



IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO	
(2) OF INTEREST TO OTHER JUDGES: YES NO	
(3) REVISED ✓	
DATE 31/5/16	SIGNATURE <i>[Signature]</i>

CASE NO: A187/2013

DATE: 12/5/16.

IN THE MATTER BETWEEN

JAPHET AMOS SHINGANGE

1ST APPELLANT

BOGANG THOMAS LEKGAU

2ND APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PRINSLOO, J

- [1] The two appellants, as accused no 1 and accused no 2 respectively, were charged, together with six other accused, in the Circuit Local Division of the Northern Circuit District, held at Polokwane, with one count of murder and three counts of assault with intent to do grievous bodily harm.

- [2] All the accused were police officers, and, at the relevant time, which was February 2008, they were stationed at the Mankweng police station.
- [3] The charges flow from an incident which occurred at or near Ga-Mailula, in the district of Mankweng, on 25 February 2008.
- [4] It was alleged by the State that, on this particular date, the accused assaulted the deceased (the subject of count one) and the complainants in respect of counts two, three and four, before taking them to the Mankweng police station.
- [5] It is common cause that the deceased, one Samuel Ragophala, passed away at the police station later on that particular day, so that a charge of murder was formulated in respect of the deceased, and, in respect of the other three complainants, allegedly also assaulted by the accused, charges of assault with intent to do grievous bodily harm were laid.

-
- [6] For the sake of detail, it is convenient to quote the wording of counts one and two:

"Count 1

In that on or about 25 February 2008 and at or near Ga-Mailula, in the district of Mankweng, the accused did unlawfully and intentionally kill

SAMUEL RAGOPHALA

an adult male.

Count 2

In that on or about 25 February 2008 and at or near Ga-Mailula, in the district of Mankweng, the accused did unlawfully and intentionally assault Samuel

Mamabolo by hitting him with a number of objects thereby inflicting certain wounds, bruises or injuries with intent to do grievous bodily harm"

- [7] Counts three and four are crafted in terms identical to the wording of count two but the complainants are Masilo Jimmy Rasekgoga (count three) and Malesela Johannes Malemela (count four).
- [8] For the sake of brevity, I will refer to the deceased as such, and to the complainants in counts two, three and four as "Samuel", "Jimmy" and "Johannes". I do so, not out of disrespect, but because that was the terminology used, by and large, during the trial.
- [9] At the trial, which commenced on 23 August 2011, all the accused pleaded not guilty, and they were legally represented. They did not offer plea-explanations, and exercised their right to silence.
- [10] For easy reference, I will refer to the first appellant as "number one", the second appellant as "number two" and the remaining six accused as "number three", "number four", "number five", "number six", "number seven" and "number eight" respectively.
- [11] In terms of section 220 of the Criminal Procedure Act, Act 51 of 1977, the defence admitted the correctness of the findings in the post-mortem report, and the doctor who performed the post-mortem also gave evidence. The correctness of the J88 medical reports relating to Samuel, Jimmy and Johannes, following their examination on 25 February 2008 by one Dr Hayat Mahmud, who did not give evidence, was also admitted.

[12] When the state closed its case on 26 August 2011, the learned trial Judge, Mabesele J, initiated a debate with the three defence counsel, representing various accused. It appears, from my reading of the record, that the learned Judge anticipated that there would be applications for acquittal of some of the accused, on some, or all of the charges, in terms of section 174 of the Criminal Procedure Act. Because of the debate, such applications never materialised in the true sense of the word, but the learned Judge gave a two line judgment, which reads as follows:

"At the close of the state case accused three, four, five and eight were acquitted on all counts. Accused one, two, six and seven acquitted on count four."

Count four is the one relating to the alleged assault on Johannes. Accused one, two, six and seven all gave evidence in their own defence.

BRIEF SYNOPSIS OF THE VERSIONS OFFERED BY THE COMPLAINANTS ON THE ONE SIDE AND THE ACCUSED ON THE OTHER SIDE

[13] The versions are mutually destructive.

[14] I will return to a more detailed summary of the evidence, but, in very broad terms, the version offered by the three complainants, Samuel, Jimmy and Johannes, which are not without material contradictions, amounts to the following:

On the morning of 25 February 2008, Samuel, minding his own business, was on his way to his aunt. He was walking. He was then confronted by five police officers in a sedan motor vehicle, and arrested. He was then taken to the home of the deceased, who was known to him, where the deceased, who was asleep, was also arrested and

some allegedly stolen goods in his house confiscated. From there they stopped at a certain place called Lula's Corner, near a certain shop, where they found a police LDV parked and manned by number seven and number eight. From there the vehicles, travelling in convoy, went to Jimmy's house where they found him washing himself. He was put in the back of the LDV and then they went to MaSialama school, looking for Johannes. He was not there, but they found him along the way, arrested him as well and then proceeded with the four of them to a bushy area at a place called Ga-Swafu, where the eight policemen produced metal objects from the boot of the sedan, including crow-bars, leg braces and a scissor-like steel object. With these metal objects the four of them were viciously assaulted by various police officers for about ninety minutes whereafter they were taken to the police station and left there in the care of the investigating officer, which was number eight. They were all injured, examined at the hospital, but not hospitalised for their alleged injuries. They later in the day received news of the passing of the deceased. They were charged with housebreaking and theft, but the charges were "provisionally withdrawn".

- [15] The version offered by the defence, and verbalised by numbers one, two, six and seven when they testified, is that numbers one, two and seven were on duty early in the morning when an informer telephoned number two about suspects of a housebreaking and theft incident being assaulted by members of the community. Numbers one, two and seven went to the scene, saw the community members backing away and arrested the deceased, Samuel and Jimmy. The three suspects had obviously been injured because there was blood on their clothing. Because of the presence of the

community members, they called for back-up whereupon numbers three, four, five, six and eight arrived in the LDV. Number eight was the driver. Because they were already three in the sedan, they also needed space in the LDV to accommodate the suspects. They then, in convoy, went in search of Johannes, as they had information about his involvement in the housebreaking as well. He was not at his school (he was still a scholar) but they found him along the way and he tried to escape, jumping several fences before he was apprehended and handcuffed. They then proceeded, in convoy, to the home of the deceased after receiving information from the latter about the stolen goods being stored there. They retrieved the goods and went to the police station where they left the four suspects in the care of number eight, who was the investigating officer.

[16] There is evidence that the deceased was later assaulted by another policeman at the police station. This was in the absence of the eight accused. Later they got news of the passing of the deceased.

[17] They never assaulted the four suspects in the bushes with the dangerous metal objects as suggested.

[18] I turn to a brief summary of the evidence.

BRIEF OVERVIEW OF THE EVIDENCE

EVIDENCE FOR THE STATE

(i) Matoli William Ramogobedi

[19] Col Ramogobedi was attached to the Mankweng police station when he testified. In 2005, when different ranks were used in the police, he was a superintendent and also a detective commander and head of the detective branch. He knows all eight of the accused before the court.

[20] He was on duty on 25 February 2008. When he arrived at work, number 1, number two and number seven were already on duty. They informed him that they were following up information around the Mailula area. Numbers one, two and seven were tasked "to do task team, tracing of wanted suspect". Number two, Warrant-Officer Lekgau, was the senior person of the three.

[21] Importantly, at about 07:20 he received a call from number two that he needs manpower. Number two informed him that there was a problem at Mailula. The community were assaulting the suspects. The case which they were busy with, and the suspects which were assaulted by the community, are the suspects of the case of number eight. The case was being investigated by number eight.

[22] The colonel then instructed number eight with numbers three, four, five and six to go and assist numbers one, two and seven.

[23] At about 15:00 in the afternoon, when he came back from an attendance at court, he received a call from the station commander that someone had passed away at the station.

[24] Numbers one, two and seven were using a Toyota Corolla, white in colour, and number eight and his group were using a Nissan LDV ("open bakkie"), white in colour.

[25] He did not communicate with the eight policemen during the day because he was busy at court. He had sent the five to assist the three, as already explained.

[26] In cross-examination, the colonel said that when he arrived for duty that morning, numbers one, two and seven were already out on investigation. They were busy investigating or tracing suspects. The charge was housebreaking and theft.

[27] He repeated that he received a call from number two requesting manpower to assist them and that number two mentioned that the suspects were being attacked by the community. Because of the seriousness of the call he sent five members to go and assist.

(ii) **Hendrik Johannes Gerhardus de Lange**

[28] He held the rank of lieutenant-colonel (also in February 2008) and had thirty four years service in the police when he gave evidence. He was the Community Service Centre commander.

[29] At about 10:10 in the morning, the relief commander, Warrant-Officer Thaba, telephoned him and informed him that a prisoner who was being detained "is seriously assaulted".

He went with Thaba to an area between the Community Service Centre and the cell complex where he came across the prisoner lying on the paving. The prisoner complained that he had been assaulted by the police. It appeared to him that the prisoner was in a serious condition and he gave instructions for an ambulance to be called.

[30] In the waiting cell in the Community Service Centre ("CSC") he also found three detainees who "were also seriously injured". They reported to him that they had been assaulted by the police. Later he noticed that the seriously injured person (the deceased) had passed away. This was confirmed by the ambulance personnel when they arrived.

[31] He knows all the accused before the court but cannot recall seeing them on that particular day.

[32] Importantly, in my view, the lieutenant-colonel, in his evidence in chief, was referred to entries in the Occurrence Book ("OB"). This is exhibit "AA" in the record. The handwritten entry is not easy to read, but the witness read it into the record and I will quote extracts from what the witness stated. He referred to entry 3105 at 10:50 on 25 February 2008:

"Arrest: Inspector Malope (my note: this is number eight, the investigating officer) arrested black males, Samuel Mamabolo ... 28 years ... Johannes Malesela ... 17 years ... Rasekgoga Jimmy Masilo ... 17 years ... charged with burglary and he was injured with face and leg because community assaulted

and Samuel Ragpapa (*sic*, this is the deceased) aged 39 years ... and he was assaulted by the community and he was seriously injured."

[33] Entry 3112 of the OB, at 11:10, contains the following entries (only portions are quoted):

"Inspector Malope charged suspects on CAS600/2/2008 after all the suspects were arrested at Ga-Mailula Village by the Detective Task team and I was called to assist in bringing all suspects to the police station to be charged ... investigated by Inspector Mametja L A and I charged the suspects and booked them to the CSC to check any injuries and if any some be taken to the hospital. One of them Samuel Ragophala passed away, but the ambulance was already called and it came. The ambulance attended, certified him dead before an ambulance could take him."

It is signed by M J Malope which is number eight.

[34] Significantly, the lieutenant-colonel testified repeatedly that a report was made to him that the people "were assaulted by a mob of people". He testified that in no circumstances the victims ought to be sent to hospital and be detained there "so that there is no expenses for the state". He said later that whether they are assaulted by the community, or by the police or by the inmates such victims should be taken to hospital.

[35] In cross-examination, the witness conceded that he had made a mistake by testifying that he had seen the suspects at 10:10, because in a statement that he made at the time he put the time at 10:50.

[36] Significantly, in my view, the lieutenant-colonel also conceded in cross-examination that, in the statement he made at the time, he never mentioned that the other three suspects, Samuel, Jimmy and Johannes, were seriously injured, as he had testified before. He only said in the statement: "I went to the CSC where it came to my notice that three other suspects were in the waiting cell, they were also complaining that they were assaulted by the police."

The witness conceded that he had made a mistake and that the mistake was with regard to a very important aspect of his evidence.

[37] In further evidence, he insisted that the injuries were serious, but he could not remember the nature of the injuries. He also conceded that an instruction that the suspects must be "taken to hospital" is not the same as that they must be "hospitalised". As I indicated earlier, it is common cause that not one of the three was hospitalised.

[38] It was put to the witness that the doctor who examined the three suspects, to whom I have referred, described their injuries, in all three cases, under "Conclusions" as "soft tissue injury".

[39] The following significant exchange also took place between counsel for numbers one, two and seven, Mr Grobler, and the witness during cross-examination:

"MR GROBLER: Now Sir, the deceased, you cannot tell the court who assaulted the deceased and when and where he was assaulted? --- No, I cannot.

You can also not tell the court that the community did not assault any of the suspects? --- I cannot tell that as well.

So you cannot tell the court that the actions of the police officers who brought the suspects to the CSC was incorrect? --- I cannot and I never did."

[40] It was also put to him that Jimmy mentioned in a statement that the deceased was assaulted twice at the police station by unknown members. The witness said he did not know about this.

[41] When he was asked whether he, himself, made enquiries from the police he answered that there were two versions at that point in time. The one version was that the community assaulted the people and the other version "was from the suspects" (I assume he referred to their version that the police assaulted them).

[42] I consider it appropriate to add that, after the conclusion of the evidence of Lieutenant-Colonel De Lange, the prosecutor, Adv Davhana, suggested that he intended calling a police photographer, Inspector O Mudau, to hand in photographs showing the deceased, as well as the extent of the injuries sustained by the complainants. He said some of the witnesses that would be called would be making use of the photos.

His suggestion was rather ridiculed by the learned Judge in the following terms:

"You know what, the most serious thing here is a murder man. Let us talk about murder, that is where this murder is here. Because now you are wasting a lot of time about assault GBH, what – I want to know who killed this man. That is what I am here for. Who killed the deceased? That is why this matter is in the High Court. But now you are talking about little things, no, whether those injuries of those three were serious or not and I say the doctor will tell us. Why should we be assisted by photos when these people were taken to the doctor? The doctor will tell us."

Needless to say, neither Inspector Mudau nor the photos featured during the trial.

(iii) **Rachel Mosutho Ragophala**

[43] She is the sister of the deceased. I will refer to her as "Rachel", as was done during the trial, and without intending any disrespect.

[44] According to her, she was at home on 25 February 2008 with her daughter and younger sibling, and the deceased was asleep in the house.

[45] She was busy sweeping the yard. It was early in the morning when children go to school.

[46] Four police officers, travelling in a sedan motor car, arrived.

- [47] Samuel was with them. His hands were handcuffed on his back. She obviously knew Samuel. So the visitors were five in number.
- [48] In the court, she pointed out numbers one, two and six as being three of the police officers.
- [49] Samuel knocked on the door and gave his name when the deceased enquired from inside. The deceased opened. She asked the deceased what was going on and the police said everything will be discussed later.
- [50] The deceased was wearing a "jockey" when the police handcuffed him. She described these as "boxer shorts". The police also took a radio cassette, DVD and a half full carton of Peter Stuyvesant cigarettes. He had to be assisted to put his trousers on. He requested a jersey to put on.
- [51] The party had now grown to six in number. When they left they put Samuel in the boot.
- [52] She heard number one phoning somebody and arranging to meet at Lulati's shop.
- [53] She saw no community members nearby.
- [54] When the deceased was arrested, she saw no injuries on him.

[55] When she came back later from collecting firewood, she got a message to report to the Mankweng police station. Later she heard that the deceased had passed away. One Piet Mangena took them to the station commander. There is no evidence as to whether or not she met the station commander. The next day she reported the developments to the head man (turning out to be a head woman) one Maria Mailula.

[56] In cross-examination, she confirmed the arrival of the five people, including Samuel. Samuel greeted her and when the police asked him where the deceased slept, Samuel pointed the place out to them and knocked on the door.

[57] At this point, it is with some regret that I turn to an exchange between counsel for numbers one, two and seven and the learned Judge:

"MR GROBLER: Right you say he knocked at the door. --- Correct so.

Why would he knock at the door if he is seeing you sweeping the yard? --- Samuel was knocking at Sam's door. That is after the police had asked him where does the deceased sleep. He pointed the place out to them and then they went over there, that is where he knocked.

You are not answering the question. You are now at your homestead, you are busy sweeping the yard. --- The police stopped at the gate with Samuel.

COURT: I think I understand what she is saying. Firstly what level of education do you have? --- Standard 5.

The way I understand the witness she is saying the police entered the yard with Samuel. At that time she stops and looks at them. Samuel greeted her and thereafter police asked Samuel where does the deceased? In which room does the deceased sleep, then Samuel said, in this room, then Samuel knocked. That

is how I understand the witness. In other words, and correct me if I am wrong, whoever came there did not have any business to do with this woman. They came there, she stops sweeping, Samuel greeted her. They asked Samuel in which room is the deceased sleeping. Samuel said in this room, then Samuel went to knock. That is how I understand the evidence and she then said after realising that these people are handcuffing this deceased, I then went to ask the deceased what is happening? I realised at that time that these people were the police. That is her evidence. Am I right?

MR GROBLER: I do not know M'Lord.

COURT: But that is the evidence, according to me here.

MR GROBLER: I think the purpose of cross-examination is I can ask her to establish what she is saying. I may even ask the same question four times.

COURT: No. I will not allow four times. If the answer is clear I will not allow it. But the fact of the matter is counsel, that is what the witness said.

MR GROBLER: The fact of the matter is M'Lord for cross-examination I may ask the same question three times or four times. I am using a figure, but more than once to see whether we get the same answer.

COURT: Ok, you can proceed, but that is how I understood the evidence.

MR GROBLER: Thank you M'Lord so they saw ... [intervenes] ...

COURT: So if you say – correct me, if you say now why would the police do this and that, you would not know what is in the minds of the police. That is the problem. And I always say to counsel if you say to a witness why would this person do this, the witness is not in the mind of that person. Why does this person act in this way?

MR GROBLER: M'Lord, I am busy testing the credibility, and the court will be ... [intervenes] ...

COURT: But the credibility does not – if you test credibility yes, you are correct, but let us not allow witnesses to speculate. Why would the police do this? Now she is going to speculate.

MR GROBLER: But the court does not know where I am going with the questions.

COURT: I know, or even if I do not know ... [intervenes] ...

MR GROBLER: The court does not know what is ... [intervenes] ...

COURT: Mr Grobler you started very well. In your life never, never argue with a Judge, you will not get anything. You will not gain anything, but what you can gain is to lose direction along the way if you argue with a Judge.

MR GROBLER: I accept that M'Lord.

COURT: I am talking from experience, I have been on the Bench for some time now and I have seen counsel doing exactly the same and it is my song, I always say you lose direction and at the end I say I told you. You can ask them. They appear before me and I told them I know that once counsel starts doing this then I warn, you lose direction. So do not ever argue with the Judge, you will lose direction. It is either you agree with me that this is how the witness said or you do not. Or if there is still something, then let the witness explain that. No problem, but let us not argue.

MR GROBLER: M'Lord, her evidence at this point is crucial to our defence and if I do not get the opportunity to cross-examine this particular point, obviously I will put my point, my defence to her when I get there, but I am

being curtailed into my cross-examination that as far as it is concerned, and I definitely do not want to argue with the Honourable court ..."

[58] I regret having to refer to these exchanges, but they are only an example of many such exchanges, and worse ones, appearing throughout the record. Relatively few pages in the lengthy record do not contain references to utterances made by the learned Judge. On a general reading of the record, I am of the view that the learned Judge spoke more than any of the counsel throughout the proceedings, and asked more questions.

In *R v Roopsingh* 1956 4 SA 509 (AD) a similar state of affairs was relied upon as a ground of appeal. At 513G, the following is said:

"The first ground of appeal which *Mr Maisels*, who appeared for the appellant, relied upon was that the learned Judge in the court below erred in his approach to the case in that he had – so to speak – descended into the arena and, as a result, his vision had been clouded by the dust of the conflict.

In support of this contention, he handed into court a detailed analysis of the questions which the witnesses had been asked during the whole course of the case. From this it appeared that 3,101 questions in all had been put to the witnesses and that, of these, the Judge had asked 1,348, the prosecutor 924 and the defending counsel 829 ..."

The whole issue is discussed, with reference to older authorities, in this judgment from 513G-515A.

In *Hamman v Moolman* 1968 4 SA 340 (AD) the learned Judge of Appeal, in dealing with the same subject, and after referring with approval to *Roopsingh*, pointed out that there were limits which a Judge should observe in intervening in the conduct over proceedings over which he presides – at 344F-H. See also the remarks at 343E-H.

I do not intend taking this issue any further, because the approach of the learned Judge, as I have attempted to illustrate, was not raised as a ground of appeal. Nevertheless, I observe, with respect, that, in my opinion, the constant interference, which I attempted to illustrate, may well have compromised the right of the accused to freely present their cases without undue interference from the Bench. In this respect, the fairness of the proceedings may have been compromised. Nevertheless, for the reason mentioned, I make no pronouncement on this issue.

[59] I return to the evidence of Rachel.

[60] It was put to her in cross-examination that the first state witness, Colonel Ramogobedi, had given specific evidence to the effect that it was only numbers one, two and seven who were on duty and using the sedan motor car. He later sent reinforcements in the persons of numbers three, four, five, six and eight. Against this background it was put to her that the only way in which there could be four police officers at her house, would be if the occupants of the two police vehicles had arrived there together. After this proposal was put to Rachel, the learned Judge initiated lengthy discussions between himself and counsel, covering several pages. The prosecutor also took an active part in the proceedings. As far as the prosecutor is concerned, I have to say that he did not follow the proper procedure of formally

objecting to whatever he considered to be inappropriate, leaving his opponent to answer, him to reply and the learned Judge to make a ruling. He simply, in a way, took part in his opponent's cross-examination by firing interjections at regular intervals with the learned Judge allowing him to do so. This procedure I also consider to be inappropriate and, in my view, something which impacted on the fairness of the trial and the right of the accused to present their case freely and fairly and without being unnecessarily disturbed in the process.

Nevertheless, these constant interruptions are evident from the record, and, for the reasons mentioned, I will attempt to refrain from re-visiting them as far as practically possible.

[61] I return to the proposition put to Rachel. Her answer was that only numbers one, two and six arrived in the sedan vehicle with Samuel. Of course, the weight of the evidence clearly suggests that number seven, and not number six, travelled in the sedan with numbers one and two.

[62] Rachel confirmed that, what the defence described as the stolen goods, were found in the room of the deceased. This included some cigarettes, a DVD and a cassette radio.

[63] It was put to Rachel that the defence witnesses would testify that by the time they arrived at Rachel's house, all the suspects, namely the deceased, Samuel, Jimmy and Johannes had already been arrested so that they did not arrive there with the deceased still at home. They only went there for the deceased to point out the stolen property.

At that stage they were already injured. Rachel said that they were not injured. She re-affirmed that only Samuel was brought there with some of the officers.

[64] She was angry when she heard about her brother's passing in police custody.

[65] Counsel for numbers three, four, five and six, Mr Nel, when cross-examining Rachel, asked her whether she was quite sure that Samuel was handcuffed with his hands behind his back and this she confirmed.

[66] Mr Nel then asked her the interesting question, namely how Samuel managed to knock on the door if his hands were cuffed behind his back. Her, even more interesting, answer was "through his mouth orally so". When asked how you knock through the mouth, she said "you call out, by calling out to the person".

True to form, the learned Judge, siding with Rachel, then explained to Mr Nel that Rachel's explanation of "knocking through the mouth" is quite plausible. The learned Judge put it as follows:

"You are right that the understanding of knocking is by knocking (knocking on bench) you know, but in another culture, like in the Limpopo province to knock a person can say 'ko-ko', that one say 'come in', then she knocked."

Unfortunately for Rachel and the learned Judge, Samuel, when he testified, insisted that he knocked on the door in the normal fashion, because, so he testified, he was "de-cuffed" by the police for that purpose. I say no more.

- [67] Mr Nel also put to Rachel that number six will deny that he was in the car with numbers one and two as she had testified and he repeated the version that the two vehicles arrived at the house together with the four suspects, as I have explained. This she disputed.
- [68] Mr Nel also put to her that nobody was put in the boot of the sedan as she had alleged.
- [69] It was put to her that numbers three, four, five and six will also testify that the suspects already had injuries when they were all brought to the house as was also put by counsel Grobler. This she disputed by saying they did not have injuries. This is a strange statement, given that she never saw, on her own version, any of the suspects barring her brother and Samuel.
- [70] Counsel for number eight, Mr Mahapa, also put to Rachel that number eight would testify that he in fact went to the house with all the accused, in the LDV that he was driving and the suspects were also with them, having been arrested earlier. Rachel disputed this version.
- [71] Rachel's evidence can be questioned in a number of respects: her insistence that number six also travelled in the sedan is not in line with the clear weight of the evidence, including that of number six himself. Her evidence that not one of the suspects was injured is unconvincing given that, on her own version, she only saw two of them. Her evidence that Samuel knocked on the door "through the mouth" is clearly far-fetched. Moreover, through no fault of her own, she clearly cannot be

described as an impartial witness, given her anger, which is understandable, about the demise of her brother.

(iv) Samuel Kolokothi Mamabolo ("Samuel")

[72] Early in the morning of 25 February 2008, he was walking along the road to his aunt's place as Segobe.

[73] The police, travelling in a Toyota Corolla motor vehicle, appeared and alighted from the car. They were five in number. Of course, Rachel said they were four.

[74] When the police alighted, Inspector Shingange (number one, he knew him) produced a fire-arm, pointed it upwards and fired it twice. I consider this inherently improbable. It was broad daylight, at a time when children were going to school on a public road. There is no apparent reason why number one would have done this. According to the record, he was then 50 years old, with an unblemished police service record stretching over twenty three years. Absolutely no reason was advanced why he would have fired two shots into the air.

[75] Samuel said the other four officers in the car were numbers two, three, four and five. Rachel said there were only four officers, including numbers two and six. The fourth one she never identified. Later Samuel said the other officers were numbers two, three, four and six.

[76] The police surrounded him and cuffed his hands behind his back. They put him in the back seat of the car. There were then two people sitting in the front and four people,

including himself, on the back seat. The police informed him that he was being arrested on a charge of housebreaking. This had allegedly been committed at Ga-Makula's shop. The police asked him if he knew the deceased, Johannes and Jimmy. He confirmed that he did. They asked him to go and show them the homes of these three. The first home they stopped at was that of the deceased. The sister was sweeping the yard outside.

[77] The police called the sister (obviously Rachel) and asked her where the deceased was sleeping. She showed them the room and the police asked him to knock on the door. He knocked and when the deceased was about to open the door, number one opened the door and entered. Those who entered were number one, number two and himself. They were the only people who entered. Rachel, on the other hand, did not mention anything about the police calling her or asking about the room of the deceased. She simply said that the police went straight to the door and asked Samuel to knock.

[78] Samuel said they found the deceased sleeping on top of the bed. When he was about to wake up they hit him with an open hand and started dragging him. He was naked. Rachel said she went to the room when they entered and the deceased was wearing boxer shorts. He was given some trousers to put on and they went to the car, putting Samuel in the boot. They went to a place at a stop sign opposite Lula's shop. They found the police LDV already standing there and he saw three policemen in the LDV. Two of those were number seven and number eight. Of course, Rachel said number seven was at her house.

[79] They put him and the deceased in the LDV, and proceeded to Jimmy's house where they found him washing himself. He was also put in the back of the LDV.

[80] They then proceeded to MaSialama School looking for Johannes. They did not find him and proceeded to Ga-Mailula when they found Johannes next to the road. They stopped the vehicle, he (Samuel) alighted, and they asked him to go to Johannes "after they had stopped him". They went to him and also handcuffed him from behind. Those who went to him were numbers three, six and eight.

Compared to this, all the defence witnesses who testified stated that Johannes tried to escape, jumping several fences in the process. The police gave chase in the vehicles, but numbers one, two and seven went on foot. Number one grabbed Johannes and felled him to the ground. Number seven assisted him before they could handcuff him.

[81] Samuel said that after they arrested Johannes, they put him in the boot (of the sedan). This is strange, because there was room in the LDV where he was placed, according to the defence witnesses. Samuel said he sat in the back seat of the sedan.

[82] They then drove further, and went to a deserted place, where people used to live at an earlier time, "in the bushes". This is known as Ga-Swafu. They made Jimmy, the deceased and Johannes alight from the vehicle and ordered them to lie on the ground on their backs. They produced a crow-bar, leg braces and a scissor-like steel object from the car and all eight the police officers (accused) started assaulting the three suspects.

Numbers two and three were those who produced the objects from the boot of the sedan.

[83] When asked who assaulted the deceased, he said numbers one, two and six. Later he said numbers one, two and seven.

[84] Describing the assault on the deceased, he said they were hitting him with the crow-bar. They hit him on the collar-bone, opened his legs wide and kicked him in his private parts.

[85] He continued to state that as soon as they had finished assaulting the other three suspects, they took him out of the sedan, threw him down and started hitting him as well. When the other three were being assaulted, numbers one, two and six were using the steel objects mentioned and the others were also assaulting them but without using the steel objects. The other two were being assaulted by being kicked and with fists. In chief, he repeatedly said that numbers one, two and six assaulted the deceased with the mentioned objects. The police officers who assaulted the other two suspects were numbers three, four, seven and eight.

[86] Number one is the accused who took him out of the sedan. He was then assaulted with a crow-bar on his neck as well as on his shoulder by numbers two and six.

[87] He said specifically that by the time he was assaulted, they had finished with the other three. "It was now my turn." Later he said it was number one who assaulted him with the crow-bar. After the assault they were put in the back of the LDV and ferried to the

Mankweng police station. There they were taken to the detective's office and he was given a mop to "clean the blood". Number two showed him the mop. He cleaned the blood. None of this was put to the first two state witnesses (police officers) for their comments. Fingerprints were taken. Later they heard that the deceased had passed away.

[88] Up to the time when he was cross-examined, the witness repeatedly insisted that it was numbers one and six who assaulted him and he also said, as I mentioned, that numbers two and six assaulted him.

[89] In cross-examination, he said he first made a statement to the police before going to the hospital for treatment. He was not hospitalised and went back to the police.

[90] At this stage, I regret to say, the proceedings were constantly interrupted by the learned Judge, ably assisted by the prosecutor, in the manner which I earlier explained, and counsel for numbers one, two and seven, Mr Grobler, repeatedly complained that he was not given the opportunity to properly conduct his cross-examination. These exchanges stretched over pages 140-155 of the record.

[91] When Mr Grobler finally managed to continue with his cross-examination, he started dealing with a statement about the alleged assault which Samuel made to the ICD (I assume, the Independent Complaints Directorate). There was some debate about the admissibility of the statement, because the police had neglected to have it commissioned, but, ultimately, the statement was allowed.

- [92] He said (without referring to the statement) that when he was arrested, he was first approached by numbers one and two. Later numbers three, four and five alighted and approached. They asked him to show them the house of the deceased. On the way, the police told him that he was under arrest for the housebreaking at Christo's Tavern. In the statement, he did not mention that the police told him the reason for the arrest.
- [93] When they arrived at the home of the deceased, the sister (obviously Rachel) was found "sitting" and some of the police officers (one and two) went over to her and asked her where the deceased was. This differs from his evidence in chief and also from Rachel's evidence. He said the sister (obviously Rachel) pointed out the bedroom of the deceased and then the police asked him, Samuel, to knock. As I indicated, this differs from the evidence of Rachel. He said that he knocked on the door and they entered, it was him, and numbers one and two.
- [94] He explained how he knocked on the door (three knocks on the desk).
- [95] Inside, they found the deceased asleep. He was completely naked. This differs from Rachel's evidence as I have pointed out. He said Rachel did not come and knock on the door later, as Rachel had testified.
- [96] He confirmed that the police removed some items from the room, but only mentioned cigarettes and a "Half jack".

[97] Importantly, in his statement he said "I knocked on Samuel Ragophala's room and he opened". This suggested that the deceased was not asleep when they entered. In his evidence he insisted that the deceased was asleep.

[98] In his statement he said "after opening all the police officials entered into Samuel's room, including myself". This differs from his evidence, where he said it was only him and numbers one and two.

In his statement he said "the police officials ordered Samuel Ragophala to take everything he stole at Christo's Tavern". In his evidence in court he said there was no conversation whatsoever between the police and the deceased.

In his statement he said "and Samuel opened a trunk and he took out a DVD player, a CD player tape and 1 x straight of Peter Stuyvesant".

In court, as I mentioned, he said that he did not know about those items but only the cigarettes and half-jack that he had mentioned.

In his statement he said that the deceased handed the items, including the DVD player, etc to number one. This differs from his evidence in court.

[99] He agreed, when confronted with the statement, that it differs materially from his evidence in court.

[100] In his statement he also did not mention that number one assaulted the deceased (by slapping him in the face). He said that he may have been "negligent" by not mentioning this assault to the author of the statement. In court, he explained that "the mentioning of the DVD and those items is not the truth, because I did not see them". In my view, it is extremely unlikely that the policeman who wrote the statement would have fabricated this evidence.

[101] In his evidence he testified that they were travelling along a certain route to get to the point where they met up with the LDV and the other policemen. He could not explain properly how he would have identified the route if he was in the boot of the car, as he and Rachel had testified.

[102] Rachel testified that when they were still at the house, a phone call was made by the police. He differed from that and said they were already at the veranda of Lula's shop when the phone call was made.

[103] When they got to Jimmy's house, it was numbers one and two who arrested him. They did not assault Jimmy at the time.

[104] They then went to the school looking for Johannes. At that stage nobody was in the boot of the Corolla. When they arrested Johannes, they put him in the boot of the sedan. Those who arrested Johannes were numbers two, three and six. I have mentioned the version of the defence.

[105] The place where they stopped before the assault, he now described as Ga-Thema, between Ga-Sehole and Ga-Mailula.

Jimmy, Johannes and the deceased were ordered to alight and lie down on their backs. Number two went to the sedan and took out the crow-bars, leg irons and the steel object looking like scissors.

[106] He remained on the back seat of the sedan, with the assault taking place towards the back of the car. The boot was closed. Later, when he was recalled by the learned Judge, he said that his visibility towards the assault scene was not obstructed. He was still on the back seat and handcuffed.

[107] Now he said numbers one, two and seven (not number six) assaulted the deceased with these items (crow-bar, scissors, etc).

[108] In his evidence in chief, he said only the deceased was assaulted with the steel items and the others were assaulted with boots and fists. In cross-examination he said "after they had finished assaulting the deceased with those items, they were also used in assaulting Jimmy as well as Johannes, the specific items that I mentioned".

When asked who used those items to assault the others, he said numbers four, six and seven.

[109] When he was confronted in cross-examination with the fact that, initially, he said that only the deceased was assaulted with the items but the other two complainants with

feet and fists, he conceded that but then he added new evidence "then later on after I have been made to alight from the motor vehicle and I had joined the group that was lying down. That is when these I have just mentioned now, they were the ones now who took over the attacks and started assaulting the others with those items." He said this did not include the deceased. Of course, in chief, he said nothing about "joining the group that was lying down" but said, as I have mentioned, that by the time he was assaulted "they have finished with the other three, it was now my turn".

[110] He testified in cross-examination that those that were assaulted stayed on their backs the whole time.

[111] In cross-examination, Samuel was invited to illustrate the gravity of the assault on the deceased and the other two complainants in the following terms:

"MR GROBLER: ... obviously they were hitting these three complainants very hard with these shackles and these items. They were assaulting them, hitting them hard. Is that correct? --- Very much.

Repeatedly? --- Correct so.

Sir, I just want to understand please, in other words it was not like hitting him, talking to him, he was hitting him the whole time. Is that correct? ---

Repeatedly so.

All over the body? --- From head to all over the body.

Even in the face? --- On the face they were not using those steel objects, but rather they were concentrating from neck down.

... and all over his body you said? --- All over the body.

... they were hitting the deceased repeatedly with these items all over his body vigorously, terribly? --- Correct so.

And this assault took place for a long time? --- Could be about ninety minutes.

And this is now an assault that took place on the deceased and the other two complainants? --- Yes, I am counting for all of them now."

He went on to say that where the others were assaulted for ninety minutes he was assaulted as vigorously for about twenty minutes.

[112] Late in his evidence under cross-examination, he introduced a new allegation that number eight also assaulted him by hitting him twice with a stone.

[113] After the assault they were taken to the police station. At the police station he was not with the deceased the whole time. He conceded that he cannot tell the court what happened to the deceased at the police station.

[114] The only injuries he sustained were on his left leg and his shoulder. Nothing else.

[115] In cross-examination, the version of the defence was put to him. I have already briefly summarised the version and will return thereto when dealing with the defence evidence. He denied that they were apprehended by the community as testified by the defence.

[116] He denied that Johannes ran away when he saw the police.

[117] Samuel was also cross-examined by counsel Mr Nel for numbers three, four, five and six.

[118] It was put to him that in cross-examination by Mr Grobler, he said that when the Toyota Corolla arrived when he was walking, numbers one, two, three, four and five were in the car. In evidence in chief he said they were numbers one, two, three, four and six. In this part of the cross-examination the accused were ordered by the court to stand up, and now Samuel said they were numbers two, seven, four and six. This is a third version. He conceded that he made a mistake with regard to number five.

[119] He was cross-examined about an identification parade that was held. There he identified numbers one, eight and six and one William Mpahlele who had nothing to do with the incident. Numbers two, three, four, five and seven were not pointed out by him at the identification parade.

[120] He confirmed that he and the other complainants knew each other before the incident.

[121] It was put to him by Mr Nel that his clients, numbers three, four, five and six, will testify that when they joined numbers one, two and seven, near the bottle-store at Ga-Mailula, he (Samuel) was already in the custody of numbers one, two and seven with Jimmy and the deceased. This he confirmed. He also confirmed that immediately after that, they went to the school looking for Johannes. In my view, this corroborates the version of the defence.

[122] He confirmed that the housebreaking charges against him and the other suspects were "provisionally withdrawn".

[123] He confirmed that when they could not find Johannes at the school, they found him later running through the mountains and he ran away from the police. He said that the police ordered him to stop and he stopped before they arrested him. He denied that Johannes jumped over fences and later suggested that Johannes co-operated with the police. This is not in line with the weight of the evidence, as will appear later.

[124] Importantly, when it was put to him that numbers three, four, five and six will testify that after Johannes was arrested the police went to Rachel's house, with all the suspects, to retrieve the stolen goods, he denied that and said that after they were all arrested they did not go to Rachel's home but to the place where they were assaulted. However, when it was then put to him that numbers three, four, five and six will further testify that after they retrieved the goods from Rachel's house they were all taken to the police station, he confirmed it. This flies in the face of his earlier evidence that it was only him with four police officers that went to Rachel's house. It also corroborates the evidence of the defence.

[125] He also confirmed that at the police station, after the suspects were left in the care of number eight, the investigating officer, numbers three, four, five and six left to go and do their assignments as student constables.

[126] In cross-examination by Mr Mahapa, it was put to him that number eight would deny that he assaulted him with a stone. As I already briefly mentioned at the outset, this

evidence of the assault by number eight was in any event rejected and number eight was acquitted after the state case was closed. The witness also said that number eight did not assault the deceased.

[127] In my view, it appears from the above analysis that Samuel was a poor witness: his evidence dramatically differed from that of Rachel. He changed his evidence about who allegedly assaulted the deceased by later replacing number six with number seven. He first said that after the other three were assaulted, it was his turn and he was the only one then assaulted. Later, under pressure, he improvised by stating that he was forced to "join the others on the ground" whereupon they were all again assaulted.

(v) Masilo Jimmy Rasekgoga ("Jimmy")

[128] He said he was arrested at his home by all eight the police. This flies in the face of the weight of the evidence, including that of the defence, and, in a sense, that of Colonel Ramogobedi.

[129] After his arrest they went to the school, could not find Johannes, and he was arrested along the way. He could not say much about how the arrest took place, because when they arrived at the scene the police were already putting Johannes in the boot of the sedan.

[130] They were taken to a place between Gatsela and Hamanoko. The names differ from those mentioned by Samuel.

[131] They were cuffed "from behind" and told to lie down. They lay on their backs. Certain objects were taken out of the boot of the sedan. He does not remember the one who first arrived at the boot of the sedan and took out the steel objects.

[132] He did say that it was himself, the deceased and Johannes who were ordered to lie on the ground. He said that the police then started assaulting them with the objects, "they were exchanging those objects amongst themselves". When asked who these attackers were, he pointed out numbers two, three, five and seven. This differs from the evidence of Samuel.

[133] Importantly, when asked whether they were assaulted separately or together, he said they were all assaulted together at the same place. This differs from the evidence of Samuel who first said that they only assaulted the deceased with the objects and the other two with boots and fists.

[134] He said after they had been assaulted the police never told them the reason why they were arresting them. This is not in line with what Samuel said, namely that the police said they were arresting them because of the housebreaking.

[135] He confirmed that Samuel was in the sedan while the other three were being assaulted. After a long while they took Samuel out of the sedan and were busy with him but "I could not see what was happening to him". He heard Samuel screaming but he could not say what was happening to him.

[136] Thereafter they went to the police station.

[137] He sustained injuries on his shin, on his back and on his hand. He was not hospitalised. He has healed completely.

[138] Upon arrival at the police station, they took Samuel and Johannes for fingerprints and left the witness with the deceased at the detective's office. The deceased was bleeding. It appeared that he was bleeding on the shins because he saw the blood on the trousers. He did not know anything about the allegation that they were arrested or apprehended by other people than police officers.

[139] In cross-examination, after confirming that Samuel and Johannes were taken away and he was left with the deceased, he was asked whether it is not correct that another police officer, whose identity was not known, then came to them and then assaulted the deceased. He said that "nothing like that ever happened". It was put to him that the deceased then fell on his head. This he denied. Later he admitted that the deceased fell down, he saw that, but he did not see the head of the deceased hitting the ground. He said that by the time that the deceased passed on, he fell down. This is not in line with what Lieutenant-Colonel De Lange said, namely that he found the deceased lying on the paving complaining that the police assaulted him.

[140] He confirmed that he laid a charge with the ICD about the incident and made a statement. He identified the statement with all the pages having been signed by him.

He confirmed most of the information on the statement as having been correctly recorded by the police officer who wrote the statement and confirmed that it was read

back to him. Later he back-pedalled, stating that he did not remember that it was read back to him.

[141] These are some of the allegations which he made in his statement:

- "Inspector Malope took Samuel Rakgopola and myself to where they took fingerprints."
- "After the eight police officials assaulted us they took us to Mankweng SAPS."
- "Upon our arrival at the station they took us to CID office and took us to a certain office."
- "Upon our arrival in the office we found a certain police officer whom they call Whitey, reading a newspaper."
- After saying that the four of them were together, he said "The said police officer who was short with short hair started kicking us on our head with booted foot." He then said they assaulted Johannes and they asked him to clean up the blood and he could not hold onto the mop.
- Importantly, when he was asked if they assaulted the deceased as well, he said "Inside the office they did not assault him.
Was it outside the office? --- He was assaulted only where we were, right there at the bush."
- "The said officer who was short with a short hair style had been kicking us on our head and booted foot, and Inspector Malope who was taking fingerprints was out and Whitey saw the police officer who was kicking us with booted foot."
- He confirmed that none of the accused before the court was participating in that assault. He confirmed that they were not even there at the time.

- Very importantly, after his statement that Inspector Malope took him and the deceased to where they took fingerprints, he said the following in the statement:

"While Inspector Malope was busy charging us, Samuel Rakgopola, that is the deceased, fell on the ground by head, and a certain police officer kicked Samuel Rakgopola, the deceased, with booted feet on his ribs and he again told us that Samuel is taking chances."

Not surprisingly, because he was clearly a dishonest witness, he said he could not remember saying this to the policeman. He called it a misunderstanding. Then he was asked:

"It could be. Or it could have been written correctly. Not so? --- I do not remember explaining it in such a way that you are saying.

Ok but that is what happened. --- I did not observe such."

This, in my view, is a feeble and unconvincing answer. It is inherently improbable that the police officer, a member of the ICD, would have fabricated this portion of the evidence in the statement, after having recorded most of the rest of the statement correctly, on the witness' own version.

[142] Then followed a tea adjournment and, when the court resumed, counsel Mr Grobler put it to the witness that during the tea adjournment he had spoken to the police officer who took the statement, Senior Superintendent Maloto, a lady, and asked her whether she had read back the statement after having recorded the details and this she confirmed.

Then followed one of the many interruptions by the learned Judge, who accused counsel that he was giving evidence. After some lengthy exchanges, counsel was allowed to continue with this line of cross-examination. He then reverted to the witness' statement that Inspector Malope took him and the deceased for fingerprints and the statement which I quoted, that while the inspector was charging them a certain police officer kicked the deceased with booted foot on his ribs and again told them that the deceased was taking chances.

He was asked whether this is what happened and he confirmed it.

Then the cross-examination went as follows:

"Thank you. And then you said:

'The said police officer kicked Samuel in the presence of Inspector Malope, myself and a certain man who is a cleaner at the Mankweng SAPS.'

Correct? --- And some other people, it was many of them I do not know. ... And there were also some other people, many of them, I do not know what they were there for because I saw them, some of them ..."

He confirmed that at that stage numbers one, two and seven were not there.

Then the following question followed:

"... So at the police station the deceased fell on his head, and he was also kicked by another police officer, which we do not know who it is.

Correct? That is your evidence. Correct? --- Indeed there was somebody who kicked him."

Later he confirmed that after the assault on the deceased he was taken away from the deceased. He admitted that he did not know whether the deceased was assaulted any further at the police station.

[143] Against this background, an interesting thought that occurs, although one must, if possible, avoid speculation, is whether the complaint by the deceased to Lieutenant-Colonel De Lange that he had been assaulted by the police (accepting, for the moment, the hearsay evidence) was not perhaps a reference to the assault at the police station, graphically described by Jimmy, rather than a disputed ninety minute assault with heavy metal objects in the bushes. It is perhaps noteworthy that the post-mortem report, exhibit "D", makes reference to "bruises on the right side of the rib cage but no rib fractures".

It is true that the post-mortem report also refers to "multiple abrasions on the upper back ... these abrasions were associated with extensive soft tissue bleeding on the upper back, lower back, buttocks, upper arms, parts of the thighs and legs".

I will revert to this subject when dealing with the doctor's evidence, but it has to be borne in mind that the complainants alleged that the assault in the bush was perpetrated while the complainants were handcuffed and lying on their backs. As opposed to this, there was clear evidence from the defence witnesses, particularly

numbers one, two and seven, that the complainants were injured by the community members and, in particular, they noticed blood on the clothing of the deceased.

[144] I now turn to another unsatisfactory aspect of Jimmy's evidence.

[145] He was asked whether he saw Johannes running away before he was arrested, and the police giving chase. His answer was "I did not see anything at all" and -
"Are you sure? --- Correct so."

He was then referred to paragraph 5 of his statement where he said that Johannes was not found at the school and then he said the following:

"On our way to Johannes' home we saw Johannes and the police gave chase to him, and he also ran away."

His somewhat astonishing answer was that that is not the truth. Then followed the usual interruptions by the learned Judge and the prosecutor, whereupon counsel Mr Grobler confronted him with the following further sentence appearing in the statement:

"The police gave chase on him and he also ran away. The police kept on running after him and they ended up apprehending him."

His response was that he did not know about that. Of course, this evidence in the statement corroborates the version of the defence, to which I will shortly turn.

[146] Jimmy's evidence about the alleged assault in the bush was equally unimpressive:

- He said in paragraph 7 of his statement that the two police vehicles were parked in the bush and that himself, Samuel, the deceased and Johannes were

all four ordered to alight. This is not in line with the evidence of Samuel and also with what he said in chief. Nevertheless, when he was asked whether he was happy with this statement he answered in the affirmative.

- He then said that the eight police officials took the deceased and started assaulting him with crow-bars and iron and leg cuffs all over his body "in our presence". Again he was asked whether that was correct and he confirmed it.
- He then said in the statement "and they also kicked him all over his body with booted feet". When asked whether that was correct he, surprisingly, said "I could not see them when they were assaulting the deceased".

When he was confronted then with the conclusion that the statement that the police were kicking the deceased all over his body was incorrect, he confirmed that stating "as the assault was being done on us simultaneously, there is no way that I could have been able to see what kind of assault was being done on him".

When he was again confronted with the fact that his evidence was not in line with the statement he said "no, I did not see how he was assaulted".

- He was then asked "so are you saying that the four of you were assaulted simultaneously and that is why you could not see how the other complainants had been assaulted?"

At this point, I regret to say, the learned Judge again interrupted the cross-examiner pointing out that in chief the witnesses said that three of them were ordered to alight. The cross-examiner reminded the learned Judge that he was

cross-examining on the statement where he emphatically said that all four of them were ordered to alight. Because of this debate, stretching over many pages of the record, the witness appeared to see the light and said although they were ordered to alight, they were not ordered to do so at the same time. The cross-examiner complained that he was being curtailed in his cross-examination.

- However, the witness kept on insisting that he could not see what was happening to the deceased because he was being assaulted at the time.
- When the witness continued with his newly found version that the assault commenced only on the three of them, him, Jimmy and the deceased, he was asked whether that meant that when they were finished with the three of them they turned to Samuel. His answer was that they did not finish before going to Samuel. This is not in line with what Samuel said as I have explained. The witness said after they had been assaulting the three of them for a long time, they made Samuel to alight from the motor vehicle and forced him to join them on the ground and then they assaulted the four of them. Again, this is not what Samuel said.

In another passage in the statement, he said that after the eight police officials assaulted the deceased, they started assaulting the four of them, himself, Samuel, the deceased and Johannes. This is, again, a different version.

- Later in the cross-examination he said that he was assaulted by numbers two, seven and eight.

[147] When asked about the identification parade the witness, surprisingly, said before the parade the police asked them to point out "the people who arrested us and handled us up to the police station, until the time that the deceased passed on". He said so repeatedly and not that they were asked to point out the people who allegedly assaulted them. After some interruptions from the court and the prosecutor, he again saw the light and said that they were asked to point out the people who assaulted them.

[148] In cross-examination by Mr Nel, the witness was reminded that, in chief, he said that numbers two, three, five and seven were exchanging the objects. His answer was that they were all exchanging the objects but those that he managed to see were two, seven and eight.

However, when Mr Mahapa, for number eight, cross-examined him and asked for number eight to stand up so that the witness could have a proper look at him, the witness said that number eight did not assault him.

[149] It is clear that this was an unsatisfactory and dishonest witness. In many ways, his testimony differed materially from what he had said in his statement. It also differed materially from what Samuel had said. As he was testifying, he gave different versions. He also admitted, that during an adjournment while he was still under cross-examination, he was sitting outside court talking to Samuel and Johannes. He, however, denied that they were talking about the case.

(vi) Malesela Johannes Malemela ("Johannes")

[150] When he was arrested, he could identify numbers one and two. He could not see who was in their company.

[151] He said after they were arrested "we drove to another place that is in the bushes. They made us to alight the motor vehicles and they told us to lie on our back, facing upwards."

The prosecutor then tried to get him to explain who "us" included. When no immediate answer was forthcoming the learned Judge interrupted by asking Johannes:

"Look, you say that the police ordered you to lie on the ground. --- Yes.

It was you and who? --- It was the four of us."

The prosecutor was then forced to ask:

"The other three, who are they? --- Jimmy Rasekgoga, Samuel Mamabolo and then Samuel Rakgopola."

So, like Jimmy in his statement, he said that the four of them were ordered to alight and lie on the ground on their back facing upwards.

[152] He said that the police started assaulting them with crow-bars and "one leg iron". When asked who assaulted him, he said he could not identify them as it was the first time that he was seeing those policemen.

[153] At the identification parade he pointed out numbers one and two. Of course, the others did not say that number one assaulted them.

[154] Then an interesting question and answer followed:

"When you were assaulted by accused one and two, where were these other two, including the deceased? Where were these other two that you have just mentioned including the deceased, that is Jimmy and Samuel Mamabolo? --- By then the deceased had already passed on, Jimmy Rasekgoga and Samuel Mamabolo were there."

[155] Then some exchanges followed, involving the learned Judge and the prosecutor.

Thereafter the witness said that:

"What happened was that at first they made myself, Malemela (which is of course himself) and the deceased to alight from the motor vehicle and we laid down. By that time Samuel Mamabolo was still at the back seat of the motor vehicle, and they assaulted us."

COURT: Do you know what happened to those you lie with on the ground at the time that you were being assaulted? --- I do not know."

[156] After further lengthy exchanges, he confirmed that they were taken to the hospital but not hospitalised.

[157] In cross-examination, he confirmed that the prosecutor prepared him for his evidence and read his statement to him that he had made to the police. Later he said that the prosecutor did not read the statement to him. After further exchanges involving the court and the cross-examiner, he confirmed that the prosecutor read the statement which he had made to the police to him. He also confirmed that when he heard the

statement he agreed that that was what he had told the police. He also identified his signature.

[158] He denied that he ran away when the police arrived. In contradiction to this, he said in his statement:

"On my way to school I saw two cars, one a white bakkie and the other a Toyota Corolla. They followed me and I changed direction and took another street and started to walk fast.

These two cars followed me and I started to run and only stopped when I saw a white Corolla which stopped not far from me. I saw Shingange who is a police officer, holding a firearm in his right hand, pointing it in the air.

One of the police officers who caught me was wearing a pink shirt and black trousers, he only handcuffed me without telling me anything."

When, after some further exchanges between the court and the cross-examiner, the latter put to the witness that he did run away his answer was "I do not recall".

He was clearly a dishonest witness.

[159] About the assault, he said they finished assaulting him, Jimmy and the deceased and then they took Samuel from the car and started assaulting them again. He later said that they finished with the deceased and stopped assaulting him but then assaulted the remaining three. This differs from various versions offered by other witnesses.

The contradictions became worse when he later said that at one stage all four of them were being assaulted.

[160] He said he was assaulted on all the joints that he has in his body, starting with the hands towards the feet. This was with a crow-bar and foot shackles.

[161] Significantly, when asked who assaulted him he said it was the policemen but "I did not pick up who it was exactly, because they were exchanging". He confirmed that he did not know who assaulted him. It was then put to him that numbers one, two and seven did not assault him. Surprisingly, he answered that they did assault him. After further cross-examination, he admitted that he did not know who assaulted him.

[162] Mr Nel, for numbers three, four, five and six, put to this witness that his clients would also deny having assaulted him. There was no clear answer.

[163] This was clearly a hopeless witness.

(vii) Kgolane Yvonne Kgoete ("Dr Kgoete")

[164] The doctor graduated at Medunsa in 2003. When she gave evidence she was working in the Polokwane Provincial Hospital in the Department of Forensic Medicine.

[165] She conducted the post-mortem on the deceased and prepared the post-mortem report, exhibit "D".

[166] She also testified about the J88 reports relating to Samuel (exhibit "A"), Jimmy (exhibit "B") and Johannes (exhibit "C"), although she did not prepare those reports or perform those examinations.

[167] I have already quoted the observations made by the doctor as they are described on the post-mortem report. I have made certain comments in that regard.

[168] The doctor found the cause of death to be "haemorrhagic shock due to multiple blunt force injuries".

[169] She found that the skull was intact and had no fractures. The findings were limited to skull fractures, not head injuries.

[170] In cross-examination, she confirmed that she could not tell which of the injuries that she saw was fatal.

[171] She was informed that there was evidence of an assault that took place at a certain site and then he was taken to the police station while he was still alive. There another assault took place. She conceded that it is possible that the assault that took place at the police station could have "contributed the final blow" to the death of the deceased. It should be recalled that Jimmy testified that Inspector Malope took him and the deceased for fingerprints and while they were being charged, the attack by the other policeman on the deceased took place. From this, it seems, the inference can be drawn that the deceased was still reasonably mobile up to the point where he was assaulted by the last-mentioned police officer.

[172] She consequently conceded that it is possible that the alleged injuries sustained during the alleged earlier assault may not have been fatal but the injuries sustained in the assault at the police station could have caused fatal injuries which lead to the death of the deceased.

[173] The cross-examiner turned to the contents of the J88 medical forms relating to the other complainants. He informed the doctor that there was evidence that these complainants were assaulted vigorously and viciously for about ninety minutes with crow-bars, foot chains and scissors-like metal objects.

[174] The cross-examiner then referred her to the J88 relating to Johannes where the injuries were described as a small half centimetre lacerated wound on the right leg and a small wound on the head. The left elbow was painful and swollen and there were multiple bruises "on his back over the chest area". There were general body pains.

It was put to the doctor that an assault of ninety minutes vigorously applied with a crow-bar and the like, will result in worst injuries such as lacerations and the bursting open of the skin. She said that she agreed but that the doctor completing the J88 "will comment on the external injuries only, whilst at post-mortem I have the chance of dissecting the whole soft tissues". She said this means that the external injuries might be minimal but the internal bleeding might be more than what the doctor had seen.

The cross-examiner persisted: they were alleged to have been viciously assaulted with these metal objects for ninety minutes, all over the bodies. The doctor answered that

"if they were dressed that could have prevented more superficial, visible injuries, but they could still have internal bleeding".

The cross-examiner persisted, after some interference by the learned Judge, in the following terms:

"If I was to assault you doctor, with a crow-bar for a half an hour all over your body even if it is just myself, not even three people, and you have got a pants on and a shirt, you are saying to me it is more probable that you will only have half a centimetre laceration on your leg? --- It is possible.

It is possible, but it is not probable. It is more probable that you would have severe injuries is it not so? --- Yes.

And it is more probable that you would have a lot more severe injuries than is reflected on this J88, if three police officers with these crow-bars and chains hit you for an hour and a half viciously and vigorously, is more probable that you will have a lot more serious injuries than is reflected on the J88. --- Yes.

You agree with me? --- I do."

[175] The cross-examiner then turned to Jimmy's J88 where the injuries were described as multiple abrasions on his right lower limb, right forearm and right hand; bruised left leg; painful right ankle, knee joint and right elbow joint; general body pain.

The question posed to the doctor was:

"You would agree with me doctor again a person has been assaulted by three or four police officers with these objects, crow-bars, chains and scissors

vigorously for an hour and a half would have a lot more serious injuries than is reflected on this J88. Not so? --- Yes.

It is most probable."

[176] The doctor was taken through the same exercise with regard to Samuel's J88 where the injuries were described as "multiple bruises over his right arm, right scapula area, left elbow; left lower limb/leg sustained one very small half centimetre lacerated wound; general body pain".

It was again put to her that with the serious assault alleged the injuries to be expected would be much worse. She conceded this but said there may have been more serious internal injuries. Of course, the state offered no evidence about internal injuries.

The cross-examiner then went on as follows:

"But one would expect that there would be external also clearly visible ... serious injuries. --- Yes.

So you would agree with me that this also does not coincide by a person being assaulted so vigorously as I have already explained to you with the other two people as well. It is more improbable that they were so seriously assaulted. Is that correct? --- Yes."

[177] The learned Judge and the prosecutor then asked a number of questions which, in my view, did not yield any results which may have softened the effect of the cross-examination by counsel.

[178] Thereafter, counsel was invited to conduct further cross-examination. In this process the doctor conceded that there were three possibilities namely that the alleged first assault could have caused the death, another possibility was that the second assault (in the police station) caused the death and the last possibility was that the two together, combined, caused the death. She also conceded that she could not say which of the three possibilities was the correct one.

[179] After the doctor had testified, the learned Judge recalled Samuel and asked him one question namely whether from where he was seated in the sedan when the other three were assaulted, there was anything that could have obstructed his view to observe the assault. He answered that there was nothing. There was no cross-examination.

[180] I have already expressed my views about Samuel as a witness.

[181] At this point the state case was closed.

[182] I have mentioned the debate which then followed between the learned Judge and counsel. I mentioned that intended section 174 applications never saw the light but, flowing from the debate, the learned Judge gave a short judgment and, for convenience, I again quote the contents thereof:

"At the close of state case accused three, four, five and eight were acquitted on all counts. Accused one, two, six and seven acquitted on count four."

Count four relates to the alleged assault on Johannes.

EVIDENCE FOR THE DEFENCE

(viii) Japhet Amos Shingange ("number one")

- [183] Surprisingly, when his counsel led him in chief, he was not asked what his rank in the police was. Nevertheless, during the sentencing proceedings, it was said by the learned Judge that he was fifty years old, married to a professional nurse and that the couple were blessed with five children. He had an unblemished service record with the police stretching over twenty three years. He was a member of an organisation called Christian Centre whose task it was to promote good models among the youth. He had one previous conviction, of culpable homicide, flowing from a motor vehicle accident, going back to 1999.
- [184] On the day in question he was on duty and then they received a phone call informing them that the community had effected an arrest upon some people at a place called Ga-Mailula. He was accompanied by numbers two and seven.
- [185] When they arrived at the scene they found the three "arrested" people. The community members moved away from these three people. They were the deceased, Samuel and Jimmy.
- [186] Number one and his colleagues then arrested the three in connection with a housebreaking offence committed at Ga-Mailula.
- [187] Number one saw that the clothes of the three was bloodied "on the trousers as well as on the shirts".

[188] They took them to a certain school looking for a scholar called Malemela.

[189] When they first arrived at the scene for the arrest, number two called the police to ask for assistance.

[190] The support arrived in the form of numbers three, four, five, six and eight while they were still at the scene where the arrest took place.

[191] From there they proceeded to the school. The support police were travelling in a Nissan bakkie whilst number one with numbers two and seven were using a Toyota Corolla.

[192] The three arrestees were placed in the bakkie.

[193] They went to a school at MaSialama where the arrestees informed them they would find Johannes Malemela who was also in their company (presumably when the housebreaking took place).

[194] They did not find Johannes at the school and went to check on him at his home. On the way Johannes was pointed out to them by one of the suspects. They stopped the Corolla next to him. He started running away towards the hill. He jumped over a fence into a certain homestead. They drove to another street. That was him, number two and number seven. He jumped a second fence and a third fence. When he jumped over the first and third fences he fell down. Number one did not concentrate on him when he jumped over the second fence. When he fell down after jumping the

third fence, number one grabbed him and he tried to break free. He was then felled to the ground and number seven came to assist him and he was handcuffed. His hands were cuffed behind his back.

[195] By then the deceased had already informed them that there were goods that were left behind at his home. These were goods that they had stolen.

[196] They went to the home of the deceased and parked both vehicles next to the gate.

[197] They went into the yard accompanied by the deceased and got into his bedroom. He pointed out the goods to number seven who then took the goods and they left. The goods included a radio, some cigarettes and a DVD player as far as the witness could remember.

[198] They went back to the police station.

[199] At the police station they took the suspects to the investigating officer's office. This was number eight.

[200] They then left to attend to another case at the traffic department.

[201] When they came back later they were informed that the deceased had passed away.

[202] They did not assault the deceased.

[203] In cross-examination he said that they found the three "detainees" with the community members inside the village behind the bottle-store.

[204] It was an informer that called number two to tell him about the incident and where to find the people involved.

[205] The three were seated with their legs stretched out.

[206] When they arrived, the community members dispersed. That is when the arrest was effected. It was clear to him that those people who were dispersing were the individuals who "effected an arrest" upon the three. The informer also told them that the community members had apprehended three people.

[207] As the community members moved away one also said "if these people could come back here, we will show them".

[208] Importantly, they waited for the back-up to arrive so that there would be room in the vehicles for the three arrestees. In my view, this was a sensible approach, and inherently more probable than the suggestion by some of the complainants that they were, at times, conveyed in the boot of the Corolla. There appears to be no reason whatsoever for that to have been necessary: when Johannes was arrested, it is common cause that both the vehicles were on the scene. Even when, on the version of Samuel, four police officers took him to the home of the deceased to arrest the latter, there was still only six of them that left the scene and there was evidence by one of the witnesses that four could sit at the back and two in front.

[209] Number one confirmed that the three suspects had blood on their clothes, the shirts and the trousers. In one case he saw a laceration on the palm of one of the suspects. When asked why they were not taken to hospital, he said that his understanding was that the investigating officer, after receiving their explanation, was the one who would have the task to take them to hospital.

[210] He denied that Samuel was first arrested before the others. When they were found, the three were together.

[211] The alleged assault with the crow-bars and so on never took place.

[212] The deceased was arrested behind the bottle-store with the others and not at his home.

[213] Nobody was assaulted. "... I did not assault anyone, I will not just admit that I assaulted anyone because they are saying so. I did not assault anybody."

[214] He denied that the deceased had injuries (presumably from the alleged assault) which caused his death.

[215] He denied that the deceased was arrested at his home.

[216] This was the end of the cross-examination of number one which, as will appear from the analysis thereof, did not in the slightest way discredit the witness. This applies to the cross-examination of all the defence witnesses.

[217] There was no re-examination.

(ix) Bogang Thomas Lekgau ("number two")

[218] Again, strangely, he was not asked about his rank and his service record, but, during the sentencing proceedings, the learned Judge said that he had a clean service record of some twenty one years as a police officer. Elsewhere it was stated in evidence that he held the rank of warrant officer and was the senior of the three police officers, numbers one, two and seven, who had called for back-up. He was a single parent with two minor children. He had no previous convictions.

[219] Number two said that they were on duty when they received a call from one of his informers. It was alleged that the community had apprehended some people at Ga-Mailula. It was alleged that they were apprehended because they had broken into a certain tavern at Ga-Mailula.

[220] When he heard that the community was involved he called his commander, Col Ramogobedi. He explained to him that he had received a call that there was mention that the community had apprehended some suspects and he called for back-up because there was mention of the community.

[221] They drove to Ga-Mailula. He was accompanied by number one and number seven.

[222] When they arrived, the community members moved away and they found the three suspects sitting down. They were the deceased, Samuel and Jimmy.

[223] While they were on the scene, the back-up arrived.

[224] They were informed (presumably by the suspects) that there was a fourth person who had been with them.

[225] They put the three suspects in the Nissan bakkie and drove to the school looking for the fourth suspect called Johannes Malemela. They could not find him at the school and went to look for him at this home. On the way Johannes was pointed out to them and then he started to flee. The two vehicles drove into separate directions in order to apprehend the suspects. Accused number seven had alighted and gave chase. The witness saw the suspect jumping a first fence when he fell down, thereafter a second fence and a third fence when he also fell down. Number one ran towards him and apprehended him.

[226] By then the deceased had already informed them that there were stolen goods at his home.

[227] They went to the home, got inside and the stolen items were pointed out to number seven.

[228] They drove back to the police station. They took the suspects to the office of the investigating officer, number eight. Then they left and went about their other duties.

[229] Ultimately they heard that the deceased had passed away.

[230] In cross-examination he said that he could not say for certain whether the three suspects were injured, but he noticed that there was blood on their clothes, the trousers as well as the shirts. In particular, he noticed blood on the clothes of the deceased and did not look at the suspects carefully. He confirmed that he had been in the police force for twenty years.

[231] He did not pay particular attention to the injuries because they were in the company of the investigating officer, accused number eight. He confirmed that he was the most senior of the group of three, which would have been himself and numbers one and seven.

[232] He was present when the four suspects were taken to the police station and to the office of number eight.

[233] Significantly, the following exchange then took place between him and the prosecutor:

"Knowing also that they were injured when you left them there. --- Yes, I saw they were injured, but I am not so certain, but isn't it they were walking freely and they were speaking to us."

[234] He does not know the place called Ga-Thema Sekweni (presumably where the alleged assault took place, although the prosecutor did not say so).

[235] He denied that Samuel was first arrested before the others.

[236] He denied that the suspects were taken to a place in the bush called Sekweni. He said he did not even know the place.

[237] He denied the alleged assault on the suspects at this particular place. He denied that there was any assault with crow-bars, iron shackles and a scissor-like object.

"... I did not assault anyone and I was not in possession of those items."

[238] He denied that he assaulted the deceased and he was not even aware of what caused the death of the deceased.

[239] This was the end of the cross-examination of number two, which he passed with flying colours. He was not in any way discredited.

[240] In re-examination, he was asked about a question whether or not he knew which members of the community apprehended the suspects. The nature of the task of him and number one and number seven at the time was to trace wanted suspects "... we trace them and after apprehending them we hand them over to the investigating officer". They do not write statements or investigate the case and they are not interested in the suspect's injuries. That is not their particular work. He saw the blood on the clothing of the suspects but left that part of the enquiry to the investigating officer. Importantly, he said that when he saw the blood he realised that the community members had assaulted the suspects.

(x) Joseph Maredi Mothapo ("number six")

[241] He was a constable in the police when he gave evidence. On 25 February 2008 he was a student constable. As I read the record, numbers three, four and five were also student constables at the time. He was about 28 years of age in February 2008.

[242] He was instructed by Col Ramogobedi to attend the particular scene. The colonel told number eight that the task team was out and they needed a back-up at Ga-Mailula.

[243] The colonel told number eight that when he went out for the back-up he should also take the students. It was a case involving the community that had assaulted people and the students should be taken along.

[244] They drove in a white Nissan bakkie. Number eight was the driver. Numbers three, four and five accompanied them.

[245] At Ga-Mailula, where there is a business area, they found numbers one, two and seven near a tavern or a shop.

[246] The deceased, Jimmy and Samuel were with numbers one, two and seven. He did not take notice whether they were handcuffed, but the manner in which they were seated down led him to believe that they were not handcuffed.

[247] He noted blood stains on their clothes.

[248] Number one informed him that they were supposed to go to a school. The discussion between number one and number eight was that another accused appears to be a learner still.

[249] They did not find the suspect at the school, and while they were travelling in the two vehicles "these accused persons" pointed out the suspect.

[250] Number seven alighted from the Corolla car which then went into another street and number seven went after the suspect. Those in the LDV took another street in order to assist. Eventually the police who were in the Corolla came back with the suspect, holding him. He was handcuffed with his hands at the back.

[251] Then they proceeded in the two vehicles to the home of the deceased. When they got there numbers one, two and seven went into the home of the deceased. The witness was left behind in the van.

[252] He saw them coming back holding certain items which were said to have been stolen. He remembers a radio, some cigarettes and a DVD player.

[253] From there they went to the police station. When they arrived at the police station the suspects alighted and went to the office of number eight.

[254] At that stage the witness was still a student and went to a place where the students were busy with their assignments.

[255] He did not assault anyone. He was not present when anyone was assaulted neither did he witness anybody assaulting anyone.

[256] In cross-examination, he denied that he was involved in the alleged assault where objects like a crow-bar, foot shackles and a scissor were used. He does not know the place referred to where the alleged assault was perpetrated. He denied the versions of the complainants.

[257] He insisted that he found the three suspects, Samuel, Jimmy and the deceased in the company of numbers one, two and seven. It was next to a shop.

[258] When asked whether he saw any community members he answered in the affirmative. They were a distance away from where the suspects were.

[259] He agreed that the suspects appeared to have been arrested early in the morning when learners were going to school.

[260] When the prosecutor insisted by putting to this witness that he, with numbers one and two, assaulted the deceased, there was an objection by counsel because initially Samuel said that the assault was perpetrated by numbers one, two and six but in cross-examination, as I have already mentioned, he said it was number one, two and seven.

[261] At this point, the somewhat dispirited cross-examination fizzled out.

[262] This witness was not in the slightest way discredited in the cross-examination.

[263] At this point, the case of number six was closed.

(xi) Frank Chikele Segoa ("number seven")

[264] On the day in question, he was in the company of number one and number two. They were on duty.

[265] Number two received a message. This necessitated them to go to Ga-Mailula. His understanding was that community members were assaulting some people.

[266] On arrival, they found three "arrested" people. They were the deceased, Jimmy and Samuel.

[267] There were some community members. It was his understanding that number two was aware of a housebreaking that had taken place. When they approached, the community members started moving away. The three suspects were arrested. As they were on their way to Ga-Mailula number two called the police station, asking for back-up. The back-up arrived as they were at the scene. Number eight was driving the vehicle. He was in the company of "some students".

[268] They put the arrested persons in the van and drove to a school. It seemed that numbers one and two had some information that there is another suspect who was still school-going. They did not find the suspect at the school, but as they were driving to his home, the person was pointed out to them. It was one Malemela. They sped up

towards the suspect in the Corolla and the witness alighted to give chase because the suspect was running away. Eventually he was apprehended.

[269] Then they went to the home of the deceased. There he pointed out the goods which included a carton of cigarettes, a radio and a DVD player.

[270] When asked whether he noticed any injuries on the suspects at the place where they were apprehended by the community members, he said "Yes, they had some blood spots on their clothes, it seemed like there was a struggle."

[271] The goods confiscated at the home of the deceased were then taken to the police station. At the police station the witness delivered the items and then they got into the Corolla and continued with their daily duties. He was then in the company of number one.

[272] In cross-examination it was put to him that he assaulted Jimmy with the metal objects, namely foot shackles, a crow-bar and a scissor-like object. This the witness denied and said that he did not assault anyone.

[273] The witness repeated that number two received a message that the community had apprehended some people at Ga-Mailula.

[274] After the arrest of Johannes, they went to the home of the deceased, because they had information that the stolen goods were at the home of the deceased. Thereafter they drove to the police station.

[275] He does not know the place called Ga-Thema where an assault was alleged to have taken place.

[276] He did not see any of his colleagues assaulting anyone, neither was anyone assaulted.

[277] Here ended the cross-examination, such as it was.

[278] This witness was not in any way discredited in cross-examination.

[279] The case for numbers one, two and seven was closed.

[280] So much for the evidence.

BRIEF REMARKS IN SUMMARY OF THE EVIDENCE

[281] I have already attempted to critically analyse the evidence, with reference to contradictions, indications of dishonesty and related aspects. Those details need not be repeated.

[282] In my view, it appears from the analysis that the evidence of the three complainants, together with that of Rachel, was of a poor quality and riddled with material contradictions. In many instances there were material differences between the evidence of a witness in court and what he said in his statement to the police. It was not disputed by the state that the statements were made freely and without undue influence. In some material instances, differences between what a witness said in

court and what he said in the statement demonstrated a clear lack of honesty on the part of such witness.

It should also be borne in mind that the complainants knew each other before the incident and the weight of the evidence suggested that they discussed the matter, even at court when one of them was still under cross-examination. They were co-accused in respect of the housebreaking charge. As far as Rachel is concerned, she had a clear motive to implicate the police, with whom she was angry after the apparent death of her brother at the police station.

[283] Apart from the quality and clear unreliability of the evidence of these witnesses, I am of the view that their version is also inherently improbable. The police contingent consisted of two senior officers with many years service in the police and clean service records. They were accompanied by four student constables and a junior officer with two years service, in the person of number seven. Number eight, who did not testify, was clearly also a senior officer and the person in charge of the investigation.

Absolutely no reason was advanced by the complainants for a possible motive for these police officers to viciously assault them in broad daylight (albeit at an allegedly deserted spot) for an hour and a half with dangerous weapons. The type of equipment used for the assault, like leg irons and scissors-like instruments, also appear to me to be unlikely assault weapons.

Often one encounters cases where accused persons alleged that they were assaulted in order to disclose information to the police, to make confessions or to allow themselves to be forced into making false statements. No such "reasons" were advanced by these complainants. As I mentioned, the validity of the statements was not attacked.

Moreover, the undisputed evidence of the members of the "task team", numbers one, two and seven, or some of them, was that their duties only included the task to trace and detain suspects. Thereafter they hand over the suspects to the investigating officer, as happened in this case. It is not their task to investigate the case or to "write statements" as number two clearly testified. Against this background, and given the inherent probabilities, and the quality of the officers in charge who, to boot, had four student constables in their company, I consider the version of the complainants, riddled with contradictions such as it was, to be so inherently improbable and fanciful that it can justifiably be rejected.

Of course, it is not necessary for a court to reject the state's evidence in order to acquit an accused if the version of the latter is reasonably possibly true.

[284] The conclusion that the version of the complainants is inherently improbable. is strengthened, in my view, by the medical evidence which, for the reasons I have mentioned when analysing that evidence, militates against the complainants' version of these vicious assaults. The evidence of the complainants cannot be married, on the probabilities, to the contents of the J88 forms.

[285] As to the death of the deceased, there was clear evidence, from the complainants themselves, of a vicious attack on the deceased by another, unknown, police officer at the police station. It was undisputed that, when the attack took place, not one of the accused was present.

The medical evidence also militates against a conclusion that an assault on the deceased by the accused, which I have found to be inherently improbable, caused the death of the deceased. It appears from the analysis of the evidence of the doctor who performed the post-mortem examination that she could not rule out the possibility that the death was caused by the assault which took place at the police station. I have also indicated reasons why, in my view, the clinical observations by the doctor of the injuries sustained by the deceased cannot be linked, beyond reasonable doubt, to an assault such as the one described by the complainants, even if it took place. The complainants indicated that the deceased was lying on his back with his hands cuffed behind him at all times during the alleged assault. There were also injuries on the body, such as those to the rib cage of the deceased, which could be married to the attack at the police station as described by Jimmy.

[286] I turn to the quality of the evidence of the four defence witnesses, numbers one, two, six and seven.

[287] I have analysed their evidence. They corroborate each other in every material respect. Not one of them had the slightest difficulty with the cross-examination. They have to be classified as excellent witnesses.

[288] There is nothing which I find to be inherently improbable about their version.

Mob justice is a common occurrence in this country. When community members attack and apprehend suspected transgressors, they invariably assault them, and, very often, kill them. The undisputed evidence of Col Ramogobedi, an impressive witness, was that he received an early morning phone call from number two, telling him that community members were assaulting the suspects and calling for back-up. It is undisputed that the back-up police officers, comprising number eight and the four student constables, went to the scene. It is common cause that the police vehicles then travelled in convoy and that Johannes was arrested, but not before he tried to flee. Efforts by state witnesses to deny that Johannes tried to flee, including his own evidence, was exposed as being untrue when their statements were put to them in cross-examination. It is common cause that the suspected stolen goods were retrieved from the home of the deceased and delivered to the police station. It is not in dispute that the goods were handed to the investigating officer, number eight. It is not in dispute that the "task team" comprising numbers one, two and seven, only had to trace and apprehend suspects and was not burdened with the obligation to investigate the cases and obtain statements. Lieutenant-Colonel De Lange also testified that there was evidence that the community members assaulted the suspects, although he also said that there were complaints that police assaulted them. In my attempt to analyse the evidence, I pointed out that the latter complaints may have had a bearing on the assaults at the police station, the existence of which is undisputed and was graphically exposed in the statement of Jimmy.

[289] I find absolutely nothing inherently improbable about the version of the defence, much of which is undisputed. As I indicated, I could find absolutely no plausible reason for

the alleged vicious assault on the suspects with dangerous objects and in the company of young police constables in broad daylight. An inference that such an assault never took place is supported, on the probabilities, by the medical evidence. For the reasons mentioned, such an inference is also supported by the overwhelming inherent probabilities.

[290] In the circumstances, it has to be concluded, as I do, that, at the very least, the version of the accused is reasonably possibly true.

[291] In *S v Makobe* 1991(2) SACR 456 (W) the learned Judge, Zulman J, said the following at 460f-j:

"Van der Spuy AJ went on to say at 716B-C: (my note: this is a reference to the case of *S v Munyai* 1986 4 SA 712 (V) at 716B)

'The fact that the court looks at the probabilities of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all the probabilities the version made by the accused is so improbable that it cannot be supposed to be the truth, then it is inherently false and should be rejected. But that offers no answer to the approach adopted, in my view quite properly, by Slomowitz AJ in the case of *S v Kubeka* (*supra*).'

In *S v Kubeka* 1982 1 SA 534 (W) at 537F-H, Slomowitz AJ said in regard to an accused's story:

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

Referring to this passage Van der Spuy AJ said at 715G:

'In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'

I agree. The test is, and remains, whether there is a reasonable possibility that the appellant's evidence may be true. In applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true (*R v M* 1946 AD 1023 at 1027)."

[292] For all the reasons mentioned, and on the legal grounds as illustrated, I am of the view that it has to be concluded, as I do, that the version of the accused is reasonably possibly true, which entitled them to an acquittal.

[293] I turn to the judgment.

THE JUDGMENT

[294] According to the record, the defence case was closed on 29 August 2011. The case was adjourned for argument on the next day, 30 August, at 10:00. Argument was concluded at 13:10 and the matter was adjourned until 14:30 when judgment was given the same afternoon.

[295] The judgment runs into fourteen pages. The summary of the evidence, not without inaccuracies, covers the first ten pages.

[296] At the end of this judgment, the following order was made:

"Accused one is guilty on counts one and two (my note: the murder of the deceased and the assault on Samuel).

Accused two is guilty on counts one and three (my note: the murder of the deceased and the assault on Jimmy).

Accused six is guilty on count two only (my note: the assault on Samuel).

Accused seven is guilty on count three only (my note: the assault on Jimmy)."

[297] When considering an appeal on fact, the Court of Appeal must pay due regard to the trite principle that it must be slow to interfere with the factual findings of the lower court. It should, generally, only do so if it finds material misdirections on the part of the trial court. I refer to the well-known cases of *R v Dhlumayo and Another* 1948 2 SA 677 (A) and *S v Francis* 1991(1) SACR 198 (A). There are a number of others, which I need not mention. I deal with this rather concise judgment with the aforesaid principle in mind.

[298] I accordingly turn to what I consider to be material misdirections on the part of the learned Judge:

- He acknowledged, in his summary of the evidence, that each of the defence witnesses "said they noticed blood stains on the clothes of the suspects on their arrival". Surprisingly, he goes on to say later on, when confirming that the cause of the injuries was in dispute, that "the complainants on one hand insist that the injuries were inflicted on the deceased and them by the accused, whereas the accused on the other hand argued that the victims had sustained

injuries when they were arrested". This could only be a reference to the "arrest" by the community members. The accused, obviously, never said that injuries were sustained when the suspects were properly arrested by numbers one, two and seven and it is common cause that they were not party to the assaults which later took place at the police station.

The only reasonable inference, even on the learned Judge's summary, is that the evidence of the accused was that the complainants (with the exception of Johannes, whose evidence was in any event rejected and whose alleged assault by the accused attracted no convictions) were injured by the community members. This is clearly apparent from the evidence of all the defence witnesses which I have dealt with. For example, the following exchange took place between the prosecutor when he cross-examined number one:

"MR DAVHANA: Yes. Now, as you have observed that they had some injuries, and they had blood on their clothes, why didn't you take them to hospital? --- My understanding was that the investigating officer, after they had explained to him, he is the one who will take them to the hospital."

In the result, the remark by the learned Judge that "the accused did not know how the complainants sustained injuries" is wrong, and a misdirection. Of course, this conclusion should be qualified by repeating that the accused did not know about the later attacks on, and injuries of, the complainants at the police station, but this is not what the learned Judge was talking about.

- The learned Judge appeared to place reliance on Rachel's denial that the deceased was apprehended by members of the community. Of course, nobody

alleged, from either side, that Rachel was present when, on the version of the accused, the deceased was arrested after being apprehended by members of the community. Moreover, Rachel's evidence was apparently accepted by the learned Judge without any consideration of the opposing version offered by the accused. He did so by completely ignoring the blatant discrepancies between the evidence of Rachel and Samuel. He did so by ignoring the eminently plausible explanation by the accused, that they waited for the back-up to arrive so that they could have room to accommodate the three arrested suspects.

He said that it was clear that the investigations (into the housebreaking case) did not start on the same day that the accused or suspects were arrested. There is no basis for this conclusion. The reference to the accused is also clearly incorrect. He then concludes "quite clearly, if the complainants were apprehended by members of the community that would have happened on the same day on which the offence was committed". No basis for this conclusion is to be found in the evidence. Even if it was, it would not appear to have any relevant bearing on the case. Another mysterious remark made by the learned Judge is the following: "save Rachel Ragophala, no member ever confirmed that the community arrested the suspects".

In my view, these are all misdirections, with particular emphasis on the fact that the learned Judge evidently totally ignored the competing version offered by the accused dealing with the arrest of the deceased, and their version that the deceased was subsequently taken to his home by them in order to confiscate the stolen goods.

- In his judgment, the learned Judge dealt with the medical evidence as follows:

"The version of the complainants that they were severely assaulted by the accused and for a long period of time, is corroborated by medico-legal post-mortem examination conducted on the body of the deceased. The examination revealed extensive bruises at the back, buttock, upper arm and legs of the deceased, as well as abrasions at the back, arms and lower limbs."

I have dealt with this issue, referring to the evidence by all the complainants that they lay on their backs throughout the alleged assault which state of affairs makes it difficult to understand the extensive bruises found by the doctor on the back and buttocks. I mentioned the graphic evidence of Jimmy about the vicious attack on the deceased at the police station. These issues appeared to have been ignored by the learned Judge when he made this conclusion. This is a misdirection. I will return to the subject when further analysing the judgment.

- As to the injuries sustained by the complainants, the learned Judge said:

"The medical doctor could not determine the extent of force applied on the complainants. Notwithstanding this use of dangerous weapons such as crow-bars and steel objects on the complainants undoubtedly caused serious harm on the complainants as the complainants testified."

This, with respect, is a completely wrong assessment of what the doctor had to say. From my analysis of her evidence, *supra*, it is quite clear that she repeatedly conceded that the somewhat superficial injuries described in the J88 medical forms relating to the three complainants, the contents of which are common cause between the parties, cannot be reconciled, on the probabilities.

with the type of assault described by the complainants. This is a clear and material misdirection on the part of the learned Judge.

- To his credit, the learned Judge recognised, at least in one respect, the flaws in the evidence of Samuel, who first said that numbers one, two and six assaulted the deceased (in chief) and thereafter he changed it to numbers one, two and seven in cross-examination. For this reason, the learned Judge felt that numbers six and seven should be acquitted on count one but he persisted in convicting numbers one and two on the same count, ignoring the quality of Samuel's evidence and the many contradictions between the evidence of the various complainants. It seems that the learned Judge, in the end, relied solely on the evidence of Samuel, as a single witness, in convicting numbers one and two on the murder charge. He clearly did not take the cautionary rules into account when dealing with the testimony of a single witness. It is obvious, in my view, and from the analysis of his evidence, that the evidence of Samuel was far from satisfactory in every respect, as required by the trite authorities, when dealing with the testimony of a single witness. There was also no corroboration of Samuel's evidence with regard to the alleged assault on the deceased. Jimmy said he could not see who of the accused assaulted the deceased and Johannes, as I pointed out, saw virtually nothing. The acceptance of the testimony of Samuel, against this background, is, in my view, a misdirection. The misdirection becomes more pronounced if one considers that the learned Judge decided to convict numbers one and two on the murder charge, against this background, without weighing up the impressive evidence of the defence witnesses, to which I have referred.

- The closest the learned Judge came to considering whether the defence version, on the evidence as a whole, was reasonably possibly true (as he should have done, in view of the authorities which I quoted) was to consider a submission that the version of number two that he told his supervisor at the police station (obviously Col Ramogobedi) that the suspects had been apprehended by members of the community and was being assaulted by them. The learned Judge actually found that this evidence of number two was false, and not reasonably possibly true, and he did so in the following terms:

"When accused two testified he testified that he did not know what caused the injuries. This is despite the fact that he told his supervisor that the suspects were injured by members of the community.

It means therefore that accused two was not telling the supervisor the truth that members of the community were assaulting the suspects since he told the court that he did not know what caused the injuries. His evidence therefore cannot be reasonably possibly true that suspects were assaulted by members of the community."

This assessment of the evidence as a whole on this particular subject is, with respect, completely wrong and a material misdirection. In the first place, Col Ramogobedi testified that when he received the call from number two at 07:20, the latter told him that "the community are assaulting the suspects". Secondly, it is clear from the evidence as a whole, with particular reference to the evidence of the defence witnesses, which I analysed, that they were all under the clear impression that the community members had assaulted the

suspects. They all saw the blood on the shirts and trousers of the suspects. Thirdly, in cross-examination of number two, the following exchange occurred:

"Just tell me, when you saw some blood on the deceased specifically, what did you think what happened there? --- When I saw blood, I then realised that the community assaulted them."

Fourthly, on the approach of the learned Judge, it would mean that number two intentionally misled the colonel when he told him that the suspects had been assaulted by the community members. I can find absolutely no motive for number two to have fabricated such evidence.

This is a clear and material misdirection on the part of the learned Judge.

- The learned Judge dealt with a submission by counsel that numbers one and two could not have been proved to have been responsible for the death of the deceased (I assume, not having seen the transcript of the closing argument, that this would have been based on the state's own version) because of the assaults on the deceased at the police station. In dealing with this submission, the learned Judge recognised the fact that Jimmy testified (particularly in his statement, exhibit "DD") that they were all assaulted at the police station "on our heads with booted feet" and later, as I have explained in detail, that a certain police officer viciously assaulted the deceased who fell on his head and was thereafter kicked in his ribs with booted feet. Nevertheless, so the learned Judge held, these injuries could not have led to the demise of the deceased. He found that numbers one and two severely assaulted the deceased in the veld and they could not be exonerated from the murder "the reason being that the

doctor testified that all injuries depicted on the body of the deceased, caused the death of the deceased". As appears from the analysis of the doctor's evidence, she conceded that there were three possibilities, namely that the injuries sustained at the police station could have caused the death, or that the injuries sustained during the assault (as alleged) could have caused the death or that the combined effect of the injuries could have resulted in the death. This evidence was overlooked by the learned Judge. His findings amounted to a material misdirection. The same applies to his explicit findings that numbers one and two severely assaulted the deceased all over his body for almost one and a half hours, using dangerous weapons while the deceased lay on the ground on his back, with his hands cuffed from behind. He did this without in any way considering the defence version, and whether or not the latter version was reasonably possibly true. He made his finding without considering the clear contradictions in the evidence of the three complainants. He also made his findings without considering the inherent probabilities, which I have dealt with. He made his findings without considering the clear medical evidence that the injuries recorded on the J88 forms of Samuel, Jimmy and Johannes, could, on the probabilities, not be reconciled with the type of assault they alleged to have taken place. He also made his findings while overlooking the fact that the alleged dangerous "murder weapons" which the police produced from the boot of the car never featured as exhibits in the court. All of these amount to material misdirections.

[299] In all the circumstances, and while paying due regard to the principle laid down in cases like *Dhlumayo*, *Francis* and others, I have come to the conclusion, and I find,

that this Court of Appeal is justified in interfering with the findings of fact of the learned Judge.

[300] For the reasons mentioned, I am of the view that the appeal falls to be upheld and the convictions set aside.

[301] I will return to this subject when making conclusionary remarks.

THE SENTENCES

[302] Because of the view I take of this matter, it is not necessary to pay any particular regard to the sentences imposed.

[303] Number one was sentenced to twelve years imprisonment on count one (the murder) and eighteen months imprisonment on count two (the alleged assault on Samuel). It was ordered that the sentences would run concurrently.

[304] Number two was sentenced to twelve years imprisonment on count one and eighteen months imprisonment on count three (the alleged assault on Jimmy). These sentences were also ordered to run concurrently.

[305] Number six was sentenced to eighteen months imprisonment on count two (the alleged assault on Samuel) which sentence was suspended for a period of five years and number seven was sentenced to eighteen months imprisonment on count three (the alleged assault on Jimmy). This sentence was also suspended conditionally for five years.

[306] I have mentioned the personal circumstances of numbers one and two, and their lengthy unblemished police service records.

Number six was 32 years old, a first offender, and a student constable at the time of the occurrence. He was single, but supporting his aged parents.

Number seven was a first offender with a police service record of some two years, who was married and had one minor child.

**BRIEF REMARKS ABOUT THE APPLICATION FOR LEAVE TO APPEAL AND
THE POSITION OF NUMBERS SIX AND SEVEN**

[307] After the conclusion of the proceedings, evidently on 31 August 2011, Mr Grobler applied for leave to appeal against the convictions and sentences of numbers one and two. There was no application in respect of numbers six and seven. I can only assume that this is because they only received suspended sentences, although this can be no more than an assumption.

[308] On a careful reading of the one page judgment dealing with this application, it seems that the learned Judge granted leave to appeal to numbers one and two against the murder conviction and against the sentences on both counts. He did not say that he was refusing leave to appeal to numbers one and two against the assault convictions. On reading the record, it seems that the learned Judge came to the conclusion, incorrectly so in my view, that counsel contended that a Court of Appeal may only convict numbers one and two on culpable homicide. This is not correct. Counsel

persisted with the argument that there was a proper prospect of success of the appeal but stated, without abandoning the argument, that even if the state's version were to be accepted on appeal a court may still only convict on culpable homicide. Nevertheless, I gather that, while under this wrong impression, the learned Judge did not grant leave to appeal against the assault convictions, although he did not expressly say so.

[309] In this regard, I add that paragraph 5 of the court order of 31 August 2011 reads as follows:

"Application for leave to appeal on both conviction and sentence on counts one and two in respect of accused one and two is granted to the Full Bench of South Gauteng High Court." (Emphasis added.)

This order also deals with the sentences imposed in respect of numbers one, two, six and seven and also mentions that bail was refused.

[310] There is another court order, also dated 31 August 2011, which only deals with the result of the application for leave to appeal and that, as was the case with the other order, reads as follows:

"That the application for leave to appeal on both conviction and sentence on counts one and two in respect of accused one and two be granted to the Full Bench of South Gauteng High Court." (Emphasis added.)

[311] In the appeal hearing before us, counsel for both the appellants and the state, Mr Sibuyi and Mr Nethononda respectively, argued the matter on the basis that the appeal was against conviction and sentence in respect of all the counts. They adopted

the same stance in the heads of argument, as well as in earlier heads of argument, filed in September 2014, when the appeal was postponed for purposes of reconstructing part of the record.

[312] In the circumstances of this particular case, I am of the view that it will be in the interests of justice to deal with the matter in accordance with the two court orders and the argument from both sides and on the basis that a proper appeal was prosecuted in respect of both conviction and sentence on both counts.

[313] I add that the comprehensive notice of appeal, dated 31 August 2011, filed by counsel Grobler, was crafted along the same lines.

[314] I turn to the position of numbers six and seven:

Because of the conclusions I have arrived at, namely that all the accused were entitled to an acquittal, I consider that it would not be in the interests of justice if this court were to fail to deal with the positions of numbers six and seven. It would not be appropriate, in my view, when upholding the appeal, to set aside the order of the learned Judge and replacing it with an order providing for only numbers one and two.

[315] I am of the view that it would be in the interests of justice, in this particular case, to set aside the convictions and sentences of numbers six and seven as well. They ought to be treated in the same way as the other accused. It seems to me that such an order may properly be made on the strength of the inherent jurisdiction of Superior Courts – see Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa*

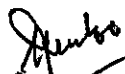
5th ed Vol 1 p49-57 and also the reference therein to the provisions of section 173 of the Constitution of the Republic of South Africa, 1996.

[316] On 31 August 2011, the learned Judge refused an application by numbers one and two for bail pending this appeal. On 8 March 2012, this court granted bail of R2 000,00 each to numbers one and two, pending the finalisation of the appeal.

THE ORDER

[317] I make the following order:

1. The appeal of the first and second appellants is upheld.
2. The convictions and sentences of the first and second appellants as well as the convictions and sentences of accused numbers six and seven in the court below, are set aside, and the order of the court below is replaced with the following: "Accused numbers one, two, six and seven are found not guilty and discharged."



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A187-2013

I agree



M F LEGODI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

(Signed on a separate page - attached)

T J RAULINGA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 4 DECEMBER 2015
FOR THE APPELLANTS: M SIBUYI
INSTRUCTED BY: L L MATHEBULA
FOR THE RESPONDENT: G D HOSTLHA
INSTRUCTED BY: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS