SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. SS118/2008
DPP Ref. No. JPV2007/416

In the matter between:

THE STATE

and

JOHNSON TSHEPO CHIRWA	Accused 1
DUMISANI SIBUSISO XULU	Accused 2
GILBERT MOSADI	Accused 3
RONNIE MAZWI KHUMALO	Accused 4
CELIWE MBOKAZI	Accused 5
VINCENT DLAMINI	Accused 6

MEYER, J

[1] Mr. Johnson Tshepo Chirwa (accused no 1), Mr Dumisani Sibusiso Xulu (accused no 2), Mr Gilbert Mosadi (accused no 3), Mr Ronnie Mazwi Khumalo (accused no 4), Ms Celiwe Mbokazi (accused no 5), and Mr Vincent Dlamini

(accused no 6), have been arraigned for trial on an indictment containing charges of the robbery of the late Mr. Franz Xaver Richter ('the deceased') of R23 213.35 with aggravating circumstances (count 1), the murder of the deceased (count 2), a conspiracy to rob and kill the deceased (alternative count to counts 1 and 2), the unlawful possession of firearms (count 3), and the unlawful possession of ammunition (count 4). Accused nos 1, 2, 3, and 4 are also charged with attempted bribery in contravention of s 11(2)(b)(iv) read with ss 1, 2, 24, 25, 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (count 5).

[2] Mr. Ntlakaza appears for the State, and accused no 1 is represented by Mr. Ncoko, accused no 2 by Mr. Biyana, accused no 3 by Mr. Mgiba, accused no 4 by Ms. Mogolane, accused no 5 by Mr. Mkhwanazi, and accused no 6 by Mr. Themba.

[3] Each accused pleaded not guilty to all the charges. Accused no 4 made a statement in terms of s 115(3) of the Criminal Procedure Act 51 of 1977. The other accused elected not to furnish plea explanations.

[4] During the course of this trial, the State wished to introduce in evidence various statements that had allegedly been made by the accused and pointings out that had allegedly been made by some of them, and six trials-within-this-trial were held to determine the admissibility thereof. The disputed statements and

notes of the disputed pointings out were removed from the *pro formas* in which they were included until their admissibility was determined at the end of each trial-within-this-trial. When I gave the rulings on the admissibility of the disputed statements at the conclusion of each trial-within-this-trial, I indicated that the reasons for the rulings would be given when judgment in the main trial is given. The reasons in each instance had been prepared before the rulings were made. Such reasons for the rulings are first given in the paragraphs that follow whereafter I return to the main trial from paragraphs 207 below.

[5] The first trial-within-this-trial concerned the admissibility of two statements that had allegedly been made by accused no 2, and one that had allegedly been made by accused no 5. On 19 May 2009, I ruled that these statements were admissible in evidence against their makers. These are the reasons.

[6] The State wished to introduce in evidence a statement by accused no 2, which had allegedly been made before Supt. Richard Ramukosi from 21h30 – 22h28 on 28 November 2007 at the Muldersdrift SAPS offices; a second statement by accused no 2, which had allegedly been made before Dir. Byleveld from 12h38 – 13h57 on 7 December 2007 at the Brixton SAPS offices; and a statement by accused no 5, which had allegedly also been made before Dir. Byleveld from 09h16 – 11h15 on 11 December 2007 at the Brixton SAPS offices.

[7] Mr Biyana, on behalf of accused no 2, objected to the admissibility of the 28 November 2007 disputed statement on the grounds that '… accused no 2 disputes having made the statement at all, that he was compelled to sign for the said statement, and his rights were never fully explained to him …'. The admissibility of the 7 December 2007 disputed statement was objected to on the grounds that accused no 2 '… was assaulted prior to making the said statement … and … his constitutional rights were never explained to him ...'.

[8] Mr Mkhwanazi, on behalf of accused no 5, objected to the admissibility of the 11 December 2007 disputed statement on the grounds '… that she was assaulted and was forced to make a statement …', '… her rights were not explained to her', and '…part of the statement is not what she told the director.'

[9] The State, upon whom the onus rests to establish the admissibility of the various statements, led the evidence of Inspector AJ Joubert, who is the investigating officer, Const. SS Nkuna, Const. EB Senosi, Const. A Munyai, Supt. R Ramukosi, Dir. PEJVS Byleveld, Insp. AM Shezi, and Const. K Letswamotse, whereafter its case was closed. Accused no 2 elected not to testify and his case was closed without calling any witnesses. Accused no 5 elected to testify, whereafter her case was closed.

[10] We were informed by the State counsel that the two statements allegedly made by accused no 2 constitute confessions. Counsel for the other accused,

and particularly Mr Biyana for accused no 2 did not take issue with Mr Ntlakaza's classification of the statements as confessions. We had not had insight into the statements and accordingly accepted their labelling as confessions.

[11] The statements that had allegedly been made by accused no 2 may not be admitted, unless they were proved to have been made by him freely and voluntarily, while he was in his sober senses, and without having been unduly influenced thereto (the requirements of s 217 of the Criminal Procedure Act). They must also, in terms of the provisions of s 35 of the Constitution of the Republic of South Africa, be excluded if they were obtained in a manner that violates any right in the Bill of Rights and if their admission would render the trial unfair or otherwise be detrimental to the administration of justice.

[12] The incident forming the subject-matter of the criminal charges against all the accused occurred at the Heia Safari Ranch, Muldersdrift on 28 November 2007 at about 10h30.

[13] It is common cause that Insp. Joubert arrested accused no 2 as a suspect at Video Squatter Camp, Muldersdrift after 16h00 on the day of the incident. Insp. Joubert's evidence that he communicated with accused no 2 in English and that accused no 2 understood English was not disputed when he was cross-examined. Insp. Joubert's evidence relating to accused no 2's understanding of the English language was also corroborated by the evidence of Const. Nkuna,

who testified that accused no 2 had told him that he understood English, and by the evidence of Supt. Ramukosi, who testified that he had ascertained that accused no 2 understood English when he interviewed him. Insp. Joubert testified that he introduced himself to accused no 2 as an Inspector from the Muldersdrift police detective branch and that he showed him his SAPS identity card. He informed him that he was arresting him for murder and armed robbery. He informed accused no 2 of his right to remain silent, of the consequences of not remaining silent, and of his right to legal assistance. He informed him that he would be detained at Muldersdrift police station as a suspect.

[14] Before taking accused no 2 to the Muldersdrift Police Station, they first went to the place where accused nos 1 and 3 were arrested (the reeds area) on a farm in the vicinity of Heia Safari where a temporary satellite operations station of the SAPS had been set up. It was put to Insp. Joubert that after accused no 2 had been arrested, he was taken to the place where the deceased had been shot, which was on the Heia Safari premises, and that he, Insp. Joubert, had assaulted him on the way. When they arrived there, accused no 2 was asked whether he knew the place, and, when he replied that he did not know the place, Insp. Joubert accused him of lying and he told him that that was the place where they had shot 'the white man.' It was also put to Insp. Joubert that from that place accused no 2 was taken to another place, which accused no 2 did not know, where his clothes were taken from him. These statements were all denied by Insp. Joubert.

[15] Insp. Joubert took accused no 2 to the Muldersdrift Police Station where he was detained as a suspect. It is common cause that Const. Nkuna, in the presence of Insp. Joubert, furnished accused no 2 with a copy of a document (exhibit 'J') that notified him of the reason for his detention and of the s 35 constitutional rights of a detained and of an arrested person (SAP14A form). It is in dispute whether Const. Nkuna first read the notice to accused no 2 before a copy thereof was given to him. Const. Nkuna testified that, at the request of Insp. Joubert, he read the notice to him in English and that accused no 2 confirmed that he understood what had been read to him. Const. Nkuna's evidence on this issue is corroborated by that of Insp. Joubert.

[16] It is common cause that Insp. Joubert commenced an interview with accused no 2 after the s 35 notice had been handed to him. Insp. Joubert testified that, when accused no 2 started to make some admissions, he stopped him, warned him again of his rights, which accused no 2 confirmed he understood, and accused no 2 indicated to him that he would get legal representation when he appears in court and was willing to give the information and to make a statement to a police officer who was a justice of the peace. Insp. Joubert contacted Supt. Ramukosi, who agreed to assist in taking a statement from accused no 2. This was confirmed by Supt. Ramukosi when he testified. Insp. Joubert requested Const. Senosi to guard the accused until Supt. Ramukosi arrived. This was confirmed by Const. Senosi when he testified. His

unchallenged evidence was that he guarded accused nos 1,2 and 3 until about 21h00 or 21h30, when Insp. Joubert phoned and requested him to take accused no 2 to an office in the same building where Supt. Ramukosi was waiting. He complied and handed accused no 2 over to Supt. Ramukosi, who was alone in that office, and he then left. His evidence on this aspect was corroborated by that of Supt. Ramukosi.

[17] Supt. Ramukosi, who was from a different unit of the SAPS, testified that he interviewed accused no 2 from 21h30 until 22h28. He testified that he had no knowledge of the merits of the case. He introduced himself and at the outset explained to accused no 2 that he was an independent person who had nothing to do with the investigation and that he had merely been asked to obtain a statement from accused no 2. He used an English *pro forma* for purposes of the interview that is used by officers only (exhibit 'L'). He then read out the form, which includes information relating to an arrested person's s 35 constitutional rights, and he completed it with the answers provided by accused no 2. At his request, accused no 2 also provided him with a copy of the notice (exhibit 'J') that had been given to him earlier on and in terms of which he had been notified of the s 35 constitutional rights of a detained and of an arrested person (SAP14A form). Supt Ramukosi also read the rights set out therein to accused no 2 and annexed a copy thereof to the statement that he obtained from him. Supt. Ramukosi *inter alia* recorded that accused no 2 understood his rights and that he informed him that he would appoint a legal representative 'at a later stage for

court purposes' and that he wished to make a statement 'to give [his] side of the event.' Accused no 2 confirmed to Supt. Ramukosi that he had not been assaulted or threatened by any person to make the statement; he was not in any way influenced or encouraged to make the statement; and no promises were made to him should he make a statement. Supt. Ramukosi testified that, according to his own observations, accused no 2 appeared to have been in his sound and sober senses. At the request of Supt. Ramukosi accused no 2 undressed and Supt. Ramukosi inspected his body for injuries. He observed no bruises or visible injuries, except for an old mark on the face. Supt. Ramukosi testified that after the form had been completed, he read it back to accused no 2, who then *inter alia* signed each page and furnished his thumb prints in confirmation that the information supplied by him was correctly recorded. Supt. Ramukosi wrote down the statement furnished by accused no 2. It was also read back to him and confirmed to be true and correctly noted down. Upon completion of this interview, Supt. Ramukosi handed over accused no 2 and the statement that had been obtained from him to Insp. Joubert. This was also the undisputed testimony of Insp. Joubert. Insp. Joubert, was not present when Supt. Ramukosi took the statement from accused no 2.

[18] It was put to Supt. Ramukosi under cross-examination on behalf of accused no 2 that Supt. Ramukosi: did not explain his rights to him; did not request or instruct accused no 2 to undress; instructed accused no 2 to write down everything that happened; was informed by accused no 2 that he knew

nothing about what had happened and that he was therefore not in a position to write down anything; told accused no 2 that he was going to make a statement whether he liked it or not; informed accused no 2 that he, Supt. Ramukosi, knew about their arrest and that he, Supt. Ramukosi, knew all the suspects arrested with him; wrote a statement for accused no 2; told him to sign it; slapped him and forced him to sign it when he had refused; and that accused no 2 decided to sign the statement because of the slap. Supt. Ramukosi denied these allegations put to him.

[19] Accused nos 1, 2 and 3 appeared before the Magistrates' Court on 30 November 2007. Insp. Joubert was present and it is common cause that the Magistrate informed accused no 2 of his rights. It is common cause that accused no 2 requested that the Legal Aid Board provide him with legal representation. After their court appearance, accused nos 1, 2 and 3 were detained at Krugersdorp police cells for further investigation.

[20] Insp. Joubert was assisted in the investigation by Const. Kagiso Letswamotse. It was put to Insp. Joubert that during an interview in the cells on 5 December 2007 at about 17h00, he grabbed accused no 2 by the ears and asked him whether he had forgotten that he could be assaulted, and that both he and Const. Letswamotse threatened to assault him. Insp. Joubert denied these allegations. It was also put to Insp. Joubert that accused no 2 replied and insisted that he knew nothing about the case.

[21] A somewhat different and more elaborate version was put to Const. Letswamotse. It was put to him that he and Insp. Joubert had booked accused no 2 out of the cells and had taken him to an office where Insp. Joubert gave him a pen and paper and told him to write down everything that had happened. Upon being told by accused no 2 that he knew nothing, Insp. Joubert said to him that it appeared as though he had forgotten that he could assault him and that he was going to assault him again. It was put to Const. Letswamotse that he too threatened accused no 2 'to speak' otherwise he was also going to assault him. It was also put to Const. Letswamotse that he had told accused no 2 to admit that '… he had an affair with the deceased's woman.' In the process Inspector Joubert grabbed him by both ears and said he must speak the truth. Const. Letswamotse denied such 'interview', accused no 2's alleged refusal to make a statement, and the alleged assault or threats of assault.

[22] The undisputed evidence of Insp. Joubert was that he received certain records on 5 December 2007 that led him to assume that accused no 2 and accused no 5 communicated with each other telephonically prior to and on the morning of the incident and it appeared to him that accused no 2 had not been telling the truth regarding his participation in the offence. He contacted Dir. Byleveld and requested his assistance with an interview of accused no 2. Insp. Joubert explained that he sought Dir. Byleveld's assistance because of the records that he had received and Dir. Byleveld was more experienced in such

investigations than he was and might assist in furthering the investigation. Dir. Byleveld acceded to the request and it was agreed that Insp. Joubert would take accused no 2 to Dir. Byleveld's office at Brixton SAPS on 7 December 2007.

[23] Dir. Byleveld's evidence corroborated that of Insp. Joubert in this regard. Dir. Byleveld has been a member of the SAPS for the past 39 years. He is attached to the provincial head office in Johannesburg and is the provincial coordinator for the investigation of serial killings and high profile cases designated to him by the national commissioner. He is also involved in the training of detectives at the SAPS Hammanskraal College. Dir. Byleveld testified that he had assisted other policemen in the country in the past and still assists them.

[24] When Insp. Joubert arrived at Dir. Byleveld's office with accused no 2 on 7 December 2007, Insp. Byleveld excused Insp. Joubert and he was not present at the interview. Insp. Joubert also testified that he did not discuss his investigation with Dir. Byleveld. Dir. Byleveld also confirmed this. Dir. Byleveld testified that only he, an English/Zulu interpreter, Insp. AM Shezi, and accused no 2 were present at the interview.

[25] Dir. Byleveld used a *pro forma* for purposes of the interview (exhibit 'N'). Dir. Byleveld read the s 35 constitutional rights contained in the form to accused no 2 and he recorded the information that he obtained from accused no 2 on this

form. It was recorded that the interview commenced at 12h38 and was completed at 13h57. Accused no 2's confirmation that he understood his rights and his election to submit a statement were recorded on the form. Also accused no 2's replies that he had no injuries, that he had not been assaulted, threatened or influenced in any way to submit a statement or to answer the questions, and that he willingly submitted the statement and answered the questions were recorded. His statement was taken down by Dir. Byleveld, who testified that accused no 2 gave a version to him of nearly four pages. The statement was read back to accused no 2 and his reply that it was written down correctly was recorded. Accused no 2 signed and furnished his thumb print at various places throughout the document.

[26] Dir. Byleveld's evidence was corroborated by that of Insp. Shezi on material aspects, such as that he acted as the interpreter when the statement was taken, that whatever Dir. Byleveld said was interpreted to accused no 2 and *vice versa*, and that Dir. Byleveld read the statement back to accused no 2 after it had been taken.

[27] When he was cross-examined on behalf of accused no 2, it was put to Dir. Byleveld that accused no 2 denies having made the statement freely and voluntarily, that he was never informed of his constitutional rights, and that he had decided to make a statement only after assaults upon him by Dir. Byleveld, Insp. Shezi and a third police officer who was present during the interview, and

that during the assault Dir. Byleveld took out his firearm and informed him that he was going to kill him and bury him next to the deceased. These statements were denied by Dir. Byleveld who added that he would not put his career at risk with irregularities and that he would not allow it in his presence either. It was also put to Insp. Shezi that accused no 2 made the statement because he was assaulted by him, Dir. Byleveld and a third officer. This was denied by Insp. Shezi, and he added that he did not know the suspect at all and he had no knowledge of the crime committed. It was also put to Insp. Shezi that after he had made the statement he told Insp. Shezi that he had made up whatever he said, and Insp. Shezi's reply was that it did not matter that he lied and that what was important was that accused no 2 had made a statement. Insp. Shezi denied such discussion and testified that whatever had been said by the suspect was interpreted by him to Dir. Byleveld.

[28] Accused no 2 elected not to testify. It is his fundamental right to remain silent. We considered the totality of the evidence, including the version of accused no 2 that had been put by his counsel to the various State witnesses. We were impressed by the State witnesses who testified in this trial-within-the-trial. Each one's evidence was coherent and satisfactory in all material respects. Together they sketched the whole picture and they corroborated each other on material aspects. Cross-examination did not detract from their credibility as witnesses or from the reliability of their accounts. Their evidence called for an answer, and, in the absence of rebuttal, proved beyond reasonable doubt the

requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the statements that had allegedly been made by accused no 2 and that the statements had not been obtained in an unconstitutional manner. See: *S v Boesak* 2001 (1) SACR 1 (CC), at p 11e – h. *Ex facie* the forms (exhibits 'J', 'L', and 'N') and the evidence given by the relevant State witnesses, there was compliance with the relevant provisions of ss 35(1) and (2) of the Constitution.

[29] S 219 of the Criminal Procedure Act provides that '[n]o confession made by any person shall be admissible as evidence against another person.' The disputed confessions of accused no 2 may accordingly only be admitted as evidence against him.

[30] Upon completion of the interview with accused no 2 on 7 December 2007, Dir. Byleveld contacted Insp. Joubert, and, when he arrived, handed accused no 2 and the statement to him. Insp. Joubert testified that Dir. Byleveld also informed him that '… if he arrests a lady by the name of Celiwe Mbokazi … [accused no 5] … [he] must inform him because he also wants an interview with this lady.' Insp. Joubert testified that Dir. Byleveld was interested in this case, and that he was interested to hear what she would say about the allegations against her. Insp. Joubert's evidence on these aspects was corroborated by that of Dir. Byleveld, who testified that he, at that stage, considered himself as part of the investigation and was interested to interview accused no 5 due to the version furnished by accused no 2.

[31] On the same day, 7 December 2007, Insp. Joubert, accompanied by a female constable, Const. Anna Munyai, attended at accused no 5's residence at Heia Safari where she was arrested as a suspect. Const. Munyai acted as English/Zulu interpreter for Insp. Joubert. This is common cause. Insp. Joubert testified that he introduced himself, he explained to accused no 5 the reason for their visit, he explained to her that he was arresting her as a suspect in the case, and he informed her of her right to remain silent, of the consequences of not remaining silent, and of her right to legal representation. Const. Munyai corroborated Insp. Joubert's evidence on these issues and she testified that accused no 5 confirmed to her that she understood the reason for her arrest and the rights that were explained to her. Accused no 5 also testified that she was informed that she was arrested as a suspect because she was implicated in the death of the deceased. Although accused no 5's version, as put to Insp. Joubert, Const. Monyai and Const. Letswamotse, and as testified to by her, was a denial that her rights were explained to her at the time of her arrest, she, under cross-examination, gave unsatisfactory evidence on this issue and she *inter alia* contradicted herself on whether or not she could remember whether the right to remain silent was explained to her and whether or not it was indeed explained to her.

[32] It is common cause that Insp. Joubert and Const. Munyai took accused no 5 to the Roodepoort police cells after her arrest where she was detained as a

suspect. It is also common cause that Const. Munyai, in the presence of Insp. Joubert, furnished accused no 5 with a copy of a document (exhibit 'K') that notified her of the reason for her detention and of the s 35 constitutional rights of a detained and of an arrested person (SAP14A form). It is in dispute whether Const. Munyai had read the notice to accused no 5 before a copy thereof was given to her. Const. Munyai testified that she first read the notice to her in English and thereafter explained to her in Zulu what she had read in English. She testified that accused no 5 confirmed that she understood what had been read and explained to her and accused no 5 signed the document. Const. Munyai testified that after she had read the rights and had filled in the document, she gave a copy to accused no 5 and advised her '… that she can continue to read those rights on her own in the cells.' Const. Munyai's evidence on this issue is corroborated by that of Insp. Joubert, although he did not understand what Const. Munyai said to accused no 5 in Zulu. His evidence was also that Const. Munyai read from the SAP14A form and that she explained in her language accused no 5's rights to her. It was not suggested to Insp. Joubert or to Const. Munyai that accused no 5 did not appreciate what she was signing or what was given to her. Under cross-examination, accused no 5 testified that she read the notice which Const. Munyai had given her when she arrived in her cell. Under re-examination she said that she did not understand anything written on the notice. At some stage during her cross-examination, accused no 5 testified that she was able to understand the English language although she could not speak it.

[33] It was put to Const. Munyai that on the occasion when exhibit K was given to her, she showed her a statement and said it was a statement from Dumisani (accused no 2) and that she told accused no 5 that she should tell the truth because they knew everything. Const. Munyai denied this and testified that she had no knowledge of Dumisani Xulu. The proposition put to Const. Munyai that she reprimanded her to tell the truth since she or they knew everything was not mentioned by accused no 5 when she testified. In chief, accused no 5 testified that Insp. Joubert told her that it was Dumisani's statement, but under cross-examination that it was the woman police officer who had told her this.

[34] It is common cause that Insp. Joubert interviewed accused no 5 on 9 December 2007. Exhibit 'P' is the form that was completed regarding this interview. The form *inter alia* sets out the right of a suspect to remain silent throughout the interview, of not being compelled to make a statement or to answer any questions, the consequences of making a statement or answering questions, and the right to legal representation. It is common cause that accused no 5 elected not to make a statement in this interview with Insp. Joubert. She informed him that she preferred to make a statement in court. She also elected to consult a legal representative of her choice. Her election not to make a statement and her election to consult a legal practitioner of her choice – Legal Wise – were recorded in the form and no statement was taken from her during this interview.

[35] Accused no 5 denied that Insp. Joubert informed her of her rights or that she made an election upon having been so informed. Her evidence on this issue is rejected. It was unsatisfactory, self-contradictory and is refuted by the probabilities and the contents of exhibit 'P'. In answer to a question under cross-examination why she wanted legal representation at that stage, accused no 5 replied 'It was of paramount importance that I should have an attorney.' Upon being asked whether she was made aware of the right to legal representation, she replied: 'That is something which I thought of myself.' At some stage during her cross-examination she, however, testified that she lacked the knowledge of invoking the right to legal representation herself. It also appears from the evidence of accused no 5 that she was represented by an attorney appointed by Legal Wise until the commencement of her criminal trial. It is overwhelmingly probable that the information relating to her election to consult with a legal practitioner of her own choice and the information relating to 'Legal Wise' that was recorded on the form had emanated from her.

[36] Under cross-examination, accused no 5 testified that, at the time of this interview with Insp. Joubert, he 'forced' her to make a statement by threatening her. The threat, according to accused no 5, was that he told her to tell him everything otherwise he was going to assault her. This version of accused no 5 was not foreshadowed in the cross-examination of Insp. Joubert and is an obvious fabrication. She first testified that she was not proficient in English and

that no interpreter was present or seen by her at the time of this interview. When she was questioned on how she could have understood the threat, her reply was first that she could see that he was threatening her by the manner in which he spoke, and then that she was able to understand the English language although she could not speak it. The objective facts are that she did not make a statement, that her election was noted on the form, and that her election was respected.

[37] It is common cause that on 10 December 2007, Insp. Joubert and Const. Letswamotse took accused no 5 to the Krugersdorp Magistrates' Court for her first appearance. Accused no 5 testified that the magistrate explained to her the constitutional rights of detained and arrested persons. The case was postponed. Under cross-examination, accused no 5 testified that an attorney appointed by Legal Wise appeared for her in court on this occasion. In reply to my questioning as to when she had instructed the attorney, accused no 5 said that she had not instructed the attorney to attend court personally, and it seemed to her that her family had arranged for the attorney to be present at court. She also testified that she informed Insp. Joubert that she had instructed a Legal Wise attorney. She first testified that she did not remember when she had told him, but then said it was at court at the time of her first appearance. She testified that she did not tell Insp. Joubert the name or surname of her attorney, but only that she had one from Legal Wise.

[38] Insp. Joubert testified that after her first court appearance on 10 December 2007, he, accompanied by Const. Kagiso Letswamotse, took accused no 5 to the Dr Yusuf Dadoo Hospital to confirm her pregnancy and the stage thereof. They were referred to the Lerathong Hospital for a sonar, and they proceeded there immediately. It is common cause that accused no 5 was taken to hospital 'to check her pregnancy' and it was not disputed that her pregnancy was confirmed and the stage thereof determined at between six and seven months. Insp. Joubert's evidence on these aspects was materially corroborated by that of Const. Letswamotse. Although she could not remember the date on which she was taken to hospital, accused no 5 denied that it was on the day of her first appearance in court, and she testified that it was on the day when she was assaulted. She testified that she was taken to hospital immediately after she had been assaulted by Insp. Joubert, Const. Kagiso Letswamotse, and one white female officer, and she thought that they wanted to ascertain whether they had not injured the baby. Accused's 5 version that she was not taken to hospital on the 10th December 2007 is contradicted by a casualty form from the Dr Yusuf Dadoo Hospital (exhibit 'H'), which document I was informed by counsel for accused no 5 was not in dispute.

[39] Accused no 5 testified that Insp. Joubert and Const. Letswamotse fetched her from the cells and took her to an office. A white female police officer, who was also present, showed her a statement that she alleged was from Dumisani and she said to accused no 5 that she had hired Dumisani to kill the deceased.

When accused no 5 denied any knowledge of what she had been accused of, she was made to lie on her stomach, Const. Letswamotse placed plastic over her head, Insp. Joubert was holding both her legs, and they assaulted her. She could not say how many times she was assaulted. During the assault they said she must admit that she was the person who had hired Dumisani to kill the deceased. Under cross-examination, she testified that she sustained the following injuries: her jaws were numb and injured; the lower parts of her legs were painful; and she had pain on her stomach. The allegations of an assault upon accused no 5 were denied by Insp. Joubert and by Const. Letswamotse.

[40] We reject accused no 5's version of an assault upon her. Mere vague propositions of the alleged assault in which he participated were put to Insp. Joubert. The propositions put to Insp. Joubert and to Const. Letswamotse also differed in certain respects from accused no 5's testimony. It was not put to any of the State witnesses that accused no 5 had sustained any injuries as a result of the assault. It is, in our view, highly improbable that the police officers would have taken her to hospital immediately after they had assaulted her. The fact that she did not report the assault upon her and the injuries that had allegedly been sustained by her as a result thereof to the doctor that attended to her immediately after the alleged assault, and her unsatisfactory replies as to why she had failed to do so, support the version of the State witnesses that she had not been assaulted. Furthermore, she was pregnant at the time, and had she

indeed been assaulted, one would have expected her to have enquired from the attending doctor whether the unborn baby had not been injured.

[41] Insp. Joubert testified that, because Dir. Byleveld had indicated to him that he would like an interview with accused no 5, he contacted Dir. Byleveld on 10 December 2007, and it was arranged between them that he would take accused no 5 to Dir. Byleveld on 11 December 2007. Insp. Joubert's evidence that he explained to accused no 5 that he was taking her to Dir. Byleveld for an interview and that she did not object or refuse when he booked her out of the Roodepoort SAPS cells on the morning of 11 December 2007, was not disputed when he was cross-examined. Accused no 5, however, testified in chief that she was not told that she was going to be taken to Dir. Byleveld or of the reason why she was taken there. It is undisputed that Dir. Byleveld interviewed accused no 5 on 11 December 2009, and it is common cause that only he, Insp. AM Shezi in the capacity as interpreter, and accused no 5 were present at the interview.

[42] It is common cause that, upon her arrival, Dir. Byleveld introduced himself to accused no 5 and Insp. Shezi who was to act as the interpreter. Dir. Byleveld used a prescribed *pro forma* for purposes of the interview (exhibit 'O'). Dir. Byleveld testified that he read the s 35 constitutional rights from the form to accused no 5 and he recorded the information that he obtained from her on it. Accused no 5's confirmation that she understood her rights and her election to submit a statement were recorded on the form. Accused no 5's replies that she

had no injuries, that she had not been assaulted, threatened or influenced in any way to submit a statement or to answer the questions, and that she willingly submitted the statement and answered the questions were also recorded. It is common cause that accused no 5 was in her sound and sober senses when she furnished the statement. Dir. Byleveld testified that accused no 5 had given him a very long account. This was not disputed. We were informed by the State counsel that, although an exculpatory statement, it contains certain admissions. Dir. Byleveld testified that the statement was read back to accused no 5 and her reply that it was written down correctly was recorded. Accused no 5 signed each page of the document. It was also recorded that she did not want a lawyer present. It was recorded that the interview commenced at 9h16 and was completed at 11h15. Upon completion of the interview, Dir. Byleveld contacted Insp. Joubert, and, when he arrived, Dir. Byleveld handed over accused no 5 and the statement that he had taken from her to him.

[43] Dir. Byleveld's evidence was corroborated by that of Insp. Shezi on material aspects, such as that he acted as the interpreter when the statement was taken, that whatever Dir. Byleveld said was interpreted to accused no 5 and *vice versa*, that accused no 5's rights were read to her and that he interpreted them to her, that the opportunity of electing whether or not to make the statement was afforded to her, and that Dir. Byleveld read the statement back to accused no 5 after it had been taken.

[44] Accused no 5 testified that Dir. Byleveld 'forced' her to make the statement. When cross-examined, she testified as follows about this issue:

'In what manner were you forced? --- He took out a firearm and he said that whatever I am going to tell him, I must tell him the whole truth.

What did he do with the firearm? --- He took out the firearm, put the firearm on top of the table and said to me that he knows everything, that I was involved or implicated in the murder of Mr Richter. All what I am going to tell him, I must tell him the whole truth.

Was the firearm used against you in any way? --- All what he did, he took out the firearm and put the firearm on top of the table.

So do I understand you correctly that the firearm was not used against you. --- No, he did not use the firearm against me. All what he said, that I must tell him the whole truth.

Did you then tell Director Byleveld the whole truth as he asked? --- Yes, I told him what I know.'

And also:

'All what he did and said is that he produced the firearm, placed the firearm on top of the table and said to me that I must tell the truth, that is all. He further said to me that if I do not tell him the truth I will see what is going to happen.'

[45] Accused no 5's version as to what had induced her to make the statement to Dir. Byleveld is not without contradiction. It was emphasised during the cross-examination of Insp. Joubert that the reason why accused no 5 had made the statement to Dir. Byleveld was because of Insp. Joubert's assault upon her. It was put to him that he 'forced' her to make a statement to Dir. Byleveld.' In reply to questions from me on the issue why she had made the statement to Dir.

Byleveld, accused no 5 said that 'the only reason' was that Director Byleveld said to her that she should tell him all that she knew. When questioned by her counsel arising from the questions asked by me she said she was threatened because he placed the firearm on top of the table and she was scared that something was going to happen to her.

[46] Accused no 5's version was further that Dir. Byleveld did not explain her rights to her before she made the statement to him and that he did not ask her whether she needed a lawyer present. According to her, because her rights were not explained to her, she was not afforded the opportunity of electing not to make the statement and of first consulting with her legal representative. On the issue whether Dir. Byleveld explained her rights to her, accused no 5 contradicted herself in chief by testifying that he did not explain any rights to her, then that she could not remember whether he informed her of her right to remain silent, and again that he did not inform her of this right. Her allegation that Dir. Byleveld's failure to explain her rights to her deprived her of an election is untenable. She conceded that she knew of her right to legal representation at the time when Dir. Byleveld was taking the statement. She testified that she did not inform Dir. Byleveld that she already had an attorney and that she required the presence of a legal representative when the statement was taken, because he did not ask her. Yet, two days before when Insp. Joubert interviewed her, she had elected not to make a statement and to consult a legal representative despite his alleged threats and failure to explain her rights.

[47] Accused no 5 also testified that Dir. Byleveld obtained the personal particulars that were completed in para 2 of the form from her, but she denied that she furnished her employment telephone number that was also recorded. This was not put to Dir. Byleveld. Under cross-examination she conceded that the number that was filled in was the correct one. In her evidence in chief, she also referred to more questions that had allegedly not been read to her over and above those that were put to Dir. Byleveld. It was *inter alia* put to Dir. Byleveld that he did not ask the questions in paras 7.1 and 7.6 of the form (whether she had been assaulted, threatened or influenced in any way to submit a statement or to answer the questions, and that she willingly submits the statement and answers the questions). He denied these statements. Under cross-examination, accused no 5 initially persisted that question 7.1 had not been asked, but then said that she did not remember whether it had been asked or not. When asked whether she had furnished any further information to Dir. Byleveld other than the information appearing on the first page of the form (in other words para 2 of the form), accused no 5 contradicted herself on whether or not she was able to recall whether he had asked her questions other than questions in connection with the crime.

[48] Accused no 5 *inter alia* testified as follows when she was cross-examined by the State counsel:

'When Director Byleveld was writing this statement was he getting information from you or was he writing it on his own? --- I think he was writing what I was saying.

So the content of the statement is what was coming from yourself? --- Yes that is correct, some of the things I did say but I do not know whether there were other things that he wrote which I did not say.

So you were not aware whether there were other parts which are incorrect? --- Yes I did not know.

Today whilst you are on the witness stand do you know whether there are any other parts on the statement which you do not agree with? --- Because I did not see the statement I am not in a position to say or dispute anything.'

When accused no 5 was confronted with the fact that her objection to the admissibility of the statement was also that part of it was not what she had told Dir. Byleveld, she adjusted her evidence by saying that her advocate had read the statement to her in a hurry. I should add that accused no 5 confirmed under cross-examination that Insp. Shezi interpreted to her what Dir. Byleveld was saying and that he interpreted to Dir. Byleveld what she was saying to him. She had no problem with the interpreting.

[49] In conclusion, this, in our view, was not 'a situation of stealing a march on an accused person.' Compare: *S v Agnew and Another* 1996 (2) SACR 535 (C) and *S v Mphala and Another* 1998 (1) SACR 388 (W). When Insp. Joubert interviewed accused no 5 on 9 December 2007, she refused to furnish a statement to him, she elected to make a statement in court, and she elected to consult with an attorney of her choice. On her version, she advised Insp. Joubert

at the time of her first appearance at court on 10 December 2007 that she was represented by an attorney that had been appointed for her by Legal Wise. She did not tell him who the attorney was nor did she furnish him with the attorney's particulars. Insp. Joubert did not take her to Dir. Byleveld because she, on 9 December 2007, elected not to make a statement, but because Dir. Byleveld had, on 7 December 2007, requested an interview with her. Dir. Byleveld is a senior officer and Insp. Joubert is a relatively young one. When interviewed by Dir. Byleveld, she was fully aware of her constitutional rights, including her rights to remain silent, against self-incrimination, and to legal assistance before and at the time of making the statement in issue. If she had wished to invoke any of her rights, she was at liberty to do so and she could simply have mentioned it to Dir. Byleveld. This was precisely what she did two days earlier when she was interviewed by Insp. Joubert. It was not suggested that she had been prevented by Insp. Joubert or by Dir. Byleveld from contacting, seeing or receiving advice from her attorney or that her attorney was prevented from contacting, seeing or advising her prior to or at the time of making the statement. She elected not to tell Dir. Byleveld of her attorney. She did not contact or have her attorney contacted. Her explanation for not having done so (because she was arrested and she did not have the facilities to phone) is simply not plausible.

[50] On the totality of the evidence my assessors and I had no hesitation in concluding that accused no 5's version that she had not been informed of her constitutional rights at the time of her arrest, when she was booked into the

Roodepoort SAPS cells, when she was interviewed by Insp. Joubert, and when she was interviewed by Dir. Byleveld, was false. We also had no hesitation in finding that her allegations of being threatened, of being assaulted, and of Dir. Byleveld threatening her with his firearm and verbally, were fabricated. We are satisfied that the evidence of each one of the State witnesses was coherent and satisfactory in all material respects. Their evidence was consistent and they corroborated each other on material issues as I have mentioned.

[51] The State, on the totality of the evidence, discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 217 or in s 219A of the Criminal Procedure Act for the admission in evidence of the statement which had allegedly been made by accused no 5 contained in exhibit 'O' and that it had not been obtained in an unconstitutional manner.

[52] The disputed statement of accused no 5, being admitted as an extra-curial admission under s 219A of the Criminal Procedure Act, is only admissible against her, unless the requirements for admissibility of hearsay evidence under s 3 of the Law of Evidence Amendment Act 45 of 1988 are satisfied. It was accordingly at that stage only admitted in evidence against accused no 5.

[53] The ruling made in this first trial-within-the-trial was the following:

> 1. The statement made by accused no 2 before Supt. Ramukosi on 28 November 2007 at Muldersdrift SAPS and contained in exhibit 'L', is admitted in evidence against accused no 2.

2. The statement made by accused no 2 before Director Byleveld on 7 December 2007 at Brixton SAPS and contained in exhibit 'N', is admitted in evidence against accused no 2.
3. The statement made by accused no 5 before Director Byleveld on 11 December 2007 at Brixton SAPS and contained in exhibit 'O', is, at this stage, only admitted in evidence against accused no 5.

[54] The second trial-within-this-trial concerned the admissibility of a statement that had allegedly been made by accused no 1 on 28 November 2007, and a pointing out that had allegedly been made by him on 29 November 2007. On 1 June 2009, the statement and pointing out were ruled to be admissible in evidence against accused no 1. These are the reasons.

[55] The State wished to introduce in evidence a statement by accused no 1, which had allegedly been made before Supt. CS Scherman from 22h05 on 28 November 2007 until 00h50 on 29 November 2007 at the Muldersdrift SAPS and a pointing out, which had allegedly been made by accused no 1 before Snr. Supt. Louise Eksteen in the afternoon on 29 November 2007.

[56] We were informed by counsel for the State, Mr. Ntlakaza, that the statement constitutes a confession, which labelling was confirmed by counsel for accused no 1, Mr. Ncoko. We accordingly accepted such labelling, and we also considered the pointing out to constitute a confession. Such approach accorded with that taken by counsel.

[57] The State must accordingly, in both instances, discharge the *onus* of proving beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the disputed statement and of the disputed pointing out, and also that they had not been obtained in an unconstitutional manner.

[58] Mr Ncoko, on behalf of accused no 1, objected to the admissibility of the statement on the grounds that accused no 1 was induced to make the statement as a result of the following:

- he used dagga prior to his arrest and consequently lacked 'appreciation';
- he was exposed to high temperature or heat at the time of his arrest;
- he was 'shot at' at the time of his arrest;
- the making of the statement was preceded by a lengthy interrogation that was accompanied by assaults;
- he was not the author of the statement and what is contained in it was what accused no 1 had overheard from the police officers at the time of his arrest; and
- he was not informed of his constitutional rights to remain silent and of legal representation.

The admissibility of the pointing out was objected to on the same grounds, except for the one that he lacked appreciation as a result of his alleged use of dagga prior to his arrest. Accused no 1 confirmed the grounds of objection.

[59] The State led the evidence of Capt. CH Slaughter, who allegedly arrested accused no 1; Supt. Christa Scherman, to whom accused no 1 had allegedly made the statement; Snr. Supt. Louise Eksteen, to whom accused no 1 had allegedly made the pointing out; Insp. Manoko, who took the photographs that had been taken prior to and after the disputed pointing out; Const. Nkuna, who furnished an SAP14A to accused no 1 at the Muldersdrift SAPS; Const. Senosi, who guarded accused no 1 at the Muldersdrift SAPS; Insp. FJ Scott, who was the driver during the disputed pointing out; Mr K Mpodisang, who was the interpreter during the interview with Supt. Scherman; Snr. Const. Barati Molefe, who was the interpreter during the interview with and the disputed pointing out to Snr. Supt. Eksteen; and Insp. AJ Joubert, who is the investigating officer. The State thereafter closed its case. Accused no 1 elected to testify, whereafter his case was closed.

[60] Capt. Slaughter testified that there was a reasonably strong police presence on and in the vicinity of the premises of the Heia Safari on the day of the incident, 28 November 2007, and particularly surrounding an area comprising dry reeds and grass on a farm in the vicinity of Heia Safari. Civilian people were also present. This area is depicted and encircled marked 'M' on photo 2 of exhibit D2, and it is hereinafter referred to as the reeds area. Information received led members of the SAPS to believe that suspects were hiding in the reeds area. Searching this area was difficult and it was accordingly set alight. Accused no 1 emerged from the reeds area with his hands raised above his head

about five to ten minutes after it had been set alight. He fitted the description of one of the persons who was sought by members of the SAPS in connection with the incident, and Capt. Slaughter accordingly arrested him as a suspect at a point just outside the reeds area that is depicted and marked 'M1' on photograph 2 of exhibit D2 ('the arrest point'). Capt. Slaughter communicated with him in English. Accused no 1's understanding and ability to communicate in the English language were not disputed when Capt. Slaughter, Const. Nkuna, Insp. Joubert, Supt. Scherman, Mr. Mpodisang, and Snr. Supt. Eksteen were cross-examined. They corroborated each other on this aspect. Accused no 1 also confirmed his understanding of the English language although he testified that he does not speak it well. Capt. Slaughter testified that he warned accused no 1 of his constitutional rights (to remain silent, the consequences of not remaining silent, against self-incrimination, and to legal assistance) immediately after his arrest. Accused no 1 confirmed that he understood his rights. Capt. Slaughter testified that he walked accused no 1 from the arrest point to a point that was about 100 metres away where vehicles were parked and police officers were gathered. He handed accused no 1 over to members of the Muldersdrift SAPS at this point, which is depicted on and marked 'M2' on photograph 2 of exhibit D2 ('the departure point').

[61] Insp. Joubert testified that he arrived at the reeds area after 16h00 pm only minutes after accused no 1 had been arrested by Capt. Slaughter. Insp. Joubert was one of the police officers who took accused no 1 by vehicle from the

departure point to the nearby Video Squatter Camp and thereafter, *via* the departure point, to the Muldersdrift Police Station where he was initially detained as a suspect.

[62] Const. Nkuna testified that he was requested by Insp. Joubert to read the SAP14A form (exhibit 'T'), which form notifies a person of the reason for his or her detention and of the s 35 constitutional rights of a detained and of an arrested person, and to hand him a copy thereof. Const. Nkuna testified that he informed accused no 1 that he had been asked to read his rights to him. Since Const. Nkuna was Tsonga speaking and accused no 1 Tswana speaking, Const. Nkuna offered to obtain the assistance of a person who speaks the same language as accused no 1, but he declined the offer and agreed for Const. Nkuna to proceed in English saying that he was comfortable in the English language. Const. Nkuna's evidence that he had read the notice to accused no 1, that accused no 1 acknowledged that he understood what had been read to him, that accused no 1 had signed the notice, and that a copy thereof was handed to accused no 1, was not challenged when he was cross-examined on behalf of accused no 1. Const. Nkuna's evidence that he had read out accused no 1's constitutional rights to him was also corroborated by the evidence of Insp. Joubert and of Const. Senosi, whose unchallenged evidence was that it took place in their presence.

[63] Insp. Joubert testified that he interviewed accused no 1 just after 6:00 pm for about 5 – 10 minutes after the s 35 notice had been read to him. He testified that accused no 1 started to make admissions during this interview. When this happened, he stopped accused no 1 and warned him again of his rights to remain silent, of the consequences of not remaining silent and of his right to legal assistance. Accused no 1 confirmed to Insp. Joubert that he was willing to make a statement to a police officer who was a justice of the peace. Insp. Joubert also enquired from him whether he would be prepared to do a pointing out regarding the scene of the crime, and, in so requesting, again warned him of his rights. Accused no 1 confirmed his willingness. Insp. Joubert thereupon contacted Supt. Scherman, who agreed to assist in taking a statement from accused no 1. This was confirmed by Supt. Scherman when she testified.

[64] Const. Senosi's unchallenged evidence was that he, at the request of Insp. Joubert, guarded accused nos 1, 2 and 3 from just before 18h00 on 28 November 2007. Insp. Joubert phoned him during the course of the evening and requested that he take accused no 1 to an office where Supt. Scherman was waiting. He complied.

[65] It is undisputed that Supt. Christa Scherman interviewed accused no 1 from 22h05 on 28 November 2007 until 00h50 on 29 November 2007 in a detective's office at the Muldersdrift SAPS, and that only she, an English/Tswana interpreter, Const. Mpodisang, and accused no 1 were present at the interview.

Supt. Scherman was stationed at the West Rand Organized Crime Unit of the SAPS, and she has been a member of the SAPS since 1983. She was an officer with a rank higher than that of captain. She testified that she had no knowledge of the case or its merits before the interview. Insp. Joubert only told her that accused no 1 had been arrested for murder and robbery. She testified that she used a prescribed *pro forma* for purposes of the interview (exhibit 'Q'). She, through the interpreter, read the contents of the form to accused no 1. His replies were interpreted to her and recorded by her on the form. Supt. Scherman testified that she *inter alia* read the s 35 constitutional rights from the form to accused no 1. She also explained the rights to him in more simple English to make it easier for him to understand. She recorded his acknowledgement to her that he understood the rights, that he elected not to consult a legal practitioner before deciding whether to make a statement, that he was willing to make a statement, and that he wished '… to tell the whole story.' She further recorded his replies to her that he had not been threatened, assaulted, or influenced to make the statement, her observation that he was seemingly of sound mind and not under the influence of liquor or any other intoxicating substance or in a state of shock. Accused no 1 informed her that he had injuries, namely bruises on his right upper arm and left arm, and a slight scratch on his left leg, and that he had sustained the injuries when the grass burnt at the place where they were hiding. He also showed the injuries to her. Supt. Scherman testified that she, through the interpreter, took down accused no 1's statement. She thereafter, through the interpreter, read the form and the statement back to him. He confirmed the

contents thereof to be a true and correct reflection of the interview. It was signed by Supt. Scherman, the interpreter, and accused no 1. His thumb print was also placed on each page of the document. An interpreter's certificate was completed and signed. Supt. Scherman explained that the interview took almost three hours since accused no 1 made a lengthy statement of about seven pages and he personally also sketched a drawing of the scene.

[66] Mr. Mpodisang testified that he is no longer a police officer and that he is currently employed at the Department of Agriculture. He was an SAPS constable during November 2007. He corroborated Supt. Scherman's evidence on material aspects, such as that he acted as an English/Tswana interpreter during the interview; that whatever Supt. Scherman said was interpreted to accused no 1 and *vice versa*; that accused no 1's rights were read, interpreted and explained to him; that accused no 1 confirmed that he understood them; that accused no 1 was asked whether he was prepared to make a statement and that he confirmed that he wished to do so; that accused no 1 indeed made a statement; that accused no 1 was 'fine'; that accused no 1 did not mention any complaints or assaults upon him; and, that everything accused no 1 said was interpreted to and recorded by Supt. Scherman.

[67] Snr. Supt. Louise Eksteen testified that Insp. Joubert requested her during the morning of 29 November 2007 to assist in a pointing out by accused no 1. She and Insp. Joubert corroborated each other on this aspect. She has 24 years

experience as a member of the SAPS. She was the Area Head of the West Rand Detective Branch at the relevant time. She is presently the Commander of a new SAPS Task Team. Snr. Supt. Eksteen testified that she was given no particulars as to the nature of the pointing out. She used an office at the Krugersdorp SAPS Detective Branch for purposes of the interview since the office was closer to the cells where accused no 1 was detained. Accused no 1 was brought to her by the police officer who acted as the interpreter for the purpose of the pointing out, namely Const. Molefe. The pointing out started at about 14h45. It is undisputed that accused no 1 is Tswana speaking. Tswana is a language in which Snr. Supt. Eksteen is competent. She greeted him in Tswana to make him comfortable and to demonstrate that she was not a threat to him. She on occasion during the interview also communicated with him in Tswana.

[68] Snr. Supt. Eksteen testified that she used a prescribed *pro forma* for purposes of the interview (exhibit 'R'). She, through the interpreter, read the contents of the form to accused no 1. His replies were interpreted to her and recorded by her on the form. She read his constitutional rights to him. She also explained his rights to him in Tswana. He confirmed that he understood his rights. Her evidence that accused no 1 also replied by furnishing her with an abbreviated version of the rights was not challenged. This confirmed to her that he fully understood his rights. She testified that accused no 1 elected to obtain legal assistance through the Legal Aid Board only when he appears in court. He

specifically elected not to have legal representation at the stage of the pointing out and said that he wished 'to tell everything'. Accused no 1 informed her that he had sustained injuries. She inspected his injuries and photographs were taken of them by Sgt. Manoko, who subsequently testified and confirmed that he, at the request of Snr. Supt. Eksteen, compiled the album (exhibit 'S') and took the photographs of accused no 1. The injuries showed to her and depicted on the photographs were injuries on his left and right arms and on his right shin, which accused no 1 told her were sustained when he had hidden in the grass when it was burnt by the SAPS. Accused no 1 confirmed to Snr. Supt. Eksteen that he was not assaulted, that no promises were made to him to influence him to point out anything, that he had not been influenced in any way by any person to point out anything, that he was not promised benefits if he points out anything, and that he was satisfied that it was his own choice to do a pointing out of his free will, without being forced, influenced, or encouraged by any person to do so.

[69] Snr. Supt. Eksteen testified that accused no 1 thereafter took her on the pointing out. Insp. FJ Scott was the driver of the motor vehicle. He confirmed this when he testified. Snr. Supt. Eksteen was seated in the front passenger seat. Accused no 1 and the interpreter were seated at the rear. Insp. Scott testified that accused no 1, through the interpreter, directed him where to go. The interpreter, Const. Molefe corroborated his evidence. When they returned after the pointing out, the notes of the pointing out were read to accused no 1, and he confirmed that he was satisfied with the pointing out, that it was his own

version, and that it had been correctly noted down. Snr. Supt. Eksteen testified that the document was read back to accused no 1, confirmed by him to be correct, and signed by her, the interpreter, and accused no 1. His thumb print was also placed on each page of the document. The interpreter's certificate was completed and signed.

[70] The evidence of Snr. Const. Barati Molefe corroborated that of Snr. Supt. Eksteen in certain respects, such as that she booked accused no 1 out of the cells and took him to Snr. Supt. Eksteen; she, as the interpreter, interpreted everything that was said between Snr. Supt. Eksteen and accused no 1; Snr. Supt. Eksteen ascertained through her questioning how accused no 1 had sustained his injuries; and when they travelled on the pointing out, accused no 1 gave the directions, which she in turn interpreted to the driver.

[71] Accused no 1 testified that he and accused no 3 went into the reeds area after 15h00 pm on the day in question to smoke dagga. They first sat next to the reeds, but, upon noticing a police vehicle, went deeper into the reeds area. The two of them smoked half the contents of dagga contained in an envelope that was sold for five rand. Police officers and civilian people surrounded the reeds area. He overheard the conversations of people surrounding the area *inter alia* saying that a German person had been robbed and killed. The reeds area was ultimately set alight. The inhalation of the smoke of the burning reeds caused him to be 'dizzy and confused' and the smoking of dagga contributed to his

dizziness. He testified under cross-examination that his dizziness and confusion lasted until the evening of the following day when he went to sleep, which was after the pointing out that he had allegedly made to Snr. Supt. Eksteen. Accused no 1 testified that the effect of dagga on him is that he does 'not think properly' after he has smoked it.

[72] Accused no 1 did not suggest that his exposure to high temperature or heat immediately prior to his arrest in any way affected him thereafter. This, however, was one of the grounds raised in objection to the admissibility of the disputed statement and of the disputed pointing out, and Capt. Slaughter was cross-examined thereon. The effect on him of the smoke caused by the burning reeds was, however, a new ground that emerged as the trial-within-the-trial progressed. It was put to Supt. Scherman 'that before and during his arrest accused no 1 inhaled a lot of carbon monoxide', which had a calming effect on him. Accused no 1's evidence of his lack of appreciation was contradictory. His alleged dizziness and confusion were not put to any of the State witnesses. His claimed lack of appreciation, dizziness, and confusion is entirely inconsistent with the account that he gave of his overhearing conversations, the accuracy with which he conveyed to Supt. Scherman what Insp. Joubert had allegedly instructed him to convey to her, and his detailed account of the events and of his own actions and the actions and omissions of the various police officers involved. It is also inconsistent with his appearance, behaviour, and communications about

which the various State witnesses testified, and particularly the evidence of Supt. Scherman and that of Snr. Supt. Eksteen.

[73] Accused no 1 testified that he noticed a white male person a distance away when he emerged from the reeds area. This person fired a shot in the air. The warning shot frightened him. This is in conflict with one of the grounds raised and confirmed by accused no 1 for objecting to the admissibility of the statement and pointing out, which was that he was 'shot at' at the time of his arrest.

[74] Accused no 1 testified that he was arrested after the warning shot had been fired. He was not informed of his constitutional rights upon his arrest. Contradictory propositions on this issue were, however, put to Capt. Slaughter, namely that he did not explain or inform him of his constitutional rights 'at all' and 'that not all the rights were explained to accused no 1.'

[75] Accused no 1 testified that he was ordered by the person who discharged the warning shot to lie on the ground after his arrest. Capt. Slaughter testified that he was the person who ordered accused no 1 to lie on the ground. He denied the proposition that had been put to him that a male person older than him ordered accused no 1 to lie on the ground. Accused no 1 testified that other police officers joined them. They tied his hands with plastic clamps and assaulted him by kicking him while he was lying on the ground. They asked

where the other person was that was with him. Accused no 1's version in this regard was not foreshadowed by the cross-examination of either Capt. Slaughter or of Insp. Joubert. All that was put to Capt. Slaughter was that accused no 1 was assaulted at the time of his arrest. It was put to Insp. Joubert that accused no 1 was assaulted by the person who arrested him at the time of his arrest and thereafter on the way to the departure point.

[76] Accused no 1 testified that a police vehicle and a 'Prado' vehicle were stationary at the departure point. He was taken to the departure point where a group of police officers assaulted him by hitting him with their open hands and kicking him. They told him that he was the person who had committed the robbery, that he was not alone when it was committed, and that he was accompanied by friends. He testified that these assaults upon him were intermittent and took a long time. He was assaulted, questioned, and, if he did not say what they required of him, assaulted again. Capt. Slaughter's undisputed evidence was that he was one of the police officers who accompanied accused no 1 from the point of arrest to the departure point. Accused no 1's version that he was assaulted and questioned at the departure point, was not put to Capt. Slaughter or to any other State witness. What was put to Insp. Joubert was that accused no 1 was assaulted when he was taken from the point of arrest to the departure point.

[77] It is common cause that accused no 1 was placed in a vehicle and taken from the departure point to the nearby Video Squatter Camp. Accused no 1 testified that he was assaulted *en route* by two police officers who sat at the back of the vehicle with him. They made him face to the side while hitting him with 'long fire-arms'. This version was not put to Insp. Joubert, whose undisputed evidence was that he accompanied accused no 1 to Video Squatter Camp. After accused no 2 had been arrested at Video Squatter Camp, they first returned to the departure point, and then to the Muldersdrift SAPS. This is common cause.

[78] Accused no 1 testified that Const. Nkuna did not explain his rights to him and he did not read the SAP14A form (exhibit T) to him. He was made to sign the form at about 921h00 pm and before he was taken to Supt. Sherman. He was only handed the form at about 01h00 am on 29 November 2009 after the interview with Supt. Sherman and before he was taken to the Krugersdorp SAPS where he was further detained. Const. Nkuna's evidence that he had read the rights contained in the SAP14A form to accused no 1 in English was, however, not disputed when he was cross-examined. It was only disputed that Const. Nkuna afforded him the option of obtaining the assistance of an interpreter. It further seems to us to be improbable that a copy of the form would not have been given to accused no 1 at the time when it was read to him or when he signed for it. The evidence of Const. Nkuna was corroborated by that of Insp. Joubert and particularly that of Supt. Scherman, who testified that accused no 1

was in possession of the form and that he showed the form to her when she interviewed him.

[79] Accused no 1 testified that they arrived at the Muldersdrift SAPS when it started to become dark. This is common cause. He testified under cross-examination that when he was interviewed by Insp. Joubert he told him that he knew nothing about the incident and he testified that Insp. Joubert's evidence that he started to make admissions during the interview with him was a lie. The evidence of Insp. Joubert on this issue was, however, not disputed when he was cross-examined.

[80] Accused no 1 testified that upon their arrival at the Muldersdrift SAPS they were taken to a large common office with many desks. Accused no 1 was placed at a desk with Insp. Joubert. He was asked questions, but he informed 'them' that he did not know anything. They assaulted him saying that he should agree to what had happened. He was made to kneel on the floor with his hands cuffed at his back. Some officers kicked him and others hit him with open hands. The assaults upon him endured from the time of his arrival at the Muldersdrift SAPS until he was taken to Supt. Scherman. Accused no 1 testified that, because of the assaults upon him, he ended up giving in. Whatever they told him he agreed to.

[81] Accused no 1's version in this regard is *inter alia* irreconcilable with Const. Senosi's unchallenged evidence that he, at the request of Insp. Joubert, guarded accused nos 1, 2 and 3 from just before 18h00 on 28 November 2007, that Insp. Joubert phoned him during the course of the evening and requested him to take accused no 1 to Supt. Scherman, and that he complied with the request.

[82] It was put to Supt. Scherman that accused no 1 was assaulted 'just before' he was taken to her for his interview. The alleged continuous assaults upon accused no 1 for the nearly four hours preceding the interview with Supt. Scherman, was not put to her. Although it was put to Const. Nkuna and to Const. Senosi that they were part of a group of police officers who assaulted accused no 1 on 28 November 2007, no mention was made that they participated in the assaults upon him when accused no 1 testified. It was put to Snr. Supt. Eksteen that accused no 1 was assaulted before, during and after his arrest. Under cross-examination, accused no 1 conceded that he had not been assaulted prior to his arrest.

[83] It was put to Insp. Joubert that after 18h00 on 28 November 2007 when he interviewed accused no 1 he placed a great amount of pressure upon him by *inter alia* saying to him 'why must he waste the rest of his life in prison while accused no 5 will be sitting with her black bum on a white person's chair.' This is a clear fabrication since accused no 5 was not even a suspect at that time.

[84] Accused no 1 denied that he was the author of the statement that Supt. Scherman had taken from him. It was his evidence that what he had told her was what he had overheard discussed amongst the police officers before, during, and after his arrest. Similar propositions were put to Insp. Joubert and to Supt. Scherman. Since accused no 1's version was that the statement that he had made before Supt. Scherman was not made freely and voluntarily, and his evidence that he had no personal knowledge of its contents, that he was not the author thereof, that its contents came from the police and not from him because what he had told Supt. Scherman was what he had overheard discussed amongst the police officers, I permitted the State to cross-examine the accused on an extract from the disputed statement (exhibit 'Q.1') for the limited purpose of testing his credibility. See: *S v Maake* 2001 (2) SACR 288 (WLD), at pp 289i – 291a. Under cross-examination, accused no 1 first persisted with the version that what he had told Supt. Scherman was what he had overheard the police officers talking about. Cross-examined on what he had overheard, he testified that he had overheard conversations about a German person who had been robbed and killed, and that after his arrest he was told by police officers that a white man had been robbed by four persons who had then fled. Accused no 1 could not recall anything else that he had heard. When accused no 1 was then confronted with the first three paragraphs of the disputed statement, he changed his evidence and then testified that the contents of the paragraphs of the statement that was put to him was an accurate version of what Insp. Joubert had told him to say to Supt. Scherman. This version of accused no 1 was not put to

Insp. Joubert, Supt. Scherman, or any of the other State witnesses, and only emerged during his cross-examination. Accused no 1 obviously adjusted his evidence when the shoe pinched.

[85] Supt. Scherman testified that accused no 1 did not mention to her that he was assaulted in any way. Her evidence was that accused no 1 appeared 'very relaxed and cooperative and it did not seem that he was influenced or threatened in any way.' She testified that '[h]e was not stressed at all.' She testified that she would have picked up if he was stressed, but she observed him by the manner in which he spoke and by his relaxed attitude not to be stressed. He interacted with her and the interpreter in a relaxed manner. Snr. Supt. Eksteen's evidence is also consistent with that of Supt. Scherman and the denials of assault or influence by Const. Nkuna, Const. Senosi, and Insp. Joubert. She testified that accused no 1 was willing to show her what had happened in respect of the incident the previous day. Her personal observations were that he was in his sound and sober senses and that he fully appreciated what he was saying. He displayed no form of fear. She testified that he did not appear to her as a person who had suffered any emotional trauma before the pointing out. He was very comfortable with her. He was relaxed and calm. Snr. Supt. Eksteen also recorded that accused no 1 appeared to be at ease, he participated in the conversation, he was very spontaneous, and he referred to himself as a friendly person.

[86] Supt. Scherman and Snr. Supt. Eksteen each testified that they pertinently asked accused no 1 whether he had injuries. The injuries shown to and observed by Supt. Scherman were bruises on his right upper arm and left arm, and a slight scratch on the left leg. The injuries shown to and observed by Snr. Supt. Eksteen and photographed by Insp. Manoko were consistent with those shown to and observed by Supt. Scherman, namely a mark on the upper right arm, a mark on the left forearm, scratches on the left forearm, and scratches on the left shin. They testified that accused no 1 had told each one of them that he had sustained the injuries as a result of the burning of the grass where he was hiding. It was never put to them that the injuries testified to by them were sustained during the alleged assaults upon accused no 1 or that he had sustained visible physical injuries as a result of assaults. The injuries that he sustained were according to accused no 1 scratch marks on both upper arms and his whole body was in pain. When he was shown the photographs that had been taken during his interview with Snr. Supt. Eksteen, he changed his evidence by saying that the injuries that he had sustained on the left arm were not on the upper left arm but on the forearm.

[87] When he testified about his interview with Supt. Scherman, accused no 1 denied that she, through the interpreter, went through the *pro forma* with him, that she read him the constitutional rights, or asked him the questions therein contained. Accused no 1 testified that Supt. Scherman only asked him his name, surname, and address. The rest she, according to him, wrote herself. This

evidence of accused no 1 does not accord with his version put to Supt. Scherman which was a denial that she explained certain rights to him.

[88] When he testified about his interview with Snr. Supt. Eksteen, accused no 1 denied that she informed him of his rights before he was taken on the pointing out. This was not put to Snr. Supt. Eksteen. She was hardly cross-examined and her version that accused no 1 even furnished her with an abbreviated version of the rights that had been read to him was not challenged. What was put to the interpreter, Snr. Const. Molefe, on this issue was that 'there is a possibility that accused no 1's rights were not read back to him after the pointing out.' Accused no 1 testified that the notes of the pointing out had not been read back to him after the pointing out. This too had not been put to Snr. Supt. Eksteen or to Snr. Const. Molefe.

[89] Accused no 1's objection against the admission of the disputed confession (exhibit 'Q') and the disputed pointing out (exhibit 'R') is on the totality of the evidence based on allegations that are not reasonably possibly true. The State witnesses were credible witnesses. Each one's evidence was satisfactory in all material respects. They corroborated each other on material aspects. Cross-examination did not detract from their credibility as witnesses or from the reliability of their accounts.

[90] The State, on the totality of the evidence, discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the disputed confession and of the disputed pointing out and that they have not been obtained in an unconstitutional manner.

[91] The ruling that was accordingly made is the following:

> 1. The statement made by accused no 1 before Supt. CS Scherman from 22h05 on 28 November 2007 until 00h50 on 29 November 2007 at the Muldersdrift SAPS and contained in exhibit 'Q', is admitted in evidence against accused no 1.
> 2. The pointing out made by accused no 1 before Snr. Supt. Louise Eksteen in the afternoon on 29 November 2007 and contained in exhibit 'R', is admitted in evidence against accused no 1.

[92] The third trial-within-this-trial concerned the admissibility of a warning statement that had allegedly been taken from accused no 4 on 2 December 2007. On 17 June 2009, I ruled that the disputed statement was admissible in evidence against him. These are the reasons.

[93] The State wished to introduce in evidence a disputed statement by accused no 4, which had allegedly been made before Const. EB Senosi from 14h20 on 2 December 2007 at the Muldersdrift SAPS.

[94] We were informed by counsel for the State, Mr. Ntlakaza, that the disputed statement contains admissions. Counsel for accused no 4, Ms.

Mogolane, labelled it as '… just a statement containing facts.' We accepted that it might contain admissions. Its admissibility was heavily contested on behalf of accused no 4. Both counsel were, however, *ad idem* that the disputed statement does not constitute a confession.

[95] The State must accordingly discharge the *onus* of proving beyond reasonable doubt the requirements stipulated in s 219A of the Criminal Procedure Act for the admission in evidence of the disputed statement and also that it had not been obtained in an unconstitutional manner.

[96] Ms. Mogolane, on behalf of accused no 4, objected to the admissibility of the disputed statement on the following grounds:

- it was obtained in violation of his s 35 Constitutional rights;
- a magistrate ordered accused no 4 to cooperate with the police;
- he was legally represented and both officers responsible for the taking of the statement were aware of it, but they disregarded his express wish to be legally represented during the interview when the statement was taken;
- the making of the statement was induced by means of persistent questioning, and accused no 4 was induced to respond to questions through threats, assault, and suffocation;
- the 'recorded statement' does not entirely reflect the correct answers given by accused no 4 during the interview;

- the statement had not been read back nor had it been interpreted to accused no 4 before he signed it.

Accused no 4 confirmed the grounds of objection.

[97] The State led the evidence of Const. EB Senosi, Insp. AJ Joubert, Const. SS Nkuna, Const. HS Madumo, and of a Magistrate, Ms. CE Breedt. The State thereafter closed its case. Mr. Ronnie Khumalo, accused no 4, testified. His brother, Mr. ZB Khumalo, was also called as a witness on his behalf. His case was thereafter closed.

[98] Insp. Joubert, who is the investigating officer, testified that he arrested accused no 4 just after 20h00 on 28 November 2007. He introduced himself, explained to accused no 4 why he had been arrested, and warned him of his constitutional rights in English (the right to remain silent, the consequences of not remaining silent, and the right to legal assistance). Accused no 4 replied in English that he understood his rights. Insp. Joubert then took him to the Muldersdrift SAPS. Upon their arrival, he requested Const. Nkuna to furnish accused no 4 with a SAP14A notice, which form notifies a person of the reason for his or her detention and of the s 35 constitutional rights of a detained and of an arrested person.

[99] Const. Nkuna testified that, at about 21h00 on 28 November 2007, he had been requested by Insp. Joubert to read and to hand over to accused no 4 the

SAP14A form (exhibit 'V'). Const. Nkuna testified that accused no 4 spoke to him in isiZulu, and, since Const. Nkuna was Tsonga speaking, he enquired from him whether 'he would be comfortable' if the rights were read out to him in English, which accused no 4 confirmed. Const. Nkuna testified that he accordingly read the notice in English to accused no 4. After he had read the rights, accused no 4 acknowledged that he understood them and he signed the notice in confirmation thereof. Const. Nkuna also signed the notice and handed a copy thereof to accused no 4.

[100] Insp. Joubert testified that he had an interview with accused no 4 in his office on Sunday, 2 December 2007. Only the two of them were present during this interview. He asked accused no 4 certain questions regarding the matter. Accused no 4 did not implicate himself. He mentioned that he had an alibi and gave no further information. Insp. Joubert booked accused no 4 back into the cells after this interview. He requested Const. Senosi to assist him in taking a warning statement from accused no 4.

[101] Const. Senosi testified that he, at the request of Insp. Joubert, took a warning statement from accused no 4 on Sunday, 2 December 2007, from 14h20 in his office at the Muldersdrift SAPS. Only the two of them were present. A *pro forma* (exhibit 'U') was used for the purpose of taking the warning statement. Const. Senosi testified that he is fluent in English and in isiZulu. His fluency in English was also apparent when he testified. Isizulu is the mother tongue of

accused no 4. Const. Senosi testified that he had read the form in English and that he had explained it to accused no 4 in isiZulu. Accused no 4 communicated with him in isiZulu and he recorded the answers given by accused no 4 on the form in English. Once a page had been read and completed, it was signed by both of them. Const. Senosi testified that he correctly explained the constitutional rights to accused no 4 in isiZulu, although the English version reflected on the form contained various errors. He testified that accused no 4 confirmed that he understood his rights. Const. Senosi recorded on the form that he had informed accused no 4 of his rights and also his election '… to give a statement in the absence of his legal representative.' Const. Senosi also recorded accused no 4's replies that he did not have any injuries and that he was not threatened, assaulted or influenced to exercise the option that he had exercised. It was also recorded that accused no 4 '… was seemingly of sound mind and did not seem to be under the influence of liquor or any other intoxicating substance or in a state of shock.' Const. Senosi requested accused no 4 to briefly explain what had happened on 28 November 2007 and where he was on that date. Accused no 4 furnished a statement in response. Const. Senosi wrote the statement in English, and, at the end of the interview, read it back to accused no 4 and explained it to him in isiZulu. Accused no 4 confirmed the contents thereof to be a true and correct version of the interview and it was signed by both of them.

[102] Insp. Joubert testified that he was not present when Const. Senosi took the warning statement from accused no 4. Const. Senosi phoned him later during the day and informed him that he had taken the statement. Insp. Joubert commissioned the warning statement late in the afternoon when it was handed to him upon his return to the police station. Insp. Joubert testified that accused no 4 appeared for the first time in the Krugersdorp Magistrates' Court the next day, which was Monday, 3 December 2007. He testified that accused no 4 was taken to court by uniformed police officers. He was uncertain who they were, but he ventured the name of female Const. Madumo.

[103] Const. Hilda Madumo testified that she and one other police officer had taken three suspects to the Krugersdorp Magistrates' Court on Monday, 3 December 2007, at 08h40. One of them was Mr. Ronnie Khumalo, who was taken to court in connection with the Heia Safari matter, which matter she said she specifically recalled. She was in uniform when she took the suspects to court. She handed the suspects over to an officer at court and then returned to the Muldersdrift SAPS. Const. Madumo referred to an occurrence book entry and a body receipt that, according to her, substantiates her version. The State Advocate, Mr Ntlakaza, applied for leave to introduce the relevant occurrence book entry and body receipt into evidence during re-examination. Ms. Mogolane, on behalf of accused no 4, objected thereto on the ground that they should have been produced when Const. Madumo testified in chief. I granted the State Counsel's request because of certain propositions that had been put to Const.

Madumo when she was cross-examined. Ms Mogolane put it to her that the body receipt did not exist, and, if it were to be produced, had been 'arranged recently'. Ms. Mogolane also objected to the admissibility of the occurrence book entry on the ground that the document produced by the State was not an original. There was no merit in this objection. The body receipt produced by the State is a carbon copy but bearing the original signature of Const. Madumo and on which she filled in the case numbers and particulars originally. See: *Damata v Otto and Another* 1972 (3) SA 858 (A), at p 881F-G. I permitted the defence counsel to further cross-examine Const. Madumo on aspects flowing from the re-examination in respect of the occurrence book entry (exhibit 'W') and the body receipt (exhibit 'Y').

[104] A Magistrate, Ms. Christa Breedt, testified that she was the presiding magistrate before whom accused no 4 appeared on Monday, 3 December 2007, in the Krugersdorp Magistrates' Court. It was his first appearance in court and the matter appeared for postponement only. She testified that accused no 4 appeared in person and there was no legal representation on his behalf. She explained to him his rights to legal representation and he indicated that he 'was going to appoint his own legal representative'. The matter was postponed to 10 December 2007, and accused no 4 was to be held in custody at the Muldersdrift police cells. Magistrate Breedt testified that postponement matters were not mechanically recorded. Her notes on the charge sheet (exhibit 'Y') constitute the only record of the proceedings.

[105] Insp. Joubert testified that he was present in court when the case against accused no 4 was postponed. He could not recall whether or not an attorney was present for accused no 4 at his first appearance. He, however, recalled that accused no 4 was legally represented at a later stage when he applied for bail in the Magistrates' Court, Krugersdorp.

[106] Accused no 4, testified that Insp. Joubert did not inform him of his constitutional rights upon his arrest. He also denied that Const. Nkuna read or explained to him the constitutional rights set out in exhibit 'V'. He testified that Const. Nkuna had instructed him to sign exhibit 'V', whereafter a copy thereof was merely handed to him. A detainee, Justice, read and explained the contents of exhibit 'V' to him upon his arrival in the cells. He testified that he understood the rights. He also specifically denied that Const. Senosi, or Insp. Joubert, had warned him of his constitutional rights. Upon his first appearance in the Krugersdorp Magistrates' Court on Monday, 3 December 2007, the presiding magistrate explained the rights to legal representation to him.

[107] Accused no 4's version is that he was legally represented at the time of his detention at the Muldersdrift SAPS; that both Const. Senosi and Insp. Joubert knew this; that he had expressly elected not to give a warning statement or to sign any document without his attorney being present; and that his election was ignored. In this regard he testified that, upon his arrival in the cells, he

borrowed a cellular phone from a fellow detainee. He called his brother and requested him to contact the attorney Mr Jackson Nqala, who was known to accused no 4, and to arrange with him to represent him at his initial appearance in court. At a later stage he again contacted his brother, who then confirmed that he had arranged with Mr. Nqala to represent him when he appeared in court and that he had paid the attorney. Accused no 4's brother, Mr. ZB Khumalo, also testified that accused no 4 had contacted him and had requested that he instruct Mr. Nqala to represent accused no 4 at his first appearance in court. Mr Khumalo testified that he thereupon instructed Mr. Nqala accordingly and that he had paid the attorney an agreed fee. He testified that Mr. Nqala *inter alia* undertook to visit accused no 4 at the Mulderdrift SAPS where he was detained.

[108] Accused no 4 testified that the attorney, Mr Nqala, was present when he appeared for the first time before the Krugersdorp Magistrates' Court. When accused no 4 was informed of his rights in respect of legal representation, he pointed at Mr. Nqala and said '… here is my attorney that I have chosen and that is an attorney that I have paid for.'

[109] Accused no 4 testified that Insp. Joubert had visited him on several occasions during his detention at the Muldersdrift SAPS. On these occasions Insp. Joubert told him that they had already arrested three other persons in connection with the matter and that they had implicated accused no 4. Insp. Joubert told him to tell the truth. His response on each occasion was that he

knew nothing of the matter and that, of the three arrested persons who were mentioned, only Dumisani Xulu had been known to him. He testified that he informed Insp. Joubert that he was prepared to furnish a response in the presence of his legal representative and he also invited Insp. Joubert to be present if he so wished.

[110] Accused no 4's account relating to the interviews that he had with Insp. Joubert and with Const. Senosi on 2 December 2007, was that Insp. Joubert had booked him out of the cells, had taken him to his office, and had tried to speak to him, but, because of a communication problem between them, had referred him to Const. Senosi, who was also present at that time. Const. Senosi then questioned him. His response to this questioning was again that he knew nothing of the matter, that he only knew Dumisani Xulu of the three persons that were mentioned to him, that he would give a response in the presence of his legal representative, and he also invited Const. Senosi to be present if he so wished. Accused no 4 testified that Const. Senosi had insisted that he sign 'certain papers', but he refused and indicated that he would only sign them in the presence of his legal representative.

[111] Accused no 4 testified that Const. Senosi, Const. Nkuna, and another male police officer who was unknown to him, took him to the Krugersdorp Magistrates' Court for his first appearance. He denied that Const. Madumo took him to court. Before he was taken, Const. Senosi had again asked him to sign

the same documents, but he again refused to sign them. During his first appearance in court it was interpreted to him that it had been said that he did not wish to cooperate with the police and that he did not wish to sign. The magistrate then told him to cooperate and to do whatever the police desired. The matter was remanded. Once the matter was postponed, accused no 4 had a discussion with his attorney. He brought it to the attention of his attorney that he had been refusing to sign certain documents, and his attorney undertook to follow him and to attend at the police station. Accused no 4 testified that he was thereafter taken to the holding cells at court. After a short while Const. Nkuna, Const. Senosi, and the other police officer fetched him to take him back to the Muldersdrift SAPS. On the way to their vehicle they told him that he should bear in mind what the magistrate had said to him, that he should cooperate with them, that he should not waste their time, and that he should sign. Const. Senosi slapped him on the right cheek.

[112] Accused no 4 testified that within two hours of their return to the Muldersdrift SAPS, Insp. Joubert booked him out of the cells. Insp. Joubert fetched a plastic bag from a Polo motor vehicle that was parked nearby the cells and he then took accused no 4 to his office. He asked him to sign the same documents. Accused no 4 refused. Accused no 4 suggested to Insp. Joubert that they should wait for his attorney who had indicated that he was on his way to the Muldersdrift SAPS. Insp. Joubert refused the request and continued to insist that he should sign the documents. Insp. Joubert placed them in front of

accused no 4 and shouted at him to sign. Accused no 4 persisted in his refusal to sign and in his request that they should wait for his attorney. Insp. Joubert then handcuffed his hands to the arm rests of the chair on which accused no 4 was seated; Insp. Joubert told him that he was going to sign the documents; Insp. Joubert placed the plastic bag over his head and tied it at the back of his head; Insp. Joubert punched him in the region of his heart and removed the bag when he was breathless. This procedure, according to accused no 4, was repeated six times, and in between he was asked to sign and told to tell the truth. He testified that Const. Senosi came into the office while he was being assaulted. Const. Senosi was seated and had with him the documents that accused no 4 was required to sign. He also urged accused no 4 to sign the documents. Accused no 4 testified that he gave in and signed each page of exhibit 'U', because the magistrate ordered him to sign and because of what he 'had been made to bear' during the torture and assault upon him. He testified that the whole document was not read back to him or interpreted to him before he had signed it.

[113] On the totality of the evidence we considered the evidence of each State witness who testified in this trial-within-the-trial to be satisfactory in all material respects. Their evidence was consistent and they corroborated each other on material aspects. Cross-examination did not detract from their credibility as witnesses or from the reliability of their accounts. Apart from the issue whether the statement correctly reflects the account that accused no 4 had given, which is

rather an issue for determination at the conclusion of the criminal trial, we, on the totality of the evidence, find accused no 4's version on the disputed issues in this trial-within-the-trial not to be reasonably possibly true.

[114] Insp. Joubert and Const. Nkuna each testified that they communicated with accused no 4 in English when they each warned him of his constitutional rights and that he understood English. Insp. Joubert also corroborated Const. Nkuna on the disputed issue whether Const. Nkuna indeed read the rights appearing on the SAP14A form to accused no 4. When the State witnesses were cross-examined on behalf of accused no 4, he was portrayed as unsophisticated and unable to understand English. In this regard it was *inter alia* suggested to Const. Senosi that accused no 4 was an 'unsophisticated suspect' and it was put to Insp. Joubert that accused no 4 was not proficient in and did not understand English. However, accused no 4 is obviously not an unsophisticated person. He achieved standard 9 at school and also obtained employment qualifications in the security industry. His own evidence refuted the propositions that he had no proficiency in or understanding of the English language.

[115] It is common cause that accused no 4 at some stage during his detention appointed the attorney Mr Nqala and that Mr Nqala represented him when he appeared in the Krugersdorp Magistrates' Court subsequent to his first appearance. Accused no 4's brother was not certain of the date upon which he instructed Mr Nqala on behalf of accused no 4 and he was not present at court

on the occasion of accused no 4's first appearance. In order to substantiate his version that he had already been legally represented at the time when the warning statement was taken and at the time when he signed it on 3 December 2007, and that Insp. Joubert and Const. Senosi were informed and aware thereof, accused no 4 *inter alia* relied thereon that Mr Nqala had been appointed to represent him prior to his first appearance in the Krugersdorp Magistrates' Court and that he was legally represented at the time of his first appearance. His evidence in this regard was refuted by the evidence of Magistrate Breedt, who was an impressive witness without any interest in this matter and whose evidence we accept as reliable, and also by the record of the proceedings of his first appearance on 3 December 2007. It is improbable that accused no 4 would have informed the presiding magistrate that he 'was going to appoint his own legal representative' had he already appointed an attorney who also happened to be present in court. It is also improbable that the attorney would not have placed his appearance for accused no 4 on record if he was present in court. The evidence of accused no 4's brother was that the attorney Mr Nqala undertook to consult accused no 4 at the Muldersdrift police cells. The evidence of accused no 4 was that Mr Nqala undertook to follow him from the Krugersdorp Magistrates' Court to the Muldersdrift SAPS and that accused no 4 suggested to Insp. Joubert that they should wait for his attorney when Insp. Joubert insisted that accused no 4 should sign the documents on the occasion when Insp. Joubert threatened, assaulted and suffocated him. We find it improbable, in the absence of any plausible explanation, that Mr Nqala would not have consulted

accused no 4 prior to his first appearance in court or at the very least that he would not have followed accused no 4 to the Muldersdrift SAPS after accused no 4's first appearance in court if he had indeed represented accused no 4 at the time.

[116] It was put to Insp. Joubert that accused no 4 expressed the wish to be legally represented, that Insp. Joubert was informed and aware that accused no 4 was legally represented, and that he was informed that accused no 4 would give a statement to his legal representative. It was put to Const. Senosi that at the time when Insp. Joubert requested him to take a statement from accused no 4, he, Const. Senosi, was well aware that accused no 4 was legally represented. Also, that at the time when he noted accused no 4's responses he was well aware that accused no 4 was legally represented. It was also put to Const. Senosi that accused no 4 informed Const. Senosi that he was legally represented and that he would give his statement to his attorney. Under cross-examination accused no 4 testified that he, in the presence of Insp. Joubert, explained to Const. Senosi that his attorney was Mr Nqala, that he furnished Const. Senosi with the cellular phone number of Mr Nqala, and that he requested Const. Senosi to phone Mr Nqala. This, however, was not foreshadowed in the cross-examination of Const. Senosi or of Inspector Joubert. Accused no 4's evidence that before he was allegedly made to sign the statement in issue he informed Insp. Joubert that his attorney was on his way and that they should wait for him, was also not put to Insp. Joubert. These are material aspects of

accused no 4's version and the explanation proffered by him why they were not put to Const. Senosi and to Insp. Joubert, namely that he only recalled these aspects while he was testifying, is not plausible. Accused no 4 attracted his counsel's attention whenever he wished to consult with her and I have allowed sufficient time on each such occasion for consultations to take place.

[117] We reject accused no 4's evidence that Magistrate Breedt made a ruling or told him to cooperate with the police and to do whatever the police desired. Apart from this being improbable, somewhat different propositions were put to Insp. Joubert, to Magistrate Breedt, to Const. Nkuna and to Const. Senosi when they were cross-examined. The propositions put to them were to the effect that the magistrate had been informed that accused no 4 was not cooperating with the police and that he refused to sign for 'the charges' whereupon she made a ruling that he must cooperate with the police and sign for the charges. We accept Magistrate Breedt's evidence that no such submissions had been made to her and that no such ruling had been made by her. She testified that she does her work properly and if submissions were made to her and if rulings were made by her, she would have recorded them and that the submissions and rulings would have been reflected on the record of the proceedings. She was also adamant that her notes on the charge sheet constitute a full and correct record of the proceedings.

[118] It followed that accused no 4's evidence that Const. Nkuna, Const. Senosi and another police officer confronted him after his first court appearance with what the magistrate had said to him that he should cooperate, and his evidence to the effect that the magistrate's ruling was one of the principal factors that induced him to sign the warning statement, was also rejected.

[119] Const. Madumo's version was supported by the occurrence book entry (exhibit 'W'), which was signed by her when the suspects were booked out to go to court, and also the body receipt, which was signed by her in confirmation that the suspects reflected thereon were escorted by her. Her version was also supported by Const. Senosi and by Const. Nkuna who denied that they took accused no 4 to court for his first appearance on 3 December 2007.

[120] Accused no 4's version as to whether or not a warning statement was obtained from him was not consistent or coherent. His grounds of objection to the admissibility of the disputed statement acknowledge that a statement was made. It was *inter alia* put to Const. Senosi that the form was not signed at the time when he narrated the events, but only at a later stage; that at the time when he obtained the statement from accused no 4 he, Const. Senosi, was aware that it was alleged that accused no 4 was involved in the murder case and that it was therefore improper of him to obtain the statement; that the statement '… is not entirely a correct reflection of the answers advanced by accused 4'; that '… he responded to some of the questions that [Const. Senosi] posed'; that accused

no 4 did not give the statement willingly; that Const. Senosi deliberately left out some of the questions and inaccurately recorded the answers; and that accused no 4's version was that he responded to questions that are omitted from his statement in order 'to create a misunderstanding of accused no 4's account of what transpired on 28 November 2007.'. Under cross-examination in answer to a question from the State Advocate whether accused no 4 had given any information to Const. Senosi which he wrote on exhibit 'U', he replied that he gave answers to questions that he could answer. It was also put to accused no 4 that: 'According to Constable Senosi it was on 02 December 2007 when he took a statement from you which is exhibit 'U'? Accused no 4 replied: 'I am not aware of the dates but if he says that the day when I was called to the office and I refused to sign the documents it was the 2nd I cannot dispute that.' Under further cross-examination accused no 4, however, denied that he made any statement.

[121] Insp. Joubert and Const. Senosi corroborated each other on material aspects relating to the taking of the warning statement from accused no 4, such as that Insp. Joubert requested Const. Senosi to take the statement, that Insp. Joubert was not present when the statement was taken, and that accused no 4 had already signed the statement when it was handed to and commissioned by Insp. Joubert on 2 December 2007. Const. Senosi's undisputed evidence was that accused no 4 did not implicate himself, had not told him anything about the commission of the crime, and that accused no 4 had told him where he had been

and that he had nothing to do with the crime. Const. Senosi testified that he was unaware of any admissions that had been made to him by accused no 4. In these circumstances we consider it highly improbable that Const. Senosi would have assaulted accused no 4 to get him to sign the exculpatory statement or that he would have participated with Insp. Joubert to get accused no 4 to sign the exculpatory document.

[122] Under cross-examination, accused no 4 reiterated that 'they were forcing or coercing' him to firstly admit his involvement in the commission of the crime, and, secondly, to sign the document. It is, however, not without significance that on his own version the alleged assault upon him ended when he indicated that he would sign the disputed statement in which he denied his alleged involvement in the commission of the crime. The alleged assault did not continue until accused no 4 implicated himself in some way. We find it improbable on all the evidence that the violence about which accused no 4 testified would have been inflicted upon him in order to get him to sign a statement in which he did not implicate himself.

[123] The State, on the totality of the evidence, discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 219A of the Criminal Procedure Act for the admission in evidence of the statement that had allegedly been made by accused no 4 contained in exhibit 'U' and that it had not been obtained in an unconstitutional manner.

[124] The disputed statement of accused no 4, being admitted as an extra-curial admission under s 219A of the Criminal Procedure Act, is only admissible against him, unless the requirements for admissibility of hearsay evidence under s 3 of the Law of Evidence Amendment Act 45 of 1988 are satisfied. It was accordingly only admitted in evidence against accused no 4.

[125] The ruling that was made is that the statement made by accused no 4 before Const. EB Senosi on 2 December 2007 at Muldersdrift SAPS and contained in exhibit 'U', is, at this stage, only admitted in evidence against accused no 4.

[126] The fourth trial-within-this-trial concerned the admissibility of a confession that had allegedly been made by accused no 3. On 3 August 2009, I ruled that the confession was admissible in evidence against accused no 3. These are the reasons.

[127] The State wished to introduce in evidence a statement by accused no 3, which had allegedly been made at Muldersdrift SAPS before Capt. MP Madibo on 28 November 2007 from 21h47.

[128] Counsel for the State, Mr. Ntlakaza, and counsel for accused no 3, Mr Mgiba, were *ad idem* that the disputed statement constitutes a confession. The

statement in issue might accordingly not be admitted, unless it was proved to have been made by accused no 3 freely and voluntarily, while he was in his sober senses, and without having been unduly influenced thereto (the requirements of s 217 of the Criminal Procedure Act). It must also be excluded if it was obtained in a manner that violates any right in the Bill of Rights and if its admission would render the trial unfair or otherwise be detrimental to the administration of justice (the provisions of s 35 of the Constitution of the Republic of South Africa).

[129] Mr. Mgiba, on behalf of accused no 3, objected to the admissibility of the disputed confession on the grounds that accused no 3 had not at any stage from his arrest until the making of the confession been warned of his constitutional rights, that the confession had not been read back to him, and he was only made to sign it. Accused no 3 confirmed his grounds for objection.

[130] The State led the evidence of Const. K Kokwe, Const. SS Nkuna, Const. EB Senosi, Capt. MP Madibo, and Insp. AJ Joubert, whereafter its case was closed. Accused no 3 testified and his case was thereafter closed.

[131] Const. Kokwe testified that on 28 November 2007, he attended as a back-up officer. He was one of the officers who had searched for suspects in an area referred to as the reeds area in the vicinity of the Heia Safari premises. Const. Kokwe testified that he noticed accused no 3 in this area; he thereupon arrested

him; he searched him; he informed him of the reason for his arrest; he explained to him his constitutional rights (the right to remain silent and that whatever he says could be used as evidence against him in a court, the right to legal assistance, and the right to be released on bail); and accused no 3 responded by saying that he understood what Const. Kokwe had said. Const. Kokwe testified that they communicated in the Tswana language since accused no 3 had told him that he speaks Tswana and Const. Kokwe was also Tswana speaking. Accused no 3 did not make any statement to Const. Kokwe. He thereafter handed accused no 3 over to Insp. Joubert.

[132] Insp. Joubert testified that accused no 3 was handed over to him by Const. Kokwe between 16h00 – 16h30 during that afternoon. Accused no 3 was thereafter taken to the Muldersdrift Police Station where he was initially detained. He requested Const. Nkuna to read to accused no 3 his constitutional rights in terms of the SAP14A notice.

[133] Const. Nkuna testified that, at the request of Insp. Joubert, he read to accused no 3 in English the reason for his detention and the s 35 constitutional rights of a detained and of an arrested person as reflected on the SAP14A form (exhibit 'Z'). Before doing so, Const. Nkuna offered to obtain the assistance of a person who speaks the same language as accused no 3, but he agreed that Const. Nkuna could proceed in English. Const. Nkuna testified that accused no 3 acknowledged that he understood what had been read to him and he signed

the notice. Const. Nkuna also signed the notice and handed a copy thereof to accused no 3.

[134] Insp. Joubert testified that he interviewed accused no 3 from about between 18:00 – 18:45 the same evening. They comfortably communicated with each other in English. He testified that because accused no 3 started to make 'certain allegations' during this interview, he stopped him and warned him of his rights (to remain silent, of the consequences of not remaining silent and of his right to legal assistance). Accused no 3 indicated to Insp. Joubert that he did not require an attorney at that stage and that he was willing to make a statement to a justice of the peace. Insp. Joubert thereupon took accused no 3 to Const. Senosi, who guarded him, he phoned Capt. Madibo, and he requested him to assist in taking a warning statement from accused no 3. Later that evening he received the statement from Capt. Madibo.

[135] Const. Senosi testified that, at the request of Insp. Joubert, he guarded accused nos 1, 2 and 3 at the Muldersdrift SAPS during the course of the evening on 28 November 2007. He guarded accused no 3 from between 18h00 – 18h30 until about 21h00. Insp. Joubert phoned him during the course of the evening and instructed him to take accused no 3 to Capt Madibo. He complied.

[136] Capt. Madibo testified that he was stationed at the West Rand Organized Crime Unit of the SAPS, that he has served in the SAPS for 27 years, and that

he was a justice of peace by virtue of his rank. He testified that Insp. Joubert telephoned him between approximately 17h00 – 18h00 pm on 28 November 2007, and that he requested him to assist in taking a warning statement from an accused person. Capt. Madibo later attended at the Muldersdrift SAPS. Accused no 3 was brought to him by Const. Senosi. Capt. Madibo had no knowledge of the merits of the matter. He interviewed accused no 3 from 21h47 and he obtained a statement from him. Only the two of them were present. They communicated in Tswana since Capt. Madibo established from accused no 3 that he was Tswana speaking. Capt. Madibo is South Sotho and proficient in Tswana since the Sotho and Tswana languages are, according to him, 'basically the same.' Capt. Madibo is fluent in English. This is the language in which he testified.

[137] Capt. Madibo used a *pro forma* for purposes of the interview (exhibit 'AA'). He read the contents of the form in English and he interpreted it for accused no 3 into Tswana. He recorded accused no 3's replies on the form in English. He testified that he explained to accused no 3 everything that is written on exhibit 'AA' without omission or addition. He *inter alia* read the rights prescribed by s 35 of the Constitution from paras 1 – 4 at p 1 of the form to accused no 3. He obtained accused no 3's statement from him at the appropriate place provided for on the form. Capt. Madibo testified that he read the statement back to accused no 3 in English and he translated it to him in Tswana. Each page of the form and

statement was thereafter signed by accused no 3 and by Capt. Madibo. Accused no 3's thumb print was also placed on each page of the document.

[138] Accused no 3 testified that he had been arrested during the afternoon on 28 November 2007 in the reeds area; that he had been handcuffed and searched by Const. Kokwe; that Insp. Joubert had been present at the time of his arrest; that he had thereafter been taken to the Muldersdrift SAPS; that Const. Nkuna had requested him to sign a document; that Const. Senosi had taken him to Capt. Madibo; and that he had made a statement before Capt. Madibo. He testified that Const. Kokwe at no stage had read his constitutional rights to him; that Const. Nkuna merely made him sign a document in a book saying it was to confirm that he had been arrested and that a copy of this document was only handed to him after he had made a statement before Capt. Madibo and before he was taken to the Krugersdorp SAPS with accused no 1 and accused no 2; that his constitutional rights had not been read to him at any time during his detention at Muldersdrift SAPS; and also that Capt. Madibo had not read his constitutional rights to him.

[139] There are unsatisfactory features in the evidence of Const. Kokwe in this trial-within-the-trial. Whether or not they detract from his credibility as a witness and particularly the reliability of his evidence on the issue whether or not he informed accused no 3 of his relevant constitutional rights immediately after he had been arrested, is not necessary to decide since accused no 3 was, in terms

of the evidence of Const. Nkuna as corroborated by that of Const. Senosi, warned of his constitutional rights as set out in exhibit 'Z' soon after he had arrived at the Muldersdrift Police Station on 28 November 2007; he was, in terms of the evidence of Insp. Joubert, shortly thereafter again warned of his right to remain silent, of the consequences of not remaining silent and of the right to legal assistance; and he was, in terms of the evidence of Capt. Madibo, warned of his constitutional rights as set out in exhibit 'AA' shortly after 21h47 and before he made the confession in issue.

[140] Const. Nkuna had recorded the time 18h00 on all three the SAP14A notices that he handed to accused no 1, to accused no 2, and to accused no 3 as reflecting the time when each one of them had been informed of the rights as set out in the forms. He conceded that the time was incorrectly recorded on at least two of the forms. He was unable to explain how the error occurred, but he maintained that he had read the time 18h00 from a wall clock in the police station, and he proffered an explanation that '…maybe I did not look at the watch after explaining to each person.' He took issue with counsel's proposition that '[i]t shows that [he] merely completed all three forms and then handed them over to the accused persons to sign, without explaining them.' Const. Nkuna's evidence that he indeed read the constitutional rights to accused no 3 was, however, corroborated by the evidence of Const. Senosi, whose evidence that he was present when Const. Nkuna read their constitutional rights to each one of the three accused individually in English we accept. The little cross-examination of

Const. Senosi and of Insp. Joubert did not in any way detract from their credibility as witnesses or from the reliability of their evidence in this trial-within-the-trial.

[141] The State case on the issues for determination in this trial-within-the-trial is essentially dependent upon the evidence of Capt. Madibo. Approaching his evidence with the required caution that should be applied to the evidence of a single witness, we have no reservation in finding that he was an impressive and credible witness and that his evidence is satisfactory in all material respects and reliable. Capt. Madibo's ability to accurately interpret from English into Tswana was demonstrated when he was asked under cross-examination to interpret into the Tswana language the right to remain silent and the consequence of not remaining silent as set out in para 1 on p 1 of exhibit 'AA'. On the evidence given by Capt. Madibo and *ex facie* exhibit 'AA' there was compliance with the relevant provisions of s 35 of the Constitution and with the requirements of s 217 of the Criminal Procedure Act for the admission in evidence of the confession made by accused no 3.

[142] The grounds of objection to the admissibility of the confession in issue were *inter alia* that it had not been read back to accused no 3 and that he was only made to sign it. Yet, accused no 3 made no mention thereof in his evidence at all. Most of the evidence given by Capt. Madibo, including his evidence that he had read the statement back to accused no 3 in English and translated it to him in Tswana, that accused no 3 had confirmed that he was satisfied that it had

been noted down correctly, and that accused no 3 had thereafter signed and placed his thumb print on each page, was also not challenged when he was briefly cross-examined. It was also not suggested to him that the contents of the statement in issue do not correctly reflect what accused no 3 had conveyed to Capt. Madibo. It was put to him that he did not explain the rights to accused no 3 when he filled in the *pro forma* or their consequences and that he simply went through the form without thoroughly explaining it.

[143] Accused no 3 testified that Capt. Madibo had forced him to make the statement. He also testified that he had been aware that the other two suspects had been assaulted and that he was accordingly scared that he too would be assaulted. This version was not foreshadowed in the cross-examination of Capt. Madibo, nor was it raised as a ground of objection to the admissibility of the statement, and it was clearly fabricated.

[144] Accused no 3 testified to the effect that at his own instance he showed Capt. Madibo that he had been injured and that he had told him that he was experiencing pain from the injury in order to get help from Capt. Madibo. This version was not put to Capt. Madibo, and the evidence of Capt. Madibo that he enquired from accused no 3 whether he had injuries was not challenged when he was cross-examined.

[145] Under cross-examination accused no 3 denied that Capt. Madibo went through the *pro forma* when he interviewed accused no 3. Capt. Madibo's evidence on this issue was not challenged when he was cross-examined. On the contrary, as I have mentioned, it was put to him that he 'simply went through the form without thoroughly explaining it.'

[146] In his evidence in chief, accused no 3 testified that after Const. Kokwe had handcuffed him he was taken to a group of police officers who assaulted him. This was not put to Const. Kokwe or to Insp. Joubert. It was also not suggested by accused no 3 that such alleged assault had induced him to make the confession or to sign exhibit 'AA'.

[147] Accused no 3 gave a detailed account of how Insp. Joubert, or Insp. Joubert through Const. Senosi as the interpreter, had demanded that he make a statement, of his refusal to do so, of accused 3 informing them of his rights, of him telling them that they were supposed to hand over to him his s 35 rights, and of him advising them of his right and preference to make a statement before a court in the presence of his attorney. Not one shred of this evidence was foreshadowed in the cross-examination of either Const. Senosi or of Insp. Joubert, and no plausible explanation was given for the omission. On the contrary, no issue was taken under cross-examination of Insp. Joubert with his evidence that accused no 3 had elected not to be assisted by an attorney at that stage and to make a statement to a justice of the peace.

[148] Accused no 3 testified that Const. Nkuna had told him that his signing of exhibit 'Z' was to confirm that he had been arrested. Under cross-examination, he testified that he observed the reference to s 35 on the document when he signed it. Under re-examination it further appeared that he was not unfamiliar with a SAP14A notice and the purpose thereof at the time of his arrest. His evidence under cross-examination as to why the notice was of no use to him when a copy thereof had eventually been handed to him after he had made the statement before Capt. Madibo was contradictory. He testified that by that time he had already made the statement and that at the stage when he asked for it he wanted to show the police officers the rights which a suspect enjoys. He then testified that when he read through it he realised that he should have been informed of the rights contained in it before he had made the statement. But, on his own evidence, he had been aware of his s 35 rights before he was arrested.

[149] The evidence of the State witnesses on the issue of accused no 3's proficiency in the English language, such as that of Insp. Joubert who testified that he and accused no 3 communicated comfortably in English, was not placed in issue when they were cross-examined. Yet, when he was cross-examined, accused no 3 testified that his understanding of and ability to communicate in English were limited and that he would not have understood the rights had they been explained to him in English.

[150] The State, on the totality of the evidence, discharged the *onus* of proving beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the statement that had allegedly been made by accused no 3, which forms part of exhibit 'AA', and that the disputed statement had not been obtained in an unconstitutional manner. The confession may, in terms of s 219 of the Criminal Procedure Act, only be admitted as evidence against him.

[151] The ruling that was made is that the statement made by accused no 3 before Capt. MP Madibo from 21h47 on 28 November 2007 at the Muldersdrift SAPS and contained in exhibit 'AA', is admitted in evidence against accused no 3.

[152] The fifth trial-within-this-trial concerned the admissibility of pointings out that had allegedly been made by accused no 6 to the late Capt. Heinrich Steyn on 16 January 2008. On 7 September 2009, I held the disputed pointings out inadmissible. These are the reasons for the ruling.

[153] Mr Ntlakaza, on behalf of the State, contended that the disputed pointings out amount to admissions, and Mr Themba, on behalf of accused no 6, contended that they amount to a confession. The State, however, accepted the burden of establishing the more stringent requirements for the admissibility in evidence of a confession. The disputed pointings out might accordingly not be

admitted, unless they were proved to have been made by accused no 6 freely and voluntarily, while he was in his sober senses, and without having been unduly influenced thereto (the requirements of s 217 of the Criminal Procedure Act). They must also be excluded if they were obtained in a manner that violates any applicable right in the Bill of Rights and if their admission would render the trial unfair or otherwise be detrimental to the administration of justice (the provisions of s 35 of the Constitution of the Republic of South Africa).

[154] Mr. Themba, on behalf of accused no 6, objected to the admissibility of the disputed pointings out on the grounds that they were obtained in violation of the constitutional rights of accused no 6 since his constitutional rights had not been read or explained to him; they were not freely and voluntarily made by him; he had been threatened and assaulted on the day preceding the pointings out; he had been unduly influenced to make the pointings out on the day of the pointings out; and the 'contents' of the pointings out were not his own account of 'what exactly happened', but what he had been told by the police on the day preceding the pointings out. Accused no 6 confirmed his grounds of objection.

[155] The State produced the death certificate of the late Capt. Heinrich Steyn. It is common cause that the disputed pointings out were made to him and that he subsequently died on 13 March 2009.

[156] The State also led the evidence of Insp. D Thwalima, who acted as the interpreter from English into Tswana and vice versa when the disputed pointings out were made; of Insp. CJ Britz, who was the photographer for the purpose of the pointings out and who took photographs of accused no 6 and of the pointings out; of Const. PT Maluleke, who was the driver of the vehicle in which the late Capt. Steyn, Insp. Thwalima, and accused no 6 travelled to and from the pointings out; of Const. KT Letswamotse, who assisted the investigating officer and who was implicated by accused no 6 as one of the police officers who assaulted him; of Insp. Joubert, who is the investigating officer and who accused no 6 also implicated as one of the police officers who assaulted him; of Constables SS Nkuna and EB Senosi, who accused no 6 implicated as the other two police officers who assaulted him; and of Inspectors T Mogorotsi and TS Ramokgolo, who were the client service centre (charge office) commanders during the day and night on 15 – 16 January 2008, which was the relevant period when accused no 6 alleged that he was assaulted. The State case was then closed. Accused no 6, Mr. Vincent Dlamini, elected to testify and his case was thereafter closed.

[157] The first witness called by the State was Insp. Thwalima. He testified in chief that he had accompanied the late Capt. Steyn to the Muldersdrift SAPS. An office was allocated to the late Capt. Steyn where he interviewed accused no 6. Insp. Thwalima acted as the interpreter between the late Capt. Steyn and accused no 6. He testified that the late Capt. Steyn had used a *pro forma*, which

is used for pointings out, he had seen the late Capt. Steyn 'recording' on it, and Insp. Thwalima had also personally signed it.

[158] Before the *pro forma* was introduced into evidence and before Insp. Thwalima was led on its contents and therefore on the communications between the late Capt. Steyn, Insp. Thwalima, and accused no 6, or between any of them, the State counsel requested permission to lead Insp. Thwalima thereon in order to afford the State the opportunity of attempting to establish the relevant requirements of s 3 of the Law of Evidence Amendment Act 45 of 1988 and of s 34 of the Civil Proceedings Evidence Act 25 of 1965 as read with s 222 of the Criminal Procedure Act 51 of 1977. The State and defence counsel appeared to have been *ad idem* that the probative value of such evidence depended upon the credibility of the late Capt. Steyn. We had not yet heard the evidence and counsels' labelling of it as hearsay evidence is not determinative of the issue. I, however, accepted that at least part of such evidence was likely to be of a hearsay nature since it is generally the sum of the evidence of an interpreter that he interpreted correctly all that was said to him and of the person to whom he interpreted, in this instance the late Capt. Steyn, on what the interpreter had said to him at the time, which qualifies it as non-hearsay. See: *R v Mutche* 1946 AD 874, at pp 877 – 878, and *Magwanyana and Others v Standard General Insurance Co Ltd* 1996 (1) SA 254 (D&CLD), at p 257A-G. Mr. Themba, on behalf of accused no 6, objected to the State being permitted to lead evidence of a hearsay nature provisionally on the basis that the person upon whose

credibility the probative value thereof depended, was the late Capt. Steyn, who the court was informed would not later testify in the proceedings. He submitted that hearsay evidence may only, in terms of ss 3(1)(b) and 3(3) of the Law of Evidence Amendment Act, be received provisionally if the person upon whose credibility the probative value thereof depends will testify.

[159] I considered the submissions of Mr. Themba to be without merit and I ruled the hearsay evidence to be given by Insp. Thwalima relating to the *pro forma* and the alleged communications between accused no 6, Insp. Thwalima, and the late Capt. Heinrich Steyn to be provisionally admitted. The reference to Insp. Thwalima was omitted from the ruling, but was added before any further evidence was led. Mr. Themba, on behalf of accused no 6, did not object to the correction.

[160] These are the brief reasons for this ruling. The State did not seek the provisional admission of hearsay evidence in terms of the provisions of s 3(1)(b) as read with the applicable provisions of s 3(3) of the Law of Evidence Amendment Act. Ss 3(1)(b) and 3(3) do not, on my interpretation of s 3, prohibit a court from provisionally admitting hearsay evidence with a view to assessing and determining at an appropriate stage of the proceedings whether or not it should be admitted in the interests of justice in terms of s 3(1)(c). This subsection

> '… enjoins a Court in determining whether it is in the interests of justice to admit hearsay evidence to have regard to every factor

> that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.'

S v Shaik and others 2007 (1) SA 240 (SCA), para [170]. Particularly the probative value of such evidence (s 3(1)(c)(iv)) and any prejudice to a party which the admission of such evidence might entail (s 3(1)(c)(vi)) are often only capable of assessment and determination once other evidence had been presented.

[161] I was at that early stage of the proceedings unable to determine whether the evidence to be led should be admitted in the interests of justice in terms of s 3(1)(c). Admitting the evidence provisionally with the intention of giving 'a clear and timeous ruling' on the admission or non-admission thereof at the latest before the State closes its case in this trial-within-the-trial 'so that the accused can appreciate the full evidentiary ambit he … faces', would not, in my judgment, have resulted in any uncertainty as to the ambit of the admitted evidence and it would not have constituted the type of 'provisional ruling' that may be prejudicial to an accused or render the trial unfair. See: *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), paras [18] – [20]; *S v Ramavhale* 1996 (1) SACR 639 (A), at p 651b - g; and *S v Molimi* 2008 (2) SACR 76 (CC), paras [36] – [44]. I accordingly considered it appropriate to the situation to admit the evidence provisionally at that stage.

[162] Immediately after the ruling had been made, Mr. Themba, on behalf of accused no 6, orally applied for a special entry to be made in terms of s 317 of the Criminal Procedure Act 51 of 1977. He submitted that the provisional admission of the *pro forma* document was irregular based on the same contention that hearsay evidence may only, in terms of ss 3(1)(b) and 3(3) of the Law of Evidence Amendment Act, be received 'provisionally' if the person upon whose credibility the probative value thereof depends will testify, and that it was known to the court that the late Capt. Steyn would not later testify. The State opposed the application for a special entry on the grounds that it was not made *bona fide* and that it was frivolous and absurd within the qualification referred to in s 317(1) of the Criminal Procedure Act.

[163] The special entry made by me on the record, after Mr. Themba had confirmed that its terms correctly and accurately reflect the special entry that was applied for by accused no 6, is the following:

> 'The provisional admission of hearsay evidence to be given by Insp. Thwalima in respect of the document referred to by him in his evidence in chief and in respect of alleged communications between accused no 6, Insp. Thwalima, and the late Capt. Heinrich Steyn is alleged by accused no 6 to be irregular or not according to law since ss 3(1)(b) and 3(3) of the Law of Evidence Amendment Act 45 of 1988 only permit the provisional admission of hearsay evidence if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in the proceedings, and the court was, in this instance, informed that Capt. Steyn had died and accordingly that he would not later testify in the trial-within-the-trial that concerns the admissibility of the disputed pointings out of accused no. 6, and the irregularity, according to accused no 6, prevents justice from being done.'

[164] I reserved judgment on whether or not the application for a special entry should be granted. It should, in my view, be refused. I need only say that it was clearly 'frivolous' or 'absurd' or its granting 'would be an abuse of the process of court' within the meaning ascribed to these qualifications in *inter alia* the case of *S v Cooper and Others* 1977 (3) SA 475 (TPD), at p 476D-G.

[165] Insp. Thwalima testified that, at the commencement of the interview, accused no 6 was asked which language he would prefer and he elected Tswana. He also mentioned that he understood Afrikaans and English. Insp. Thwalima is proficient in Tswana and in English and he interpreted to accused no 6 what the late Capt. Steyn had said and to the late Capt. Steyn what accused no 6 had said. At times accused no 6 communicated directly with the late Capt. Steyn in English or in Afrikaans. Insp. Thwalima testified that the late Capt. Steyn introduced himself. He showed to accused no 6 his appointment certificate. He made copies of its front and reverse sides. All three of them signed the copies. They were then attached to the *pro forma* (exhibit 'CC'). The late Capt. Steyn asked accused no 6 whether anyone had explained his rights to him. Accused no 6 confirmed this and he produced and handed to the late Capt. Steyn his copy of the SAP14A notice. The late Capt. Steyn made copies thereof. He read out to accused no 6 the rights contained in the SAP14A form in English. Insp. Twhalima explained the rights to accused no 6 in Tswana. Accused no 6 was asked whether he understood the rights that had been read out to him and he replied that he understood them. Accused no 6 did not seek to exercise any

of the rights. All three of them signed a copy of the SAP14A notice, which was then also attached to the *pro forma* (exhibit 'CC'). Accused no 6 informed them that he was prepared to make the pointings out. He gave the directions. He made certain pointings out. They returned to the Muldersdrift SAPS. Capt. Steyn handed to Insp. Thwalima the *pro forma* and the notes of the pointings out. Insp. Thwalima read the *pro forma* and the notes of the pointings out to accused no 6 in English and he explained to him what he had read in Tswana. Accused no 6 confirmed that he understood and that he was satisfied with what had been read back and explained to him.

[166] Insp. Britz of the Local Criminal Record Centre was the photographer. He took photographs of accused no 6 before the pointings out, of the matters pointed out, and again of accused no 6 after the pointings out (exhibits 'DD' and 'EE'). Const. Maluleke, who was stationed at Florida SAPS at the time, was the driver of the vehicle in which Capt. Steyn, Insp. Thwalima, and accused no 6 were traveling when they went on the pointings out. Insp. Britz used his own vehicle.

[167] The evidence of the other State witnesses relating to the events that preceded the pointings out was briefly the following: The investigating officer, Insp. Joubert, traced accused no 6, who was a suspect in the present matter at the time, to the Johannesburg Correctional Facility. Insp. Joubert was assisted by Const. Letswamotse in the investigation. They attended at the Johannesburg

Correctional Facility on 14 January 2008 where they found accused no 6. On 15 January 2008, Insp. Joubert instructed Const. Letswamotse to book accused no 6 out of the Johannesburg Correctional Facility and to take him to the Muldersdrift Police Station for investigation. Const. Letswamotse, accompanied by a trainee police officer, attended at the Johannesburg Correctional Facility. He booked accused no 6 out. He identified himself to him. He informed him that he was arresting him on a charge of murder and of armed robbery. He warned him of his constitutional rights in English, which he read to him from his pocket book. Accused no 6 was then transported to the Muldersdrift SAPS.

[168] At the Muldersdrift SAPS, Const. Letswamotse, in the presence of the client service centre commander, Insp. Mogorotsi, informed accused no 6 of the reason for his detention. He read to him his constitutional rights in English from the SAP14A notice (exhibit 'FF'). They both signed the notice, and Const. Letswamotse handed a copy thereof to him. Insp. Mogorotsi made an occurrence book entry (exhibit 'GG'). The time recorded by Insp. Mogorotsi is '12:20'. The occurrence recorded is that Const. Letswamotse detained Vincent Dlamini (accused no 6) for armed robbery and murder; that his rights had already been explained to him; that he understood them; that he had contacted his next of kin; and that he had no injuries or complaints. Insp. Mogorotsi took accused no 6 to the cells after he had made the entry.

[169] Constables Letswamotse, Senosi, and Nkuna were not on duty from 16h00 on 15 January 2008. Insp. Joubert booked accused no 6 out of the cells for investigation early that evening at about 19h00. Insp. Ramokgolo, the client service centre commander at the time, fetched him from the cells and handed him over to Insp. Joubert. Insp. Ramokgolo made an occurrence book entry (exhibit 'HH'). The time recorded by Insp. Ramokgolo is '19:17'. The occurrence recorded is that Insp. Joubert booked Vincent Dlamini out for investigation. Insp. Joubert interviewed accused no 6 in his office upstairs. He explained his constitutional rights to him in English and accused no 6 indicated that he was willing to proceed without a legal representative. Insp. Joubert handed accused no 6 back to the client service centre commander after the interview. Insp. Ramakgolo again made an occurrence book entry (exhibit 'HH'). The time recorded by Insp. Ramakgolo is '22:20'. The occurrence recorded by him is that Insp. Joubert had booked Vincent Dlamini back from investigation and that he had no complaints. Insp. Ramakgolo took accused no 6 back to the cells. There were five persons who were detained at the Muldersdrift SAPS cells at the time. All of them were in the cells once Insp. Ramakgolo had taken accused no 6 back to the cells. Insp. Ramakgolo and another police officer visited the cells at 23h00. Insp. Ramakgolo made an occurrence book entry (exhibit 'HH') in which he recorded the cell visit at '23:00' and that the detainees had 'no complaints'. Early the next morning, 16 January 2008, Insp. Joubert arranged with the late Capt. Steyn, who was from Florida SAPS, to assist with the pointings out.

[170] By the end of the State case I made a ruling admitting the *pro forma* (exhibit 'CC') in evidence, and admitting the statements therein contained as well as the evidence of Insp. Thwalima relating to the communications between the late Capt. Steyn, Insp. Thwalima, and accused no 6, or between any of them in evidence, insofar as they constitute hearsay evidence, in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. I indicated that the reasons for the ruling would be given at a later stage. These are the reasons.

[171] The view that I took of Capt. Thwalima's evidence was that it essentially depended upon his own credibility. *Zeffert Paizes St Q Skeen: The South African Law of Evidence* (2003), at pp 366 – 368. I nevertheless considered it appropriate to subject the evidence to the enquiry envisaged in s 3(1)(c).

[172] The nature of the proceedings: Courts do have an 'intuitive reluctance to permit untested evidence to be used against an accused in a criminal case.' *S v Ramavhale* 1996 (1) SACR 639 (A), at p 647j. But the true test for the evidence to be admitted is 'whether the interest of justice demands its reception.' *S v Shaik and Others* 2007 (1) SA 240 (SCA), at p 299C.

[173] The nature of the evidence: The evidence consists of what the late Capt. Steyn had said in English to the interpreter, Insp. Thwalima, and what he in turn had interpreted to accused no 6 in Tswana; and, what accused no 6 had said to Insp. Thwalima in Tswana and what he in turn had interpreted to the late Capt.

Steyn in English. The *pro forma* purports to record such communications in the printed parts thereof and in the manuscript recordals thereon.

[174] The purpose for which the evidence relating to the *pro forma* and the communications between the late Capt. Steyn, Insp. Thwalima, and accused no 6 was tendered by the State was to prove that an effort was taken to ascertain and that it was ascertained that accused no 6 desired freely and voluntarily, without undue influence, and in his sound and sober senses, to make the pointings out before they were made, and that he was informed of his constitutional rights.

[175] The probative value of the evidence: The probative value of the evidence contained in the *pro forma* depended on the credibility of the late Capt. Steyn to the extent that he had read the printed information correctly from the form in English to Insp. Thwalima, and that he noted correctly on the form what Insp. Thwalima had interpreted to him at the time when he read and noted the information. Confirmation for the contents of the *pro forma* was to be found in the evidence of Insp. Thwalima. He testified that, upon their return from the pointings out, Capt. Steyn handed to him the *pro forma* and the notes of the pointings out and that he, Insp. Thwalima, had read the *pro forma* and the notes of the pointings out to accused no 6 in English and that he explained to him in Tswana what he had read. He testified that accused no 6 confirmed that he understood and that he was satisfied with what had been read back and

explained to him. Confirmation for the contents of the *pro forma* was also to be found in the evidence of the various other State witnesses, such as that accused no 6 wished to make the pointings out (Insp. Joubert), that he had not been assaulted (Insp. Joubert, Insp. Mogorotsi, Insp. Ramokgolo, Const. Letswamotse, Const. Senosi, Const. Nkuna), and that he had no injuries (Insp. Britz, Insp. Mogorotsi, Insp. Ramokgolo). The evidence under consideration seemed reliable. This conclusion was only based on the evidence presented by the end of the State case.

[176] The reason why the late Capt. Steyn was not called as a witness was because he had died on 13 March 2009.

[177] Any prejudice to accused no 6 which the admission of the evidence could entail: It appears from the grounds of objection raised to the admissibility of the disputed pointings out and the version of accused no 6 that had been put to the various State witnesses that his version was that he did not make the pointings out in issue freely and voluntarily and without undue influence essentially as a result of alleged brutal assaults that had been committed upon him by Insp. Joubert and Constables Letswamotse, Senosi and Nkuna the night before the pointings out were made. They also allegedly told him what to say and what to point out to a senior official the next day. If his version were to be accepted, then the pointings out would not have been made freely and voluntarily and without undue influence whether or not the late Capt. Steyn had correctly read to Insp.

Thwalima the information contained in the *pro forma* and whether or not the late Capt. Steyn had correctly noted down what he had been told by the interpreter. Accused no 6's counsel had the full opportunity to cross-examine all the State witnesses on all the events that had preceded the pointings out and on the events that had occurred during the interview and pointings out. Insp. Thwalima was extensively cross-examined on the *pro forma* and on the events and communications at the interview and pointings out.

[178] I accordingly concluded that it would be in the interests of justice to admit such evidence.

[179] I now give a synopsis of the evidence of accused no 6. He testified that Insp. Joubert and Const. Letswamotse attended at the Johannesburg Correctional Facility on 15 January 2007 just after 7h00 when he was booked out of that facility. Const. Letswamotse acted as interpreter for Insp. Joubert. His constitutional rights were not read or explained to him on this occasion. Upon their arrival at the Muldersdrift SAPS charge office, Insp. Joubert, through Const. Letswamotse's interpretation, informed him that he was charging him with murder and robbery. He was assaulted by Const. Letswamotse, who slapped him with an open hand, when he enquired from them where the murder and robbery had taken place. He stopped assaulting him when Insp. Joubert told him to leave him alone since they would 'deal with him later'. One of the police officers brought a book. Accused no 6 was ordered to sign in it. A page was removed from the

book and handed to him. It is common cause that this page was a copy of the SAP14A notice (exhibit 'FF'). He was then taken to the cells by Insp. Joubert and Const. Letswamotse.

[180] Insp. Joubert, Const. Letswamotse, Const. Senosi, and Const. Nkuna fetched him from the cells 'during the night.' Insp. Joubert assaulted him at the cells by hitting him with a clenched fist in the stomach. He tripped him, and he placed his foot on his back when he had fallen. He was taken to an office upstairs in the building. He was shown photographs and told that accused no 1 had alleged that he was in his company when the crimes had been committed. He denied such allegations. Const. Letswamotse initiated an assault upon him in which the other three officers participated. Insp. Joubert placed a plastic tube over his head. He was hit with clenched fists in his stomach. This had suffocated him. He fell to the floor and lost awareness or consciousness. This form of assault was repeated once more. Const. Senosi forced a firearm into his mouth. This caused an injury inside his mouth, which was bleeding. Const. Senosi suggested to him that they could kill him and say that he had tried to escape. He was taken to a river that 'was not far away from the police station'. Insp. Joubert again placed a tube over his head. His body was forced underneath the water. He lost awareness or consciousness. He regained awareness after he had been taken out of the water. He was vomiting and Const. Letswamotse was administering first aid on him. Accused no 6 then finally agreed to agree to everything that Insp. Joubert had told him earlier. He

was taken back to the Muldersdrift SAPS. Insp. Joubert read a statement to him. He was then taken on a pointings out rehearsal to his house and to 'the scene where the crimes had been committed'. He was shown what to point out. He was taken back to the Muldersdrift SAPS. He was told repeatedly throughout these events that he should repeat what he had been told and point out what he had been shown to point out to a 'high ranking official', who, he was told, would be coming the next day. He was finally taken back to the cells by Insp. Joubert and Constables Letswamotse and Senosi while Const. Nkuna remained behind. Const. Letwamotse acted as English/Tswana interpreter between Insp. Joubert and accused no 6 throughout the events. He was paid yet another visit in the cells by Insp. Joubert and Const. Letswamotse at about 8h00 the next morning, which was 16 January 2008. Insp. Joubert confirmed with him that he still remembered what they had told him to say and had showed him to point out. Insp. Joubert also instructed him to take a bath. He was unable to open the bath tap due to his swollen hands. Insp. Joubert opened it for him.

[181] He was thereafter fetched from the cells by the late Capt. Steyn and by Insp. Thwalima and taken to an office upstairs. At the outset Insp. Thwalima said this to him: 'I am not here to play. You must tell us what they said you must say the previous day.' Insp. Thwalima spoke to him in Tswana despite his election to speak Zulu. When accused no 6 told him about his interview with Insp. Joubert the previous day, Insp. Twhalima replied by saying: 'We are not here for that. Tell us what you have been told yesterday to tell us.' Accused no 6 then

narrated what he could still remember. He was asked whether he was going to show them the place where he stayed, and he confirmed that he would. He was made to sign papers. Accused no 6 confirmed his signature on each page of the *pro forma* and on the annexed copies of the late Capt. Steyn's appointment certificate and the SAP14A notice. Photographs were taken of him.

[182] The motor vehicle in which the late Capt. Steyn, Insp. Thwalima, Insp. Maluleke and accused no 6 travelled for purposes of the pointings out, followed the motor vehicle in which Insp. Britz and another police officer were traveling to his house and thereafter to the first place that accused no 6 had been told to point out. Accused no 6 did not give any directions to his house or to that place. Once they reached the first place that he had been told to point out, they proceeded on foot and he pointed out what he had been told to point out. The officer who accompanied Insp. Britz also showed him a place to point out. Both vehicles were waiting at the final point that he had been told to point out. Insp. Maluleke drove the one there and the other one was driven by the officer who accompanied Insp. Britz. They returned to the Muldersdrift SAPS and accused no 6 was taken directly to the cells.

[183] Accused no 6 *inter alia* denied that he had furnished to Insp. Thwalima or to the late Capt. Steyn his copy of the SAP14A notice; that Capt. Steyn read the constitutional rights from the SAP14A notice to him in English or that Insp. Thwalima translated them to him in Tswana; that the questions appearing on the

pro forma were read or interpreted to him; that he furnished the replies recorded on the form, except those relating to his personal particulars and to an old injury to his wrist; that photographs were taken of him after the pointings out; that Insp. Thwalima read back the *pro forma* and notes of the pointings out to him in English or that he interpreted what he had read to him into Tswana; or that he confirmed that he understood and was satisfied with what had been read back and explained to him.

[184] Accused no 6 testified that the assault on him by the four police officers and Insp. Joubert's instruction to him to say and point out what they had told him to say and had showed him to point out had induced him to make the pointings out.

[185] Accused no 6 made an unfavourable impression upon us in the witness stand. He was often evasive in answering questions during cross-examination. There were material contradictions in his evidence and between his evidence and what had been put by his counsel to State witnesses. Certain material aspects of his evidence were not put to the State witnesses despite the fact that he and his counsel were afforded whatever time they required for consultations whenever it was indicated that he wished to consult with his counsel or whenever his counsel wished to take instructions from him. His detailed version was put to various State witnesses in English and then interpreted to him. He heard it a few times in court before he entered the witness stand.

[186] A few of many examples suffice: Accused no 6 testified that he had suffered from an injury inside his mouth, from pains all over his body, that he had been unable to speak properly, and that his whole face, eyes and mouth had been swollen as a result of the assault upon him by Insp. Joubert and Constables Letswamotse, Senosi, and Nkuna. His inability to speak properly was not put to any of the State witnesses. His alleged injuries were also not visible on the photographs, although it was put to some of the State witnesses that photograph 18 (exhibit 'DD') depicts his swollen face. The State witnesses, who were confronted with accused no 6's version that he had a swollen face on the day of the pointings out, all denied it. Accused no 6 testified that Insp. Britz, the photographer, was present throughout the interview between him and the late Capt. Steyn. This was neither put to Insp. Thwalima nor to Insp. Britz. Accused no 6 testified that the motor vehicle in which he, the late Capt. Steyn, and Insp. Maluleke travelled *en route* to the pointings out followed the vehicle in which Insp. Britz and another police officer travelled. This other police officer is an important person in his account. He testified that this other police officer was also present in the office to which accused no 6 had been taken after the assaults upon him the previous night and that he looked at accused no 6 and conversed with Insp. Joubert. This was not foreshadowed in the cross-examination of Inspector Joubert or that of Constables Letswamotse, Senosi or Nkuna.

[187] The fact that accused no 6 is an unreliable and untruthful witness, does not conclude the enquiry. We must be satisfied that the prerequisites to admissibility have been proved beyond reasonable doubt.

[188] The State presented a strong case on the issue whether or not the pointings out were made freely and voluntary and without undue influence. The State witnesses corroborated each other on various material aspects.

[189] The State case on the issue whether or not accused no 6 had been properly informed of his constitutional rights in a language that he understood, is, however, unsatisfactory in various material respects.

[190] Const. Letswamotse testified that, at the time when he fetched accused no 6 from the Johannesburg Correctional Facility, he read the constitutional rights to him in English from his pocket book and he enquired from him in Tswana whether he understood the rights, which accused no 6 confirmed. Const. Letswamotse's pocket book was, however, not tendered in evidence. Const. Letswamotse referred to certain rights in his evidence that he had read to accused no 6, but he, of his own accord, conceded that his recollection might not be accurate.

[191] Const. Letswamotse testified that, upon their arrival at the Muldersdrift SAPS, he read to accused no 6 his constitutional rights from the SAP14A notice

in English and he explained them to him in Tswana. He contradicted himself under cross-examination when he testified that he did not explain the rights to accused no 6 in Tswana, but that he only ascertained in Tswana whether or not accused no 6 understood the rights. Insp. Mogorotsi, who was the client service commander at the time, was adamant that Const. Letswamotse did not read the rights to accused no 6 in English, but in Tswana. Const. Letswamotse testified that it was a station order at Muldersdrift SAPS to read the rights in English, and if a person did not understand them, to then explain them in the language in which he or she would understand. But Insp. Mogorotsi testified that the SAP14A forms were available in almost every language, including Tswana.

[192] Insp. Joubert testified that he warned accused no 6 of his constitutional rights in English during the interview between them. He testified in chief that this took the form of explaining to accused no 6 that he had the right to remain silent, that everything he said would be written down and held against him in a Court of Law, that he had the right to a legal representative and, if he could not afford one, to be provided with one by the State and that he also warned accused no 6 that he did not need to make any confession or pointing out.

[193] The *pro forma* (exhibit 'CC') is tailor made to inform an accused person with some precision of his or her constitutional rights and, particularly, to make an accused person aware of his rights to legal representation prior to his engaging in self-incrimination. There was no evidence that the rights set out in

the *pro forma* had been read or interpreted to accused no 6 prior to him making the pointings out. On the contrary, Insp. Thwalima testified that the only rights that were explained to accused no 6 during the interview were those set out in the SAP14A notice. In giving his evidence, accused no 6 denied that most of the statements and questions contained in the *pro forma* had been read to him or that he furnished most of the replies that were noted on the form. Insp. Thwalima's evidence that only the rights contained in the SAP14A notice had been read and interpreted to accused no 6, corroborates the evidence of accused no 6 to the extent that the rights contained in the *pro forma* had not been read and interpreted to him. What casts further doubt on the reliability of the evidence contained in the *pro forma* is the fact that replies were noted on it in response to certain questions relating in content to constitutional rights while others were left blank. It raises the question that if those specific questions were not read to accused no 6, why were replies noted? Although the evidence contained in the *pro forma* was ruled admissible against him at the close of the State case, no weight is attached thereto, except insofar as the issues relating to admissibility under s 217 of the Criminal Procedure Act are concerned.

[194] There was no evidence that the late Capt. Steyn read all the rights contained in the SAP14A notice to accused no 6 in English or that he had read them correctly. But even if this could be inferred, and we would hesitate to do so, then, on the State's version, accused no 6 elected Tswana and the rights contained in the SAP14A were interpreted to him into Tswana by Insp. Thwalima

in consequence of his election. Insp. Thwalima's inability to have interpreted the rights correctly to accused no 6 was undeniably demonstrated when he was cross-examined. He did not correctly interpret those with which he was confronted under cross-examination, and he requested ten minutes to interpret the first one when he failed to answer promptly. There was accordingly no reliable evidence placed before us that immediately before the pointings out were made, accused no 6 had been correctly and adequately warned of his constitutional rights before deciding whether or not to make the pointings out or whether or not to obtain legal assistance.

[195] Insp. Joubert, Insp. Thwalima, and Const. Letswamotse testified that accused no 6 understood English. Accused no 6 maintained that he understood only 'a little bit' of English and that his ability to communicate in English was limited. His proficiency in the English language was probably much more than he conceded. An inference could, however, not be drawn that whatever understanding accused no 6 might have had of his constitutional rights before the interview with the late Capt. Steyn, remained unaltered and accorded with the constitutional provisions after Insp. Thwalima had probably interpreted them inaccurately to him. Compare *S v Monyane and Others* 2001 (1) SACR 115 (TPD), at pp 120d – 121c.

[196] The admission of the disputed pointings out and accompanying statement will, in our view, taint the fairness of the trial. A correct exposition of the rights

set out in s 35 of the Constitution was probably not correctly interpreted to accused no 6 before he made the incriminating pointings out. No reliable evidence was placed before us as to what precisely was interpreted to him prior to the making of the pointings out. This is in the realm of the imponderable. Whether accused no 6 nevertheless would have made the incriminating pointings out had his constitutional rights been correctly interpreted to him, or whether he would have elected to remain silent, or whether he would have elected the assistance of an attorney before doing so, is impossible to say.

[197] We are in the circumstances unable to hold that the admission of the disputed pointings out will not be prejudicial to accused no 6, and, accordingly, will not render the trial, as far as he is concerned, unfair. The admission of such evidence would also be detrimental to the administration of justice since it would condone the materially wrong interpretation of constitutional rights by interpreters to accused persons prior to them engaging in self-incrimination with significant consequences.

[198] The State accordingly failed to discharge the onus of proving beyond reasonable doubt the constitutional requirements for the admission in evidence of the pointings out that had allegedly been made by accused no 6.

[199] The pointings out and statements made by accused no 6 to the late Capt. Steyn on 16 January 2008 were accordingly ruled inadmissible in evidence. The application for a special entry by accused no 6 was refused.

[200] The sixth-trial-within-this-trial concerned a witness statement which Const. Dichaba Ernest Moraba obtained from accused no 5 not long after the incident on 28 November 2007. She was at that stage a complainant and considered to be an eye witness for the State.

[201] Before Const. Moraba was called as a witness Mr. Mkwanazi on behalf of accused no 5 objected to the statement on the basis that she maintained that once the statement had been taken by Const. Moraba it was not read back to her and the correctness of certain parts thereof were disputed by her. I followed a somewhat unusual procedure and ordered that the issue whether or not the statement had been read back to her be determined in interlocutory proceedings by way of a trial-within-this-trial in order to ensure that accused no 5 was not prejudiced in some way or another.

[202] It was undisputed that Const. Moraba was assigned to obtain statements from various witnesses at Heia Safari early in the afternoon on 28 November 2007. He had no knowledge of the case other than that the deceased was murdered by unknown people who were still at large at the time. It is common cause that Const. Moraba obtained the statement from accused no 5 at her

residence at Heia Safari and after her also from others. Accused no 5 explained the incident to Const. Moraba. She is Zulu speaking and they communicated in Zulu. He reduced her statement to writing in English. Const. Moraba described himself as 'good' at Zulu and his ability in English as 'fair'. Accused no 5 signed each page of the statement.

[203] Const. Moraba testified that once he had taken the statement from accused no 5, he read it back to her in English and thereafter interpreted or explained it to her in Zulu. She confirmed that she understood the statement and she signed it. She did not bring to his attention any part of the statement which she did not understand or dispute. Accused no 5 testified that Const. Moraba did not read the statement back to her once it had been taken, he did not ask her to confirm it, and she did not confirm the contents or the correctness thereof. She testified that certain parts of the statement are not correct.

[204] Under cross-examination accused no 5 said that the statement was not read back to her because Const. Moraba was in a hurry and he wanted to take statements from the other people present. She also testified that she was unable to ask him why she was required to sign the statement, because he was in a hurry. Had he not been in a hurry she would have enquired this of him. None of this was foreshadowed in the cross-examination of Const. Moraba. Accused no 5 said under cross-examination that they 'were scared', 'frightened', 'still confused and not knowing what just happened.' The State advocate asked her:

'The parts, which you are stating to the Court that are incorrect on the statement, is it because of the fact that you were confused at the time when the statement was taken?' Her answer: 'That is correct.'

[205] The limited evidence presented on the issue favoured the version of Const. Moraba. A different conclusion might be reached once the two conflicting versions are measured in the light of all the evidence in the main trial. The issue further appeared to us to be rather one of accuracy, which will best be decided at the end of the trial.

[206] The ruling made was accordingly that the witness statement made by accused no 5 on 28 November 2007 is admitted into evidence. This statement was thereafter introduced into evidence as exhibit 'KK'.

[207] I now return to the main criminal trial. The six accused made formal admissions in terms of s 220 of the Criminal Procedure Act (exhibit 'A') *inter alia* relating to: the identity of the deceased; the date and cause of his death; that he sustained no further injuries after the incident; the correctness of the findings of the *post-mortem* examination conducted on the body of the deceased (exhibit 'B') and the *post-mortem* photographs (exhibit 'C'); the photographs of the scene of the incident, the surrounding areas, the deceased's motor vehicle, the deceased's body in it, exhibits found at the scene, and the key thereto (exhibits 'D1', 'D2' and 'E'); the correctness of certain ballistic tests and the findings in

respect thereof (exhibits ‘F1’ and ‘F2’); and the contents of the deceased’s will (exhibit ‘G’). Shortly after the admissions had been made, accused no 1 changed his mind and put the State to the proof of the *post-mortem* findings and of the photographs taken at the scene of the incident and surrounding areas.

[208] The State, in the main trial, called thirty-three witnesses. They are: Ms. G. Burgmer; Mr. M. Mbokazi; Ms. S. Wenman; Ms. N. Mbokazi; Mr. S.Mbokazi; Ms. K. Ngcobo; Mr. T. Ncxolo; Mr. L. Nginda; Capt. C.H. Slaughter; Capt. Pongum; Const. K. Kokwe; Const. G.N. Phakula; Mr. J.J.E. Celliers; Const. M. Sekgobela; Insp. N.J. van Niekerk; Supt. R. Ramukosi; Dir. P. Byleveld; Snr. Supt. L. Eksteen; Insp. N.S. Manoko; Supt. C.J. Scherman; Const. E.B. Senosi; Capt. M. Madibo; Const. V. Mpikashe; Mr. K. Lekalakala; Insp. J.M. Nel; Const. D.E. Moraba; Ms. J.P. Heinecke; Ms. H. du Plessis; Mr. A.G. Boonstra; Insp. M.W. Mokone; Dr. H.S. Johnson; Ms. A.Z. Mzolo, and Insp. A.J. Joubert.

[209] Ms. Burgmer, who is the daughter of the deceased, testified that he arrived in South Africa from Germany in 1952. He first worked in the gold mines. He bought a piece of land in Muldersdrift during 1970 where he established the Heia Safari Ranch and game reserve, which he developed into a well known national and international tourist destination (‘Heia Safari’). It *inter alia* has a commercial hotel and a Zulu village - Phumagena Amusi – where employees who perform Zulu dances for guests reside. Ms. Burgmer assisted the deceased

at Heia Safari. She and her daughter, Bianca, managed the hotel. Ms. Wenman had been the deceased's professional assistant and bookkeeper since April 1992, and she was someone in whom he confided.

[210] Ms. Burgmer testified that her late father was passionate about Africa and his motto was 'live in Africa with Africa'. She testified that '[h]e was a well respected businessman and he also created a lot of jobs for people in the community.' An employee, Mr. Nginda, testified that the deceased was a very good employer and very much liked by everybody. I pause to mention that accused no 4 also said that the deceased was known as a good person who helped a lot of people in the community. The deceased turned 80 years of age on 23 October 2007. He was 'still a very active man' at the time of his death on 28 November 2007.

[201] The deceased resided in the farm house on Heia Safari. Ms. Burgmer testified that the deceased was widowed in 1983. He thereafter for many years stayed on his own. Accused no 5, Ms. Celiwe Mbokazi, was one of twenty persons whom he recruited from a rural village in KwaZulu Natal during 1987 and whom he employed as Zulu dancers. The deceased and accused no 5 soon fell in love and accused no 5 later on moved from the Zulu kraal into the farm house where she and the deceased resided together as husband and wife until his death (the 'farm house'). These facts are undisputed and appear from the

statement of accused no 5 (exhibit 'O') and the evidence of Dir. Byleveld, Ms. Burgmer, and Ms. Nosipho Mbokazi.

[212] The deceased and accused no 5 had five children living with them in the farm house for whom the deceased cared. They were Nosipho, Siyabonga, Lindokuhle, Thabang, and Bheki ('the children'). Only Bheki, was not yet attending school. Nosipho Mbokazi, who is 15 years of age, testified that accused no 5 is her aunt, but she regards her and the deceased as her mother and father. In her words they 'were like a couple', 'like husband and wife', 'like married people', and they 'brought her up'. She was brought from KwaZulu Natal to the deceased's house in 2004, after she had been involved in an accident. The deceased paid her medical expenses. Siyabonga Mbokazi, who is 16 years of age, also referred to accused no 5 as his mother and to the deceased as his 'dad' when he testified. Ms. Burgmer and Ms. Wenman also referred to the children in their evidence.

[213] Ms. Wenman testified that the monthly payment of the dancers at the Zulu kraal 'was a ritual'. The deceased would first have breakfast at the hotel at 9h00, and be ready to leave the hotel at 10h00. The children usually accompanied the deceased when he paid the wages at the Zulu kraal, and, on his way out, the reception lady at the hotel would usually phone the farm house and say that he was on his way and that they should wait outside for him. On this occasion the Zulu dancers were going to be paid on 28 November 2007. Ms. Wenman

assisted in preparing the wages in small brown self-sealing envelopes for each employee (the 'wage envelopes') and by placing all the envelopes in a stationery box for wage envelopes with a list that was to be signed by each employee in confirmation of the receipt of the wages (the 'wages box'). The total amount of wages on this occasion was approximately R23 213.00.

[214] Ms. Wenman testified that on Wednesday, 28 November 2007, the deceased 'was running a bit late'. He came back from breakfast at about 10h00. He went into his office to make a few phone calls. Ms. Wenman handed the wages box with the filled wage envelopes to him at about 10h20. Mr. Terrence Ncxolo, who was employed by the deceased as a driver, testified that he accompanied the deceased that morning. His time estimate was that the deceased finished breakfast at 09h55. He also testified that the deceased went to his office and came out with the wages box. The deceased was driving and Terrence was seated on the back passenger seat. The two of them arrived at the gate of the farm house at 10h20.

[215] Nosipho testified that she was present when the deceased called her mother asking that they get ready to go and pay the employees at the Zulu kraal. She cannot remember the time of the call, but said it was between about 9h00 – 10h00. They then washed themselves, got dressed, and went to wait for their 'dad' at the gate. Accused no 5 was with them at the gate. The deceased accompanied by Terrence arrived in the Nissan game drive vehicle, which she

referred to as ‘the zebra vehicle’ (exhibit ‘E’, photographs 1, 5, and 6). Siyabonga testified that he woke up late at about 8h00. He went outside and was cleaning the veranda and outside the house. His mother, accused no 5, told him that the deceased had called and said that they must get ready to go to the Zulu kraal to pay the employees. He quickly finished his cleaning duties and then went inside the house to get ready. He heard his ‘dad’ arriving. He hooted. They went out. Terrence also testified that the deceased hooted for the children to come. The children came first and they were then followed by accused no 5.

[216] Nosipho, Siyabonga, and Terrence testified that they drove off to the Zulu kraal. The deceased was driving. Accused no 5 was seated next to him on the front passenger seat. The wages box with wage envelopes was placed between them. The children were seated in the middle row and Terrence at the back. Terrence estimated the time that they had left the house and drove off to the Zulu kraal to have been about 10h27. I pause to mention that, according to Ms Burgmer’s unchallenged evidence, the Zulu village was about three kilometers away from the farm house. It is also common cause (refer to the evidence of Nosipho, Siyabonga, and Terrence) that the relevant part of the route from the farm house to the Zulu kraal is the one depicted on exhibit ‘D2, photograph 1. They travelled on the private gravelled road from the direction of the arrow ‘K’ towards the direction of the arrow ‘A-E’. *En route*, at the arrow ‘J’, was a gate (‘the gate’).

[217] Nosipho, Siyabonga and Terrence testified that the vehicle stopped when they reached the gate. Siyabonga and Terrence testified that Siyabonga alighted from the vehicle to go and open the gate. When it was opened, they drove through the gate and waited on its other side for it to be closed. Terrence went to assist Siyabonga in closing the gate. Nosipho testified that Siyabonga and Terrence alighted from the vehicle to open the gate. Her version accords with that of accused no 5 in terms of her witness statement (exhibit 'KK'). This discrepiency is of no moment. All of them agreed that both Siyabonga and Terrence were outside the vehicle to close the gate.

[218] Nosipho testified that while they were waiting at the gate, she saw three persons approaching the vehicle from the direction of the trees and bushes to the left as they were travelling. She heard one gunshot fired when the three were approaching, and they kept on saying 'voertsek'. The three went to the side of the vehicle where accused no 5 was seated, and one of them tried to open the front passenger door. The deceased said to accused no 5 'give them money'. The assailants responded by saying they did not want the money, they want the deceased. They pointed a firearm at accused no 5, opened the door, and pulled her outside the vehicle and pushed her to the ground. Nosipho jumped off the vehicle. She heard a second gunshot fired. She ran away. She ran back to the vehicle to fetch her mother, because she heard her screaming. She grabbed her mother and they ran to the house of Ms. Burgmer's daughter, Bianca, which is next to the hotel, where they asked for help. They returned to the scene with the

deceased's daughter, Ms Burgmer. The deceased was shot. Nosipho was unable to identify the three assailants.

[219] Siyabonga testified that, at the stage when he was at the gate, he heard a gunshot fired in the air. When he looked behind him, he saw people whom he could not recognise coming from the left hand side of the vehicle. He was unable to say how many people were there. He also testified that they were screaming 'voertsek', 'voertsek'. Siyabonga and Terrence ran away to get help.

[220] Terrence also testified that while he was closing the gate with Siyabonga next to him, three persons were approaching the vehicle. All three, according to him, were armed with firearms. Terrence heard three gunshots going off. The shots were directed towards the right hand side of the vehicle. Terrence was unable to identify them, because their faces were covered. He estimated the time of the shooting to have been 10h30. He ran back to the hotel where he informed the deceased's daughter, Ms. Burgmer, of what had happened. He returned to the scene with Ms Burgmer's daughter, Bianca. On their way back to the scene they passed Nosipho and accused no 5 walking up towards the hotel. Upon their arrival they found the deceased's vehicle a few metres away from the gate under a tree at points F and H (exhibit 'D2'). Terrence found the deceased still in the vehicle, but no longer alive. The wages box with the wage envelopes was no longer in the vehicle. The wages box was empty and lying nearby in the grass.

[221] In her witness statement (exhibit 'KK'), accused no 5 states that she saw 'three black male suspects' approaching the vehicle from the left and it seemed that the suspects had hidden themselves at the trees next to the gate. She states that she was 'grabbed' out of the vehicle, her bag was searched, and her cell phone (Samsung D820 with number 358225006760699 and MTN number 0738493908), identity book and handbag were taken. The suspects took money from the deceased (the money to pay the employees at the Zulu kraal) and 'they' fired three shots at him. The vehicle was pushed away to a tree. This statement corresponds to the undisputed evidence of Terrence that he found the vehicle a few metres away at a tree. We accordingly reject her denial that she informed Const. Moraba of this. She also states that when 'they grabbed' her out of the vehicle she was instructed not to look at them. She also states that she was unable to identify them, since they wore balaclavas.

[222] Mr Lindikhaya Nginda, an employee of the Heia Safari, testified that on 28 November 2007 from about 7h00, he, and other employees, were working about 100 metres away from the gate (exhibit 'D2' photograph 1, point 'J1'). He heard a gunshot when he noticed the deceased's vehicle going through the gate. A second gunshot went off. This prompted him to look properly. He noticed people at the vehicle. He heard a third gunshot. This happened 'at past 10h00'. He saw four persons running away towards a nearby bush (exhibit 'D2',photograph 1, point J2), which was about 50 metres away from where Mr Nginda was working.

A security officer arrived, and Mr. Nginda told him about the four persons who ran into the bush. Mr.Nginda accompanied the security officer and they were traversing the Heia Safari premises and surrounding area by motor vehicle in search of the fugitives. At some stage of the search, Mr. Nginda noticed four persons at the top of a mountain. Three of them went down the mountain side. The police was contacted. When they arrived, Mr. Nginda pointed the three out to the police. They then started to run - two of them into a bush (exhibit 'D2': the area depicted just up from the arrow 'M' on photograph 2), and the third 'took his own direction'. A police search ensued at the reeds area. Mr. Nginda merely assumed that the persons whom he subsequently noticed and pointed out to the security officer and the police were the same as those who initially ran into the bush near the gate. He did not take notice of their clothes and was not able to identify them.

[223] Mr. Celliers, who was the manager of Drift Reaction, which is the security company that rendered security services to Heia Safari, testified that Drift Reaction received a panic from Heia Safari between 10h00 and 11h00 on 28 November 2007. He and a Mr. Rohann Treptaw were the security officers who reacted to the panic. Police officers had not yet arrived when they arrived at the scene of the incident, but there were many people present. They found the deceased's vehicle stationery against a tree, and the deceased slumped forward in the vehicle. Information received by them prompted them to go to the reeds area.

[224] Const. Sekgobela of the Muldersdrift SAPS attended at the scene to secure it. He too found many people present. He *inter alia* found the deceased dead in the vehicle. He summoned Insp. van Niekerk to the scene. Insp. van Niekerk, who was from the SAPS Local Criminal Record Centre, Krugersdorp, arrived at about 12h20. He *inter alia* took photographs of the points showed to him at the scene, he collected exhibits found at the scene and he secured them in forensic bags with serial numbers. His later involvement included the taking of aerial photographs of the area and the receipt or collection by him of further exhibits. All the exhibits remained in his safekeeping and he delivered them in due course to the SAPS forensic laboratories in Pretoria.

[225] The sum of the evidence of Capt. Pongum, Capt. Slaughter, Const. Kokwe, Const. Phakula, and Mr. Erasmus is that there was a strong police presence at and in the vicinity of the Heia Safari premises in the hours that followed the incident in search of suspects about whom information was received. The search was particularly focused on the reeds area to which employees directed the members of the SAPS. This area is the encircled area at arrow 'M' on photograph 2 of exhibit D2. Const. Kokwe and Const. Phakula each testified that they arrived at the reeds area after about 10h00. Const. Phakula testified that present in the area were *inter alia* members of the community, members of the SAPS Dog Unit with their dogs, members of the Florida SAPS, and members of the Muldersdrift SAPS. Capt. Slaughter, who was a shift

commander stationed at the West Rand Flying Squad, arrived at about 12h30. There was a lot of noise in the area. It was unsuccessfully searched for hours on foot and by police helicopter. Const. Kokwe eventually set the reeds area alight.

[226] Once the reeds were burning, accused no 1 emerged from the area with his hands above his head. This happened at about 16h00. Capt. Slaughter arrested him. Capt. Pongum searched him and found R7, 890.00 in cash on him – R1, 500.00 inside his trousers, R50.00 in the right rear pocket of his trousers, R190.00 in the left rear pocket of his trousers, R4, 150.00 inside his right 'tekkie', and R2, 000.00 inside his left 'tekkie' (exhibit 'D1', photographs 15, 16, 17, and 18). When Capt. Pongum came across the R50.00 in the right rear pocket of his trousers, accused no 1 remarked that the R50.00 was his money, which was not his reaction when the rest of the money was found, and Capt. Pongum gained the impression that accused no 1 did not wish him to also confiscate the R50.00. At about 16h30, Insp. van Niekerk collected the clothes of accused no 1 (black denim pants and black t-shirt), and they were sealed in a forensic exhibit bag FSD 550048.

[227] Const. Kokwe, Mr. Celliers and Mr. Treptow entered the reeds area and found accused no 3 hiding in a crouched position. When he stood up, money fell from his clothes and onto the ground. This was an amount of R2, 000.00. He was searched and a further amount of R1, 530.00 was found in one of his

pockets. Accused no 3 claimed that the money belonged to him. He was arrested by Const. Kokwe.

[228] Accompanied by accused no 1, certain members of the SAPS went to the Video Informal Settlement, Nooitgedacht, where accused no 2 was arrested by Insp. Joubert at his shack (exhibit 'D2', photograph 3, shack 'P') after he had been pointed out by accused no 1. Ms Burgmer testified that the Video Informal Settlement is not far from Heia Safari. Insp. Joubert searched him and confiscated a Nokia cell phone with IMEI number 357680/01/501769/0 that he found on him (exhibit '1').

[229] Information received in the late afternoon or early evening prompted Mr. Celliers to go to the gate of the Garden Lodge Hotel, which he estimated to be one kilometer away from the Heia Safari entrance. Ms. Burgmer testified that the Garden Lodge Hotel is adjacent to the farm house. Mr. Celliers found accused no 4 at the gate. He told him to lie on the ground. He searched him and found a cellular phone in one of his pockets. He informed accused no 4 that he was detaining him in connection with the murder and robbery at Heia Safari until the SAPS arrive. He contacted the SAPS, and upon the arrival of Insp. Joubert, handed accused no 4 and his cellular phone over to him. Insp. Joubert testified that he arrested accused no 4. He also seized the cell phone. It was a Nokia cell phone with IMEI number 359762000632630 (exhibit '2').

[230] Insp. Joubert testified that accused no 5 was initially a State witness and complainant in this matter. Her cell phone was taken during the incident. This also appears from her witness statement (exhibit 'KK'). I pause to mention that this was also the undisputed evidence of accused no 5. Ms. Burgmer testified that the land line of the farm house was connected to the switchboard of the Heia Safari hotel and it formed part of the same telephone system. Its extension was 5079. This was confirmed by Nosipho. The system generates records reflecting the date, time, and number of each call. Telephone records were printed out daily for the purpose of charging guests for their calls. Shortly after the death of the deceased, Ms. Burgmer obtained a printout of the telephone records for the farm house. She noticed unfamiliar numbers that were often repeated. She accordingly handed the records over to the investigating officer, Insp. Joubert. He confirmed this, and testified that these records (exhibit 'MM') reflect calls between the land line of the farm house where accused no 5 resided and the cell phones of accused no 2 and of accused no 4. Accused no 2 implicated accused no 5 during an interview with Dir. Byleveld on 7 December 2007 (exhibit 'N'), and she was arrested later the same day. Insp. Joubert subsequently caused call data to be obtained from Vodacom (exhibit 'LL') and MTN (exhibit 'NN').

[231] Insp. Joubert testified that accused no 6 remained an outstanding suspect. He traced him to the Johannesburg Prison on 14 January 2008, and he was arrested on 15 January 2008 in connection with this case. He was implicated in the disputed confessional statements of accused nos 1, 2, and 3.

[232] The medical *post-mortem* examination (exhibit 'B') conducted by Dr. Johnson at the Roodepoort mortuary revealed that the deceased's death had been caused by multiple gunshot wounds to the chest and upper left arm. Dr. Johnson identified three entrance wounds, although she states in her report, and in her evidence, that the individual tracks were difficult to distinguish due to the multiplicity and cross direction of the wounds. Her opinion in this regard is, however, supported by the finding of two spent bullets inside the body of the deceased and one spent bullet inside and a cartridge case outside the deceased's vehicle. The one track passes from left to right and downwards from the upper left front side of the chest just below the left collar bone and it terminates in the muscles of the right upper back where a spent bullet was found. The other track also passes from left to right and downwards from the left upper arm into the left upper chest cavity and it exits through the seventh rib on the right. The other track passes from left to right from the fourth rib space on the outer left side of the chest and it terminates in the eighth thoracic vertebra where a spent bullet was lodged. The entrance wounds, in her opinion, are to be classified as intermediate wounds, and not contact wounds. The deceased was, in her opinion, not shot at point blank range, but at a distance of at least two metres. She also expressed the opinion that the caliber of the weapon used 'looks like it would have been a handheld weapon due to the nature of the wounds.' Dr. Johnson removed two spent bullets from the deceased's body (FSC459104), which were later subjected to ballistic examination.

[233] Evidence relating to the finding of exhibits and the ballistic analyses thereof was tendered by the State. Relevant are exhibits 'B', 'D1', 'D2', 'E', 'F1' and 'F2' and the evidence of the witnesses Insp. van Niekerk, Const. Mpikashe, Mr. Lekalakala, Insp. Nel, Dr. Johnson and Insp. Joubert.

[234] On 28 November 2007, Insp. van Niekerk attended at the scene of the incident where he *inter alia* collected one cartridge, which he sealed in forensic bag FSCC698755. On 29 November 2007, Dr. Johnson removed two spent bullets from the deceased's body (FSC459104), which was received from her by Insp. Joubert and he in turn handed them to Insp. van Niekerk. On 1 December 2007, Insp. Joubert collected one spent bullet that was found in the deceased's vehicle (exhibit 'E'), which he handed to Insp. van Niekerk and it was sealed in forensic bag FSCC698741. I have mentioned that these exhibits remained in the safekeeping of Insp. van Niekerk until they were delivered to the forensic laboratory in Pretoria.

[235] Information received by Insp. Joubert caused him to attend at the Honeydew SAPS on 14 January 2008 where he booked a firearm, which was a .38 Special Enfield revolver that was sealed in exhibit bag FSC458435, out of Honeydew SAP13/1435/2007 for the purpose of his investigation, and he booked it into Muldersdrift SAP13/3005/2008.

[236] On 7 February 2008, the police expert in ballistics, Insp. Nel, *inter alia* received the two spent bullets that were found in the deceased's body (FSC459104), the spent bullet that was found in the deceased's vehicle (FSCC698741), the cartridge that was found at the scene of the incident (FSCC698755), and the .38 Smith & Wesson Calibre Enfield revolver ('the .38 revolver') that was found at Honeydew SAPS (FSC458435). He marked the 9 mm Parabellum calibre fired cartridge case 13542/08C. He described the spent bullets as one 9mm caliber fired bullet, which he marked 13542/08L, and two . 38/.357 calibre fired bullets, which he marked 13542/08K and 13542/08M respectively. He found the latter two spent bullets unsuitable for microscopic comparison due to damage, but no indication was given whether both of them were the ones found in the body of the deceased or whether one of them was the one found in the deceased's vehicle. Insp. Joubert testified that only one of the spent bullets found in the deceased's body was damaged. This, according to Insp. Joubert, was the .38 spent bullet. The other damaged spent bullet was, according to Insp. Joubert, the one found in the deceased's vehicle. The two unsuitable spent bullets were sealed in exhibit bag FSCC860781. Insp. Nel, through a process of microscopic comparison, ascertained that the 9 mm cartridge and 9 mm spent bullet were not fired from the .38 revolver. See: Exhibit 'F1'.

[237] Acting on information that he had received regarding another firearm, Insp. Joubert attended at the Honeydew SAPS on 8 February 2008, where he

booked this other firearm, which was a Z88 9 mm pistol with no serial number ('the Z88 9 mm pistol), out of the Honeydew SAP13/1427/2007 storeroom, he sealed it in an evidence bag FSC436785, and he forwarded it to the forensic laboratory in Pretoria on the same day. On 18 February 2008, Insp. Nel, through a process of microscopic comparison, ascertained that the 9 mm Parabellum caliber fired cartridge case that he marked 1354/08C, and the 9 mm caliber fired bullet that he marked 13542/08L, were fired from the Z88 pistol (exhibit 'F2').

[238] The finding of the one cartridge by Insp. van Niekerk at the scene of the incident (exhibit 'C', photograph 1 FSCC698755), of the two spent bullets that were recovered by Dr. Johnson from the body of the deceased (FSC459104), of the spent bullet collected by Insp. Joubert that was found in the deceased's vehicle (FSCC698741), of the .38 revolver found by Insp. Joubert at the Honeydew SAPS (FSC458435), and of the Z88 9 mm pistol found by Insp. Joubert at the Honeydew SAPS (FSC436785) did not establish any link between any of the accused and the death of the deceased.

[239] The *post mortem* and ballistic evidence, however, establishes that one of the firearms with which the deceased was shot, is the Z88 9 mm pistol and that the three bullets that penetrated his body are two .38 mm bullets and one 9 mm bullet.

[240] The commission of the offences of the robbery of the deceased with aggravating circumstances and of the murder of the deceased have accordingly been proved by evidence other than the confessions that have been admitted into evidence.

[241] At the close of the State case an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 was made on behalf of accused no 2, accused no 4, accused no 5, and accused no 6 for their discharge on all the counts, which are the main counts of murder and of robbery or of conspiracy in the alternative (counts 1 and 2), the unlawful possession of firearms and ammunition (counts 3 and 4), and, in regard to accused no 2 and accused no 4, a corruption charge (count 5).

[242] The State, correctly in my view, conceded the applications by accused no 4 and by accused no 5 in regard to counts 3 and 4, and the applications by accused no 2 and by accused no 4 in regard to count 5, and they were accordingly found not guilty and discharged on those counts. The applications for their discharge on the other counts were refused. These are the reasons.

[243] Apart from her witness statement (exhibit 'KK') and her disputed statement made before Dir. Byleveld (exhibit 'O'), the State presented circumstantial evidence against accused no 5. The evidence included evidence that the deceased and accused no 5 were husband and wife; she was on the payroll of

Heia Safari; she, their 'adopted' children, and members of her family shared in the privileges of the deceased's lifestyle; she was a beneficiary in terms of his last will and testament; she formed a relationship with accused no 4 and became pregnant by him; her attempt at aborting the unborn child failed; she informed the deceased of her pregnancy during August 2007; he was very upset about it and he told her that she must go home to KwaZulu-Natal for the birth and return to Johannesburg 'for work with other people'; she was to leave for KwaZulu-Natal on 16 December 2007; the monthly payment of the employees at the Zulu kraal was 'a ritual' and usually done close to month end; payment of the employees on the 28th November 2007 was unusual; she knew when the employees were going to be paid on that occasion; various calls were made between the cell phone of accused no 5 or from the land line of her residence and the cell phone of accused no 2, and more particularly one from her cell phone to that of accused no 2 at 08h37, another from the cell phone of accused no 5 to that of accused no 2 at 20h37 and another from accused no 2's cell phone to that of accused no 5 at 20h40 on 26 November 2007, and five calls from her cell phone or land line to the cell phone of accused no 2 from 7h51 until 9h59 on 28 November 2007; the deceased fetched her and the children after 10h00 on that morning; the deceased was shot minutes later while they were *en route* to the Zulu kraal; accused no 5 identified accused no 2 as one of the assailants (exhibit 'O'); and shortly after the funeral of the deceased she expressed an expectation of being arrested. It should also be mentioned that her version put to State witnesses included a denial that she knew accused no 2 and

a denial that she had ever called him. The circumstantial evidence had the potential of providing proof of her guilt beyond reasonable doubt. The rules for determining whether the circumstantial evidence has proved her guilt on any or all of the main counts or alternative count beyond reasonable doubt apply at the conclusion of the trial and not at the conclusion of the State case. See: *S v Cooper and Others* 1976 (2) SA 875 (T), at p 890; *S v Mpetha* 1983 (4) SA 262 (C), at p 266. This finding made it unnecessary to further consider the implication of accused no 5 in the second confession of accused no 2 (exhibit 'N').

[244] We admitted into evidence two disputed confessions of accused no 2. The one was allegedly made to Supt. Ramukosi on 28 November 2007 (exhibit 'L'), and the other one to Dir. Byleveld on 7 December 2007 (exhibit 'N'). It was put to Supt. Ramukosi that the contents of exhibit 'L' did not emanate from accused no 2 and that he was forced to sign it. It was put to Dir. Byleveld that accused no 2 made a deliberate false statement to him (exhibit 'N'). Mr. Biyana, on behalf of accused no 2, submitted that there are contradictions between the two statements and inconsistencies between them and the State evidence that are such that there was no evidence upon which a reasonable person might convict accused no 2. I disagreed. Whether or not the contents of the first confession emanated from Supt. Ramukosi or from accused no 2 and whether or not the second one was in content a deliberate falsehood on the part of accused no 2 were issues that should be determined on the totality of the evidence at the

conclusion of the trial. Whether or not each statement was correctly admitted into evidence, the reliability of each, and what weight should be attached to each were similarly matters for assessment and decision at the conclusion of the trial.

[245] The first confession of accused no 2 (exhibit 'L') implicates accused no 4. The confession of accused no 1 (exhibit 'Q'), the pointings out of accused no 1 (exhibit 'R'), the first confession of accused no 2 (exhibit 'L'), the second confession of accused no 2 (exhibit 'N'), and the confession of accused no 3 (exhibit 'AA') implicate accused no 6. These statements were, of course, at the conclusion of the State case inadmissible against accused no 4 and against accused no 6. They would, however, become admissible if their makers elect to testify and confirm them.

[246] In *S v Lubaxa* 2001 (2) SACR 703 (SCA), para [21], Nugent AJA said this:

> 'Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.

[247] A factor which is permissible to be taken into account in granting or refusing an application for discharge is whether there is a reasonable possibility that the evidence of co-accused might supplement the State case. See: *S v Hudson and Others* 1998 (2) SACR 359 (WLD), at pp 360h – 362f. Ms.

Mogolane, on behalf of accused no 4, and Mr. Themba, on behalf of accused no 6, submitted that the versions of accused nos 1, 2, and 3 that were put to the relevant State witnesses all indicate that they would disavow the confessions and pointings out should they testify. I accepted that what had happened during the trial – also the cross-examination of the relevant State witnesses to whom the confessions and pointings out were made and not only the versions of the co-accused that had been put to them - should also be taken into account in evaluating whether there is a reasonable possibility of the co-accused or any of them repeating in evidence some or all of what is contained in the statements. See: *S v Mpetha and Others* 1983 (4) SA 262 (K), at p 268E – G.

[248] An important consideration in determining whether such 'reasonable possibility' exists is the content of co-accused confessions admitted into evidence. See: *S v Hudson (supra)*. The versions of the co-accused that had been put to the relevant State witnesses to whom the confessions and pointings out were made and their cross-examination, did not, in my view, necessarily detract from the reasonable possibility that arose from the existence and contents of the confessions and pointings-out.

[249] The discretion contained in s 174 must be exercised fairly to both the accused and the State. See: *S v Hudson (supra)*. I realised that a refusal of the discharge applications meant that accused nos 4 and 6 would remain in custody and that they would have to sit out the rest of the trial, which, at the stage of the

discharge applications, was about to be postponed since the time allocated for the trial had run out. They have been on trial in connection with serious crimes and the trial has been attracting public interest and constant media publicity. Confessional pointings out that had allegedly been made by accused no 6 were not admitted into evidence for the reason that his constitutional rights were probably not properly and accurately interpreted to him. Incriminating statements that had allegedly been made by accused no 5 against accused no 2 and accused no 4 were also not admitted *inter alia* because of the risk of false co-accused incrimination.

[250] Taking into account all the circumstances of this case and balancing the interests of accused no 4 and of accused no 6 with the interests of the State and the prosecution as well as the interests of the community in the prosecution, I concluded that the proper administration of justice would be compromised by discharging accused no 4 and accused no 6 on the counts under consideration at that stage of the proceedings. See: *S v Lubaxa (supra)* and *S v Mondlane en Andere* 1987 (4) SA 70 (TPA).

[251] Accused no 1 denied that he was in any way involved in the murder or robbery of the deceased. He testified that he, accompanied by his cousin, accused no 3, attended at the place of employment of another cousin of his, one Niki America, which was a workshop on a farm, Mandevu's Place in Muldersdrift, at between 14h30 – 15h00 on 28 November 2007, to collect money that Niki

owed him. Niki asked that they wait until he finished work. Accused no 3 and he accordingly walked down to a nearby stream where they smoked dagga. They noticed an approaching police van, which prompted them to seek hiding from the police in the reeds area since the police might arrest a person for smelling of dagga. The police arrived and set the area where they were hiding alight. Accused no 1 emerged from the area and was arrested. He told the police that there was another person with him in the reeds. Accused no 3 was then arrested.

[252] The version that accused no 1 stayed in the reeds area until it was burnt for fear that he might be arrested for smelling of dagga despite the police presence in and around the reeds area and despite the fact that he and accused no 3 were no longer in possession of dagga is improbable.

[253] Accused no 1 was searched by Capt. Pongum at the time of his arrest. Capt. Slaughter effected his arrest. An amount of cash totaling R7, 890.00 was found on the person of accused no 1 when he was arrested hours after the incident in which the deceased was robbed of a large amount of cash. The evidence of Capt. Slaughter and that of Capt. Pongum that the money was found in his trouser pockets, inside his trousers and inside his 'tekkies' was not challenged when they were cross-examined. Also see exhibit D.1, photographs 15, 16, and 17. When he testified, accused no 1, however, denied that money was found inside his trousers. In his post-arrest confession, to which I return,

accused no 1 admits that the money found on his person was the money that he had taken from the deceased, except for the sum of R190.00. It is not without significance that only R50.00 cash and R190.00 cash were found in the right and left back pockets of his trousers and the rest inside his underwear and 'tekkies'. Accused no 1, in his post-arrest statement, claims that the R190.00 was his own money. Capt. Pongum testified that he only claimed the R50.00 that was found in the right back pocket of his trousers to have been his own. We, on the totality of the evidence, reject accused no 1's denial of his post-arrest admission relating to the money.

[254] Accused no 1 was wearing black denim trousers which were seized by the police once he was searched and arrested. Insp. van Niekerk's undisputed evidence is that he sealed it in forensic bag FSD – 55048, which was kept in his safekeeping. On 4 December 2007, Insp. Joubert requested Insp. van Niekerk to open the forensic bag as a result of information that he had received. It was opened at the office of Insp. van Niekerk and in his presence. An MTN simcard with serial number 0252367202 was found in the right pocket of the black denim trousers that belonged to and were seized from accused no 1 after his arrest. Insp. van Niekerk handed the simcard over to Insp. Joubert. The simcard was received in evidence as exhibit 3. The undisputed evidence of accused no 5 was that her cell phone was taken at the time of the robbery and murder of the deceased and that the simcard, which has been proved to be exhibit 3, was in it. Insp. Joubert and Insp. van Niekerk corroborate each other on all the aspects

relating to these events. Also see: Exhibit D1. The finding of accused no 5's simcard that was taken during the course of the robbery in the pocket of the trousers of accused no 1 that he wore a few hours after the incident is of serious incriminating nature against him.

[255] Mr. Ncoko, on behalf of accused no 1, put it to Insp. Joubert that accused no 1 does not know who placed the simcard in his trousers and when it was placed in his trousers. Insp. Joubert replied that accused no 1 was the person who gave him the information about the simcard. This accused no 1 denied when he testified. Whether or not accused no 1 told Insp. Joubert of the simcard in the pocket of his trousers is immaterial. It is common cause that accused no 1 was searched at the time of his arrest and that the simcard was not found during such search. It is, however, a very small item which could easily not have been detected when he was searched. There is no basis for suspecting that anyone had placed the simcard in the pocket of his trousers in order to incriminate him. We accept the evidence that the simcard of accused no 5 that was taken at the time of the incident was found in the trousers of accused no 1.

[256] The disputed confession of accused no 1 taken by Supt. Scherman on 28 November 2007 (exhibit Q) and his disputed pointings out to Snr. Supt. Eksteen in the afternoon of 29 November 2007 (exhibits R and S) were held to be admissible at the end of the second trial-within-this-trial referred to in paragraphs 54 - 91 above. What needs to be determined presently is whether they were

made at all or in the terms alleged by the State. The State led evidence relevant to these issues in both the second trial-within-this-trial and in this main trial. Both assessors and I sat during all the trials-within-this-trial and it is accordingly competent for us to take cognisance of the evidence that was led by the State in the second trial-within-this-trial. See: *S v Nglengethwa* 1996 (1) SACR 737 (A).

[257] It is common cause that accused no 1 made the confession to Supt. Scherman. The terms of the confession were not placed in issue when she was cross-examined. It was put to Supt.Scherman on behalf of accused no 1 that what he told her was what he 'overheard'. Accused no 1 also testified this when he gave his evidence in chief. Under cross-examination he explained that he overheard the information from policemen who were talking about what had happened when they were walking 'up and down' the area in the vicinity where accused no 1 was hiding in the reeds before his arrest. What he could remember under cross-examination was that they were talking about a white person who had been robbed and killed. Under cross-examination accused no 1 adjusted this version and his evidence in chief. He first testified that the source of the information that he relayed to Supt. Scherman was also Insp. Joubert who instructed him to relay to her 'exactly' what Insp. Joubert had told him to say, which *inter alia* was that he must admit to the commission of the crime and that the people he was staying with were the people with whom he was involved in the crime. When accused no 1 was cross-examined on the aspect that the persons named in the statement were people with whom he stayed or who were

known to him, he again adjusted his version by saying that not all the information contained in the statement emanated from Insp. Joubert or from what he had overheard prior to and at the time of his arrest, but that the names, and only the names, emanated from him. Insp. Joubert, according to him, assigned roles to the persons mentioned by accused no 1. He later adjusted this evidence too by saying that some of the facts, such as the facts relating to his arrest, also emanated from him. Apart from being contradictory, the version put forward by accused no 1 when he testified was essentially not foreshadowed in the cross-examination of Supt. Scherman and of Insp. Joubert, and is in conflict with what had been put to them when they were cross-examined on behalf of accused no 1. It was pertinently put to Supt. Scherman that accused no 1's version is that what he told her was what he had 'overheard'. What also counts heavily against the version of accused no 1 is that we find Insp. Joubert and Supt. Scherman to be credible witnesses and their evidence reliable in the light of all the evidence.

[258] At the foot of the last page of the manuscript statement (exhibit Q) appears a sketch and names. Accused no 1 testified that the names appearing at the foot of the last manuscript page of the statement were written by Supt. Scherman and he had no knowledge as to what was depicted on the drawing. This again was not put to Supt. Scherman and is contrary to her unchallenged evidence that accused no 1 drew the sketch, that he depicted the incident, and that he wrote the names next to it. Accused no 1 also testified that he informed

Supt. Scherman that the information he was relaying to her was dictated to him by Insp. Joubert. This too, however, was not put to Supt. Scherman.

[259] In his evidence in chief accused no 1 testified that he made the pointings-out to Snr. Supt. Eksteen because he was told to show all the places that he had been to on the day of the incident. Accused no 1 testified that he only pointed out the place where he stayed at Video Squatter Camp (exhibit S.1, photograph 6), the place where they alighted from the taxi (presumably when he and accused no 3 had allegedly gone to the place of employment of his cousin Niki America) (exhibit S.1, photograph 7), the place where they were arrested (exhibit S.1, photograph 16), and the place where Niki was employed, which place does not appear on exhibit S.1.

[260] Accused no 1 testified that once he had pointed out these movements of his on the previous day, he was then taken to Heia Safari at the instance of Snr. Supt. Eksteen. She asked or told him to point out all the places depicted on exhibit S.1, photographs 8, 9, 10, 11, 12, 13, 14 and 15, which were places which he did not know and which did not form part of his movements of the previous day. Accused no 1 denied that he made the statements that were noted down in respect of the pointings out and he suggested that Snr. Supt. Eksteen fabricated the pointings out as depicted on photographs 8 – 15 of exhibit S.1 and as described in the notes of the pointings out (exhibit R.1). Under cross-

examination he also said that he does not know where she got the information from.

[261] We find this version of accused no 1 palpably false on the totality of the evidence. Snr. Supt. Eksteen was a most impressive witness and her evidence is totally credible and reliable. She testified that she had no knowledge of the case or where to go on the pointings out. Accused no 1 informed her that he wished to show her what happened and that is what he did. His evidence about the pointings out is irreconcilable with the evidence that was given in the second trial-within-this-trial by Snr. Supt. Eksteen, by that of the interpreter, Const. Molefe, by that of the photographer, Insp. Manoko, and by that of the driver, Insp. Scott, who all corroborated the evidence of Snr. Supt. Eksteen in various material respects.

[262] The similarities in the versions that accused no 1 gave to Supt. Scherman and to Snr. Supt. Eksteen on the two different occasions are striking. The one given to Supt. Scherman he said came from him, but was essentially what Insp. Joubert had told him to tell her. But the other one recorded by Snr. Supt. Eksteen, according to accused no 1, was not what he had conveyed and pointed out to her, apart from the places where he resided, where the taxi dropped him and accused no 3 off, and the place of their arrest. Snr. Supt. Eksteen, according to accused no 1, either made the pointings out up or they came from somebody else. No such fraudulent conduct involving Snr. Supt. Eksteen was

even vaguely suggested to her when she was cross-examined on behalf of accused no 1.

[263] The State has, on the totality of the evidence, proved beyond reasonable doubt that accused no 1 made the confession to Supt. Scherman and the pointings out to Snr. Supt. Eksteen in the terms in which they are recorded and photographically depicted in exhibits 'Q', 'R', and 'S'. The State furthermore has proved beyond reasonable doubt that the contents of the confession and of the pointings out emanated from accused no 1 only. His version that he conveyed to Supt. Scherman what he had overheard at the time of his arrest and what Insp. Joubert had dictated to him to tell, and that the contents of the pointings out made came from either Snr. Supt. Eksteen or from another source are, on the totality of the evidence, false and rejected.

[264] To borrow the words of Cameron, JA in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), para [34], 'from the words of his own tongue' accused no 1 admitted to: a pre-planning by him, Xolani, Gilbert, and Vincent to rob the 'white man' of a large amount of money that was meant to pay the employees at Heia Safari on 28 November 2007; the plan included for Vincent and Gilbert to approach the white man and to point firearms at him, for accused no 1 to then take the money, and for Xolani not to make himself visible since he was a former employee of Heia Safari; his awareness that two firearms were taken along; Gilbert, Xolani, Vincent and himself having gone to Heia Safari on the morning of

28 November 2007; the positions they took up at the gate where the 'white man' was expected to stop for it to be opened and closed, which was Xolani hiding in 'bushes' and Gilbert, Vincent and accused no 1 at trees next to the gate; their surprise attack once the vehicle had driven through the gate and stopped while a passenger was closing it; Vincent and Gilbert approaching the vehicle on its left front passenger side where a black lady was seated and accused no 1 following behind them; two gun shots that had gone off and people running away from the vehicle; the front passenger door of the vehicle being opened, the deceased shot, and of blood 'coming out of his shirt on the left side' by the time of accused no 1 reaching the vehicle; the deceased saying 'take the money' in Zulu; the tearing of the money box because the deceased held it tight and some of the envelopes with money falling inside the vehicle; the taking by accused no 1 of about nine envelopes with money; their running away in the direction from which they came and their splitting up; the police searching for them; the burning of the grass and accused no 1 emerging from his hiding place; his disclosure to the police of accused no 3's presence; how he took the money from the envelopes while he was hiding and putting it in his pants, in both his shoes, and in the pockets of his pants; and his pointing out of Xolani at Video Squatter camp after his arrest. I should mention that although accused no 1 testified that 'Gilbert' is accused no 3, 'Xolani' accused no 2, and 'Vincent' accused no 6, his confession is, in terms of s 219 of the Criminal Procedure Act, not admissible as evidence against any of his co-accused.

[265] By his own pointings out accused no 1 admitted the places where he and his co-perpetrators planned to rob the deceased (photograph 6), where they were dropped off by his uncle (photograph 7), the foot path and route they walked from where they were dropped off to the gate (photographs 8, 9, 10 and 11), the points where they took hiding (photographs 12 and 13), the direction from which the deceased's vehicle was approaching (photograph 14), where it stopped before the deceased was attacked (photograph 15), and the place where accused no 1 took hiding before he was arrested (photograph 16).

[266] The commission of the offences of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2) have been proved by evidence other than the confession and pointings out of accused no 1. See: s. 209 of the Criminal Procedure Act. There are also many pieces of confirming evidence outside his confession and pointings out which corroborate them in material respects as is evident from a reading of the State case to which reference is made in paragraphs 209 - 239 earlier in this judgment. Notably, the three bullet entrance wounds identified by Dr. Johnson, who performed a *post-mortem* examination on the deceased on 29 November 2007 from 9h20, which was after accused no 1 had made the confession to Supt. Scherman, were in the upper left front side of the chest just below the left collar bone, in the left upper arm, and in the fourth rib space on the outer left side of the chest. Accused no 1, in terms of his confession admitted that he saw blood coming out of the deceased's shirt 'on the left side'. Furthermore, accused no 1 states in his confession (exhibit 'Q') that Xolani carried a Z88 9 mm firearm,

which he later handed over to Gilbert. The *post mortem* and ballistic evidence to which I have referred in paragraphs 232 – 239 above, proved that the deceased was *inter alia* shot with a Z88 9 mm firearm, which was only found by the investigating officer on 8 February 2008 and microscopically compared on 18 February 2008.

[267] The confession and pointings out of accused no 1 are, in our judgment, reliable evidence and establish the guilt of accused no 1 that he committed the offences of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2). The denials by accused no 1 of his post-arrest extra-curial confessions and the exculpatory version put forward by him in these proceedings are, on the totality of the evidence, not reasonably possibly true. The circumstances under which he was arrested, the relative large amount of cash that was found on his person a few hours after the robbery, and the simcard that was taken during the robbery and found in the pocket of his trousers further satisfy us of his guilt beyond any reasonable doubt.

[268] Accused no 1 shared with others the purpose of taking the large amount of money with which the deceased was to pay employees at Heia Safari. He knew in advance that two of his fellow robbers had firearms that would be pointed at the deceased. His role was then to follow and to take the money. He must have envisaged the use of potentially deadly force and reconciled himself to the consequences of that use. Accused no 1 participated in the planning, in the

execution of the plan, in the taking of the money, and in running away with the others or some of them. His active participation is clear. His active association never stopped and he never disassociated himself from the attack on the deceased. The inescapable and only reasonable inference is that accused no 1 foresaw the possibility of the deceased being killed and performed his acts of association with recklessness as to whether or not death was to ensue. He had the necessary *mens rea* to sustain a conviction for murder. See: *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), at paras [35] – [36]; *S v Mgedezi and Others 1989 (1) SA 687 (A)*, at p 705I – 706C.

[269] Taking into account that mere knowledge that a member or members of a group were in possession of firearms and even acquiescence in their use of the firearms for fulfilling their common purpose are not sufficient to infer that the group had the intention to exercise joint possession of the firearms through the actual detentors and that the actual detentors had the intention to hold the firearms on behalf of the group, we are not convinced that the State has proved accused no 1's guilt of the charges of unlawful possession of firearms (count 3) and of ammunition (count 4) beyond reasonable doubt. See: *S v Mbuli* 2003(1) SACR 97 (SCA), paras [71] – [72].

[270] Accused no 2 did not testify in the first trial-within-this-trial to which reference is made in paragraphs 5 – 29 and 53 above, but his version was put to the various State witnesses who testified in that trial-within-this-trial. I have

mentioned that we were impressed by the State witnesses. We considered each one's evidence as coherent and satisfactory in all material respects. They corroborated each other and cross-examination did not detract from their credibility as witnesses or from the reliability of their accounts. We found that their evidence called for an answer, and, in the absence of rebuttal, proved beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of the confessional statements that had allegedly been made by accused no 2 before Supt. Ramukosi on 28 November 2007 at Muldersdrift SAPS (exhibit 'L') and before Dir. Byleveld on 7 December 2007 at Brixton SAPS (exhibit 'N').

[271] In giving his evidence in the main trial, accused no 2 answered the evidence of the various State witnesses in the first trial-within-this-trial. Both assessors and I sat during that trial-within-this-trial and it is, as I have mentioned, accordingly competent for us to take cognisance of the evidence that was led by the State in that trial-within-this-trial. See: *S v Nglengethwa* 1996 (1) SACR 737 (A).

[272] In his evidence in this main trial, accused no 2 has given an extensive account about the actions of the relevant police officers against him and their assaults upon him which induced him to sign a statement that Supt. Ramukosi had fabricated and which induced him to give a false statement to Dir. Byleveld. His evidence, however, differs in many material respects from his version that

had been put to the various State witnesses and many material aspects about which he testified had not been put to the State witnesses who testified in the first trial-within-this-trial concerning the admissibility of the two confessional statements. A few examples will suffice.

[273] Accused no 2 testified that he was assaulted by Insp. Joubert, who was assisted by two other police officers, inside a motor vehicle immediately after his arrest. He thereafter accompanied the police officers to his residence where Insp. Joubert and other police officers assaulted him gruesomely and in the process placed a plastic over his head. He was taken back into the vehicle and further assaulted. From there they took him to what appears to be the place where the incident occurred and they proceeded with the assaults upon him and they threatened to kill him if he was not going to tell the truth. This version is essentially different to the one that was put to Insp. Joubert when he was cross-examined on behalf of accused no 2. It was put to him that from the scene of arrest he took accused no 2 to the scene of the alleged incident and that he assaulted accused no 2 on the way there, and from there 'he was taken to a place that he did not know, where his clothing were taken.'

[274] Insp. Joubert's undisputed evidence was that he interviewed accused no 2 early the evening on 28 November 2007, that accused no 2 started to make some admissions during this interview, and that accused no 2 indicated to him that he was willing to give the information and to make a statement to a police

officer who was a justice of the peace. This is why Insp. Joubert requested Supt. Ramukosi to take a statement from accused no 2. Accused no 2 now disputes that Insp. Joubert had this interview with him.

[275] The undisputed evidence at the first trial-within-this-trial was also that Const. Senosi guarded accused no 2 until Supt. Ramukosi arrived to interview him and that when Supt. Ramukosi arrived, Const. Senosi handed accused no 2 over to him. It was pertinently put to Supt. Ramukosi that when Constable Senosi left accused no 2 with him, he, Supt. Ramukosi, instructed accused no 2 to write down all that had happened. Yet, when he testified, accused no 2 came up with a new version. He testified that Insp. Joubert took him to Supt. Ramukosi, who told him that he was there to make a statement, and he pertinently denied that Const. Senosi took him there.

[276] I have referred in paragraphs 20 and 21 of this judgment to the version of accused no 2 that was put to Insp. Joubert about a visit that Insp. Joubert, accompanied by Const. Letswamotse, had paid him on 5 December 2007, and to the somewhat different and more elaborate version that was put to Const. Letswamotse. The versions underwent further changes when accused no 2 testified. An example suffices. He testified that Const. Letswamotse threatened him that he would get ‘a heavy sentence of life’ because he refused to write down what Const. Letswamotse had said he must write. Now both Insp. Joubert and Const. Letswamotse assaulted him. He testified that they ‘were not aiming blows

at [his] face, but [at] his body – all over the rib cage and stomach.' He claimed that what rescued him was the appearance of another police officer. The assault then stopped.

[277] Insp. Joubert testified that he was at the High Court on the day of the incident and that he only arrived at the scene at about 15h30. There were already detectives at the scene and he was not yet assigned as the investigating officer. He phoned and requested Supt. Ramukosi to take a statement from accused no 2 after he had had the interview with accused no 2 early that evening. Supt. Ramukosi was from a different unit, namely the Provincial Serious and Organised Crime Unit in Germiston. He testified that he had nothing to do with the investigation of this case and no knowledge of the merits thereof. He merely agreed to assist in taking a statement from 'a person who wants to give a statement'. In these circumstances and on the totality of the evidence we find it highly improbable that Supt. Ramukosi would have acted in the way in which accused no 2 testified he did by telling accused no 2 that he 'was forcibly going to make a statement', by writing one out for him, and by assaulting him to sign it.

[278] Reference to what was put to Dir. Byleveld and to Insp. Shezi when they were cross-examined is made in paragraph 27 of this judgment. When he testified an elaborate account was given by accused no 2 about threats and grievous assaults that preceded and induced him to succumb and to give a

fabricated confessional statement to Dir. Byleveld. Many aspects thereof were not put to Dir. Byleveld or to Insp. Shezi when they testified. Notably, accused no 2 testified that Dir. Byleveld shoved a firearm into his mouth whereas the version put to Dir. Byleveld was that he took out his firearm. This is an essential aspect of accused no 2's alleged inducement to make the statement. It was also not suggested to Const. Senosi when he was cross-examined that he had in any way been involved or present when any of the alleged events occurred. Yet, accused no 2 testified that Const. Senosi was present when Insp. Shezi showed him a number of photographs depicting blood stains on a wall and threatening him that he would be like the blood marks if he were not going to tell the truth. This was also not foreshadowed in the cross-examination of Insp. Shezi. Other aspects of his evidence also differ from the versions that were put to Dir. Byleveld and to Insp. Shezi.

[279] On the totality of the evidence we remain satisfied that the State discharged the onus of proving beyond reasonable doubt the requirements stipulated in s 217 of the Criminal Procedure Act for the admission in evidence of both confessional statements (exhibits 'L' and 'N'), and that they had not been obtained in an unconstitutional manner. We find accused no 2's version on the disputed issues to be a falsehood.

[280] Accused no 2 denied that he made any statement to Supt. Ramukosi. He testified that Supt. Ramukosi told him that he, Supt. Ramukosi, had all the names

of those who had been arrested, he had full information about them, and he had information about everything. Supt. Ramukosi then wrote out a statement. He thereafter gave it to accused no 2 saying to him 'this is your statement, sign!' Accused no 2 refused to sign it. Supt. Ramukosi assaulted him and he accordingly signed the statement. Acccused no 2 testified that he did not know what was contained in the statement. His only participation was to sign it. Accused no 2 also testified that the statement that had been taken by Dir. Byleveld was made by him, accused no 2, but its content was a fabrication on the part of accused no 2.

[281] Both statements refer to: employees at Heia Safari who were going to be paid on 28 November 2007; a prior meeting which accused no 2 had with his friends Vincent, Gilbert, and Johnson at Video Centre Squatter Camp; the four of them who went to the Heia Safari premises on the morning of 28 November 2007; Vincent, Gilbert and Johnson who took hiding underneath a tree next to the gate or at a nearby tree; the 'old man' or 'white man' who arrived at the gate; a passenger who got out of the vehicle to open the gate; the vehicle driving through the gate; Gilbert, Johnson and Vincent emerging from hiding at the nearby tree or jumping out of the bushes; Vincent and Gilbert being armed with firearms; an attack upon the 'old' or 'white' man and the firing of gun shots; Johnson taking the money; and to the four of them running away after the completion of the incident.

[282] It is, in our judgment, inconceivable that accused no 2 could have fabricated a statement so similar to the one that was allegedly written by Supt. Ramukosi. Accused no 1's denial of having made the confessional statement to Supt. Ramukosi is, in our judgment, false beyond a reasonable doubt for the reasons given hereinbefore and for those I have given in respect of the admissibility of such. We are also quite satisfied that so is his version that he was compelled or influenced to make a false statement to Dir. Byleveld.

[283] The reliability of the confessions was attacked on the basis of inconsistencies between them and the proven facts and contradictions between them. Notably, the one made to Supt. Ramukosi refers to an approach which was made to accused no 2 by Ronnie (accused no 4) to rob the owner of the hotel, and the one made to Dir. Byleveld refers to an approach made to accused no 2 by one Thobila, who within the context of the statement is the wife of the 'old man' or 'owner of the hotel' and therefore probably a reference to accused no 5, 'to make a plan to murder her husband so that she could be the owner of the hotel.'

[284] The two confessions, in our judgment, do not contain 'material untruths'. See: *S v Khumalo* 1983 (2) SA 379 (A), at p 383G-H. It is common cause that accused no 4 and accused no 5 were lovers at the time and that accused no 5 was made pregnant by him. Evidence which is inadmissible against accused no 4 indeed raises a strong suspicion of his complicity in the commission of the

crimes under consideration. Accused no 2 was also instrumental in his arrest. The evidence contained in the cell phone records shows many calls between the land line and cell phone of accused no 5 and the cell phone of accused no 2 from 2 November 2007 until about half an hour before the deceased was robbed and killed. Accused no 2 and accused no 5 denied that they knew each other or that they ever contacted each other. Accused no 2 was, however, unable to proffer any plausible explanation for the calls between the land line or cell phone of accused no 5 and his own cell phone. I return to this later on in this judgment.

[285] The plan implemented in terms of both confessions, whether or not it was initiated by an approach from 'Thobila' or one from 'Ronnie' or one from both of them, was the same, namely a surprise attack on the deceased during which he was robbed when he was on his way to pay employees of Heia Safari at about 10h30 on 28 November 2007. Other inconsistencies that were pointed out in evidence and in argument between the two confessions and between each confession and the proven facts, are, in our judgment, not material untruths and do not make any one of them false in its essence. Such inconsistencies, in our judgment, do not render a conviction of accused no 2 unsafe. The essential features of both confessions are, as I have mentioned in paragraph 281 of this judgment, materially similar.

[286] I have mentioned that the commission of the offences of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the

deceased (count 2) have been proved by evidence other than the confessions of accused no 2. There are also many pieces of confirming evidence outside the confessions of accused no 2 which corroborate them in material respects as is evident from a reading of the State case to which reference is made in paragraphs 209 – 239 earlier in this judgment.

[287] We are satisfied beyond a reasonable doubt that the confessions are reliable irrespective of any inconsistencies that there are. To mention a single example of evidence with a high degree of confirmatory value of the confessions: the one made to Supt. Ramukosi on 28 November 2007 (exhibit 'L') refers to Vincent and Gilbert who had firearms and to both of them firing shots at 'the white man'. The confession made to Dir. Byleveld on 7 December 2007 (exhibit 'N') refers to Vincent and Gilbert who were armed with a 9 mm pistol and a .38 revolver. Three spent bullets were found, two in the deceased's body and one in his vehicle. One was of 9 mm calibre and two of .38 calibre. One 9 mm fired cartridge case was found at the scene outside the deceased's vehicle.

[288] The denials by accused no 2 of his two post-arrest extra-curial confessions and the exculpatory version put forward by him in these proceedings are, on the totality of the evidence, not reasonably possibly true. The confessions are, in our judgment, reliable evidence and we are satisfied beyond a reasonable doubt as to the guilt of accused no 2 of the offences of the robbery

of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2).

[289] Accused no 2 shared with others the purpose of taking an amount of money from the deceased. He knew in advance that two of his fellow robbers had firearms. He chaired the pre-planning, he was at all times present, and from his hiding place he had a view of everything that was happening. He must have envisaged the use of potentially deadly force and reconciled himself with the consequences of that use. Accused no 2 actively participated in the planning, in the execution of the plan, and in running away with the others once the plan was executed. His active association never stopped and he never disassociated himself from the attack on the deceased. The inescapable and only reasonable inference is that accused no 2 foresaw the possibility of the deceased being killed and performed his acts of association with recklessness as to whether or not death was to ensue. He had the necessary *mens rea* to sustain a conviction for murder. See: *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), at paras [35] – [36]; *S v Mgedezi and Others 1989 (1) SA 687 (A)*, at pp 705I – 706C.

[290] Mr. Ntlakaza, on behalf of the State, conceded that the State failed to prove accused no 2's guilt on the charges of the unlawful possession of firearms (count 3) and of ammunition (count 4). This concession was, in our view, correctly made. The State has not established facts from which it can be properly inferred that the group had the intention to exercise possession of the

firearms and ammunition and that those who are mentioned in accused no 2's confessions as the actual detentors had the intention to hold the firearms and ammunition on behalf of the group. See: *S v Mbuli* 2003 (1) SACR 97 (SCA), paras [71] – [72].

[291] Immediately before the close of the State case, Mr. Ntlakaza, on behalf of the State, applied that certain statements that had allegedly been made by accused no 5 in exhibit 'O' be admitted as evidence against accused no 2 and against accused no 4 in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. I refused to admit the statements against accused no 2 or against accused no 4. I return to such application and to the reasons for my ruling later on in this judgment.

[292] Accused no 3 denied that he was in any way involved in the murder and robbery of the deceased. His exculpatory explanation when he testified is similar to that of accused no 1. They went to Niki America's place of employment and thereafter to the vicinity of the reeds area where they smoked dagga. The presence of police officers made them take hiding since the police arrest people for smelling of dagga.

[293] Accused no 3 stayed in the burning reeds for longer than accused no 1. When Const. Kokwe called his name he tried to crawl away. On his own version he was no longer in possession of dagga. The explanation proffered by him,

namely his alleged fear that he might be arrested for smelling of dagga, is untenable.

[294] The undisputed evidence of Const. Kokwe was that R2, 000.00 in cash fell off the person of accused no 3 when he got up. A further R1, 530.00 was found on his person. When he was cross-examined, accused no 3 said that all the money, which on his version amounted to R3, 650.00 was in his wallet that was in his pocket, and he disputed that money fell off his person. This denial that the money fell off his person is in conflict with the unchallenged evidence of Const. Kokwe. The circumstances of his arrest and the relatively large amount of cash that fell off his person and that was found on his person are incriminating of his complicity in the commission of the offences under consideration.

[295] The admissibility of a disputed confession made by accused no 3 before Capt. Madibo during the evening on 28 November 2007 (exhibit 'AA') was the subject-matter of the fourth trial-within-this trial referred to in paragraphs 126 – 151 earlier in this judgment. As was the case in all the other trials-within-this-trial, both assessors and I sat during the one concerning the admissibility of the disputed confession that had allegedly been made by accused no 3 and, I have mentioned before that it is accordingly competent for us to take cognisance of the evidence that was led by the State in the fourth trial-within-this-trial. See: *S v Nglengethwa* 1996 (1) SACR 737 (A).

[296] When he testified in this main trial accused no 3 said that what prompted him to make the statement to Capt. Madibo was that Capt. Madibo frowned and demanded a statement from him. The statement was not read back to him and he signed it, because he was 'not supposed to ask questions' and was 'told what to do.' This version of accused no 3 was not put to Capt. Madibo when he testified in the fourth trial-within-this-trial nor when he testified in this main trial and is clearly, on the totality of the evidence, a fabrication.

[297] Accused no 3 further denied that the confession correctly reflects what he had told Capt. Madibo. He testified that only certain parts of the statement emanated from him and others not. Those that did not come from him, according to accused no 3, came from Capt. Madibo's 'own head' and was furnished to him by 'one person, Joubert.' He suggested that Capt. Madibo and Insp. Joubert had a meeting where they 'discussed how to implicate' accused no 3. This version of accused no 3 was also not foreshadowed in the cross-examination of either Capt. Madibo or of Insp. Joubert and is, in our judgment, clearly an afterthought. The undisputed evidence in the fourth trial-within-this-trial was that when Insp. Joubert interviewed accused no 3 early in the evening on 28 November 2007, he started to make admissions and he indicated his willingness to give the information and to make a statement to a justice of the peace. This is why Insp. Joubert requested Capt. Madibo to take a statement from accused no 3. Const. Senosi guarded him until Capt. Madibo interviewed him. Capt. Madibo had no knowledge of the matter when he took the statement from accused no 3. The

improbability of Capt. Madibo not having recorded the statement of accused no 3 correctly and having tried to implicate him is *inter alia* demonstrated by his recordal in the statement of accused no 3's version that the large amount of cash that was found on his person at the time of his arrest was his own and that he had won it when he was gambling.

[298] We applied the caution applicable to the evidence of a single witness to the evidence given by Capt. Madibo in the fourth trial-within-this-trial and we found him to have been an impressive and credible witness and his evidence to have been satisfactory in all material respects. He was hardly cross-examined in that trial-within-this-trial or in this main trial. We make the same finding with regard to him as a witness and his evidence given in the main trial. Accused no 3's denial of his post-arrest statement is, in our judgment, untruthful.

[299] Accused no 3's denial that the statement does not correctly reflect the version given by him to Capt. Madibo is, we are quite satisfied, false beyond a reasonable doubt for the reasons I have given in respect of the admissibility of the statement and for the reasons given in this judgment.

[300] The commission of the offences of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2) have been proved by evidence other than the confession of accused no 3. Many pieces of confirming evidence outside his confession also corroborate it in

material respects as is evident from a reading of the State case to which reference is made in paragraphs 209 – 239 earlier in this judgment. Some examples are the 'game reserve bakkie' driven by the deceased, the gate where the surprise attack was made, the 'money box' between the front seats, and the like.

[301] The 'words of his own tongue' are, in our judgment, reliable evidence and we are satisfied beyond reasonable doubt that they establish the guilt of accused no 3 that he committed the offences of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2).

[302] In his confession accused no 3 admits to: preceding discussions between Johnson, Xolani, Vincent and him at Video Squatter Camp about collecting salaries that would be paid out at Heia Safari; an agreement between them to take the money; Johnson, Xolani, Vincent and himself having gone to Heia Safari on the morning of 28 November 2007; Vincent and him being armed with firearms; position taken up by them at the gate; their attack on the 'game reserve bakkie' at the gate; he and Vincent pointing firearms at the driver; 'the money box between the front seats' of the vehicle; the driver saying to them in Zulu 'take the money'; Vincent who opened fire at the driver when he 'tried to catch Vincent' when 'Vincent wanted to grab the money'; Vincent having fired two shots; the four of them running away and them all meeting at a point; the

sharing of the money between Vincent and Johnson at that point in the presence of accused no 3; his hiding 'at the bushes' after they had seen the helicopter and the security; the burning of the place where they were hiding and their arrest.

[303] Accused no 3 attempted to exculpate himself by stating that the agreement was '…that we only took money, we don't kill' and by stating that he asked Vincent what he was doing when he opened fire. However, accused no 3, by his own admission, was armed and he knew beforehand that one of his co-robbers had a firearm. It follows that, at the very least, he contemplated the use of force if necessary. 'Such force when threatened with a firearm is always potentially deadly.' See: *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), para [35]. Accused no 3 must have reconciled himself with the 'deadly consequences' of the use of the firearm.

[304] Accused no 3, similar to our findings in respect of accused no 1 and accused no 2, participated in the planning, in the execution of the plan, and in running away with the others once the plan was executed. His active participation is also clear. His active association never stopped and he never disassociated himself from the attack on the deceased. The inescapable and only reasonable inference is that accused no 3 foresaw the possibility of the deceased being killed and performed his acts of association with recklessness as to whether or not death was to ensue. He too had the necessary *mens rea* to

sustain a conviction for murder. See also: *S v Mgedezi and Others 1989 (1) SA 687 (A)*, at p 705I – 706C.

[305] By his own admission accused no 3 was in possession of a firearm which was handed to him by Vincent. The only inference to draw is that his possession was unlawful. He should accordingly also be convicted of count 3, which is the charge that he unlawfully possessed a firearm. Only he and Vincent, were, in terms of his confession, armed with firearms. I have mentioned that Dr. Johnson found three bullet entrance wounds in the body of the deceased. Two spent bullets were found in the body of the deceased and one in his vehicle. Two of the spent bullets, as I have mentioned, were of .38 calibre and one of 9 mm calibre. By ineluctable inference accused no 3 must therefore have been in possession of ammunition. He should accordingly also be found guilty of the unlawful possession of ammunition (count 4).

[306] In conclusion on accused no 1, on accused no 2, and on accused no 3 with regard to the the charges of robbery with aggravating circumstances and of murder, I should mention that all the State witnesses whose evidence is relevant to these charges insofar as accused nos 1, 2, and 3 are concerned, were, in our judgment, good and credible witnesses. Each one's evidence was coherent and satisfactory in all material respects. We, on the totality of the evidence, consider their evidence to be reliable. Together they sketched the picture or created the

mosaic, and the individual confessions of accused no 1, of accused no 2, and of accused no 3, each completed the picture or mosaic perfectly.

[307] Accused no 4 was a most unimpressive witness and his evidence untruthful and unreliable throughout. He was evasive or he adjusted his evidence when the shoe pinched. I elaborate on some of these aspects later on in this judgment. It also requires mention that it is trite that lies in themselves or improbabilities in an accused's version do not establish the guilt of an accused [see: S v Steynberg 1983 (3) SA 140 (A); S v Mtsweni 1985 (1) SA 590 (A); S v Shackell 2001 (2) SACR 185 (SCA)]. The question is whether there is proof beyond a reasonable doubt that accused no 4 was also involved in the commission of the serious crimes with which all the accused are charged. He denied any involvement. His explanation of his movements on the day in question is the subject of contradiction.

[308] I have mentioned that immediately before the close of the State case, Mr. Ntlakaza applied that the following statements relating to accused no 2 and/or accused no 4 contained in the written statement that was allegedly made by accused no 5 to Dir. Byleveld on 11 December 2007 (exhibit 'O'), be admitted as evidence against accused no 2 and against accused no 4 in terms of s 3(1)(c) of The Law of Evidence Amendment Act 45 of 1988:

- 'On the 27th of November 2007 Ronnie phoned me on my cell phone during the morning wanted to know (asked when we are going to get paid in Zulu). My response to him was that we are going to get paid on Wednesday 28th November 2007 at about 10:00.'

- 'I further wanted to add on the 2007/11/28 Ronnie arrived at 7:00 and used my cell phone and speak to Dumisani.'
- Referring to the attack: 'I knew Dumisani between the three suspects.'
- A concluding remark: 'Ronnie and Dumisani planned to kill the old man.'

I refused to admit the said statements as evidence against accused no 2 (Dumisani) or against accused no 4 (Ronnie). These are the reasons.

[309] These being criminal proceedings in nature I was mindful of the caution that 'a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.' Per Schutz, JA in *S v Ramavhale* 1996 (1) SACR 639 (A), at p 649d – e.

[310] The nature of the evidence relates to incriminatory statements concerning accused no 2 and accused no 4 that accused no 5 allegedly made in her extra-curial exculpatory statement to Dir. Byleveld a few days after her arrest. I should mention that her version foreshadowed in the cross-examination of Dir. Byleveld is a denial that she made the statements in issue.

[311] The purpose for which the State sought the admission of the statements in issue was essentially to incriminate accused no 4 in the commission of the crimes of murder and robbery or of conspiracy to aid or procure or commit murder and robbery. The first of the disputed confessions of accused no 2, which implicates accused no 4, may not feature directly, indirectly, or in the chain

of inferences against accused no 4, unless accused no 2 elected to testify and repeat its content under oath. There was by the end of the State case essentially no other evidence against accused no 4.

[312] The probative value of the statements in issue depends on the credibility of accused no 5 at the time when she made the statements, if she made them. The allegations against accused no 2 and against accused no 4 emanate from a self-exculpatory statement a few days after her arrest and a motive to have implicated accused no 4 falsely is real. The incident that led to the death of the deceased occurred at about 10h30 – 11h00 on 28 November 2007. Accused no 5 was not a suspect but a complainant and State witness at the time. Accused no 2 was arrested during the afternoon and accused no 4 during the early evening on 28 November 2007. Later that evening, accused no 2 made a confession to Supt. Ramukosi wherein he *inter alia* implicated accused no 4 as the person who contacted and 'advised' him to rob the deceased on 28 November 2007. The investigating officer, Insp. Joubert, testified in the first trial-within-this-trial that he received a printout of the Heia Safari telephone system on 5 December 2007, which data show calls between the cell phone of accused no 2 and the land line of accused no 5. He accordingly requested Dir. Byleveld to assist him with an interview of accused no 2. Dir. Byleveld interviewed accused no 2 on 7 December 2007 when he made a further confession wherein he implicated a certain Thobila, who, in context is probably a reference to accused no 5, who asked him to make a plan to kill her husband so that she could be the

owner of the hotel. Insp. Joubert testified that after the interview Dir. Byleveld requested him for an interview with accused no 5 when she is arrested. She was arrested on the same day after accused no 2 had made this confession. On 11 December 2007, she was taken to Dir. Byleveld when she made an exculpatory statement, but in which she, in turn, implicated accused no 2 and accused no 4.

[313] The statement that accused no 4 arrived at 7h00 and used her cell phone to speak to accused no 2, is contradicted by the State evidence relating to the cell phone data, which show a total of five calls between either the cell phone or land line of accused no 5 to the cell phone of accused no 2 from 7h51 until 9h59 on 28 November 2007.

[314] The risk that accused no 5 falsely implicated accused no 4 outweighed the probative value of the statements in issue. Common sense dictated that those statements should be treated with caution and that corroboration and guarantees of their reliability be found. The compelling justification '… that must always be sought if hearsay evidence is to play a decisive or even significant part in convicting an accused' was absent. *S v Ndhlovu* 2002 (2) SACR 325 (SCA), para [47].

[315] The reason why the evidence was not given by accused no 5 upon whose credibility the probative value of the evidence depends, was obvious. The application for the admission of the disputed statements was appropriately made

before the close of the State case in order for accused no 2 and accused no 4 to appreciate the full evidentiary ambit of the cases against them.

[316] The inevitable prejudice to particularly accused no 4 if the hearsay was admitted was another consideration in this instance that militated against its admission. If accused no 5 would elect to testify and repeat the statements in issue in her testimony, then different considerations would apply. Her evidence would not be hearsay, and she could obviously be cross-examined thereon.

[317] I concluded that the statements in issue made by accused no 5 out of court incriminating accused no 2 and accused no 4 must be disregarded as against accused no 2 and accused no 4.

[318] The confession which accused no 2 made before Supt. Ramukosi implicates accused no 4. Accused no 2 testified and he did not confirm his confessions. They are, in terms of s 219 of the Criminal Procedure Act, accordingly not admissible as evidence against accused no 4.

[319] The evidence contained in the cell phone records of numerous calls between the cell phones of accused no 2 and of accused no 4 prior to and after the incident in which the deceased was robbed of money and lost his life does not create a sufficient basis upon which to convict accused no 4. The State presented this evidence *inter alia* to establish accused no 4's association with

someone who was proved to have participated in the commission of the murder and robbery, namely accused no 2. The participation of accused no 2 in the actual commission of the robbery and of the murder, however, only appears from his confessions and from those of accused nos 1 and 3. There is as far as accused no 4 is concerned no evidence of the guilt of accused no 2 sufficient to support his conviction outside his confessions. The confessions may, however, not legally be used against accused no 4 to establish an essential part of the chain of inference leading to his conviction, which is that accused no 2 had taken part in the murder and robbery. See: *R v Baartman & Others* 1960 (3) SA 535 (A), at p 542D.

[320] When the confessions are not used either directly or indirectly against accused no 4, then an inference that the association between accused no 2 and accused no 4 was a criminal one based on the evidence that they spoke to each other before and after the commission of the crimes is not consistent with the proven facts which are admissible against accused no 4, and such inference is not the only reasonable one that may be drawn from those facts. See: *R v Blom* 1939 AD 188 at pp 202 – 203. It must on the totality of the evidence be accepted that accused no 2 and accused no 4 came from the same village in Eshowe, Kwa-Zulu Natal and that they have known each other for many years. Accused no 4 testified that he relocated to Johannesburg during 2003 and that he worked at Heia Safari for a period of about two weeks. Accused no 2 testified that he relocated to Johannesburg at the beginning of 2006 and that he was employed at

Heia Safari from February until May 2006. They often called and visited each other.

[321] The state has, in our judgment, failed to prove beyond reasonable doubt the guilt of accused no 4 on the charges of robbery (count 1), of murder (count 2) or of the alternative charge of conspiracy to rob and kill the deceased and accused no 4 must therefore be found not guilty on these charges. The State counsel, Mr. Ntlakaza, also correctly in our view conceded this.

[322] It is perhaps appropriate to refer to the following passage from the judgment of the Constitutional Court *per* Nkabinde J in *S v Molimi* 2008 (2) SACR 76 CC, para [50]:

> 'It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute (and it is not in this case), as is the case in this matter, to prove the guilt of the accused beyond reasonable doubt. That standard of proof, 'universally required in civilized systems of criminal justice, is a core component of the fundamental fair trial right that every person enjoys under s 35 of the Constituion. In *S v Zuma and Others,* this court, *per* Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in *S v T*, 'is not part of a charter for criminals and neither is it a mere technicality.' When the State fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal.'

(I have omitted the references to footnotes in the quoted passage).

[323] Accused no 5 denied any involvement in the robbery and murder of the deceased. She testified that she did not know why the deceased was murdered.

[324] The disputed statement of accused no 5 taken by Dir. Byleveld on 11 December 2007 (exhibit 'O') was held to be admissible in evidence against her at the end of the first trial-within-this-trial to which reference is made in paragraphs 5 – 53 of this judgment. Accused no 5 denied that the statement correctly reflected in all respects what she had told Dir. Byleveld. She testified that certain parts of the statement did not emanate from her. The State led evidence relevant to this issue in both the first trial-within-this-trial and in this main trial and, as I have mentioned, it is competent for us to take cognisance of the evidence that was led by the State in that trial-within-this-trial since both assessors and I sat during it. See: *S v Nglengethwa* 1996 (1) SACR 737 (A).

[325] What was placed in issue as not having emanated from accused no 5 in the statement when Dir. Byleveld was cross-examined was that accused no 5 did not inform or tell Dir. Byleveld that: Ronnie had phoned her on 27 November 2007 and enquired from her when they were going to be paid; accused no 4 phoned Dumisani on 28 November 2007; she knew Dumisani amongst the three suspects who attacked them; and Ronnie and Dumisani planned to kill the old man.

[326] The version of accused no 5 put to Dir. Byleveld was that he had informed her that she phoned Dumisani on the morning of 28 November 2007. This she denied, and upon Dir. Byleveld enquiring from her 'who then used her phone on

that morning', she answered that Ronnie had used her phone that morning. It was put to him that the statement was not read back to her after it had been written down and that, had it been read back to her, 'she would have been able to correct what had been highlighted in this court today.' Dir. Byleveld insisted that he had correctly recorded her statement. He referred to an instance where he even corrected the wrong spelling of the deceased's name from 'Mr Richard' to that of 'Mr Richter' at the instance of accused no 5. Her counsel, Mr. Mkwanazi, thereupon took instructions from her and put it to Dir. Byleveld that she agreed that she had rectified the spelling of Mr Richter's name in the statement.

[327] Contrary to what was specifically admitted immediately after her counsel had taken instructions from her, accused no 5 denied under cross-examination that the spelling of the deceased's name was corrected at her instance. She also denied that she had informed Dir. Byleveld of matters contained in her statement that were not challenged when he was cross-examined on her behalf.

[328] Under cross-examination, accused no 5 was adamant that accused no 4 had never told her whom he was calling whenever he used her cell phone or land line and that she never knew whom he was calling on such occasions. When she was confronted with her statement to Dir. Byleveld that Ronnie, on 22 November 2007, had asked her to use the land line 'to phone his mother in Natal', she disavowed any knowledge of that statement too.

[329] It is recorded in the statement that '[t]he old man was very upset due to the fact that I was pregnant.' Under cross-examination she conceded that she had told Dir. Byleveld that she had mentioned to the deceased that she was pregnant, but she denied the rest saying that she had mentioned to Dir. Byleveld that as her live-in partner the deceased 'was unhappy that it was not his child.'

[330] It is recorded in the statement that accused no 5 'wanted to go for an abortion at Nigel and [she] was given some tablets but it (*sic*) didn't work.' This statement was also disputed when she was cross-examined and it contradicts the evidence of her sister, Ms. Khanyisile Ngcobo, that accused no 5 attempted to abort her unborn child.

[331] Accused no 5 also testified under cross-examination that Dir. Byleveld 'had a pile of papers in front of him' when he interviewed her and that he confronted her with her cell phone records. Such version was not foreshadowed in the cross-examination of Dir. Byleveld in this main trial and his unchallenged evidence in the first trial-within-this-trial was that he was not 'in possession of any document' when she was brought to his office.

[332] We are satisfied that accused no 5's denial that the statement does not correctly reflect the version given by her to Dir. Byleveld in certain respects is false beyond a reasonable doubt for the reasons I gave in respect of the

admissibility thereof and for the reasons given in this judgment. Her denial of certain parts of her post-arrest statement made to Dir. Byleveld is untruthful and an *ex post facto* attempt at supporting her palpably false denials that she knew accused no 2 before the incident, that she communicated with him until shortly before the deceased was robbed and killed, and that she identified him as one of the assailants. She is assisted in this attempt by accused no 2 and by accused no 4. I elaborate on this later on in this judgment.

[333] We, on the totality of the evidence, accept the evidence of Dir. Byleveld that he correctly recorded what had been conveyed to him and that of Insp. Shezi that he interpreted from English into Zulu and *vice versa* whatever was said by Dir. Byleveld and whatever was said by accused no 5. They corroborate each other that the statement was read back and interpreted to accused no 5 and that it contains what she had said. They were credible witnesses and their evidence is reliable.

[334] Apart from the 'words of her own tongue' as contained in her post-arrest statement (exhibit "O'), the implication of accused no 5 is based on circumstantial evidence. By way of introduction I refer to the summary of the circumstances given in paragraph 236 of this judgment. I elaborate on them hereafter.

[335] It is common cause that accused no 5 was one of twenty dancers whom the deceased had recruited from their rural village in KwaZulu Natal during 1987

to be employed at Heia Safari as Zulu dancers. She initially stayed at the Zulu kraal on the premises. The deceased and accused no 5 formed a love relationship and she, on her undisputed version (exhibit 'O'), moved from the Zulu kraal into the farm house during 1995. Her twin brother, Mcelwa Mbokazi, who became employed as a dancer at Heia Safari during 1988, testified that the relationship between accused no 5 and the deceased was apparent.

[336] The undisputed evidence of accused no 5's sister, Ms Khanyisile Ngcobo, of her twin brother, Mr Mcelwa Mbokazi, and of her 'daughter', Nosipho, is that the deceased and accused no 5 lived together as husband and wife. This was also the evidence of accused no 5. The undisputed evidence of Mcelwa is that the deceased and accused no 5 were married by customary union. The deceased, during the 1990's, paid lobola for accused no 5.

[337] Accused no 5 and their five 'adopted' children - Nosipho, Siyabonga, Thabang, Bheki, and Lindokuhle shared in the privileges of the deceased's lifestyle. See the evidence of Ms. Burgmer, Nosipho, Siyabonga, and Mcelwa. Ms. Burgmer's undisputed evidence was that accused no 5 was on the payroll of Heia Safari. Apart from their common home at Heia Safari, the deceased had built accused no 5 a house in her rural village. The deceased also gave her father Christmas presents in the form of cattle. This is confirmed in the statement of accused no 5 (exhibit 'O').

[338] It is common cause that the deceased executed a last will and testament on 10 July 2007, which was a little more than four months before he met his untimely death. Ms Wenman was one of two witnesses who attested and signed it. This will (exhibit 'G') is admitted (exhibit 'A', para 10). Accused no 5 and the five children, who are referred to as 'orphans', are beneficiaries in terms of the will.

[339] A testamentary trust is created for accused no 5 in terms of the will. The trust money is the amount of R1 million. The income, and if insufficient, the capital, is to be applied for the maintenance of accused no 5 ('the acquisition or provision of a residence, medical treatment and advice, travel, reasonable pleasures, the payment of taxes and general welfare and benefits'), and for the provision, free of charge, of daily meals and beverages to her as she had received at the date of the death of the deceased from the Heia Safari Hotel or otherwise. A similar testamentary trust with a trust amount of R500, 000.00 is created for the five children. Accused no 5 is further the beneficiary of a life usufruct over the farm house and the expressed intention of the deceased is that she should use it as a personal residence for herself and the orphans. The will provides that she 'shall in no circumstances be required or obliged to pay to any beneficiary any consideration or compensation for her rights of occupation, use and enjoyment of the residence', and it obliges the deceased's estate 'to bear all costs of maintaining and keeping the Residence in good order and condition and shall promptly and faithfully pay all assessment rates and other levies and

imposts raised in respect of the ownership of the Residence and also any insurance premium relating to any insurance cover in respect of the Residence.'

[340] Ms Wenman testified that the deceased had told her that he was leaving R1 million to accused no 5 so that she could stay on the property and Ms. Wenman said that he had mentioned this to accused no 5 to give her peace of mind, because he was not always in good health. It is to be noted that Dr. Johnson, who conducted the medical *post-mortem* examination, found a heart pacemaker in place in the body of the deceased. Ms. Wenman testified that the deceased did not know legal technicalities and he did not explain to her that the R1 million was left to accused no 5 in the form of a trust. The evidence about what the deceased had told Ms Wenman was, with the consent of all the parties provisionally admitted on condition that the State make application for the admission thereof before the close of the State case. The State did not to make such application and at the end of the State case I accordingly ruled that such hearsay would not be taken into account.

[341] Whether or not accused no 5 was aware of the fact that the deceased had made her and the children beneficiaries in terms of his will, is a matter that should be decided on the totality of the evidence without taking into account the hearsay of Ms. Wenman on the issue. The version put to Ms. Burgmer on behalf of accused no 5 was that she did not know about the will 'before' the death of the deceased and that she only became aware of it while she was incarcerated at

the Johannesburg Prison after her arrest. The circumstances in which accused no 5 became aware were not disclosed despite Ms. Burgmer's reaction of astonishment saying: 'Well I am not aware of who now sent her a copy to the prison.' The version put to Ms. Wenman, however, was without qualification that accused no 5 did not know anything about the will. Also in her evidence in chief, accused no 5 testified that she was unaware of the will. She testified that she did not at any stage know that the deceased had made a will and that he had never informed her of anything.

[342] We, on the totality of the evidence, find it highly improbable that the deceased would not have told accused no 5 that she and the children would, in terms of his will, be looked after in the event of his death. They lived together as a family. Accused no 5 was his wife. It is evident on the evidence before us that the deceased very much cared for the children and that they, or at least Nosipho and Siyabonga, loved him as their father. The affection with which Nosipho and Siyabonga referred to the deceased when they testified was noticeable.

[343] Accused no 5 did not dispute her statement (exhibit 'O') that she met accused no 4 during September 2006, that she had fallen in love with him, that she became pregnant by him, and that the deceased was unaware of this. See the evidence of Dir. Byleveld. This also accords with the version of accused no 5 that was foreshadowed in the cross-examination of her sister, Ms. Khanyisile Ngcobo. Nosipho testified that she had noticed that her mother was pregnant,

but she was unable to say when she noticed it. The unchallenged evidence of accused no 4 was that he and accused no 5 had commenced a love affair during 2006 and that it is continues to this day. He was aware of her pregnancy and she had told him that he was the father of the child. Accused no 5 also acknowledged the relationship between her and accused no 4 throughout her testimony.

[344] Accused no 4's unchallenged evidence, which accords with his version that was put to State witnesses, was also that the relationship between the two of them had been kept a secret and that the deceased did not know of it. He and accused no 5 used to meet secretly in the tool shed on the premises where accused no 5 resided, when no one else was present. The unchallenged evidence of accused no 5's sister, Ms. Khanyisile Ngcobo, was that accused no 5 was scared that the deceased would 'kill her if he realised that she was pregnant' and that she accordingly attempted to abort the unborn child. The attempt failed. Her evidence also accords with the statement of accused no 5 (exhibit 'O') on this issue. In terms of her statement accused no 5 was scared to inform the deceased about her pregnancy. Her statement is further to the effect that her attempt at aborting the unborn child had failed. This was denied by accused no 5 when she testified, but her denial is clearly false in the light of the unchallenged evidence of Ms. Khanyisile Ngcobo and of Dir. Byleveld.

[345] According to her statement (exhibit 'O'), accused no 5 informed the deceased during August 2007 of her pregnancy. This accords with the evidence of Ms. Amanda Mzolo that accused no 5 had told her that she had informed the deceased that she was pregnant and also the unchallenged evidence of accused no 4 on this aspect that accused no 5 had told him that she had informed the deceased of her pregnancy during August 2007. In her statement accused no 5 states that the deceased was very upset about her pregnancy. I have mentioned that this statement was not challenged when Dir. Byleveld was cross-examined. We reject accused no 5's attempt at watering it down when she testified to mere unhappiness on the part of the deceased 'that it was not his child.' Accused no 5's undisputed statement was that the deceased had told her that she 'must go home to Natal to give birth to the child and [she] must come back to Johannesburg for work with other people.' She was to leave for KwaZulu-Natal on 16 December 2007.

[346] I have mentioned Ms. Wenman's undisputed evidence that the monthly payment of the employees at the Zulu kraal was 'a ritual' when accused no 5 would *inter alia* be required to get the children ready so that they could accompany the deceased. Ms. Wenman's undisputed evidence was further that payment of the employees at the Zulu kraal on the 28th November was unusual and that the dancers at the Zulu kraal were normally paid close to month end. Ms. Wenman was aware of the intended date of their payment since Monday, 26 November 2007, and the preparation of the wages was completed by Tuesday

afternoon, 27 November 2007, for payment of the employees on Wednesday morning, 28 November 2007. Accused no 5 stated in her statement (exhibit 'O') that the deceased had told her before the 28th that they were going to be paid on the 28th November 2007 at about 10h00. This was not disputed by accused no 5. I have referred to the unchallenged evidence of Nosipho and of Siyabonga that earlier on during the morning on 28 November 2007, they had made ready to accompany the deceased: Nosipho, because she was present when the deceased called her mother asking that they get ready, and Siyabonga, because accused no 5 had told him that the deceased had called and had said that they must get ready.

[347] Ms. Amanda Mzolo, who is 22 years of age, testified that about a week after the funeral of the deceased, accused no 5 mentioned to her that she was concerned and afraid that she would be arrested. The fear that she expressed to Ms. Mzolo is contrary to what one would expect of a complainant and state witness which accused no 5 was at that time. Accused no 5's denial of this conversation is rejected. Accused no 5 was a mother figure to Ms. Mzolo and they were close. This was not disputed when she was cross-examined on behalf of accused no 5. No acrimony between them was suggested to her nor any motive on the part of Ms. Mzolo to get her into trouble. Yet, when she testified, accused no 5 said that she only knew Ms. Mzolo by sight and had never spoken to her. She also denied that she had seen Ms. Mzolo at her place of residence after the death of the deceased. Accused no 5's counsel, Mr. Mkwanazi,

however, put it to Ms. Mzolo that '[a]ccused 5 will confirm that at some stage you came to her place while she was still grieving the death of the deceased.' We accept the evidence of Ms. Mzolo.

[348] The State introduced into evidence the cell phone records of calls made from, and received by, the cell phones of accused no 2 (exhibit 'LL') and of accused no 5 (exhibit 'NN'). Ms. Petro Heineke, who is the Forensic Liaison Manager at Vodacom and responsible, *inter alia* for the supply of information and call data on the Vodacom Network, testified about the call data pertaining to the cell phone of accused no 2 (exhibit 'LL'). Ms. Heineke's undisputed evidence was that data is electronically generated without human intervention except for the person dialling and for the person receiving the call. The system stores historical information of all activity involving a simcard and a handset that is used on the network. The data produced in evidence was raw data and was printed by her directly from the system. It had not been tampered with or manipulated in any way. Ms. Hilda du Plessis, who is employed by Mobile Telecommunications Network ('MTN') in the capacity of Forensic Data Specialist and responsible, *inter alia* for the extraction of data from the MTN Network, testified about the call data pertaining to the cell phone of accused no 5 (exhibit 'NN'). She extracted the data, which was automatically generated, from the Network. When regard is had to the factors listed in s 15(3) of the Electronic Communications and Transactions Act 25 of 2002, and when the data contained in each of exhibits 'LL'

and ‘NN’ are compared and correlated, we are satisfied with the reliability of the data relevant to the issues in this case.

[349] Capt. A.G. Boonstra, who is stationed at the SAPS Provincial Head Office and attached to the Crime Management Center in the capacity of Operational Analyst, testified about a report that he had prepared (exhibit ‘OO’) at the request of the investigating officer, Insp. Joubert. The report contains an analysis of the call records through the use of computer software. His report and evidence are based on call records beyond those admitted into evidence (exhibits ‘LL’ and ‘NN’), and no reliance is accordingly placed on his analysis. When Ms. Heineke was cross-examined by Mr. Biyana on behalf of accused no 2, he, without objection from all the parties concerned, produced the data of the land line of the residence of accused no 5 into evidence (exhibit ‘MM’). This is the data that Insp. Joubert had obtained from Ms. Burgmer shortly after the death of the deceased.

[350] It is not disputed that the call data (exhibit ‘LL’) relate to the use of accused no 2’s cell phone number 079 0442171 with simcard number 655010430036954 (‘IMSI’) and his Nokia 1110i handset with serial number 35768001501769 (‘IMEI’) (exhibit ‘1’). It is also not disputed that the call data (exhibit ‘NN’) relate to the use of accused no 5’s cell phone number 073 849 3908 with sim card number 0252367202 (exhibit ‘3’) and her Samsung D820 handset with serial number 358225006760690 (‘IMEI’). It is not disputed that the

land line telephone number 011 919 5000 was that of the farm house residence of the deceased and of accused no 5. It is also not disputed that the cell phone number 073 276 1455 belonged to accused no 4.

[351] The cell phone data show the following cell phone and land line contact between the cell phone or land line of accused no 5 and the cell phone of accused no 2, which, to use the words of Griesel AJA in *Nxumalo v The State* (450/2008) [2009] ZASCA 113 (23 September 2009), is the 'guilty' cell phone:

- on 2 November 2007, a call at 14h30 lasting 138 seconds made from the land line of accused no 5's residence to the cell phone of accused no 2;
- on 22 November 2007, a call at 08h13 lasting 13 seconds made from the land line of accused no 5's residence to the cell phone of accused no 2;
- on 25 November 2007, a call at 13h42 lasting 127 seconds from accused no 5's cell phone to that of accused no 2;
- on 26 November 2007, a first call at 08h37 lasting 14 seconds from accused no 5's cell phone to that of accused no 2, a second one at 20h37 from accused no 5's cell phone to that of accused no 2 lasting one second; and a third one at 20h40 lasting 105 seconds from accused no 2's cell phone to that of accused no 5;
- on 28 November 2007, one at 7h51 lasting 53 seconds from accused no 5's cell phone to that of accused no 2; a second one at 09h20 lasting 46 seconds from accused no 5's cell phone to that of accused no 2; a third one at 09h36 lasting 26 seconds made from the land line of accused no 5's residence to

accused no 2's cell phone; a fourth one at 09h39 lasting 13 seconds made from the land line of accused no 5's residence to accused no 2's cell phone; and a fifth one at 09h59 lasting 36 seconds from accused no 5's cell phone to that of accused no 2.

[352] The versions of accused no 5 and of accused 4 are that it was accused no 4, and not accused no 5, who called his friend, accused no 2, on many occasions from accused no 5's cell phone or from her land line. Accused no 5's version is that she never called the cell phone number of accused no 2, she did not know 'the owner of cell number 079 044 2171', which is the cell phone number of accused no 2, and that she has never communicated with accused no 2. She testified that she did not know accused no 2 before her arrest and that she only became aware of his name 'here in court.' Accused no 2 denied that he knew accused no 5, that she had ever made a call to him or that he had ever made a call to her cell phone or to her land line.

[353] The exculpatory version that accused no 5 gave in her statement to Dir. Byleveld (exhibit 'O') is that 'on the 2007/11/28 Ronnie arrived at 7:00 and used my cell phone and speak to Dumisani and we later went into the house because my airtime was finished, and asked if he could use the land line to speak further to Dumisani which he did.'

[354] In his plea explanation, which accused no 4 at the time confirmed was correctly read into the record, he stated that on 27 November 2007 he slept in the tool room at Heia Safari Lodge. On 28 November 2007, he received three 'please call me' text messages from accused no 2. He had no airtime and he accordingly asked accused no 5 to borrow her cell phone, but 'she had no airtime too.' He then 'ended up using the land line in the house at the Heia Safari Lodge.' The call related to a request by accused for a loan of R300 from accused no 4, which he promised would be repaid by his brother, Bhekinkosi Xulu, in December 2007.

[355] Nosipho testified that she had been at home on the morning of 28 November 2007, and had not see accused no 4. The version of accused no 4 put to Nosipho was that on the morning of 28 November 2007, he went to accused no 5's house; on his arrival he spoke to accused no 5 while he was outside the fence; he sought her permission to use her cell phone whereupon she informed him that she did not have sufficient airtime on her cell phone; he then sought her permission to use the land line inside the house; and when he then used the land line no one else was present. It was put to Nosipho on behalf of accused no 5 that when accused no 4 came to use the land line Nosipho was still in the house but busy washing herself.

[356] Siyabonga testified that he had slept late until about 08h00 on the morning in question. It was put to him that 'accused number 4's version was that he came

into the house very early in the morning to make a phone call.' It was put to him that it 'was about 07:00 in the morning' and that Siyabonga could therefore not dispute that fact since he had been sleeping, which, of course, Siyabonga readily conceded. It was put to Siyabonga on behalf of accused no 5 that she confirmed the version of accused no 4. When he woke up, Siyabonga went to clean outside on the veranda until he was told by his mother to get ready to go to the Zulu Kraal. He did not see accused no 4.

[357] A somewhat different version of accused no 4 was put to Capt. Boonstra. The version was that on the morning of 28 November 2007 he had 'made an attempt to phone accused 2 using the cell phone of accused 5' and 'since he had made an unsuccessful attempt to call accused 2 using the cell phone he ended up using the land line at the deceased's house.' The 'contact' from accused no 4 to accused no 2 was put to him to have been 'at about 07:00'. It was further put to him that accused no 4 'dialed' accused no 2's number using his cell phone at about 10:54 (the cell phone data show a call of one second from the cell phone of accused no 4 to that of accused no 2 at 10:53:03) and that accused no 2 contacted accused no 4 later '[i]nforming accused 4 that he would no longer meet with accused 4' (the cell phone data show a call of 13 seconds from the cell phone of accused no 2 to that of accused no 4 at 15:21).

[358] Counsel on behalf of accused no 4 put to Dir. Byleveld that on 28 November 2007 he had received three 'please call me' messages from accused

no 2; accused no 4 did not have enough airtime; he sought permission from accused no 5 to use the land line at Heia Safari; and when he called accused no 2 he 'only asked for a loan of R300 … with a promise that it would be repaid at a later stage.'

[359] Counsel on behalf of accused no 4 also put to accused no 2 that accused no 2 had sent accused no 4 three 'please call me' messages on 28 November 2007, that accused no 4 had realised that his cell phone had insufficient airtime, that he requested to use accused no 5's cell phone which also did not have sufficient airtime, and that he ended up using the land line of accused no 5.

[360] By way of interpolation it will be noticed that I have quoted what was put on behalf of the respective accused without mentioning each time the answer. The reason is that in assessing the veracity of the accused's respective versions, it was what was put on their behalf that gives the lie to their versions, not the response thereto.

[361] The problem for accused no 5 with the versions that were put to particularly Nosipho and to Siyabonga is the following: although those versions explain why Nosipho would not have seen accused no 4 using the land line (because it happened while she was washing herself) and why Siyabonga would not have seen it (because it happened at about 7h00 while he was still asleep) those versions remain irreconcilable with the evidence emanating from the cell

phone data. Firstly, five calls and not only one call were made from the land line and cell phone of accused no 5 to the cell phone of accused no 2. Secondly, the calls were made from 7h51 until 09h59 and not at about 7h00. Thirdly, not one but two land line calls were made. Fourthly, the first land line call was preceded by two cell phone calls from the cell phone of accused no 5 to that of accused no 2. Fifthly, the two cell phone calls were much longer in duration than the two land line calls (53 seconds and 46 seconds as opposed to 26 seconds and 13 seconds) and there could accordingly not have been an insufficiency of airtime on the cellphone of accused no 5 for accused no 4 to have made a call to accused no 2. Sixthly, the two land line calls were followed by a final call lasting 36 seconds at 09h59 from the cell phone of accused no 5 to that of accused no 2.

[362] When accused no 4 testified, he proferred versions which contradicted each other and which contradicted what had been put to the State witnesses and to accused no 2. His version was no longer that accused no 5 had informed him that she did not have sufficient airtime on her cell phone and that he accordingly made a call to accused no 2 from the land line of accused no 5 at about 7h00. He had no recollection of the time when he arrived at the farm house or of the duration that he spent there or of the time when he left. He asked for her cell phone, because his had no airtime. She gave it to him and he kept it until the deceased came to fetch accused no 5 and the children. He checked it for airtime and he ascertained that it had airtime equivalent to about R4.00 – R5.00. She

did not inform him that the cell phone had insufficient or no airtime. He called accused no 2 from the cell phone of accused no 5 and he spoke to him. While speaking to him he realised that the cell phone had insufficient airtime for a lengthy conversation and he accordingly ended the conversation and he then made a call to accused no 2 from the land line of accused no 5. His evidence was also that he did not remember how many calls he had made to accused no 2 from the cell phone of accused no 5 before he called him from the land line. After he used the land line, he again phoned accused no 2 from the cell phone of accused no 5, only to tell him that he should meet accused no 4 at the no. 1 bus stop where accused no 4 would give him the money, since that bus stop was on the way to accused no 4's place of work. When he was confronted with the fact that two calls had been made from the land line of accused no 5 to the cell phone of accused no 2, he replied thus: 'If the evidence shows that accused no 2 was called twice on the land line I will admit I called him twice.' When he was confronted with the three calls made from the cell phone of accused no 5 to that of accused no 2 he claimed to have called accused no 2 three times from the cell phone of accused no 5. He also testified that he had 'made a few calls', 'had a chat with her', and 'then left'. He 'did not take notice' or he 'is not sure' how many calls he had made to accused no 2, but he used the land line and her cell phone. Statements in conflict with his evidence were put to accused no 5 when she was cross-examined on behalf of accused no 4.

[363] Accused no 2 and accused no 4 also contradicted each other on the issue of the calls that had allegedly been made between them on 28 November 2007. Accused no 2 testified that he had only sent text messages to accused no 4 on that day and accused no 4 had called him three times. Accused no 2 sent accused no 4 'please call me' text messages early in the morning. Accused no 4 called him and accused no 2 asked him for R300.00. Accused no 4 told him that he first needed to go somewhere else before he could go to accused no 2 and that accused no 2 should wait at the taxi stop for him. Accused no 2 waited at the taxi stop, but accused no 4 did not arrive. Accused no 2 sent a text message to accused no 4 at about 9h00 – 10h00. Accused no 4 called him and told him that he was 'just delayed', and accused no 2 should wait for him. Accused no 4 did not arrive. Accused no 2 sent another text message to accused no 4 after 15h00. Accused no 4 called him and said accused no 2 should wait for him and he would see him when he arrived. Accused no 2 ultimately left and went back to Moses' place to watch DVD's. Accused no 2 was unable to proffer any plausible explanation for the five calls that were made from the cell phone and land line of accused no 5 on the morning in question.

[364] Accused no 4 testified that early in the morning on 28 November 2007 he went from his residence at Honeydew Informal Settlement to that of accused no 5 at Heia Safari. The reason why he did so was because he had left an amount of R1000.00 at her place and he needed R50.00 to board a taxi 'to go to work'. He called accused no 2 in response to the text messages which he had received

from accused no 2, and he promised to take R300.00 to accused no 2 at a certain bus or taxi stop that was on the way to his place of employment. He left accused no 5's residence to go via the Garden Lodge to his place of employment, which was a company called Interactive. On his way to his place of employment he was informed by a certain Mzo Khanyile that the deceased had been robbed and murdered. Accused no 4 did not go to his place of employment (despite the fact that he allegedly specifically went to accused no 5 to get R50.00 to pay for a taxi to go to work) nor did he go to the bus or taxi stop where his very good friend of many years' standing was allegedly patiently waiting for him (despite the allegedly many calls between them to arrange it and despite the fact that he received R300.00 of his own money from accused no 5 to give to accused no 2) nor did he inform accused no 2 that he was not going to meet him at the taxi stop nor did he inform accused no 2 of the death of the deceased.

[365] The version which accused no 4 proferred also materially contradicts his statement to Const. Senosi on 2 December 2007 (exhibit 'U') and it is significant that the allegations that he had gone to accused no 5's residence on the morning in question and that he had called accused no 2 from the cell phone and from the land line of accused no 5 do not appear anywhere in that statement (exhibit 'U'). Accused no 4's denial that the statement correctly reflects the version and answers given by him to Const. Senosi is, we are quite satisfied, false beyond reasonable doubt for the reasons I have given in respect of the admissibility of

the statement and for the reasons given in this judgment. We are satisfied that Const. Senosi was a credible witness and his version reliable. The statement of accused no 4 is an exculpatory one. Accused no 4 explained his movements on the day in question to Const. Senosi. Const. Senosi made no attempt to implicate accused no 4 in the statement. We find it improbable that Const. Senosi's recording of the statement was a fabrication as counsel on behalf of accused no 4 put it to him or that the movements of and calls made by accused no 4 immediately before the incident would not have been recorded in the statement had accused no 4 indeed told Const. Senosi thereof as he claims he did. According to that statement, accused no 4 was coming from his brother in Soweto at about 08h00 on 28 November 2007. Accused no 2 had called him at about 10h40 to see where he was, and he called accused no 2 at about 13h00 to tell him what had happened to the deceased. It is noteworth that there was no mention whatsoever of his earlier visit to the residence of accused no 5. Accused no 4's statement to Const. Senosi was, of course, made before the land line and cell phone records became available to the investigating officer.

[366] The version of accused no 5 about the events of the morning on 28 November 2007, which essentially only emerged during her cross-examination by the State counsel, was that she was about to take a bath when accused no 4 'knocked on a certain pole at [her] residence.' Nosipho, Siyabonga, and the other children were still asleep. She went to accused no 4 where he was waiting outside the fence of the premises where accused no 5 resided. He informed her

that he was there to fetch money that he had asked her to keep for him. He also asked to use her cell phone. She went back into the house to fetch her cell phone. She returned to where accused no 4 was waiting and she handed her cell phone to him. Nothing was said about airtime and she did not check how much available airtime it had. Accused no 4 remained outside the premises. She was not present when accused no 4 used her cell phone. She had gone back into the house to take a bath. Once she had taken a bath, accused no 4 'knocked again'. She went outside the premises to him. He asked 'to make a call from the land line.' He did not tell her why he wanted to use the land line or whom he wanted to call and she did not ask him why he wanted to use it. Siyabonga had woken up earlier and was sweeping outside the house at this stage. Accused no 5 left accused no 4 outside the premises without saying anything to him and went back into the house in order to see whether the children were still asleep, because she and accused no 4 were having a secret love affair and she did not wish the children to see accused no 4. She noticed that Nosipho and the other children, Thabang and Bheki, had just woken up. Siyabonga had just gone back into the house. He was also in the bedroom with the other children. Nosipho and Siyabonga and the other children all went into the bathroom to take a bath. Nosipho and Siyabonga went into the bathroom to wash the younger children, because that was what they used to do. Accused no 5 went to fetch accused no 4 since the children would not see him while they were in the bathroom. Accused no 4 entered the house and used the land line telephone which was in the dining room. Accused no 5 went into the kitchen to

prepare food for the children and was not with accused no 4 when he used the land line nor could she hear with whom he was speaking. When he had finished, accused no 4 called her and indicated that he wanted to go outside. She went to see whether the children were still in the bathroom. They were and she accordingly saw to accused no 4 leaving the house. He went outside and she did not take notice where he was. After a while he 'knocked again' and handed back her cell phone.

[367] Accused no 5 testified that her cell phone was with accused no 4 at the time of each cell phone call that was made between it and that of accused no 2 on the morning of 28 November 2007. She was also completely unable to give any indication or estimation whatsoever of the time that accused no 4 spent at her premises. She said she was concentrating on what she was doing and later on during her cross-examination that she did not have a watch.

[368] Accused no 5 testified that Nosipho and Siyabonga did not see accused no 4, because they were in the bathroom. This, of course, is not what was put to Siyabonga. To him it was suggested that he did not see accused no 4, because he was asleep until about 8h00. Siyabonga testified that he also did not see accused no 4 when he was outside the house cleaning. Accused no 5 suggested in her evidence that this is so, because the premises are big. But this was also not suggested to him when he was cross-examined.

[369] When confronted with the various calls that were made on 2, 22, 25, and 26 November 2007 between her land line or cell phone and the cell phone of accused no 2, she denied that she had been a party to any of the calls. She said that accused no 4 used to borrow her cell phone and she allowed him to use it without ever enquiring from him what he wanted to do with it or whom he wanted to call. She testified that accused no 4 used to use her cell phone most of the time. In 'most cases' he used to borrow her cell phone and kept it with him. This was disputed on behalf of accused no 4, and when Ms. Mogolane was afforded a further opportunity to cross-examine accused no 5, she put it to accused no 5 that accused no 4 had his own cell phone and he only used the one of accused no 5 on occasions when he had insufficient or no airtime, she first replied that she had no comment and then that it was true. In her evidence in chief accused no 5 testified that she sometimes lent the deceased's cell phone to accused no 4. This was also disputed on behalf of accused no 4, and his denial thereof was put to her when she was initially cross-examined on behalf of accused no 4. These contradictory versions of both accused no 5 and of accused no 4 demonstrate their lack of credibility and reliability.

[370] The undisputed evidence as I have mentioned was that the relationship between accused no 4 and accused no 5 had been kept a secret. Nosipho testified that she knew accused no 4. She used to see him when he was visiting his brother at the Zulu kraal. Nosipho testified that she did not know about the relationship between accused no 5 and accused no 4. It was put to her by

counsel for accused no 4 that there had been a relationship between them, and she replied that it must have been a secret. This was not disputed. On the contrary, accused no 4 testified that the relationship between him and accused no 5 was a secret. Siyabonga also testified that he knew accused no 4. He used to see him in town. In exhibit 'O' accused no 5 also states that she and accused no 4 had sexual intercourse at the kraal and, referring to the occasion when accused no 4 allegedly used the land line during the afternoon of 22 November 2007, that she was afraid to talk to accused no 4 in the deceased's house. These statements by accused no 5 were not disputed when Dir. Byleveld was cross-examined by her counsel. We accordingly also find it overwhelmingly improbable that accused no 5 would have permitted accused no 4 to have visited her at the farm house for about two hours and ten minutes from 7h51 until 10h00 on the morning in question or that she would have permitted him to have used the land line at 9h36 and at 9h39 while the children were inside and around the house and while the deceased was on his way to fetch them. We also find it improbable that Nosipho and Siyabonga would not have seen him if he had spent about two hours and ten minutes from about 07h51 until 09h59 at or near the farm house and from 9h36 – 9h39 inside the farm house.

[371] The totality of the evidence, in our judgment, proves the explanations proffered by accused no 4 and accused no 5 for the calls between the cell phones of accused no 5 and of accused no 2 and the calls between the land line of accused no 5 and the cell phone of accused no 2 to be false. The evidence

proves beyond any reasonable doubt that the calls were indeed made between accused no 5 and accused no 2. The versions of accused no 4 and of accused no 5 twisted and turned during the course of this trial in an obvious attempt to meet the State case as far as accused no 5 was concerned.

[372] Accused no 5 is charged with murder and robbery or in the alternative with conspiracy under s 18(2)(a) of the Riotous Assemblies Act 17 of 1956. Any person who conspires with another person to aid or procure the commission of or to commit any offence, whether of common-law or of statutory origin, is guilty of an offence in terms of this statutory provision. See generally on conspiracy: *S v Cooper and Others* 1976 (2) SA 875 (TPD), at pp 878H – 880G; *S v Twala and Others* 1979 (3) SA 864 (TPD), at pp 871G – 873G.

[373] A concise and accurate summary of the judgment of Hefer, JA in *S v Khoza* 1973 (4) SA 23 (O) appears in the headnote, which reads:

> 'The clear intention in sub-section 2(a) of section 18 of the Riotous Assemblies Act , 17 of 1956, is that the act which is punishable thereunder is the *conspiracy* to aid in or procure the commission of the offence. The conspiracy as such is the actual *actus reus* – aiding or procuring the commission of an offence is only the objective towards which the conspiracy is directed. A person who conspires with another to commit an offence or to aid in its commission, may eventually have nothing to do with and render no aid in the commission thereof. Nevertheless the section is clearly still applicable to him. Should he, however, in execution of the conspiracy proceed to the deed and commit the offence or assist in committing it, he is punishable as principal or accessory in the offence itself. In such cases it is then also usual practice not to charge him with the conspiracy.'

[374] Conspiracy 'is generally a matter of inference deduced from certain acts of the parties accused, done in pursuance of a criminal purpose in common between them'. '[E]verything done by any one of the conspirators in furtherance of the common purpose is evidence against each and all of the parties concerned, whether they are present or absent and whether or not they were individually aware of what was taking place …'. Per Boshoff, J in *S v Moumbaris and Others* 1974 (1) SA 681 (TPD), at p 687A – G.

[375] On the question of the degree of proof required in matters of conspiracy, Van Winsen, J, in *R v S* 1959 (1) SA 680 (CPD), at p 683 B – E, quoted and relied upon the following passage in an unreported judgment of Bloch, J in that division in the matter of *R. v. Ruper and Jane Lewis*:

> "Conspiracy to commit a crime requires an agreement on the part of two or more accused to commit the criminal act (see *R. v. Solomon,* 15 S.C. 107, and *R. v. Dhlamini,* 1941 O.P.D. 154). Mere intention is insufficient: there must be an actual concurrence of minds in an agreement to do the act in question. Such concurrence need not necessarily be by way of explicit, spoken words, for the agreement to commit a crime, as any other agreement, can be arrived at tacitly and by conduct (see e.g. *R. v. B.*, 1956 (3) S.A. 363 (E) at p 365). Where, however, the agreement is sought to be inferred solely from the conduct of the alleged conspirators such inference must, on the cardinal rules of logic enumerated in *R. v. Blom, 1939 A.D. 188 at pp. 202 and 203,* be consistent with all the proved facts, and the proved facts in turn must be such that they exclude every reasonable inference from them save the one sought to be drawn.'

Also see: *R v W and Another* 1960 (3) SA 247 (ECD), at p 251 D – G.

[376] The following statement of accused no 5 in her post-arrest statement (exhibit 'O') is presently relevant:

> 'On the 22nd of November 2007 during the afternoon Ronnie then asked to use the land line phone to phone his mother in Natal. He did phone his mother.
>
> …
>
> On the 27th of November Ronnie phoned me on my cell phone during the morning wanting to know (asked when we going to get paid in Zulu). My response to him was that we are going to get paid on Wednesday 28th November 2007 at about 10:00. Before the 28th the old man told me that we are going to get paid on the 28th November as well as the time.
>
> …
>
> On Wednesday the 28th November 2007 at about 6:45 the old man left for work. At about 9:00 the old man phoned the house and said to me I must be ready with the children. At 10:00 he come and pick us up.
>
> …
>
> He arrived at 10:30 pick us up to the Zulu Kraal to pay the employees. On our way there is another gate to be entered before the Zulu Kraal. At the gate, the driver and my sister's little boy climbed out of the car to open the gate. We went through the gate with the old man in the car. Before we could close the gate we were attacked by three males. *I knew Dumisani between the three suspects*. The old man asked me to give them the money and told me not to look at them. I gave them the money. They pushed us out of the car together with the children. I ran to the hotel *due to the fact I know that they going to rob the old man*. After the first shot they seem to fire in the air, and a second shot hit the old man. I wasn't nearby.
>
> …
>
> I further want to add on the 2007/11/28 Ronnie arrived at 7:00 and used my cell phone and speak to Dumisani and we later went into

the house because my airtime was finished, and asked if he could use the land line to speak further to Dumisani, which he did.

…

Ronnie and Dumisani planned to kill the old man.'

(Italics added)

[377] The statement of accused no 5 that she '*knew Dumisani between the three suspects*' is reliable and accepted. This statement is supported by the ineluctable inference to be drawn from the evidence emanating from the cell phone data that show contact between the cell phone or land line of accused no 5 with accused no 2's 'guilty' cell phone on 22, on 25, on 26, and on five occasions on 28 November 2007. The last contact having been made a mere half an hour or so before the deceased, in the company and presence of accused no 5, drove into a surprise attack where he was robbed of a large amount of cash and lost his life. It is probable that one or more calls were made to the cell phone of accused no 2 from the cell phone or land line of accused no 5 by accused no 4, but not those made on 28 November 2007. They, we are satisfied, have been proved beyond reasonable doubt to have been made by accused no 5.

[378] Accused no 5 identified accused no 2 as someone who had participated in the commission of the offences. The fact that the attackers wore balaclavas, as accused no 5 stated in her witness statement (exhibit 'KK'), or that they concealed their faces, as she testified, which aspect is corroborated by the evidence of Terrence, who testified that their faces were covered, is no bar to

accused no 5's ability to have identified accused no 2 as a participant at the scene of the incident. It is not known when the balaclavas were put on. Accused no 5 appears to have seen more than any of the other eyewitnesses. To her, in terms of her undisputed statement in her witness statement (exhibit 'KK'), it seemed that the suspects had hidden themselves at the trees next to the gate. Nosipho testified that she had seen three persons approaching the vehicle from the direction of the trees and Terrence also testified that he had seen three persons approaching the vehicle. Mr. Nginda saw four persons running away towards a nearby bush. Facial features are not the only features by which an assailant can be identified. Accused no 5 identified someone who was known to her.

[379] Although it is probable that Ronnie (accused no 4) planned with Dumisani (accused no 2) to kill the deceased as was stated by accused no 5 in her statement (exhibit 'O'), the State did not prove this beyond a reasonable doubt by means of admissible evidence against accused no 4. The State, in our judgment, however, proved beyond reasonable doubt that, amongst others, accused no 5 *'and Dumisani planned to kill the old man'* through the mechanism of the robbery. This inference, in our judgment, is consistent with all the proved facts and those facts are such that they exclude every other reasonable inference but the one drawn.

[380] 'From the words of her own tongue' accused no 5 admits that she knew that accused no 2, amongst others, had been involved in planning to kill the deceased. She also knew that the deceased was going to be robbed after a shot had been fired into the air and after she had already handed the money over to the attackers. This is why she said she ran away.

[381] Nosipho testified that she heard one gunshot fired and the three assailants kept on saying 'voertsek' when they were approaching. Siyabonga also testified that he heard a gunshot fired in the air and the shouting of the word 'voertsek'. The only inference to draw on the evidence before us is that the shouting of the word 'voertsek' was directed at the other passengers of the vehicle and they or many of them complied and ran away. Nosipho testified that when the deceased told accused no 5 to give them the money, the assailants responded by saying that they did not want the money but the deceased. Terrence testified that shots were directed at the right hand side of the vehicle. It is common cause that the deceased occupied the right driver's seat of the vehicle. The *post-mortem* evidence also shows three gunshot wounds to the chest and upper left arm of the deceased.

[382] It is not disputed that payment of the employees on the 28th November 2007 was unusual and that the date and time when they were going to be paid fell within the knowledge of accused no 5. The inevitable and only inference is that the robbers would not have been able to embark upon the ambush if they

had not been informed when to strike and that such information was conveyed by accused no 5 to accused no 2. She accompanied the deceased on the fatal journey. The only inference is that she thereby maintained the appearance of normality to the monthly 'ritual'. To use the comparison used by Harms JA in *S v Nglengethwa* 1996(1) SACR 737 (A), at p 743a – b, her position is comparable to someone who has planted a bomb and looks on as it goes off.

[383] A reasonable explanation for the constant contact between accused no 5 and accused no 2 during the hours that immediately preceded the robbery and murder of the deceased is absent. Instead, accused no 5 falsely denied that she knew accused no 2, or that they had ever communicated. She also denied her participation in the commission of the offences. The cell phone evidence relating to the contact between accused no 5 and accused no 2 is severely incriminating of her and no inference other than an adverse one is to be drawn that her denials were false.

[384] The only reasonable inference which can be drawn from all the circumstances of this case is that the State has proved beyond reasonable doubt that there was, at least on the morning of 28 November 2007, a conspiracy between accused no 5 on the one hand and accused no 2 on the other. A concurrence of minds is readily inferred from their conduct. Accused no 5 conspired with accused no 2 to commit the offences of murder and robbery of the deceased or to aid in their commission.

[385] Applying the cardinal rules of logic referred to in *S v Blom (supra)*, the State has shown beyond reasonable doubt that accussed no 5 in the execution of the conspiracy assisted in the commission of the offences of murder and robbery. A common purpose to rob and kill the deceased with which accused no 5 had actively associated herself, and the ultimate execution of the purpose has been proved beyond a reasonable doubt. She and accused no 2 shared that purpose and they acted in concert. See: *R v Kahn* 1955 (3) SA 177 (AD), at p 184A.

[386] Even if accused no 5 only made common cause in the commission of the robbery of the deceased, she must have contemplated the use of force, if necessary, and that such use might be potentially deadly taking into account the nature and size of the envisaged robbery. The inescapable and only reasonable inference is that she, at the very least, foresaw the possibility of the deceased being killed and that she actively associated herself therewith, reckless as to whether or not death was to ensue. She has, in our judgment, the necessary *mens rea* to sustain a conviction for not only robbery, but also for murder.

[387] The guilt of accused no 5 of the robbery of the deceased with aggravating circumstances (count 1) and of the murder of the deceased (count 2) has on the totality of the evidence been proved beyond reasonable doubt. Accused no 5 did not impress us as a witness and her denial of her involvement in the commission

of the offences is on the totality of the evidence false. Dir. Byleveld, Insp.Shezi and all the other State witnesses who testified in this main trial, except for Mr. Lakalakala whose evidence has no bearing on the guilt of accused no 5, were good and credible witnesses. We are on the totality of the evidence satisfied that they each gave evidence which is satisfactory in all material respects and is reliable.

[388] Pointings out that had allegedly been made by accused no 6 to the late Capt. Steyn on 16 January 2008 were ruled inadmissible at the end of the fifth trial-within-this-trial to which reference is made in paragraphs 152 – 199 of this judgment. They may accordingly not be used against accused no 6.

[389] Evidence relating to the finding of exhibits and the ballistic analyses thereof were presented by the State *inter alia* to establish a link between accused no 6 and the commission of the crimes in issue. This appears from paragraph 7 of the State Advocate's address in terms of s 150(1) of the Criminal Procedure Act.

[390] At around 22h00 on 2 December 2007, while they were patrolling the streets of Zandspruit, Honeydew, Mr. Kenneth Lekalakala and other members of the community policing forum picked up a firearm that was silver in colour after they had given chase to a person who had a firearm in his possession. The person apparently dropped the firearm and got away. They took the firearm to

the Honeydew SAPS on 3 December 2007, where Insp. Joubert subsequently found it. See the evidence of Mr. Lekalakala, Const. Veronica Mpikashe, and Insp. Joubert. This is the Z88 9 mm pistol to which I have referred in paragraphs 235 – 236 earlier on in this judgment. It was subsequently through a process of microscopic comparison ascertained that this firearm is one of the firearms with which the deceased was shot. Mr. Lekalakala testified that the person who dropped the Z88 pistol was known to him and that he was able to identify him. He then identified a prison warden, who was sitting in the public gallery immediately behind the accused. The finding of the three spent bullets, one cartridge, and the Z88 pistol did not establish any link between accused no 6 and the robbery and death of the deceased. This, in our view, was also correctly conceded by Mr. Ntlakaza on behalf of the State.

[391] The confession of accused no 1 (exhibit 'Q'), the pointings out of accused no 1 (exhibit 'R'), the first confession of accused no 2 (exhibit 'L'), the second confession of accused no 2 (exhibit 'N'), and the confession of accused no 3 (exhibit 'AA') all implicate accused no 6 in the robbery and murder of the deceased. These confessions are all inadmissible against accused no 6 since not one of their makers confirmed any one of them when they testified.

[392] The State has, in our judgment, accordingly failed to prove beyond reasonable doubt the guilt of accused no 6 on any one of the charges with which

he is charged in this criminal trial. This too was in our view correctly conceded by Mr. Ntlakaza on behalf of the State.

[393] What remains is the corruption charges against *accused no 1* and against *accused no 3* (count 5). It is alleged that they contravened s 11(2)(b)(iv) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The part of this section that is presently relevant, provide in essence that any person who, directly or indirectly, agrees or offers to give any gratification to any other person with the intent to cause or induce any person to conceal a police docket with the intent to impair the availability of such police docket for use at the relevant trial, is guilty of the offence of 'corrupt activities relating to witnesses and evidential material during certain proceedings'.

[394] The State's evidence consists of that of Insp. Mokone and of Insp. Joubert. Insp. Mokone is a court orderly at the Krugersdorp Magistrates' Court and Insp. Joubert is the investigating officer.

[395] Insp. Mokone testified that he was on duty as the court orderly for Court D at the Krugersdorp Magistrate's Court on 30 November 2007. Accused nos 1, 2, and 3 were brought to the Krugersdorp Magistrate's Court for their first appearance. He fetched them at the main cell in order to take them to the court cells for Court D and from there into Court D. On the way to the court cells, accused no 3 asked him 'Father (meaning Officer) can you make a plan. You

see Officer, if you can steal the docket for us, we will pay you an amount of R15, 000.00.' Accused no 3 explained that he was referring to 'a murder docket'. Insp. Mokone agreed. Accused no 3 called accused nos 1 and 2, who were already in the court cell since they walked ahead of Insp. Mokone and accused no 3. Accused no 3 told accused no 1 that Insp. Mokone is the officer who will make a plan for them. Insp. Mokone testified that accused no 2 did not participate in the conversation and that he only listened attentively. Insp. Mokone locked them in the court cell and went to call the magistrate into court. Their matter was postponed to 10 December 2007. Insp. Mokone testified that the agreement reached between accused nos 1 and 3 and him was that Insp. Mokone would steal the docket; accused no 1 would arrange his cash payment from his brother, Moses; and, they would 'finish the deal' at their next appearance in court, which was scheduled for 10 December 2007. Insp. Mokone testified that he informed the investigating officer, Insp. Joubert, about the approach that had been made to him. This was corroborated by Insp. Joubert. He testified that Insp. Mokone informed him that the accused approached him to buy the docket in this case from him for R15, 000.00. Insp. Joubert obtained a digital recorder from the SAPS technical support unit for Insp. Mokone to record the conversation between them on 10 December 2007. This is confirmed by the evidence of Insp. Mokone.

[396] Insp. Mokone was not on duty as the court orderly for Court D on 10 December 2007. He went to the cells for Court D and found accused nos 1, 2, 3,

and an additional suspect, who was accused no 4, in one of the court cells. Accused no 3 enquired from him how they were going to deal with the matter and Insp. Mokone insisted that the money be paid first. Accused no 3 asked accused no 1 to let Insp. Mokone phone his brother Moses, 'because he is the person who is supposed to bring the money.' Accused no 1 called Moses with Insp. Mokone's cell phone and *inter alia* said to him that the inspector will help them once he got the money. Accused no 1 informed Insp. Mokone that Moses was delayed in Randburg and he handed the cell phone back to Insp. Mokone to also speak to Moses. Insp. Mokone informed him that when he arrives he should contact him. It never happened. Insp. Mokone testified that he used the recording device during their discussions on this occasion. He handed it back to Insp. Joubert and he confirmed to him that he had made a recording regarding the buying of the docket. This is confirmed by Insp. Joubert, who also testified that the conversations recorded could not be transcribed due to the poor quality of the recording.

[397] Accused no 1 denied that any offer was made to Insp. Mokone in exchange for the disappearance of the docket. He testified that Insp. Mokone approached them and created an impression that he was an attorney, although he did not tell them that he was one. He said to them that he would assist them so that they could be released. Accused no 1 testified that Insp. Mokone did not specifically speak to him directly on 30 November 2007. He and Insp. Mokone only had a conversation at the time when Insp. Mokone handed him his phone to

make arrangements for the payment of his fee, which was on 10 December 2007. On that occasion, Insp. Mokone told him that he 'should phone people outside so that they can arrange an amount of R20, 000.00.' Accused no 1 told him that he believed his family could only afford an amount of R10, 000.00.

[398] The evidence of accused no 1 is a far cry from his version that was put to Insp. Mokone. It was put to Insp. Mokone that he, on 30 November 2007, informed accused no 1 that he was an attorney (accused no 1 denied under cross-examination that Insp. Mokone said this), that 'this was a difficult case, that he 'has helped many people outside', and he indicated that his fee was R20, 000.00. It was put to him that on 10 December 2007, he again went to the holding cells and demanded payment of the R20, 000.00 and that accused no 1 informed him that he had been in custody since his arrest and that Insp. Mokone needed to contact his relatives. Under cross-examination accused no 1 conceded that Insp. Mokone did not demand R20, 000.00 when he arrived at the cells on 10 December 2007.

[399] Accused no 3 denied that he approached Insp. Mokone with the request that he 'should make the case disappear.' He testified that Insp. Mokone approached him at the court cells on the occasion of his first appearance on 30 November 2007. Insp. Mokone told him that he could see that the matter for which he had been arrested was a serious one and he offered to assist him to be released on bail so that he could attend his trial while he was not in custody. He

told accused no 3 that he had helped many people before. Accused no 3 enquired how much his assistance would cost them, and Insp. Mokone requested R20, 000.00. Accused no 3 told him that it was too much and Insp. Mokone thereupon reduced the amount to R15, 000.00. This amount also, accused no 3 told him, was too much and accused no 3 called accused no 1 so that he could give Insp. Mokone the telephone numbers of people with whom Insp. Mokone could make arrangements. On 10 December 2007, when Insp. Mokone approached him again, they only had a brief discussion. Accused no 3 told him that he should phone the 'people outside' since there was nothing they could do while they were in custody. That was the end of their dealings. Accused no 3 testified that he was under the impression that Insp. Mokone was an attorney. He testified that Insp. Mokone only approached him on the two occasions and that he was wearing civilian clothing on both occasions. I pause to mention that Insp. Mokone testified that he was dressed in civilian clothing on 30 November 2007 and in uniform on 10 December 2007.

[400] The evidence of accused no 3 is irreconcilable with his version that was put to Insp. Mokone, which was that Insp. Mokone: approached him saying that he could 'help with the case' and that he could 'make this whole matter disappear'; approached him on four occasions when the matter was discussed; was dressed in civilian clothes on the first three occasions; was dressed in uniform on the fourth occasion when he also opened cells for people to go to court D and accused no 3 then realised that he was a policeman.

[401] Approaching the evidence of Insp. Mokone with the necessary caution that should be applied to evidence of a single witness [*S v Sauls and Others* 1981 (3) SA 172 (A), at pp 179G – 180G], we are on the totality of the relevant evidence satisfied that his evidence is satisfactory in every material respect and reliable. The evidence of accused no 1 and of accused no 3 in support of their denials is in every respect obviously and palpably false. The evidence as a whole establishes the guilt of accused no 1 and of accused no 3 on the charge of corrupt activities (count 5) beyond a reasonable doubt.

[402] In the result:

1. Accused No. 1, Mr. Johnson Tshepo Chirwa, is found:

1.1 guilty as charged on the main count of count 1 - the charge of the robbery of the deceased with aggravating circumstances;

1.2 guilty as charged on the main count of count 2 - the charge of murder of the deceased;

1.3 not guilty on count 3 - the charge of unlawful possession of firearms;

1.4 not guilty on count 4 - the charge of unlawful possession of ammunition; and

1.5 guilty as charged on count 5 - the charge of corrupt activities.

2. Accused No. 2, Mr Dumisani Sibusiso Xulu, is found:

2.1 guilty as charged on the main count of count 1 - the charge of the robbery of the deceased with aggravating circumstances;

2.2 guilty as charged on the main count of count 2 - the charge of murder of the deceased;

2.3 not guilty on count 3 - the charge of unlawful possession of firearms; and

2.4 not guilty on count 4 - the charge of unlawful possession of ammunition.

3. Accused No. 3, Mr Gilbert Mosadi, is found:

3.1 guilty as charged on the main count of count 1 - the charge of the robbery of the deceased with aggravating circumstances;

3.2 guilty as charged on the main count of count 2 - the charge of murder of the deceased;

3.3 guilty on count 3, that he was in unlawful possession of a firearm;

3.4 guilty on count 4, that he was in unlawful possession of ammunition; and

3.5 guilty as charged on count 5 - the charge of corrupt activities.

4. Accused No. 4, Mr Ronnie Mazwi Khumalo, is found:

4.1 not guilty on count 1 - the charge of the robbery of the deceased with aggravating circumstances;

4.2 not guilty on count 2 - the charge of murder of the deceased; and

4.3 not guilty on the alternative count to counts 1 and 2 - the charge of conspiracy.

5. Accused No. 5, Ms Celiwe Mbokazi, is found:

5.1 guilty as charged on the main count of count 1 - the charge of the robbery of the deceased with aggravating circumstances; and

5.2 guilty as charged on the main count of count 2 - the charge of murder of the deceased.

6. Accused No. 6, Mr Vincent Dlamini, is found:

6.1 not guilty on count 1 - the charge of the robbery of the deceased with aggravating circumstances;

6.2 not guilty on count 2 - the charge of murder of the deceased;

6.3 not guilty on the alternative count to counts 1 and 2 - the charge of conspiracy.

6.4 not guilty on count 3 - the charge of unlawful possession of firearms; and

6.5 not guilty on count 4 - the charge of unlawful possession of ammunition.

P.A. MEYER
JUDGE OF THE HIGH COURT

5 March 2010