

REPUBLIC OF SOUTH AFRICA



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

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

16/9/2022
DATE

SIGNATURE

CASE NUMBER: SS53/2021

In the matter between:

THE STATE

and

SIMPHIWE THANDO NDIMANDE
PHINDA TATI
ANDILE NDWE
BONGINKOSI MASANGO

ACCUSED 1
ACCUSED 2
ACCUSED 3
ACCUSED 4

JUDGMENT

DOSIO J:

INTRODUCTION

[1] The four accused are arraigned on six counts. The counts are as follows, count one is a count of murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'). Count two is a charge of robbery with aggravating circumstances read with s51(1) of Act 105 of 1997. Count three is a contravention of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000'), read with the provisions of s51(2) and part II of Schedule 2 of Act 105 of 1997, for unlawful possession of a 9 mm pistol with a magazine. Count four is a contravention of s90 of Act 60 of 2000 for unlawful possession of ammunition to wit an unknown number of 9mm rounds. Count five is only in respect to accused three and it is a contravention of s3 of Act 60 of 2000, read with the provisions of s51(2) and part II of Schedule 2 of Act 105 of 1997, for unlawful possession of a 9 mm pistol with a magazine. Count six is also only in respect to accused 3 and it is a contravention of s90 of Act 60 of 2000 for unlawful possession of ammunition to wit 13 x 9mm rounds.

[2] In respect of count one the State alleges that on 28 August 2020 and at 7 Nuwejaarsvoel street, Chloorkop, Birchacres, the accused did unlawfully and intentionally assault David Nutall-Smith ('the deceased') by shooting him, thereby causing certain injuries as a result of which Mr Smith died at the Milpark hospital on 9 September 2020, The State accordingly contends that the accused unlawfully and intentionally killed Mr Smith. In respect to count two the State alleges that on 28 August 2020 at the place referred to in count one, the accused did unlawfully and intentionally shoot Mr. Smith and with force and violence robbed him of cash in the amount of R20,000 aggravating circumstances being present as defined in section 1 of act 51 of 1977 in that a firearm was used. In respect to count three the state alleges that on the same date and place as referred to in count one, the accused unlawfully had in their possession a 9 mm pistol with a magazine. In respect to count four the state alleges that on the same date and place as referred to in count one, the accused had unlawfully in their position an unknown number of 9 mm rounds. In respect to count five the state alleges that on 7 July 2020 and at 399 Harvest Rd, Bridell, Kempton Park, accused three had in his position a 9 mm pistol with a magazine. In respect to count six the state alleges that on the same date and place mentioned in count five, the accused three had in his position 13 x 9 mm rounds.

[3] Prior to the accused pleading, the court apprised all four accused of the provisions of the minimum prescribed sentence of life imprisonment in respect to count 1 as well as the minimum sentences applicable in respect to count two, three, four, five, and six. All the accused understood. The court also apprised the accused of their right to have an assessor, as count 1, is a charge of murder, however, all four accused elected to proceed without an assessor.

[4] Accused one and two are represented by Advocate Moloï and accused three and four are represented by Ms Simpson. The State is represented by Advocate Le Roux. This trial lasted almost nine weeks and this court thanks the State advocate, Advocate Moloï and Ms Simpson for their dedication in bringing this matter to an end. The accused understood all the charges and accused one to four pleaded not guilty to counts one to four. Accused three pleaded not guilty to count five and six. No plea explanations were made by any of the four accused.

[5] At the inception of the trial, formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (Áct 51 of 1977') were handed in by agreement and marked as exhibit A. The contents of exhibit A are:

(a) As regards the photo album of the crime scene:

That on 28 August 2020, Sergeant GP Hlonwane, who is an official draughtsperson, and official photographer and forensic fieldworker in the South African Police Service, attended to the crime scene at No. 7 Nuwejaarsvoël Street, Chloorkop, Kempton Park. The said crime scene was subsequently investigated and photographed by him as per the attached sketch plan and photo album (photos 1 – 74) together with the key thereto. That exhibit B is a correct reflection of the crime scene and the investigation that followed at the scene on the above mentioned date.

(b) Pertaining to accused one only:

That sergeant Hlongwane took a swab, marked as Exhibit J1 from the crime scene, as indicated by him on photos 42 to 48. The swab serial number being 14DCAR5587 as per paragraph 11 of the forensic statement and photos 45 - 48.

(c) Pertaining to the post-mortem, exhibit C, in respect to count one:

That the person in count one is the deceased referred to in the post mortem report with serial number DR 2020/2020. That on 11 September 2020, doctor A.M. Mofokeng performed a post mortem on the deceased's body, and correctly recorded his findings on the prescribed form GW 7/15, namely exhibit 'C'. That the cause of death is correctly reflected as '*Multiple gunshot wounds requiring intervention and complications thereof*'. Furthermore, that the deceased sustained no further injuries which contributed to the cause of death from the moment when the deceased was transported from the crime scene to the Netcare Milpark Hospital on 28 August 2020, until his demise at the said hospital on 09 September 2020, as a result of the gunshot wounds sustained at the crime scene.

[6] All four accused confirmed the contents of exhibit A stating they understood them and

that they were made freely and voluntarily.

[7] The exhibits handed in during the duration of this trial are accordingly referenced as follows:

Exhibit A are the admissions.

Exhibit B is the photo album of the crime scene compiled by Sergeant Hlongwane.

Exhibit C is the post mortem report.

Exhibit D is a copy of the fire arm license of the deceased.

Exhibit E is the snap shot album containing photos taken from video footage of the following premises, namely the Engen garage at Northmead Square, outside the Nedbank and First National Bank at Northmead Square, inside First National Bank at Northmead Square, the parking area at Northmead Square, 14th Avenue, a view of Boomkruiper Street, Birch Acres from the premises at Gate Force, a view of Nuwejaarsvoel street from the premises of Rebar Man, a view of Nuwejaarsvoel street from the premises of Montana Furniture and a view of the entrance to casualties at Zamokuhle hospital Tembisa. Exhibit F is the Nedbank snap shots obtained from video footage within and outside Nedbank at Northmead Square.

Exhibit G is the Nedbank covid register at Northmead mall.

Exhibit H is the route from Northmead Square to the crime scene.

Exhibit I is an Engen petrol slip.

Exhibit J is a photo album with pictures of the BMW belonging to accused three.

Exhibit K are the hospital records of accused one.

Exhibit L is the DNA buccal sample form in respect to accused one.

Exhibit M is the SAP 13 register with reference to the buccal specimen of accused one.

Exhibit N is the SAP 13 register pertaining to the clothing of accused two.

Exhibit O is the SAP 13 register in respect to a DNA sample of the deceased.

Exhibit P is the notice of rights in respect to accused one.

Exhibit Q is the statement of Sergeant Kwenaithe.

Exhibit R is the warning statement of accused one.

Exhibit S is the SAP 13 register pertaining to the clothing of accused one.

Exhibit T is the crime stats analysis in respect to Johannesburg Central.

Exhibit U is the statement of Constable Mtshali.

Exhibit V is the SAP 13 register in respect to the firearm and ammunition (count 5 and 6)

Exhibit W is the notice of rights in respect to accused three.

Exhibit X is the SAP 13 where photos of a BMW are depicted.

Exhibit Y are electronic journal transactions in respect to the bank account of Mr Nutall-Smith.

Exhibit Z is a NaTIS print out depicting that vehicle with registration HV32JTGP does not exist on the NaTIS circulation system.

Exhibit AA is s212 affidavit in terms of Act 51 of 1977.

Exhibit BB are bail application transcripts in respect to accused three,

Exhibit CC is a s212 affidavit in terms of Act 51 of 1977 in respect to DNA evidence

Exhibit DD is a receipt in respect to evidence bag PA4004145621

Exhibit EE is a statement from the managing agents where accused three stays at 399 Harvest, Unit 4

Exhibit FF is an aerial photo showing the Zamokuhle hospital

Exhibit GG is a photo of the street called Abram O Tiro Crescent

Exhibit HH is a statement of sergeant Raseloane

Exhibit II is the cell phone records of accused two with number 0817337648

Exhibit JJ is the cell phone records of accused three with number 0630193482

Exhibit KK is a map showing various locations where accused three's cell phone was picked up on 28 August 2020

Exhibit LL is a statement of captain Mthethwa

Exhibit MM is a form handed in by accused three from Lenmed showing that the number 0789309808 belongs to Mbali Nkosi dated 28 August 2020.

Exhibit NN is four pages depicting where the second Kaalfontein is situated.

[8] Various real evidence also comprises part of this record and trial, namely:

1. Engen garage: photos 1 – 8, 10 & 48, 51 (exhibit E)
2. Northmead Square parking lot: photos 9, 11 – 13, 15, 43 – 47, 49, 50, 52 (exhibit E)
3. Northmead Square (mall footage): photos 14, 16 – 21, 24 – 29, 35, 36, 38 & 40 – 42 (exhibit E)
4. Nedbank: photos 1 - 14 (exhibit F)
5. Northmead Square (rooftop parking): photos 22 & 23 (exhibit E)
6. FNB: photos 30 – 34, 37, 39 (exhibit E)
7. Gate Force, Boomkruiper Street: Photos 56 – 59 (exhibit E)
8. Rebar Man: photos 60, 62, 66 (exhibit E)
9. Montana Furniture: photos 61, 63 – 65 (exhibit E)
10. Zamokuhle hospital: photos 67 – 86 (exhibit E)

[9] In the opening address, the State's counsel stated the summary of the facts to be led are as follows:

That on 28 August 2020 the deceased and his wife visited the Nedbank Branch in Northmead Square, Benoni to withdraw money. Accused three was also inside Nedbank, right behind the deceased. Immediately after the deceased made the withdrawal, he was followed to the outside by accused three. After the deceased made the withdrawal, he was followed to the rooftop parking outside by accused two and three. The state alleges the four accused then followed the deceased on route to his business premises at 7 Nuwejaarsvoël street in the motor vehicle of accused 3 and a further car, namely a VW Polo. At the business premises the deceased was accosted and a shootout followed between the deceased and some of the accused, during which the deceased and accused one were wounded. As result of this shootout, the deceased succumbed to his injuries on 09 September 2020.

[10] The State further alleged that at all relevant times, accused 1 to 4, together with other person(s) not before court, acted in concert with one another, in the furtherance of a prior criminal agreement and/or common purpose to commit the offences listed in Counts 1 to 4 in the indictment. The State alleges that it is unknown exactly when and where the prior criminal agreement and/or common purpose was formed, and who all the other parties thereto were, but it is alleged that the criminal agreement and/or common purpose existed immediately prior to the offences, and continued for the duration thereof.

THE EVIDENCE

[11] The following witnesses were called by the state in respect to count 1 to 4, namely Fiona Nutall-Smith, Mrs Coetzee, Lindiwe Mkhabela, Doctor Maponya, Sergeant Kwenaita, warrant officer Naidoo, constable Vusimuzi Linda Bheki Mtshali, Patrick Dingindlela, Paul Powell, sergeant Mazibuko, captain Mthetwa, Ettiene De Klerk, Collen Mazibuko, Neill James Edmondson, Everhardus Johannes De Villiers, Brian Potgieter, Givemore Machaka, Constable Raselomane and sergeant Hlongwane.

The witnesses in respect to count 5 and 6 were constable Makgotlho and constable Given Thinavhuyo Makhokha.

At the end of the state's case an application was brought in terms of s174 of Act 51 of 1977 in respect to accused four which was dismissed.

All four accused then came to testify. Accused three called Tobie Schlebusch and Sihle

Khumalo as his witnesses. Accused four called Babane Philip Mashaba as his witness.

At the end of the defence's case the court in terms of s186 of Act 51 of 1977 requested a witness who could come and give evidence regarding the cell phones of accused two and three. The witness that was available was the investigating officer constable Raselomane. The court then allowed the State and defence to re-open their cases and accused three re-opened his case and came to testify.

I accordingly deal with a summary of the evidence presented.

Fiona Nutall-Smith

[12] This witness testified that the deceased was her husband. On 28 August 2020 she met the deceased at the Nedbank bank branch at Northmead Square with the purpose to withdraw R62,000. Photo 74 on exhibit B depicts the withdrawal slip showing that an amount of R62,000 was withdrawn at 11:28. This witness arrived in a different vehicle to that of the deceased and left in our own vehicle after the transaction was completed. She later heard that the deceased was involved in an armed robbery. She was contacted by Maureen Coetzee to give her information pertaining to the deceased's motor vehicle and the route the deceased which usually drive. She explained the route to Ms. Coetzee that the deceased travelled for the last 30 years. She received some of the money that was robbed, but an amount of R25,000 was missing. Photo 49 and 50 on exhibit B are photos of the deceased's motor vehicle. This witness identified a dent on the right back of the bakkie as being a unique feature of this vehicle. A further identifying feature of this motor vehicle was a red stripe on the back of the motor vehicle above the fender, which allowed this vehicle to enter in and out of Botswana. The deceased possessed a firearm which went missing after this robbery. The firearm was licensed in the name of the deceased which is depicted in exhibit D. This witness was then shown various photos on exhibit E with specific reference to photos 22 to 26, which depicts the deceased walking from his motor vehicle in the parking area up to the Nedbank branch at Northmead Square. This witness was shown photos 49 and 50 of exhibit E, which shows the deceased driving his motor vehicle down the ramp from the upper parking bay at Northmead square and that he is seen turning right into 14th Avenue. She confirmed that photo 53 of exhibit E is a photo of her husband driving his motor vehicle a Toyota King Cab with registration number BR34ZLGP along 14th Avenue and that he is once again seen driving along Boomkruiper street on photo 56 of exhibit B as the dent on the right back of the bakkie is clearly visible in the photo. She stated that at the intersection of Boomkruiper and Nuwejaarsvoel, the deceased would have turned left to go to the factory.

[13] This witness was shown exhibit F which is the snapshots depicting the interior of the Nedbank branch. She confirmed that photo 1 showed the deceased walking into the Nedbank branch, that photo 2 depicted the deceased signing the covid register, that photo 3 showed the deceased sitting next to her, that photo 4 showed herself and the deceased moving to the teller to withdraw the money. She stated that photo 7 depicts her exiting the Nedbank branch and the deceased collecting the money. The time on photo 7 is 11:29:14s. She confirmed that photo 11 shows the deceased leaving Nedbank and photo 12 shows him moving towards his car. She confirmed the deceased's signature appeared on exhibit G, which is the covid register and reflecting the time 11:30. She confirmed that exhibit H is the route she gave Maureen Coetzee as being the direction her husband usually drove from Northmead Square to his factory.

Maureen Coetzee

[14] This witness stated that she is currently employed by ABSA as an investigating officer and information specialist since 2011. Her mandate as investigator is to investigate all incidents at ABSA and or its clients. She gathers information on people who target ABSA or their clients. She explained that this investigation entailed a bank associated robbery where a client is followed from the bank and then robbed. She stated that she has been working in this field since 2003. She was a captain in the South African Police up to 2011, after which she then joined ABSA. She has gained extensive experience in bank associated followings as a result of interviews with suspects and testifying in various trials. She explained that the *modus operandi* in respect to these crimes consists of two groups, namely, (1) spotters and (2) the gun men. These two groups will travel in two different vehicles.

[15] She explained that the role of the spotters is to target the victims. The spotters will split up and go into various banks. The spotters usually are seen loitering around and continually observing clients who were withdrawing large amounts of money. These spotters are usually identified as asking for plastic bank bags, paying DSTV accounts, or merely leaving the bank without making any transaction. This is given the term non-client behaviour. She stated that this type of crime cannot be committed without some form of communication between the prospective robbers and the spotters and that this is usually by phone.

[16] She stated that due to load shedding certain cameras would lose time as they needed to re-start however, this would not affect the authenticity, as the camera would kick in and function as it did before. As regards the Engen garage she stated it has a generator and it would take 3

to 5 minutes for the camera to kick in. The load shedding would not affect the chronology of events, as Ms Coetzee would not use the time as a primary indicator, she would instead look at the content of overlapping cameras and look at certain people with bright shorts or cars in a bright colour to follow the sequence.

[17] She explained that she was told that one of her ABSA clients had been shot, however, she was later told it was a Nedbank client. She then managed to speak to the wife of the client that was shot, who gave her information pertaining to the make and registration number of the client's vehicle. She was informed that the client had been driving a king cab bakkie, and that the vehicle had a red reflecting band at the back of the bakkie. She identified this Toyota Hilux bakkie with the red reflecting band on photo 49 and 50 of exhibit B and that the registration number was BR34ZLGP. After the deceased's wife gave her the route that the deceased usually drove from Northmead Square to his factory, she then drove this route with the purpose of looking for cameras on this route. The cameras would according to this witness show the vehicles that followed the deceased from Northmead Square to his factory. The distance between Northmead Square and Nuwejaarsvoel street was approximately 20 to 30 kilometres and the traveling time was approximately 30 to 40 minutes. She compiled exhibit E which consists of 86 snapshots obtained from video footage. The state presented the video evidence which comprises of six video clips, amounting to real evidence in terms of s15 read with s14 of the Electronic Communications and Transaction Act 25 of 2002. The original memory stick was handed in.

[18] When she was shown exhibit J , which are photos taken of accused three's BMW on the day of his arrest, she indicated that according to her, this is the same vehicle appearing in the snap shots she made of the BMW in exhibit E.

[19] Mrs Coetzee proceeded to explain the video evidence which is captured in exhibit E. Photos 1 to 86 of Exhibit E and photos 1 to 14 of Exhibit F (Nedbank) can be summarized as follows:

Exhibit 1/ Exhibit E photos 1 – 8 & 10 are photos of the Engen Garage. Mrs Coetzee personally downloaded the footage at the Engen Garage onto a flash drive. The system stores the footage via the cameras onto the hard drive of the DVR. This is an automatic process without human intervention. This footage shows accused three arriving in his silver grey BMW 1 series, and a person dressed in blue reflector pants, light blue top, cream white cap, tekkies, carrying a back pack, alighting from the BMW and walking towards Northmead Square. The time starts in this sequence as 11:27:30 (photo 1), and ends at 11:30:35 (photo 10). The petrol slip, exhibit I,

reflects the time of this transaction as 11:18. It is important at this stage to note that although the identity of this person is in dispute, it is not disputed that this person was later identified by accused two and three as the mechanic or 'Patrow' as they called him. The court will refer to this person as the mechanic or Patrow. The mechanic got out of accused three's BMW at the garage.

[20] Exhibit 2/ Exhibit E, photos 9 and 11 are photos of Northmead Square parking lot and it shows the alleged 'Patrow' walking across the parking lot towards the mall.

Photo 15 shows accused three getting out of the BMW in the parking lot. All the mall footage was received from Mr Paul Powell, the center manager at Northmead Square.

[21] Exhibit 3/ Exhibit E, photos 14, 16, 28 and 29 are photos of Northmead Square, Specifically, the mall footage, showing 'Patrow' walking inside the mall and entering FNB bank. Photos 18 to 21 shows accused two walking up and down the passage inside the mall.

[22] Exhibit 6/ Exhibit E, photos 30 to 34, 37 and 39 are photos inside FNB depicting Patrow inside FNB talking on his cell phone. According to the time recorded by the FNB cameras, Patrow enters FNB at 11:26:17 and is constantly busy on his cell phone. Upon receiving a phone call he leaves the bank in a hurry at 11:31:38. This is 4 min 11 sec after he entered the bank and without doing a transaction. Mrs Coetzee identified this person referred to as Patrow, as being accused four. The FNB footage was received from Mr Evert de Villiers from Protea Coin, on behalf of FNB.

[23] Exhibit 5/ Exhibit E, photos 22 to 27 are photos at Northmead Square depicting the rooftop parking and mall footage outside Nedbank. The deceased arrived at Northmead Square and entered Nedbank. Accused three is standing right behind the deceased in the banking queue. The time sequence of these cameras starts at 11:30:53 and ends 11:37:43.

[24] Exhibit 4/ Exhibit F, photos 1 to 3 are of the inside of Nedbank. The deceased is seen entering the bank and signs his name at the host desk which is reflected on exhibit G. He then goes and sits next to Mrs Nutall-Smith who was already inside the bank. This footage was received from Mr Brian Potgieter from Protea Coin on behalf of Nedbank.

Exhibit 4/ Exhibit F, photos 4 to 8 are of the inside of Nedbank. Accused three is seen at the host desk, 2 minutes after the deceased entered the bank. The deceased and his wife walk towards the teller. Accused three sits down at a seat towards the back of the bank. The tellers

are in his view and he is seen constantly busy on his phone, whilst the deceased and his wife are at the teller.

Exhibit 4/ Exhibit F, photos 9 to 12, is the Nedbank footage. Accused three is seen leaving his seat, according to the footage, at 11:31:07. The deceased is still at the teller, but can be seen putting something in his pockets shortly before accused three left his seat. The deceased is seen leaving the teller at 11:31:21, 14 seconds after accused three left his seat. The accused is seen turning towards his right, walking down the passage in the mall, in the opposite direction of the deceased, who turns to his left, walking towards the rooftop parking.

[25] Exhibit 3/ Exhibit E, photos 38 and 40, is the Northmead Square, mall footage. Accused three is seen leaving the bank 12 seconds before the deceased leaves the bank.

[26] Exhibit 4/ Exhibit F, photos 13 and 14 is the Nedbank footage. Twenty-eight seconds after accused three turned right into the mall passage, he comes walking back passed Nedbank, in the same direction as the deceased. Accused two is now also visible, following a few metres behind accused three. What is important to note here is that when photos 12 and 14 on Exhibit F are compared with photos 40 and 41 on exhibit E, it shows that the two accused were 17 seconds behind the deceased, as he was on his way to his motor vehicle parked on the roof top parking.

[27] Exhibit 3/ Exhibit F photos 40, 41 and 42 is Northmead Square, mall footage. Patrow is seen leaving FNB bank 6 seconds after accused two and three are seen walking in the same direction as the deceased on photo 41.

[28] Exhibit 1 & 2/ Exhibit E photos 43 to 52, depicts the Northmead Square parking lot and Engen Garage. Accused two and three are seen walking down the ramp, coming from the rooftop parking. The deceased passes accused two in his bakkie, down the ramp, and 'Patrow' is seen moving in the direction of accused three's car. At some point Patrow starts to run, clearly in a hurry to get to the BMW. All three eventually get into the BMW. What is further significant is the fact that the time lapse between photos 48 and 51 is 31 seconds. These two photos reflect the same stop street at the mall, picked up by camera 7 at the Engen filling station. Accused two can be seen getting into the BMW at this stop street. From the parking lot footage, the deceased's bakkie is seen turning right into 14th avenue. The BMW also turns right into 14th Ave, 32 seconds behind the deceased's bakkie.

[29] Exhibit E, photos 53 to 55, are photos taken from the LPR street camera in 14th avenue. This footage shows the deceased driving down 14th avenue, 300 to 400 metres from where he turned out of the parking lot at Northmead Square. The number plate of his vehicle is registered by the camera. Thirty-one seconds behind him a silver grey BMW, registering 'no plate' follows. Approximately 5 minutes later a white VW Polo is picked up by this camera with registration number HV 32 JT GP. These three photos were received from Mr Etienne de Klerk from Secure Tactical response.

[30] Exhibit 7/ Exhibit E, photos 56 to 59, are photos taken from the camera at Gate Force in Boomkruiper street. The deceased passes Gate Force, followed by a white VW Polo, 8 seconds later, and 73 seconds later a BMW of exactly the same model, make and colour as the BMW of accused 3 follows. The VW Polo is also of exactly the same model, make and colour as the one seen in photo 55. This is about 200 meters from where the deceased was shot. Mrs Coetzee did the downloading of this footage herself, from a Hikvision system. The recording is done automatically without any human intervention and is stored on a hard drive.

[31] Exhibit 8 and 9/ exhibit E, photos 60 to 66 are photos taken from the camera at Rebar Man and Montana furniture. The photos show the same sequence of vehicles as is seen driving towards the crime scene. However, at the T-junction, the BMW turns right, away from the scene of the crime and the white VW Polo follows the bakkie of the deceased. This camera at Montana furniture is situated across from the crime scene in Nuwejaarsvoël street. Fifty two seconds after the white VW Polo passes, the security guard walks towards the gate. Eight seconds later the white VW Polo again passes this gate at a high speed, but in the opposite direction. The footage at Rebar Man was downloaded by Mrs Coetzee herself from a hard drive. The recording and storage of the data is also done on this hard drive. The footage recorded at Montana furniture was provided to her by Mr Edmondson. What is further important to point out is that the combination of motor vehicles picked up in 14th avenue, in the beginning by the license plate reader ('LPR') camera, 400 metres from Northmead Square, is the same three vehicles one can observe 200 metres from the crime scene, approximately 30 to 40 minutes later. According to this witness the coincidence of this happening suggests that the BMW and the VW Polo followed the deceased from Northmead Square. She stated that in an associated bank following, there is more than one vehicle involved. She stated that in the vehicle in which the gunmen drive, she has never come across a legitimate number plate as it is usually a false number plate. Due to the fact that the BMW had a legitimate number plate and because the VW Polo had a false number plate she concluded that the latter vehicle was the gunman vehicle.

[32] Exhibit 10/ exhibit E, photos 67 to 86 are the photos taken at Zamokuhle Hospital. These photos show the arrival of accused one, two, three and 'Patrow' at the hospital where accused one is dropped off after being shot. The time recorded on photo 67 is 12:34:49. This is approximately 30 minutes after the robbery.

[33] Mrs Coetzee further testified that she knows accused one, two and four from before the incident. She knows accused two since 2017 from observing him on video footage, but also from personal contact as she met him twice in person and through intelligence driven information. She would see him almost every month on video footage. The first time she met with accused two she spent about 1 to 2 hours in his presence. The second time was about 6 to 7 months before this incident, and then she spent about 4 to 5 hours in his presence. This enabled her to identify accused two without seeing his face and only from his build and the way that he walks. She was also present when accused two was arrested on 1 September 2020. Constable Mtshali was also present. A search was done at the premises, and the black T-shirt with a new balance white print on the front and All Star tekkies, similar to what accused two was wearing on the day of the incident, was found hidden in a back room, in a plastic bag, stuck between two corrugated iron sheets.

[34] Mrs Coetzee identified accused four as the man getting out of the BMW of accused three at the Engen garage, walking inside the mall, and eventually entering FNB bank. She also observed him at the hospital, where he walked about 15 metres from the car to the sanitizing station. Although he is wearing a cap and a buff, she knows him well enough to identify him on his gait and his posture. She studied the footage over and over. The analysis took around 12 to 13 hours to complete. She has observed him from previous footage as far back as 2017. She also had personal contact with him on three occasions between 2018 and 2020. The shortest space of time spent with him was between 1 to 3 hours, and the longest was half a day. Although he gained weight since the incident, Mrs Coetzee was still able to identify accused four. She knows him so well, that she could identify him by just looking at him where he would be standing in a queue. By way of example she referred to the fact that one would be able to identify your neighbour at a distance, even though you can't see his face.

[35] She stated that she has attended a course on facial recognition which included body build and gait. It was a five-day course. She testified that accused 1,2 and 4 have been seen together on footage prior to August 2020. In February 2018 she saw accused one with accused four on footage taken at Olifantsfontein. Six months prior to the incident *in casu*, she saw

accused two with accused four on footage take at Rooihuiskraal.

Lindiwe Mkhabela

[36] She testified that she and accused two were in a love relationship at the time of the incident. She lent her bank card to him on a certain day, the date of which she couldn't remember. She confirmed this card number after she was shown exhibit I which was the Engen petrol slip. She identified accused two from the mall footage, as well as the footage at the hospital. She also stated she knows accused 3 as he is a friend of accused two. She was present on 1 September 2020 at her mother's house when the police arrived and searched her premises, and arrested accused two. She stated the police searched the premises without her consent. She identified accused three's car on photo 10. She stated that the shoes of accused two were found in the main room where she and accused two were and the clothes were found in the room at the back, exactly where she was not sure.

Doctor Chuene Nicole Maponye

[37] She testified that she is a qualified medical doctor and was working at Zamokuhle hospital on 28 August 2020. At around 12:00 she was called out to the emergency room to treat a patient. She confirmed that page 3 of exhibit K is the hospital records of accused one and the information that accused one gave her on that day. Accused one informed her that he had been shot at the Edenvale taxi rank when unknown men pulled out firearms and started shooting at people in the taxi rank. He was helped by strangers who brought him to Zamokuhle hospital. She was adamant that there was no possibility of any misunderstanding. She remembers asking him why he didn't go to Edenvale hospital and accused one replied "*he doesn't know*". She asked this question because the logical nearest hospital would have been the Edenvale hospital. She noted that accused one was bleeding profusely. She remembered this incident very well as it was during the covid period and there were few gunshot patients. She initially stated that she saw accused one at 12:13, however, she corrected herself and stated it was 12:43.

Sergeant Kgabo Kwenaitse

[38] She testified that at the time of the incident she was attached to the Trio Task Team, East Rand Division. She was the initial investigating officer. On 28 August 2020 at around 12:30 she visited the crime scene. Whilst there she received certain information, which led her to Zamokuhle Hospital in Tembisa. There she found accused one and he was injured. She introduced herself to him and asked him how he got injured. Accused one informed her that he was shot at the MTN taxi rank in Johannesburg. She decided to follow up this version. She

first decided to view the video footage, on exhibit E, photo 67 – 86. Mr Machaka from the hospital assisted her. It was downloaded on a flash drive. This flash drive was later handed over to Maureen Coetzee, with a request to analyse it, and compile a photo album.

[39] She followed up on the vehicle registration of the BMW appearing on the footage, and discovered that it was registered to a certain Mr Andile Ndwe, namely accused three. She followed up on the allegation that there was a shooting incident at the MTN taxi rank in Johannesburg that day, but could find no confirmation for this. In this regard she also went to the Johannesburg central police station, to no avail. She further went to Nedbank and checked the covid register, namely, exhibit G, where the name A Ndwe caught her eye. She also requested to view the video footage at the mall, and saw a BMW similar to the one she saw at the hospital on exhibit E, photo 9 and 12. She then concluded that there must have been a connection between accused one and three. She went back to Zamokuhle hospital, where she informed accused one that she is arresting him on charges of armed robbery and attempted murder. His notice of notice of rights was marked exhibit P. Accused one was then transferred to the Tembisa hospital where a buccal swab was taken as per exhibit L, by Sgt Mazibuko. She signed as witness to this event.

[40] The swab was properly sealed, and was kept by her under lock and key in her cabinet at work until she booked it in at the SAP 13 store on 30 August 2020. She confirmed exhibit M is the SAP 13 register and that she handed in one exhibit bag with sealed number PA4004879983 which contained the buccal sample. She stated she is the only one who had a key to her cabinet. She testified that the buccal sample was forwarded to the forensic science laboratory on 7 September 2020. There was no tampering with this exhibit up to the point it was handed over to the forensic science laboratory. On 1 September 2020 accused two was handed over to her and she received certain exhibits from constable Mtshali which are marked as exhibit N and which were placed in the SAP 13 register. These exhibits included one black new balance T-shirt, 2 pairs of white all-star tekkies, and 2 cell phones. She confirmed that the T-shirt that was handed to her resembled the one worn by accused two on photo 21 of exhibit E. Exhibit O was also handed in, which is a SAP 13 entry, and reflects the DNA sample obtained from the deceased after his death.

Warrant officer Naidoo

[41] He testified that he is attached to the Johannesburg Central Crime office and has access to the data system on crime statistics within his precinct. He stated that this precinct borders on Hillbrow, End street, Crownwood at Langlaagte, and Brixton. He stated that the MTN taxi

rank at Plein and Klein street falls within this area. He confirmed that no shooting incident was reported on 28 August 2020 in this precinct. As proof of this, he handed in exhibit T which reflected all incidents reported from 28 August 2020 to 29 August 2020. From his experience, the possibility that a shooting incident of this nature would not be reported is zero.

Vusimuzi Linda Bheki Mtshali

[42] He testified that he is a constable in the Ekurhuleni SAP. He arrested accused two on 1 September 2020 at 4714 Nkhwandlana, Ivory Park. They had received information and had to act immediately. He believed that if he applied for a warrant, it would have been granted, so he proceeded to search in terms of s22 of Act 51 of 1977. They knocked, introduced themselves and found accused two and Lindiwe Mkhabela at the house. Lindiwe told them of a back room in the house which she opened for them. Inside they found clothing hidden in a blue plastic bag stuck between the corrugated iron plates in the roof. He identified accused two on photo 21 of exhibit E, as well as the clothing and tekkies he was wearing on the photo. Sergeant Kwenaita was contacted and she told them to bring accused two to Norkem Park SAP.

Patrick Dingindlela

[43] He testified that he was employed at the deceased's premises and he was at work on 28 August 2020 and he witnessed the robbery. It happened at around 12:00. He can confirm the time, because it was knock off time. The deceased drove through the open gate and he was followed by the vehicle used by the robbers which was a white VW Polo, similar to the one appearing on photos 55 and 58 of exhibit E. One person alighted from the seat behind the driver of the VW Polo and went to stand at the pole of the gate so that the electronic gate did not close. This person was wearing a navy blue work suit with Sasol pants. On the knee line there was a reflector band and this person was also wearing a black jacket and an off-white hat. A second person alighted from the back passenger door of the Polo, he had a firearm in his hands and he was wearing a blue pair of jeans. This second man stood at the wall of the factory and faced the deceased directly. The deceased asked him what he wanted, but this person did not respond, he just fired a shot to the deceased. This witness then ran away. A second shot was fired. He saw 3 people in total getting out of the Polo. He confirmed that the man he saw with the reflector pants, is similar to those depicted on photos 7, 21 and 34 of Exhibit E. This witness could not identify any of the perpetrators. He saw only one of the three holding a gun. The deceased was seen by him lying next to his motor vehicle. He confirmed that the VW Polo is the same one as depicted on photo 55 of exhibit E.

Paul Powell

[44] He testified that he is the centre manager at Northmead Square and as such has access to the security system. He stated that the security system records automatically without human intervention. He was present when the downloading took place. The footage was handed over to Mrs Maureen Coetzee without any tampering. In respect to photo 9 on exhibit E he stated that it reflects the ramp leading down from the roof top parking. Photo 11 to 13 and 15 on exhibit E shows the parking lot outside the mall, on the ground. Photo 14 and 16 to 21 and 24 to 29 on exhibit E, shows the passage on the upper level, which also leads from Nedbank to the roof top parking outside. He stated if one compares photo 7 on Exhibit F with photo 35 on exhibit E, the time difference is about 10 minutes. He stated that it is not unusual for recording systems to lose time. This is due to load shedding and other technical problems.

Sergeant Mazibuko

[45] He testified that he is a sergeant and was working at the Ekurhuleni North Trio task team on 28 August 2020. He is an authorised officer who was trained to take buccal samples. He took the buccal sample marked as exhibit L. The donor of the buccal sample was accused one.

Captain Mthetwa

[46] He testified that in 2020 he was attached to the Trio Task Team in Ekurhuleni holding the rank of Captain. He assisted Sgt Kwenaithe in the initial investigation. He arrested accused three, who was brought to him by his lawyer to the Norkempark police station on 13 September 2020. Accused three pointed out his BMW motor vehicle at house number 4714/5 Manyaka street, which was photographed and is reflected in a photo album, exhibit J on photos 7 and 8. The registration number of the BMW is VNF 393 GP. He requested accused three to show him the T-shirt he wore on 28 August 2020 at the hospital and accused three showed him the shirt reflected on photo 33 of exhibit J which is a blue/black and white striped long sleeve shirt. He confirmed that exhibit X reflects the BMW of the accused where it was kept in the SAP 13 store. The photos clearly show that the BMW has no number plate in the front. This witness arrested accused four at the police station in Brakpan. Upon receiving the Nedbank footage, he handed it to Mrs Maureen Coetzee. He followed up the number plate of the VW Polo appearing on exhibit E, photo 55, namely HV 32 JT GP, but could not find any ownership on the vehicle.

Ettiene De Klerk

[47] He testified that in 2020 he was working for Bad Boyz Security, but is now a director of his own company, namely Tactical Secure Response in Sandton. He received a phone call from Mrs Coetzee on 28 August 2020 who provided him with the details of the deceased's vehicle.

He entered the registration number of the deceased's vehicle into the LPR. He stated the LPR is a specific camera working off a sniper platform which is connected to various law enforcement platforms. He stated that after entering a vehicle's registration number, if that vehicle went past that specific LPR camera it will give the picture of that vehicle, stipulating the time and location of that camera. The cameras function on movement, irrespective of whether the vehicle has a number plate or not. He had 3 years training in the usage of this system. In this capacity he downloaded photos 53 to 55 on exhibit E and emailed it to Mrs Coetzee. He stated in order to download you need to be specially vetted and you should have a PSIRA registration number. He said there are a limited number of people who have a password. He is one of them. He stated there are 50 street cameras placed in the East Rand area. He stated that for investigation purposes they take 5 minutes before the specific footage and 5 minutes after. This will give him a clear indication if the vehicle was followed as it gives him a description of the vehicle in front and behind. He stated that this particular camera is situated about 300 metres from Northmead Square. He stated that the time on these photos is very accurate, because it is stored on a cloud. He confirmed that the car that followed the deceased's vehicle was a BMW as it registered on the LPR system as per photo 54 of exhibit E and it reflected that there was 'no plate'. He stated that on photo 55 of exhibit E one could see that an additional vehicle followed the deceased's vehicle and this was a VW Polo with registration number HV32JT GP.

Mr Collen Mazibuko

[48] This witness testified that he worked for the deceased and was at the deceased's premises on 28 August 2020. The deceased entered the premises and he was followed by a white VW Polo. He saw two people with firearms in their possession. The deceased asked these men what they wanted and he was busy pulling out his firearm when one of the men shot him. These men then jumped towards the deceased and grabbed him. The one who shot is the one who grabbed his employer. The other man shot the deceased twice. One of the men then took money from the deceased's pocket. He could not identify anyone. He stated this incident happened at 12:00.

Neill James Edmondson

[49] This witness testified that he is the owner of Montana furniture. He confirmed the correctness of the footage reflected in exhibit E, photos 61 and 63 to 65. He stated that these photos were recorded by the camera on his premises facing the street. He stated that photo 60 is at Rebar Man, which is a business situated to the left of Montana. He stated that the system at Montana is a Hikvision system. The cameras run 24 hours continuously and record

automatically. The images are stored onto a hard drive and there is no human intervention in this process. He stated that this system would lose time due to load shedding. The system was installed about 12 to 13 years ago, and the system has worked without failure over this period. It is clear that on photo 63 of exhibit E, which depicts his business, the time reflected is 11:12:39 whereas the camera at the business next door, which is Rebar Man the time on photo 62 is 12:34:38, to this, this witness stated that clearly his own camera had fallen behind due to load shedding. He stated he did recall this incident on 28 August 2020 as it happened between 12:00 and 13:00. He recalls having heard a sound like something heavy dropping.

Everhardus Johannes De Villiers

[50] He testified that he has been an investigator at Bidvest Protea Coin for the past ten years, in the field of bank associated robberies. He stated that Bidvest is contracted by FNB to handle their risk and security management. He stated that bank associated robberies occur when clients' behaviour is observed inside the bank, and then conveyed to prospective robbers on the outside. The person doing the 'scouting' in the bank is referred to as a 'spotter'. The 'spotter' would leave the bank shortly before or after the identified victim leaves the bank. He is mostly on his cell phone in the bank to provide the rest of the group outside the bank with a description of the gender and clothes that the victim is wearing. As soon as a spotter observes a client is drawing a large sum of money, he will stop his activities and follow the client. The *modus operandi* of these types of offence were exactly as explained by Mrs Coetzee.

[51] This witness stated that he had gained his insights into this type of crime phenomenon through interviews with so called 'spotters' and by analysing numerous video footages from banks, where spotters were involved in robbery incidents. He stated he was requested by Mrs Coetzee to access footage at the Northmead Square branch of FNB for 28 August 2020 to see if he found anything suspicious. Mrs Coetzee requested him to roughly look between the time period 11:00 to 12:00. He downloaded this footage and put it on a memory stick. He viewed the footage for that day from 11:26 to 11:40. He noticed an African male at the main entrance, busy on his cell phone who started walking into the banking hall towards the teller section. He immediately recognised this man as Bonginkosi Masango, namely accused 4 before court.

[52] This witness stated that accused four was observing the banking hall all the time for about 4 to 5 minutes, then, suddenly and suspiciously, accused four left the branch in a hurry without performing any transaction. He stated that photos 30 to 34, 37 and 39 on exhibit E reflects this. This witness stated that the man on photos 6 and 7 which is the footage at the Engen garage, also shows accused four. He also recognised accused four on the Zamokuhle hospital footage.

[53] This witness stated that he knows accused four from before and recognises him by his prominent bum, his hips are wider than his shoulders and he walks bent slightly forwards and it looks like he has knock knees.

[54] This witness stated that he knows accused four as he has had previous personal contact with accused four. The first time was in 2018 at Olifantsfontein and the contact lasted about 1 to 2 hours. The second time was in February 2020 at Wierda Bridge, Pretoria. It was an interview, and it lasted about 1 to 2 hours. This witness stated that he has also observed accused four from previous court appearances. He saw accused four for the first time on video footage in November 2017 and on 6 other occasions between 2018 to 2020. In all these instances accused four was not wearing a mask and had clear facial features. This witness stated that he observed accused four's full body features and his gait on the footage he had analysed.

[55] He stated that all the downloaded footage was placed in a sealed evidence bag, and handed to Mrs Coetzee. Whilst he was in possession of the memory stick it was kept under lock and key. There was no tampering with the footage. He stated that the recording system inside the bank is called 'Milestone' and the recording is done automatically, without human intervention and is backed-up for 90 days. The hard drive is kept at an office at the back of the bank under lock and key. There are only two key holders.

[56] This witness stated that the reason for the time difference between the mall footage and the footage from inside FNB, is because it is two different systems which are not synchronised and as a result time may be lost because of load shedding.

Brian Potgieter

[57] This witness testified that he is an investigator with Bidvest Protea Coin. He is contracted to Nedbank, to handle their bank related criminal investigations. He downloaded the footage in exhibit 4 which is exhibit F, which is photos 1 to 14 and which depicts the interior of Nedbank at Northmead Square. He accessed the details of the transaction made by the deceased on the Electronic Journal Transaction system and stated that the time indicated for this transaction was 11:28 on 28 August 2020. This is marked exhibit Y. The video footage was played and this witness gave a description of what he saw on the day. He testified that according to his observations accused three was sitting about 5 to 6 metres behind the deceased, whilst the deceased was busy making the withdrawal. According to this witness accused three had a clear view of what was taking place at that teller. He was, according to this witness, constantly on his

cell phone, observing the deceased. He stated that on photo 5 of exhibit F at 11:28:28 accused three is seen entering the bank. The deceased left the bank on photo 11 of exhibit F at 11:31:21. Accused three had already left the bank a few seconds before. This witness stated that the behaviour of accused three resembled closely that of a spotter. He stated that at the time the deceased made the transaction and left the bank, no one else apart from accused three left the bank.

[58] This witness stated that the recording system inside the bank is a Hikvision system. The cameras are connected to a DVR, which stores the recorded footage automatically. The recording system is kept in a server room. He gained access to the server room through the branch manager. He made a download of the footage and made it available to the police. There was no tampering with the footage whilst under his control.

Givemore Machaka

[59] This witness testified that he is the facilities manager at Zamokuhle hospital and he is the only person mandated to access the camera system. He stated that Sgt Kwenaithe approached him and as a result, he made the downloads as reflected on exhibit E with specific reference to photos 67 to 86/ Exhibit 10. He downloaded it on a memory stick and handed it to Sgt Kwenaithe. He stated that the camera system is a Hikvision system which has been in operation since 2016 and which is self-operating. There is no human intervention in this process. He stated that the hard drive is kept under lock and key in the basement of the hospital, and only he can access this room. He stated that the time indicated on the video footage is accurate because the hospital cannot afford interruptions in the power supply, as a result, the hospital has a UPS system as a back-up power supply. He stated there was no tampering with the footage. As regards photo 67 on exhibit E he stated that the time there is 12:34:49. He stated this photo depicts the correct time when the BMW of accused three arrived at Zamokuhle hospital.

Constable Raselomane

[60] He testified that he is the investigating officer in this case. He drew a document from the NaTIS system regarding the registration number HV32JT GP which is the registration number of the VW Polo. The result of his search was that the vehicle is not recognised on the NaTIS system.

Colonel Matukudu Samuel Mashegoane

[61] This witness testified that he is a colonel attached to the biological science section in

Pretoria. It is clear that he is an expert in his field as reflected from the contents of the s212 affidavit which set out his qualifications and experience and which was marked as exhibit CC. As per the table on exhibit CC, this court will concern itself with the results of the swab marked J1 which has kit number 14DCAR5587 packaged in forensic bag PA4004145621 and reference sample marked "Ndimande S T" kit number 20DBAL9042 packaged in forensic bag PA4004879983. The STR-LOCI references in respect to swab J1 and reference sample "Ndimande S T" match in that all 15 STR-LOCI are identical. As a result, the most conservative occurrence for the DNA result from swab J1 kit number 14DCAR5587 is 1 in 2.6 million trillion people. This means there can only be one person with the same result as obtained from swab J1.

Sergeant Hlongwane

[62] This witness stated that he is a photographer and forensic field worker attached to the Local Criminal Record Centre at Kempton Park. In this capacity he attended to the crime scene at 7 Nuwejaarsvoël street and compiled the photo album which was handed in as exhibit B. He processed the crime scene. He lifted the swab J1 with kit number 14DCAR5587 containing suspect human blood. This swab was lifted behind the deceased's vehicle at point J on exhibit B. This swab was put in forensic bag PA400415621 which was duly sealed and safely kept, until it was forwarded to the forensic science laboratory.

Witnesses in respect to count 5 and 6

Constable Makgotlho

[63] This witness was involved in arresting accused three on 7 July 2020 for possession of an unlicensed firearm and ammunition. They went to address 399 Harvest Road Bredell and searched the premises without a search warrant. The unit number of accused three was 11. The security at the gate allowed them access to the complex. He found a 9mm pistol with 13 rounds in it in a washing basket in accused three's unit.

Constable Given Thinavhuyo Makhokha

[64] This witness gave the same evidence as constable Makgotlho.

[65] This concluded the evidence for the State.

Accused 1

[66] He testified that on 28 August 2020 he was in the central business district of Johannesburg where he came to buy some clothes. He was at the MTN taxi rank where he

intended to board a taxi to Tembisa. Whilst he was waiting in the line, certain people were involved in a scuffle. Gunshots went off and people started running away for safety. Whilst running away he was shot at. He sustained three wounds, namely, to his cheek, his back and to his leg. He cannot remember the time when he was shot. He then ran into the main road where he found male persons standing at the traffic lights and he asked them for help. They helped him and put him into the motor vehicle and asked him where he had come from. He replied that he had come from Tembisa. He then took out his cell phone to try and contact his sister. He was not able to contact her, he then started feeling dizzy and regained consciousness at the hospital. He had no knowledge what happened to his cell phone, and suspects that it may have landed up with the people who helped him.

[67] He agreed that Sgt. Kwenaithe found him at the Zamokuhle hospital in Tembisa. He has no knowledge how he got to Zamokuhle hospital or the time that he arrived there. He stated that when he was approached by Sgt. Kwenaithe, she asked him how he had sustained the injury. He then explained to her how he had sustained the injury. Sgt. Kwenaithe then left and returned later that day. She then informed him that he was now under arrest for the robbery that occurred that same day at 7 Nuwejaarsvoel, in Birchacres. She also took his clothes that were stained with blood, without explaining why she took them. She took his clothes whilst he was still at the Zamokuhle hospital and they were never returned to him. The clothes he had been wearing that day were a black jacket, a white vest, light blue pants and tekkies. He stated that although he viewed the video footage presented during the trial, none of the video footage depicts him. He cannot remember how long he remained in the Zamokuhle Hospital, but he remembers that he was transferred to Tembisa Hospital later that afternoon where he remained five days. After he was discharged from Tembisa Hospital, he was kept at the Kempton Park police station. It is common cause that he arrived at the Zamokuhle hospital in a BMW motor vehicle together with accused two and accused three. He stated that he knows accused two as he is his friend. Accused two informed him that he was telephonically contacted by the people who had helped accused one. He knows accused four as he is also his friend. He does not know accused three and got to know him after his arrest. He had no knowledge why he was brought to the Zamokuhle hospital. He stated that he informed the doctor who treated him that he had sustained the gunshot injury at the MTN taxi rank in Johannesburg. One of his family members paid the medical admission fee to the hospital.

[68] He denied ever visiting Northmead square on 28 August 2020 and denies being involved in any of the crimes committed on 28 August 2020 or that he knew the perpetrators of these crimes. He also stated nothing was ever found in his possession. He has no knowledge who the

occupants were of the white VW Polo depicted on the video footage, or to whom it belongs. He also stated that he was kept in custody for thirteen months prior to the blood results being obtained, as a result he believes that the State were certain all along that it was his blood. He had no comment regarding the prior knowledge that Maureen Coetzee had regarding him.

[69] He stated that he heard the evidence that at the scene of the crime something that looked like human blood was lifted and that the swaps taken from the scene of the crime matched his blood. However, he states this did not surprise him, because Sgt. Kwenaito took his clothes and never returned them to him.

Accused 2

[70] Accused 2 testified that on 28 August 2020 he was going from Tembisa to Kempton Park. He was in the company of a mechanic, called Patrow and the reason for going to Kempton Park was to get a quotation to fix his sister's car. Whilst on his way he received a call from accused three who asked him to wait for him at a filling station in Bredel. Accused two accepted a lift from accused three as accused two needed to carry certain items that he was going to buy. Accused three picked him up together with the mechanic and they first went to have something to eat. After they finished eating they went to Northmead square as accused three needed to transfer money from one bank account to the other. When they arrived at Northmead square, accused three asked accused two to put petrol in the BMW and that he would later refund him the money. When they arrived at Northmead square, due to covid, accused two decided he would not go into the mall but waited outside. Accused three later informed him he had forgotten his identity book. They then went back to the motor vehicle. Accused two states he walked down the ramp at Northmead square as he wanted to smoke a cigarette and accused three did not want him to smoke in the car. Accused two cannot remember what time he was at Northmead square. Accused two then received a call on his cell phone. Although the phone screen reflected that it was accused one phoning him, the person on the line was someone else who informed him that accused one had been shot and that he needed assistance. The caller informed accused two that the injured person had informed them that he lived in Tembisa and they wanted to know from accused two to which hospital they must take accused one. This caller was constantly phoning him and they met near the Tembisa mall. This caller was in a silver grey Ford siesta. Accused three parked the BMW behind the Ford siesta and they gave these people who assisted accused one R200. This caller returned accused one's phone to accused two. Accused two then called accused one's girlfriend, namely Mbali and informed her that accused one had been injured and she informed him that they must take accused one to the Zamokuhle hospital. When they arrived at the Zamokuhle hospital the security said they

could not assist accused one, that is when the accused one's girlfriend arrived and filled in all the documents.

[71] Accused two testified that he does know Lindiwe Mkhabela as she was his girlfriend. He confirmed that when the police came to his girlfriend's premises on 1 September 2020 he was also at the premises. These premises belonged to his girlfriend's parents. When the police arrived he and his girlfriend were in the main house and Lindiwe was taking a bath. At 11 AM they heard a knock at the door and Lindiwe opened the door. The police showed her a picture on the phone and they explained they were looking for Phinda Tati. Accused two was then arrested and that is when he saw Ms Maureen Coetzee. Miss Coetzee pointed him out and stated "yes it's him". Accused two was handcuffed and assaulted. The police then went back into the house and asked him where the firearm was. They then asked accused two about a black T-shirt that he had worn. The police did not ask for permission to search the house.

[72] His girlfriend informed the police there was another room, after which Ms Coetzee and his girlfriend went to that other room. Accused two remained in the main house. In this other room the police found two cell phones, a T-shirt and sneakers. The police stated that they were actually looking for this T-shirt and two pairs of sneakers. Accused two confirmed the T-shirt was his as well as one pair of the sneakers. These items were never returned to accused two. No firearm was found in his possession. Accused two was then taken to Norkem Park police station where he was interviewed by a lot of people. He was asked about the shooting of a white person who had been robbed of his money. Accused two stated he knew nothing about that incident.

[73] Accused two confirmed that the photo number 18 which is depicted in exhibit E is in fact a photo of himself walking in the Northmead Square mall. He stated that this photo relates to the day that he accompanied accused three to the Northmead Square mall. He was asked whether he knew the occupants of a white VW Polo to which he replied he did not. He also stated he had no knowledge who had shot and robbed the deceased as he was never at 7 Nuwejaarsvoel street on 28 August 2020.

[74] Accused two confirmed that photo 70 of exhibit E depicts himself and accused three when they arrived at the Zamokuhle hospital to drop off accused one. He confirmed the time reflected on photo 70 is 12:35. He also stated that he has known accused one since 2003 or 2004.

[75] As regards accused two's previous knowledge of Maureen Coetzee, or having met her

before, accused two stated that it was the first time for him to meet her on the day of his arrest when he was interviewed at Norkem Park Police station.

[76] As regards the unknown people who dropped off accused one, accused two stated that it was the first time for him to set eyes on them that day. He also did not take down any contact details of these unknown people. Accused two also stated that in the end, he never bought what he had set out to buy that day, as the day was spoilt from the incident concerning accused one.

[77] During cross-examination accused two stated that he left home situated at 52 Emoyeni, section, Tembisa at around 09h00. He then called the mechanic and agreed they would meet at the Engen Garage. His sister deposited R350 instant money for him which he would use for the taxi and food. The car that the mechanic was fixing was housed at the mechanic's yard in Mqantsa section, Tembisa. This is where the mechanic fixes cars. The car had been towed to these premises two weeks before.

Accused 3

[78] He testified that on 28 August 2020 he was at Nedbank and he was talking on his phone as the video footage reflects, as he is a business man and works with many people. He stated that he knows accused two from 2017 as accused two used to frequent his pub in Tembisa called Si-andi lounge.

[79] At the time of his arrest, accused three lived at unit 11, 399 Bredel, Harvest Road, Kempton Park. He explained that the entrance to the complex does not have security guards, instead it has an electronic security gate that is operated by a remote. He stated that he is the owner of a BMW with registration number VNF393 GP. Accused three stated that his car had a registration plate on the front on 28 August 2020. He stated that only at the time of his arrest in September 2020, did his car no longer have a registration plate at the front.

[80] He stated that on 28 August he phoned accused two to ask him to go out and eat together. He wanted to get rid of his babbalas. Accused two informed him that he was on his way to Kempton Park to fix a motor vehicle. Accused three told accused two that he wanted to go to Nedbank to transfer money from his investment account to his current account. He met accused two at 10:00 at the shops next to Bredel at the Engen garage and they went to eat cowhead at Mam Thembi. They were there about 30 to 40 minutes. Accused two came with another unknown man whom accused three did not really associate with. After eating they went

to Northmead Square. He cannot give an exact time when they arrived at Northmead Square. The petrol gauge in his car showed it was on reserve. Accused two paid to fill up the car.

[81] Accused three stated that the person who alighted from his vehicle at the garage is the mechanic but he did not ask him where he was going to. Accused three then drove his car to the parking at Northmead square. In the car was himself and accused two. He told accused two that he was going to the bank and accused two said he would wait for him. Accused three stated that he and accused two did not enter the mall together. He stated that when he entered Nedbank he did sign the covid register and did insert his name. When he entered the bank he sat at the back. He did not notice the deceased or his wife. He stated that he then realised that he did not have his small card holder with him which contains his bank card and Identity document. His wallet was in the car.

[82] Accused three denied that he was observing the deceased in the bank. When asked how long he was in the bank, accused three once again conveniently could not give an answer, later he said it was 5 minutes, then he agreed it was 3 minutes. He agreed that when he exited Nedbank he turned to the right as he was looking for accused two. Accused two was doing window shopping and he told him that he had forgotten his card and they must leave. He denied looking back to see where the deceased was going and he denied following the deceased in order to spot the vehicle he was driving.

[83] Accused three stated that when they left the parking, accused two and the mechanic where in his vehicle. The mechanic entered his vehicle at the parking lot and sat in the front passenger seat and accused two sat behind. According to accused two, when they left the mall accused three received a call and accused two said "*ewish*" and then accused three noticed that accused two was no longer himself. That is when accused two informed him that a friend of his had been shot in Johannesburg and that people from Johannesburg were bringing his friend to Tembisa. Accused two then told accused three to drive to Birch Acres where they met these people just after the Birch Acres mall at a bus stop.

[84] Accused three testified that photo 54 on exhibit E which depicts a BMW driving past on 14th avenue, is not his vehicle as his vehicle had a registration plate in front and the vehicle depicted on photo 54 clearly does not have a registration plate. He also testified that he did not see the deceased's bakkie in front of him. He denied following the deceased's vehicle.

[85] Accused three testified that when he left Northmead Square his intention was to go home to fetch his card, however due to the call that accused two received he drove to the bus stop at Tembisa. When they got there accused two alighted from the vehicle and went to the other vehicle which was a silver Ford. Accused three told the mechanic to move to the back seat and the unknown people assisted accused one to come into accused three's motor vehicle. Accused two and the mechanic then got into the back seat of accused three's car. He testified that the closest hospital would have been Zamokuhle hospital. He then put on his car lights and hazard lights and drove to the Zamokuhle hospital. Before he parked and entered the hospital grounds, accused two and the mechanic alighted from his car. After dropping off accused one, accused three drove off with accused two and the mechanic. Accused three disputed that the mechanic is accused four before court. He also did not know anything about following a Volkswagen Polo white in colour, or anything about the occupants therein. He denied following the deceased up to 7 Nuwejaarvoel street and denied being involved in the robbery and shooting of the deceased. He denied being in possession of a firearm on 28 August.

[86] Accused three agreed that he pointed his BMW to Captain Mthetwa on 13 September 2020 at the address 4714-5 Manyaba Street. He stated that he kept the car at this address or his mother's address, as he could not keep it where he lived as they are only allowed to keep one car where he lives and he kept the Ford Focus at his residence.

[87] He stated that at the time of his arrest the police asked him what shirt he had been wearing on 28 August and he pointed out a blue and white striped top. He denied wearing a red and white striped shirt on 28 August 2020.

[88] He stated that the nearest hospital to Nuwejaarsvoel street is the Arwey hospital and not Zamokuhle hospital. Accused three was shown an aerial photo of Zamokuhle hospital, which was marked exhibit FF. Accused three pointed out Abram O Tiro Crescent which is the road that runs parallel to the entrance where accused three offloaded accused one. He stated that accused two and the mechanic alighted at position X2 and X3 and he marked this on exhibit FF. Accused three also explained the route he took after he dropped off accused one.

Count 5 and 6

[89] As regards counts 5 and 6, accused three testified that he resides at unit 4 at 399 Harvest Road, Bredel, Kempton Park and he stated that Captain Mthetwa took pictures of unit 11

[90] He stated that he was arrested for the firearm in July 2020. He stated that there is no security guards where he lived and that there is merely an electric gate that is remote

controlled. This witness stated that Makgotlo lied about accused three living at unit 11. Accused three handed up a statement issued by the Landlord called Tobi, marked as exhibit EE. This statement was issued in July 2020 and it reflects unit number 4 as being the unit where accused three lived. According to accused three, the police gained access to this complex by breaking open the gate. He denied that the police found a firearm in a washing basket in his unit. Accused three's version is that the firearm was found at Zakhele's house at Mqantsa. He denied being in possession of this semi-automatic firearm.

Tobie Schlebusch

[91] Accused three called Tobie Schlebusch who testified that accused three rented premises at 399 Harverst street and he was living in unit 4, not unit 11. A video was shown from his cell phone which shows clearly that there were no security guards at this complex and that on 7 July 2020, the police did in fact force open the front security gate at the complex to gain access.

Sihle Khumalo

[92] He testified he knows accused three as he works for him. He remembers the incident that occurred on 7 July 2020. The police broke open the security gate. He stated that in Zakhele's residence the police found a firearm in the washing basket. He confirmed Zakhele ran away after the firearm was found.

Accused four

[93] Accused four stated that he knows accused one and two. He only met accused three when he was in prison. He knows accused one after attending the same primary and high school. He knows accused two because they both attended initiation at the same time. Accused four stated that he has not gained weight since 2020 and neither has he gained weight since 2018. He disputed that he has knock knees. He also disputed that his hips are wider than his shoulders and that he leans forward when he is walking. He also denied having shaved his goatee beard. In fact, he stated he never had a beard or a moustache. He denied that he walks with a brisky walk or that he has a slightly bigger bum. He was adamant that Mrs Coetzee is making a big mistake in identifying him from prior video footage.

[94] He testified that on 28 August 2020 he was in Soshanguwe as he had gone to visit Billy Mashaba who is a traditional leader. He arrived on 24 or 25 August 2020 and returned home around 30 August 2020. He stated that the reason for his visit to the traditional healer is because he is having a calling and he is battling to connect with his ancestors and in addition to that, he is suffering from swollen feet. He stated he is also a diabetic.

[95] Accused four disputed that he had previous interviews with Mr De Villiers or Mrs Coetzee. He disputed having had three close interviews with Mrs Coetzee on the following dates, namely, 3 hours in 2018, half day in February 2020, a 1 to 3 hours interview between 2018 and 2020. He disputed having an interview with Mr De Villiers for 1 to 2 hours in February 2018, or a second interview in February 2020 for 1 to 2 hours.

[96] He disputed that he arrived at Northmead Square in the BMW of accused three on 28 August 2020. He disputed he is the person seen on photo 6 or photo 7 of exhibit E. He stated he has never owned clothing depicted on these photos. He disputed having entered First National Bank at Northmead mall. He denied being the person depicted in the photos at First National Bank or at Zamokuhle hospital. He denied being at the premises 7 Nuwejaarsvoel on 28 August 2020. Accused four says that if it was him in any of these photos, he would have been identifiable by a scar on his eyebrow. He stated he was arrested on 4 October 2020 and Captain Mthetwa charged him for these offences.

Babane Philip ('Billy') Mashaba

[97] Mr Mashaba was called by accused four as his witness. He testified that he is a traditional healer in Soshanguwe. He confirmed that accused four is a client of his and he has treated him in the past. He stated that he treated accused four the last time during covid around August 2020. He stated that accused four arrived with his mother on Monday 24 August. Accused four stayed behind as he had some work to do on him. Accused four left on the Sunday. Accused four was suffering from ancestral calling and needed training to become a traditional healer. Mr Mashaba testified that when someone has problems with an ancestral calling it manifests itself in physical ailments like headaches or in the feet.

This concluded the evidence for accused one to four.

Constable Raselomane

[98] Constable Raselomane returned to testify when the court in terms of s 186 of Act 51 of 1977 requested that evidence be placed before the court in regard to the cell phones of accused two and three. The court felt it was in the interests of justice to hear this evidence.

[99] Constable Raselomane testified that he obtained the records of accused two's cell number which was 0817337648. He obtained these records from Telkom. He stated that the Rica information on this number reflected that the phone belonged to Gullu Shakh, a Lesotho

national, residing at 75 Bree street, Johannesburg Gauteng and the effective date was 21 July 2020. He concentrated his evidence on calls made by this number on 28 August 2020. From 08:00:09 to 16:01:24 the handset with number 0817337648 was stationary at the Lekaneng section in Tembisa.

[100] As regards accused three's cell number which was 0630193482 he stated that the Rica information on this number reflected that the phone belonged to Nokuthula Sibeko and the effective date was 9 March 2015. He concentrated his evidence on calls made by this number on 28 August 2020. He testified that the third and fourth call made on this date was at 10:19:11 and was picked up from base station Kaalfontein, which is point 2 of exhibit KK. The fifth and sixth calls at 10:21:38 were picked up at base station Mooifontein, which is point 3 on exhibit KK. The seventh and eighth calls at 10:41:13 were picked up at base station Chloorkop and Neuton road, which is point 4 on exhibit KK. The ninth and tenth calls at 11:01:16 were picked up at base station DB Schenker at point 5 of exhibit KK. The eleventh and twelfth calls at 11:10:58 were picked up at base station Brentwood Park Benoni on point 6 on exhibit KK. The thirteenth and fourteenth calls at 12:20:31 were picked up at base station Tshenolong on point 7 on exhibit KK. The fifteenth and sixteenth calls at 13:12:13 were picked up at base station Ibaxa on point 8 on exhibit KK.

[101] Accused three re-opened his case and he came to testify and stated that the number 0789309808, which constable Raselomane said was his, was a lie. He stated this phone number belonged to the mother of accused one's children. He stated the number 0630193482 belonged to his ex-wife. He disputed the accuracy of exhibit KK and handed in documentation to show that there is another Kaalfontein closer to Brentwood Park.

EVALUATION OF THE EVIDENCE

[102] There is no direct evidence linking the four accused to the crimes committed as listed in counts 1, 2, 3 and 4 and accordingly the State is solely relying on circumstantial evidence. In the matter of *R v Blom*¹ the Supreme Court of Appeal established two cardinal rules. The first rule is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Secondly, 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 doubt whether the inference sought to be drawn is correct. The learned authors Zeffert DT, Paizes AP and St. Q Skeen A in *The South African Law of Evidence* state that circumstantial evidence is no less cogent than direct

¹ *R v Blom* 1939 AD 188 at 202 and 203

evidence. It can in many instances be more compelling.² Each case must be determined on the facts presented as there are cases where the inferences will be less compelling and direct evidence more trustworthy.

[103] The circumstantial evidence is to a large extent based on the video evidence placed before this court. Initially, the defence attacked the reliability of the video footage presented in the form of exhibit E and exhibits 1 to 10, as well as the identification by Mrs Coetzee of certain of the accused. It is now apparent that what was presented in these exhibits are no longer in dispute, in that it is not disputed that accused two and three were present at Northmead Square or that the mechanic is seen on the video footage inside FNB. What is still in dispute is the identity of the robbers, as well as the identity of the third occupant of the BMW on the day of the robbery. The State alleges accused one to four were involved in the robbery, whereas, accused one to four dispute this.

[104] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others*³ the Supreme Court of Appeal held that:

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on (a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

- (i) The witness's candour and demeanour in the witness box,
- (ii) His bias, latent and blatant,
- (iii) Internal contradictions in his evidence,
- (iv) External contradictions with what was pleaded on his behalf or with established fact or with his own statements or actions,
- (v) The probability or improbability of particular aspects of his own version,
- (vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in

² *The South African Law of Evidence*, Zeffert DT, Paizes AP, St. Q Skeen A, Lexis Nexis Butterworths, 2003 at page 94

³ *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA) paragraph 5

discharging it'.⁴

[105] When considering a criminal case, it is important to consider the totality of the evidence and then to assess the probabilities emerging from the case as a whole. The court must evaluate the evidence of the State and the defence.

[106] The witness Mrs Fiona Nutall-Smith impressed the court.

[107] The witness Mrs Coetzee, although she admitted to the counsel for accused one and two that she is not an IT expert, she still impressed the court with her observations. She stated that being an information analyst requires more experience than qualifications. She never hesitated in answering all questions during cross-examination and she maintained her version presented in her evidence in chief. It is important to note that despite attacking her expertise regarding the identification of accused two, it later became apparent that accused two admitted that it was him on the footage at Northmead Square and the hospital.

[108] She maintained her version that the BMW of accused three seen leaving the parking lot is the same as the BMW spotted 200 metres and 30 seconds later on the LPR camera depicted in photo 54 of exhibit E. She confirmed once more that the times on the various footages will differ because you are working with different systems and because of the power outages. She stated that working with these systems for 20 years she looks at the sequence of events as she cannot always rely on date and times. She indicated that an entity like a hospital's system would be more reliable, than that of a small business like Rebar Man. Throughout her evidence it was never disputed that Mrs Coetzee had prior knowledge of accused one and two. She maintained her version that the VW Polo and the BMW were both at the beginning and at the end of the route. What happens in between is not important.

[109] During the cross-examination by the legal representative for accused three and four she denied that because she assumed that a certain suspect is on the scene, others previously associated with him would by default also be suspects. Mrs Coetzee maintained her version that it is accused four seen at Zamokuhle hospital based on the way he stands, walks and his mannerisms. She did this by comparing accused four to previous bank footages.

[110] She maintained that 1 minute is more than enough time to commit a robbery, even if you have to load a wounded robber into a vehicle. She stated she investigates around 120 robberies

⁴ Ibid paragraph 5

a year. It is important to note that at no stage was it ever put to Mrs Coetzee during the cross-examination that the mysterious man wearing the reflector pants was in actual fact the mechanic called 'Patrow'. It was also never put to her that accused four would deny that she knows him from before.

[111] She stated that SABRIC is an institution that creates a platform for the collaboration of all major banks and law enforcement to combat crime within the banking industry. She confirmed that this collaboration would not affect her objectivity, in fact it is an advantage as she can give guidance to the police what to look for.

[112] Lindiwe Mkhabela impressed the court. She was an honest witness. It is important to note that it was not put to this witness that accused two was going to meet a mechanic on 28 August 2020. If anyone should have known the movements of accused two on that day it would have been his ex-girlfriend, yet nothing was put to her about accused two going to buy parts for a car.

[113] Doctor Maponya impressed the court. When confronted by accused one's counsel that if a patient is in pain he cannot narrate a history, doctor Maponya confidently answered that pain has nothing to do with your mental faculties.

[114] As regards the evidence of sergeant Kwenaithe, although there was no objection initially against the exculpatory statement made by accused one to this witness, it later transpired that the accused raised the aspect that he was not warned of his constitutional rights. This led to a trial within a trial being held. The Court ruled the statement was admissible. The Court confirms that interlocutory finding. She repeated that when she first met accused one she did not take a statement, she just spoke to him out of concern for his injuries and not as a suspect. As a result of what accused one told her that he was shot at the Joburg taxi rank she went there and spoke to a lot of people doing business at the taxi rank, and was eventually referred to a Queue-marshall at the MTN taxi rank who stated that there had been no shooting there the day of 28 August 2020. She appeared very confident in answering the questions put to her on behalf of accused one and two's counsel. She denied that there is another taxi rank near Luthuli house. This court was impressed with all the investigations that sergeant Kwenaithe did as she also went to Johannesburg Central police station where she spoke to someone at the charge office and also perused their register. It was put to her that Johannesburg Central was not the only police station that would receive such a complaint, upon which she insisted that it was. It was further put to her that many police officers dealt with him and his clothes, to which she responded that she

was the one who dealt with him and seized his clothes. She did not separate the clothes as they were full of blood. She put them in a plastic bag and booked them into the SAP register. In this regard exhibit S of the SAP 13 register reflects same. As regards accused two, it was put to sergeant Kwenaithe that accused two was only arrested because of footage at the Northmead Square mall, to which she replied that it was also because his presence was seen on the footage at the hospital. This witness impressed the court.

[115] Warrant officer Naidoo was aware of the taxi rank at the old Luthuli house address and he stated this was wanderers taxi rank. He was adamant that he never heard that there were taxis available at the MTN taxi rank that would go to Tembisa. He once more confirmed that shootings are not under reported. If it does not occur on the data base, it did not happen. This witness impressed this court.

[116] Constable Mtshali impressed this court. He was adamant that accused two told him he had hidden the clothes in the spot where they were found. He did admit that this part was not reduced to writing in a statement. If constable Mtshali wanted, he could have said these clothes were found on a bed or chair in that shack, however he did not. There is no reason for him to falsely implicate accused two.

[117] The witness Patrick Dingindlela impressed this court. He could easily have said he saw all the accused before court on the said day, instead he said he could not recognise anyone of them. This shows his honesty. As to his reliability, his observations of the VW Polo as well as his description of the clothing of the man who stood at the gate is very similar to that worn by Patrow at the Zamokuhle hospital, the only difference is that Patrow is wearing a dark blue jacket at the hospital and not a black jacket. Mr Dingindlela's observation of a black jacket still reflects that it was a dark jacket, which is not far off from that which Patrow wore.

[118] The witness Paul Powel impressed the court. There is no evidence of him having tampered with the footage. He stated that sometimes the cameras malfunction and have to be re-booted. Although he is not an IT expert, he is familiar with the system, and has been working at Northmead Square for 10 years.

[119] The witness sergeant Mazibuko stated that he received training to do the buccal samples. He took the swab from accused one at Tembisa hospital. His colleagues were present. He used a swab from the swab kit, of which the serial number appears on Exhibit L. He took the

swab from inside the cheeks of accused one. He already had 13 years experience in the police force when he took these swabs. The swabs were sealed in exhibit bag PA4004879983. This witness impressed this court.

[120] Captain Mthethwa during cross-examination was adamant that the BMW seen on photos 3 to 6 and 8 of exhibit E does not have a number plate. He was also adamant that the shirt worn by accused three as seen on the footage of Nedbank is red and white and not black and white. This court could not find any reason not to find this witness a credible witness.

[121] Mr Ettiene De Klerk during cross examination was adamant that the BMW did follow the deceased's vehicle and that it had no number plate. He stated that the only way the LPR would not pick up the registration plate is if the registration plate was altered, however it would still pick up one or two digits, however, in this instance it did not pick up any letters. He also stated that it would take a matter of seconds to drive from Northmead Square to 14th Avenue. This witness impressed the court.

[122] In considering the evidence of Collen Mazibuko it is clear to this court that he and Patrick Dingindlela differ with each other as regards to how many shots were fired. One must bear in mind that Patrick Dingindlela testified that after the first shot was fired he immediately ran away to find refuge from the shots being fired. It is clear Collen Mazibuko remained where he was, which means Mr Mazibuko observed the scene of the crime for a longer period of time. It is clear that the two eye witnesses observed the scene from different points and even though they both state they heard a different number of shots and that Mr Mazibuko said two of the occupant's shot towards the deceased whereas Mr Dingindlela said it was only one, this court does not find this a material contradiction, as Mr Dingindlela may have run away before the second man fired shots towards the deceased. It is true that Mr Mazibuko believed the robbery took 2 to 3 minutes as opposed to Mr Dingindlela who stated it took 1 minute, the fact is they both state this robbery happened very quickly. They both corroborated each other that this incident happened at 12:00 and that a VW Polo followed the deceased's car as it entered the work premises and that the deceased was shot by the occupants of that VW Polo. Neither Mr Dingindlela or Mr Mazibuko said it was any of the accused before court, therefore this court finds Mr Mazibuko a credible witness.

[123] The witness Neill Edmonson impressed the court. He was an honest and reliable witness.

[124] The witness Everhardus Johannes De Villiers testified that he had an independent memory of accused four from interviews and watching previous footage from banks. It is true that his observation regarding accused four having knock knees and that his hips are wider than his shoulders is questionable, however, the remaining aspect of his evidence is credible. He was still adamant during cross examination that the person he saw on the video footage of 28 August 2020 is accused four. As regards the manner in which accused four walked, this court will deal with this part of the evidence in more detail when this court evaluates accused four's evidence.

[125] The witness Brian Potgieter was adamant during cross examination that accused three was observing the deceased when the teller handed him the money. This happened at 11:31:01 according to the video footage and accused three left the bank at 11:31:07, after the deceased had put the money in his pockets. This witness was adamant that he did not believe accused three was there to complete a transaction. There was no reason for this court to reject this witness's evidence.

[126] The witness Givemore Machaka impressed this court. There is nothing to dispute the accuracy of the time when the BMW of accused three arrived at Zamokuhle hospital.

[127] The witness Colonel Mashegoane was cross examined at length by accused one's counsel with the insinuation that although he had signed the s212 affidavit it was not solely his work that contributed to the conclusion reflected on the s212 affidavit. Colonel Mashegoane stated that the DNA system allows different analysts to work on the result jointly. Different analysts work on the system using the quality management reporting system to reach the final result which he was reporting on. He stated it is clear that team work results in the final conclusion being obtained. He stated that he works like a project manager and checks that everything was done correctly. This witness impressed this court. There is no reason not to accept the findings on exhibit CC. The fact that a team of analysts work in order to achieve this final result is not foreign. There was also no conflicting evidence to suggest that these results were contaminated in anyway. If the defence wanted to challenge the calibration certificates, it should have done so and led evidence to support the existence of such calibration not having been done. In the absence thereof, this court accepts the calibration was in order. In fact, this witness stated that the genetic analyser was indeed calibrated. This witness impressed this court with how the statistics are captured and how the various barcodes are feed into the computer.

[128] Sergeant Hlongwane impressed this court. He explained that the reason why the serial number of the swab C1, on photo 20 is the same as J1 on photo 46 to 48 of exhibit B, is that

there are two swabs contained in the collection kit.

[129] The investigating officer constable Raselomane was called twice. As regards his first testimony regarding the retrieval of the Natis system information, this court could not find any fault with his evidence. As regards the second testimony which was presented when the court called a witness in terms of s186 of Act 51 of 1977, there are certain aspects where he clearly made a mistake. These were in respect to the position of Kaalfontein and stating that the cell number 0789309808 belonged to accused three. It is clear that the cell number with number 0789309808 belonged to the mother of accused one's children. As to whether this was a genuine mistake or a deliberate attempt to falsely implicate accused three, this court finds it was a mistake. Had constable Raselomane wanted to implicate accused three falsely, he could have done this the first time he testified. He did not do that. In fact, the rest of the information that he testified about is information that was derived from Telkom and MTN.

The witnesses in respect to count 5 and 6

[130] Both the witnesses constable Makgotlho and constable Makhokha did not impress this court. It is clear that they were both lying when they said the security personnel at 399 harvest road gave them access to the complex. From the video footage shown in court, which Mr Schlebush provided, it is very clear that they forced the security gate open and that there was no security on duty. In addition, they both lied about finding a forearm in unit 11, as that is not the unit of accused three. Mr Schlebush confirmed accused three lived in unit 4. Due to their lies, their evidence is unreliable and is rejected as false.

Accused 1

[131] During cross-examination accused one, although denying his involvement, he accepted that the shooting incident at Nuwejaarsvoel street happened at 12 o'clock. He could not dispute the accuracy of the cameras at the Zamokuhle hospital, so this court accepts that he arrived at the hospital thirty minutes after the shooting, namely at 12h30. This accords further with the time that the doctor saw him, namely at 12:43, a few minutes later.

[132] Accused one did not impress the court as regards the incidents that happened at the MTN taxi rank. Firstly, he does not remember the time that he arrived at the taxi rank. Later he contradicted himself and stated it was in the morning that he arrived at the taxi rank. Secondly, he could not remember how many gunshots went off at the taxi rank. Thirdly, he could not remember which injury he sustained first. His version of what happened after he was shot is very vague. He states that there were two occupants in a motor vehicle that initially assisted him, yet,

he gave no explanation as to how he landed up in the car with accused two and three. If according to his version he could not get hold of his sister, how is it that he managed to explain to these unknown people who assisted him to get hold of accused two. This remains totally unexplained. If accused one cannot remember anything from the time he was helped until he was brought to the hospital, then this glaring inability to explain how unknown people could randomly pick a number and phone accused two seems totally implausible. In addition, if accused one needed help, the logical person to phone would have been his girlfriend, wife or partner, yet, somehow, these unknown people phone accused two who did not even have a car that day. This all seems improbable.

[133] After realising that this earlier version that he could not remember anything from the time he was picked up by these unknown people, up to Zamokuhle hospital, (due to his unconscious state), would not hold water, accused one then changed his version completely and he gave a vivid explanation how he was put in the front seat of accused 3's vehicle and that he was transferred from the one vehicle into accused three's vehicle and that this transfer occurred between the Plaza and the Tembisa mall. He also remembered that the people who assisted him phoned accused two. This is a lot of things that he suddenly remembered, which during his evidence in chief he had no knowledge of. This suggests that this later part of his evidence was all a recent fabrication to possibly align himself with the version that would be proffered by accused two and three. This version of being transferred from one car to the other was never put to the State witnesses. Accused one's wife/partner, namely Mbali, was also never called to testify that she had given instructions to accused two to take accused one to Zamokuhle hospital. In the absence of this witness being called, this court draws a negative inference and rejects this version of accused one as false and not reasonably possibly true.

[134] This complete contradiction from his evidence in chief as compared to his cross-examination places a serious question mark as regards the credibility of accused one as well as to the reasonable possibility of his version being true. The reasonable possibility of his version being reasonably possibly true is further compounded by why he was taken to a hospital in Tembisa as opposed to one of the many hospitals in Johannesburg.

[135] In regard to the initial reason given by accused one why he was taken to Tembisa hospital and not a hospital in Johannesburg, accused one answered that it is the unknown people who assisted him and decided to take him to Tembisa, because they heard him say he lived in Tembisa. If someone is bleeding profusely, as accused one did, then the normal and logical thing to do would be to bring him to the closest hospital in Johannesburg, not to drive a further forty

kilometres amounting to thirty-five minutes to Tembisa. In addition, if accused one was bleeding profusely, it is not logical that the people who helped him would first stop and meet accused two and three at the Plaza and transfer him from one vehicle to another. The logical thing to do would be for the people who assisted him to immediately drive directly to the Zamokuhle hospital and drop accused one there.

[136] Accused one's counsel argued that the version of accused one should not be prejudiced merely because he exercised his right and choice to be taken to Zamokuhle, because the family of the deceased chose to take the deceased to Milpark hospital, which is much further away than the Zamokuhle hospital. The difference between accused one and the deceased is that accused one's version is that he was driven 40 kilometres to get to a hospital, as compared to the deceased who was airlifted to Milpark hospital in a few minutes.

[137] If accused one was assisted by these unknown helpers at the Johannesburg taxi rank, then the logical place for him to have been brought for medical attention would've been one of the hospitals in the Johannesburg area, yet this doesn't happen, instead he was taken to a faraway hospital in Tembisa, this simply does not make logical sense.

[138] It is more probable that he was nearby accused two and three just after he was shot, and that is how they immediately brought him to the nearest hospital namely Zamokuhle hospital which is in Tembisa. This version is more probable. Even though Arwey hospital and Tembisa hospitals were other options, it is clear they preferred the Zamokuhle private hospital.

[139] Accused one in his evidence in chief stated that he could not explain what happened to his cell phone, so if he had no cell phone how could he have contacted accused two. Later this version changed and he stated he had his cell phone. These contradictions unfortunately impact on the truth of accused one's version making his version completely false and not reasonably possibly true. It is more likely that he was in the presence of accused two and three, who on his behalf then phoned the mother of accused one's kids, namely, Miss Nkosi Mbali, who then came to pay the admission fees at the Zamokuhle hospital. This version is more probable.

[140] The version of accused one is further improbable when one looks at the entry made by the doctor who treated him at Zamokuhle hospital. Doctor Maponya stated that she wrote on exhibit K that accused one told her that he had been shot at the taxi rank in Edenvale by unknown males. Although accused one denies having told the doctor that he was shot at a taxi rank in Edenvale, there is no reason for the doctor to make up such a version. In fact, doctor

Maponya even remembers asking him why he was not taken to a hospital near Edenvale. All the other information on exhibit K with specific reference to his age, namely, that he was 33 years old is correct, so pain could not have affected his mental state. It is clear to this court that doctor Maponya got this information all from accused one and no one else. It is important to note that accused one told doctor Moponya that strangers brought him to the Zamokuhle hospital. This is in complete contrast to the version of accused two and three who state they are the ones who eventually took accused one to the hospital.

[141] It is important to note that it was never put to Dr. Maponya during cross-examination that accused one told her that he had been shot at the MTN taxi rank. When confronted by the State advocate why this aspect was never challenged, accused one stated that he never heard the doctor saying he had stated he had been shot at a taxi rank in Edenvale. The court rejects this version of accused one as not reasonably possibly true. This evidence was clearly heard in court and interpreted to accused one. In addition, there were numerous postponements and adjournments wherein accused one consulted with his counsel. This was a crucial aspect of the doctor's evidence and the basis of accused one's version. For this aspect not to have been challenged, places the accused one's version in jeopardy.

[142] In the matter of *Mkhize v S*⁵ the Supreme Court of Appeal held that:

'It is the duty of the cross-examiner to put all contested points to the witnesses in cross-examination. A cross-examiner who fails to do so runs the risk of having his witness criticised of recent fabrication when that witness later testifies'.⁶

[143] In the matter of *President of the Republic of South Africa v South African Rugby Football Union*⁷, the Constitutional Court held that:

'...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.'⁸

'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.'⁹

[144] Accused one's version of being shot at the MTN taxi rank is not probable for the following

⁵ *Mkhize v S* (390/18) [2019] ZASCA 56 (1 April 2019)

⁶ *Ibid* paragraph [15]

⁷ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)

⁸ *Ibid* page 61

⁹ *Ibid* page 63

reasons. If there was shooting and people were running around, it is most likely that more people would have been shot than just accused one. From the evidence of warrant officer Naidoo, he went to the MTN taxi rank and he reported that no shooting incident was reported. Accused one could not explain why no shooting incident was reported at the MTN taxi rank. The court finds it is more likely that no incident was reported because nothing happened at the MTN taxi rank on 28 August 2020. The version of accused one is further contradictory in that he told doctor Maponya the shooting occurred in Edenvale, whereas to Sergeant Kwenaithe he said the shooting occurred at the MTN taxi rank in Johannesburg. Accused one compounded his versions further by adding it was not the MTN taxi rank that Sergeant Kwenaithe went to investigate it was in fact the taxi rank near Luthuli house. This was now the third taxi rank that accused one had given various State witnesses as to where this alleged shooting incident occurred. Accused one could not give sergeant Kwenaithe a time when this shooting occurred which all suggests that it was a recent fabrication on his part. All these versions of where accused one was shot at a taxi rank is rejected by this court as false.

[145] From the evidence of Mr Machaka, who works at the Zamokuhle hospital, he stated that the time of 12:34:43, which is depicted on photo 67 of exhibit E, is correct. This is the time that accused three's car arrives at the hospital. It is extremely coincidental that 30 minutes prior to this, the deceased had been robbed and shot, not very far from this hospital. The only reasonable explanation, is that accused one was injured whilst shooting the deceased and that accused two and three, who were all close to the scene of the crime, picked up accused one and took him to the nearest private hospital which was Zamokuhle hospital.

[146] Accused one's version in regard to his blood being found at the scene of the crime is that the police took his bloodied clothes and dropped some blood at the scene of the crime. This version is not probable because Sgt. Hlongwane processed the crime scene at 13:40 which is long before the clothes were taken away from accused one by Sgt. Kwanaithe. The notice of rights was explained to accused one by Sgt. Kwanaithe at 16:50 and only then were his bloodied clothes removed. This time was not challenged by accused one, so this Court accepts that the time noted by Sgt. Kwanaithe on the notice of rights is correct. Therefore, if blood was seen, photographed and lifted before the clothes of accused one were removed, the only inference this court can make as the only reasonable inference, is that this blood was already at the scene of the crime when Sgt. Hlongwane photographed the scene and lifted the blood sample. Photo 46 of exhibit B reflects the swab that was removed at the scene and marked as exhibit J1. Accused one's version that his clothes were taken to the scene and blood squeezed out of his clothes onto the floor, to obtain his DNA, is far-fetched and rejected by this court as false and not reasonably

possibly true. This court finds accused one was at 7 Nuwejaarsvoel street and that he was one of the gunmen who opened fire on the deceased and who in turn was shot.

[147] Accused one states that he had left R35,000 with the mother of his children, and that this is how Mbali Nkosi was able to pay the amount of R3900 on his arrival at Zamokuhle hospital. Accused one states that he had this amount of money in his house because he was saving for the tombstones of his mother and grandmother. The court finds this highly improbable that he would keep such a high amount of cash in the house. It is more likely that this amount of cash was available because it had just been robbed from the deceased.

[148] Accused one states that in respect to photo 74 of exhibit E he could only identify accused three who was holding the wheelchair and accused two who was standing between the BMW and the ambulance. Accused one had no knowledge who the person was who was wearing the reflector pants and who assisted to transfer him from the car to the wheel chair. The court finds accused one does not know who this man was and that it was indeed accused four. It is after all common cause that accused one and four are known to each other. It was never disputed during Mrs Coetzee's evidence that she knew accused one, accused two and accused four. In light of the decision of *Mkhize*¹⁰ and *President of the Republic of South Africa*¹¹ this remains undisputed.

[149] After constable Raseloane testified and a correction was made by accused three that the number 0789309808 was not his number, but instead belonged to the mother of accused one's children, namely Mbali Nkosi, this evidence was not disputed by accused one. The MTN records according to constable Raseloane stated that the number 0789309808 belonged to a person by the name "Alex Alex" and the address given was 105 Johannesburg. The Rica date of this cell number was 15 February 2020 which is a few months prior to this offence having been committed. Constable Raseloane stated that the address 105 Johannesburg did not exist. As stated by the State advocate, it would not make sense for accused one, who was a gunman, to still possess a cell phone which may have placed him on the scene of the crime. The State advocate argued that such cell phones are referred to as 'burner phones' as they are discarded immediately after the offence is committed and the actual cell phone they are using is left at home. As stated previously, this court has found that on the probabilities accused one was a gunman as he was shot at the scene where the robbery took place, so it would make logical sense for him to discard this phone. As a result, the version of accused one that his cell phone was lost and that he could no longer remember the cell number is rejected as false. Accused two

¹⁰ Note 5 above

¹¹ Note 7 above

must still have had the number of accused one on his cell phone, so this number could easily have been obtained from accused two.

Accused two

[150] Accused two didn't impress this court with his version. He states his main aim on 28 August 2020 was to go with the mechanic to get a quote and then buy parts for the vehicle that the mechanic was fixing. Yet, when accused three phoned him to accompany him "somewhere" all the urgency to buy the parts seem to dwindle into obscurity. Accused two states he accepted the offer to go with accused three as then he could get a lift to carry the parts he would buy. Even after dropping off accused one at the hospital there is no suggestion that he asked accused three to take him to buy the parts. There is no mention that he asked accused three to take him to Golfwagen to buy parts. Instead he merely accompanies accused three to eat and then to the Northmead Square so that accused three can do a banking transaction. The mechanic, Patrow also tags along with no urgency to accomplish what he and accused two set out to do that day. If accused three needed to go to the bank there was no necessity for accused two or the mechanic to tag along. It is more probable that it had all been planned previously that accused two would accompany accused three to Northmead Square as previously planned to spot a potential victims to rob. The court rejects this version as false and not reasonably possibly true.

[151] It is clear from accused two's version that he did not have money on him, as his sister paid for his taxi fare and would also pay for the parts he was going to buy. This court finds it very strange that he then borrows and uses his girlfriend's card, out of the blue to help accused three to pay for petrol. This whole version seems far-fetched to the extreme.

[152] Accused two elected not to call this mechanic. The mechanic is seen on the video in First National Bank talking on his phone and looking around. There was no discussion between accused two, accused three or the mechanic that the mechanic needed to go to the bank, so this whole version of accused two amounts to a fabrication that does not make sense. No such version was ever put to any of the state witnesses. In light of the decision of *Mkhize*¹², this all amounts to a recent fabrication. There is no logical explanation from accused two's version why this mechanic tagged along and then spent a considerable time in First National Bank. It is more probable that this alleged mechanic was accused four and that it had all been previously planned that he would also act as a spotter on 28 August 2020 and that his role was to spot potential victims in FNB bank.

¹² Note 5 above

[153] As regards accused two's version of using his girlfriend's credit card to pay for petrol in accused three's car, accused two was extremely evasive. When asked by the State about this transaction and specifically exhibit I, accused two kept saying "*he thinks*" exhibit I relates to this transaction. When asked by the state if this exhibit I relates to the transaction of putting petrol in the BMW he once again said "*I think so*". He eventually confirmed that as per exhibit E, with specific reference to photo 3 to 8 that the photos show accused three's vehicle next to the petrol pump. Accused two later agreed he had used his ex-girlfriend's credit card. Why accused kept stating he was unsure about this is extremely strange. When asked by the State that the time of the transaction of exhibit I reflects 11:18, accused two had no comment. He stated he did not know what time they got there. The court finds it extremely strange that he can remember it was 09:00 when he left home and 10:00 when he met accused three at Bredel. He signed exhibit I and the time is clearly reflected as being 11:18. This inability of accused two to remember the time petrol was poured is all a tactic to exculpate himself as it is clear that if this Court accepts the time was indeed 11:18 then it places accused two and three at the Northmead Square at the same time the deceased arrived at Northmead Square. After much questioning in this regard he later agreed that he must have arrived at the garage between 11:18 and 11:28.

[154] Accused two confirmed that he has the telephone number of the mechanic, but he would not be calling him as a witness. He later stated he lost the contacts of the mechanic, however, he agreed he gave the contact details to his sister so that she could call the mechanic to retrieve the car. He was not sure if his sister still had the mechanic's contact details, yet he didn't even bother to ask her if she still had his contacts. Accused two then stated that he would not know where to look for the mechanic, yet he can point this place out where the mechanic works. No attempt is made to brief his legal representative to find this mechanic or to contact accused two's sister to see if she still had the mechanic's details. Accused two when asked if he did not think it was important to find this mechanic replied "*I don't see it being important.*" If there is such a person, then the failure of accused two to call the mechanic allows this court to draw a negative inference that such a person does not exist and could not be called. In addition, due to a failure to put this version of the mechanic's presence to the State witnesses, this court finds it is a recent fabrication and is rejected as false.

[155] Accused two's version of taking the car to the mechanic in the first place and the fact that accused two's sister was going to give him money to buy the parts is crucial to accused two's version, yet once again, accused two did not call his sister to verify this version, which allows the court to draw a negative inference that such version is false and cannot be corroborated.

[156] Accused two stated that after having dropped off accused one at the Zamokuhle hospital, the mechanic was dropped off at Kgansi section and accused two and three proceeded to Emoyeni section. He confirmed that it is himself who is seen on photos at Northmead Square and also at Zamokuhle hospital. When Mrs Coetzee testified this was vigorously disputed. It is clear that when his ex-girlfriend identified him, he had no route of escape and had to admit it was him. It was never disputed that Mrs Coetzee had prior knowledge of him, therefore as stated in the decision of *Mkhize*¹³ and *President of the Republic of South Africa*¹⁴ this remains undisputed.

[157] From the video recorded at the Zamokuhle hospital it is clear that when accused three drove the car to the emergency casualty section, accused two was not in the car and he came walking towards the BMW a short while later. Accused two's version is that he got out 10 meters before the entrance to the emergency section and before the car came into the view of the camera at the hospital as he needed to ask the security guard where to park. This court finds this version strange, because the wording "Ambulance" was clearly written where casualties are to be unloaded. What is further strange is that accused two did not lift a finger to help accused one get out of the car. The people who helped him were accused three, the mechanic and another man who was wearing a rugby or soccer type top and light blue jeans. If accused two was such a good friend of accused one, why would he allow a mechanic who is totally unknown to accused one to get involved in helping accused one. This does not make sense. Accused two's justification for playing a passive role is that he was continually on the phone speaking to the mother of accused one's children, namely, Mbali. What is interesting is that accused three mentioned that this mechanic was very dirty. Why would a dirty person be allowed to be so close to a badly injured person where the possibility of contamination to accused one's wounds could occur is illogical. It seems more likely that because accused one was known to accused four, that accused four played an active role to help his friend get into the emergency section.

[158] Accused two confirmed that at the Northmead Square, as per the video footage, he is seen following accused three, after accused three exits the Nedbank branch and that the time was 11:41:13. Accused two also confirmed that that both accused three and himself walked towards the roof top parking and then walked down the ramp to the parking lot. Accused three walked ahead of accused two and accused two followed later. There is no reason why accused two and three should not walk down together. Accused two gives two reasons why this did not happen. His first reason was that accused three forgot his card in the car so accused two told him to go and fetch the card in his car, secondly, accused two states that he lit a cigarette and that

¹³ Note 5 above

¹⁴ Note 7 above

accused three did not want him to smoke in the car. Both reasons afforded by accused two would not have precluded both accused two and three from walking down the ramp together as it is the open air. It is more probable that accused two was told to remain behind and to watch exactly into which car the deceased was getting into so that he could point it out to accused three. This version would then explain why accused three, who was the driver of the BMW, would need to get to his car quickly and why accused two walking down the ramp at exactly the same time the deceased's car came down the ramp. It was never disputed that the van that passed accused two while accused two is walking down the ramp is the car that belonged to the deceased.

[159] What this Court also finds strange is that accused two and three do not mention that they walked up the ramp to gain access to the mall, so their reason to exit the mall in a different route, namely, to walk to the roof top parking and down the ramp, allows this court to infer that they were following x the deceased to the roof top parking to ascertain which vehicle he was driving. The mechanic did not exit the mall using the ramp, he used the steps that presumably accused two and three had initially used to alight and gain access to the first floor of the banking mall. Therefore, accused two's reason that the steps were far away from Nedbank and that's why he and accused three used the ramp to descend into the parking area is rejected as false and not reasonably possibly true. It is clear the purpose of accused two and three exiting on the roof top parking and using the ramp to descend was to spot the car that the deceased was driving.

[160] Accused two's version during cross-examination is that he made the phone call to the mechanic whilst he was still outside Nedbank. Yet, in his evidence in chief he stated he made the call to the mechanic while he was walking down the ramp. This is a contradiction which remains unanswered.

[161] When questioned by the State as to what exact point on exhibit E he received the call from accused one's phone, accused two answered and said it was when he was walking down the ramp. The video footage shows accused two on the phone whilst walking on the ramp. From the evidence of constable Raseloane, the cell phone belonging to accused two with number 0817337648, for the time period 08:00:09 to 16:01:24, on 28 August 2020, was stationary at Lekaneng section. This means accused two must have used another phone which was never declared to the police on his arrest. As stated by the State advocate, such phones are often referred to as burner phones and are quickly disposed of after an offence is committed so as not to trace the whereabouts of an accused on the day of the offence. As a result of a failure of accused two to give any reasonable explanation why the number 0817337648 was stationary at Lekaneng section, allows this court to infer as the only reasonable inference that accused two

was involved in this robbery and that he discarded the phone that he was using on 28 August 2020.

[162] The version of accused two when he received the phone call from Thato explaining what happened to accused one is not in line with the version that accused three gave in his bail application, which is marked exhibit BB. On page 8 of the bail application accused three stated: *“After the phone call accused two turned to me frantically and directed me to a place where we picked up the unknown person who upon entering my vehicle it was a male person.”* From this extract of the bail application the impression is created that accused two was already in the car with accused three when he received this call. Accused two when confronted with this version, quickly changed his version once again stating that when he was in the car with accused three he received a second call from accused one’s phone. It is clear that accused two was fabricating and adjusting his story at each turn to try and make his version sound more probable, however, this court rejects this version as false.

[163] Accused two states that when Thato phoned him he was informed that Thato is not familiar with Thembisa, so accused two told him he would meet him “in Thembisa along the road”. Accused two further stated that accused one was transferred from the one vehicle into accused three’s vehicle, because accused three knew Tembisa well. If accused two could explain to Thato how to get to Thembisa mall, he could have equally explained to Thato how to get to Zamokuhle hospital. Accused two states these unknown people would not have been able to find Zamokuhle hospital. The court rejects this version of accused two as false and not reasonably possibly true. Accused two made his version even more improbable by stating that they decided to transfer accused one into accused three’s vehicle because it would have wasted more time for these people to follow them from Birch acres to Zamokuhle hospital. This version simply does not make sense, especially if accused one was bleeding profusely. By taking someone out of a car and transferring him to another car, in the condition that accused one was in, is a waste of time and could easily have cost accused one’s life.

[164] Accused two was asked by the State how long it took to drive from Northmead mall to Tembisa mall where accused one was picked up, however, accused two did not know how long it would take. This court rejects accused two’s inability to give an assessment of this time as not reasonably possibly true. Accused two’s answer for not remembering is that it happened long ago. This is completely contradictory to his ability to remember that he left his home that day at 09:00 and that he met accused three at Bredel at 10:00 and that they ate together for forty

minutes which also happened long ago. Accused two's inability to remember the distance from Northmead mall to Tembisa mall is because he was carefully guarding not to incriminate himself, knowing fully well that his version of driving from Northmead mall to Tembisa was not the truth.

[165] It is clear from the footage that when accused three drove the car into the ambulance parking, the people in that car were only accused three and accused one. The mechanic on photo 71 of exhibit E comes from the top right hand corner of the photo as opposed to accused two who appears in the bottom right hand corner of the video footage and is seen on photo 71. When questioned about this, accused two stated that the mechanic had gone to relieve himself. It is clear that this version of the mechanic alighting to relieve himself was never mentioned either in the evidence in chief or in the earlier part of the cross-examination of accused two. Accused two states this was never mentioned as he was never asked about this. This version was never put to any of the State witnesses who commented on the video footage at the Zamokuhle hospital and accordingly, this court finds this is a recent fabrication and rejects it as false. More will be said about this during the evaluation of accused three's evidence.

[166] As regards accused two's version that he was assaulted by Constable Mtshali and his colleagues, when they arrived to search his ex-girlfriend's house is rejected by this court as false. No such version was ever put to Mrs Coetzee who was also present when accused two's clothes were found. Furthermore, accused two had more than two years to lay criminal charges, yet to date he never has. Accused two stated he never lay charges as he had no proof as no injuries were visible. The court, finds no injuries were visible because he was never assaulted. As regards the clothing of the new balance t-shirt, accused two stated that he never hid these clothes. The court also rejects this version as false. There is no reason for constable Mtshali or Mrs Coetzee to make up this evidence.

[167] It is clear that accused two's aim in this trial was to mislead the court right from the start. Mrs Coetzee was cross-examined for a lengthy period of time as regards his identity and that it could not have been him at the mall or the Zamokuhle hospital on 28 August 2020. This shows how devious accused two is. Only after his ex-girlfriend identified him on the footage did he then admit it was him. It is clear that was all a tactic to discredit Mrs Coetzee and delay the finalisation of this trial.

Accused three

[168] Accused three did not impress the court because just like accused two, he remembers clearly that it was past nine when he phoned accused two, that it was 10h00 when he met

accused two and that they spent 30 to 40 minutes at Mam Thembi to eat, yet as regards the time that he arrived at the garage at Northmead Square, to fill up the car, he could not remember the time. This is clearly indicative, like accused two, that when they were asked anything relating to time when arriving at Northmead Square they were both unable to give answers. It is clear to this court that this was all tactics to exculpate themselves.

[169] Accused three's reason to phone accused two on 28 August 2020 is bizarre. He initially stated in his evidence in chief that he knows accused two from 2017 as accused two used to frequent the pub he owned, yet why he calls accused two that specific day is not clear. There is no mention that accused two and three are so close that they see each other frequently and rely on each other for support. Therefore, why would he ask accused two for money to pay for petrol, specifically, since accused two did not even have any money of his own as accused two's sister had given accused two taxi fare for 28 August 2020. It is clear that accused two had to as a result use his ex-girlfriend's credit card to pay for the fuel. The circumstances of this on the impromptu meeting on 28 August 2020 between accused two and three is far-fetched and this court rejects it as false. It is more probable that it was all planned that accused two and three would go to Northmead Square to spot potential victims.

[170] Accused three's version of going to the bank to do a bank transfer does not seem probable. Firstly, his intention was to set off from home that morning to do this bank transaction, yet when he enters the Nedbank he realises his wallet is in the car and he does not even have the small card holder that contains his bank card and identity card. This version does not make sense it is clear that he did not want to go into the bank to do a transfer, otherwise he would have been fully prepared. There is no suggestion that he was so absent minded on 28 August 2020 that he did not know what he was doing. Accused three stated that he spent 5 minutes in the bank, later he changed this to 3 minutes. This is a long time for someone to realise he does not have his bank cards, identity card and necessary documents. In the bail application accused three stated that he had forgotten his bank card, at the inception of his evidence in chief he stated he had forgotten his identity document. Later it transpired that he had forgotten his bank holder which contained both his bank card, identity document and he added, it also contained his business cards. These were all contradictions noted in his evidence. The period spent in the bank is more suggestive that he was observing who was in the bank and deciding who was a potential victim.

[171] On exiting the bank, accused three turned right which is the opposite direction to which he needed to go. What the court found strange is that even though he spoke to accused two, the video footage shows them not walking together like normal people would do, instead the footage

shows accused three walking ahead of accused two. Accused three attributes this fact to the smoking habits of accused two, however, this Court rejects this version as false, because the footage clearly shows that whilst accused two passed Nedbank, following accused three, he was definitely not smoking. There is no communication between them whilst accused two and three was walking in the mall, which is suggestive that all the communication had already taken place telephonically between accused three and two, whilst accused three was sitting in the bank.

[172] Both accused two and three were close to the escalators when they went past Nedbank when they headed towards the rooftop parking, which is where the deceased had parked his car. There was clearly a purpose in not going down the escalators, because otherwise they would not have been able to see in which vehicle the deceased was driving. As for accused three's version that he did not look back to see when the deceased exited Nedbank, the court rejects this as false. The footage clearly shows accused three turning around to look and when the deceased exited, accused three immediately followed him.

[173] The version of accused three all along was that this mechanic was filthy and was wearing dirty clothes and he did not want to associate with him, yet, when accused three drove away from the parking lot at Northmead square, the mechanic sat next to him in the passenger seat and his friend, namely accused two sat behind. The court finds this very strange. This version becomes even more strange, because in accused three's bail application at page 8 accused three stated that after accused two received the call in the car accused two turned to accused three frantically and directed him to a place to pick up an unknown person. For accused two to turn to accused three, it means accused two had to have been sitting in the front passenger seat and not in the back seat. The footage clearly shows that accused two did in fact enter the BMW at the back seat when accused three left the parking lot, which suggests that the version in the bail application was false and not reasonably possibly true.

[174] Accused three's version of when accused two received the phone call alerting him as to what had happened to accused one, was when they were already in the car. This version is in complete contrast to the version of accused two who testified that he received the first phone call alerting him that accused one was shot when he was walking down the ramp and he received the second phone call when he was in the car with accused three. Had accused two already received the first phone call whilst walking down the ramp and before entering the vehicle, then accused two would have immediately told accused three what had happened when he got into the car and accused three would have noticed this panic and change in accused two's appearance, however this is not the version of accused three, as accused three said accused two's appearance

changed only after they were driving away. This contradiction clearly shows this whole version of receiving a phone call about accused one being shot in Johannesburg was fabricated.

Accordingly, this Court rejects accused three's version that accused two received this call whilst accused two was in the car, as false and not reasonably possibly true.

[175] Accused three conveniently could not remember the time that it took to drive from Northmead mall to Birch acres. However, he was adamant that 4 minutes would be too little time to drive from Northmead Square to the point on 14th avenue where the LPR photo 54 of exhibit E shows a BMW driving past. The court rejects this version of accused three as false, if he could not determine how long it would take to drive from Northmead to Birchacres, how can this Court possibly believe his version that it would take longer than 4 minutes to drive a short distance which from the evidence presented by Ms Coetzee is about 200 meters. In fact, it is more probable that for such a short distance it did take about 4 minutes. The version of accused three was compounded further when he recalled that he it took 17 minutes to drive between this bus stop where they picked up accused one and Zamokuhle hospital and that the distance was 10 to 11 kilometres. The only reason he can remember this time and not remember the time it took to drive from Northmead to Birchacres, is because he was fabricating his evidence as he went along and selectively chose which distances would support his version and recall same, while not recalling distances that would not support his version.

[176] Accused three states that when he left the Northmead mall, he was not rushing. The court rejects this as false. The video footage shows that accused three approached the stop street exiting the parking lot and did not stop. Accused three even admitted that he saw the alleged mechanic on the video footage running towards his car. Accused three entered 14th avenue at a very high speed as he must have seen himself that there was oncoming traffic from his left hand side and had he not accelerated he would have collided with the car that was coming from his left side. The video footage shows how this car on his left had to brake in order not to collide with accused three's car. This court finds that he accelerated his speed as he had to keep up with the vehicle of the deceased that had already turned right into 14th avenue.

[177] As regards whether accused three's car had a registration number plate on the front or not, accused three maintains it did on the 28th of August 2020. The State put it to him that the car parked at the Engen garage did not have a number plate and accused three denied this. In fact, he added that the number plate was blurry. This court viewed the video footage with specific reference to photos 4,5,6,7 and 8 of exhibit E. All the other cars parked there had registration number plates and the lettering on those registration plates were blurry. However, the car of

accused three did not have a number plate. During re-examination it was put to accused three that on photo 3 of exhibit E the back left rim of the tyre of the BMW looked a different colour, namely orange. The court looked at the video footage, which includes photo 3 and even though the rim of the BMW did look initially look orange in colour, the colour quickly vanished as the car turned. It was clear to this court that the angle which the sun reflected on the BMW cast different colours on various parts of the car. What remains certain is that this car did not have a number plate in front. This court accordingly rejects accused three's version that his car did have a registration plate in front on 28 August 2020 as false and not reasonably possibly true. This would explain and support why the photo 54 on exhibit E reflects that the LPR did not pick up a registration plate on the BMW that passed in front of this camera at 11:31.

[178] In addition to the evidence that no registration plate was seen on the BMW, there are other identifying features which accused three agreed depicted his car. These were black door handles, silver mags and the silver colour coded side view mirrors. This description is seen the clearest on photo 10 of exhibit E (taken at the Engen garage) and photo 59 of exhibit E which is the footage taken of a BMW passing the business premises of Gate Force on Boomkruiper street at 12:03:27. Both the photos depict the same identifying features of this BMW with the additional characteristic that in both photos no registration plate is seen in the front.

[179] The business premises of Gate force is situated 200 metres from the deceased's business. What is important about the camera at these premises is that on photo 56 of exhibit E, the deceased passed this business at 12:02:34. The white VW Polo passed this same business at 12:02:43 and the BMW passed this business at 12:03:27. It is clear to this Court that the White VW Polo and the BMW vehicle were following behind the deceased's vehicle. This supports the evidence of Mrs Coetzee that the same two vehicles are seen following the deceased's vehicle at the beginning and also the end.

[180] As regards accused three's version that the mechanic drove in the same vehicle as his and that the mechanic and accused two alighted the car at point X2 and X3 respectively on exhibit GG, at the Zamokuhle hospital, does not make sense. If the mechanic was in such a need to relieve himself, he would not have walked further up the road to relieve himself. The photos 71 show the mechanic coming towards the BMW of accused three from the extreme opposite side. It is clear to this court that he could not have alighted at the same spot at accused two as he appears almost 30s after accused two allegedly alighted from the BMW. Therefore, this version of accused three is rejected as false and not reasonably possibly true.

[181] As regards the cell phone usage of accused three and the points where accused three's phone was picked up on the day does not help to clarify accused three's movements on that day. There is nothing to dispute that he was using Whatsapp on 28 August 2020, however, this does not strengthen accused three's version in anyway.

Count 5 and 6

[182] As stated previously, the State witnesses in respect to counts 5 and 6 were not credible witnesses and in light of the fact that the state has not asked for a conviction on count 5 and 6 there is no need to evaluate the evidence of accused three on these counts or the evidence of Tobie Schlebush and Sihle Khumalo.

Accused four

[183] Accused four did not impress the court. When he was asked exactly what medicine Mr Mashaba administered to him he answered "*I cannot recall*". When asked what time he arrived at Mr Mashaba on the Monday, he stated "*I can't recall.*" Later he stated it was after 12 in the afternoon. When he was asked how many where in the queue when he arrived at Mr Mashaba's place he stated "*Can't recall*". When asked by the State if it was more or less than 10 he replied "*Can't recall*". When asked by the State how long he had to wait to see Mr Mashaba he stated "*cannot recall*". When the State advocate asked him where he stayed at Mr Mashaba's place, whether it was in the main house or other rooms he stated "*I can't recall, I don't want to lie*", When he was asked how many other patients other than himself stayed over during this period he stated "*Can't recall, don't want to lie*". When he was asked if he had ever spoken to Mr Mashaba since 30 August 2020, he stated "*Don't want to lie, I do not remember*". It is clear accused four was very evasive with his answers.

[184] Accused four mentioned his mother took him and paid for this period that he was at Mr Mashaba's place, yet he never called his mother to verify this alibi and the court draws a negative inference from a failure to do this.

[185] Accused four states if it was him on photos 80 and 81, which depicts a close-up view of a man, then one would see a scar on his eyebrow. This evidence is nonsensical because the man seen on photos 80 and 81 is wearing a cap, so one would not see a scar.

[186] Although accused four denies that he never met Mrs Coetzee or Mr De Villiers, the court rejects this as false. This version was never put to Mrs Coetzee. It was also never put to Mrs Coetzee or sergeant Kwenaithe that the man wearing the reflector pants was the mechanic called

Patrow. In light of the decision of *Mkhize*¹⁵, this court finds that this version was fabricated at a later stage of the trial and rejects it as false.

[187] This court cannot see any reason why Mrs Coetzee or Mr De Villiers would want to falsely incriminate accused four. If they wanted to team up and implicate all the accused in this matter then they could easily have said they knew accused three as well, yet they never did this. The fact that Mrs Coetzee and Mr De Villiers pointed out accused four is because they knew him from prior interviews. As stated previously, it was never disputed when Mrs Coetzee testified she had met accused two and four before, accordingly this remains undisputed.

[188] Accused four was asked by the State Advocate, if Mrs Coetzee had never met with him, how did she get his name, to which he replied "*Don't know where she got my name*". Mrs Coetzee testified that she had met accused four on three occasions and that the shortest period of time she spent with him was 1-3 hours and the longest period was half a day. This evidence also remains undisputed and the court accepts it as the truth. The fact that Mrs Coetzee identified accused two whilst he too had a hat and a mask on, which was verified by accused two's girlfriend and later confirmed by accused two himself, enhances the reliability of Mrs Coetzee's identification in respect to accused four.

[189] Accused four stated that he has been suffering from swollen feet for 7 years. He stated that he goes to the clinic every month and his feet do pain, in fact he cannot wear shoes. He stated that "*when I put my foot on the surface I get pain*". He stated that when he is at home he wears slip slopes and should he wear sneakers, he does not fasten them tight. This admission of accused four that he has difficulty walking, lends credibility to Mr Everhardus De Villiers's perception of a person that "*gives the impression he has knock knees.*" Mr De Villiers is not an orthopaedic surgeon, neither is he a podiatrist, neither is he physiotherapist or an occupational therapist. He also did not have any knowledge prior to testifying, that accused two had any personal issues with his feet. Therefore, for Mr Everhardus De Villiers to observe accused four walking with difficulty, giving the impression that he has knock knees, is not that far-fetched anymore. The fact that accused four has pain when walking will create the impression that he walks differently to most people. This court cannot find any reason why Mr Everhardus De Villiers would want to falsely implicate accused four.

[190] Much was made of the fact that Mrs Coetzee and Mr De Villiers are not experts in their field. In this regard the case law is clear, academic qualifications is not a prerequisite for a person

¹⁵ Note 5 above

to express an opinion, and for the courts to except it. In this regard the case of *S v Mdlongwa*¹⁶, a decision of the Supreme Court of Appeal is important. The evidence of these two witnesses as to the identity of the accused is not solely based on their experience and opinion, but also on their personal contact they had with the accused four previously. They both identified accused four independently from each other on 28 August 2020. In addition, they indicated, independently from each other that they had seen accused four on several occasions prior to this incident where they had in depth personal contact with him during interviews. As stated previously, accused four's version of not having had contact with Mrs Coetzee or Mr De Villiers is rejected as false and not reasonably possibly true.

[191] Accused four stated that Mr Mashaba would cut with a razor on top of his foot, above the toes and in front of the ankle. This version of Mr Mashaba cutting accused four's feet with a razor was completely rejected by Mr Mashaba. Accordingly, this court rejects accused four's alibi as being false and not reasonably possibly true.

[192] As regards accused four's phone, accused four stated that the police did track his phone and it showed that he was never near any of the towers where the offence took place and that it showed no contact between accused two and accused three's phone on the day. This version is nonsensical. If his phone was switched off for the duration of his period in Soshanguwe, logically it would not show any tracking to any of the towers where the incident occurred or any contact between accused two and three's phone on the day of the offence. Even though accused four denied that he had another phone, this possibility still exists. This court finds that accused four also possessed another cell phone as the video footage clearly shows that he was talking on his phone in FNB. The phone depicted on the FNB video is clearly a 'burner' phone and that is why it could not be traced.

[193] From the video footage at Zamokuhle, the person wearing the reflector pants takes an active role in helping accused one get out of the car. It is common cause that accused one is known to accused four and this is why accused four is seen helping his friend out of the car at Zamokuhle hospital.

[194] The State witness Mr Dingingdlela testified that the person who had held open the electronic security gate at the deceased's factory was wearing pants with a reflector. It is true that the jacket of the man on photos 74 to 76 of exhibit E is a dark blue jacket, however, the fact

¹⁶ *S v Mdlongwa* 2010(2) SACR 419 (SCA)

remains it is still a very dark colour. This court finds that it was accused four who stood at the gate of the deceased's factory and stopped the gate from closing.

Mr Mashaba

[195] Mr Mashaba did not impress this Court. He was asked on numerous occasions how he remembered that accused four had come to him from Monday 24 August 2020 to the following Sunday and the only answer he gave was *"Each person who comes to my house I recall"*. When asked if he keeps a book to note the dates when his patients come to see him, he replied *"There is an agreement form, they pay a deposit and pay the balance later"*. He later contradicted himself when accused four's legal representative asked him *"You testified 24th August he came for treatment and left, did you check indeed it was the 24th?"* to which Mr Mashaba replied *"I do not know how to assist you. He came on the 24th, we didn't write anything down"*. It appears that Mr Mashaba was contacted in October 2020 in connection with this case. When asked when was he was contacted to testify in this case he stated *"I cannot recall"*. When he was asked when did he hear he had to testify on a specific date he replied *"I'm not sure, I think it was Monday or Tuesday"*. When the State asked him prior to 24 August 2020 when was the last time he saw accused four he stated *"It's kind of difficult as I did not mark it anywhere when he came and what he came for, so I don't have an exact date."* Mr Mashaba contradicted himself because in his evidence in chief he stated he did not write anything down when accused four came to him on 24 August 2020, yet during cross-examination he stated that this specific agreement was at home as he was not asked to bring it. He then contradicted himself and stated that there was no agreement form *"because accused four was not doing anything on credit, there was no need for an agreement form"*. He also contradicted accused four's evidence as he stated that he did not make any incisions on accused four's body with a razor. He later testified that he just pricked certain parts of accused four's body with a thorn, but it definitely was not accused four's feet.

[196] He was vague regarding what physical ailments accused four had. In fact, he did not mention he treated accused four for swollen feet. According to him accused four had shoes on and he was walking properly when he saw him. Therefore, he totally contradicted accused four's evidence about having swollen feet.

[197] He was unable to explain how many other patients he treated on the 24th of August 2020 and it is clear that he mentioned the date of 24th August purely because accused four's mother phoned him and told him to explain where accused four was on 24 August 2020. It is clear to this court that Ms Mashaba was not a reliable witness as he had not reliable evidence to

support that he could remember this date with certainty. He couldn't even remember when he was asked to come and testify. He could not produce the agreement to prove that accused four was treated by him on Monday the 24th August 2020 to the following Sunday. In fact, he stated that "*If a person comes with an ancestral calling I don't write, they just come and go*". He could not remember any dates prior to 24 August 2020 when he treated accused four. From accused four's evidence he states he has not had contact with Mr Mashaba since August 2020, therefore it is clear that he was told this date by accused four's mother.

[198] Its possible Mr Mashaba treated accused four in the past but as to whether he treated him from the Monday 24 August 2020 to the following Sunday the court rejects his evidence as false.

FINDINGS

[199] In the matter of *S v Thebus and Another*¹⁷, the Constitutional Court gave recognition to the fact that common purpose ("a joint enterprise") has two forms. These are:

'The first arise where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'¹⁸

[200] An agreement to commit an offence is generally a matter of inference deduced from certain acts of the accused, done in pursuance of a criminal purpose in common between them.¹⁹

[201] In the absence of an agreement, express or implied, a common purpose may arise from an act of association if the requirements constituting an active association have been individually satisfied. The requirements for this form of common purpose were determined in *S v Mgedezi*²⁰.

[202] The evidence led by the State proves that:

- (a) Accused one's DNA was found at the scene of crime.
- (b) Accused two, three and four arrived at the Engen garage shortly after 11:00 in accused three's car which was a BMW.
- (c) The BMW of accused three has no registration number plate clearly visible on photos 3 to 5, and 8 of exhibit E. On the day of his arrest accused three's BMW still had no number plate.

¹⁷ *S v Thebus and Another* 2003(2) SACR 319 (CC)

¹⁸ *Ibid* paragraph 19

¹⁹ See *S v Moumbaris and Others* 1974(1) SA 681(T) at 687 A and *S v Sibuyi* 1993 (1) SACR 235 (A) at 249 h.

²⁰ *S v Mgedezi* 1989 (1) SA 687 (A) at 705 I- 706C

- (d) Accused two and three were present at the time and place where the deceased withdrew money from Nedbank.
- (e) Accused three was inside Nedbank during the withdrawal, whilst not doing any transaction.
- (f) Accused two and three were 17 seconds behind the deceased and followed him to where his bakkie was parked at the roof top parking.
- (g) The BMW turned in the same direction as the deceased's car out of the parking at Northmead Square, 31 seconds behind the deceased's car.
- (h) A similar BMW is picked up (same colour, make, model, without a number plate) about 200 metres from Northmead Square, 31 seconds behind the motor vehicle of the deceased in 14th Avenue, on photo 54 of exhibit E.
- (i) It is here where the white VW Polo was picked up for the first time, about 5 minutes later, behind the motor vehicle of the deceased on photo 55 of exhibit E.
- (j) The white VW Polo is furthermore also picked up on a camera at Gate Force, in Boomkruiper street, 200 metres from the crime scene, and 8 seconds behind the bakkie of the deceased, and at Montana Furniture opposite the crime scene.
- (k) According to eyewitnesses, the robbers drove a white VW Polo on the day.
- (l) It is undisputed that a man with reflector pants was part of the group of robbers.
- (m) The behaviour of both accused three and four, both occupants inside the BMW of accused three, are in line with the behaviour of a spotter, as testified by Mrs Coetzee, Mr de Villiers and Mr Potgieter.
- (n) The deceased was robbed shortly after he arrived at his business premises, making the conclusion inevitable that he was followed from the bank.
- (o) The clothing accused two wore on the day of the robbery was found hidden a few days later in a shack on the premises where his girlfriend stayed at the time.

[203] This court finds that there was a prior agreement between the four accused on 28 August 2020. This is evident by the arrival of accused two, three and four at Northmead Square and the placement of accused three in Nedbank and accused four in First National Bank to observe potential victims. The constant use of a cell phone by accused two, three and four demonstrates to this court that continual communication ensued between the three accused, which is crucial in order to spot a potential victim. It is true that no evidence was presented by the State demonstrating proof of conversations between accused one, two, three and four on their cell phones, however, as stated previously, accused one, two and four had "burner" phones and such tracing would have been impossible.

[204] In the absence of cell phone evidence linking the phones of all four accused, this court has relied on the video evidence presented by the State. This prior agreement is evident, because after accused three identified a victim, accused four was contacted telephonically to immediately come back to the BMW as they needed to follow the deceased. The meticulous planning and the execution of their prior agreement is manifested by the actions of accused two and three, in that accused three proceeded to fetch the car whilst accused two remained behind to observe in which vehicle the deceased was travelling. Accused two is seen constantly on his phone whilst walking down the ramp. It is clear to this court that this was to keep accused three and four up to date in which direction the deceased's vehicle was driving. This prior agreement is further evident from the fact that the occupants of the VW Polo were contacted once the BMW started following the deceased's vehicle. Soon thereafter, the VW Polo joined the convoy of cars following the deceased.

[205] This court finds that although the BMW turned right in Nuwejaarsvoel street, it had followed the deceased's vehicle all the time and the occupants of that vehicle, although they were not in the premises of the deceased's business grounds, a prior agreement had been reached that the VW Polo would follow the deceased into the business premises. The roll that the BMW occupants had played as spotters, had been executed. As agreed, the duty to rob and shoot the deceased now passed over to the occupants of the VW Polo. As a result, this court finds both the occupants of the BMW and the occupants of the VW Polo had a common purpose to rob and shoot the deceased. This prior agreement to shoot is clear from the evidence of Patrick Dinglelela who states that before the deceased could even finish asking what the robbers were doing in his business premises, he was shot.

[206] The prior agreement between the four accused was that only the vehicle housing the gunmen would follow the deceased into his premises, that is why the BMW turned right at the intersection between Boomkruiper street and Nuwejaarsvoel street. There is no evidence presented before this court that the occupants of the BMW disassociated themselves from what would further transpire. It is clear that the occupants of the BMW were aware that the occupants of the VW Polo proceeded to the premises of the deceased loaded with firearms and that they were prepared to use them.

[207] As a result of a prior agreement and due to the fact that the occupants of the VW Polo were loaded with firearms, this court finds that the occupants of both the BMW and the VW Polo were aware that firearms would be used in the execution of the robbery and that a victim would be shot and killed. Due to this prior agreement between the occupants of the BMW and the VW

Polo, this court finds that the occupants of the BMW and the VW Polo had the intention to make common cause with those who actually perpetrated the ultimate unlawful consequence.

[208] In this matter, the court finds that those who were on the scene of the crime were accused one and four, together with others that were never arrested.

[209] Due to the prior agreement between accused four, accused one and the other occupants in the VW Polo, accused four stood at the electronic gate of the deceased's premises to disallow the gate from closing. It was agreed between accused four, accused one and the other occupants of the VW Polo that the deceased must be shot. This agreement is evident from the fact that various shots were fired towards the deceased. The deceased died as result of multiple gunshot wounds.

[210] In both forms of common purpose, whether it is by prior agreement or active participation, it must be shown that the requisite *mens rea* or fault was present in respect of the remote party. This court finds that accused one had the intention in the form of *dolus directus* to rob and kill the deceased. Although accused two and three were not physically at the scene when the deceased was robbed and shot, on the basis of a prior agreement, the intention to rob and kill is imputed to accused two and three as well. Accused four was at the scene and on the basis of a prior agreement, the intention to rob and kill is also imputed to accused four.

[211] The State did not seek a conviction in respect to count 3 or 4. As stated previously in the judgment, the evidence of the State in respect to count 5 and 6 is rejected as false.

[212] In the result, the following order is made:

Count 1

In respect to count 1, on the basis of common purpose, all four accused are found guilty of murder.

Count 2

In respect to count 2, all four accused are found guilty of robbery with aggravating circumstances.

Count 3

All four accused are acquitted.

Count 4

All four accused are acquitted.

Count 5

Accused three is acquitted.

Count 6

Accused three is acquitted.

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JUDGE OF THE HIGH COURT

Date Heard 18 July to 13 September 2022
Judgment handed down 16 September 2022

Appearances:

| | |
|----------------------------------|-------------|
| On behalf of the State | Adv Le Roux |
| On behalf of the Accused 1 and 2 | Adv Moloji |
| On behalf of Accused 3 and 4 | Ms Simpson |