audi were still spinning while it was stationary, thus generating smoke. The tyres caught fire as a consequence. Other members of his team came and exchanged fire with the Audi. Using sand, bucketed water and fire extinguishers they tried to douse the flames. The driver of the Audi and the passenger who sat in the front were removed from the vehicle, however the third occupant who was seated at the backseat was trapped and couldn't be rescued. He was later called by Captain Maloka and instructed to remove what he, Captain Maloka was seeing, being two rifles. One was in the front on the passenger side pointing downwards and another was next to the deceased suspect at the backseat. The rifle at the backseat had two magazines bound together with a tape. The rifle at the front of the car had one magazine. He also recovered two bags on the back seat with overalls, balaclavas and gloves. The two suspects, which he identified in court as accused 1 and 2 were taken by ambulance under escort and the deceased was removed from the



vehicle by emergency services. The boot was searched when the paramedics came but nothing was found inside.

[24] He confirmed on being referred to exhibit C, the first photo album, that the vehicle he drove had a bullet hole on the left front door; that the left front door window was shattered and that the back cover of the left rear view mirror was damaged, all as a result of the shooting on the day. He also believes that the cracked windshield of their vehicle was as a result of a projectile. This, that bullet holes that caused damage to the Golf, were on the left of it, would of course be consistent with the version of the same self accused that the Golf that attempted to, as they said “hi-jack them” was to their right. As there was no other evidence from them of any shooting that came from their left, it seems to me reasonable to conclude that the shooting came from the Audi’s right, a vehicle in which accused 1 and 2 as well as the deceased were in.

[25] During cross examination he stated that the reason why he says he knew that the Tata was part of those who were under surveillance was because the registration number thereof was given to them by members who were holding posts at the mall. The reason why he called for backup was because there were in total five cars and he wanted to be assisted with the stop and search operation. He was not aware of what a take down was and Col. Le Roux never mentioned it. Before they sought to cut off the Audi they received instructions from Captain Maloka, who was part of their convoy, that they can implement the stop and search. He did not stop the Tata because it did not make sense for the lead car, which was his, to stop the vehicle which was last in the convoy, hence pursuit of the Audi. When referred to the position of the vehicles with

reference to the testimony of Col. Le Roux, he indicated that he is relating what he personally saw.

[26] He testified that the intention in moving to the front of the Audi, was to force the vehicle to stop. However they did not succeed because the Audi kept on swerving from left to right. At some point when the vehicles were driving parallel to one another, he saw about 6cm of a barrel of a rifle pointed at them. Later when there was a tyre burst, they thought it was a bullet going off so they fired shots at the Audi until Captain Mbalati shouted “cease fire”.

[27] When it was put to him that no gunpowder residue was found on the deceased, he testified that he was not aware of that. He indicated that together with his colleagues they assisted accused 1 and 2 out of the Audi by pulling them through the drivers window. He also removed the two firearms which were in the vehicle through the same window and placed them on the road where they were looked after by Captain Moloka. Captain Maloka looked after the firearms until LCRC came to take over the crime scene.

[28] On behalf of accused 2 it was put to him that no firearms were recovered in the Audi. It was further put to him on behalf of accused 2 that when the unmarked Golf VW drove parallel to the Audi, accused 2 was under the impression that a car hi-jacking was in progress as no blue lights or siren was activated. He asserted that the blue lights were activated and denied that they fired the first shot directed at the Audi and that they assisted the two occupants of the vehicle out of the vehicle. After assisting them he retrieved two rifles and two bag, he testified.

[29] The version of accused 3 was put to him. It was put to him that accused 3 denies that on the day he was driving as part of a convoy. It was also put to him that on the day there was normal traffic on the road and that there was no Audi in sight. The accused was minding his business when he was suddenly stopped by two men wielding firearms. He disputed accused 3's version.

[30] On behalf of accused 4 it was put to him that he, accused 4, was simply given a lift by accused 3. He indicated that he does not know if indeed that was the case as he was not there when the vehicles left Evaton Mall.

[31] On behalf of accused 5 it was put to him that he was a passenger in a white Tata which drove from Evaton Mall to Moshoeshoe Street, that on the Golden Highway there were lots of vehicles which intermingled. He agreed that ordinarily when driving on the road, vehicles change lanes and intermingle. He indicated that he could not comment on accused 5's version to the effect that once on Moshoeshoe Street they were diverted to a side street by police and that there was emergency tape. He testified he could not comment about the arrest of accused 5 on a side street because he was not there when his arrest took place.

[32] He testified when cross examined on behalf of accused 6 and 7 that he did not pay much attention to the presence of other vehicles at the scene. He observed however that there were vehicles from JMPD, TRT as well as from his team. He confirmed that he was not part of the team that arrested accused 6 and 7.

[33] Tshepo Vincent Malebane testified that he is based in the Johannesburg Flying Squad since 2010 and holds a rank of sergeant. He has 13 years service

in the SAPS. On 7 June 2019 he was on duty when they converged at Tembisa for a briefing. He was in the company of sergeant Tloti and they were driving in a VW Golf 7. After the briefing they drove to Evaton and stopped on the Golden Highway. After about 30 minutes they drove along the Golden Highway where he observed 5 vehicles that later turned into Moshoeshoe Street. They then called for backup. They switched on blue lights and siren of their vehicle and drew attention to the Audi RS5 that they were being stopped. The rear passenger in the Audi fired a shot at them using a rifle and he and his colleagues returned fire. The convoy consisted of the Audi RS5, a silver VW Caravelle minibus, a Tata whose colour he could not readily recall, a BMW X1 and a silver VW Polo. After they returned fire, the Audi hurriedly drove over the centre island, bumped into children and crashed into a house. While trying to reverse out of the house the vehicle caught fire. They got out of their vehicles and tried to douse the flames using bucketed water and fire extinguishers. At that time the occupants of the Audi were trapped in it. They managed to bring down the flames but could not douse the fire completely.

[34] He testified further that sergeant Tloti was then given instructions by Captain Maloka to secure evidence from the vehicle, who removed two rifles and two bags in which were hand gloves, balaclavas and ammunition and placed them on the ground not far from the Audi. Photographers later took custody of the exhibits. The two rescued occupants were transported by ambulance to hospital. When referred to photos 198 and 199 in Exhibit C, he confirmed that what is depicted is a damaged mirror and a bullet hole which were occasioned when the occupants of the Audi fired at them. Although one of the photos depicted a cracked windshield, he testified that he does not know what caused the crack.

[35] He testified during cross examination on behalf of accused 1 that when they left the Golden Highway, they then spotted the convoy when they turned left into Moshoeshoe Street. They called for backup because they were outnumbered. There were no other vehicles on Moshoeshoe Street other than the convoy, them as well as backup which had arrived. He clearly saw the person at the back of the Audi with a rifle as the windows were not tinted. When the vehicle caught fire, they rescued the two front occupants by pulling them out of the vehicle through the windows. The version of accused 1 was put to him and he stated that that was his version.

[36] During cross examination on behalf of accused 2 it was put to him that his version mirrored that of accused 1. He confirmed that they were told about the convoy which they later spotted. He denied that they did not switch on the siren and blue lights before they attempted to stop the Audi and confirmed that when backup arrived they also fired shots at the Audi. He denied accused 2's belief that they, the police team, caused damage to the mirror as well as the bullet hole on the door on the VW Golf 7 they drove on the day. The version of Sergeant Tloti was put to him and he stated that it was his version.

[37] He disputed accused 3's version that the VW Caravelle was not part of a convoy of the suspects that were being surveilled at the mall. He denied that there was traffic on the road and that the VW was part thereof. It was further put to him on behalf of accused 4 that he did not witness any shooting. He testified that he did not pay much attention to the number of passengers or occupants in the other vehicles. He further denied that there were cars intermingling as put to him on behalf of accused 5. He further indicated that he does not know if the Tata was redirected by the police to a side street which is parallel to

Moshoeshoe street. Although he does not know if they were part of a conspiracy, he is sure that they were part of the convoy.

[38] When cross examined on behalf of accused 6 and 7 he confirmed that he discussed his statement with Sergeant Tloti as they travelled together and saw the same thing. He indicated that this was not unusual.

[39] Constable Myron Peter Vencencle testified that he has 14 years service and is attached to the Dog Unit of the JMPD. His duties included among others crime prevention. On 07 June 2019 he was on duty with Sgt. Van Wyk in an unmarked vehicle. They proceeded to Moshoeshoe Street in Sebokeng where they spotted vehicles that were mentioned to them, namely, a blue Audi, a silver VW Combi, a BMW and a white Tata. Upon getting instructions to pull the vehicles over, they switched on their siren and blue lights. The Tata tried to flee but they accelerated and cut it off by blocking its path. There were three occupants in the Tata and they were ordered to step out of the vehicle with their arms raised and directed lie on the ground. The driver was made to lie on the driver's side, the passenger on the passenger and the passenger who was seated at the back of the Tata was directed to lie at the back of the vehicle. The vehicle was searched and at the back seat thereof they found balaclava as well as hand gloves, which were later handed to the LCRC. The suspects were individually asked where they were going and they indicated that they were on their way to work. When asked where work was, they were not forthcoming. They were then placed under arrest and taken to Sebokeng SAPS. None of them mentioned that they were headed to Parys. He made a dock identification of accused 5 as the driver of the Tata. I hasten to add that Mr Botha sought to place on record and it was so placed, that the identification was made while all the accused were

wearing their masks (it was during the Covid era). The court asked them to stand and remove their masks. The witness in each instance confirmed his identification as correct. He indicated that accused 6 was the front passenger and accused 7 the rear seat passenger. He testified that he did not pay attention to the other vehicles that were part of the convoy during the take down, understandably in my view.

[40] During cross examination he testified that he did not pay much attention to other vehicles that were part of the convoy because he concentrated on cutting off the Tata. He later observed that the VW was stopped approximately 13m ahead of them. They were later moved to the “VW bus” he said. He also heard the shooting that emanated from the Audi which was about 20 to 30m away. He insisted that the VW Combi was part of the convoy and asserted that there was no traffic at the time of the take down of the Tata, of which the VW was part. He indicated that the VW and the Audi were approximately a car length apart. He did not see a red Fiat and a gold Volvo as part of the convoy.

[41] He was referred to the version of Col. Le Roux who testified that he was driving behind the Tata and that it was stopped at the same time with the VW Transporter. He indicated that he was sticking to his version and can not comment about the testimony of Col. Le Roux. Although there were other vehicles on the road, there was no traffic as he understood it. Before searching the vehicle he sought permission from the suspects. Their constitutional rights were explained to them after they were arrested. The version of accused 5 put to him was that they were not arrested on Moshoeshoe Street and that other two black police officers effected the arrest. He disputed the version that there was

police tape that cordoned the road. He testified that police tapes were placed on the road later after the arrests.

[42] The version of accused 6 and 7, which was said to be the same as that of accused 5, was also put to him. He testified that he stood by his evidence in chief. After the arrest he remained on the scene until it was taken over by a senior commander and it was handed over to LCRC. He disputed the accused's version that they were not part of a convoy.

[43] Lincon Muloyi testified that at the time of the incident he was attached to the K9 unit of the JMPD and held the rank of Sergeant and had 12 years of service. On 7 June 2019 he was on duty when they were directed by their commander to meet up at Tembisa. It was the JMPD Flying Squad, TRT, Crime Intelligence as well as the JMPD K9 unit. He was in the company of MPO Magubane. After the briefing he drove to Evaton Mall to observe the suspects. On arrival at the mall he spotted the vehicles that were part of the briefing and he parked his vehicle next to KFC. He saw a BMW X1, VW Caravell T5, a silver Polo Vivo, a blue Audi RS5 and Tata and a Hyundai IX35 that was used by the police informer. The suspects who were 12 or 13 were standing outside their vehicles and holding a meeting about 100m from where he stood outside his vehicle with Magubane. He observed them for approximately 30 minutes thereafter they climbed into their various vehicles and exited the mall in a convoy. Through police radio he updated the team of the movements of the convoy. He waited for the vehicles to catch up with them and when they arrived on Moshoeshoe Street in Sebokeng, they took a decision to take down the vehicles as allocated during the briefing. He and his crewman were allocated VW Caravelle to take down.



[44] He switched on the police siren and activated the blue lights. The VW Caravelle tried to speed off but he drove ahead of it and blocked its path. When the VW Caravelle stopped, they instructed the two occupants to get out of the vehicle and lie on the ground. They complied. He asked the driver to search the vehicle and he agreed. He then searched the vehicle while his crewman was standing guard and covering him but found nothing. He asked the suspects about the planned cash in transit and also where they were headed to but they gave no response. He then informed them that he was arresting them for conspiracy to commit robbery and thereafter read them their constitutional rights. They waited for LCRC to come to the scene.

[45] When he stopped the VW Caravelle he heard gunshots ahead of them as police pursued the Audi S5. After he searched the Caravelle he saw that the Tata was also stationary and that its three occupants were lying on the ground. He later saw that the Audi S5 had crashed into a house. He left the scene and went to assist. They used buckets which they filled with tap water and attempted to douse the flames until the Fire Brigade arrived. He observed that two occupants of the Audi were already outside the vehicle and being dragged away from the vehicle by the police. He also saw two rifles in the middle of the road. The officers that were busy with the Tata were MPO Vencence, Sgt. Van Wyk as well as others he could not remember.

[46] In cross examination he testified that he disagreed with the testimony of Col. Le Roux to the effect that the VW Caravelle exited the mall first. He indicated that their commanders Captain Maloka and Captain Mbalati were in charge of the operation and not Col. Le Roux. He stated further that at the mall he did not observe a BMW sedan driving around as testified to by Col. Le

Roux. He indicated that during the observation he was not close enough to the suspects to make an identification of any of them. However, he observed all those who were part of the meeting climb into the vehicles he was surveilling, drive out of the mall in a convoy onto the Golden Highway and then turn into Moshoeshoe Street where the take down took place. He testified that the briefing at Tembisa was conducted by a Captain Seko and not Colonel Le Roux. When it was suggested to him that the search of the Caravelle yielded nothing, he indicated that it was not unusual in his experience because in a robbery participants are allocated roles and that the fact that nothing was found in the Caravelle is not proof that the occupants were not part of the conspiracy.

[47] When the version of accused 3 was put to him to the effect that the VW Caravelle was part of traffic, he disputed it and stated that there is no traffic in the township around 13h00. It was further put to him that the Caravelle was fitted with a dashboard camera which was on and its footage would show that there was no Audi in sight. This issue was not pursued further. He was at pains to explain that he would not go through the trouble of writing a statement about an arrest and search he did not perform. This, in response to accused 3's version that he was stopped by two policemen in police uniform but driving in an unmarked white VW Golf 7. He denied that accused 4 was picked up by accused 3 when exiting the mall. He testified that once the convoy left the parking area of the mall no one was picked up. His recollection is that accused 3 and 4 wore Arab scarves on that day. He denied that a Ford ST took down the VW Caravelle (Transporter) and denied that rights of the accused were not explained to them. He testified that he personally explained those rights to them at the scene of the arrests.

[48] He was referred to photos 18 and 19 in Exhibit D, which I hasten to add depict a white Tata. He testified that as far as he is concerned the Tata that was part of the convoy on the day was silver in colour. He insisted that accused 5 was part of the convoy that he monitored. When referred to the testimony of Colonel Le Roux to the effect that the surveillance team was comprised of Crime Intelligence operatives, he stated that they also conducted their own surveillance as they did not trust information from Crime Intelligence. They felt as operators they needed to get first hand information at the instance of either Captain Maloka or Mbalati who were heading the TRT unit. If there was a BMW driving around at the mall then he would have seen it, however the incident took place some two to three years ago, he said.

[49] He stated that they became part of the operation on request from Sgt Van Wyk. He confirmed that the briefing at Tembisa was done by a black Captain and not Col Le Roux. He testified that it could be that more than one briefing was held. In re-examination he testified that whereas he testified about a silver Tata even when he was shown a photo of a white Tata, his statement will have the correct colour. He was given his statement to refresh his memory. As per the statement, the Tata was said to be white in colour.

[50] Lindiwe Nkukuma testified that she resides at Baylor Street, Zone 13 Sebokeng. On 07 June 2019 at about 14:03 she was about to exit the gate on her home on her way to work. Two persons alighted from a BMW X1 while it was in motion. The vehicle manoeuvred on its own and bumped into a neighbour's gate. The two male persons who hurriedly alighted from the BMW X1 and met her at the gate where one of them, whom she described as chubby, had a black bag with which he bumped her on her left shoulder. They were running and

jumped over a fence at the back of the yard and disappeared into bushes. There were people who were in pursuit and she thinks they were the police. She alerted the neighbour who came to inspect the damage to the gate and called the police. She was referred to exhibit D photos 22, 23, 30, 32, 34 and 35. She confirmed that they depicted the neighbour's yard as well as the BMW X1. Later while walking to work, she went past a house where an Audi had crashed into a house.

[51] Warrant Officer Eric Gezani Chauke testified that he is with the Forensic Division of the SAPS based in central Johannesburg. He has 30 years experience within the SAPS 19 of which were within the forensic division. His duties include among others, taking photographs of crime scenes and collecting forensic evidence. Their job is similar to that of the LCRC, the difference being that they are located at Provincial level. On 7 June 2019 he received a call to the effect that there was crossfire between suspects and the police in Sebokeng. He proceeded to the scene whereupon arrival he observed lots of spent cartridges as well as a burnt motor vehicle. He saw a body of an African male person with burn wounds. He also saw carry bags with extra clothing inside, saw two rifles and three rifle magazines as well as unused ammunition. The carry bags and the firearms were in the middle of the road. He processed the scene, took photos and collected all exhibits including a jacket that was next to the deceased person. He also took prime residue from the hands of the deceased. He was referred to the photo album, Exhibit C, photos 19, 20, 21 and 22 which depict the deceased's hands.

[52] He swiped the firearms for DNA and thereafter placed them in an exhibit bag on which he placed a seal with number PAR 000798991. He collected 54

spent cartridges as well as 112 unused ammunition. The unused ammunition was packaged in the same forensic bag with the magazines and sealed with a seal bearing the numbers PAD001664075. The 54 spent cartridges were placed in their own forensic bag and sealed with a seal bearing number PA40004619753. All the collected exhibits were booked into the SAP 13 register at Sebokeng Police Station on 08 June 2019 and registered under SAP 13 1021/2019. He explained that although the scene was attended to on 07 June 2019, they worked all the way until after midnight, hence what appears to be a discrepancy or delay in handing in the exhibits.

[53] He continued with investigations and on 11 June 2019 he booked the exhibits out of SAP 13 at Sebokeng and booked them in at their offices and registered them in the SAP 459 under number 99. When booked out of Sebokeng and into the SAP 459, the seals of the exhibits were not broken or tampered with. The exhibits were placed in a safe until he booked them out on 13 June 2019 and personally transported them to the Forensic Science Laboratory in Pretoria. He explained that exhibits whose seals are broken or tampered with in any manner, are not accepted at the FSL. If discovered later, the analyst would naturally call the investigating officer and let him/her know. Such exhibits however would not be analysed. The procedure he knows about is that the forensic bags are cut open at the bottom to access the contents. They are then kept at a safe place.

[54] He was referred to extracts of the SAP 13 register. I interpose to elucidate that the bolding of numbers and letters in my judgement are my emphasis. He confirmed that what is reflected therein, namely, that he booked out the exhibits on 11 June 2019, was correct. He further confirmed that in column 6, of that

exhibit it is narrated that the firearms were, at Sebokeng, transferred to a firearm register and allocated number 1339. He had no control of that administrative act. However, when he collected the exhibits, the seals of the forensic bags were still in tact. He was referred to photo 113 as well as the sketch plan. He confirmed that the seal number PA4000461975S, is in relation to the cartridges that were booked in. Initially when he prepared his plan, he explained, he recorded the last three numbers as 755. He went on to say that there was a typing error and that he recored a 5, instead of an S. The last correct numbers and letter therefore are 975S, and it was in respect of spent cartridges.

[55] He further explained that whereas he earlier referred to seal number PA40004619753. The correct last numbers and letter however are 975S. The SAP 13 extracts were admitted into evidence as exhibits M1, 2 and 3. The SAP 459 as exhibit N.

[56] The cross examination by Ms Dlakama took an interesting turn. It was put to him that investigations should be complete before the docket is handed over to the defence counsel. I interpose to indicate that this position as articulated by counsel is not accurate and is of no moment. Evidence is at times brought in, right in the middle of a trial, depending on circumstances and subject to explanations advanced. It is therefore understandable that the witness was not in a position to explain why the SAP 13 testimony was brought in at this stage of the proceeding. Based on experience, SAP 13 evidence is brought in usually when there is an objection from the defence, just as was the case in this matter.

[57] He confirmed that he properly completed the SAP 13 register and signed all requisite portions. To the extent that others did not sign the SAP 13 register,

they must explain themselves, he said. He confirmed that he personally took the exhibits to the FSL and that results, if any, would have been sent to the investigating officer and not him.

[58] He was referred to Exhibit C, the photo album. He confirmed that photo 11 depicts an African male person with burn wounds. He further confirmed that the scene was handed over to him by a sergeant Khumalo who is stationed within the Hawks. He confirmed that he knew Captain Maloka from the SAPS but thinks he did not meet him on the day. The version of accused 2 was put to him.

[59] Warrant Officer Gerhardus Pieterse testified that he has 31 years experience within the SAPS. In mid 2017, he joined the Organised Crime Unit. He took over the investigation of the matter from two investigating officers. He was requested to investigate ownership of the firearms recovered at the scene and he did so. He tested rifle 1 on the firearm registration system and the results showed that it was a Vector LM5 with serial number C07610. The firearm which is owned by an institution named, Fidelity Cash Solutions (PTY) Ltd with the physical address 105D Mimosa Road, Helderkruin Roodepoort, is a .223 calibre rifle. It was reported stolen at Alberton CAS 411/05/2017. The license was issued on 23 May 2003.

[60] Rifle 2 is a Vector LM5. It's calibre is .223 Remington and bears the serial number C05994. The number was tested against the system and it shows that it is owned by an institution named Fidelity Security Services (PTY) Ltd, ID no. 16455, with the street address 104D Mimosa Road, Helderkruin, Roodepoort. The ID number of the institution is 116415. It was reported stolen at Tinmyne CAS 225/12/2018. The date of issue of the license is 17/06/2003.

[61] The companies who are registered as owners of the firearms, which by the way were stolen when cross pavement robberies took place, are in the business of transporting cash and providing other security services. He obtained a statement from Luke Enslin who confirmed ownership of the firearms. He also visited the biology division of the FSL to check up on the DNA results, tests in respect of which were meant to establish if the accused are involved in other crimes, and the results are still in process.

[62] The state brought an application in terms of section 158 of the criminal Procedure Act, 52 of 1977. The state counsel explained that Captain Maloka has been deployed in Cape Town where his skill is sought for investigations. He is not in a position to come to Gauteng to testify and that there are no prospects of him returning anytime soon. He submitted that the circumstances of this case meet the requirements set out in section 158 (1)(3) of the CPA in that, as a start, the witness consents to his evidence being tendered virtually. The application was not opposed by the defence.

[63] Section 158 provides as follows;

***“158 Criminal proceedings to take place in presence of accused***

(1) *Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.*

*(2)(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.*

*(b) A court may make a similar order on the application of an accused or a witness.*



(3) *A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-*

*(a) prevent unreasonable delay;*

*(b) save costs;*

*(c) be convenient;*

*(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or*

*(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.”*

[64] I considered that hearing the evidence virtually would avert a delay in the proceedings, save costs and would be convenient to both the parties and the court. Counsel for the accused did not express any objection to the application. My view therefore was that they did not believe there would be prejudice to their clients. With all the requirements set out in section 158 (3)(c) of the CPA met, I granted the application.

[65] Frans Maloka testified virtually from Cape Town, that he holds a rank of Captain and is based in the ORS Technical Response Team, under the Tshwane TRT. His unit deals with medium to high risk operations which include cash in transit heists, house and business robberies. On 07 June 2019 he was on duty when he received a call from a Captain Letsoko. Having spoken to him he called Colonel Louw and they agreed to meet at Tembisa Police Station. (I interpose to indicate that the Colonel Louw/Leeuw referred to in the witness's testimony turned out to be Colonel Le Roux).

[66] Together with approximately 8 TRT members he travelled to Tembisa Police Station where Colonel Le Roux gave a briefing to the effect that about 20 suspects were in vehicles and were intent on committing a cash in transit robbery. They remained at Tembisa while the suspects were being monitored. After a few minutes a second briefing was held and they were informed that the robbery will not take place at Tembisa, as earlier discussed but that it will take place at Sebokeng or Evaton. They were given a list of vehicles which were on their way to Sebokeng, namely, a blue Hyundai, a gold Volvo, a red Fiat, a white Tata Indica, a white VW Polo, a grey VW Transporter minibus, a dark grey BMW and a blue Audi S5. They split up and proceeded to Sebokeng. On the highway he spotted the gold Volvo stuck on the left side of the road and next to it was the Audi and the Transporter. On arrival at Sebokeng they took cover in between houses in the township while awaiting further information. He received information that the vehicles were at the mall and drove there in a marked police vehicle. He did not get closer to the mall because he feared he could be spotted, he nevertheless observed a group of people next to vehicles. Absent where they were gathered was the Hyundai, the Fiat and the Volvo. He then returned to where they had taken cover with colleagues.

[67] When they received information that the vehicles were on the move, they followed them. The vehicles they followed were led by the Audi S5 followed by the Polo, BMW, VW Transporter and lastly the Tata at the back. Of the police vehicles that followed the suspects' convoy, his vehicle was 5th in line. Two vehicles took down the Transporter and his vehicle was now placed third. They followed the remainder of the vehicles in the convoy. At some point the Polo and BMW turned left while the Audi proceeded straight. While following the Audi he heard a gunshot and saw the Audi executing a u-turn at high speed.

He

observed a barrel of a rifle protruding through the rear passenger window. He turned right to face oncoming traffic and disembarked from the vehicle and took cover using his vehicle. The Audi, which was driving towards them, got off the road and hit a child before crashing into a house. He approached the Audi S5, which was now on fire, tactically and with caution. He noticed that the passengers were injured. Together with Captain Mbalati, they ordered police members to cease fire. The driver and the front passenger raised their hands in surrender. He drew closer to the vehicle and saw an R5 rifle with a magazine between the thighs of the front passenger seat occupant. The passenger at the back was slumped over the seat and had an R5 rifle at his feet. He summoned the Fire Department and instructed police members to try and extinguish the fire with water buckets. The driver and passenger were removed from the vehicle through the window.

[68] He instructed Sgt. Tloti to secure the firearms from the vehicle. He saw him take out a black bag in which was a blue work suit, black cap, balaclava, hand gloves as well as another bag, and place them in the middle of the road which had been cordoned off. The scene was handed over to other role players and as tactical commander he handed the firearms and exhibits to Warrant Officer Chauke. He together with Sgt. Tloti looked after the exhibits, which were not tampered with until they were handed over. He disputed that both the driver and the passenger got off the vehicles on their own and disputed that no firearms were found in the Audi. The fact that they took down the vehicles and made arrests means that the information they received, about a possible CIT robbery was positive, he testified.

[69] He testified further that the Colonel Louw/Leeuw who gave the briefing at Tembisa Police Station was from Crime Intelligence. Further, that he was the first state witness in this case. The first state witness in this case was Colonel Le Roux. It turned out therefore that Colonel Louw/Leeuw that the witness kept on referring to in his testimony, is in fact Colonel Le Roux.

[70] In cross examination he stated that he identified the vehicles that they were monitoring through their make and colours. He recalls further that the driver of the Transporter was a tall fellow, heavily built with dreadlocks. He saw him next to the Volvo that was stuck on the side of the road and also saw him at the mall. The next time he saw him was during the arrest at the scene. He confirmed that the Tata Indica and the VW Transporter were taken down by police officers in private clothes and driving a BMW. They were later joined by a VW Golf 7 from Ekurhuleni Metro as well as TRT members. He did not see Colonel Le Roux during the takedown. It was put to him that the rear window of the Audi does not open, he stated that he saw a barrel protruding and that it could be that the back window was broken at that time. Although he is not sure, when he heard the gunshot he suspected that it was from the Audi because it was when the Audi executed a U-turn. After the suspects were taken out of the vehicle, he instructed Sgt. Tloti to remove the bags from the vehicle as he feared there could be an explosion, were they to catch fire. The back seat had been dropped and the bags were on top, half inside the boot and half on the back seat.

[71] He was referred to his statement written on 07 June 2019 which he wrote personally and later commissioned. He testified that to the extent that the statement reflects that the occupants of the VW Polo were arrested by members

of the SAPS, that was a mistake in that they were not arrested. He testified that in so far as surveilling the suspects at the mall is concerned, he went there alone and did not give instructions to Sgt Muloyi or anyone else to also place the suspects under surveillance. He was referred to photo 26 in Exhibit C which depicts a partially burned Audi S5. He was told that contrary to his evidence in chief, to the effect that part of the rear seat of the Audi were dropped down, exposing a black bag which was later secured as an exhibit, the photo showed the rear seat in an upright position. He testified that the photo was taken after the bag was removed as he feared there could be an explosion. He denied that removing the bags was tempering with evidence. The version of accused 1, as set out in the plea explanation was put to him and he denied it, labelling it a lie.

[72] The same version was repeated on behalf of accused 2. It was further put to him that accused 2 was not taken out of the burning vehicle by members of the SAPS but that he by himself exited through the window and was thereafter instructed to help his friend, the driver, out of the vehicle. He denied this. Whereas he personally did not have registration numbers of any of the vehicles, the vehicles they took down, including the Audi, fitted the description given at Tembisa Police Station during the briefing.

[73] It was suggested to him on behalf of accused 3 that he, the witness, was creating his own version when he says at the briefing in Tembisa they were told that a VW Transporter was part of the list of vehicles to be surveilled, in that the version of Colonel Le Roux was to the effect that the Transporter became part of the list at Evaton. Further, that it was his own fabrication that the vehicles were followed or observed from Tembisa to Evaton. When challenged about absence, from his written statement, of the bit about the gold Volvo on

the side

of the road with its bonnet open, he indicated that in court he divulged all he knows, including matters which were not in his statement. The version of accused 3 as earlier disclosed was put to him and he disputed it.

[74] Counsel for accused 5 canvassed the arrest of the occupants of the Tata with him. He testified that he only saw it when it was stopped and could not testify about the arrest of the occupants. Further, he did not see Colonel Le Roux stop momentarily during the arrest of the Tata occupants. He saw only the vehicles of his operators and those which were part of the convoy. He was referred to parts of the testimony of Sgt Muloyi, Malebane and Colonel Le Roux, all of whom mentioned a silver Polo at some stage in their evidence, although Sgt. Muloyi and Col. Le Roux later corrected themselves and testified that the Tata was white. He testified that he saw what he saw. The version of accused 5 was put to him. It was put to him that accused 5 became a passenger at the mall and that before then he was not part of the Tata. It was further suggested to him that evidence suggests that accused 5, 6 and 7 could have been arrested at a different place. He denied those assertions. He also denied seeing Col. Le Roux stop behind the Tata to observe an arrest. What he saw, he testified, were vehicles of operators and the convoy of suspects.

[75] He was referred to the fact that Sgt. Muloyi made reference to a silver Tata as opposed to a white one. I must interrupt myself to say that the colour of the Tata was clarified and should not be of any moment. The fact that Malebane, Muloyi and Le Roux make reference to a silver Tata is of no moment because objective evidence in the form of photos show that the Tata was white in colour. He denied that the street on which accused 5 was arrested was cordoned off and that the Tata was taken down on a street parallel to Moshoeshoe Street.



## **Hearsay Evidence**

[76] During the trial Col. Le Roux testified that he received information from an informer about commission of a cash in transit heist. The testimony of Col. Le Roux, being hearsay on this aspect, was provisionally admitted into evidence. When Capt. Maloka testified he made reference to the briefing at Tembisa Police Station and indicated that they were told of a cash in transit heist that was imminent as per an informer. The informer was not called as a witness. The evidence about the informer and what was conveyed by him/her, is therefore hearsay evidence subject to the legal prescripts on hearsay evidence.

[77] The state counsel applied that the hearsay evidence be admitted in terms of section 3 (1)(c) of the *Law of Evidence Amendment Act*<sup>1</sup>. He argued that the evidence is simply explanatory and does not make mention of any accused person. He submitted that the informer who provided the information was no longer available and that it would be in the interest of justice that the hearsay evidence be admitted. All the counsel objected bar Mr Tlouane and Mr Mohlabane. The thrust of the objection was that the accused would be prejudiced on count 1, that of conspiracy to commit robbery.

[78] At the trial I gave a ruling as well as very brief reasons to the effect that I was of the view that the hearsay evidence, if admitted would prejudice the accused. In essence, I was of the view that Captain Maloka testified about what he heard from Col. Le Roux who in turn had testified about what he heard from the informer. This being too remote among others, from the originator of the information, I ruled that such evidence be excluded. I gave a brief basis for my ruling which in short amounted to the fact the accused would be prejudiced

<sup>1</sup> *Law of Evidence Amendment Act 45 of 1988*

were the hearsay evidence to be admitted and that it would not be in the interest of justice to admit it.

[79] I must say the State did not bring a full and proper application at the time when the evidence was led so that an in-depth consideration to admitting the hearsay evidence could be considered. When mention was made of the fact that information about commission of the crime did not originate from Col Le Roux, therefore that such evidence was hearsay evidence, such evidence was provisionally admitted. The understanding at the time, being that later in the proceedings a full application would be launched. Usually section 3(1)(c) applications are made as and when the hearsay evidence to be relied upon is flagged. This is so that the court can have the benefit of placing such evidence in context and also determine whether the requirements of section 3 are met. In bringing the application at the end of proceedings just before the close of the state case and in dealing with it in that manner, the court was deprived of an opportunity fully examine and finally decisively determine admissibility.

[80] Section 3(1)(c) of The *Law of Evidence Amendment Act*, deals with circumstances under which hearsay evidence may be admitted as evidence. The general principle however is that hearsay evidence shall not be admitted unless it is in the interest of justice to do so. The section provides as follows;

***"3. Hearsay evidence***

*(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

- (b) *the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
- (c) *the court, having regard to -*
  - (i) *the nature of the proceedings;*
  - (ii) *the nature of the evidence;*
  - (iii) *the purpose for which the evidence is tendered;*
  - (iv) *the probative value of the evidence;*
  - (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
  - (vi) *any prejudice to a party which the admission of such evidence might entail; and*
  - (vii) *any other factor which should in the opinion of the court be taken into account,*

*is of the opinion that such evidence should be admitted in the interests of justice.*

[81] Hearsay is unreliable and therefore inadmissible. In *S v Ramavhale*<sup>2</sup> Schultz JA, quoted with approval, what was said in another judgment, namely; *".....a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so....."*

---

<sup>2</sup> *S v Ramavhale* 1996 (1) SACR 639 (A)

[82] I just want to in point form deal with the requirements as set out in the subsections of section 3, which I have set out above, but with specific reference to this case, as I undertook when I gave then ruling during the trial proceedings.

#### *68.1. Nature of proceedings*

It is common cause that we were in the middle of a trial and that we were not in the middle of a trial within a trial. In fact we were at the trail end of the state's case'

#### *68.2. The nature of evidence*

The nature of the evidence is important but confirmatory in nature. All that is sought is confirmation of information which informed the actions of the police on the day. If the testimony of witnesses is anything to go by, on two fronts. Firstly, the information to the effect that suspects were going to commit a cash in transit heist and secondly, that the suspects had changed their plans and were no longer going to commit the robbery at Tembisa but in Aberton/Sebokeng. On reflection, police actions are what in my view is critical. A closer examination of their actions show the following. They had information which caused them to congregate at Police Station. In the case of Captain Maloka, he was at Mamelodi but had to drop all he was doing and head to Tembisa. Once there, a briefing was held where information was shared, some of it hearsay. If we, for a minute disregard the content and focus on actions, after the information was shared, the police remained at Tembisa Police Station. Later, when the second briefing was held, they drove to a mall in Sebokeng. Which brings me to the purpose.

#### *68.3. The purpose*

The purpose of the evidence is to show that the information of the informer was credible in that the leads the police followed, which were informed by such information yielded fruit.

68.4. *Probative value of the evidence and prejudice to the accused*  
Opposition to admission of the hearsay evidence was strong on this point. It was argued in particular, that admitting the evidence, particularly in relation to count 1, that of conspiracy to commit robbery, would seriously prejudice the accused. The point being that only the informer is in a position to testify about the conspiracy that the state relies upon. I have to make the point that the argument that the accused would be prejudiced in that the hearsay evidence may end up determining his guilt was considered in *S v Shaik & others*<sup>3</sup>. In paragraph 177 of this judgment the following is said;

*“The fact that the admission of the fax could lead to the conviction of the appellants was clearly not intended to constitute prejudice to be taken into account in deciding whether the evidence should be admitted or not. It is for this very purpose that hearsay evidence is, in the interests of justice, admitted in criminal cases. The appellants, however, contended that they were prejudiced by the admission of the fax because they had not had an opportunity to cross-examine Thétard. However, it could only be found that the appellants would be prejudiced in this respect if there appeared to be a reasonable possibility that cross-examination of Thétard would strengthen the appellants’ case. In the light of what has been said in the preceding paragraph it is highly unlikely that cross-examination of Thétard would have rendered positive results for the appellants. All the indications were that cross-examination of Thétard*

---

<sup>3</sup> *S v Shaik & others* 2007 (1) SACR 247 (SCA) para 171; [2006] ZASCA 105

*would have served no other purpose than to reinforce the impression that he is dishonest and unreliable. In the circumstances the risk that the appellants would be prejudiced by not being given an opportunity to cross-examine Thétard was very slim.”*

By parity of reasoning, the fact that the admission of the hearsay evidence of Colonel Le Roux and Captain Maloka, on the limited aspect of information gathered by the informer, who did not testify, is clearly not intended to constitute prejudice to be taken into account in deciding whether the evidence should be admitted or not. The inability to cross examine the informer is prejudice only if the case of the accused could be advanced by cross-examination of him. While neither the state nor the defence has led evidence on this aspect, I am prepared to accept that some prejudice would result. I am prepared therefore to exclude the evidence.

#### *68.4. The reason why the evidence is not given by the person*

The state gave a somewhat cryptic explanation of why the witness could not testify. It was hinted that the witness had passed on. What is clear however is that the witness is not available to testify.

#### *68.5. Any other factor*

I did consider all the factors and I came to the conclusion that admitting the hearsay evidence would be an affront to justice. Hence my ruling. Besides, the hearsay evidence does not advance the case in favour of any of the parties.

[84] Having ruled the hearsay evidence inadmissible, the state closed its case. The defence applied for a discharge in terms of section 174. The ruling has been

encapsulated in a separate judgment which I penned, complete with reasons. There is therefore no need to repeat it here. Suffice to say accused 3, 4, 5, 6 and 7 were found not guilty and discharged on counts 4 and 5 which dealt with unlawful possession of firearms and ammunition respectively.

### **The defence case**

[85] Lawrence Mabena, accused 1, took to the witness stand to give evidence in his own case. He testified that on the date of the incident, he woke up at his place in Fearie Glen and proceeded to fetch his friend, accused 2 together with his wife from Tembisa. Accused 2 asked him to drop off his wife at Diepkloof and thereafter fetch a friend of his whereafter they would proceed to the Vaal. On their way to the Vaal he was asked to stop at a mall to purchase food and he did so. They went into KFC, bought food, sat down and ate. They left and he was being given directions by accused 2 to where they were headed. He then noticed a VW Golf 7 with two occupants approaching. The occupants were wearing balaclavas. There was no siren. The one on the passenger side pointed a firearm at him and at that point he thought he was being hijacked. He tried to speed off and got shot at. He was shot in the face and he became dizzy and could not see the road. He collided into something he is not sure what it was. He heard gun shots and after a while heard men speaking and ordering them to get out of the vehicle. He could not move as he was injured. He was helped out of the vehicle by accused 2. An ambulance that arrived at the scene was sent away by the police who said they must be left to die, that was his evidence. Another one came an hour later, he was then transported to hospital. He denied that there were bags in the vehicle. He testified that the only bag that was there was a small bag belonging to the fellow they picked up in Soweto. He denied



that he committed murder, shot at anyone, possessed firearms or ammunition, or conspiring to commit robbery.

[86] During cross examination by counsel for accused 3, he stated that he doesn't know him and that he never met him on 7 June 2019. He stated that he never met accused 4 at the mall. He also never met accused 5 on the day of the incident. He met him for the first time when they appeared in court. He confirmed, when it was put to him on behalf of accused 6 and 7, that he never conspired with them. On the day of the incident there were many vehicles on the road. He however did not see a Combi, Tata or a BMW.

[87] During cross examination by the state counsel, he testified that as at the date of the incident he had been friends with accused 2 for a year, having met him at accused 2's bottle store in Tembisa. Their friendship was limited to him being a patron at the bottle store and sitting and watching soccer games. Four days before the day of the incident, he was asked by accused 2 to fetch him from Tembisa, if he was not busy and thereafter drop him off at Vaal, where one of his friends was. He offered to, as they say, "pour R400-00 petrol " for him. At about 09h00 on the day of the incident he picked up accused 2 together with his wife, and travelled to Diepkloof where his wife was dropped off near a bus stop. He then drove to a filling station, as directed by accused 2, to pick up accused 2's friend who had in his possession what looked like a tool bag which was approximately 30cm long and light blue in colour, and which he placed in the boot of the Audi. His name is Katiba and he settled behind the driver's seat. They went to the mall where they spent about an hour and thereafter drove off.

[88] He then spotted a VW Golf 7 with 2 occupants who were wearing wool woven balaclavas. There were no police blue lights and no sirens. The VW Golf drove parallel to his vehicle and the occupants pointed firearms at them. They also drove ahead of his vehicle and tried to block him off. In front of him he saw a Quantum. He testified that he did not see a VW Transporter before he saw the Golf 7. He testified nevertheless that he would dispute that a VW Transporter, a white Tata Indica, a navy blue BMW X1 were there because he simply did not see those vehicles. I hasten to add that you dispute that something was there because you looked and it wasn't there, but not because you didn't look but are nevertheless prepared to say they were not there. He drove at approximately 100km/h to try and get away from what he believed to be a hi-jacking incident. The dashboard of the vehicle, having been damaged by bullets, caught fire together with the front tyres. No one tried to extinguish the fire and the police officers who testified that they did with bucketed water, did so after he had been taken out of the burning vehicle by accused 2. He stated that when the police testified that they extinguished the fire, which version was not disputed, they were not telling the truth.

[89] He was referred to exhibit C with specific reference to photos 195 to 199 and photo 202. He stated that the vehicle in those photos very much looked like the vehicle that attempted to execute a hi-jacking on them. He confirmed that photos 196 and 197 showed that the golf had their blue lights on. He however denied that the occupants of the Golf 7 that attempted to "hi-jack them" had theirs on, even when referred to photo 197 which depicts blue lights on the Golf 7. He further confirmed that photos 199 and 200, depicted a bullet hole and a damaged left rearview mirror respectively. He confirmed that he heard

witnesses testify that that damage was as a result of the police being shot at by the occupants of the Audi S5.

[90] He testified that in his boot was a jack as well as a spare wheel and nothing else in the form of a black bag/s as depicted in photos 169 and 122. He denied that the bag depicted in both photos is the one that was brought by the deceased and placed in the boot of the Audi. The other items as shown in photos 114, 115, 116, 117, 159 and 160, which included overalls, hand gloves and a balaclava, some of which were found inside a bag, are unknown to him. He testified that he was 100% sure that the police were fabricating evidence. That they were being monitored and were seen exiting the mall in a convoy formation, that the Audi was seen together with the Transporter and a gold Volvo are things he heard in court for the first time. He denied that police saw black bags being loaded in his Audi and stated that despite a black bag being found in his vehicle the witnesses were lying. He denied that 2 rifles, ammunition, overalls, gloves and balaclavas were found in his vehicle. He stated that to this day he does not know what happened to the VW Golf that tried to hijack him. He does not know why his lawyer did not mention the fact that the persons who tried to hijack him were wearing balaclavas, when cross-examining witnesses.

[91] Paulina Barbara Sithole testified that she is the wife of accused 2. On the day of the incident she, together with accused 2 were fetched by accused 1 from Tembisa in his vehicle and driven to Diepkloof in Soweto where she was dropped off next to a bus stop. She knew accused 1, having seen him at the place where she sells liquor. She later received a call from the police informing her that accused 1 was shot and that he was at Sebokeng Hospital.

[92] During cross examination she confirmed that she did not make a statement and that she was relying on her memory but can vividly recall everything despite the lapse of time. As at the time of the incident she had known accused 1 for less than a year. On a Wednesday preceding the Friday, being the date of the incident, she was informed by accused 2 that a man in the Vaal, one Siphon, liked the tiles they had installed at their place. To the best of her knowledge accused 2 doesn't know how to install tiles, he was simply going to give directions to the Vaal where the man was. Around 12h00 she was dropped off at Diepkloof. She confirmed that besides the say so of accused 2 about a trip to the Vaal and the installation of tiles, she doesn't know if what she was told was true.

[93] She testified that accused 1 fetched them in a white Audi. She was referred to photo 195 on Exhibit C, which depicts a white VW Golf. On exhibit D she was referred to photos 16 to 19, which depict a white Tata. Then photos 22, 23, 38, 39 which depict a blue BMW. In all the above instances, she testified that she did not know any of the vehicles depicted on those photos. When referred to exhibit C showing a partially burned blue Audi, she initially stated that she could not see the car clearly. When asked if it wasn't the one she was collected in, she stated that it in fact was. When confronted with her version in chief that the Audi was white, she said she doesn't know colours, she then said she made a mistake when she earlier testified that the vehicle was white.

[94] She, obviously, as she was at that time on her version in Soweto, could not dispute or confirm that the Audi depicted in the photos was spotted at a Mall in Evaton, where a meeting also took place. She also could not dispute that the Audi exited the mall in a convoy format together other vehicles, a Tata, BMW

and a VW Transporter, nor the fact that police tried to stop the Audi unsuccessfully and that a passenger seated at the back seat shot at the police, who then returned fire and hence accused 2 was hospitalised. She was further not in a position to dispute that two R5 rifles plus ammunition were recovered from the Audi. When referred to photo 12 in Exhibit C she stated that the person depicted thereon was Katiba, the one who was supposed to install tiles. It is curious to note that she had not stated that she had met him before and knew him so well as to identify him. She conceded that depicted in photos 114 to 117, which the State alleges are firearms found in the vehicle in which accused 1, 2 and the deceased were in, have nothing to do with the installation of tiles.

[95] Accused 1's second witness Tshepang Tshike, whom I might add, was called belatedly, as a witness on behalf of accused 1, testified that she hails from Sebokeng Zone 13 and that on the day of the incident she was in her home watching movies on a laptop. She and her sibling who was at that time 10yrs old heard gunshots, and she observed her sibling, looking at the sliding door, whose curtains were tied open. When she looked she also saw a vehicle coming towards her door which was closed. She looked closely and saw that shots were being fired from her yard. The car collided with the sliding door just before she managed to take her baby sister away and run outside and they then hid in the toilet and when the shots subsided they were collected therefrom and taken to a neighbour's house. A fire broke out where the vehicle that collided was and they then went out to also have a look but were warned by the police to stay away as the vehicle could explode. At that time the occupants of the vehicle had already been taken out. She did not see who helped them out. People arrived with bucketed water, and she would dispute that such persons were the police, and

doused the flames after which they went to the neighbours place. She vividly remembers the scene because she was scared.

[96] During cross examination, she testified that as at the time of the incident she was with her sibling when they heard gunshots. When she went to look what was happening she saw police on foot in front of the gate shooting, although she is not sure what they were shooting at as at that time she was in the veranda running towards the kitchen and then eventually to the outside toilet where they stayed for 20 to 30 minutes and where they waited 5 to 10 minutes before coming out.

[97] She testified that she did not observe any collision but heard that a child was almost collided into and further that a shoe was found in the yard. Before noticing that there was a car that was on fire, which car was approximately 3m away, they were in the neighbours yard for some 30 to 40 minutes. After the firefighters arrived she did not see them removing any of the occupants of the burning vehicle being removed therefore can't dispute that is how it occurred. Some of the things she did not see that well as the place was crowded. She could not as a consequence dispute whether the fire started while the occupants of the vehicle were in the vehicle or out. She can not dispute that police sirens and blue lights were at that time activated, but could dispute that police were the first to extinguish the fire. This is because when she arrived there they were telling the members of the public that the car could explode. Although there were many police officers at the scene and she can't testify as to what each one of them did, she was prepared to dispute the version of approximately 3 officers who testified that they were the first to extinguish the fire.

[98] Accused 2, Patrick Magwaza Ngobeni testified in his own defence that he is a tavern owner and knew accused 1 as hailing from Mamelodi and his friend. The same was the case with one Katiba, the deceased, apparently a tiler, who hails from Soweto. They both from time to time were patrons at his tavern, Chicago Tavern. On one occasion when there was a promotional event at the tavern, one of the patrons named Sipho who hails from Zone 10 in Sebokeng, took a liking to the tiles that had been installed in the sitting room, and wanted the contact details of the tiler, so he could procure his services. The day of the incident, 7 June 2019, was the day they had agreed, among themselves telephonically in the week, that he will transport Katiba (deceased) to Sebokeng so he could install tiles at Sipho's place.

[99] On the morning of 7 June 2019 accused 1 arrived at his place in Tembisa and they left for Soweto, firstly to drop off his wife who hails from there, pick up Katiba the tiler and proceed to Siphon in Zone 10 Sebokeng. Between 9 and 10 AM they left for Soweto whereupon arrival they dropped his wife at a bus stop, and collected Katiba next to a filling station in Diepkloof Zone 6, in the vicinity of hostels. He was in possession of a light blue bag approximately 75-80cm in width which he placed in the boot after accused 1 opened the boot for him. Their next stop was at Everton Mall where after parking the vehicle they entered KFC, ordered food, sat down and consumed it.

[100] After eating, they went back to the car, exited the mall onto the Golden Highway and drove into Moshoeshoe Street on their way to Siphon's place. They were driving relaxed on the left lane of the road when they spotted a white VW Golf 7 with 4 occupants clad in balaclavas. It is worth noting that the occupants of the Golf 7 were said to be 4. The occupants thereof pointed rifles at them at

which point he thought they were being hi-jacked. Accused 1 accelerated the vehicle, however, he lost control thereof and crashed into a nearby house. Shooting continued amid shouts from the crowd that was forming and instructions from the police for them to get out of the vehicle. He tried to get out however the door would not open despite him trying to force it open by bashing it with his elbow. He therefore had to exit through the window and was thereafter made to lie on the ground on his stomach.

[101] After 2 to 3 minutes after the vehicle had started to burn, police then instructed him to go back to the vehicle to rescue accused 1. The driver's door however could not open so he was forced to remove him through the driver's window, which he did. Ambulances arrived some 2 to 3 hours later and the police turned them away. He denied that the sirens and police blue lights of the VW Golf 7 that tried to, in his view, hi-jack them had been activated. He labelled it a lie. He equally labelled it a lie that any of the occupants of the Audi fired at the VW Golf 7. The deceased, Katiba, who had been seated at the back seat, screamed with his hand placed on his back and subsequently died. At that time there were no firearms in the Audi in which he was a passenger, no two black bags and in addition he denied that he conspired with anyone to rob. He labelled it a lie that two rifles were found in the vehicle and further, he denied that accused 3 through to 7 were known to him at that time.

[102] During cross examination by the state counsel, he testified that as at the day of the incident he knew accused 1 for some time but was not sure exactly for how long. He knew him through his friends who hailed from Tembisa and who frequented his tavern particularly to watch soccer matches on the big screen he had at the tavern. When he was approached about facilitating the tile



installation project, he had no idea how big the project was or how many rooms were to be tiled. He spoke to accused 1 and told him that he would pour petrol for R500-00 for him were he to accompany him, which amount was to be reimbursed to him by Siphso. He conceded that this was not mentioned in his evidence in chief.

[103] After picking up Katiba, they proceeded to the KFC at Evaton Mall, they did not stop anywhere. After eating at KFC they drove into Moshoeshoe Street where a white VW Golf 7 with four occupants, all clad in balaclavas and whose faces he could not make out, pointed firearms at their vehicle. He only saw one firearm, approximately 70 to 80 meters in length. The occupants of the VW Golf 7 did not say anything nor did they make any signals. Accused 1 then accelerated his vehicle at which point shooting started. He lost control of the vehicle and collided into a house, he however did not see three or four children before the collision. Thereafter there was silence for about 2 seconds then shooting began again but he did not see who was shooting at who.

[104] After exiting through the window and after he had been ordered to lie on the ground he was instructed to go and rescue "his friend" from the vehicle. Although he had been shot on his upper back next to the spine, in pain and bleeding heavily, he complied. When the vehicle caught fire members of the community doused the flames at first then later the police joined in. It was put to him that such a version was not put to witnesses (this was to be verified and counsel was informed accordingly). There was an objection by the defence and an assertion was made that such a version was placed on record. It was agreed that the record will be looked at. I have gone through the record and my notes and can confirm that indeed such a version was not put to witnesses. He testified

further that the fire started when he was outside the vehicle. When referred to the testimony of both Tloti and Malebane to the effect that the fire started while he was inside the vehicle and that such a version was not disputed, he confirmed that it was not disputed and that his version was not put to them. That was as far as he could take it. He labelled it a lie that police assisted them out of the burning vehicle, this despite him testifying that they, the police, assisted in the dousing of the flames. He stated that when he rescued accused 1 out of the vehicle, the deceased was still in the vehicle and he does not know where he ended up where he did or what happened to him. Although the deceased was his friend, after he was shot, he only followed police commands.

[105] He testified that what was inside the deceased's light blue bag which was approximately 75cm, was unknown to him but he expected tools to fit or fix tiles to be inside. When told that photos taken at the scene do not show such a bag but instead show things such as gloves, balaclavas, lots of R5 ammunition and 2 R5 rifles he indicated that such photos would have been taken when they were no longer at the scene but in hospital and that he can not dispute them. I must say again that it was never put to the witnesses who testified that the photos at the scene were taken after they had been transported therefrom. He disputed that there was a rifle where the deceased had been seated as well as where he himself was seated and he in fact called it a lie.

[106] The following version was put to him and he denied it; that police conducted surveillance at the mall and saw them at a meeting; that bags were removed from another vehicle and put in the boot of the Audi; that the vehicle he was in was followed and the police switched on their blue lights and siren in an endeavour to stop them; that a person at the back of the Audi shot at the

police and they returned fire and that they were part of a convoy that exited the mall. He even went further to say everything was fabricated against them. When the specific vehicles were mentioned as having left the mall in a convoy, a silver VW Transporter, a black or dark blue BMW X1, a white Tata, a VW Polo, he testified that he knew nothing about those and labeled the circumstances of the abandonment of the BMW X1 as testified to by a witness, who said the occupants alighted while it was in motion, he said it was not a normal occurrence. He denied that the vehicle he was in was passed by Captain Maloka standing on the side of the road with other vehicles, denied conspiring to commit robbery and stated that the police arrested the wrong persons.

[107] Tumelo Tsikane, accused 3, testified that on the day of the incident being 7 June 2019, he was at that time in the transportation and towing business. One of the businesses he was involved in at that time was to transport staff members who were involved in the preparation of a pitch or perhaps track for the spinning of cars, transporting them from Lenasia to Masiza Stadium in Sebokeng. On that day around 12:00 he was en route to fetch the staff from the stadium. Later that day and on his way to pick up staff and transport them to Lenasia, and at a stop street near Everton Mall, he was approached by two young men who offered to fix his broken left mirror. They entered the Everton Mall where they proceeded to fix the mirror, drove out of the mall to test if it was properly fixed while driving over potholes, passing Everton Police Station in the process then went back to the mall, put on more glue and the two young men were paid for their efforts.

[108] He exited the mall and stopped at a fruit market and while there he was approached by accused 4, whom he did not recognise at first but after an

explanation by accused 4, he was able to. Accused 4 asked for a lift and they left in the direction of Sebokeng. He denied that he was part of a meeting at the parking lot of the mall with a group of persons and further denied that they exited the mall in a convoy with his vehicle leading the way initially and later further back in the convoy.

[109] While driving, a white Ford ST suddenly emerged. When he looked at it he saw men wearing blue bulletproof vests and as there were cars ahead of him he had to be careful but he eventually pulled over to the side of the paving and stopped. They were instructed to exit the vehicle and lie on the ground to which instruction they complied. They were asked whose vehicle it was and he indicated, to those people that it was his.

[110] The vehicle was searched while they lay on the ground and their hands cuffed, nothing was found. When the testimony of Sgt. Tloti was put to him, namely, that when they tried to stop him he tried to speed off, he stated that they were on a main road and that with vehicles all around him, he could not just stop there and then on the spot, hence he moved to the side paving and stopped there. He testified that there were many police officers there, asking many questions, to which he responded that he was headed to Masiza Stadium, while he was lying on the ground and facing down. Col le Roux then asked him whose vehicle this was and he indicated that it was his. The purpose for stopping them appeared to him to have been to search his vehicle. After 10 to 15 minutes of being made to lie on the ground he explained that he had a back problem and was then made to stand next to the minibus, and while there three people were brought in and it was accused 5, 6 and 7 before court, whom he did not know at all. He testified that a few days before the incident, he went

through

a traffic violation on the same stretch of road which was an indication, in his view, that he was frequenting that road.

[111] During cross examination by the state counsel, he testified that when accused 5, 6, and 7 were brought to where they were, he was still standing after the police gave him permission to. He testified that he could not dispute the place of arrest. In answer to the question whether he was able to tell whether the persons who stopped them were police, he stated that he simply looked at them. When they were stopped by the occupants of the Ford ST the occupants thereof pointed firearms at them, a fact which he conceded was mentioned for the first time during cross examination. He however denied that those occupants had blue lights and siren on, on their vehicles. He further denied that at the time they were ordered to exit the vehicle and lie on the ground, he heard gunshots and saw sirens nor did he notice that the road had been cordoned off.

[112] Around 20h00 he was placed in his vehicle together with accused 4, 5, 6 and 7, driven to a place where there was a road block and there they were transferred into a police van. Accused 5, 6 and 7 were brought to where he and accused 4 were made to lie down soon after he had asked to stand up, owing to his back issues. The road where they were arrested was cordoned off 30 min after they were stopped.

[113] State counsel placed the version of the State before him, which in summary form was the following; that Captain Maloka was briefed in Tembisa about a possible crime; that he placed certain vehicles under surveillance and while driving from Tembisa observed accused 3's vehicle, a Volvo and an Audi on the side of the road where he specifically saw accused 3; that the next time

he saw accused 3 was where they were stopped and were made to lie on the ground, he arrest scene; that he observed a group of people in a meeting at a parking lot of Evaton Mall; that he saw persons get into vehicles, which included accused 3's vehicle and drive out of the mall in a convoy. He denied the version that was put to him stating that it was all a lie.

[114] In response to the testimony of Constable Muloyi to the effect that; he had to block accused 3's vehicle as he could not stop; that upon being stopped he was asked about a planned cash in transit heist, and where they were going, to which questions there was no response; that he was arrested by Constable Muloyi; that he was informed by him about the reason why he was being arrested; before then he had been part of the group that was placed under surveillance by the police and was seen leaving the mall in a convoy; that the group conspired to commit robbery; that the version he presented was a figment of his imagination designed with the sole purpose of meeting the case against him. He denied the case put to him by the state counsel and in relation to the circumstances of the abandonment of the BMW X1, he stated that he was surprised by it and that he doesn't know what they were doing.

[115] Joseph Khoza testified that on 7 June 2019 he left his home in Mofolo North and was headed to Sebokeng, specifically Arcelor Mittal where he was hoping to get work or income for his bakkie. He used public transport to travel to Evaton and once there he met accused 3 who offered him a lift. He climbed into the vehicle and they entered a busy main road. Once there, he saw a white VW Golf whose occupants were in possession of firearms. They signalled to them to pull over. Accused 3 complied and moved the vehicle onto the pavement. The VW Golf drove past them and then another vehicle, a white

Ford ST came. The occupants of the Golf instructed them to alight from the vehicle, lift their hands and lie on the ground facing down. They complied with all the police instructions.

[116] After asking to, the police searched their vehicles and found nothing. They all were asked where they were going and they gave their respective answers. They were made to lie on the ground for a long time until it was dark and eventually they were transported to the police station. He denied that accused 3's vehicle was part of a convoy. With the exception of accused 3 whom he knew, the other co-accused he did not know at all.

[117] In cross examination he stated that he did not own a company, that he only owned a bakkie in respect of which he was hoping to get work from Samuel Khunong who is based in the transport department of Arcelor Mittal. He conceded that the version about him going to Arcelor Mittal to look for work was not put to any of the witnesses called by the state. He indicated that they were not told of the reason for their arrest by the officer in charge of the scene, Lincoln Muloyi. When they were waived out of the road by the occupants of a white VW Golf, he got the impression that they were the police giving instructions, no impression was formed that they were being hi-jacked. The occupants were not wearing balaclavas and one of them was white. They were ordered to place their hands on their heads and lie down, where they were later joined by three other men. They were not asked about a cash in transit heist as testified to by Officer Muloyi, which evidence he conceded he did not challenge. He denied seeing blue lights and hearing sirens, but was not in a position to dispute the testimony of Officer Mule to the effect that their siren and blue lights were on. He also did not hear the exchange of gunfire.



[118] He was referred to photos 195, 196 and 197 in Exhibit C depicting a white VW Golf. He testified that it looked very much like the one that tried to waive them down to pull over. When he met accused 3 on the day of the arrest he was next to fruit hawkers. He did not tell him he was going to Arcelor Mittal, only that he is going to meet an acquaintance Samuel Khunong. In turn accused 3 informed him he was going to Masiza Stadium.

[119] He was referred to the summarised version of the state, namely; that they were placed under surveillance at the mall, were observed in a meeting; were seen climbing into vehicles that included a VW Transporter, BMW, Polo and a Tata; form a convoy and exit the mall. The convoy was seen entering Moshoeshoe Street where a takedown was activated and executed he did not see any street cordoned off. He denied the version and further denied that circumstances of the meeting with accused 3 were simply a figment of his imagination, designed for the sole purpose of meeting his case.

[120] Erick Gwababa Khambule, accused 5, testified that on 7 June 2019 he received a call from accused 7 who informed him he was on his way, they had arranged to meet at the mall and were meant to travel to Sebokeng Zone 13 to fetch Mr Mokhele then travel with him to Parys where they were to meet Oupa. Accused 6 did not know the route and upon leaving the mall they joined the Golden Highway, entered a busy tarred road which had been cordoned off with red tape, where they saw a policeman in uniform conducting traffic and directing cars to turn into another street. A white vehicle suddenly stopped, two black men with firearms ordered them out of their vehicle and ordered them to lie on the ground. They were in plain clothes and did not introduce themselves. None of those who testified in court were those who arrested them. One of

those men took him into another vehicle where he was made to lie at the back and the vehicle was driven in the direction from they came. When the vehicle stopped, he noticed that there was some red tape. He was made to lie on the ground and met two other men, he saw accused 3 leaning against a vehicle. The person they were meant to meet, Mr Mokhele, passed away in 2020. He denied being part of a conspiracy to commit robbery, meeting at the mall, exiting the mall in a convoy and knowing accused 1, 2, 3, 4, and 6.

[121] During cross examination he testified that he knew accused 7 who hails from Tembisa and accused 6 was unknown to him. Oupa and Mokhele were only known to him and not to accused 7. The purpose of going to Parys was to see if they can make 2 to 3 bakkies available for some tender job. He did not have any bakkies nor did accused 6 and 7. They drove in a Tata which accused 6 disclosed after their arrest belonged to him. In respect of the costs of the Parys trip the late Mr Mokhele was going to be responsible.

[122] When they were arrested they were not informed of the reasons of their arrest. They were stopped and taken to where the police red tape was. He did not take notice if the VW Transporter was there but there were according to him lots of people there. He saw accused 6 and 7 when he was made to lie on the ground. Accused 4 was on the ground and accused 3 was seated and leaning against a vehicle, not standing he testified. They were informed the reason why they were stopped was that they had committed robbery. While he lay flat on the ground the vehicle was searched but nothing was found and the police said so.

[123] The state put the version to the effect that the the police received information; followed it up and placed a group of suspects under surveillance at the mall and that part of the vehicles that were there was an Audi, VW, BMW, TATA and a Polo; that the group was seen in a meeting of sorts and left the mall in a convoy; once on Moshoeshoe street a take down was activated and arrests took place where the suspects tried to get away but were blocked off and prevented from doing so. He went as far as to say that the police were fabricating evidence against him in that the police who effected the arrest never testified in court, the state witnesses were mistaken, and were fabricating evidence. Because he wanted Mr Mokhene to testify on his behalf, he asked around about him and eventually ended up obtaining his death certificate. At the scene of their arrest, they were never asked where they were headed to and were arrested without any information.

[124] Tshepo Ntsiki, accused 6, testified that on 7 June 2019 he did not know any of the co-accused bar accused 7 and 5. He testified that the Tata belonged to him. On that day he was from Midrand and that he sells sneakers by going door to door. He was accompanying accused 7 on the day at his request. The intention was to travel to the Vaal and thereafter to Parys, but he did not know the purpose of the visit. After meeting accused 5 they travelled with the pair giving him directions as he wasn't familiar with the route. While driving he looked upfront and noticed a red tape and one policeman directing vehicles to turn right. Further down the road after turning right they encountered a white vehicle that ordered them to stop while they were pointed with firearms and ordered to exit the vehicle and lie on the ground. At that point he did not know if they were being hi-jacked or not. He denied being part of a conspiracy to commit robbery or any other crime.

[125] The vehicle was searched and nothing was found he testified. When referred to the testimony of Officer Vencence, to the effect that overalls, hand gloves and balaclavas were found, he testified that those items are always in his vehicle and besides it was winter, he said. After accused 3, 4, 5, and 7 were also made to lie on the ground, they were all placed in the VW minibus and transported to a place where there were many onlookers.

[126] During cross examination he testified that he did not enquire about the reasons for going to Parys, all he knew was that they were going to meet someone and he charged them R1000-00 for the trip, which was to be paid by accused 7. The overalls, gloves and balaclava that were found after the police searched the vehicle belong to him and are always in the boot of his vehicle, he testified, and denied that they were found at the back seat. He testified that he doesn't know why it was not put to the witness that those items were his and that they were not in the backseat but in the boot. He further denied that at the time of their arrest there were police sirens as well as blue lights. He did not tell the police where they were going because he was not asked, besides at that time he was confused after one of the policemen kicked him with booted feet or trampled on him to the point where he lost consciousness.

[127] State counsel put it to him that there never was a trip to Parys; that he was part of a convoy that left the mall which had been placed under surveillance, and taken down on Moshoeshoe street, he denied that version. When referred to the version of Lindiwe Nkunkuma about the manner in which the BMW X1 was abandoned, he testified that he will not comment on it as he did not see it.

[128] Alby Johannes Mthimunye testified that on 7 June 2019 he went to the mall to meet up with accused 5 as they intended to travel to Parys using accused 6's vehicle. At the mall he did not meet anyone else other than accused 5, nor was he part of a group that conspired to commit robbery. On leaving the mall they encountered a road where there were lots of people and there was red tape. A policeman who was directing traffic diverted them to another road. Once on that road another vehicle drove past them and thereafter blocked their path. There were two black officers who alighted from it and pointed firearms at them. The two officers who stopped them and searched the vehicle were not part of the witnesses called by the state. They were ordered out of the vehicle and instructed to lie on the ground and they complied. They were later placed in a vehicle and taken to the area of the red tape where he saw accused 3 and 4. He did not see any flashing blue lights or hear blurring sirens, nor did he hear gun shots going off. He denied being arrested by Constable Vencencle. He denied being part of a conspiracy and also denied having an intention to kill anyone.

[129] During cross examination he stated that he had a vivid recollection of where the red tape was as well as the turns he made after being diverted by the uniformed policeman. There were other motor vehicles on the road ahead of them which were never stopped, only theirs was. He did not pay attention if any vehicles behind them were stopped as he was looking at the road ahead of him. He testified that in fact two cars blocked them off, one in front and one at the back. They were then pointed with firearms and made to lie on the ground. Their vehicle was searched but nothing was found, as for him he doesn't know anything about the testimony of a police officer who said overalls, balaclava and gloves were found in the vehicle, which version was confirmed by accused 6. When they were accused of committing robbery they were all surprised and

did not say anything. He stated that when the trip to Parys was arranged no details were given about what they were going to do there. He opted to pay R1000-00 to go to Parys and not using his bakkie because he wanted to get there first and get the details of the tender. Even though it did not make sense and appeared wasteful, in his view it was his money. He disavowed Constable Vencence and testified that he only saw him for the first time in court. He denied that there were blue lights and sirens when they were stopped by the police and that anything was found after the vehicle was searched. He challenged the testimony of accused 6 to the effect that the police were informed that they were on their way to Parys, saying he never spoke. Although he was surprised when they were arrested on allegations of robbery, he never told the police where they were going because the police were aggressive. The R1000-00 payment for the travelling arrangement from the Vaal to Parys was known to accused 6 and that he was aware that a further payment for travelling from Parys to the Vaal would be made.

[130] Excerpts of the state's case were put to him, namely; that a group of people were surveilled and were seen meeting at the mall, after which meeting they were seen getting into vehicles which formed a convoy and exited the mall, after the police obtained intelligence that a crime was about to be committed they were stopped on. He disputed such evidence and disputed that they were stopped on Moshoeshoe street. He had no comment to offer when challenged by the state that he can't dispute they were not stopped on Moshoeshoe street when he doesn't know it.

[131] When referred to the testimony of Lindiwe Nkunkuma, on the circumstances and manner in which the BMW X1 was abandoned, he testified

that he had no comment, however he did not agree with the notion that the manner was interesting and/or surprising.

### **State Argument**

[132] State Counsel argued that as per the indictment the state led approximately 9 witnesses to prove their case. His summary of his evidence was to the effect that;

132.1. Police intelligence obtained information about a planned cash in transit heist. Armed with that information, they then followed up certain leads;

132.2. The leads they followed led them to Evaton Mall where surveillance occurred over a period of 30 minute;

132.3. Captain Maloka on his way to the mall saw three stationery motor vehicles and positively identified accused 3;

132.4. Specified vehicles were spotted at the mall and two bags were seen being loaded from a BMW X1 onto an Audi;

132.5. The specified vehicles were seen leaving the mall in a convoy and once they reached Moshoeshoe street a decision was taken to take them down, at that time the Tata was at the back of the convoy. The Tata and the VW Transporter were taken down first while Officers Tloti and Malebane went after the Audi S5 while their sirens and blue lights were activated;

132.6. The occupants of the Audi opened fire on the pair and they were forced to return same, a few moments later the Audi collided with a house;

132.7. In the Audi two R5 rifles were recovered, where accused 1 was seated one magazine was found and where the deceased was seated two magazines which had been taped together were recovered;

132.8. With regards to the Tata which was stopped by Constable Vencence, where accused 5, 6 and 7 were apprehended, what was found were overalls; gloves and balaclavas. The accused were asked where they were headed to and they did not give any response. In particular, they did not say they were on their way to Parys;

132.9. With regards to the VW Transporter, in which nothing was found after it was searched, accused 3 and 4 did not mention that they were on their way to Kwamasiza stadium. Besides, state witnesses testified that the vehicle attempted to flee. Earlier, the VW transporter was spotted stationary on the road, next it was seen at the mall until it was taken down on Moshoeshoe street;

132.10. The version to the effect that there was a pick up point in Soweto and that the deceased was carrying a light blue bag with tiling tools, which bag was never recovered, and which according to Exhibit C, no such bag is depicted, points to the fact that there was never such a bag and that the version is fabricated;

132.11. Two rifles were found in the Audi. If the testimony of the accused is anything to go by, those firearms were planted by the police. When you contrast that with evidence that two bags were seen being transferred to the Audi, and two bags were found and the fact that the version of the accused is to the effect that there was a light blue bag, which light blue bag was never recovered, points to the fact that it is improbable that evidence was planted at the scene. Otherwise, the state argued, the police



could have very easily planted firearms in the VW Transporter as well as the Tata;

132.12. Which means, so the argument went, that given that the firearms were subject of a robbery which took place in Alberton, it did not make sense to seek to infer that the police would have probably been involved in such robbery, and later plant the stolen firearms at a crime scene;

132.13. Further, the testimony of Officer Tloti, who was in the VW Golf, was to the effect that a passenger in the Audi shot at them. That the police were shot at is evidenced by a bullet hole on the left door as well as the damaged left rear view mirror, he argued;

132.14. Counsel also made reference to discrepancies and/or contradictions in the testimony of accused 1 and 2. Although accused 1 said there were 2 occupants in the VW Golf, accused 2 testified that there were 4 and that they were wearing balaclavas;

132.15. Counsel readily conceded that, *in casu*, there was no direct evidence of a conspiracy and that with the exception of accused 3, none of the accused were positively identified. That aside, he argued, case law was on the side of the state. Since prior agreement to carry out an offence is a requirement for purposes of conspiracy, it can nevertheless be inferred, as it should in this case, from the conduct of the parties as per *S v Agliotti*<sup>4</sup> 2011 (2) SACR 437 (GJ) para 9.4.; he argued.

132.16. He further submitted that the entire conduct of each of the participants in the conspiracy was not free from inferential reasoning and ought to be taken into account. Absence of direct evidence, he submitted, would not avail the accused in that it can be inferred from the conduct of

---

<sup>4</sup> *S v Agliotti* 2011 (2) SACR 437 (GJ) para 9.4;

the accused, he referred the court to *S v Heyn*<sup>5</sup> 1959 (1) SA 607 (W), at page 209.

132.17. With reference to *R v Blom* 1939 (AD) 188, counsel argued that there are certain proven facts from which inferences can be drawn and those were in summary form;

132.17.1. That the Audi S5 and the VW minibus were spotted on the road;

132.17.2. That accused 3 was specifically identified on three different occasions;

132.17.3. That said vehicles were again spotted at the mall;

132.17.4. That the suspects were seen partaking in a meeting at the mall;

132.17.5. That two black bags were seen loaded onto an Audi A5 from a BMW X1;

132.17.6. That the suspects were observed leaving the meeting place then board various motor vehicles;

132.17.7. The vehicles formed a convoy and left the mall and that they were followed until they reached Moshoeshoe street;

132.17.8. That when the takedown was activated on that street, the vehicles attempted to flee, and that the VW Polo and BMW X1 successfully did so;

132.17.9. That the occupants of the BMW abandoned it under very questionable circumstances and that the occupants thereof fled on foot;

132.17.10. That there was a shootout between the police and occupants of the Audi S5;

---

<sup>5</sup> *S v Heyn* 1959 (1) SA 607 (W), at page 209

132.17.11. That after the shooting two rifles were recovered from the Audi S5, there were also two bags whose contents were testified about;

132.17.12. That in the Tata Indica hand gloves were found;

132.17.13. That the VW minibus was also spotted three times, on the road, at the mall and at the scene;

132.17.14. That accused 1 and 2 did not, mention Siphon (the tiler) at any time;

132.17.15. On the other hand accused 3 and 4 did not mention KwaMasiza stadium;

132.17.16. That accused 3 and 4 did not mention that they were going to Parys and further that there were contradictions between them;

132.17.17. That accused 1 and 2 failed to call any witnesses, such Siphon to whom allegedly they were going, to corroborate their version;

132.17.18. That although a blue bag was mentioned in relation to the Audi, none was found;

132.17.19. That accused 3 failed to call any witness in relation the collection of workers who were supposed to prepare the pitch at the stadium;

132.17.20. That accused 5 failed to call a witness in relation to who they were to meet at Parys.

[133] Counsel argued that the court can draw no other inference other than that there was an agreement to commit an offence. The information that the police obtained was positive in that high calibre firearms and ammunition were

recovered. Coupled with the suspects' attempt to escape and the shoot out that ensued. The fact that the police did not lose sight of the suspects they placed under surveillance should count in the state's favour, he added.

[134] Counsel further argued that to the extent that it could be submitted or argued that there were contradictions in the state's case, which he readily conceded were there, they were not material to the extent that the state's case ought to be rejected. The discrepancies, he submitted, are as a result of the witnesses conducting surveillance from different vantage points and that they do not go to the nub of the matter, and he cited cases<sup>6</sup>.

[135] In response to the defence, in general terms, put up by the accused through their respective counsel; he submitted that when one has regard to the total matrix of what has been put up, the versions of the accused ought to be rejected as not reasonably possibly true, in light of the evidence. He further submitted and made reference to case law<sup>7</sup> that the state has discharged the onus resting on it and that in his view the guilt of the accused has been established beyond reasonable doubt.

[136] In relation to count 6 that of reckless driving applicable only to accused 1, he argued that the manner in which accused 1 drove the Audi on Moshoeshoe street, which is a dual carriage public road, with an island in the middle, sped off from the police, changed lanes, executed a u-turn and eventually crashed into a house, was clearly reckless and that the court should find accordingly.

---

<sup>6</sup> *S v Nkhohle* 1990 (1) SACR 95 (A); *S v Mafaladiso* 2003 (1) SACR 586 (SCA), *S v Pistorius* 2014 (2) SACR (SCA)

<sup>7</sup> *S v Ntsele* 1998 (2) SCA 180; *R v Mlambo* 1957 (4); *S v Sauls* 1981 (3) SA 172 (A); *S v Phalo* 1999 (2) SACR 558 (A))

## **Defence Arguments**

### **Accused 1**

[137] Counsel for accused 1 submitted that two witnesses were called to support his case. The wife of accused 2, he submitted, confirmed that accused 1 and 2 were on their way to collect a tiler then drive to the Vaal. The second witness stated that she did not hear sirens but heard gunshots. Further, that the people who extinguished the fire were members of the public.

[138] In so far as the conspiracy charge is concerned, he argued that evidence before this court is simply that people were seen gathered at the mall and that there is no direct evidence in the form of photos, footage from the mall or KFC or even a till slip therefrom.

[139] In relation to the reckless or negligent driving charge, counsel argued that the reason why accused 1 drove in the manner that he did, was because he thought he was being hi-jacked. Which is why he accelerated and when he realised that there were no sirens he simply continued driving in the manner he did, which he admitted was reckless or negligent but argued that it was necessary for him to drive in that manner owing to the purported hi-jacking.

[140] On the murder and attempted murder as well as the possession of unlicensed firearms, counsel made reference to the SAP13. He argued that there was a discrepancy in the evidence of the state in that although the crimes are alleged to have been committed on the 7th June 2019, exhibits were booked into the SAP13 on the 8th June 2019. Uncontested evidence of course is to the effect that although the crimes are said to have been committed on the 7th, exhibits were booked into SAP13 just after midnight, hence the variance in the

dates. Secondly, counsel argued that whereas the firearms were described as R5 rifles in the SAP13, i.e. exhibit M, in exhibit F, in the 212 statement of Warrant Officer Shadung, a Forensic Analyst, they are described, and counsel quoted therefrom, as “.....5.56x45mm Calibre Vector Model LM5 Semi Automatic Rifle”. Firstly, the court reassured counsel that what is described in the 212 statement of Shadung, are what are colloquially referred to as R5 rifles but are given their technical/mechanical description in the 212 statement. He accepted that he was not that knowledgeable on firearms.

[141] His next attack was directed at the fact that no gunpowder residue was found on the deceased which meant, in his view, that no firearm was discharged from the Audi. State counsel had something to say about this which I will deal with in his reply. The last attack was that photo 120, which depicts an evidence bag bearing number PA5002214379, and placed on what appears to be paving, when contrasted with photos 195,7&8 shows that the photos in question were taken at the police station. Counsel offered no evidence for such a proposition which was being raised for the first time in argument. Counsel was reminded that the SAP13, the 212 statement of Shadung, the photo albums all were admitted into evidence with the concurrence of the defence. It was therefore inappropriate to raise objections thereto belatedly, particularly in argument, when such matters were not canvassed with witnesses.

## **Accused 2**

[142] Counsel for accused 2 started off by aligning himself with the submissions of counsel for accused 1 in so far as the conspiracy charge is concerned. He submitted that the only evidence presented by the state was to the effect that people will gather and later rob. Such evidence, he went further,

was not even from the source, meaning that it was hearsay. As a result such a gathering could very well have been for any reason. While accepting that evidence of a conspiracy can be inferred, in this case he argued, there is no evidence that there was the meeting of the minds by all those who gathered there. The version of the accused, he argued, to the effect that he bought KFC, can not be gainsaid by the evidence tendered by the state.

[143] On the the testimony to the effect that two bags were placed in the boot of the Audi, he argued that the state offered no evidence of the registration of such a vehicle. In addition, he argued that if the bags, presumably with firearms, were placed in the boot, how would they have been accessed by the occupants of the Audi. Such analysis of the evidence of course is blind to the uncontested evidence before this court to the effect that the back seat of the Audi was found to have been dropped and that half the bag was in the boot and half in the Audi.

### **Accused 3**

[144] Accused 3's counsel submitted that evidence before this court called for the acquittal of accused 3 in that the evidence was of very poor quality. He made reference to the testimony of Col. Le Roux to the effect that initially the VW minibus was not on the list of vehicles they were provided with, and argued that that vindicates accused 3. He further argued that witnesses deliberately contradicted each other. This submission was not pursued further when probed by the court, because it did not make sense how witnesses would testify so as to deliberately contradict each other and thus harm their very own case. The route that accused 3 took in travelling to the mall and the fact that some persons assisted in fixing his rearview mirror could not be disputed, he submitted. The version of accused 3 was that he was on his way to fetching his

customers. Such a version, counsel argued vociferously, was reasonably possibly true.

[145] He submitted that even if there was evidence of a meeting, for accusations of a conspiracy to stick, there ought to be evidence, in addition, that a “specified” crime was to be committed, in the absence of such evidence the state’s case was doomed. Such evidence, counsel argued, was to be found in the specificity of the crime that was due to be committed.

#### **Accused 4**

[146] Counsel flagged, the conspiracy; attempted murder and murder charges. In so far as the conspiracy count is concerned he argued that none of the accused was specifically identified; there was audio or photographic footage and further that the version of accused 4 to the effect that he was at the mall to buy airtime and accidentally bumped into accused 3, with whom he then travelled to Sebokeng, as a passenger, was reasonably possibly true.

[147] He submitted that it is common cause that the vehicle was searched and that nothing incriminating in nature was found. Counsel further submitted that the counts relating to murder or attempted murder will only come into play only if the conspiracy charge stands. In his view it does not stand therefore accused 4 ought to be acquitted.

#### **Accused 5**

[148] Counsel began by stating that there was no direct evidence of a conspiracy, that much, he submitted, the state had admitted. The onus was on the state to prove the guilt of the accused, beyond a reasonable doubt. He



questioned quality of the evidence and the fact that in his view, there was no corroboration of the state case.

[149] He argued that even in circumstances where there was the same intent on the part of the accused to commit a cash in transit heist, there ought to be, in addition, a meeting of the minds. Counsel was critical of the testimony of Col. Le Roux stating in the process that it was lacking in detail and that it provided no real evidence. He submitted that further criticism was the fact that there was no identifiable individual who was at the alleged meeting and was later seen getting into the vehicles which formed a convoy and exited the mall.

[150] The state case has contradictions in relation to by whom and how the briefing at Tembisa Police Station occurred, he argued, further, whether the vehicles intermingled on Moshoeshoe street as testified to by officer Vencence as well as their sequence. He made reference to the principle set out in *R v Blom*<sup>8</sup> and argued that on the facts of this case more than one reasonable inference can be drawn. Further, that accused 5 was neither seen specifically at the alleged meeting nor when it is alleged those who gathered entered their vehicles. All that he was when they were stopped and arrested by the police, was a passenger in a vehicle that was headed to Parys. His version, he argued further, was reasonably possibly true<sup>9</sup> and in addition the accused bears no onus to prove that he did not commit a crime. The fact that upon his arrest he did not say he was headed to Parys or that he did not know that there were items at the back seat, can not be held against him.

---

<sup>8</sup> *R v Blom* 1939 AD 288

<sup>9</sup> *R v Biya* 1952 (4) SA 514 (AD)

[151] Counsel further argued and made reference to *R v Difford*<sup>10</sup> that on the principles of that case, the accused ought to be acquitted. Further that if the conspiracy charge falls away, as he argued it should, then accused 5 can not be found guilty on the balance of the charges, namely murder and attempted murder. Besides there is no direct evidence in the form of video footage or photos implicating him in any crime.

### **Accused 6 and 7**

[152] Counsel argued that the state had failed to meet the standard of proof expected of it. Col. Le Roux, who was the state's main witness was a woefully unsatisfactory witness. The murder and attempted murder charges would only come into play if the conspiracy count is affirmed. He referenced to *R v Difford (supra)*, and argued that the court should not only find that the version of the accused is improbable, but that it is false beyond reasonable doubt. The court is entitled to test whether the version of the accused is reasonably possibly true and test it against improbabilities, a principle which was set out in *S v Shackle*<sup>11</sup>. The court ought to take into account all the evidence before it including the version of the accused, counsel referenced *S v Jochems*<sup>12</sup> which in his view postulates such an approach or proposition.

[153] Counsel made the point that Col. Le Roux was the star witness of the state yet on his evidence, when he went to the mall to conduct surveillance, he

---

<sup>10</sup> *R v Difford* 1937 (AD) 370, where the following was said by Watermeyer AJA,

“... no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

<sup>11</sup> *S v Shackle* 2001 (2) SACR 185 (SCA)

<sup>12</sup> *S v Jochems* 1991 (1) SACR 208 (A)

had a limited number of vehicles that were known to him which excluded the Tata. Besides, he argued, there was no direct evidence of what was discussed at the meeting that took place at the mall. Even if the identified vehicles were at the mall, the court can not conclude that they attended the meeting at the mall. More was required from the state, such as the question whether the accused intended to commit the crimes. He emphasised that there ought to be the meeting of the minds among those involved<sup>13</sup>. Relying on *S v Agliotti*, (*supra*), and specifically mentioned paragraphs 9.4. and 9.5, (which I quote in full below), he accentuated, in my view, the following summarised points;

153.1. There ought to be a conspiracy to commit a crime;

153.2. There can also be an inference of a conspiracy provided it is the only inference;

153.3. There ought to be, in addition, clarity on what was discussed at the meeting;

[154] Counsel, finally, argued that if there is no proof of prior agreement, there can not be proof of common purpose. He further submitted that the murder and the attempted murder counts can only stand if the conspiracy charge is sustained. Even if the meeting took place, so the argument went, there was no evidence of the vehicles into which the suspects went into after the alleged meeting. There was no evidence therefore that accused, 6 and 7, were part of a conspiracy, and that has been proven beyond a reasonable doubt, so the argument went. Counsel quoted *S v Sefatsa*<sup>14</sup>, and argued that on the basis of the arguments or requirements listed thereon, there was no proof of prior knowledge of an agreement or of common purpose. Even if it can be found that

---

<sup>13</sup> *S v Agliotti* 2011 (2) SACR 437 (GS);

<sup>14</sup> *S v Sefatsa and Others* (242/1986) [1987] ZASCA 150; [1988] 4 All SA 239 (AD)

accused 6 and 7 were part of some meeting, it can never be argued that they were aware of the presence of firearms at the scene and that those (firearms ) were procured for purposes the main count, that of robbery.

### **State's reply**

[155] Counsel for the state argued and submitted, in reply, that there was and he spotted it, a common denominator in the evidence of the defence, namely, their deafening silence on the issue of the BMW X1 and the circumstances under which it was abandoned.

[156] Counsel argued that an experienced and senior police officer, Captain Maloka, testified that the operation of thwarting a cash in transit heist was successful in that, among others, firearms, in particular rifles, were found in the Audi. The fact that there is no specific and individual identification of the persons who gathered at the mall, what matters is that those persons were seen getting into vehicles, which vehicles then formed a convoy up until the take down. He further argued that Captain Maloka identified accused 3 three times, on the road when the vehicles had stopped next to the Volvo with its bonnet open, at the mall where there was the alleged meeting as well as at the scene of the take down.

[157] On the argument that no gunpowder residue was harvested or found from the occupants of the Audi, particularly the deceased, he argued that as one would have observed from the photo album, the body of the deceased was badly charred or burned, making it difficult or even impossible to get any gunpowder residue from him. Lastly, to the extent that counsel referred and relied on *S v*

*Mgedezi*<sup>15</sup>, the facts of this case are clearly distinguishable and besides, so he argued, the legal principles are different in that in *Mgedezi* the court was dealing with the doctrine of common purpose and not conspiracy to commit an offence as is the case *in casu*.

### **Summary of the issues to be decided as well as the applicable law**

[158] It is trite that in criminal proceedings the burden of proof, to establish the guilt of the accused, rests on the state. Such proof should be beyond reasonable doubt and further, that there is no onus, as in this case, for the accused to prove their innocence<sup>16</sup>. In *S v Van der Meyden (supra)*, the court correctly held that:

*“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some might be found to be only possibly false or unreliable; but none of it may simply be ignored.”*

[159] The approach to be adopted or implemented in the evaluation of evidence was so articulately set out in a matter that served in the Supreme Court of Appeal, namely *S v Chabalala*<sup>17</sup>, thus;

---

<sup>15</sup> *S v Mgedezi* 1989 (1) SA 687 (A)

<sup>16</sup> *S v V* 2000 (1) SACR (SCA) at 455 A-C; *S v Van der Meyden* 1991 (1) SACR 447 (WLD) at 449j-450b.

<sup>17</sup> *S v Chabalala* 2003(1) SACR 134 (SCA) at para 15

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

[160] Section 18(2)(a) of the Riotous Assemblies Act<sup>18</sup> describes conspiracy to commit a crime as follows:

*“18(2)(a) Any person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”*

[161] In this case the state alleges that the accused conspired to commit armed robbery. It is not in dispute that during the police take down of at least the Audi A5, one Katiba was fatally wounded. It is trite that where various persons conspire to commit a crime, it is not necessary, for a conviction to follow that each and every co-conspirator play an individual role in the commission of that

---

<sup>18</sup> Act 17 of 1956

crime or that such co-conspirator be physically present at the scene when such crime is committed. In *S v Cooper and Others*<sup>19</sup> the Appellate Division held:

*“A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely, (1) making or formation, (2) performance or implementation and (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of performance or by abandonment or frustration or whatever it may be; per Lord PEARSON in *Director of Public Prosecutions v. Doot and Others*, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; *R. v. Murphy*, (1837) 8 C. & P. 297 at p. 311(173 E.R. 502 at p. 508). Although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. The detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes of necessity be admitted as steps to establish the conspiracy itself. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them. *R. v. Briscoe and Scott*,*

---

<sup>19</sup> *S v Cooper and Others* 1976 (2) at SA 879A-H

(1803) 4 East 164 at p. 171 (102 E.R. 792 at p. 795). If the conspirators pursued, by their acts, the same object, often by the same means, some performing one part of the act and others another part of the same act, so as to complete it with a view to the attainment of the object which they were pursuing, the conclusion may be justified that they have been engaged in a conspiracy to effect that object. The question to be answered is, had they a common design and did they pursue it by a common means?" (The underlying is my emphasis)

[162] Still on the conspiracy count and its ramifications, some of the counsel referred to *S v Agliotti*<sup>20</sup> (*supra*), and advanced an argument to the affect that;

162.1. Before it can be said that there has been a conspiracy between two or more people to commit a crime, there ought to be, as set out in *S v Agliotti*, "a meeting of the minds". Counsel argued that on the facts of this case there has been none;

162.2. And this in answer to a question posed by the court, namely, whether there ought to be an agreement about how the crime would eventuate. To which question counsel confirmed that there ought to be an agreement of sorts. I must hasten to state that counsel's response did not accord with the findings of Kgomo J in *S v Agliotti* in particular paragraph [9], sub-paragraphs 3 and 4, which assert that a conspiracy need not be express and that it may be tacit. Further, that consent may be inferred from the conduct of the parties, something which the state counsel argued, provided the inference is the only reasonable inference that can be drawn from the facts<sup>21</sup>.

---

<sup>20</sup> *S v Agliotti* (SS 154/2009) [2010] ZAGPJHC 129; 2011 (2) SACR 437 (GSJ) (25 November 2010)

<sup>21</sup> *S v Khoza* 1973 (4) SA 23 (O) at 23. *S v Heyne* 1958 (1) SA 607 (W) at 609. *S v Cooper* (*supra*) and *S v B* 1956 (3) SA 363 E at 365.



[163] Of course counsel were quoting selectively from *S v Agliotti* in that it provides that; there need not be an agreement about the exact manner in which the crime was to be committed<sup>22</sup> and further that a conspiracy can be inferred from the conduct of the parties provided the inference sought to be drawn was the only reasonable inference that could be drawn from the facts, this of course being in line with *R v Blom*<sup>23</sup>.

[164] In *Reddy and Others v S*<sup>24</sup> the legal position was explained as follows:

*“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 oft-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”. The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508-9:*

*“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must*

---

<sup>22</sup> Para 9.4.5.

<sup>23</sup> *R v Blom* 1939 AD at 202

<sup>24</sup> *Reddy and Others v S* [1997] JOL 327 (A) at pages 19-20

*satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”*

[165] On the other hand in the event of a person who was party to a common purpose or prior agreement to committing a particular crime (like robbery), and he/she foresaw the possibility that another crime (for example murder or attempted murder), may be committed in the execution of the plan, but he/she persisted, reckless of such consequences, and it occurred, he/she will also be guilty of the secondary crime<sup>25</sup>. All counsel conceded that this was the correct legal position.

## **Evaluation of evidence and application of the law to the facts**

### ***Accused 1 and 2***

[166] The state’s case is that after the briefing at Tembisa Police Station where seemingly hearsay evidence was conveyed, those who were part of the briefing travelled to Evaton Mall in various vehicles for purposes of conducting surveillance. Captain Maloka’s evidence is that on his way there, he saw a gold Volvo whose bonnet was open together with an Audi A5, fitting the description of accused 1’s vehicle, as well a VW Caravelle (a minibus) fitting the description of accused 3’s vehicle, standing along side it. Captain Maloka, on his evidence, was able to identify accused 3, whom he described as having dreadlocks at the time, standing next to all the mentioned stationary vehicles. The next time he spotted accused 3 was at the mall where he, accused 3, was

---

<sup>25</sup> *S v Majosi and others* 1991 (2) SACR 532 (A) at 536 I – 537 E; *S v Nkabinde and others* 2017 (2) SACR 431 (SCA)

part of a group of persons who appeared to have been holding a meeting and lastly he spotted him at the scene of the arrest.

[167] The accused's version is to the effect that they were on their way to a place where tiles were to be installed. They dropped off accused 2's wife then fetched the deceased who had in his possession a light blue bag. This light blue bag, was however never found inside the Audi A5. Instead, two black bags were found together with lots of ammunition. The version of the state through Col. le Roux, is that at the mall he observed two black bags being removed from a BMW X1 and placed in the boot of the Audi A5. The discovery of the two bags, during the take down, is corroboration, through objective evidence; i.e discovery of the bags, that the testimony of Col. Le Roux was correct. I have to pause at this stage and deal with the insinuation or suggestion that the police may have planted evidence. During argument I confronted counsel for accused 1 and said to him, if the version of accused 1 and 2 was to be accepted, namely; that there were no firearms and ammunition found in the Audi, then in that event, the only explanation about the discovery of the firearms and ammunition, would be that the police brought them to the scene, obviously in an effort to falsely implicate them. In response counsel for accused 1 retorted that "*this is the SAPS, we all know how they are*". State counsel was of the view that the police would not plant firearms, which on the evidence had been stolen elsewhere, at the scene of a robbery. Clearly they would be exposed for manufacturing evidence, tempering with the scene, including contaminating it and so forth.

[168] To stretch, the conspiracy theory even further, police would have had to fire at their own vehicle so as to generate bullet holes from outside their

vehicle, so as to be able to show later on, possibly in this court, that they were shot at by the occupants of the Audi; further, that while people were dousing off the flames, the police placed in the middle of the road two bags with some 112 rounds of ammunition as well as the aforementioned rifles, again so as to falsely implicate the accused. I take the view that such versions, thus far, are so far fetched as not to be reasonably true and further, that they ought to be rejected as false beyond a reasonable doubt. Besides, it was never the case of the accused that they were falsely implicated by the police.

[169] Counsel for accused 1 in particular, argued that accused 2's wife was called to, *inter alia*, confirm that both accused, 1 and 2, accompanied each other and were in fact on their way to collecting someone who was supposed to fix/fit floor tiles; that through her testimony the version of accused 1 and 2, to the extent that the duo sought to prove they were going to the Vaal to fit/fix tiles has been confirmed, she had knowledge of that trip, it was submitted. The timelines are to me very crucial, especially to the extent that they seek to show that accused 1 and 2 were not part of the convoy as alleged by the state or that knowledge of the fact that they were headed to the Vaal, is proof of the fact that their version is the correct one. The first person to be eliminated as a corroborative witness, is accused 2's wife. She was dropped off at Soweto and although she may have known or may not have been told about the tile fitting arrangements, she is not in a position to assist this court as to what happened after she was dropped off. In other words, the movement of accused 1 and 2 after she was dropped off. Accused 1 and 2's evidence is somewhat synchronised. They travelled to Diepkloof where they dropped accused 2's wife, picked up the deceased, then headed to the Vaal. It was not disputed that the vehicle, the Audi, was at some point at the mall. It must be born in mind

that

several state witnesses spotted the Audi at the mall. Counsel for accused 2 asked if there ought to be designated parking at a mall, thus stating the glaringly obvious or whether anyone can park anywhere, implying in essence that it did not matter that the vehicle was at the mall, it may have been part of the vehicles that patronised the mall.

[170] The testimony of accused 2's wife was meant to show, among others, according to counsel, that the story about the installation of tiles was legitimate. However, she could not confirm an innocuous yet significant piece of detail. The witness was asked what the colour of the Audi was and she stated without hesitation that it was white, of this she was sure, she testified when pressed by counsel. When shown the photo which depicted a dark blue Audi, she testified that she was not so good with colours. The difficulty with accepting such an explanation, is that the colours are such distinct colours. Dark blue is a dark colour while white is bright. It is therefore difficult to accept that one can be so bad with colours to the extent of mistaking white for dark blue. Unless if the testimony was specifically crafted and that piece of detail was left out in the crafting process.

[171] Accused 1's second witness was not of much help either on the main issues, for corroboration, under contention or in dispute. She was seated in her living room when she saw a vehicle coming towards the sliding door. She testified that she saw police on foot already in her yard shooting at the Audi as it approached the sliding door. This version, when broken down to its various components, presents many problems to the defence. By '*the defence*' is meant accused 1 on whose behalf the witness was called. For one, accused's 1's own version is that, he, together with the occupants of the Audi, were being pursued

by the VW Golf, which they thought was effecting a hi-jacking, and that accused 1, in the process and in response, in an attempt to avoid the hi-jacking, accelerated, lost control over the vehicle, which crossed over the middle island and crashed into a random house. Why would police, some in uniform, lie in wait, in a random house, just in case, rhetorically I ask, the vehicle which was being chased by the police made its way there, and thereafter shoot at it?

[172] She did not see when the fire on the Audi started and she did not see the occupants of the Audi being assisted out. Although she did not hear sirens, she can not dispute that the police were pursuing suspects and that their sirens were switched on. What she also saw were members of the public trying to put out the flames while at the same time they were being restrained by the police who warned that the vehicle could explode. She was in hiding in the toilet for some 20 to 30 minutes, and thereafter there was an additional 5 to 10 minutes after the shooting subsided, before they were taken into the neighbours house. Before noticing that the fire had started, they were at the neighbour's house for a further 30 to 40 minutes. The timelines suggest that the witness took approximately an hour from the time the vehicle entered her yard to the time she went out and observed that the vehicle was on fire. Given the timelines and the witness's testimony that she did not see much, to insist that the police did not assist in the dousing of the fire, gives the impression that the witness came prepared not to make that kind of concession even though she was out of sight of the vehicle for about an hour.

[173] The state led evidence to the effect that after the police took a decision to effect a takedown, they switched on their sirens and blue lights. This is heavily contested of course. In his section 220 statement accused 1 did not admit to

driving the Audi. He admitted its ownership and the fact that he sustained injuries. That he was the driver came out during cross examination of state witnesses. The VW Golf then accelerated to cut off the Audi however it also accelerated, in an attempt to get away. In addition it swerved from left to right. This was taking place on Moshoshoe street, a busy public road. The Audi then crossed over the middle island across and in the face of oncoming traffic, collided with or very narrowly missed children before ploughing into a nearby house, where it caught fire. On these facts, which were not disputed and in the face of the defence of accused 1, namely, that he thought a hi-jacking was in progress, the court must determine whether the version of the accused is reasonably possibly true. If not, then the court must determine whether the driving of accused 1 was reckless or simply negligent.

[174] There is of course a clear distinction between recklessness and negligence. Simply put, reckless driving is a heightened form of carelessness. In *S v Smith*<sup>26</sup> it was put thus; “*The distinction between reckless and negligent driving is a matter of degree. Recklessness, in essence, is the more significant form of carelessness and negligence, the lesser form.*”

The National Road Traffic Act<sup>27</sup> (NRTA) provides as follows;

***“Reckless or negligent driving***

63. (1) *No person shall drive a vehicle on a public road recklessly or negligently.*

(2) *Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.*

---

<sup>26</sup> *S v Smith* 1973 (3) SA 217 (T) 219 A

<sup>27</sup> National Road Traffic Act 93 of 1996



(3) *In considering whether subsection (1) has been contravened, the court shall have regard to all the circumstances of the case, including, but without derogating from the generality of subsection (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have been expected to be upon that road, and the speed at and manner in which the vehicle was driven.”* (Underlining my emphasis).

[175] When the driving of accused 1 is juxtaposed against the provisions of section 63 of the NRTA, a picture that emerges is that of a driver who drove recklessly, for the following reasons;

175.1. Although the exact speed at which he drove is unknown, on both versions, his own and that of the state, he accelerated and drove at high speed, estimated by accused 1 during cross examination by state counsel, to have been approximately 100km/h, upon spotting the VW Golf 7;

175.2. He swerved his vehicle from left to right. It is unsafe to drive in that manner at high speed;

175.3. He drove in the above manner on a busy public road;

175.4. He attempted to execute a u-turn and drove over the central island. It is reckless to drive in that manner, for at least six reasons; firstly, this was a busy public road, secondly, there were pedestrians, thirdly, there were other vehicles using the road, the presence of which he simply disregarded, fourthly, he recklessly crossed over to the lane of oncoming traffic. It is purely by luck that he did not crash into oncoming traffic. Fifthly, he collided with a pedestrian, thus failed to have regard to other road users. Lastly, he collided with a house, thus causing harm to property.

When all the above factors are taken into account, I find that accused 1 did not drive negligently on the day. My finding is that he drove recklessly.

### ***Accused 3, 4, 5, 6 and 7***

[175] The consolidated version of accused 3 and 4 is to the effect that they are not so well acquainted with one another. They met purely by chance at a fruit market just outside Evaton Mall, on the date of their arrest. It was at such a chance meeting that accused 3 asked and was offered a lift. The meeting occurred when accused 3 was, on his version, exiting the mall for the second time having done so earlier to “test the mirror”. The version of state witnesses who were surveilling a group of people at the mall, all testified that the VW Transporter exited the mall as part of a convoy and that it did not stop after exiting the mall. If it had stopped as alleged by accused 3, for the duration which he gave, then it surely would not have been part of the convoy vehicles that exited the mall, which was kept under observation until the take down.

[175] The other possibility of course is that for the VW Transporter to end up in the presence of other random vehicles, all of which bar two that escaped, namely the VW Polo and the BMW X1, is because it was coincidental. The changing of positions in the convoy upon exiting the mall as well, would have been a coincidence. So would have been the case with the take down, the VW Transporter would then have been at the wrong place at the wrong time, in that the drivers and occupants of the vehicles which the state alleges were part of a conspiracy, did not know one another. This would further mean that, without exception, in every vehicle that was stopped, there was a person who was not well known to an occupant of that vehicle. This proves nothing when individually viewed. I digress and observe, without making any finding, that a

common theme or feature of the drivers and passengers of the vehicles surveilled by the police, is as follows;

- (a) Accused 1, to whom the Audi belonged and who was is in the company of accused 2, was transporting the deceased to fix tiles in the Vaal;
- (b) Accused 3, was on his way to transport staff from KwaMasiza stadium to Lenasia;
- (c) Accused 4, was on his way to Arcelor Mittal to find some work for his bakkie to provide transportation services;
- (d) Accused 5, was being transported to the Parys, for purposes of a tender to provide bakkies, seemingly, to *transport* goods, that being the logical inference;
- (e) Accused 6, was transporting accused 5 and 7 to Parys and didn't know the reason;
- (f) Accused 7, was being transported to Parys. All he knew was that they needed bakkies, again I can only surmise to transport goods. The details of what was to be transported, he testified, were to be obtained once they were in Parys after meeting Oupa.

[176] In an endeavour to show that accused 3 is truthful in his testimony that he was transporting staff around the time of his arrest, his counsel sought to enter into evidence a ticket for a traffic violation on Moshoeshoe street, from a different date than that of the arrest, in circumstances where a contract would have been much more persuasive. I was of the view then am still now, that all that the traffic ticket shows is that on the day indicated therein, accused 3 drove on Moshoshoe street and committed a road traffic offence. For current purposes it is of no evidentiary value.

[177] The movements of the VW Transporter on the day of the incident have been brought into sharp focus by accused 3, essentially to show that he was not part of any conspiracy therefore, was not part of any meeting at the mall. His version is that he entered the mall with two passengers so that his rearview mirror could be fixed. That he exited the mall to test the mirror but returned there again. That he then exited the mall, stopped momentarily at the fruit market outside the mall, offered an acquaintance a lift then headed to Moshoeshoe street where the arrests took place. Officers Tloti and Malebane did not observe the VW Caravelle at the mall because they were parked a kilometre away on the highway. Once told that the vehicles had exited the mall, they spotted the VW as part of a convoy. Officer Vencence spotted the VW Transporter on Moshoeshoe street. Captain Maloka spotted it three three before the take down. Firstly, along the highway together with the Audi and a gold Volvo. Secondly, at the mall after he drove there in a marked police vehicle, but kept a distance. After this excursion to the mall he returned to hide in between houses, for fear of being made. The third time, was when the vehicles exited the mall and on his version, the Audi was leading the way.

[178] The person with a much clearer observation of the movement of the VW Transporter was Lincoln Muloyi. He observed the vehicles as well as the people that were at a meeting and that were under surveillance for 30 minutes. He further observed the persons who were in the meeting enter various vehicles, form a convoy and head for the exit of the mall. This happened about 100m from where he was. The VW Transporter was part of the vehicles that gathered at the mall, into which persons from the meeting climbed, formed a convoy and exited the mall. At no point, according to him, did the VW Transporter stop to give a lift to any person, after it exited the mall. He together with his crewman

MPO Magubane had been allocated the VW Caravelle to take down, so he had an extra incentive to observe it. If the testimony of Lincoln Muloyi is anything to go by, if the fixing of the mirror took place, it surely would have been before the vehicles were observed by him. Similarly, even when the VW Transporter made a pit stop after exiting the mall. I have above dealt with the probable scenarios and resultant pitfalls were the version of accused 3, to be accepted as reasonably possibly true.

[179] I also picked up contradictions in the consolidated cases of accused 3 and 4. When the first state witness, Col. le Roux, was cross examined by counsel for accused 3, it was put to him that the reason why the VW Caravelle was at the mall was firstly to fix the mirror but secondly, that it was there because accused 3 was to meet customers in connection with his transportation business. That was the last time the meeting of customers at the mall was mooted or mentioned. On the movements of the VW Transporter, MS. Dlhakama, the initial counsel for accused 4, put it to Col. le Roux that once at the mall, accused 4 met accused 3, whom he “knew only by name” and also knew that he hails from Soweto. Accused 3 offered accused 4 a lift to Sebokeng and they then “exited” the mall and drove onto Moshoeshoe street. The version of accused 3 is the exact opposite of that. His version is that he didn’t recognise accused 4 at all and that he recognised him after he explained himself. Another differentiation factor is that accused 3 testified that he offered accused 4 a lift whereas accused 4 testified that he asked for a lift. Trivial some might say but a contradiction nonetheless.

[180] Which brings me to the version of accused 4. On the day of his arrest he says he left his house at Mofolo North, to look for work for his bakkie at

Arcelor Mittal, specifically, he was to meet a certain Mr. Khunong who was supposed to meet him there. He did not have a registered company nor any staff members. He did not have an appointment but hoped he could utilise the lunch hour for such a meeting. There were no formal procurement processes, however, he hoped to get work for his bakkie, hence the meeting with Mr. Khunong. He also conceded that despite him mentioning it in chief that when questioned as to where they were headed upon being stopped by the police, he never challenged the version of state witnesses to the effect that he never gave an answer, upon being arrested, that he was headed to Arcelor Mittal. At first he described Mr. Khunong as his friends but when questioned further changed and called him an acquaintance. He, accused 4, testified that he did not ask accused 3 where he was going. When the prosecutor pressed him as to how he could get into a vehicle whose destination he did not know, he then changed his version and indicated that he could have asked him. This coupled with the small contradictions that I mentioned above, leaves one with the impression that the version of accused 4 is being adjusted as he goes along, to plug holes that have been poked.

[181] The consolidated versions of accused 5, 6 and 7 is that accused 5 knew accused 7 and not accused 6. Accused 6 is the owner and on the day was the driver of the Tata Indica. He, accused 6, in turn had been asked by accused 7 for transport to Parys. Accused 6 and 7 first had to collect accused 5 at the mall and they would then travel to Zone 13 Sebokeng to meet Mr. Mokhele then head to Parys to meet one Oupa. They left the mall and drove on the highway until they joined a busy main road. They were diverted from the busy road and were made to drive on an adjoining road and together with other cars were made to drive

deeper into the township, turning a few times, where they were eventually arrested.

[182] According to accused 5, the reason for going to Parys and meet up with Oupa was to talk business. Seemingly there was a tender that needed bakkies and they needed people from outside Parys who had bakkies. All of them, accused 5, 6 did not have bakkies as well as accused 7 who said he was going to organise one. I pause to observe that preferential procurement is the opposite of this proposition. Usually, local tenderers or residence are given preference.

[183] All three accused are in agreement on the following minimum issues;

183.1. That the three of them were at the mall albeit for purposes of fetching accused 5;

183.2. That they were not arrested by Officer Vencence and that none of the officers who testified were there during their arrest;

183.3. That there were neither sirens nor blue lights;

183.4. That they were diverted from a main road where there was police tape, and they drove deeper into the township where they were arrested;

183.5. That after their arrest they were moved closer to where accused 3 and 4 were.

184.6. That they did not hear any gunshots and did not see the Audi;

[186] The following are some of the discrepancies of the three accused;

186.1. Accused 5 testified that there was nothing found in the vehicle, no balaclava, gloves or overalls;

186.2. That they were not asked where they were going to upon being stopped by the police and they did not say they were on their way to Parys;

186.3. That they were not told about the reason for their arrest;

186.4. That Mokhele was going to be responsible for payment of the traveling costs to Parys;

187.5. That they have no tentative views therefore are noncommittal, about the manner in which the BMW X1 was abandoned;

[188] Accused 6 for his part testified that;

188.1. When stopped by the police he did not know if a hi-jacking was in progress;

188.2. When the police searched the vehicle, nothing was found. When referred to the version of Officer Vencence about what was found in the backseat of the vehicle, he changed tack and stated that the balaclava, hand gloves and overalls were his property that was always in the vehicle;

188.3. He had charged accused 7 R1000-00 for the trip to Parys which was going to be paid on their return;

188.4. He did not know why they were going to Parys and did not ask because he was confused after he was assaulted to the point of losing consciousness;

188.5. Accused 7 however, explained to the police that they were going to Parys;

188.6. The police told them they were arresting them for robbery;



188.7. After being made to lie on the ground he was loaded into a vehicle and made to sit at the rear seat. He was driven to where the police tape was, which is where he met accused 5 and 7.

[189] On the part of accused 7;

189.1. When they were stopped by the police, they were told that they were coming from a robbery;

189.2. He was surprised by the statement by the police so he did not respond to it;

189.3. That he knows nothing about balaclava, gloves and overalls as testified to by Officer Vencencle;

189.4. He did not know Mokhele who they were going to collect in Zone 13 nor Oupa whom they were to meet in Parys;

189.5. That contrary to the testimony of accused 5, he in fact had a Hyundai bakkie, which he did not use and chose to spend money because it was his money;

189.6. He had agreed to pay accused 6 R1000-00 on their return from Parys for the trip from Tembisa to the Vaal. In addition, Mr Mokhele was to pay an undisclosed sum for the trip from Vaal to Parys. Accused 6 was aware of the extra payment from Mr. Mokhele;

189.7. He never told the police that they were on their way to Parys;

189.8 After being made to lie on the ground, he was thereafter transported in a vehicle to the place where the police tape was and that is where he met accused 5 and 6.

[190] It came out during the cross examination of accused 5, 6 and 7 that a few imputations which were both relevant and important, were not put to witnesses

called by the state. One can not over emphasise the value of putting a version to a witness so that the witness can have an opportunity to comment on particularly when the contention is that the witness is lying, manufacturing evidence or even when it is implied that the witness is falsely implicating the accused. This is so that the witness can then meet the imputation and if necessary destroy it. No less than the Constitutional Court had occasion to say the following in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>28</sup> about the importance of cross examination;

*“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.*

[62] *The rule in *Browne v Dunn* is not merely one of professional practice but is essential to fair play and fair dealing with witnesses It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

---

<sup>28</sup> *Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)

[63] *The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”*

[191] The same goes for accused 1 to 4. What the judgment mentioned immediately above implies, particularly paragraph 63, is firstly, that whenever imputations are made to a witness, they should be clear. Secondly, it should be set out clearly that the evidence covered by the imputations is to be challenged, by the cross examiner. Thirdly, and in addition to setting out clearly that the evidence is to be challenged, how it is to be challenged. To do so is not in anyway to unburden the state of the onus resting on it, to prove the guilt of the accused beyond a reasonable doubt. Nor is it to shift the onus to the accused and require of them to prove their innocence.

### **Conspiracy to commit robbery**

[192] Everyone is in agreement that the conspiracy to commit robbery count, count 1, is premised not on direct evidence but on circumstantial evidence. It is settled (see *R v Blom* ) that, inferential reasoning ought to be applied, to arrive at a finding. The nub of it is that when you seek to arrive at a finding through the drawing of an inference, there are two, as is often said, cardinal rules of logic which must be part of the exercise;

- (a) the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

**(b)** the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[193] I must hasten to add that even when direct evidence is absent, such as in the present case, a plethora of cases tell us that a conviction, after careful evaluation of evidence of course, may still be competent in that a conspiracy may be inferred, provided it meets the two cardinal rules of logic set out in *R v Blom. Kgomo J in S v Agliotti*, among others, sets out the following about a conspiracy;

193.1. that it need not be express, that it may be tacit;

193.2. that it may be inferred from conduct of the persons involved;

193.3. that the conspirators need not agree about the manner in which the crimes will be committed.

[194] Having considered the versions of both the state and the defence and having evaluated the evidence from both sides, I find as follows;

194.1. that the police received information about a crime that was about to be committed. Armed with that information, various units of the law enforcement agencies, JMPD, TRT, Crime Intelligence and JMPD K9 converged outside Tembisa Police Station for a briefing;

194.2. Some of those who were at the briefing included Col le Roux, Capt. Mbalati, Solly Tloti, Vincent Malebane, Lincoln Muloyi, MPO Magubane and Capt. Maloka. Peter Vencence when he testified, did not indicate that he and his crewman Van Wyk were at the briefing;

194.3. from the briefing, the members of the various law enforcement agencies, who had by then been allocated tasks, moved accordingly with some conducting surveillance in and around Evaton Mall;

194.4. the following vehicles were at Evaton Mall on 7 June 2019, BMW X1, VW Caravelle T5, a silver Polo Vivo, a blue Audi RS5, a Tata and a Hyundai IX35. Lincoln Muloyi was 100m away from where the vehicles were. At a distance Col. le Roux spotted the Audi S5, BMW X1, VW Combi, Tata, VW Polo and a BMW sedan. Fearing to be spotted and observing at a distance was Capt. Maloka who saw the same vehicles bar a gold Volvo, Red Fiat and a Hyundai. The Audi, the VW Transporter and the Tata Indica are all placed at the mall by all accused at varying times and obviously for different reasons;

194.5. Col. le Roux testified that he observed the BMW X1 interacting with the Audi S5, saw two black bags moved from the BMW X1 to the boot of the Audi. That two black bags were placed at the boot of the Audi S5 from the BMW X1, was not challenged by counsel for accused 1. The challenge by counsel centred around the fact that Col le Roux and his team failed to capture what was taking place through the taking of photos and that there was absence of video footage. Further, he was cross-examined at length about the statements he made under oath and what appeared to be discrepancies. I must accept therefore that the occupants of the BMW X1 at the mall did place two black bags in the boot of the Audi.

### *The meeting*

[195] Col. le Roux testified that at the mall having observed the interaction between the BMW X1 and Audi S5, he observed a group of persons

approximately 10 or 12 emerge from various vehicles then interact with the occupants of the BMW and Audi in a meeting. Lincoln Muloyi testified that he saw a group of about 10 or 12 people holding a meeting. Captain Maloka testified that when he went in a marked police vehicle to conduct surveillance at the mall he too saw a group of people gathered, whereafter he returned to where they were lying in wait. Both Col. Le Roux and Lincoln Muloyi observed those who were gathered, get into vehicles and those vehicles forming a convoy. That a meeting took place at the mall is confirmed by the above mentioned three witnesses, none of whom were able to make identification of any of the meeting attendees. There is no evidence of what was discussed at the meeting. On the evidence thus far, it can not be said that the conspiracy was express.

### *Conduct of the parties*

[196] A conspiracy can be tacit and can be inferred from the conduct of the parties<sup>29</sup>, provided the inference is the only reasonable one that can be drawn from the proven facts. Conduct that is relevant in this case is the removal of two black bags from the BMW X1 to the Audi S5. Then the interaction between the occupants of both vehicles followed by the convergence and congregation of occupants of vehicles at the parking lot, followed by their interaction with occupants of the Audi and BMW, in a meeting.

[197] Having concluded their meeting, the accused were seen getting into various vehicles and these vehicles were observed exiting the mall in a convoy. In the sequence of events, this is another form of conduct from which an inference will be drawn. They were throughout under surveillance. Much was

---

<sup>29</sup> *S v Khoza, S v Heyne and S v Cooper (supra)*.

made about the contradictions between Col. le Roux and Lincoln Muloyi about which vehicle exited the mall first; whether there was traffic on Moshoshoe Street and whether the vehicles intermingled. I take the view that since the police had descriptions as well as registration numbers of these vehicles before hand, had observed said vehicles for more than 30 minutes at Evaton Mall, had followed them therefrom all the way to the place of the take down, it makes little difference what the sequence of the vehicles was and whether they intermingled in traffic.

[198] This brings me to the contention by counsel for accused 6 and 7 who made a submission, during closing argument, to the effect that in his view, the police investigated the case backwards. When clarity was sought from him as to what he meant by that, he indicated that he was of the view that the police firstly hastily effected the arrests then worked their investigation backwards, thus implying, that it is only after the arrests that things such as registration numbers were taken down or recorded. This version or account of events, call it a proposition if you will, came as a surprise because it was never put to any of the witnesses called by the state. It was being raised for the first time in argument. Elsewhere in the judgment I deal with the value and importance of cross-examination and how the court is left poorer, where cross-examination falls short of the framework set out in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (supra)*. The belated proposition by counsel is clearly misplaced, untimely and unhelpful to the court for is trite that a cross examiner should put his/her defence “*on each and every aspect which he or she wishes to place in issue, explicitly and unambiguously, to the witness implicating his client*”<sup>30</sup>.

<sup>30</sup> *S v Boesak* 2000 (1) SACR 633 (SCA) at 647 c-d



[199] The next issue on conduct of the parties, is how all the accused behaved upon being confronted by the police in an endeavour to stop them. The driver of the Audi on his own version sought to evade what was happening and sped off and crossed over the central island across the face of oncoming traffic. The driver of the VW Transporter tried to speed off and was blocked off by Lincoln Muloyi. The Tata Indica tried to flee and according to the testimony of Officer Vencence he accelerated and cut the vehicle off. All the accused were then arrested at that stage. All the vehicles tried to avoid being arrested, they all tried to speed off.

[200] All the accused before court claimed that they did not see any blue lights and did not hear any sirens even though on the undisputed evidence of Officer Vencence, the shooting occurred some 30m from where the other vehicles were stopped. It is understandable why they would take that posture. Police vehicles which are unmarked are fitted with sirens and blue lights for a reason, namely, not to be conspicuous until the exact time they are needed. It is therefore inconceivable, I find, that the police would attempt to take down vehicles without activating blue lights and their sirens. The versions of the accused that blue lights and sirens were not activated is rejected.

[201] I infer from the conduct of the parties, which inference in my view, is the only one and is reasonable, and is drawn from the facts, that the accused before court came together and conspired to commit robbery

[202] The matter of *S v Mogale and Others*,<sup>31</sup> is shockingly on all fours with the facts of this case, and in that matter the court found the accused guilty. I very generously draw parallels;

202.1. Police received a tip off that a robbery was going to take place at Boxer store and they became alert. They also went to the mall, where the planned robbery was to take place and kept watch of the vehicle that they were told the suspects were going to use;

202.2. The identified vehicle (a Ford Ranger) was seen leaving while it was being surveilled, and they followed it;

202.3. The police then switched on their sirens and blue lights while in pursuit;

202.4. The rear passenger of the Ford Ranger opened the rear window and fired at the police as they were fleeing;

202.5. As they fled, they drove through red traffic lights and drove in the face of on coming traffic’

202.5. The police returned fire and in the process two of the suspects were killed. Some of the suspects exited the vehicle while it was in motion, reminiscent of this matter;

202.6. The scene was then cordoned off;

202.7. The accused claimed that they did not know each other. One of them even claimed that he was a hitchhiker, who wanted a lift;

202.8. 99 spent cartridges were found at the scene. In this case 54 were found, and gloves were found, as was the case in this matter;

202.9. Police tape was then set up to cordon off the scene.

---

<sup>31</sup>*S v Mogale and Others* (CC76/2018; 10/2/11/1-L41/18) [2020] ZALMPPHC 69 (6 July 2020)

[203] The version of accused 5, 6 and 7 is that there was police tape on the road when they were diverted. It is illogical and does not make sense why police tape would be put up to cordon off the scene before it comes a scene of anything. How would police know, before hand, in which direction vehicles would drive and to then thereafter set up their tapes at designated streets. The version of the accused in this regard is rejected as false beyond reasonable doubt.

#### *Murder and attempted murder*

[204] Accused 1 and 2 were in the Audi S5, from which evidence suggests, shots were fired at the police. The shattered rear view mirror and the bullet hole on the police VW Golf is the clearest evidence that the occupants of the Audi S5, did in fact shoot at the police. Accused 2 who was seated at the front passenger seat next to accused 1 as well as the deceased, who was seated at the back seat, were, as evidence suggests, found to have had rifles with them, or at least where they were seated, firearms were found. State's evidence is that they were shot at by the passenger in the back seat. I have no hesitation, in light of the facts and evidence, in finding that the police were shot at and that the crime of attempted murder was therefore committed. Further, that the occupants of the Audi S5 possessed firearms, and ammunition, for themselves as well as for all those who were passengers in the Audi S5. Accused 1 and 2 are accordingly therefore guilty, I find, of unlawful possession of firearms and ammunition.

[205] I have found, above, that the occupants of the Audi S5 both possessed firearms and ammunition unlawfully and that in firing at the police they attempted to kill them. That however is not the end of the matter, for the state alleges that in furtherance of a common purpose the occupants of the VW

Transporter and the Tata Indica, are also guilty of attempted murder as well as murder (they were found not guilty on the counts relating to possession of firearms and ammunition). In a matter where a conspiracy is successfully found to exist or is proven, and common purpose is proven, it must follow that the actions of a few of the accused are also actions of the rest of the co-accused. In this case, the accused must have foreseen and therefore by inference did foresee the possibility that the planned armed robbery may necessitate the use of firearms. Further that towards that end and in furtherance of a common purpose or design, namely, the robbery, they may meet resistance towards which they would have to respond with gun power. The use of firearms would as a consequence result in death. It is immaterial whether it is the death of the police or the death of one of the suspects or co-conspirators. Accordingly, I find that the shots fired by one culprit is, as far as their *mens rea* is concerned, the shot of each of them and must be imputed to each, rendering them guilty of the attempted murder charges as well as the murder charges in relation to the co-conspirator, John Dennis Hlatshwayo<sup>32</sup>. The matter of *S v Nkombani & Another*<sup>33</sup> is instructive. In that matter two persons conspired to carry out a robbery at a filling station. One of the robbers was shot in the process. The court found that it was foreseeable that any person associated with the robbery could be killed and further that the fact that there was indifference to such an outcome, means that all the conspirators were by association guilty of the murder. Consequently, one of the robbers was found guilty of the murder of his co-conspirator.

---

<sup>32</sup> *S v Nkosi* 2016 (1) SACR 301 (SCA); *S v Nhlapo and Another* 1981 (2) SA 744 at 751 A-C

<sup>33</sup> *S v Nkombani* 1963 (4) SA 877 (A)

[204] In the result, I find that the state proved beyond reasonable doubt that the following offences in respect of which the version by all the accused, in turn, is not reasonably possibly true, in fact and I find accordingly, is false beyond reasonable doubt, have been committed;

204.1. that all accused conspired to commit robbery with aggravating circumstances;

204.2. that they committed the murder of John Dennis Hlatswayo;

204.3. that they attempted to murder various members the police;

204.4. that accused 1 and 2 unlawfully possessed firearms and also unlawfully possess ammunition;

204.5. that accused 1 drove recklessly.

## **Order**

[205] Accordingly, I find as follows;

1. All the accused are found guilty on counts 1, 2 and 3;
2. Accused 1 and 2 are found guilty on counts 4 and 5
3. Accused 1 in addition is found guilty on count 6.



SA THOBANE

**ACTING JUDGE OF THE HIGH COURT**

ON BEHALF OF THE STATE : Adv. Mashile

ON BEHALF OF ACCUSED 1 : Adv. Tshawe

2 : Adv. Tlouane

3 : Adv. Mohlabane

4 : Adv. Mohlahlo

5 : Adv. Fourie

6&7 : Adv. Botha

DATE OF JUDGMENT : 18/19/ 20 September 2023