IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG

SOUTHERN CIRCUIT LOCAL DIVISION

HELD AT SCOTTBURGH

REPORTABLE

Case No: CC66/2016P

THE STATE

versus

PHATHIZWE MZOKHONA DLAMINI **Accused 1**

MYAMEZELI RICHARD CELE **Accused 2**

CYPRIAN CALUZA **Accused 3**

ORDER

All three accused

Count 1: Murder of Menzi Khuzwayo - Guilty and convicted as charged.

Count 2: Robbery with aggravating circumstances – Guilty and convicted as charged.

JUDGMENT

Delivered: 02 December 2020

Moodley J

[1] The accused in this matter stand indicted before this court on the following charges:

Count 1: Murder, read with the relevant provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The State alleges that upon or about 18 August 2015 and at or near Ashbrook Farm in the district of Umzinto the accused unlawfully and intentionally killed Menzi Khuzwayo***.***

Count 2: Robbery with aggravating circumstances (as defined in s 1 of Act 51 of 1977) read with the relevant provisions of s 51(2)(a) and Schedule 2 Part II of the Criminal Law Amendment Act 105 of 1997. The State alleges that upon or about 18 August 2015 and at or near KwaBangibizo, in the district of Umzinto, the accused unlawfully assaulted Menzi Khuzwayo and by intentionally using force and violence to induce submission by the aforesaid person, robbed him of a New Holland Tractor-Loader-Backhoe, which was his property or in his lawful possession (hereinafter referred to as "the TLB") with registration number .[...].

[2] The State alleges further that the accused acted in concert and in furtherance of a common purpose in the commission of the aforesaid offences. The accused pleaded not guilty to the charges. Their Counsel confirmed that the minimum sentences and competent verdicts had been explained to the accused, and that they elected to remain silent as to their defence.

Overview of the trial proceedings

[3] The State adduced the evidence by lay witnesses, experts and police officers. Accused 1 and accused 2 testified in their defence and did not call witnesses. Accused 3 did not testify. Admissions were made in terms of s 220 of the Criminal Procedure Act 51 of 1977 by the accused inter alia in respect of the albums compiled of photographs taken at various crime scenes and of the impounded vehicles and related exhibits, the results of the forensic investigation on the TLB and the white Toyota Tazz impounded on 18 August 2015, the ballistic exhibits recovered at Ashbrook Farm where the body of the deceased was found, and the post-mortem report on the deceased. An inspection in loco was held with reference to the C-Track GPS and AVL reports on the TLB and cellphone masts as reflected in

the cellphone records which were adduced as evidence by the State. There were also two interlocutory rulings for which reasons will be furnished.

[4] Substantial portions of the evidence were common cause or undisputed, and as the evidence is on record I shall only summarise the pertinent evidence. I have structured the judgment by commencing with the common cause facts and undisputed evidence which set out the matrix against which the offences were committed, followed by the evidence of lay witnesses, the experts who testified to the video downloaded from the cellphone of accused 1, the cellphone records of the numbers belonging to or allegedly used by the accused at the times relevant to the events in this matter, and the C-Track GPS and AVL reports on the movement of the TLB on 18 August 2015, and finally of the Investigating Officer and the corroborative evidence of Mr Henning. As it was common cause that the deceased was murdered and robbed of the TLB, the issues for determination are whether the State has proved beyond a reasonable doubt that the accused were the perpetrators of the offences and that they acted in common purpose.

The undisputed evidence under s 252 of the CPA in respect of the events and circumstances leading to the arrest of accused 1 and the recovery of the New Holland TLB with registration .[...]operated by the deceased and the white Toyota Tazz bearing registration number .[...]

[5] Mr R Ramnath, a businessman in the Port Shepstone area informed the crime intelligence unit that on 17 June 2015 accused 1 offered to sell him a Bell TLB which belonged to the Umzumbe Municipality for R150 000, and made a statement to that effect. On 13 August 2015 Mr Ramnath met the Investigating Officer in this matter Det W/O Koeglenberg of the DPCI and Captain Munsamy and W/O Vandayar who posed as the purchasers (‘agents’). Mr Ramnath phoned accused 1 and gave him the number that had been provided by the Crime Intelligence Unit: .[...]. Shortly thereafter accused 1 phoned from number .[...]to the number provided by the CIU and offered W/O Vandayar a New Holland TLB for R150 000 which belonged to the Municipality where he was employed. Accused 1 enquired further if he was interested in an excavator at a price of R400 000. He informed W/O Vandayar that he wanted to finalise the deal as soon as possible. W/O Vandayar arranged to meet accused 1 later. Thereafter the Investigating Officer took the agents to the

designated spot for the transaction which was a tunnel under the N2 freeway in the Louisiana area ('the designated spot').

[6] After several communications over the weekend between accused 1 and W/O Vandayar, the agents met with accused 1 on 17 August 2015 at the Hibberdene Mall. Accused 1 arrived in a white Toyota Tazz ('the Tazz') with registration number .[...], accompanied by a male whom he said was his supervisor Mr Chiliza. The agents introduced themselves as businessmen from Empangeni. Accused 1 told them the purchase price of the TLB was R200k. When W/O Vandayar offered R150k, accused 1 went to the Tazz and spoke to Chiliza and returned with an offer of R180k which was accepted. The agents drove accused 1 to the designated spot for the delivery of the TLB, which accused 1 said he was familiar with and that he would use the old road to deliver the TLB. While at the designated spot, W/O Vandayar asked accused 1 if he was not scared about carrying the money with him after the transaction was concluded; the accused informed him that he was not scared as he had a firearm.

[7] They returned to the Hibberdene mall and agreed that the time and date for the transaction would be 18 August 2015 at 18h00. W/O Vandayar informed accused 1 that cash would be paid on delivery of the TLB and asked to view the TLB. Accused 1 responded that the TLB was in use in the Umthwalume area and it would raise suspicion if they went there.

[8] On 18 August, W/O Vandayar received R150k in cash from the Investigating Officer, and the agents proceeded to the Louisiana area. W/O Vandayar remained in constant communication with accused 1. At about 17h00 accused 1 informed him that there was a delay in the transaction, because the TLB was in use at Umthwalume, and he would drive the TLB to the designated spot after it was parked off and everyone left. Accused 1 called Vandayar at 18h32 to inform him that he was leaving Umthwalume and driving to the designated spot. The agents parked their vehicle on the road leading to the designated spot from where they could observe the TLB or any other vehicle that drove into the area surrounding the designated spot. The Investigating Officer reported to them that the same Tazz which accused 1 had driven to the Hibberdene mall was in the Louisiana area near the designated spot with a number of occupants. After the TLB passed them, the agents overtook

the TLB, and parked their vehicle with the engine running and the lights on, facing oncoming vehicles.

[9] Shortly thereafter accused 1 arrived in the Tazz and alighted from the back seat. He asked W/O Vandayar for the money, who responded that he would give him the money once they saw the TLB. Accused 1 left in the Tazz. About 30 minutes later accused 1 drove the TLB to the designated spot and parked it under the bridge as arranged. He told the agents that he had left the keys in the TLB and asked for the money. The money was placed on the bonnet of the agents' vehicle. As accused 1 started to count the bundles of money, the agents gave the signal for the operations team to move in and a stun grenade was fired. Accused 1 and the agents dropped to the ground. Accused 1 was arrested and the Investigating Officer secured the scene and the money.

[10] DW/O Sonnekus who conducted observation duties in the Louisiana area where the transaction was to take place on 18 August 2015, took up his observation post about 300 metres from an intersection on the Louisiana road and one km from the designated spot at about 16h00. It was dark when he was informed that the targets were on the way. He observed the Tazz with more than one occupant travelling on the Louisiana road from south to north and lost sight of it as it went downhill towards the designated spot. The Tazz passed him again heading in the opposite direction towards Port Shepstone. About 10 to 15 minutes later, he observed the yellow New Holland TLB travelling at high speed heading towards the designated spot. Shortly afterwards, he heard the stun grenade indicating that the operations team had moved in.

[11] After a search, D W/O Sonnekus found the Tazz abandoned outside a training facility. He secured the vehicle and asked Inspector SC Jula of the Port Shepstone LCRC to photograph the keys in the ignition and the handbrake, the unlocked doors and the shop outside which the Tazz was found. The vehicle was then impounded and taken to Port Shepstone for further investigation. A DNA test on the blood splattered on the Tazz indicated that it was human blood.

[12] On the morning of 19 August 2015 Mathozamile Cele, who resides at the Heradas Chicken Farm, found the deceased lying in the sugar cane plantation on

Ashbrook Farm. On the previous evening between 18h30 and 19h00, she observed a vehicle on the road through the plantation and heard three gunshots.

[13] The post-mortem report on the deceased (Exhibit "C") recorded that the deceased's ankles had been tied with black cable ties and his wrists bound with the cable ties behind his back. He sustained two gunshot wounds to his head and one to his chest, which were the cause of his death.

[14] Three spent 9x19mm cartridge cases and a spent bullet head were recovered at the scene of the deceased's shooting by the police. The ballistic forensic investigation on the recovered exhibits indicated that they were fired from the same firearm.

[15] The deceased was employed by Kukhanya Kwezwe 110 Investments as a TLB operator and was in lawful possession of the new Holland TLB with registration .[...] on 18 August 2015.

Admissions in terms of s 220

[16] Accused 1 admitted that as at 18 August 2015 he had two cellphones registered in his name: a Nokia N73 with an MTN sim card with mobile number. [...] and a Samsung Galaxy with a Vodacom sim card with mobile number. [...], which were seized by the police when he was arrested.

[17] Accused 2 admitted that a DNA forensic test revealed that his DNA was found on the handbrake of the Tazz and that his fingerprints were also found on the outside of the Tazz. Accused 2 used a sim card with cellphone number.[...] on MTN network during August 2015.

The following evidence was also undisputed:

[18] At about 14h00 on 18 August 2015 at the Turton taxi rank, Mr NM Jwara asked the deceased to clear his land. The deceased agreed and followed Mr Jwara in the TLB to his property where he worked from about 15h30 until it got dark. While he was busy, he received a number of phone calls. Mr Jwara paid the deceased R1 000 in cash and he left about 18h15. He was going to return to complete the work. [19] Mr Sandile Cele called the deceased on 18 August 2015 at about 18h20 to

procure his services. The deceased agreed to do his work on the following day. When the deceased did not arrive on 19 August and could not be contacted on his cellphone, on the number. [...], Mr Cele went to Mr Jwara where he had last seen the deceased working on the evening of 18 August. He and Mr Jwara went to the deceased's residence, where they discovered that he had died.

[20] Sicelo Khuzwayo, has known accused 3 all his life: they went to school together, lived in the same KwaDweshula area, shared a room after school and both drove metered taxis. Accused 3's nickname is Kaladhi. In January 2016 Mr Khuzwayo confirmed to the Investigating Officer that he knew accused 3. Mr Khuzwayo's cellphone number was. [...]. Accused 3 gave him two cellphone numbers as his contact: one number was [….]; but when Mr Khuzwayo entered the other number. [...], on his phone, he found that the number was already saved under accused 2's name viz Rich. Mr Khuzwayo also knew accused 2 because they were neighbours in KwaDweshula. He and the three accused gambled at various locations.

I turn now to the further evidence in the State case: Lay witnesses

[21] Mr Roy Ramnath testified that on 17 June 2015 accused 1 arrived at his premises driving a tipper truck which bore the Umzumbe Municipality insignia and the person with him was wearing a garment bearing the Municipality insignia. Accused 1 initially offered to sell him a spare tyre for the tipper truck and then he offered to sell Mr Ramnath a Bell TLB which belonged to the Umzumbe Municipality for R150k. He assured Mr Ramnath that there was nothing to worry about because he would get other people to access the TLB out of the Municipality and sort out the tracker on it. Mr Ramnath advised accused 1 that he was not interested but he may be able to obtain a buyer. He took down accused 1's cellphone number which was. [...] and gave him his cell number which was [....]. Accused 1 thereafter called at Mr Ramnath's offices for a period of about six to eight weeks to check on progress with the sale of the TLB. In the interim Mr Ramnath informed the CIU and the aforementioned meeting of 13 August with the agents and the Investigating Officer took place. Mr Ramnath was a clear coherent witness who answered questions directly and confidently. I shall revert to his evidence later in this judgment.

[22] Ms Mathozamile Cele, who found the deceased on 19 August 2015, testified that at about 19h00 on the evening of 18 August 2015, while she was in her yard feeding the dogs, she heard a sound of a motor vehicle stopping. She observed the vehicle approach on the gravel road and turn onto the road through the plantation normally used by tractors and do a U-turn before it drove up the tractor road towards her. The motor vehicle stopped, she heard the sound of its doors, and then three gunshots, but no voices. The dogs barked and attempted to jump the fence, but she called them back because she thought that the motor vehicle belonged to the security company that operated on the farm. She then heard the doors of a motor vehicle being shut, and the motor vehicle drove from the plantation onto the gravel road and left. She thereafter phoned her boyfriend at 19h00 and told him not to use the gravel road when he returned home because she had heard gunshots. Despite her lack of sophistication Ms Cele was a confident witness who was able to offer cogent reasons for her evidence.

[23] Ms Samkelisiwe Blose, the deceased's fiancée, testified that she spoke to the deceased on 18 August 2015 several times during the day. In his last call about 16h30, the deceased told her that he was still working at Mphomhilo in Umthwalume and he would be delayed for about an hour because he was going to check on another job.

[24] When Ms Blose was unable to reach the deceased from about 19h00 on both his cellphone numbers,.[...]and .[...], she became concerned because he did not usually switch off his phones or be unreachable. After making various enquiries, Ms Blose advised Mr Khowa that the deceased had not arrived home. The TLB was traced through the tracker to the police pound in Marburg. Ms Blose and the deceased's brother eventually traced the deceased to the Scottburgh hospital. However, he had already passed away.

[25] Under cross-examination by Mr *Mtshaka*, Ms Blose testified that she did not know accused 1; however about two weeks before his death, the deceased had told her that he knew a Dlamini who worked for the Municipality and who drives machinery including TLB's. She presumed it was Umzumbe Municipality because it was the closest. The deceased told her that he was confused by Dlamini's suggestion that they sell Mr Khowa's TLB. But as he had a good relationship with Mr

Khowa and it was the first job where he was treated and paid well, he could not do something like that to Mr Khowa, but he was going to look into this Dlamini.

[26] Ms Blose was an impressive witness. She answered questions frankly without emotion or hesitation. Her evidence about the Dlamini who approached the deceased to sell the TLB was elicited under cross-examination and accused 1's version confirmed that the Dlamini that the deceased had referred to was accused 1. Ms Blose responded quietly but confidently to accused 1's version that he and the deceased had hatched a plan in July to sell Mr Khowa's TLB, saying that she knew the deceased very well and that he would never be involved in a plan of this nature. She also questioned pertinently why, if as alleged by accused 1, he and the deceased executed the plan together, the deceased was dead?

Expert evidence

[27] As the qualifications of the experts and most of their evidence was undisputed, I refer only to the relevant portions of their testimony. W/O Mkhomo, who is employed at the Digital Forensic Lab for the DPCI and is responsible for downloading and extracting information from cellphones and other electronic digital devices and preparing reports, confirmed that he was given two phones on 20 August 2015 by the Investigating Officer, (which were the two phones that accused 1 admitted in Exhibit "G" were his phones).

[28] The relevant data W/O Mkhomo downloaded from the Nokia N73 was admitted as Exhibit "L". Under the contact numbers on the Nokia N73 phone he pointed out entry 76, being the name of Rich Cele and the number. [...], (which is accused 2's number).

[29] The relevant video W/O Mkhomo downloaded from accused 1's Samsung cellphone is not in dispute. He confirmed that the video was taken on the Samsung device and not forwarded to it, which is disputed by accused 1. W/O Mkhomo testified that as the time setting on the Samsung phone was 'automatic', it would reflect the correct time at the location of the device. If the phone was used to record a video the time of the recording would be reflected on the video and the phone, and the time reflected is the time at the end of the video. He clarified the details recorded under File info on page 54 of

Exhibit “M” and explained how the path shows the movement of the video from the camera to the phone as in the video recording made on 18 August 2015 at 7.15.11 pm. The recording ended at 7.17.19 pm. He played the video recording from the original cellphone via a laptop computer and projected it onto a screen via data projector. The recording was of male persons conversing while liquid from three white containers was poured into the tank of a yellow vehicle which bore a red marking.

[30] The interpretation and transcript of the conversation is contained in Exhibit “CC” to which I shall revert in due course. Under cross-examination by Mr *Mtshaka*, W/O Mkhomo firmly rejected accused 1’s version that the video was sent to his phone by someone as a lie. He clarified further that a downloaded video cannot be saved in the DCIM folder. Only photographs and videos created on that phone can be stored in the DCIM folder (as was the case with the video footage viewed by the court).

[31] Mr Michael J Du Preez, the Executive Operations and Technical Manager for C-track testified how the tracker system operates via the tracking unit or GSM modem with a sim card installed in a vehicle and the GPS satellite which relays the information or signal received to earth, which by generating the GPS co-ordinates (consisting of the longitude, latitude and altitude), records a location on the map of earth. C- Track utilizes the global system of cellphone towers which are part of the GSM network to track a vehicle. The data which records the speed, position and time and is stored at the back end hub and on a standard tracking device attached to a vehicle, a report is generated every two minutes reflecting the speed, location and time, the vehicle status and the odometer reading. If the vehicle is switched off, the monitoring continues but switches to standby mode; when the vehicle is switched on, the unit starts transmitting data again. Any tampering with or removal of the battery is reported in the status report of the vehicle. Further if the ignition is on but the engine not running, the tracker will continue recording. If the ignition is switched on, the status is reflected as ‘startup’. When the vehicle moves, the status would change to driving. The time reflected on the reports are accurate to the second and read in GMT time. The printout provided by C-track reflects

the South African time which is GMT plus two hours. Neither the time nor the data generated permit interference. The GPS remains operational at all time and the modem will continue tracking and recording all data even in areas not covered by the GSM network and the historical recording would be transmitted when the vehicle comes back into coverage.

[32] The GPS location generated from the modem may be geocoded to a location on a map, according to the GPS coordinates (according to longitude and latitude) and the GPS coordinates would take one to the vehicle with the accuracy of within a ten-meter radius of the vehicle. Mr Du Preez generated an electronic report in PDF format on the TLB (bearing registration number […]) on the C-track system which he forwarded to the Investigating Officer on 2 September 2015, and could do a visual display of the route followed by the vehicle.

[33] At this stage, Mr *Radyn* requested an inspection in loco, the objective of which was:

(a) for Mr Du Preez to demonstrate how one could plot and follow the route of the TLB according to the tracking report and the coordinates generated thereon;
(b) for the pointing out of the crime scene and other significant points that the State witnesses had testified to; and
(c) the pointing out of other significant points pertinent to events that unfolded during the planning and the commission of the crimes.

[34] The inspection in loco took place between 10h45 and 16h15 on 22 October 2019. The route taken was the route of the TLB on 18 August from the taxi rank at Umthwalume, to Mr Jwara's homestead and through various stops it made until it was parked at the tunnel of the N2 referred to as the designated spot at 8:33:43 pm, as plotted by Mr Du Preez from the C-track report.

[35] Several other points, including the road through the sugar cane field where the deceased's body was found, the homestead from where Ms Cele observed a motor vehicle in a sugarcane field before and after she heard the gunshots, the Engen Service Station at Hibberdene at which the State alleges that accused 2

purchased fuel for the TLB, and the Station Road intersection where the TLB was allegedly refuelled were also pointed out.

[36] The notes on the inspection in loco were read into the record on 23 October 2019 and the correctness of the notes were confirmed by Counsel for the State and defence and Mr Du Preez. Thereafter with the aid of a map showing the route followed by the TLB, and still images which he compiled (Exhibit “O”), Mr Du Preez demonstrated the route taken by the TLB which was followed during the inspection in loco. He testified that the TLB passed the Cele residence and field in which the deceased was found between 6.40 – 6.42 pm and stopped at 7.08.53 pm at Station Road, Umzumbe. It proceeded on the R102 South at 7.17 pm and proceeded via Rethman road, across the N2 into Louisiana road.

[37] Ms Susanne Ras, a specialist at Vodacom who interprets data, records and testifies in court, confirmed that Exhibit “P” was a proper record of the reports from 10 to 23 August 2015, for the cell numbers. [...], which belonged to accused 1 and .[...], which belonged to the deceased. She also confirmed that, as reflected on page 83 of Exhibit “O”, the last transaction was on 18 August 2015 at 11:32:31. The last call on the deceased phone as recorded at page 99 of the report, was at 18:25:48.

[38] Under cross-examination by Mr *Mtshaka*, Ms Ras confirmed that if a call is made by a third party while the handset is involved in a call, the call is referred to voicemail, it would be recorded in the column under third party and there would be four extra digits, which would indicate that a voicemail was left. She stated that the last call on the deceased phone’s at 18:25:48, could mean that the phone was either switched off or the battery went flat. If calls were made after the phone was switched off, a voicemail would be recorded only if a voicemail facility had been activated.

[39] Mr Dharmesh Kanti the manager of the law enforcement division of MTN SA, whose responsibilities include testifying as an expert in respect of cellphone data and records, testified about how data is recorded and stored on the MTN network utilizing a completely electronic process without human intervention (and that to his knowledge such electronic records have never been manipulated). He testified that each handset or cellphone has an exclusive IMEI number and if there is a sim card swop, the record will reflect the change in the IMEI. Sim cards also have unique electronic serial numbers that are not available to the general public.

[40] Mr Kanti also testified about the manner in which calls are relayed through base stations or cellphone towers which are identified on the cellphone records and the relevant radius of the base station which is dependent on its location in a CBD, urban or rural area. He explained that the relay of the cellphone signal is also dependent on the topography of the area. Therefore a call may be relayed by a base station which is not the closest in proximity to the caller, because the closest tower is not within the user's line of vision. He testified that it is possible to track the movement of a user according to the base station which picked up the signal handset.

[41] Mr Kanti testified that the cellphone records for the three accused and deceased's MTN numbers (Exhibits "U1, 2, 3 and 4" respectively) were true copies of the electronic records on his computer and that Exhibit "V" was a summary of cellphone records U1-4 reflecting an analysis of the calls between the four numbers. He then pointed out with reference to the ANB mapping of crime (Exhibit "W") the relevant base stations on the TLB route and then testified how the users of the 4 handsets moved on 18 Aug 2015. He pointed out the movement of the handsets which indicated that the users of the handsets U1, U2 and U3 had converged at 6 pm in the area covered by the Mfazazana base station near the Jwara homestead. Further at the time when the deceased's last call was logged at 6.24.15 the users of the four handsets referred to in U1, U2, U3 and U4 were in the same area. He pointed out calls between users which indicated that the users were in the same area but not together and could therefore have been in separate vehicles. He pointed out that the first call between U1 and U3 on the records was at 7.19.20 but thereafter between that time and 20h20 there were 17 calls between them. At 7.37pm the users of U1, U2 and U3 were in the Louisiana area which is covered by the New Bolton Farm base station, as reflected on the cellphone records and also Sanderstead Farm and High Ridge Farm base stations, and that they remained in the same area until approximately 9 pm. Thereafter he plotted the usage of U2 and U3 which indicated that the users were together at 10h00 on 19 August and again in the Durban CBD near the Warwick and ML Sultan base stations about 15h00. Thereafter both users travelled to Inanda and remained there until the last time recorded on the reports.

[42] Mr Brian Henning who is a forensic expert with 20 years' experience in the LCRC Port Shepstone, and since retired, testified that as a forensic field worker he lifted samples and exhibits from crime scenes. He examined the three white plastic containers recovered at Station Road, but was unable to find DNA evidence. He testified further that when there is a high usage of an item such as a steering wheel the finger prints may be smudged. Therefore, it's better to swab for touch DNA. Similarly, with a handbrake. Even though the handbrake of a vehicle may have a high number of users – the DNA lifted would be that of the last user ie the freshest sample. His evidence was not disputed.

The trial within a trial in respect of the video footage from the CCTV camera at the Hibberdene service station

[43] On Mr *Radyn*'s request, Mr *Mlambo* was requested to furnish the basis of the challenge by accused 2 to the video footage from the CCTV camera at the Hibberdene Service station which the State intended admitting into evidence.

[44] Mr *Mlambo* responded that accused 2 admitted that he had been at the service station at other times, but not on the date and time in question and disputed the time and date as reflected on the video footage. Mr *Mlambo* initially also stated that the video footage itself was not challenged but after taking instructions, he persisted that it was necessary for the State to prove the authenticity of the video tape without any specific challenge which would require accused 2 to divulge his defence, because as he had elected to remain silent, his constitutional right to remain silent as to his defence would be assailed.

[45] In order to obviate the imprecision and ambiguity in accused 2's challenge, I directed that a trial within a trial be held to determine the authenticity and admissibility of the CCTV footage.

The State called two witnesses in the trial within a trial. The first witness Mr Walter Daniel Greyvenstein testified that he has been employed from 1 October 2001 as Operations Manager at the Engen service station (the service station) at Hibberdene, which consists of a quick shop and a garage. He is responsible for overseeing the complete operation at the service station, including security management.

[46] Mr Greyvenstein explained the process according to which a purchase transaction was conducted on the tills in the shop, and the data which is generated and displayed on the till slips and then stored on the Winbranch program, which was utilized by Engen garages. The details on the till slips include the description of the product, time, date, sequence number, name of the cashier, the method of payment and the slip number. All the data generated is stored in what he referred to as the back-office and the records of all transactions are saved to a backup server and accessible at a later stage.

[47] Mr Greyvenstein testified further that a new and effective security system with 32 CCTV cameras was installed in October 2014 and was in use in August 2015. He maintains and adjusts the cameras himself except when a technician has to be called on site. Only he and the owner have the authority to operate the CCTV system which consists of two sets of 16 cameras. Each camera records individually and automatically 24 hours a day and the data is stored on the hard drive in an MVR modem, which is in a locked safe. Only Mr Greyvenstein and any staff that work inside the safe have access to the MVR. Mr Greyvenstein explained the procedure involved in extracting data or video footage from each individual camera. The data on the MVR may be downloaded onto a USB and viewed on a computer. Mr Greyvenstein explained how he input the date and time parameters to initiate download of the relevant footage on 24 August 2015, which he thereafter stored on a USB and handed over to the Investigating Officer.

[48] He explained that the CCTV system was not connected to the internet in order not to compromise the integrity of the cameras and the footage. Although the system is not connected to the internet, the footage nevertheless reflects the time and date which only he sets manually when necessary. Very specific knowledge is required to set the time. Mr Greyvenstein testified further that there can be no interference with the data from that moment when the camera records until the data is stored in the MVR.

[49] Mr Greyvenstein was requested by the police to search for a Toyota Tazz on the CCTV footage for the service station as well as a sale transaction for three five litre empty containers on 18 August 2015. Mr Greyvenstein explained how he located and retrieved the particular transaction which was on the Winbranch system

on 24 August 2015 which he printed. The till slip (Exhibit “TT1”) bore sequence number which Mr Greyvenstein emphasized cannot be manufactured. The till slip records that at 18h52, the cashier Lwazi, sold three five litre empty containers.

[50] He then examined and found the CCTV footage related to the transaction on the till slip. He downloaded all the footage relating to the person who purchased the containers and viewed the footage of the purchaser taking the containers to the pump of the forecourt where a pump attendant sold him 15 litres of diesel. He paid for the diesel at 18h59. The till slip for the purchase of the diesel was admitted at “TT2”. Mr Greyvenstein testified that the video footage had not been altered or tampered with from the time he retrieved and stored it until he gave it to the Investigating Officer. He did not know any of the accused.

[51] Mr *Radyn* applied for the court to view sections of the video footage (on the authority of *Motata v Nair NO & another* 2009 (1) SACR 263 (T) without opposition, which was granted. Six (6) short video clips from various cameras which Mr Greyvenstein confirmed he downloaded for 18 August 2015 were shown to the court.

[52] Under cross-examination by Mr *Mtshaka*, Mr Greyvenstein acknowledged that he did not receive formal training to maintain the cameras. However he was trained by the technicians who installed the CCTV system and has experience with the operation and maintenance of the system since its installation which obviates the need to call out technicians’ every time there is a problem with the system. He also confirmed that the MVR was not accessible without a ladder and that none of the employees had or have the pin code to the MVR.

[53] Under cross-examination by Mr *Mlambo*, Mr Greyvenstein clarified that although a system failure may require the time to be re-set, which he did manually, the time differential was only a few minutes and not hours, and the date had never been compromised. Only Mr Greyvenstein and the owner have the pin code for the CCTV system; however as the owner does not know how to change or re-set the times, only he could set the time. He confirmed that it is impossible to make any changes once the recording has taken place. In the event of a power failure, there was a backup generator. He confirmed that the owner of the company which had installed the security had since died.

[54] The second witness called by the State in the trial within a trial was Det W/O Koegelenberg, the Investigating Officer in this matter since its inception. He confirmed that Mr Greyvenstein had downloaded the CCTV footage from the Hibberdene service station and handed it to him. He retained the original footage, and also made a working copy which he saved on a USB. For the purposes of testifying, he compiled an album of still images of relevant portions of the CCTV footage and conducted an exercise in comparison with clips of the video footage downloaded from accused 1's Samsung cellphone in order to create a timeline, which sustained the State case. Secondly, he created a comparative table between the times that the suspect on the video footage, whom he identified as accused 2, was seen talking on his cellphone and accused 2's cellphone records. He thereafter calculated the variance between the manually set time at the service station which is reflected on the CCTV footage and the time recorded on the accused 2's cellphone records.

[55] Because the technician who installed the CCTV system at the Hibberdene service station had since passed away, and although the date was confirmed and consistent on all the CCTV footage and cameras and other documentary evidence in his possession, the Investigating Officer compared the C-track report, the cellphone records and other evidence with the date and time on the video footage in order to provide further evidence which would also sustain the timeline. In the album of comparative still images (Exhibit "TT3") the Investigating Officer pointed out the similarities between the clothing of the suspect at the Engen garage and the clothing of the person pouring the fuel into the vehicle at Umzumbe Station Road, specifically the black jacket, the blue jeans and white t-shirt with the grey and blue markings, and the alphabets UIK on the t-shirt. On other stills, the letters SILVE were also visible on the white t-shirt which the Investigating Officer associated with the surfing brand name 'QUIKSILVER'.

[56] The Investigating Officer testified about how his investigations led him to recover three empty five litre plastic containers near the Umzumbe Station Road signboard where the TLB had been refuelled. The CCTV footage showed the suspect purchasing three empty plastic containers for the fuel and then taking it to the pump where it was filled with fuel. The suspect then placed the three containers inside the back of white Toyota Tazz parked on the forecourt of the service station.

[57] As he had received the two receipts for the containers and the fuel, which were admitted as “TT1” and “TT2”, the Investigating Officer linked this with the three containers of fuel that were filled into the vehicle as recorded on the video downloaded from accused 1’s cellphone. Further the suspect arrived in a Toyota Tazz at the forecourt of the Engen garage at 18:48:44 and departed at 18:58:54 as recorded on the CCTV footage, and a Toyota Tazz was recovered on 18 August 2015 after it was seen near the designated spot.

[58] Under cross-examination by Mr *Mlambo* the Investigating Officer persisted that the three containers he recovered were the containers visible in the CCTV footage at the Hibberdene service station. When questioned by Mr *Mlambo* about a call received by accused 2 on 20 August 2015 from accused 1 on a cellphone that had allegedly already been seized by the police, W/O Koegelenberg testified that accused 1 made the call to accused 2 on 19 August using the sim card he had stealthily removed from his cellphone which had been seized by the police. He had used the sim card in another handset. The call to accused 2 therefore reflected a different IMEI number. The sim card was subsequently seized from him. W/O Koeglenberg’s evidence about the sim swop by accused 1 was corroborated by Mr Kanti’s testimony that accused 1 had used the same handset until 19 August when the change in IMEI number indicated he used a different handset until 20 August 2015.

[59] Accused 2 failed to testify in the trial within a trial. After hearing argument, I ruled that the video footage was admissible and that I would furnish reasons later, which I proceed to do so at this stage.

[60] Accused 2’s challenge was to the authenticity of the video footage and the date and time reflected on the CCTV footage. The facts of this matter are directly on point with facts and principles set out in *S v Mdlongwa* 2010 (2) SACR 419 (SCA). Firstly in *Mdlongwa* the SCA held that video footage taken from a surveillance camera installed in a bank constitutes real evidence and provided that it is relevant, it may be produced as admissible evidence, subject to any dispute as to its authenticity or the interpretation thereof. Referring to *S v Ramgobin & others* 1986 (4) SA 117 (N), where the court held that for video tape recordings to be admissible

in evidence it must be proved that the exhibits are original recordings and that there exists no possibility of 'some interference' with the recordings, the court of appeal held that the authenticity and originality of the video footage were established because evidence was presented that the video footage was secured until the sole person authorised to download it, retrieved the footage and handed it to the police officer. The court held further that in any event it did not have to be established that the original footage was used because the purpose of introducing the video footage into evidence was to identify the scene where the robbery took place and to enable the witness to identify the robbers, and provided corroboration for the testimony of an eye witness to the robbery. The video still provided identification of the appellant, and proved his presence at the crime scene and participation in the robbery.

[61] The next question considered was: Could the court properly rely on Mr Greyvenstein as an expert? In Du Toit *Commentary on the Criminal Procedure Act* ch 24 at 28-31 the authors provide the following authorities. In *Minister of Basic Education, Sport and Culture v Vivier NO & another* 2012 (2) NR 613 (SC) the court held at [21]:

'…The admissibility of opinions … must be determined on a case-by-case basis, regard being had to the nature of the issue which must be adjudicated; the ability of the court itself to draw inferences and form opinions based on the facts presented to it in evidence; the qualifications, knowledge and experience of the witnesses who express the opinions; the reliability and authority of the opinions expressed and the measure of assistance the court can derive from them in the adjudication of any given case—to name a few. It is within these parameters that the admissibility of the expert evidence and the permissible degree of reliance placed thereon by the court *a quo* must be assessed.'

[62] Qualifications of the expert witness - The judicial officer must decide in each case whether the witness is sufficiently qualified to assist the court (*Mkhize v Lourens & another* 2003 (3) SA 292 (T)). The witnesses' experiential capacity need not necessarily be acquired in the course of a profession, but may be the result of personal experience (*see Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 17A-E) or even his own reading. 'A qualification is not a *sine qua non* for the evidence of a witness to qualify as that of an expert.'

[63] Mr Greyvenstein's expertise is derived from special experience, and is a product of some training as well as familiarity with the CCTV system. Campbell J, in a passage quoted by Wigmore (para 556), stated appositely in *Kelley v Richardson 37 NW 514:*

'The phrase "expert testimony" is not entirely fortunate as designed to cover all cases where a witness may give his opinions. . . [Secondly,] then, there are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may properly be termed "experts", - a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training.'

[64] The importance of this distinction is that special experiential capacity – unlike general experiential capacity - must be satisfactorily established before the testimony of the expert witness may be received.

[65] Mr Greyvenstein testified that he was solely responsible for the security system and while he and the owner had the pin code to the CCTV system, he was the only one who actually worked with and maintained the system since its installation, unless it was necessary to call in a technician. He was personally responsible for the setting of the times, which was a complicated process but was done manually because he and the owner had decided, for security reasons and to prevent hacking into the system, that the system would not be connected to the internet which would set the time automatically. Therefore he was the only person who set the time on the CCTV system, although he could not guarantee that it was strictly in accordance with real time. Therefore the video footage reflected the time on CCTV system as set by him. The two systems were simultaneously set and the date and time remained the same on both systems. The date was never an issue or tampered with.

[66] In *S v Panayiotou* [2018] 1 All SA 224 (ECP) para 75 Chetty J received the evidence of a witness on the operating system of a motor vehicle tracking device,

even though he lacked a recognised 'qualification' in that area, since it was 'abundantly clear, both from his prefatory discourse and evidence adduced concerning the operating system of the unit that he [was] eminently qualified to express an opinion'.

[67] The same comment is applicable to the evidence of Mr Greyvenstein. I was accordingly satisfied that Mr Greyvenstein had the knowledge and experience to be considered an expert in respect of the CCTV footage extracted at the garage. Furthermore a comparison of the CCTV footage and the till slips, revealed a close correlation between the date and time recorded on the two till slips with the times recorded on the footage for the transactions.

[68] Mr Greyvenstein also testified that the transactions which are saved on the computerized Winbranch system, cannot be tampered with. Therefore the details on a till slip generated for a purchase transaction, specifically the sequence number, date and time cannot be altered. His evidence in respect of the till slips which were generated for the purchase of the three five litre containers and the diesel was not challenged or controverted by the defence. The relevant two till slips reflected the times and date as follows:

(a) "TT1" till receipt number 7962 reflected that three empty containers were purchased at 18h52 on 18 August 2015; and
(b) "TT2" till receipt number 7967 recorded that diesel fuel was purchased at 18h59 on 18 August 2015.

[69] Mr Greyvenstein utilised the time and date on the two till slips to locate the relevant CCTV footage. He testified as to how he located the relevant video footage on each camera and downloaded it on to a flash drive or USB which he handed to the Investigating Officer. He also testified that once the footage was recorded it was not possible to change the date and time on it.

[70] The evidence of the Investigating Officer about his investigation in respect of the video footage and related evidence was not disputed or controverted under cross-examination. The video downloaded from the cellphone of accused 1 together with the C-track system also provided corroboration for the transactions recorded on the CCTV footage.

[71] At this stage I did not take into consideration the calculation by W/O Koeglenberg of the time variance from real time on the CCTV cameras through a comparison of the times reflected on accused 2's cellphone records with the time at which accused 2 was on his cellphone as visible on the CCTV footage, as I was mindful that the cellphone records of accused 2 had not yet been proved.

[72] Finally although accused 2's version that he had been to the garage at other times but not on that specific date and time was put to the witnesses, he did not confirm his version under oath, although the Investigating Officer identified the suspect on the clips of the CCTV footage viewed, as accused 2.

[73] In the premises I was satisfied that the State had discharged the onus to prove the authenticity of and the correctness of the date and time reflected on the video footage and ruled the CCTV footage admissible. The CCTV footage was then admitted as Exhibit 3 and the evidence in a trial within a trial was admitted as evidence in the main trial. I have no reason at this stage, to reconsider my ruling on the admissibility of the CCTV footage, particularly as accused 2 confirmed under oath that he is the person in the footage. His dispute related to the date and time only, but he eventually conceded that he was confused and that 18 August 2015 was the correct date.

[74] Mr *Radyn* then commenced the testimony of W/O Koegelenberg about his investigations in this matter from its inception, in the main trial because the other witnesses were not yet available.

[75] W/O Koegelenberg testified that he was informed by crime intelligence on 16 July 2015 that a Municipal worker was trying to sell a Municipal vehicle. He met with Mr Ramnath who informed him that a Mr Dlamini from the uMzumbe Municipality had offered him a Bell TLB. He confirmed with Bell South Africa that they sold a Bell TLB to the uMzumbe Municipality in 2014 for R650k and thereafter investigated the information. His evidence about the undercover operation was consistent with the evidence of Captain Munsamy and W/O Vandayar. He confirmed that when accused 1 phoned W/O Vandayar he offered to sell a New Holland TLB, not a Bell TLB and also an excavator. He observed the meeting between the agents and accused 1 at the Hibberdene mall on 17 August 2015 and received information from Captain Munsamy via cellphone. On his instructions, Captain Munsamy ascertained that a

New Holland TLB, not a Bell TLB, was for sale. The agents informed him that accused 1 had told them that they could not view the TLB because it was used by another operator and would only become available after working hours the next day.

[76] The Investigating Officer testified how he set up the operation for the take down on 18 August 2015. He instructed the agents that the person delivering the TLB should collect and count the money on the bonnet of their vehicle where he could be observed. The Tazz with registration number .[...], which was the same vehicle that accused 1 drove to the meeting at the Hibberdene mall, drove up to the designated spot after 20h00. He observed accused 1 alight from the backseat of the Tazz, speak to the agents and then leave in the Tazz. After a while, the TLB driven by accused 1 parked in the tunnel. As accused 1 started counting the money, the signals were given and the TRT moved in. The Investigating Officer arrested accused 1 and seized his Samsung and Nokia cellphones and took possession of the R150k.

[77] When accused 1's cellphone rang he was given his phone to take the call. Accused 1 told the caller that everything was okay and they should come and fetch him; however the other person refused saying that they heard the loud bang. Both phones rang constantly late into that night. W/O Sonnekus subsequently found the Tazz abandoned at the training centre. The Tazz and the TLB were processed and taken on flatbeds to the pound at Marburg.

[78] Although the Investigating Officer retained accused 1's cellphones and money, he gave accused 1 his phone so that he could inform whoever he wanted to of his arrest. When accused 1 was asked for the IMEI number of the Nokia, he opened the back of the phone and removed the battery. The Investigating Officer later discovered that accused 1 had stealthily slipped the MTN sim card out of the phone at that stage and made the call that Mr *Mlambo* questioned him about in the trial within a trial. Accused 1's cellphone records confirmed that accused 1 made calls on 19 and 20 August before the Investigating Officer discovered on 20 August that he had removed the sim card. After the sim card was recovered from accused 1 at 14h00 on 20 August, W/O Mkhomo was assigned to extract the data on his phone. The Investigating Officer placed and sealed accused 1's two cellphones in exhibit bag bearing unique number PA4000962238.

[79] When the Investigating Officer received a report that a person was found dead and his TLB, which was missing, was the same TLB that was involved in the undercover operation, he immediately proceeded to the pound and examined the Tazz. He observed what he suspected were blood splatters on the bonnet at the rear of the Tazz on the driver's side and individual swabs of all the splatters were collected. While sufficient DNA could not be extracted to make a match, the splatters were confirmed to be human blood (DNA analysis Exhibit "Z").

[80] The bunch of keys with two bottle openers, a nail clipper and two house keys on a leather key ring which was found in the TLB were sealed in exhibit bag number PAD000952401. Although Ms Blose was unable to confirm whether the bunch of keys and other attached objects which were recovered from the TLB belonged to the deceased, accused 1 subsequently confirmed that they did. A charge of murder was added to the charges against accused 1 and the matter was transferred to the Investigating Officer's DPCI unit.

[81] On 21 August W/O Henning of the LCRC re-examined the crime scene at Ashbrook Farm where the body of the deceased was discovered, and he recovered another bullet head and a spent cartridge which were sent for ballistic investigation with the two spent cartridges recovered at the scene by the Hibberdene police, (admitted as Exhibit "S").

[82] W/O Koeglenberg went to the Hibberdene service station and two other service stations in the area, in an attempt to find out where the cool drink bottle which was found in the Tazz could have been purchased. When he ascertained where Mr Khowa had purchased the New Holland TLB and that there was a tracking system on the TLB, he contacted the company that managed the tracker who placed him in contact with Mr Du Preez of C-Track, who downloaded the reports on the movement of the TLB 17 and 18 August.

[83] When he received the video footage from accused 1's Samsung phone on 24 August, he noted the specific markings on the TLB. He ascertained that the TLB was registered in the name of a company called Kukhanya Kwezwe 110 Investments. The name Kukhanya is written in white on the TLB as depicted in photos A44-45 and is also distinctly visible on the video that was downloaded from accused 1's phone.

On the still images from the video, the Investigating Officer pointed out the barrier below the Umzumbe Station Road signboard.

[84] W/O Koeglenberg noted on Google Maps and the C-track reports, that the TLB had been stationary at Umzumbe Station road for several minutes and that the video footage on accused 1's phone was recorded at 19h15. At 15h20 on 24 August he went to the Umzumbe Station Road turn off and found three five litre plastic containers just below the road sign. The photographs of the three containers and the location at which the Investigating Officer found them compiled into a photo album (admitted as Exhibit "Q"), which he annexed to his statement. He pointed out the railing, the signboard and the location of the containers. He recognized the smell of diesel in the container in photo "Q6" which had no lid. No DNA or finger print evidence was found on the containers.

[85] After he found the containers he requested the Engen garage at Hibberdene to look for the transaction of a purchase of three containers, and obtained the relevant information and CCTV footage from Mr Greyvenstein and the owner of the garage. On the still images from the CCTV footage, he pointed out the Tazz travelling from North to South before it turned into the Engen service station and parked in the forecourt. Photo 2 was a clear image of the suspect whom W/O Koeglenberg identified as accused 2. Accused 2 was arrested on 8 November 2015.

[86] W/O Koegelenberg confirmed that he arrested accused 3 on 14 March 2016 in his room at Inanda in Durban and seized his identity document, a Nokia cellphone with an MTN sim card, and three loose sim cards, one Vodacom and two MTN, which he placed into a forensic bag. The IMEI number of the phone was .[...]. The sim card in the Nokia cellphone bore the unique registration number .[...]. The data on the cellphone records, Exhibit "U3" indicated that this sim card was in the handset for the duration of the period from 10 August 2015 until the last report on 23 August 2015, and the number .[...]which was used to generate the data captured in Exhibit "U3". Accused 3 did not have any ties to the Inanda or Durban areas and spent most of his time in the Port Shepstone area and shared a room with Sicelo Khuzwayo.

The State then closed its case.

[87] Mr *Mbambo* applied for a discharge of accused 3 in terms of s 174 of the CPA on both counts 1 and 2. In my ruling I set out the relevant law and legal principles applicable to such an application and refused the application. This seems to be the appropriate stage to furnish my reasons for refusing the application. Although the evidence presented by the State against accused 3 may be circumstantial, the cardinal rules in *R v Blom* 1939 AD 188 are to be applied when evaluating the conspectus of evidence when the defence case is closed. The test applied to an application in terms of s 174 is, as referred to in my ruling, where there is no evidence upon which a court acting carefully and properly exercising its discretion may convict, then a discharge may follow.

[88] I considered firstly the evidence referred to by Mr *Mbambo* in his application, that of Mr Khuzwayo and the Investigating Officer. Mr Khuzwayo testified that he knew accused 3 all his life as Kaladhi, and they both lived in the KwaDweshela area, and even shared a room. When accused 3 gave him two cellphone numbers as his contact details, Mr Khuzwayo discovered that the one number was already saved as Riche (which is accused 2's name), whom he also knew as accused 2 who was also from the Kwa Dweshela area. He and all three accused gambled together at various locations. It could therefore be reasonably inferred, that the three accused were known to each other and that accused 3 could be contacted through accused 2. Mr *Radyn* further pointed out that while Mr *Mbambo* submitted that there had been no communication between Mr Khuzwayo and accused 3 for some time, the cellphone records for .[...]ie the cellphone which the State alleges was used by accused 3 and which is the number provided by Mr Khuzwayo as one of the two numbers given to him by accused 3 (the other number was for Riche), indicate that there were 61 calls between Mr Khuzwayo and accused 3 during the period 10 August – 23 August 2015. The offences in this matter occurred on 18 August 2015. It was therefore incorrect that there was no communication between Khuzwayo and the user of this number allegedly accused 3 for some time, but more relevantly established prima facie evidence that the user of the phone at the time when the offences were committed was accused 3.

[89] While It was correctly pointed out by Mr Mbambo that the cellphone which the State alleges was in the possession of accused 3 during the commission of the offences, was Rica'd in the name of a third party, and that the evidence by the

Investigating Officer was not conclusive in proving that the cellphone was used by or in the possession of accused 3, there was further pertinent evidence in the cellphone records that placed the user of the phone in proximity with accused 2, the various points which connected with the route travelled by the TLB (via the CTrack report) and accused 1's cellphone. After accused 1 was arrested, accused 2 and the user of the phone were in the Durban area. Thereafter the record for the phone allegedly used by accused 3 was in the Inanda area from 19 August 2015. The phone was recovered on 14 March 2016 in the room at Inanda where accused 3 was arrested. While it was correctly argued that the accused's girlfriend was in the room, Mr *Mbambo* also argued that accused 3 could not be said to be found in possession of the phone. Again the recovery of the cellphone and the sim cards must be considered in the light of the evidence as a whole. The name of the girlfriend was not furnished – so no link between her and the person who Rica'd the phone was established. However, as pointed out by Mr *Radyn*, the Investigating Officer recovered several sim cards amongst which was the sim card that was used in the phone during the period when the offences were committed, and at the time when Mr Khuzwayo was in contact with accused 3 at that moment.

[90] This evidence of the location of the cellphone in the vicinity of where the robbery and murder were committed, had to be considered with the evidence which suggested the presence of a third person with accused 1 and 2. The Investigating Officer advised W/O Vandayar that the Tazz was seen in the Louisiana area with a number of occupants. The evidence of W/O Vandayar and Captain Munsamy was that accused 1 arrived at the designated spot seated at the back of the Tazz. Therefore it may be reasonably inferred that there was someone seated in the front passenger seat. Further in the video footage extracted from the CCTV camera at the Engen garage at Hibberdene, it is clear that there are two persons in the Tazz as the person alleged to be accused 2 alighted from the front passenger seat. Finally in the version put to the State witnesses, accused 1 alleged that the deceased met him with two unknown men in the Tazz. Therefore what remained in dispute is the identity of the third person involved in the commission of the crimes.

[91] In the video downloaded from accused 1's cellphone in the transcribed evidence of the conversation the speaker (allegedly accused 1) addresses the 'guys' – clearly referencing that more than one person was involved in the shooting of the

deceased, and that the ‘guys’ are present with the speaker. The speaker also addresses ‘Riche’ directly – allegedly accused 2. Khuzwayo confirmed that accused 2 was called Riche, even by accused 3. The speaker then asks for an alternative number because ‘if I phone you guys I ought to get hold of you so that I can drop you off along the way.’ And the number he asks for is that of Khaladi, because Riche’s phone is always busy. This is in the middle of the delivery of the TLB to the ‘purchaser’. The inference that may reasonably be drawn is that Riche and Khaladi are together, which is why the speaker wants his number as the alternative contact. This is borne out by accused 1 calling Khaladi’s number numerous times shortly after the TLB moved from Station Road and receiving calls from Khaladi’s number.

[92] Mr *Mbambo* contended that the video footage was hearsay in respect of accused 3 and not admissible against him, but provided no authority for this submission. However, his argument appeared to be premised on his earlier reliance on *S v Molimi* 2008 (2) SACR 76 (CC), when he argued that the cellphone records were insufficient to constitute circumstantial evidence against accused 3. The facts are clearly distinguishable and the reliance on *Molimi* to advance both arguments could not be sustained. In the premises the application in terms of s 174 was refused.

Defence case

[93] Accused 1 and 2 testified in their defence and did not call any witnesses. I have summarised the main points in their evidence in chief and shall deal with their cross-examination by the State later in this judgment. Accused 3 did not testify.

Accused 1

[94] Accused 1 confirmed that he was employed by Umzumbe Municipality and drove a Bell TLB. He testified that he had a good relationship with the deceased whom he knew for about one and a half years and he knew that the deceased operated a New Holland TLB. Mr Ramnath, to whom he sold tyres and from whom he bought sand, informed him that some people were looking for a TLB. They exchanged numbers and Mr Ramnath told accused 1 to call him as soon as he found a TLB for sale. Accused 1 spoke to the deceased who agreed to sell the one

he was operating for R300 000. He was prepared to lower the price to R250 000 but not less. Accused 1 phoned Mr Ramnath and told him that he had obtained a TLB for sale. Mr Ramnath gave him the buyer's phone number.

[95] Accused 1's evidence about the meeting at Hibberdene mall, the negotiation of the purchase price and the pointing out of the designated spot was consistent with the evidence of the State witnesses. Accused 1 met the deceased later that afternoon. On hearing that the price agreed was R200 000, the deceased was upset but eventually agreed. The next day they phoned each other after work to make arrangements about the TLB. The deceased told accused 1 to meet him at Nkanini sports ground where he had a job. Accused 1 was going drive the TLB and the deceased, the Tazz. When they met as arranged, the deceased had two unknown men with him. Accused 1 had already told the deceased that he had arranged to meet the purchasers at Louisiana. Before accused 1 could leave with the TLB, the deceased asked him if he had any money because he wanted to give the money to his wife. Accused 1 had R10 000 because he was going to the casino later, which he gave the deceased. Accused 1 left with the TLB.

[96] Near Umzumbe station, he was flagged down by a person who wanted him to do a job. He took the man's contact number and proceeded to Louisiana where he met the two men in the Tazz. They told him that the deceased had remained with his wife and sent them to fetch accused 1. They then proceeded to the designated spot. Accused 1's testimony about the events that occurred thereafter at the designated spot until accused 1 was arrested was consistent with the evidence of the State witnesses. He did not know what happened to the men in the Tazz who were to have followed him to the designated spot. I shall revert to accused 1's cross-examination later in this judgment.

Accused 2

[97] Accused 2 testified that he and accused 1 were friends since 2010 and gambled together. They used to meet three or four times a week and call each other often, but accused 1 did not tell him that he was selling a TLB. He knew accused 3

as Caluza or Cyprian. They came from the same neighbourhood and knew each other since 2011. Accused 2 did not know the deceased.

[98] Accused 2 alleged that on 18 August 2015 he went from Murchison to Port Shepstone to gamble and play cards. Then he went with Dubha to Umtwalume in Dubha's car. Then they proceeded to a game behind a shop at Kwabangibizo. It was late when they returned to the rank at Hibberdene. After playing cards at Hibberdene, they went to Louisiana. Accused 2 left Louisiana because he was going to go to the casino with accused 1. He could not remember how long he remained in Louisiana, and he did not see the Tazz or accused 1. It was night by the time he got to Port Shepstone. He played cards but did not stay long. Although he and accused 1 intended to go to the casino on 18 August, they did not meet that night. Accused 2 phoned accused 1 repeatedly but accused 1 told him that he was still busy although he did not tell accused 2 what he was busy with.

[99] Accused 2 alleged that his DNA and fingerprints were found in accused 1's vehicle because he was in accused 1's vehicle regularly and could have touched anything at random. He confirmed that his cell number during August 2015 was .[...]. He did not dispute that on 18 August 2015, he had received a call at 6.54 pm which originated and terminated at Mfazazana suburb where he was playing cards at a shop in Kwabangibizo, and at 6:55 pm he received a call from accused 1 originating and terminating at Hibberdene. However, as the travelling time between the two towers was 25 minutes, he was confused how his phone could be in two areas within a minute.

[100] Accused 2 did not dispute that he was in the video footage downloaded from the CCTV camera at the Engen garage, but alleged that he was at the garage 16 August 2015 at about 10:00 pm with Dubha in his (Dubha's) Toyota Tazz. He recalled the date when he watched the footage, because he was usually in the Hibberdene area on the 15th and 16th of every month. He purchased the three five litre containers and diesel for Dubha but did not enquire why Dubha needed the diesel. Accused 2 disputed that he filled diesel in the TLB, and that he could be linked to the video downloaded from accused 1's cellphone by his clothing or by the name Riche, as both lacked exclusivity to him. I shall revert to accused 2's crossexamination in due course.

Argument

[101] Argument by Counsel for the State and defence is the heads of argument on record and I shall refer to them when relevant to the assessment of the evidence.

Law and legal principles

[102] It is trite that the onus to prove the guilt of the accused beyond reasonable doubt rests on the State. In evaluating the relevant testimony and the credibility of the witnesses and in determining whether the State has discharged the onus on it or whether the versions of the accused are reasonably possibly true, I remained mindful of the guiding precept in the judgment of Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-I:

> 'The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.
>
> In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[103] This precept was affirmed and applied by the SCA in *S v Van Aswegen* 2001

(2) SACR 97 (SCA) and in *S v Trainor* 2003 (1) SACR 35 (SCA) at 41B-C where Navsa JA restated what the trial court is obliged to do:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.'

Circumstantial evidence

[104] The following precepts are also relevant because some of the evidence, and particularly the case against accused 3 is circumstantial. Whereas previously in South African law the courts relied heavily on the cardinal rules of logic set out in *R v Blom* 1939 AD 188 at 202-3: firstly, that the inference sought to be drawn must be consistent with all the proven facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The assessment of circumstantial evidence has shifted in favour of inferential reasoning based on the proven facts. See D T Zeffertt and A P Paizes *The South African Law of Evidence* 3 ed at 108-110.

[105] In *R v Mthembu* 1950 (1) SA 670 (A) at 679-680 Schreiner JA unequivocally expressed his opposition to an approach that would require all intermediate facts in a criminal trial to be proved beyond a reasonable doubt. In a well-known passage, he set out a broad test for determining when proof on such a standard would nevertheless be necessary:

'I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing

on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties.'

[106] In *R v Sibanda & others* 1965 (4) SA 241 (SRA) at 246A-C Beadle CJ elaborated on Schreiner JA's test as follows:

'The degree of certainty with which the individual facts must be proved in criminal cases must always depend on the probative value of the individual facts themselves. Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt; it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of an accused beyond reasonable doubt. See *R v De Villiers*, 1944 AD 493 at p. 508.'

[107] In *S v Morgan & others* 1993 (2) SACR 134 (A) at 172-173 Corbett CJ expressly recognised that:

'[t]he cumulative effect of a number of probabilities pointing in the same general direction may be such as to establish the guilt of an accused beyond a reasonable doubt',

and that it was

'not necessary that each such finding or inference or circumstance should establish such complicity beyond a reasonable doubt'.

Finally, in *S v Reddy* 1996 (2) SACR 1 (A) it was held at 8C-D:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the

explanation given by an accused is true. The evidence needs to be considered in its totality ….'

The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:
'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'

Evaluation of the evidence

[108] I turn to an evaluation of the evidence bearing in mind that the onus to prove the guilt of the accused beyond reasonable doubt lies with the State. As stated at the commencement of this judgment, much of the evidence led by the State is common cause or undisputed. I shall only deal with the disputed evidence to the extent relevant.

[109] Under cross-examination Mr *Mtshaka* put to Mr Ramnath that accused 1 knew him before 17 June and that he had been at Mr Ramnath's business premises three times before that date. Mr Ramnath did not dispute that accused 1 may have called at his premises but he was not aware of it. He confirmed, as recorded in his statement, that accused 1 advised him that the TLB was a Bell TLB from the Municipality but had assured him that there was no problem because the security guard and the TLB operator ie the deceased, would each receive a portion of the R150 000 purchase price. W/O Koeglenberg's evidence that he ascertained that the Umzumbe Municipality purchased a Bell TLB was undisputed. However the evidence of Captain Munsamy, W/O Vandayar and the Investigating Officer was that during the first discussion with Vandayar on 13 August 2015, accused 1 offered a New Holland TLB and not a Bell TLB, as Mr Ramnath had reported. This was

confirmed during the meeting at the Hibberdene mall on 17 August 2015. While the purchase price mentioned by accused 1 was still R150k during the call made by accused 1 to W/O Vandayar, at the Hibberdene mall the price was R200k which after approval with Chiliza, was settled at R180k. This was confirmed by accused 1 himself, when the only aspect of the agent's evidence that he was aggrieved with was that they brought only R150k and not R180k to the designated spot, and he instructed his counsel to question them about this shortcoming. Therefore the Investigating Officer's initial conclusion that this matter involved theft from and corruption within the Municipality was correct.

[110] However the sale of a New Holland TLB clearly introduced a new dimension to accused 1's plan to sell a TLB. Firstly it is common cause that the New Holland TLB referred to by accused 1 was the TLB owned by Kukhanya Kwezwe 110 Investments and in the possession of the deceased. Ms Blose testified that the deceased had told her about two weeks prior to his death that he had been approached by a Dlamini to sell the TLB, and he was uneasy with the proposal. This not only explains the change from the Bell TLB offered to Mr Ramnath to the New Holland TLB offered to the agents, but also is an indication that the deceased was not party to the plan, as alleged by accused 1.

[111] It was also undisputed that when W/O Vandayar asked accused 1 to view the TLB on 17 August 2015, accused 1 responded that the TLB was in Umtwalume and such inspection would raise suspicion. Mr *Mtshaka* argued that this ought not be viewed as an indication that the deceased was not party to the sale. However I am of the view that is was correctly submitted by Mr *Radyn*, that if the deceased had been party to the sale, there would have been no concerns about raising his suspicion if the agents viewed the TLB as prospective purchasers. Further the evidence of Mr Cele and Mr Jwara confirm that the deceased was in fact busy with the TLB in Umtwalume on 18 August 2015. Accused 1 informed the agents that the delivery of the TLB could only take place after work on 18 August 2015, which is why the delivery was arranged for 18h00. However the deceased only left Mr Jwara's premises after 18h00 according to the AVL report. Again if he were part of the plan to sell the TLB, why would he deliberately run late. Further he undertook to do work for Mr Cele on the 19 August and to complete Mr Jwara's job. These are not the

actions associated with knowledge that the TLB would be sold and no longer be available after 18h00 on the 18 August.

[112] The next aspect that is relevant is that when the TLB and the Tazz were seen in the Louisiana area at about 8 pm, as concluded by the Investigating Officer there were other persons that were involved in the delivery. When accused 1 arrived at the designated spot, he was seated in the rear passenger seat, giving rise to the inference that there were two persons in the front of the vehicle. This was confirmed by the version of accused 1 put to the State witnesses that he was with two unknown men who were friends of the deceased. It eventually became common cause that the deceased was not in the Tazz. Under cross-examination, W/O Vandayar estimated that the time lapse between the arrival of accused 1 in the Tazz at the designated spot and his return with the TLB was approximately 30 minutes. It is common cause that the take down took place at about 20h30. Accused 1 was arrested and his cellphones seized. Accused 1 received calls on his phone with the number .[...]thereafter and the caller or callers refused to pick him up as they had heard the stun grenade. This indicates that they were in close proximity to the designated spot, waiting to pick up accused 1 after the delivery. It could reasonably be inferred that the pick up was the two men in the Tazz, which was later confirmed by accused 1.

[113] The agents testified that accused 1 parked the TLB under the tunnel and left the keys in the ignition, which accused 1confirmed. But what is relevant at this stage is that the bunch of keys contained several personal items belonging to the deceased. It is highly improbable that the deceased would have handed over his personal items together with the TLB keys when he knew the TLB was to exchange hands.

[114] It is also relevant at this stage that the two men absconded from the Louisiana area after abandoning the Tazz. Two points arise from this: when the car was impounded, accused 2’s DNA and fingerprints were found in it. The undisputed evidence is that the last or freshest set of DNA was lifted from the handbrake, which proved to be that of accused 2. As the car was seen on 18 August 2015 with accused 1 in the back seat, the reasonable inference to be drawn at this stage is that

accused 2 must have been in the Tazz on 18 August, and seated in the front, when the Tazz was driven to the designated spot.

[115] Secondly the Investigating Officer observed what he suspected were splatters of blood on the Tazz. Although the DNA in the samples were inconclusive the tests confirmed that the splatters were human blood. Like the Investigating Officer deduced, when the report was made that the deceased had been found shot in a sugar cane plantation on Ashbrook Farm and the TLB was missing, the trail leads back to when the deceased was last seen alive and left Mr Jwara's premises at about 6.02 pm.

[116] The time frame extending from the deceased's departure and the arrival of the TLB operated by accused 1 in Louisiana is crucial to the State case, and the pertinent evidence must be viewed holistically, which includes Ms Blose's evidence that the deceased told her about 16h30 that he would only be home about 19h00 as he had to check out some prospective work. But the most significant evidence is the C-Track AVL report which provides the details of the route taken by the TLB after the deceased left Mr Jwara's premises, the stops it made enroute to the designated spot and the time when the stops were made. It is relevant to note that whereas Ms Cele, Ms Blose and Mr Jwara testified to the times when certain events occurred, the accurate times are as recorded on the AVL Movement Report and the cellphone records.

[117] The time and route followed by the TLB are found in the Movement Report (Exhibit "N") and still images which Mr Du Preez compiled (Exhibit "O"). The data on page 11 of Exhibit "N" shows that the TLB travelled from Jwara's residence at 6.00 pm until 6.23.3 whereafter it entered the dirt road from the intersection of the gravel road and travelled uphill until 6.28.17 pm. At 6.28.17 pm the ignition is switched off and at 6.29.02 pm the TLB is started up. During the inspection this spot was referred to the turn off as near the Storage facility where the TLB went to the top of the hill and then made a U-turn. It is relevant that the version of accused 1 which was put to Det W/O Koeglenberg in cross-examination was that delivery of the TLB took place at the U-turn. This movement of the TLB is also plotted on page 5 of the ANB mapping of Crime (Exhibit "W"). The TLB was at this area for 7.5 minutes. Thereafter the TLB returned to the gravel road and picked up speed travelling between 20 km

per hour to speeds in excess of 30 km per hour until it stopped at Umzumbe Station Road at 7.08.53 pm. Mr Du Preez pointed out during his testimony that the TLB passed the Cele residence and sugar cane field in which the deceased was found between 18h40 and 18h42, and stopped at 7.08.53 pm at Station Road, Umzumbe.

[118] I therefore turn to the evidence of Ms Cele. Ms Cele's statement recorded that about 19h00 on 18 August 2015 she noticed motor vehicle lights in the sugar cane field and heard a bang like gun fire. Mr *Mlambo* argued that if accused 2 was in the Tazz at Hibberdene garage just before 7 pm then he could not have been in the vehicle spotted by Ms Cele in the sugar cane plantation at the same time. Under cross-examination by Mr *Mtshaka*, Ms Cele testified that it was her regular habit to feed the dogs every day at 18h30, which she does to date. She observed the motor vehicle lights while feeding the dogs. She did not look at the time when she heard the gunshots but she did notice the time when she was entering the house, as she phoned her boyfriend at 19h00. Therefore the time frame set out in her testimony is between 18h30 and 19h00. Secondly she had already started feeding the dogs which meant that it was past 18h30 when she observed the motor vehicle move on the field, then stop. Although Ms Cele's statement (Exhibit "K") merely recorded that she heard a bang, she persisted that, as testified, she heard car doors, no voices and then three gunshots. Then the dogs started barking. She watched the vehicle drive back onto the gravel road and then went into the house, and made the call at 19h00, which was after the vehicle left. Therefore the argument that the deceased was shot at 19h00 cannot be sustained.

[119] On accused 1's version he met the deceased at the U-turn point and he took over the driving of the TLB. He drove off and left the deceased with the two unknown men and the Tazz. However if the TLB passed that way between 18h40 -18h42 then the probabilities are that the deceased was bound and placed in the Tazz before that and driven to the sugar cane field, which is not only consistent with Ms Cele's evidence, but also the time frame of 6.23 and 6.29 reflected on the Movement Report. It may also be inferred that accused 1 was not present when the deceased was shot. I also note that no blood was found on accused 1's clothes which were sent for forensic investigation.

[120] The aforesaid time frame is also borne out by the cellphone records of the accused and the deceased. The last call registered on the deceased's phone was at 18.19.20 and the last sms registered was at 18.25.48. Although there were numerous calls between accused 1 and accused 2 from 15.37 onwards until 16.24, there are no calls until 18h15. During that time period the cellphones of accused 1 and accused 2 were using the Kwabangibizo Water Tanks tower and Mfazazana tower in the Kwabangibizo area. The phone allegedly used by accused 3 also registered a communication at 17h51 via the Mfazazana tower in the Kwabangibizo area.

[121] Mr D Kanti pointed out the movement of the handsets which indicated the time and location when the users of the handsets U1, U2 and U3 had converged in the particular area covered by the Mfazazana base station at about 6 pm which is near the Jwara homestead. He also pointed out specifically that at the time when the deceased's last call was logged at 6.24.15 the users of the four handsets referred to in U1, U2, U3 and U4 were in the same area. He pointed out calls between users which indicated that the users were in the same area but not together and could therefore have been in separate vehicles. This is consistent with the fact that the TLB was driven by accused 1 and accused 2 and 3 were allegedly in the Tazz.

[121] It is common cause that accused 2 was linked to the Tazz by his DNA and fingerprints. A match between a DNA sample taken at the scene of a crime and the profile of an accused person is circumstantial evidence. The probative value of a fingerprint in a criminal case as held in *R v Du Plessis* 1944 AD 314 at 319 'lies in the degree of probability that in the ordinary and natural course of things it would have been the perpetrator of the crime who made it, and in the degree of probability that, if it were made innocently, the person concerned would be able to account for it'. As already set out under the relevant legal principles, circumstantial evidence must be evaluated holistically with all the other evidence. I have already referred to the footage downloaded from the CCTV at the Engen garage as well as the video downloaded from accused 1's phone and set out the prima facie evidence established in respect of accused 2 in my ruling on the application in terms of s 174. But now that all the evidence was complete, the cellphone records of accused 1 and 2 reflecting the phone calls between the two of them while accused 2 was at the Engen garage in Hibberdene, as well as the time variance between the CCTV

footage and the cellphone calls, calculated at 8.14 seconds by the Investigating Officer on Exhibit “TT4” could be taken into consideration. The cellphone records indicate that the terminating base station at this time for the calls accused 2 received from accused 1 was the Hibberdene Telkom uW tower. The times of the calls from accused 1 are also consistent with the times of 18.52 and 18.59 reflected on the till slips (“TT1” and “TT2”).

[123] The Movement Report also recorded that accused 1 stopped the TLB at the Umzumbe Station Road, which accused 1 admitted. The video footage at the garage and the video from accused 1’s phone also implicated accused 2. The Investigating Officer testified to the relevant evidence implicating accused 1 and 2 and as I have set out his evidence in detail it is not necessary to repeat it at this point, but I shall revert to the recordings in my evaluation of the defence case.

[124] Similarly, I have set out in my reasons for refusing the discharge of accused 3 at the end of the State case as I was satisfied that the evidence constituted a prima facie case against him. As all the cellphone records and the expert analysis of the information was also proved and properly before the court, accused 3 was in my view implicated by his presence with accused 2 not only before the offences were committed but also by his communications with accused 1 while the TLB was enroute to the designated spot, and his movements which mirrored that of accused 2 before and after the arrest of accused 1. The State had in my view established a strong prima facie case against the accused. However I remained mindful that the defence case is integral to a holistic evaluation of the evidence and further that in evaluating the defence case, as held in *Shackell v S* [2001] 4 All SA 279 (SCA) by Brand AJA at 288e-f:

‘…a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.’

We have also been mindful that, as stated in *S v Mgedezi & others* 1989 (1) SA 687 (A) at 703E-F that the duty of the trial court is:

'to consider the evidence of each accused separately and individually, to weigh up that evidence against the particular evidence of the individual State witness or witnesses who implicated that accused, and upon that basis then to assess the question whether the accused's evidence could reasonably possibly be true.'

[125] I accordingly turn to the evaluation of accused 1 and particularly his evidence under cross-examination. Under cross-examination the accused contradicted himself constantly and was a very evasive witness on practically every aspect of his case that he was challenged on.

Accused 1 testified that Mr Ramnath informed him that some people were looking for a TLB. They exchanged numbers, and Mr Ramnath told accused 1 to call him as soon as he found a TLB for sale. Accused 1 alleged that Mr Ramnath approached him because he knew where accused 1 worked and lured the accused into getting a TLB for him by introducing purchasers, and that although Mr Ramnath did not actually say that he wanted to buy a stolen TLB, it was what he meant.

[126] However, Mr Ramnath's undisputed testimony was that on 17 June 2015 accused 1 had offered to sell to him a spare wheel for a tipper truck and then a Bell TLB which had been delivered to the Umzumbe Municipality for R150k. Accused 1 told him not to worry because he was going to get other guys to pull the TLB out of the Municipality and get the tracker sorted out, and the security guard was going to get a share of the proceeds. Mr Ramnath responded that he was not interested in buying the TLB but he may be able to get a buyer. They then exchanged cellphone numbers and accused 1 popped into his office several times for a period of six to eight weeks to check if he had found a buyer. Therefore until accused 1 testified it was undisputed that he had initially offered Mr Ramnath a Bell TLB and then offered W/O Vandayar a New Holland TLB, which is why the Investigating Officer had requested Captain Munsamy to obtain clarification from accused 1 at the meeting at the Hibberdene mall.

[127] When it was put to Mr Ramnath that accused 1 had been to his premises three times, Mr Ramnath admitted that it may have been so, but he did not know the

accused and met him for the first time on 17 June 2015 and exchanged cell numbers on that day. Accused 1 however contradicted himself several times about when he had obtained Mr Ramnath's number or whether they had exchanged numbers.

Initially he alleged that he and Mr Ramnath had each other's numbers and were in contact before 17 June 2015. Then he stated that although there had been prior dealings between Mr Ramnath and himself, it was only because Mr Ramnath now wanted something from him, that he took the accused 1's number on that day. Finally he alleged that he and Mr Ramnath exchanged numbers on 17 June. When confronted with the contradictions in his evidence about his alleged previous dealings with Mr Ramnath and acquiring his cellphone number, accused 1 resorted to the excuse that he could not remember. He alleged further that Mr Ramnath lied that he did not know him before 17 June 2015 and that accused 1 had made him an offer to sell the TLB, but he had not corrected the alleged lies through his counsel as he thought he would speak for himself. However he had definitely told Mr *Mtshaka* that Mr Ramnath asked for the TLB. My record shows that before Mr *Mtshaka* began his cross-examination of Mr Ramnath, he took instructions from accused 1 and specifically put those instructions to Mr Ramnath. Therefore the accused had the clear opportunity to put his version to Mr Ramnath, which renders his belated version highly improbable. Accused 1's allegations that he had numerous dealings with Mr Ramnath and that Mr Ramnath bought diesel from accused 1 or that accused 1 sold parts from heavy machinery to him, were not put to Mr Ramnath and only arose when accused 1 was under cross-examination. Mr *Mtshaka* submitted that the contradiction was not significant.

[128] However the contradiction is significant because not only does it impact adversely on the credibility of accused 1, it also undermines his version. Mr *Radyn* submitted that by the time the meeting at Umgababa took place and the accused called W/O Vandayar, the accused 1 must have approached the deceased and/ or already planned to rob the deceased of the New Holland TLB. This inference may properly be drawn from Mr Ramnath's evidence that the accused called him several times after he made the initial offer of the Bell TLB which belonged to the Municipality. Mr Ramnath could not have been mistaken – he had specifically noted the insignia of the Municipality on the vehicle and the jacket of the passenger on 17 June 2015 and it was very reason why he approached the CIU. In any event,

accused 1's own evidence confirmed the State case: he admitted that he intended to sell the Bell TLB that belonged to the Municipality but it broke down. That is why he referred to the security guard in his discussion with Mr Ramnath, which he subsequently denied. Once Mr Ramnath advised him there was a buyer, accused 1 was desperate to sell a TLB, because the TLB he operated was no longer functional. He then approached the deceased who was uncooperative.

[129] Accused 1 also contradicted himself about when he approached the deceased and the deceased's willingness to conduct the transaction. He initially testified that he approached the deceased before he knew who the buyers were. He had only spoken to Mr Ramnath at that stage. He later contradicted his evidence when he testified that he told the deceased that two Indian men wanted to buy the TLB. When faced with this contradiction he refused to acknowledge it, but persisted that there was an agreement with the deceased. Although he initially stated that he begged the deceased to sell the TLB, the accused later persisted that he did not have to convince the deceased, and that the deceased told him that he had an explanation for the owner of the TLB. Accused 1 was extremely evasive in his responses. He then alleged that the deceased had suggested that the person guarding the TLB should get a share which indicated that the deceased was not against selling the TLB. This was a new allegation which was not consistent with Mr Ramnath's version but was not put to him.

[130] It was correctly submitted by Mr *Mtshaka* that accused 1 admitted that he was aware that the intended sale of the TLB operated by the deceased was unlawful. However accused 1 initially insisted that the New Holland TLB belonged to the deceased. Only when it was put to him that the deceased was operating the TLB which belonged to Mr Khowa, did he admit that he was aware that the TLB did not belong to the deceased, and selling the TLB would be unlawful and that the deceased had no right to sell the TLB.

[131] Mr *Mtshaka* submitted that the significance of Ms Blose's evidence was that it sustained accused's version that he had discussed the sale of the TLB with the deceased; However, in my view the significance of Ms Blose's evidence lay in the deceased's avowed reluctance to betray his employer who had placed faith in him and entrusted a valuable asset to him, by committing a crime in selling what did not

belong to him. Further the allegation that the deceased wanted to go home to give his wife small change in the form of R10k only emerged when accused 1 testified. It was not put to Ms Blose when she testified that she was expecting the deceased about 7 pm for dinner after he investigated a prospective job at the Nkanini Sports Ground. It is also common cause that the deceased was paid R1 000 for the work he had just done. Only when accused 1 was pressed about his arrangements with the deceased about the delivery of the TLB, did he allege that he met the deceased at his home on 17 August. This was also not put to Ms Blose, and in my view was a further fabrication by the accused. Further, as already held the fact that the deceased had made arrangements to do a job for Mr Cele on the 19 August is a strong indication, coupled with accused 1's response to W/O Vandayar that the TLB could not be viewed as it would raise suspicions, that the deceased could not have been part of the alleged plan. When it was put to accused 1 that if the deceased was part of the plan to sell the TLB, he would have removed his other items before he handed the TLB keys to him, accused 1 responded that they were going to meet again. However the undisputed evidence, even on his own version, was that he left the whole bunch in the TLB and told the purchasers the key was in the ignition and demanded the money.

[132] There is also merit in Mr *Radyn's* argument that if the deceased was party to the plan he would have warned accused 1 that the TLB was low on fuel, and that as according to accused 1 he had informed the deceased that the delivery was scheduled for 18h00, the deceased would not have only left Mr Jwara's premises after 18h00 and headed off to investigate a prospective job, when it would have taken about 1 hour 40 minutes to get from Mr Jwara's premises to the designated spot.

[133] It was clearly because he appreciated this anomaly that accused 1 refused to acknowledge that he was in a hurry to get to the designated spot, even to the extent that he denied that there had been a firm arrangement that the delivery of the TLB would take place at 18h00 and yet this arrangement was never placed in dispute earlier. He initially alleged that he could not recall that W/O Vandayar testified that he and the accused arranged that the delivery would take place at 18h00 on 18 August 2015. Then he insisted that he and the deceased were going to phone each other about the delivery and became evasive when pressed to admit that the

delivery had been arranged at 18h00 and about details of his arrangements with the deceased. Eventually he admitted that the deceased had other work to do at Nkinini and he was going to wait for the deceased to finish the work. He was evasive about the fact that the quickest route to the designated spot was via the toll road and not the R102. Eventually accused 1 then alleged that the delivery was not going to take place at exactly 18h00; it was going to take place about 18h00 and he was in constant communication with the agents.

[134] Accused 1 also alleged that he and the deceased had agreed on 17 August that they were going to deliver the TLB together. He was going to drive the TLB because he knew the destination and had been in contact with the purchasers. He could not explain why the arrangement was made a day earlier although the deceased only expressed his intention to go to his home on the 18th after he asked accused 1 for money. This was also improbable because the delivery was running late and the deceased was soon going to collect his substantial share of the proceeds of the sale. The deceased already had R1 000 which Mr Jwara paid him, and it was also not put to Ms Blose that the deceased was going to bring some money home.

[135] Accused 1 alleged that he suspected that the unknown men with the deceased killed him for the R10 000 and denied that he fabricated the version of the R10 000 loan in order to create a version of who murdered the deceased. According to accused 1's own version, the plan only involved him and the deceased; and although he was shocked to see the two unknown men with the deceased, but once the deceased said they were his friends, he was satisfied and did not ask who they were or what their names were. According to accused 1 the deceased did not tell him that the men were going to come with him to Louisiana.

[136] Accused 1 alleged that as the deceased did not know the exact spot in Louisiana where they were going to meet, they were going to be in constant communication by cellphone until they reached their destination. When he admitted that it did not happen and the Tazz was driven by the other men, he suggested that the deceased may not have been near his phone, and added that the evidence indicated that the perpetrator had already killed the deceased, and therefore no communication was possible. However he also alleged that he did not attempt to

communicate with the deceased because he was aware that the deceased was coming. On accused 1's own evidence, the deceased did not know where the transaction was to take place. As the accused did not communicate with the deceased who was supposedly in the Turton area about 30 km away, the deceased could not have informed the two men where to meet accused 1 in the large Louisiana area.

[137] Accused 1 suggested that they may have spotted him when they entered the Louisiana area and followed him. When he pulled off, the men told him that the deceased had instructed them to fetch him. However, the version put to the Investigating Officer under cross-examination was that accused 1 stopped the TLB about 200 m away from the training centre. Then the two unknown men arrived in the Tazz and told him that they had been sent by the deceased to check on the money. That is when accused 1 boarded the Tazz and went to the designated spot.

[138] Accused 1 alleged that he was surprised that the deceased was not present and asked them where he was. However, he still did not ask for their names or whether they knew about the planned sale etc because they were the deceased's friends. When asked why he did not phone the deceased as the deceased did not call him or even inform him he was not coming to deliver the TLB, accused 1 responded 'I was rushing to get the money' – which was the first time that he admitted that he was rushing. Accused 1 then alleged that he was going to phone the deceased after he met the purchasers.

[139] Accused 1 alleged that he went in the Tazz with the two men to designated spot because the TLB travelled too slowly and he wanted to check if the purchasers were at the designated spot. Further the purchasers had set up the time for delivery at 18h00 and they wanted to know where he was. Not only did accused 1 contradict his earlier persistence that he was in no hurry, but as he also testified that he was in constant communication with the purchasers, he could have ascertained their location telephonically especially as accused 1 informed W/O Vandayar that he was leaving Umtalume at 18h40.

[140] Accused 1 did not dispute that he left the U-turn meeting point with the TLB at 18h20 and drove until he reached the Umzumbe station. He also did not dispute that as recorded in the Movement Report, he had stopped the TLB between 19h08 and

19h17 (7:08 and 7:17 pm), but he disputed the Investigating Officer's evidence that he had stopped in order to refuel the TLB. He also disputed his own evidence that a driver had flagged him down which is why he stopped at Station Road. Under crossexamination he alleged that he stopped because a person flashed his lights from a car behind him and because he wanted to urinate/relieve himself. He alighted from the TLB with his cellphone and spoke to the man who wanted him to do some work for less than ten minutes. They exchanged numbers and agreed to phone each other. There was no one else present. After the man then left accused 1 went to relieve himself. It was put to the Investigating Officer by Mr *Mtshaka* that accused 1's instructions were that he stopped at Umzumbe to relieve himself and after relieving himself a person approached him to clear his yard. This clear contradiction further undermined the accused's version, as did his following allegation that he could not remember whether he saved the man's number although he had punched the number into his phone. At this stage accused 1 disputed that he was in a hurry to get to the designated spot, as he had informed the purchasers that he was on his way.

[141] Accused 1 also did not dispute that his phone was set on automatic time update and that therefore the phone would automatically generate the time and the date that the video downloaded from his phone was recorded and that the time reflected would be the time when the recording ended. He also did not dispute that the video was on his handset and that it was recorded from 19:13:05 to 19:15:11. But he disputed that he recorded it, and alleged that as there was no proof as to who had activated the location on the phone, he had no knowledge who recorded the video. However he admitted that when he went to relieve himself down the steep, grass bank and into the bushes in the dark, he took his phone with him and there was no one else at the TLB at any time, nor did he see anyone taking a video of the TLB. This begs the question: Who could have taken the video? Not the man who stopped him certainly because he allegedly remained in his car, and the accused had his phone with him even when he went down the bank. Logically it could only have been accused 1 himself because it is evident that while there are two people in the video, the one was refuelling the TLB while the other was holding the cellphone. The only reasonable inference to be drawn from the facts here is that accused 1 was holding the cellphone with the camera light on to enable his companion to see the mouth of the fuel tank, but did not realise that the video function was on and that

their discussion was being recorded. Although counsel for accused 1 and 2 argued that the accused could not be identified by their voices without an expert identification, I have not relied on the voices for the conclusions drawn by this court. I am also duly cogniscent that accused 1's face is not visible.

[142] The written transcript of the discussion, was admitted as Exhibit "CC" by consent. I repeat only relevant and significant portions:
'Voice 1: Did you make sure case guys?

Voice 2: Yes I hit the brain. I hit the head

Voice 1: two

Voice 2: bonus to the stomach';

Laughter

Voice 2: he did not even cry my brother
Voice 1: did you hit three times?
Voice 2: I heard the dogs barking at the boer's place. And I heard them being called out 'hey hey'. Sure case the boer went to check out what was happening'

Voice 1: 'Did you put him in the forest or in the sugarcane plantation

Voice 2: we put him in the sugarcane plantation'.

Voice 1: nothing that can tell me that the person subsequently moved?

Voice 2: 'No ways with a bullet penetrating through his brain? It hit him and he did not even cry at all.

Voice 1: Were there two to the brain?

Voice 2: Hm Hm '

[143] Mr *Radyn* correctly pointed out that the deceased's body was found in the sugar cane field; that Ms Cele testified that the dogs on the property across from the sugar cane field barked after the shots were heard. Taken together with the location of the gunshot wounds sustained by the deceased as recorded in the post-mortem report, the time frame set out in Ms Cele's evidence, and the cellphone records, it is

more than apparent that the discussion was about the shooting of the deceased. It also confirms that although accused 1 was not present when the deceased was shot he was aware that the deceased was to be shot. It was undisputed that accused 1 told W/O Vandayar that he had a firearm, although it is common cause that no firearm was observed or found on accused 1.

After a few more comments the discussion continued:

'Voice 1: Listen guys…listen Rich, your phone has a problem of being busy. I don't trust those people, so when I phone you I have to get hold of you (plural) so that I can keep you on track because you never know, those are Indian people. When I contact you guys, I find the phone busy (plural)

Voice 2: You don't trust them.

Voice 1: I am not sure, I must always be on the lookout you see. Each time I phone you I should be able to get hold of you. Just forget about other things.

Voice 2: fine then. Go now.

Voice 1: No I need to at least get Khaladi's number, because sometimes you are unreachable. I phoned you right now, yet your number is busy, you see.

Voice 1: No Wait Wait I have to. You guys need to take cover over there you see. So I can get to tell you the things you should do and take cover. '

[144] It is apparent from this part of the discussion that it is accused 1 who is complaining to Riche that he cannot get hold of those who are supposed to be assisting him, the one being Riche himself. He then asks for Khaladi's number and tells Riche and Khaladi to take cover and await his instructions. In my view Mr *Radyn* correctly submitted that based on the video footage, accused 1 was the mastermind behind the plot and gave instructions on which his fellow perpetrators acted.
Accused 1's comments about not trusting the Indians whom he did not know and being in communication with them, is consistent with accused 1's testimony that he was in constant contact with the intended purchasers.

[145] At 1.48 minutes of the video, the name Khukanye written in white on the wheel of the TLB is clearly visible. It was indisputable that the TLB that was being

refuelled was the New Holland TLB that had shortly before been in the lawful possession of the deceased. As the cellphone records constitute circumstantial evidence, I have remained mindful that they must be evaluated holistically with the other evidence.

[146] Mr *Radyn* pointed out the following entries as relevant: Within five minutes of accused 1's offer of a New Holland TLB being accepted by W/O Vandayar, accused 1 phoned accused 2, and not the deceased. Mr *Radyn* submitted that it should be inferred that accused 1 phoned accused 2 because he wanted to tell him that the deal was on.

[147] Mr *Radyn* calculated that between the 10th and 16th of August 2015, the number of calls or attempted communications between accused 1 and accused 2 were 7, 10, 6, 4, 6 and 3 respectively. On 17th August before accused 1 met the agents, there was one call and following on the meeting, there were 13 calls. On 18th August, there were 49 calls or SMS's or attempted communications between accused 1 and accused 2. Further, on the 18th, there were communications every few minutes between accused 1 and accused 2 before the TLB arrived at Station Road intersection.

[148] Accused 1 suggested that the calls related to his intended trip to the casino with accused 2, but could not recall what those conversations were about. He admitted that he knew that accused 2 was in the same area although not exactly where but disputed that both of them were at Eugene's Plot at 17:13, which is the time when the video commenced and that accused 2 is the person in the video with him. His denial is highly improbable.

[149] It was put to accused 1 that Sicelo Khuzwayo testified that accused 3 went by the name of Khaladi. He asked for Khaladi's number on the video and four minutes after the video ended, he called that number; Thereafter between 7:19 pm to 8:30 pm, he called that number 15 times and he received two calls from that number. Further when accused 1 left Station Road at 7:17 pm, Khaladi's phone registered the same tower ie Eugene's plot. Accused 1 denied that accused 3 was with him at Station Road or that he phoned him, but he did not deny that the phone with number. [...] was used by accused 3 on 18 August 2015.

[150] In my final evaluation of the conspectus of the evidence in respect of accused 1, I remained mindful of the words of Heher AJA in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139H-140A:

'...The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt.'

[151] By the end of the case for accused 1 I was satisfied that accused 1 was an inveterate liar and that his version was not reasonably possibly true, and fell to be rejected as false, while the evidence pointing towards his guilt was overwhelming. He was the mastermind while his cohorts in the Tazz provided him support and carried out his instructions. I am therefore satisfied that the State has proved its case against accused 1 in respect of both charges beyond a reasonable doubt.

[152] I turn now to an evaluation of the case against accused 2 and his defence. Accused 2 admitted that accused 1 was his best friend and that it was not unusual for them to be in contact regularly. He alleged that 49 calls between them on one day was not unusual. Although there were 13 communications between accused 2 and accused 1 before accused 1 met with the deceased at the U-turn point, accused 2 was vague about their discussions, saying that they spoke about many things, especially as they were going to go to the casino that evening and he was going to Durban the next day. But he offered no cogent reason for that many calls if they were in fact going to meet in a short while.

[153] Accused 2 admitted that he also knew accused 3 well and that he called him regularly on the number .[...]. Although he had spoken to accused 3 for 154 seconds at 9.12.43 on 18 August 2015 he could not remember what they had discussed then or on the many calls that followed on that day until 3.49 pm. Further, although there were no calls between them thereafter, according to accused 3's cellphone records, at 3:55 accused 3 was also in the Port

Shepstone area and at 5:51 he was at Kwabangibizo, where accused 2 himself was. However accused 2 denied Mr *Radyn's* proposition that it could be inferred from the calls and the location of the handsets, that accused 2 and 3 met in Port Shepstone and travelled to Kwabangibizo together to meet accused 1. He also denied that the and accused 3 absconded together to Durban and Inanda after accused 1 was arrested. However accused 2 did not deny that he was at all the locations where his handset was utilised on 18 August 2015, which was at all the locations at which accused 1's phone and the TLB was after 6.00 pm onwards until 20.45 pm and accused 3's phone was from about 7.21 pm onwards until 20.45 pm. He merely alleged he was playing cards and gambling at those locations.

[154] However accused 2 could not give any specific time when he was at a given location or travelling. Except for covering all the base stations in his cellphone records with allegations that there was a gambling location at each area which he visited on 18 August, his evidence was very sparse on other details. Accused 2's alleged confusion about different towers picking up his location was explained by Mr Kanti and Ms Ras: that where there are many towers in proximity to an area and the service radius overlaps, a communication may be transmitted via any one of the towers and not the closest base station to the handset depending on the volume of data being transmitted at a given time. It is for that very reason that cellphone records are considered circumstantial evidence and need to be evaluated together with other evidence. It is also the very reason why the court relied on the CC decision in *S v Molimi* in *S v Ngubane* 2018 JDR 0271. If there is no other evidence but cellphone records of a suspect the authorities are clear: a conviction cannot follow on cellphone records alone. In respect of accused 2 there is much more evidence presented by the State than mere cellphone records.

[155] From 6.29 pm when accused 1 left the U-turn spot and 7.08 pm when he arrived at the stop on Station road, there were five entries in respect of communications between accused 2 and accused 1. Accused 2 denied that the conversations between accused 1 and himself were about the TLB

running low on fuel and that he had to purchase fuel and meet accused 1 at Station road, and that was when he went to the Engen garage in Hibberdene.

[156] It is therefore appropriate to deal with the CCTV footage at the Engen garage and the purchases of three white containers and diesel at the garage. The Investigating Officer's evidence about how he traced the containers he found at Station Road intersection and the purchase of the containers and diesel at the Engen garage were not disputed. Although accused 2 admitted that he was visible in the CCTV footage, he initially disputed that the CCTV footage was correctly dated. But under cross-examination and when faced with the clear depiction of himself on the video inside the shop and on the forecourt, his movements and his use of his cellphone at material times which could be matched with the entries in the cellphone records of himself and accused 1, accused 2 eventually conceded against overwhelming evidence that the footage was correctly dated. There is therefore no need to traverse his evidence about the video jogging his memory about going with Dubha in his white Tazz to buy diesel at 10 pm on 16 August 2015 at the very same garage, which was undoubtedly false. Like his allegations about gambling at the various locations where he was implicated in the offences with which he has been charged, accused 2's version was clearly fabricated to meet the State case. The till slips for the purchases of the containers and diesel also provided corroboration for the date and times- as I have already set out in my ruling on the trial within a trial.

[157] A very significant part of the CCTV footage is the clothing worn by accused 2: In photos 2 and 4 of Exhibit "TT3" there are clear depictions of accused 2 inside the Engen garage shop wearing a dark jacket, blue jeans and a white T-shirt with alphabets IKSILV with a grey line underneath the letters. Accused 2 admitted that he was wearing a dark jacket and a white Quiksilver t-shirt at the Engen garage, which was the conclusion reached by the Investigating Officer. Photo 3 which is a still image taken from the video downloaded from accused 1's phone depicts a person at the TLB wearing a dark jacket and a white t-shirt with half the U and the letters I and K with a grey line underneath. But accused 2 disputed that he appeared in the video.

[158] But when the video recording downloaded from accused 1's cellphone was played in court, it was clearly visible that the person visible in the video filling diesel into the TLB was wearing the same white t-shirt and the dark or black jacket and blue jeans. Accused 2 admitted that the pants that was worn by the person in the video was a navy or dark blue. Therefore the three items of clothing visible in the CCTV footage and the stills from inside the Engen garage shop were the exact 3 items of clothing that the person filling the diesel into the TLB was wearing. Given the time frame of less than 20 minutes between the footage at the garage and the video and the proximity of the location of the garage in Hibberdene and the TLB at Station Road, there is little doubt that the person filling the fuel is accused 2. It is highly improbable that another person wearing the very same clothing is in the video as suggested by accused 2. Further accused 3 bought three containers of diesel. In the video he fills three containers of diesel into the TLB.

[159] It is not necessary to repeat the relevant transcribed conversation between accused 1 and accused 2 at the TLB. Although when Mr *Radyn* put to accused 2 that this was a discussion in which he confirmed shooting the deceased twice in his head and once in his stomach and reassuring accused 1 that the deceased was in fact dead, accused 2 denied he was a party to the discussion, the facts indicate otherwise. The post-mortem report records that the deceased was shot twice in the head and once in the chest, and proven facts indicate that the shooting took place not even an hour before the discussion. Further when asked who accused 1 was referring to when he called him Riche, accused 2 denied that accused 1 called him Riche, saying that he called him Cele. This was never put to accused 1. In fact accused 1 said he had saved accused 2's number under the name Riche although there were many others he knew by the same name. Finally the cellphone records indicate that accused 1's complaint that he tried to get hold of accused 2 several times unsuccessfully appear well founded. On page 11 of Exhibit "U2" from 2.12.47 pm to 6.54.39 pm there are eight call forwarding entries – indicating calls from accused 1 to accused 2 which were not answered. Consequently I am satisfied beyond doubt that the person at the TLB with accused 1 in the video is accused 2.

[160] In *S v Baleka (1)* 1986 (4) SA 192 (T) at 194H, Judge Van Dijkhorst stressed the usefulness of video footage as evidence by stating as follows:

'Having sat through two weeks of video, viewings, I am convinced that the video can be a very helpful tool to arrive at the truth.'

I share in the validity of his comments.

[161] Accused 2 testified he used to be in the Tazz frequently because he was good friends with accused 1 but he denied that he was with accused 3 in the Tazz when it was seen in the Louisiana area or that he had travelled in the Tazz at all on 18 August 2015. He testified in his evidence in chief that he had last seen accused 1 two or three days before the 18th. It was put to the Investigating Officer that accused 2 may have been in the Tazz prior to the 18 August. It was however undisputed that his DNA was found on the handbrake of the Tazz and his fingerprints on the outside. Although the Investigating Officer was criticised for not being a forensic expert when he testified that the DNA of the last person who touched the handbrake would be lifted, Mr Henning corroborated his evidence when he testified that accused 2's DNA was the freshest on the handbrake, which was undisputed. It is common cause that accused 1 drove the Tazz on 17th August and his version was that he had not seen accused 1 on 17 and 18 August. Further the Tazz was seen in Louisiana and at the designated spot. Therefore if accused 2's DNA was the last print on the Tazz, he must have been in the Tazz on 18 August 2015. The undisputed evidence that after the Tazz was found abandoned, the Tazz was secured by W/O Sonnekus. Both W/O Sonnekus and the Investigating Officer testified that W/O Jula of the LCRC took forensic prints without any interference with the Tazz once it was secured, and that the Tazz was moved to the pound on a flatbed. The presence of human blood on the outside of the Tazz, also sustains the inference that the Tazz was the vehicle in which the deceased was taken to the sugar cane plantation and shot by accused 2.

[162] I am therefore satisfied that accused 2's version is not reasonably possibly true, and falls to be rejected as false, while the evidence pointing towards his guilt is overwhelming. He assisted accused 1 to execute the plan to rob the deceased of the TLB and he shot the deceased in the sugar cane field. He also purchased the diesel for the TLB and refuelled the TLB before proceeding to Louisiana to provide accused 1 with further support and to carry out his instructions. I am therefore satisfied that

the State had proved its case against accused 2 in respect of both charges beyond a reasonable doubt.

Accused 3

[163] Accused 3 did not testify nor was any version put to any of the witnesses and specifically the Investigating Officer who testified that he found the cellphone and the sim card that the State associated with the offences, in the possession of the accused. Mr *Mbambo* submitted that the Investigating Officer's evidence did not prove that the handset and relevant sim card was in the possession of accused 3

because although it was found under the pillow in the room in which accused 3 was sleeping with a girlfriend, it was Rica'd under the name of a woman. The argument does not take into consideration that accused 3 did not dispute that it was his phone when he was arrested. The Investigating Officer testified that he was very cooperative and furnished the details required of him without resistance. If the phone was not his or being used by him there was no reason not to have informed the Investigating Officer accordingly. In addition in light of the Investigating Officer's evidence, there is no evidence tendered by the accused under oath denying or disputing the Investigating Officer's evidence that the phone was in accused 3's possession. It is also noteworthy that after accused 3 lost his job as a taxi driver, he remained in the KwaDweshula area, and yet after the abortive sale of the TLB and the Tazz was abandoned, accused 3 went to Inanda where he stayed until his arrest. Accused 2 also travelled to Durban and then to Inanda, like accused 3.

[164] Nor was it disputed when Sicelo Khuzwayo testified that the same number .[...]was the contact number he had for accused 3 on which he contacted him. It was also the number given to him by accused 3 together with the number he had saved for accused 2. Under cross-examination it was not disputed that he spoke to accused 3 on that number. It was only put to him that it had been a very long time since he had communicated with accused 3 on that number. However it was evident from Exhibit "BB" which is an extract of the phone calls between Mr Khuzwayo and accused 3 from Exhibit "U3" that between 10 August – 23 August 2015 there were numerous communications between Mr Khuzwayo and accused 3 on that number.

This together with accused 2's evidence sustains the State allegation that that phone and number was in the possession and used by accused 3 on 18 August 2015.

[165] It is trite that corroboration may be found in the mendacity of an accused. The fact that accused 3 disavowed the use of that number and his communication with Mr Khuzwayo which has been proved to be mendacious and false, immediately raises the question as to why he is dissociating himself from the number. The only reasonable inference to be drawn is that his repudiation of the phone is intended to disassociate himself from the persons he is related to via the cellphone during the course of that day.

[166] Accused 2 confirmed that that is the very same number on which he contacted accused 3 even on 18 August 2015 and accused 1 did not dispute that the number he called was that of Khaladi viz accused 3. Accused 1 and 2 alleged that they knew accused 3 by another name although it was not disputed when Mr Khuzwayo testified that accused 3's nickname was Khaladi. The other relevant facts have already been set out in the s 174 ruling and do not require repeating. Therefore the argument that the phone could have been used by anyone else but accused 3 is without merit and rejected.

[167] It has been reiterated in argument that cellphone records are insufficient to constitute a prima facie case against the accused. However the State did not rely on cellphone records in isolation. The State has proved that accused 1, 2 and 3 knew each other well prior to 18 August 2015. The cellphone records constitute circumstantial evidence that not only did accused 2 and 3 exchange calls before their phones converged at Port Shepstone on the afternoon of 18 August 2015, but that thereafter they were together at Kwabangibizo at material times to the robbery and murder of the deceased. This must be considered together with the evidence that other than when accused 1 was in the Tazz on 18 August 2015, at all material times there were two men in the Tazz, one being accused 2. We also know that at the Engen garage, accused 2 got in and out of the front passenger seat of the Tazz. The driver was not visible.

[168] At the Station Road stop, while the TLB was refuelled by accused 2 – the driver of the Tazz is not visible or heard in the video. But accused 1 is heard

referring to ‘you’ in the plural and to ‘you guys’ – again in the plural, confirming that there were two men in the Tazz. As agreed by Mr *Mbambo* the identity of the second man is in issue. It is trite that identity may be proved by direct or circumstantial evidence. (D T Zeffertt and A P Paizes *The South African Law of Evidence* at 162.) A clear indication of who the second man is, is given towards the end of the discussion between accused 1 and 2 in the video recorded inadvertently by accused 1.

[169] Mr *Mbambo* contended that because accused 3 was not involved in the conversation between accused 1 and accused 2, the discussion was irrelevant and therefore inadmissible for want of relevance.

[170]: s 210 of the CPA provides that Irrelevant evidence inadmissible

‘No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.”

Commentary on CPA – Du Toit Chap 24 at 228 ‘ Meaning of 'relevance’: The relevance of an item of evidence refers to its logical tendency to show or indicate the material fact for which the evidence is offered. In *R v Katz & another* 1946 AD 71 78 Watermeyer CJ approved the following definition by Stephen *Digest of the Law of Evidence* 11 ed (1930) Article 1:

“The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.’”

[171] Therefore the questions relating to relevance may not be resolved by resorting to juridical formulae but rather to reason and common sense. A finding that evidence is logically relevant, on the other hand, does not end the enquiry. It must still be asked whether the evidence is sufficiently relevant to be received.

[172] In *S v Meyer & others* (204/2012) [2017] ZAGPJHC 286 (4 August 2017) para 294 Klein AJ made the point that logically relevant evidence may be:

'disallowed where the evidential value thereof is overshadowed by the danger of (a) unfair prejudice caused thereby, (b) confusion of points in issue and (c) excessive delay, waste of time or unnecessary duplication of evidence'.

In a criminal case, Klein AJ added in para 293:

'the points in issue are demarcated by the extent to which the allegations in the charge sheet are disputed by the plea (as supplemented by a plea explanation)'.

[173] Evidence that proves or disproves such a point in issue is relevant. Moreover, evidence that does not directly prove or controvert a point in issue but tends to do so is, as a rule, admissible.

[174] In my view the conversation recorded on the phone of accused 1 is both logically and sufficiently relevant to be received. The State case is that accused 3 acted in concert with and in common purpose with accused 1 and 2 in perpetrating the offences with which they have been charged. There is undisputed evidence that accused 3's nickname is Khaladi and that he is known to both accused 1 and 2. Accused 2 and Sicelo Khuzwayo also confirmed that the number reflected on the records Exhibit "U3" is the number they contacted him on. Accused 1 and 2 hold the recorded conversation in the midst of the delivery of the TLB of which the deceased was robbed. Accused 1 asks for accused 2 for the number to facilitate communication with accused 2 during the delivery of the TLB to the designated spot and thereafter there are calls between accused 1 and accused 3, and accused 1 and 2. There is no version from accused 3 as he elected to remain silent when he pleaded and he has not denied any of the aforesaid evidence under oath. In my view none of the aforesaid authorities sustain the argument that the conversation between accused 1 and 2 is irrelevant to accused 3.

[175] Mr *Mbambo* further contended that the video constituted a confession and hearsay evidence which was inadmissible against accused 3. While it is correct that s 219 of the CPA provides that '(n)o confession made by any person shall be admissible as evidence against another person', it is necessary first of all to consider whether the video does constitute a confession.

[176] As pointed out in Du Toit *Commentary on the Criminal Procedure Act* ch 24 at 53 there is no statutory definition of a confession in the CPA. It is therefore

necessary to look at the common law. The courts have given the term a very narrow construction so as to restrict the effect of the strict statutory requirements governing its admissibility. In *R v Becker* 1929 AD 167 at 171 De Villiers ACJ concluded that a confession could only mean 'an unequivocal acknowledgement of his guilt, the equivalent of a plea of guilty before a court of law'. It is therefore an extra-curial admission of all the elements of the offence charged. As Wessels J put it in *R v Hans Veren & others* 1918 TPD 218 at 221, the accused must in effect have said 'I am the man who committed the crime'.

[177] Firstly the video is a private discussion between accused 1 and 2, or as described by Mr *Mlambo* himself 'a conversation'. From Mr *Mbambo's* submissions it would appear that he contends that accused 2 confessed to the offences in the conversation with accused 1. But it is apparent that there is no confession. I have set out the contents of the relevant part of the evidence: what accused 2 says is:
'Yes I hit the brain. I hit the head; bonus to the stomach'; he did not even cry my brother; I heard the dogs barking at the boer's place. And I heard them being called out 'hey hey'. Sure case the boer went to check out what was happening' We put him in the sugarcane plantation'. 'No ways with a bullet penetrating through his brain? It hit him and he did not even cry at all.'

[178] Is it possible to call these comments an unequivocal admission of guilt? Will those comments be sufficient to sustain a plea of guilty to the offences with which the accused has been charged? The answers to both questions are an unequivocal no, especially because there is no indication who is accused 2 talking about and when the acts he describes occurred? In my view the comments also do not constitute admissions because extraneous evidence is required to make sense of the statements and place them in context. But more significantly, the statements were not made 'voluntarily' in the sense that neither accused was aware that the conversation was being recorded. The light of the camera was utilised by accused 1 to facilitate the refuelling, not to record their conversation. Had he been aware that this conversation had been recorded and was on his phone there can be little doubt that he would have attempted to delete it before the police discovered it. This inference is based on the fact that when accused 1 was given the phone by the Investigating Officer to make calls, he stealthily removed the sim card. There is no

reason to believe that he would not have deleted an incriminating video. The recording of the conversation can therefore only be described as inadvertent (which is actually involuntary or accidental). This immediately renders the comments of accused 2 and accused 1 neither a confession nor an admission, and renders any argument about its admissibility nugatory.

[179] Nevertheless, it is also apparent from my judgment that the video footage on its own did not establish the guilt of accused 2. Nor did the State argue that it did. That is why the State provided other evidence such as the CCTV footage, the DNA report and the cellphone records.

[180] Secondly since the judgment of the SCA in S *v Litako & others* 2014 (2) SACR 431 (SCA) it is accepted that the courts are now constrained to treat admissions and confessions equally. Navsa and Ponnan JJA held:
'[67] …we are compelled to conclude that our system of criminal justice, underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.'

[181] This correctness of the decision in *Litako* was confirmed by the CC in *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC) paras 37-38. Nevertheless, it may be better, in respect of both ss 219 and 217, to allow a measure of flexibility to deal with the exceptional case where the interests of justice would favour admissibility. The statutory preconditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interests of justice justify its reception. A court making a determination whether it is in the interests of justice to admit hearsay evidence must have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. But in this case the application of s 3 of the Law of Evidence Amendment Act is irrelevant.

[182] In the video only in the latter part of the conversation when accused 2 has finished filling the fuel and is about to replace the fuel cap, does accused 1 complain that he has not been able to get hold of accused 2 all the time, and needs an alternative number – that of Khaladi. The clear inference to be drawn is that Khaladhi

will take his urgent calls and is a viable option when communication with accused 2 fails. The circumstances under which he requires the number are clear – they are all involved in the delivery of the TLB to the designated spot and accused 1 needs to give them instructions. This is corroborated by the calls made to accused 3 shortly after the TLB leaves the Station Road intersection, the first being at 7.19.30 pm, while both were within the Eugene's plot tower which services the Station Road intersection. Thereafter there are several calls between accused 1 and accused 3, as well as between accused 2 and accused 1. The cellphone records also show the movement of the persons with the three handsets together into the Louisiana area. The AVL Movement Report for the TLB shows the TLB took the same route.

[183] In the recorded conversation accused 1 also says 'You guys need to take cover over there you see. So I can get to tell you the things you should do and take cover.' The irresistible and only reasonable inference to be drawn from the calls between accused 1 and accused 3 and accused 2 is that he is doing just that – giving them instructions. It is common cause that accused 1 was picked up by the Tazz and brought to the designated spot to meet with the purchasers. Accused 1 admitted that the Tazz was supposed to pick him after the transaction was completed.

[184] Finally Exhibit "X" provides a clear holistic depiction of the interaction between the three accused. Pages 12 and 13 specifically relate to the period from the time accused 1 obtained accused 3's number.

[185] I have remained mindful as stressed by Nkabinde J in *Molimi t*hat there is no onus on the applicant to prove his innocence. A mere suspicion, strong as it might be, is not adequate to confirm his conviction. But unlike in *Molimi*, I am satisfied that the evidence does amount to a complete mosaic justifying the accused's conviction. I am further mindful that, as held in *Ntsele v S* [1998] 3 All SA 517 (A), while the onus of proof required was that an accused had to be found guilty beyond a reasonable doubt – where the State relies on circumstantial evidence, it is sufficient that the cumulative effect of the evidence before the Court indicates that the accused is guilty beyond a reasonable doubt. In my view, all the circumstantial evidence cumulatively indicates that accused 3 was the other person in the Tazz with accused 2.

[186] While the failure of an accused to testify can never afford corroboration of the evidence led by the State, the constitutional position relating to the election by the accused to remain silent as elucidated in *Osman & another v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC) para 22 *and S v Boesak* 2001 (1) SACR 1 (CC) is relevant. In *Boesak* Langa DP said:

'[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."' (footnotes omitted.)

[187] Therefore a negative inference may be drawn from the accused's silence which does not fall foul of his constitutional right to silence under ss 35(1) (a) or

35(3)(h) of the Constitution. I am satisfied that the State has proved that accused 3 was the third person who participated in the robbery and murder of the deceased with his co-accused, beyond a reasonable doubt.

Common purpose

[188] Where a group of people having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. See C R Snyman *Criminal Law*, 5 ed at 264.

[189] There can be little doubt that the proven facts sustain the finding that the robbery and murder of the deceased was planned and premeditated by accused 1 and 2 that there was a clearly expressed intention to murder the deceased in the recorded conversation. The deceased was also bound hand and feet rendering him helpless when he was shot in the sugar cane field. The cable ties and the firearm had to be brought to the scene by the accused for that specific purpose.

[190] Mr *Mbambo* has contended that the State has failed to prove that accused 3 acted in common purpose with his co-accused – whether in planning the offences or in the execution.

[191] Where premeditation and planning has not been proved it has been held in *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706B that the following must be proved sustain to the finding that the accused and his companion acted in common purpose in robbing the deceased and killing him:

(a) the accused must have been present at the scene where the offence was perpetrated;

(b) he must have been aware of the unlawful act;

(c) he must have intended to make common cause with the perpetrators of the violence;

(d) he must have performed an act of association with the conduct of the others; and

(e) he must have had the requisite mens rea.

[192] There is little doubt that accused 3 associated himself and made common cause in the robbery of the TLB from the deceased. He accompanied accused 2 from Port Shepstone to meet accused 1 at KwaBangibizo and he was present in the Tazz at all material times thereafter. As accused 2 testified that he cannot drive, which was not disputed, accused 3 had to be the driver of the Tazz from the time the deceased was robbed and tied up. Accused 3 then drove the Tazz into the sugar cane plantation where the deceased was shot by accused 2. He remained with accused 2 after the shooting and drove back to Hibberdene and then to Station Road and Louisiana with accused 2 and accused 1 continuing to take an active part in the execution of their plan.

[193] However, before a conviction on the charge of murder can follow, it must be proved that the accused had the necessary mens rea to commit the murder. Such conclusion can only be complete if it is proved that accused 3 knew or foresaw the possibility that, in the execution of the planned robbery the deceased would be killed, and reconciled himself with killing or such possibility and nevertheless continued to participate in the commission of the offences, being reckless to the consequences. (Snyman *Criminal Law* 5 ed at 184). It is very seldom that a court would have direct evidence on what an accused person's specific intention and foresight was at the time of the commission of an offence. More often than not the question as to whether or not an accused person subjectively foresaw a certain possibility is proved by inferential reasoning.

[194] The following quotation from *S v Lungile & another* 1999 (2) SACR 597 (SCA*)* para 17 is instructive in this regard:

'In the present case, the crucial question therefore is whether the State proved beyond reasonable doubt that the first appellant in fact did foresee ("inderdaad voorsien het") that the death of a person could result from the armed robbery in which he participated. In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. Because such reasoning can be misleading, one must be cautious. Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing

that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.'

[195] In this case the participation of accused 3 in the robbery and the subduing of the deceased and then driving the bound man into the isolated plantation where he was shot leads to the inescapable inference that accused 3 was part of the plan to shoot the deceased. Even if he did not know when he participated in the robbery that the deceased was to be killed, his subsequent actions establish that he had the requisite mens rea and reconciled himself to the murder of the deceased.

[196] In the premises it has been established that the three accused acted in concert and in common purpose in the robbery and murder of the deceased. Therefore the conspectus of proven facts brings the commission of the robbery and murder within the ambit of s 51 of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2, as stated in the charges.

Order - all three accused

Count 1: Murder of Menzi Khuzwayo - Guilty and convicted as charged.

Count 2: Robbery with aggravating circumstances: Guilty and convicted as charged.

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