IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case number: CC76/2022P

In the matter between:

THE STATE

and

LINDANI THEOPHILUS HLONGWA **FIRST ACCUSED**

FANELE DLOMO **SECOND ACCUSED**

MLUNGISI INNOCENT BAXTER **THIRD ACCUSED**

Coram: Mossop J
Heard: 2, 3, 4, 5, 6, 11, 12, 16 October 2023
Delivered: 16 October 2023

JUDGMENT

Mossop J:

Introduction

[1] The three accused in this matter faced trial on five counts. Those counts arose out of events that occurred on 15 July 2022 and comprised two counts of

kidnapping, a count of murder, a count of attempted murder and a count of robbery with aggravating circumstances. Each of the accused pleaded not guilty to all counts and each elected to remain silent and offered no plea explanation. Each, furthermore, confirmed that they understood the concept of a minimum sentence and acknowledged that they understood that the State relied upon the minimum sentence legislation embodied in Act 105 of 1997 in respect of the murder count and the count involving robbery with aggravating circumstances.

[2] Before the leading of evidence commenced, the accused were advised by the court to draw to their respective counsel's attention to any aspect of the evidence due to be led with which they did not agree. They were invited to raise their hand to indicate that they wished to speak to their legal representatives when this occurred.

[3] Having referred to legal representatives, it is appropriate to acknowledge that Mr Khathi appeared for the State, Ms Franklin for accused 1, Mr Stuurman for accused 2 and Ms Citera for accused 3. Counsel are all thanked for their assistance.

[4] Before the leading of evidence commenced, an album of photographs was handed up by consent and appropriately marked. After some evidence had been led, formal admissions were made by each accused regarding the identity of the deceased person alleged to have been murdered by the accused, who was a Mr Osama Mohamed Zaky Taha Elbitawu (the deceased), the post-mortem conducted on his body and the finding of the pathologist that conducted that post-mortem.

The evidence adduced by the State

[5] The sequence of evidence led at this trial did not make for an easy understanding of the events in question. In considering the evidence in this judgment, I consequently do not intend dealing with the evidence in the sequence in which it was presented but rather in the sequence that makes the facts more understandable.

[6] Mr Khathi, with the consent of the three legal representatives for the three accused, handed in an affidavit deposed to by a Mr Shaker Samieer (Mr Samieer). Mr Samieer is the complainant in one of the counts of kidnapping, the count of

attempted murder and the count of robbery with aggravating circumstances. He was in the company of the deceased on the evening of 15 July 2022.

[7] Mr Samieer narrated in his statement that at about 17h00 on 15 July 2022 he and the deceased had been travelling in a motor vehicle with registration mark N[...] 8[...] (the Toyota Corolla).[1] Mr Samieer was the passenger and the deceased drove the motor vehicle. They were on their way to a place called Gugulethu. In the area of a cemetery, they were stopped by three African males asking for a lift. While talking to them, a firearm was produced by one of the African males and it was pointed at the deceased. Mr Samieer and the deceased were ordered out of the motor vehicle and were then bundled into its boot. The Toyota Corolla was driven an undisclosed distance and it then stopped. The deceased was ordered out of the boot, and he was summarily shot in the forehead by one of the three African males and died on the scene. Mr Samieer was also ordered out of the boot and was made to lie on the ground. Whilst lying prone, he was stabbed in his back and then shot in his stomach. Believing that his death was imminent, he decided to put up a fight and sprang to his feet and grappled with the person who had shot him and grabbed the firearm. He struggled with his assailant for control of the weapon and managed, at one stage, to get his finger on the trigger. He pulled it. A shot went off. One of the robbers who was not involved in the struggle, and who was standing to the side of the struggle, was shot.

[8] Mr Samieer did not name any of the robbers. That apparently is why the defence consented to the reception of his statement without him being called to testify. But Mr Samieer did record that the person shot by him was the person who had initially produced a weapon when asking for a lift, it being Mr Samieer's understanding that there was only one firearm possessed by the three males. Mr Samieer used the shooting of one of the men to make good his escape from the gang and he found his way to the main road where he was picked up by a motorist and taken to SAPS Greytown.

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[1] The photograph album has a photograph of a number plate of a motor vehicle with the registration mark N[...] 8[...]. The difference in the registration mark referred to by Mr Samieer and that which appears in the photographic album was never explained. I shall assume that Mr Samieer incorrectly narrated the registration mark given the later identification of the owner of the motor vehicle bearing the registration mark N[...] 8[...], referred to later in this judgment.

[9] Mr Samieer made the following unequivocal statement in his affidavit:

‘I can identify all of them.’

[10] Five days after this ordeal, he attended SAPS Greytown and met the investigating officer, Constable Sibongiseni Sibiya (Cst Sibiya), who asked him to identify certain exhibits that had by then been recovered. He was shown, and positively identified, six bed covers, two boxes of pots and ‘four rims’. As regards the latter, his statement specifically records that:

‘I was told that vehicle (sic) was found without tyres.’

[11] As indicated, Mr Samieer was never called to give oral evidence. According to Cst Sibiya, his present whereabouts are unknown. Even those who know him will apparently not disclose his whereabouts. Given his dreadful ordeal, that is, perhaps, understandable.

[12] The statement of Mr Samieer is the only evidence presented that explains the events of the evening of 15 July 2022 and that explains how the deceased met his fate. All the other evidence led by the State related to events that occurred after the murder of the deceased. I remain alert to this fact.

[13] Mr Musawenkosi July Zakwe (Mr Zakwe) was called as a witness by the State, and, at the request of Mr Khathi, I cautioned him in terms of the provisions of section 204 of the Criminal Procedure Act 51 of 1977 (the Act). He was advised that by virtue of the knowledge that he allegedly possessed of the events in question he would be required to answer questions that might incriminate himself. Provided that he answered all such questions truthfully and frankly, he would be indemnified from future prosecution. If he did not answer with the necessary frankness, he would not be so indemnified. He indicated that he understood and agreed to continue with his evidence.

[14] Mr Zakwe testified that he knew all the accused. He worked with accused 1 and accused 2 at a municipality and accused 2 actually lived at the same premises as him, which were situated at a location known as ‘France’ (France). He also knew accused 3 as he was a mechanic that would visit his father’s homestead from time to time.

[15] On 15 July 2022, he testified that he was asked by his mother and his aunt to drive them to church at around 17h00. He was to convey them in his aunt’s motor vehicle which was a small Kia motor vehicle (the aunt’s motor vehicle). He did so, and after having dropped them there, he received a cellular telephone call from accused 3 who requested his assistance. He was told that accused 1 had been shot and was requested to pick him up, together with accused 2 and accused 3, for the purpose of taking accused 1 to hospital. He agreed to assist but before proceeding to pick up the three accused, he first went home and requested both his girlfriend, Ms Amanda Nana (Ms Nana), and his uncle, Mr Musa Mthokoziseni Ndlovu, to come with him as he was scared, was uncertain about what was actually going on and felt that he needed some support. Both agreed to accompany him.

[16] Having picked up his girlfriend and his uncle, Mr Zakwe testified that he drove to a forested area (the plantation) where he finally found the three accused, after initially getting lost and after having made and received telephone calls to and from accused 3 to ascertain their precise location. All the accused got into Mr Zakwe’s aunt’s motor vehicle, and he took them to Ntumjambili Hospital. Upon arrival at the hospital, it was suggested by the accused that it might be preferable if the witness and his girlfriend, Ms Nana, took accused 1 into the hospital for treatment. This they did.

[17] As regards the injury that accused 1 sustained, Mr Zakwe indicated that he was bleeding from a wound below his left breast, in the vicinity of his ribs. After medical examination at the hospital, it appeared that accused 1 would have to be transferred to another hospital due to the seriousness of his wound. After tarrying at the hospital for a while, Mr Zakwe and his companions were ultimately instructed to leave.

[18] Mr Zakwe thereafter asked accused 2 and 3 what had happened that led to the wounding of accused 1 but was informed by them that they would only explain when they were alone with Mr Zakwe. By now it was around 02h00. Accused 2 and accused 3 then directed the witness to the Toyota Corolla, which was parked in the plantation but at a location about 3 kilometres from the spot at which the witness initially uplifted the three accused. There, the witness was requested to transfer bed linen sets (the bed linen) and cooking pots (the pots) from the Toyota Corolla to his aunt's motor vehicle and to take them to his homestead for safekeeping. He and Ms Nana then drove to his homestead and unloaded the bed linen and the pots from the aunt's motor vehicle. Ms Nana then retired to her bed, but Mr Zakwe proceeded back to the plantation to accused 2 and 3, his uncle and the Toyota Corolla.

[19] Upon arriving at the Toyota Corolla, he discovered that its wheels had now been removed and he was then requested to also take the four wheels back to his home, together with the second and third accused and his uncle. He obliged and accused 2 and 3 then went to sleep at Mr Zakwe's father's homestead.

[20] The next morning, Mr Zakwe suggested to accused 2 and 3 that they should think of rewarding Ms Nana for her assistance the previous day by giving her a set of bed linen. They agreed to this. Mr Zakwe also took a set of bed linen for his own purposes. He then inquired from accused 2 and 3 about what was going on. He was told that the items that he had transported the previous night had been taken from a Pakistani man during a robbery and during the robbery a fight had occurred during which accused 1 had been shot and one Pakistani man had been killed and the other Pakistani man had been injured. He professed to be shocked to learn this.

[21] Accused 2 and 3 then left his homestead but Mr Zakwe later called them by cellular telephone and asked them to return and remove the bed linen and the pots that he was storing for them. He advised them that he was no longer prepared to store them as it was now clear to him that they were the proceeds of a crime and their presence at his homestead might cause problems for him. Accused 2 and 3 returned and some debate then ensued about where the items could be removed to and stored. It was proposed by accused 2 and 3 that they be stored at the homestead of the mother of Mr Zakwe's children at Ntembisweni. The mother of his

children is a Ms Sindisiwe Mahlaba. Mr Zakwe indicated that he informed accused 2 and 3 that this would not be possible. But he told them that while he was not prepared to make that request of Ms Mahlaba, they were at liberty to approach her in this regard if they wished to do so.

[22] Mr Zakwe indicated that thereafter the South African Police Services (SAPS) had arrived at his homestead, and he had been arrested. How the SAPS came to know of Mr Zakwe's involvement in the events was never revealed at trial. He explained that in his yard there was an old Opel Corsa motor vehicle that no longer functioned. Accused 2 and 3 had slept in that vehicle. Inside that vehicle the SAPS discovered a pair of trousers with blood stains on them. No further reference to this potential source of evidence was made during the course of the trial. [2]

[23] Mr Musa Ndlovu (Mr Ndlovu), is Mr Zakwe's uncle and is the person who accompanied him and Ms Nana to the plantation on the night of 15 July 2022.[3] His evidence confirmed the evidence of Mr Zakwe in most part. He confirmed that in attempting to locate accused 3 and the other accused they had got lost in the plantation. He confirmed cellular telephone calls between Mr Zakwe and the accused seeking directions to their location. He also confirmed the presence of all three accused in the plantation that night and he confirmed that accused 1 had a gunshot wound.

[24] His evidence, however, differed from the evidence of Mr Zakwe in two significant respects. The first difference was related to transporting accused 1 to the hospital: Mr Zakwe testified that all the accused had gone in his aunt's motor vehicle to the hospital and that Mr Ndlovu had been seated in the rear of the motor vehicle on the lap of accused 3. This was confidently scotched by Mr Ndlovu as being incorrect: only accused 1 had been transported to the hospital and the other two accused had remained in the plantation. He explained that there simply was insufficient room in the vehicle driven by Mr Zakwe to accommodate all the accused, Mr Zakwe, himself and Ms Nana. That sounds probable to me, given the fact that Mr

[2] In argument, Mr Khathi indicated that this was because the results of deoxyribonucleic acid (DNA) testing performed on the blood stains on the trousers had never been received from the Forensic Sciences Laboratory.
[3] Ms Nana was, inexplicably, never called as a witness.

Zakwe's aunt's motor vehicle was not a large motor vehicle. The second difference between his evidence and the evidence of Mr Zakwe manifested when he denied that he had remained in the plantation while Mr Zakwe and Ms Nana transported the bed linen and the pots to Mr Zakwe's homestead. He indicated that he gone home with them and had thereafter remained at home. That, too, sounds probable. There was no reason for Mr Ndlovu to remain in the plantation with accused 2 and 3 while the bed linen and the pots were transported to Mr Zakwe's homestead. It was never suggested to Mr Ndlovu that he was in any way involved in the criminal acts or that he had any particular interest in the matter, nor that he had made any claim to any of the items transferred from the Toyota Corolla to Mr Zakwe's homestead. His presence in the plantation was designed simply to support Mr Zakwe. Upon finding the three accused, Mr Zakwe was co-operative with them and any need for Mr Ndlovu's presence in support of Mr Zakwe became redundant.

[25] Under cross examination, Mr Ndlovu also rebuffed suggestions that accused 2 was not with the other two accused on the night in question and he denied categorically that accused 3 was absent when he, Mr Ndlovu, arrived at the plantation.

[26] The mother of Mr Zakwe's children, Ms Sindisiwe Mahlaba (Ms Mahlaba), was called to testify. She stated that she resided at the Zakwe homestead and had three children by Mr Zakwe. She knew all three of the accused thorough her relationship with the father of her children. She disclosed that she is a sangoma and on a date that she did not remember, and while she was busy with a client, accused 2 and accused 3 had arrived at her homestead and asked her to store some items for them. She asked where the items came from and accused 3 told her that they belonged to him. She was told that the items comprised of pots and pans and bed covers. She was further told by accused 3 that he did not have space to keep the items. Ms Mahlaba agreed to assist, and the items were brought to her home in three trips by accused 2 and 3. The items were placed in her kitchen and accused 2 and accused 3 then left. Ms Mahlaba described the items as comprising 15 bed covers and two boxes of pots, with each box of pots containing 6 pieces.

[27] While she had earlier indicated to accused 2 and 3 that it would not be a problem for them to leave the items at her homestead, later that evening while watching television, Ms Mahlaba described experiencing a feeling that, properly interpreted, caused her to feel that she should not store the items. She then approached Mr Zakwe's sister, Ms Pumelele Zakwe (Ms Zakwe). Ms Zakwe resided at the Bhengu homestead and was asked to take the items from Ms Mahlaba. She agreed to do so.

[28] At some stage, Ms Mahlaba learnt of the arrest of Mr Zakwe. Having visited him at the police station, her home was, in turn, visited by the SAPS who were in search of the bed linen and the pots. She was not at home when they came but she was subsequently located at France. She was requested to present herself to one Capt Hadebe at the Greytown SAPS station the next day, which she did. There, she was advised that the SAPS had recovered the items from Ms Zakwe's residence.

[29] Under cross examination from Ms Franklin, Ms Mahlaba confirmed that she had not known that accused 2 and 3 would be coming to her homestead nor had she spoken to Mr Zakwe before that visit occurred. After accused 2 and 3 had delivered the items and had left, Mr Zakwe had, indeed, telephoned her and asked her to remove the items from her home as their presence could potentially cause him problems. He repeatedly told her to do as he said. She then stated that she asked him if the items were stolen but did not receive an answer to this question.

[30] When faced with Mr Zakwe's version that he had not telephoned her, she disagreed with it. When Mr Stuurman for accused 2 put it to Ms Mahlaba that accused 2 had never been to her house, she replied with an answer that she thereafter regularly employed when answering to a version of the accused being put to her namely: 'That is a huge mistake.' Ms Mahlaba was prepared to accede to Ms Citera's suggestion that it was unusual for accused 2 and 3 to make the request of her that she store the bed linen and the pots for them. When the version of accused 3 was put to her by Ms Citera that he, too, had never come to her home, she replied with her by now standard response that it was 'a huge mistake'. She disputed that she was in cahoots with Mr Zakwe to frame accused 2 and 3.

[31] When re-examined by Mr Khathi, Ms Mahlaba confirmed that there were foreigners in the area selling products like those that she had agreed to store for accused 2 and 3. She confirmed that the bed linen and the pots, and accused 2 and 3, had arrived at her home in Mr Zakwe's aunt's motor vehicle. She also confirmed that the three accused had all visited her home in the past. This was denied on behalf of accused 2 by Mr Stuurman when the defence were given an opportunity to ask further questions arising out of the re-examination of Ms Mahlaba by Mr Khathi.

[32] Ms Pumelele Ntombi Zakwe is the sister of Mr Zakwe. She was called to give evidence that she had stored the bed linen and the pots at the Bhengu residence at the request of Ms Mahlaba. Her evidence was uncontroversial, and she was not cross examined.

[33] Mr Zweleni Zethembe Mathonsi's evidence related to the recovery of the four wheels that were allegedly taken off the Toyota Corolla. He testified that he knew all three accused and that he resided in a rented room in France. He confirmed that Mr Zakwe's home is not far from his rented room. He knew that the wheels were stored at the place where he rented a room but could not say when they had been brought there. The SAPS had arrived at his rented accommodation with a local man called 'Gatsheni' and he was asked where the wheels were. He pointed them out. He had previously been told by accused 2 that he, accused 2, had taken the wheels to that place. He testified that the wheels were replete with rubber tyres when they were seized by the SAPS. When Mr Stuurman disputed on behalf of accused 2 that his client had told Mr Mathonsi that he had taken the wheels to his rented accommodation, this was vehemently disputed by Mr Mathonsi: he asked how he would know this if he had not been told as much by accused 2.

[34] The investigating officer, Cst Sibiya, was called to the witness box. Besides being the investigating officer, he is also the SAPS official that took down the statement of the complainant, Mr Samieer. That statement was taken on 20 July 2022, by which time the bed linen and the pots had been recovered by the SAPS. Mr Samieer was shown the exhibits by Cst Sibiya and identified them as being his and the deceased's property. The identification was effected from the foreign writing on the packaging, which Cst Sibiya described in his evidence as being 'Egyptian' in its

nature and style. Cst Sibiya stated that Mr Samieer identified each of the wheels from a mark appearing on each of them which he, Cst Sibiya, had been told would be found on the rims prior to the identification occurring. Because he was able to identify the exhibits, all of them were returned to Mr Samieer.

[35] Cst Sibiya testified that he went to the scene where the Toyota Corolla was recovered. A registration plate was found there detached from that motor vehicle and it was photographed, and that photograph appears in the photograph album. As stated earlier in this judgment, the registration plate bore the registration mark N[...] 8[...]. The registration plate was traced to a person with an 'Egyptian' name. It transpired that the owner of the Toyota Corolla was the deceased's brother.

[36] Under cross examination, Cst Sibiya indicated that he had taken Mr Samieer's statement with the assistance of a local resident who was fluent both in the language that Mr Samieer spoke and in English.

[37] When considering the photograph album, the court had noted that there were photographs of two debit cards found at the scene where the deceased's body was discovered. Cst Sibiya was not asked by any of the legal representatives to whom those cards belonged. The court asked him that question. His initial answer was that they were of no assistance at all as they were old cards. The court, however, noticed that at least one of the cards had an expiry date of February 2025, and was thus a current card. Cst Sibiya then conceded this to be correct but said, astoundingly, that the cards had not been investigated nor had the holders of those cards been identified. When it was pointed out that the cards could belong to the murderers of the deceased, Cst Sibiya conceded that could be so. However, neither he nor the SAPS had ascertained to whom they belonged.

[38] Cst Sibiya was asked, given the positive statement by Mr Samieer that he would be able to identify the three assailants, whether an identification parade had been held to allow him to do so. He indicated that it had not been held because he allegedly could not find Mr Samieer.

[39] Warrant Officer Nosindiso Theorine Mbaleni (WO Mbaleni) is employed by the SAPS Local Criminal Records Centre and is stationed at SAPS Greytown. She attended the scene and took the photographs that populate the photograph album. She drew the sketch plan that was not for a minute referred to in this trial.

[40] Dealing with the sketch plan, it is a singularly confusing document. It depicts a road running east to west. On land to the south of that road, in a plantation, a motor vehicle is depicted. On the northern side of the road, in a further part of the plantation, several points are depicted, one of which is the point at which the deceased's body was discovered. But the distance from the motor vehicle to the body, which appears in the sketch to be some twenty or thirty metres is, in fact, some 6 kilometres. WO Mbaleni indicated that she wished the sketch plan to depict that while the two points are separated by some considerable distance, they are both contained within the same plantation. That was not apparent upon considering the sketch plan. There are plenty of ways that this could have been demonstrated in a manner that would not be confusing. Regrettably, none of these other methods occurred to WO Mbaleni.

[41] WO Mbaleni confirmed that both the place at which the Toyota Corolla was discovered and the place where the deceased's body was found is within the Greytown jurisdiction and not within the Kranskop jurisdiction, as alleged in certain of the charges in the indictment and in the summary of substantial facts. Mr Khathi, for the State, accordingly, proposed an amendment to counts 3, 4 and 5 of the indictment involving the deletion of the word 'Kranskop' and the substitution therefore of the word 'Greytown' and for the same substitution to be effected to paragraph 5 of the summary of substantial facts. After considering the nature and substance of the amendment sought by the State overnight, counsel for each of the accused consented to such amendment on behalf of their respective clients and the amendment was accordingly granted.

[42] WO Mbaleni confirmed that she had attended the crime scene on the evening of Friday, 15 July 2022 and on Saturday,16 July 2022. She testified that she had, inter alia, dusted for fingerprints at the scene. This fact went unexplored, and no questions were asked about the result of that dusting, so the court broached that

topic. WO Mbaleni said that fingerprints had, indeed, been found and lifted at the scene and that there had been a positive comparative match using that fingerprint. She had, however, not brought any of her charts to demonstrate the match because the investigating officer, Cst Sibiya, had told her that she was not required to give evidence on the fingerprints, only on the photographs that she had taken and on the sketch plan that she had drawn.

[43] WO Mbaleni thereafter left the witness box. The court wanted to get to the bottom of this latest revelation and recalled Cst Sibiya to the witness box. He was asked whether he had instructed WO Mbaleni that she was not to testify on the fingerprint evidence. I confess that I did not truly understand his reply: he seemed to indicate that she had not been present when he initially served the subpoena on her, but he appeared to concede that he had told her not to testify on the fingerprint evidence shortly before she took to the witness box.

[44] While he was recalled to the witness box, the court also asked Cst Sibiya what had happened to the balance of the bed linen: Mr Samieer indicated in his statement that he was called upon to only identify 6 sets of bed linen whereas Ms Mahlaba said that she had received 15 sets into her possession. After consulting the SAP13 register, Cst Sibiya confirmed that the SAPS only had 6 sets of bed linen in their possession. He could not account for the balance. He was also asked to explain what had happened to the tyres of the Toyota Corolla. As will be remembered, Mr Samieer stated that he was told that the Toyota Corolla had been recovered without tyres. He had accordingly been requested to identify the rims of a motor vehicle. Cst Sibiya remained adamant that the tyres were on the rims and thus the allegation in Mr Samieer's statement, which Cst Sibiya himself had taken down, that Mr Samieer had been advised that the motor vehicle was found without tyres remains unexplained. He then left the witness box.

[45] At this juncture, Mr Khathi indicated, with reference to the evidence of WO Mbaleni that she had matched a fingerprint found at the scene with one of the accused, that he would not ask for an adjournment to lead that fingerprint evidence as the Local Criminal Records Centre usually takes 14 days to prepare its evidence and this court would not grant him an adjournment for that length of time. Before this

supposition could be considered, it was then fortuitously discovered that WO Mbaleni was still within the court precincts. She returned to court and promised to have the necessary comparative charts prepared by Tuesday, 10 October 2023. The matter consequently stood adjourned to that date.

[46] True to her word, WO Mbaleni was able to present her evidence on fingerprints found on the Toyota Corolla on Tuesday, 10 October 2023. She testified initially about a fingerprint found on the front edge of the right-hand side of the bonnet of the Toyota Corolla (all references to right or left are references when viewed from the perspective of someone sitting behind the steering wheel). For some reason she did not complete her evidence on this fingerprint but shifted her focus to a palm print located on the back right panel of the Toyota Corolla, above the back right wheel, or at least where the back right wheel could be expected to be found if it had not been removed, as in this case. She found seven points of identification on this palm print when it was compared with a set of fingerprints taken from accused 3. She testified that before she gave her evidence, she had again taken the fingerprints of accused 3 and when she compared that print with the lifted palm print, the identification remained valid.

[47] WO Mbaleni, understandably, was only questioned on this evidence by Ms Citera for accused 3. From this it emerged that accused 3 reaffirmed his presence at the scene and that he had, in fact, driven the Toyota Corolla. It was also established that the palm print on the rear right panel was facing upwards. Ms Citera suggested to the witness that the position of the palm print would be consistent with someone walking past the motor vehicle and losing his balance and touching the motor vehicle. WO Mbaleni disputed that this could be possible as the palm print was located too low down on the panel of the motor vehicle. It was, nonetheless, still put to her that accused 3 had found himself in difficult terrain and had lost his balance and had steadied himself by holding onto the Toyota Corolla. The witness had no comment to this proposition.

[48] After the cross examination of WO Mbaleni, the State closed its case.

Section 174 of the Criminal Procedure Act

[49] Each of the legal representatives then brought brief applications for the discharge of their respective clients in terms of section 174 of the Act. I dismissed all three applications without giving reasons. My reasons now follow.

[50] Section 174 reads as follows:
'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[51] In essence, having heard the basis of the applications, my view was that there was evidence that the accused committed the offences for which they were charged. There was evidence that the two complainants had been accosted by three African males on the evening of 15 July 2022 and had been placed in the boot of the Toyota Corolla in which they were travelling. There were three accused before me. There was evidence that the three accused were found with the Toyota Corolla and there is evidence that the vehicle belonged to the deceased's brother. There was evidence that one of the robbers had later been shot. Accused 1 admitted that he had been shot, albeit in a different incident and at a different location.[4] There was evidence that the bed linen and the pots contained within the Toyota Corolla were taken from that motor vehicle at the behest of accused 2 and 3 and were initially stored at the home of the first State witness, Mr Zakwe. There was evidence that accused 2 and 3 had informed Mr Zakwe that the bed linen and the pots had been taken from two Pakistani men and that in the course thereof, one of the Pakistani men had been killed and the other wounded and accused 1 had been shot. There was further evidence that the next day, 16 July 2022, accused 2 and 3 had been involved in relocating the bed linen and the pots removed from the Toyota Corolla from Mr Zakwe's homestead to the homestead of the mother of Mr Zakwe's children. There was evidence of a palm print left by accused 3 on the Toyota Corolla that placed him squarely at the scene. And, finally, there was the evidence that Mr Samieer had been able to identify the items recovered by the SAPS as being his and the deceased's property.

[4] I shall deal with the version of the accused later in this judgment.

[52] I am aware of the decision of *S v Lubaxa*,[5] where the Supreme Court of Appeal expressed itself as follows:

'[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence.

[19] The right to be discharged at that stage of trials does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ''reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (S10 and S12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self- incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by S10 and S12.'

[53] In *S v Faku and others*,[6] it was held that the words 'no evidence' have on numerous occasions, been interpreted to mean no evidence upon which a reasonable man, acting carefully, may convict. In my view, all of the evidence

[5] *S v Lubaxa* 2001 (2) SACR 703 (SCA) paras 18 and 19.
[6] *S v Faku and others* (2004) 3 ALL SA 501 (CK) at 504 i-j.

mentioned above exceeded the threshold required by the law and called for an explanation from the accused. There was thus evidence upon which a court could convict. The accused were consequently put to their respective defences.

The version of accused 1 and 2

[54] During the trial, the version of each of these accused was put to various State witnesses. Accused 1's version was that he was walking past a petrol station on his own and entered what he described as being a passageway, where two men accosted him and attempted to rob him. He had no money in his possession but did have an old cellular telephone which those robbing him took but then threw it back at him in a derisory manner when they saw how old it was. He was then shot in the chest and when he later came around, he was surrounded by a group of people. Accused 1 asked them to call Mr Zakwe, which they did and he came and picked him up and took him to hospital.

[55] Accused 2's version was that he was not in the company of accused 1 and 3 and at all times was at home at Makhabeleni.

[56] After the dismissal of the accuseds' section 174 applications, accused 1 and accused 2 elected not to give evidence and each closed their respective cases without calling any witnesses who might have been able to support their versions. The consequences of them so doing were discussed with them and they were reminded that whatever had been put to the State witnesses on their behalf did not constitute evidence in their favour. They indicated that they understood this but nonetheless elected to remain silent and call no witnesses. Accused 3, after initially indicating that he, too, would close his case, recanted that decision after this explanation was provided by the court and decided to testify.

[57] As a consequence, the versions of accused 1 and accused 2 may not be considered as they do not constitute evidence in their favour.[7]

Evidence by accused 3

[7] *Maculeko and Others v S* (A16/2010) [2011] ZAWCHC 83 (1 April 2011) para 10.

[58] Mlungisi Innocent Baxter is accused 3 and he testified that he knew both his co-accused. On the evening of 15 July 2022, he had been with accused 2 and they were walking from Greytown to the Mhlalakahle township when they met up with accused 1, who was also on foot. Accused 1 suggested that they go instead to a place named Gugulethu, to which suggestion accused 2 and accused 3 assented.

[59] As they reached the area of a cemetery,[8] accused 1 crossed the road that they were walking on and flagged down a motor vehicle driving in the same direction that they were walking in. It is not disputed by accused 3 that this motor vehicle was the Toyota Corolla driven by the deceased. The Toyota Corolla stopped and accused 1 had a conversation with the driver that accused 3 could not hear. Accused 1 then produced a firearm and pointed it at the driver. The driver and his passenger were forced from the Toyota Corolla by accused 1 and put into its boot. Accused 1 then pointed the firearm in his possession at accused 3 and ordered him to drive the Toyota Corolla. He got into the vehicle and complied with the instruction that he had received. Accused 2 assumed the front left passenger seat and accused 1 sat on the back passenger seat. While so seated, accused 1 pulled down a part of the backrest of the rear seat to allow him to see into the boot and to speak to its occupants, from whom he apparently demanded their cellular telephones.

[60] Accused 1 then instructed accused 3 to drive to the main road to Kranskop, which bears the number ‘R74’. He did so. Accused 1 then told him to drive to Nadi Ngobevu Road, and he again obeyed. At that place he was instructed to stop at an area that he described as being ‘a circle’. By this he meant that there was a clearing in the plantation that took the shape of a circle. The road that the Toyota Corolla was then being driven upon ended at this circle.

[61] Accused 1 alighted from the Toyota Corolla, as did accused 2. Accused 3 switched off the ignition of the motor vehicle and did not alight but remained seated behind the steering wheel. He was instructed to open the boot with a lever from within the motor vehicle and he did so. He saw accused 1 take one of the men out of the boot and lead him into the plantation. This observation was made by accused 3

[8] It will be remembered that Mr Samieer stated in his statement that he and the deceased were on their way to Gugulethu and were stopped by the three men near a cemetery.

looking into the internal rear-view mirror of the Toyota Corolla. He next heard a gunshot and saw the man taken from the boot lying on the ground. Accused 1 came back to the Toyota Corolla and accused 3 pulled the boot release lever again. He offered various reasons for doing this: because he was in a panic, because he was in shock or because the sudden opening of the boot lid was intended to distract accused 1 and act as a diversionary tactic to enable him to make his escape from an intolerable situation. He claimed that he did not want to be connected to the case. Having thus opened the boot lid, he jumped from the Toyota Corolla and ran into the plantation and fled, avoiding the roads within the plantation. He ended up running all the way to France and ultimately made his way to Mr Zakwe's father's home.

[62] Accused 3 denied that he ever went to the home of the mother of Mr Zakwe's children, Ms Mahlaba, and claimed that Mr Zakwe was a liar and Ms Mahlaba was mistaken when they said that he had. He claimed that he could not have telephoned Mr Zakwe as the latter testified he had done because he had sold his cellular telephone to accused 1 and thus did not have a cellular telephone. He also claimed that Mr Zakwe had a motive to falsely incriminate him because he, accused 3, had failed to properly fix Mr Zakwe's motor vehicle which had allegedly broken down again after it had purportedly been fixed by him. He did not dispute the fact that his fingerprints were found on the Toyota Corolla. He claimed, however, that the palm print was found on the rear right panel because he was in shock and that had caused him to hold on to anything to steady himself.

[63] Accused 3 was cross examined at some length by Ms Franklin for accused 1. He was taxed on why he had not run away, if it was his intent to escape the scene, when accused 1 was out of sight in the plantation with the deceased. He first stated that he was in shock. Given the absence of accused 1 this, surely, was the opportune moment to make a dash for it, it was suggested to him? Accused 3's response, inexplicably, was that it did not occur to him. The explanation is strange, given that accused 3 was apparently, on his own version, planning to get away from what was happening yet did not make use of the perfect opportunity to do so. Why would it then not occur to him to escape when accused 1 was not there? He then stated that he did not know where accused 1 had gone because the open boot obscured his view. He then claimed not to have seen the deceased lying on the

ground, but to have seen him actually fall to the ground. He repeated that when accused 1 had returned to the Toyota Corolla he had pulled the boot release lever for a second time to distract accused 1 and to allow him an opportunity to safely escape. He was placed under some pressure by this latter disclosure as according to his version the boot lid was already open as it had obscured his view of events. He simply could not explain how the boot lid had become closed, who closed it or when that had occurred. Indeed, it is in this instance, inexplicable.

[64] Mr Khathi, for the State, later inquired from accused 3 as to whose motor vehicle had not been satisfactorily repaired by him: he suggested to accused 3 that it was Mr Zakwe's father's motor vehicle and not Mr Zakwe's. This elicited the response from accused 3 that it was both their motor vehicle, a hitherto unrevealed fact. Accused 3 confirmed that he had no difficulties with Mr Ndlovu, Mr Zakwe's uncle, who placed him in the plantation with the other two accused on the evening in question. But Mr Ndlovu, nonetheless, was a liar according to accused 3. It was suggested to him that his palm print on the right panel was likely left there when the right rear wheel was removed from the Toyota Corolla. This was denied and accused 3 indicated that it was left there when he ran away. It was then put to him that he would have run in the opposite direction, that is, away from accused 1 who was at the rear of the motor vehicle closest to the boot, and therefore away from the rear of the Toyota Corolla, when making his alleged escape. The logic of the proposition appeared to be undeniable.

[65] The court asked accused 3 to clarify certain aspects of his evidence. He had indicated during his cross examination that accused 1 and the man that had been removed from the boot had disappeared from his view. He was asked how he had then seen the man fall to the ground after hearing the gunshot if they were not in view. He explained again that he had used the internal rear-view mirror to make some observations but that his observations had been obscured by the open boot lid. He had continued to make further observations using the left and right external wing mirrors attached to the Toyota Corolla. He was asked to consider photographs 22 and 23 in the photograph album and was asked to point out the external wing mirrors. He could not do so as there were none to be observed on the Toyota Corolla. To be entirely fair to accused 3, there was no driver's door on the Toyota

Corolla,[9] and it is possible that a wing mirror could have been attached to the missing door but there certainly was no wing mirror attached to the left front passenger door. Accused 3 was also asked to explain why, if he had fled the scene, Mr Samieer would state that 'they' had helped to put the wounded person into the Toyota Corolla because there would then only be a single person remaining to do so (accused 3 having allegedly fled the scene and accused 1 being the person who was shot). The description would be that 'he' put the wounded person into the Toyota Corolla and not that 'they' did so. The use of the word 'they' implied that there had been more than one person assisting the injured person. Accused 3 indicated that he could not say how many people Mr Samieer had seen. It was pointed out that this answer did not address the question but there was subsequently no better answer forthcoming from accused 3.

[66] Accused 3 then closed his case and the matter stood down for argument the following day, Wednesday, 11 October 2023. On that day, Ms Citera telephoned my registrar and informed her that she was ill. The matter was then rolled to the next day.

Argument

[67] When the matter was argued the next day, Mr Khathi called for the conviction of the accused on all charges. The legal representatives for the three accused called for the acquittal of their respective clients on all counts.

Analysis of the evidence

[68] The first point to be acknowledged in this regard is that no oral evidence was led by the State of what befell the deceased and Mr Samieer. While the deceased obviously could not testify, Mr Samieer could, but did not, for the reason previously mentioned. The only explanation for what happened, excluding for a moment the evidence of accused 3, came from Mr Samieer's statement and from Mr Zakwe's evidence but the latter involved a version that accused 2 and 3 disclosed to Mr Zakwe. The statement that Mr Samieer made was handed in by consent, but I caution myself that what is stated therein has not been tested by cross examination.

[9] The Toyota Corolla was discovered without the driver's door and the investigating officer was never able to discover its whereabouts.

The second point is that there is no forensic evidence linking accused 1 and 2 to the commission of the offences. In addition, the firearm used to kill the deceased was never recovered by the SAPS in their generally woeful investigation of the matter. I shall have more to say about the investigation at the end of this judgment. There is, however, forensic evidence in respect of accused 3 which establishes his presence.

[69] The fact that there is no direct eyewitness testimony is unusual but not fatal to the State's case. The State requires inferences to be drawn from the facts that it has established to convict the accused. When reasoning by inference, the test postulated in the well-known matter of *R v Blom*[10] must be applied, namely that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The proved facts should be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.[11]

[70] Facts may be classified either as primary in the sense that they are directly established by the evidence or secondary in that they are established by way of inference from the primary facts.[12]

[71] The principal witness for the State was Mr Zakwe. He is the person who ostensibly had inside knowledge of what had occurred on 15 July 2022. That knowledge necessitated him being warned in terms of the provisions of section 204 of the Act. He was clearly involved in the events, but only after the fact.

[72] Mr Zakwe presented himself as being a confident witness, sure of his facts when led by Mr Khathi for the State. He initially impressed me. He was sure of what he said, and he did not hesitate in providing his answers. There was nothing about his demeanour to attract doubt about what he was saying. That confidence was dented somewhat by his cross examination by Ms Franklin for accused 1. She utilised the statement that he had deposed to when becoming a State witness to

[10] *R v Blom* 1939 AD 188.
[11] Ibid, pages 202-203.
[12] *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) 602A-B.

cross examine him. Differences emerged when the content of that statement was compared to his oral evidence.

[73] I remain mindful of the fact that witness statements are often recorded in a slap dash fashion by the SAPS official tasked with taking them down. Statements taken from witnesses by the SAPS are notoriously lacking in detail and are often inaccurate and incomplete and:

'… not taken with the degree of care, accuracy and completeness which is desirable. . .'[13]

It is very common for differences to arise between a written statement made by a witness some time ago and the oral evidence of that the witness subsequently given at a later trial. Comparing the oral evidence of a witness against an earlier extra curial written statement made by that witness is a legitimate method of cross-examination and is regularly employed by defence counsel in criminal trials. Where a difference is perceived to exist between the two versions, however slight that difference may be, it is seized upon and exploited to its maximum benefit.[14]

[74] In *S v Mahlangu and another*, the court noted that:

'[t]here will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was unsatisfactory or untruthful'.[15]

I agree with that statement. The court will in the final analysis consider the evidence as a whole to determine in what respects the witness's evidence may be accepted and in what respects it should be rejected. The test is whether the differences were material:[16]

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[13] *S v Xaba* 1983 (3) SA 717 (A) at 730B-C.
[14] *S v Govender and others* 2006 (1) SACR 322 (E) at 326c-j.
[15] *S v Mahlangu and another* [2012] ZAGPJHC 114.
[16] *S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE) at 437E-F; *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593E.

‘always bearing in mind that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement’.[17]

Deviations which are not material will accordingly not discredit the witness. In *S v Mafaladiso en Andere*,[18] the court held that the final task of the judge is to weigh up the previous statement against viva voce evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth has been told, despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.

[75] There were undoubtedly differences between Mr Zakwe’s written statement and his oral evidence. Some differences were relatively minor: In his evidence in chief, Mr Zakwe indicated that accused 1 lived in the general area of France and not at his, Mr Zakwe’s, homestead. Under cross examination, however, he asserted that accused 1 actually lived at his homestead. The court had specifically canvassed this with him in his evidence in chief and the answer that he now gave was contrary to the answer that he initially gave. He also contradicted himself on whether he received the cellular telephone call from accused 3 requesting assistance before or after taking his mother and aunt to church. But these are, in truth, not deviations of any great moment or significance.

[76] There were other differences in his evidence that were slightly more significant. In his written statement he recorded that after taking the bed linen and pots home with his girlfriend, he had then obtained food for accused 2 and 3 (bread and polony) and had returned to the plantation with a set of spanners to give them to assist them in stripping the Toyota Corolla. This was a version not advanced at all in his oral evidence and exists only in his written statement. Mr Zakwe claimed that he had not said this to the policeman who recorded his statement and if it was in his statement then it was incorrectly included. Well, it was in his statement, which was handed up as an exhibit. It is difficult to understand how this could have occurred as Mr Zakwe confirmed that his statement had been read back to him and that he had

[17] *S v Mahlangu and another*, supra.
[18] *S v Mafaladiso en andere* supra.

signed it as being correct. When confronted further with this and other differences, Mr Zakwe lapsed into silence and ultimately said that he had no response to make.

[77] Mr Zakwe further mentioned in his written statement that accused 2 and 3 had used his aunt's motor vehicle to transport the bed linen and pots to the homestead of Ms Mahlaba, a transaction that was never previously mentioned by him in his oral evidence. That this is what did occur was, however, confirmed by the evidence of Ms Mahlaba.

[78] Mr Zakwe's version in his evidence in chief had resolutely been that he only found out on 16 July 2022, the day after he assisted the three accused in the plantation, how they came to be in possession of the Toyota Corolla and the bed linen and the pots and how accused 1 came to be shot. That, to my mind defied belief and the innate inquisitiveness of human nature. The court consequently asked him why, after having been dragged from his routine to attend upon the accused at night in a plantation which was a 20-to-30-minute drive from his homestead, he did not ask immediately how accused 1 came to be injured when he arrived at the place where the accused were. Was he not inquisitive? He claimed that he did ask this but was fobbed off by the other accused. It seemed improbable to me that he would not have insisted on being told what had happened. After all, he had roused his girlfriend and uncle to travel with him because he was not sure of what was going on. Surely, he would demand to know what was going on?

[79] Mr Zakwe's written statement gives a far more probable version of what must have happened. In that statement, he records that upon arriving at the plantation and seeing the injured accused 1 lying on the ground:

'I asked them how he injured (sic) and Mlungisi answered me that he had been shot by the Pakistanians (foreigner) while they were robbing. I asked what they got from that Pakistanians and [illegible] answered me that they got the car of the Pakistanian'.

That seems to me to be a far more likely scenario. Mr Zakwe would surely have wanted to know what had occasioned the necessity for him to proceed to the plantation on that night and what had happened to his friend.

[80] Thus, according to his written statement, Mr Zakwe knew from the outset what he was dealing with. It is, however, troubling that he would not acknowledge this to be the case when he testified. He may have believed that the version he advanced at the trial of the accused would assist him in avoiding prosecution for his involvement in the matter in the sense that the version advanced in his oral testimony would present him in a more favourable, and less complicit, light. If that is what he thought, then it is apparent that he did not truly understand the warning that he was given. To be indemnified, he would have to admit all his own criminal wrongdoing and not advance a sanitised version thereof.

[81] It has not been suggested at all that Mr Zakwe was involved in the kidnapping or the subsequent misfortunes that befell the deceased and Mr Samieer. I must accordingly accept that to be the case. But it is undeniable that he very readily joined in when dealing with the stolen goods, a fact that even he was ultimately compelled to admit.

[82] While his evidence is not free from criticism, there is sufficient consanguinity between his written statement and his oral evidence. Both versions have the same essential features and, in their core, narrate the same story: the perpetrators of the crimes committed against the deceased and Mr Samieer were the three accused. I am therefore satisfied that Mr Zakwe generally answered frankly and honestly. I intend, after some consideration and reflection, to grant Mr Zakwe the indemnity contemplated by section 204 of the Act at the conclusion of this judgment.

[83] While the evidence of Mr Zakwe is open to criticism for its deviations from his written statement, the same cannot be said of the evidence of his uncle, Mr Ndlovu's evidence. A slight man who appears older than his 43 years, he gave a simple explanation of what occurred and could not be made to recant that version. Indeed, he very often agreed with the defence version, particularly when cross examined by Ms Citera for accused 3. But his version differed in some respects to that of Mr Zakwe, as previously stated.

[84] I have no doubt that Mr Ndlovu was a thoroughly honest, sensible and uncomplicated witness who did not hesitate in answering questions. In short, he was in his simplicity an impressive presence in the witness box. Where there are differences between his evidence and the evidence of Mr Zakwe, I prefer his version. That does not, in the final result, detract from the thrust of Mr Zakwe's evidence or permit it to be discarded.

[85] Mr Ndlovu's evidence indelibly established that the three accused were together on the evening of 15 July 2022 and dispelled any notion that accused 2 was not there and that accused 3 had left the other two accused. He found all three of them in the plantation. That is what Mr Zakwe also stated in his evidence.

[86] The only controversial aspect of the other evidence presented in the State's case was the evidence of Ms Mahlaba and Mr Mathonsi. The controversy over their evidence was the fact that each of them implicated some of the accused in the events that occurred after 15 July 2022. Ms Mahlaba was a feisty, confident witness, who impressed with her forthright attitude. She testified that both accused 2 and 3 associated themselves with the items later identified by Mr Samieer as being his and the deceased's property. The denial by accused 2 that he ever went to Ms Mahlaba's homestead may be dismissed by virtue of the fact that he was not prepared to make that denial under oath. His denial of the evidence of Mr Mathonsi that he had taken the stolen wheels of the Toyota Corolla to the witnesses rented accommodation must suffer the same fate for the same reason. Indeed, it must be mentioned that when accused 2's version that he had not taken the wheels to Mr Mathonsi's rented accommodation was put to Mr Mathonsi he, Mr Mathonsi, was visibly angry that it was indirectly being suggested that he was not being truthful. I found both Ms Mahlaba and Mr Mathonsi to be fair witnesses.

[87] The State presented no direct evidence of the individual roles played by each accused but has sought their conviction based on inferential reasoning. Mr Samieer indicated in his statement that he and the deceased had set off for Gugulethu at 17h00. At that very time, Mr Zakwe was dropping off his mother and aunt at church. Soon after he had delivered them, he received the cellular telephone call from accused 3. Mr Samieer narrated that he and the deceased were stopped by three

African men. On trial before me are three African men. It is a fact that accused 1 suffered a gunshot wound to the chest – he has admitted as much. Mr Samieer describes in his statement that he shot one of the persons who had stopped him and the deceased. It is a fact that accused 1, together with accused 2 and 3, were found by Mr Zakwe and Mr Ndlovu in the plantation shortly after 17h00 after being summoned there by accused 3. When Mr Ndlovu made his observations in the plantation, he saw the Toyota Corolla that was later revealed to belong to the deceased's brother. All of this coalesces into a formidable body of evidence from which it is possible to infer that the three accused were the three men who stopped the deceased and shot and killed the deceased. The alternative to this is that there must have been a second gang of three men at loose in the area between Greytown and Kranskop that night, one of whom was also wounded by a bullet. The possibility of this alternative scenario occurring is virtually non-existent. Accused 1 and 2 chose not to attempt to rebut these facts. Accused 3, on the other hand, essentially, confirmed all these facts but sought to minimise his involvement in those criminal events.

[88] What, if anything, is to be made of the failure of accused 1 and accused 2 to testify? In *S v Boesak*[19] the Constitutional Court held as follows:

'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 & 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

[19] *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

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."'

[89] In *Mahlalela v S*, [20] Dlodlo AJA stated the following:

'I agree that where a prima facie case is proved against an accused person in a case built and resting upon circumstantial evidence to which a reply from an accused would be expected, the fact that the accused elects not to reply may be a factor which, together with other factors in the case, leads to an inference of guilt. However, the weight to be attached to the accused's silence depends on the facts of the particular case.'

[90] An explanation was required from accused 1 about how he came to sustain his injury, but none was forthcoming. This is a factor that must be placed in the scales when weighing up his guilt or innocence.

[91] The position as regards accused 3 is somewhat different. His exculpatory version put to witnesses by his legal representative cannot simply be ignored because he did testify under oath. His evidence must be carefully considered. If it is reasonably possibly true, then he stands to be acquitted.[21] The fact that he did testify is, perhaps, understandable: after all, he is the only one of the three accused who is identified by objective evidence as being at the Toyota Corolla. He has an incentive to try and explain why there is such evidence and why the court should not infer therefrom that he was complicit in the events under consideration.

[92] Accused 3's explanation is simple. He admits that he and the other two accused were together, and he admits being present when the deceased and Mr

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[20] *Mahlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016) para 16.
[21] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-G.

Samieer were stopped in their motor vehicle. He also observed the execution of the deceased by accused 1, for that, in truth, is what it was. His version appears to be that he did not know that accused 1 possessed a firearm or that he intended stopping the Toyota Corolla or that the firearm would be used to shoot the deceased and Mr Samieer. But it must be borne in mind immediately that Mr Samieer stated that there was only one firearm and the person that he, Mr Samieer, managed to shoot while wrestling with another man for control of the firearm was the person who originally had the gun when their motor vehicle was stopped. The accused were thus willing to share the firearm and to use it if necessary.

[93] Accused 3 thus appears to deny that there was any common purpose, which the State relies upon to convict all the accused. Count 3 of the indictment, being the count of murder of the deceased, specifically draws the accuseds attention to the fact that:

'the murder was planned or premeditated and/or committed by a group of persons acting in furtherance of common purpose.'

[94] Common purpose is:

'… a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim.'[22]

A common purpose may come about by prior agreement between those involved or it may come about on an impulse without prior consultation or agreement.[23] If there is such a prior agreement, there is seldom evidence that may be led of such agreement. Courts are usually asked to infer the existence of such common purpose from the proven facts.

[95] It is not in dispute that the accused all knew each other: the issue is whether they were all together on the evening of 15 July 2022. According to accused 3, he and accused 2 were on their way to Mhlalakahle to drink. After meeting up with

[22] *S v Motaung and Others* 1990 (4) SA 485 (A) 509A.
[23] *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A) 96e-f.

accused 1 they were prepared to change their plans and join him and go to Gugulethu. There clearly thus was a good relationship between the three of them. In those circumstances, how likely is it that accused 1 would suddenly embark upon a series of criminal acts without having informed his companions of his intentions? In my view, the likelihood of that occurring is negligible. One minute, they were discussing where to drink and the next minute accused 1 has conceived of, and implemented, a murderous plot to rob the deceased and Mr Samieer without discussing this with his companions. Indeed, it goes beyond that, if accused 3 is to be believed, in that accused 1 threatened to kill accused 3, a person with whom he was quite prepared to go drinking with, if he did not participate in accused 1's suddenly developed scheme. Such Jekyll and Hyde transformations may occur in the theatre but are seldom found in everyday life, and I do not accept that it happened in this instance. Remarkably, in accused 1's version no threats are made against accused 2 by accused 1. The only threats made by accused 1 are directed at him.

[96] The narration by accused 3 of how the deceased met his fate accords broadly with what was stated by Mr Samieer in his written statement. Accused 3's version is simply too contrived to possibly be true. His clamant desire to extricate himself from the events in the plantation have all the hallmarks of a defence thought up after the fact. That his explanation of what he did in the plantation is false is amply demonstrated by the alleged release by him of the boot lid of the Toyota Corolla as a diversionary tactic when, on his version, it had remained open and was thus still open when he allegedly pulled the boot lid release lever within the Toyota Corolla a second time. That he had not fled from the plantation is confirmed by the evidence of Mr Ndlovu, who I have already found to be a reliable witness.

[97] Accused 3's explanations of how the palm print came to be on the Toyota Corolla smacks of recent invention and is self-serving. There was not a single explanation, but multiple explanations: He steadied himself because of the difficult terrain, he steadied himself due to shock and he touched the Toyota Corolla as he fled from accused 1 and the scene. In advancing the last version, he clearly did not consider that for that to have occurred he would have to be running towards accused 1 and not away from him. The fact that the palm print was facing upwards and not

downwards also does not accord with accused 3's version. By far the most likely explanation for the presence of the palm print, given its location and orientation, is that put to accused 3 by Mr Khathi: it was left there when the right rear wheel was removed from the Toyota Corolla.

[98] That being the case, the palm print would have to have been left there after accused 1 had been taken to hospital and after Mr Zakwe had taken the bed linen and the pots back to his homestead as it is only upon his return to the plantation that he observed that the wheels had been removed from the Toyota Corolla.

[99] Accused 3's version was that he had fled immediately after the shooting. That cannot be so. The presence of his palm print testifies to his presence at the Toyota Corolla long after he claims to have fled.

[100] A further factor to be considered was the demeanour of accused 3 in the witness box. Throughout his stay there he persistently looked downwards at the floor. He made no attempt to make eye contact with whomever was addressing him. His demeanour was unsatisfactory and did not generate any confidence in the veracity of what he said.

[101] In the circumstances, I do not accept accused 3's version of events where it is at variance with the oral evidence of Mr Zakwe or Mr Ndlovu or, for that matter, where it differs from what Mr Samieer narrated in his statement. That means that I do not accept that he acted under any form of compulsion or that he withdrew from the crime scene and disassociated himself from the activities of his co-accused.

[102] It seems to me that the accused may well have fortuitously met up with each other on the day in question but what happened thereafter is not ascribable simply to the rogue behaviour of accused 1. The common purpose may well have arisen by impulse and without any prior plotting and planning but it surely did arise and when it did, it involved all three of them. As evidence of that, they collectively acted in furtherance of their purpose by proceeding to a relatively isolated area where an attempt was made to rid themselves of any persons who could possibly identify them. Even when that went wrong and one of those persons escaped after accused

1 was shot, they remained together and sought the assistance of Mr Zakwe. Accused 2 and 3 continued their conduct in furtherance of the common purpose the next day when they attended to the transfer and preservation of the spoils of their conduct the previous evening. In so doing, accused 3, in particular, did not demonstrate a desire not to be associated with his co-accused, as he claimed in his evidence. To the contrary, he associated himself fully with the hiding of the bed linen and the pots. Such conduct is not consistent with the version that he advanced that he was only present due to being compelled to participate by accused 1. Accused 1, of course, was no longer present because of his wound.

[103] In *R v De Villiers*,[24] the court remarked as follows when considering the task of a court when assessing the guilt or innocence of an accused person:

'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.'

[104] In *S v Chabalala*,[25] the Supreme Court of Appeal stated that the correct approach is:

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

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[24] *R v De Villiers* 1944 AD 493 at 508-9.
[25] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[105] I am satisfied that the evidence as a whole permits the inference sought by the State to be drawn that the accused were the persons who set upon the deceased and Mr Samieer. No acceptable explanation to negate the drawing of that inference has been offered by accused 1 and 2 and the explanation proffered by accused 3 to the extent that it attempts to minimise his knowledge and actions is also false. I find the evidence indicative of the involvement of all three of the accused and, ultimately, the guilt of all three accused. All three accused set out on a criminal enterprise that involved at least one firearm and they must have appreciated that at some stage it might be necessary to use that firearm to achieve their purpose. They clearly reconciled themselves with this possibility.

[106] I accordingly find that on 15 July 2022 the three accused, acting with common purpose, kidnapped[26] the deceased and Mr Samieer by placing them in the boot of their motor vehicle against their will and thereby deprived them of their liberty, that they robbed them of their private property and later murdered the former and attempted to do the same to the latter. They stand therefore to be convicted on all the charges that they face.

The SAPS investigation

[107] Finally, and regrettably, something needs to be said about the investigation of this matter and the conduct of the investigating officer. This matter has not been a good example of how criminal offences should be investigated. To be blunt, the matter has been poorly investigated and presented. Obvious clues have not been pursued by the SAPS and false explanations have been provided for why this was not done. I allude here, in particular, to the explanation offered by the investigating officer that the debit cards found at the scene were old and would have been of no assistance to the SAPS. Between the date of the investigating officer's evidence and the closure of the State case there was an opportunity for this vital investigation to occur. It did not.

[26] In our law, kidnapping is defined as 'the unlawful, intentional deprivation of a person's freedom of movement'. The two key elements of kidnapping are the unlawful deprivation of the freedom of the individual. The use of force or duress is not an element of the offence: see *Ntuli and Another v S* (2858/2017) [2021] ZAGPPHC 149 (10 March 2021) para 30.

[108] There was also evidence of fingerprints linking one of the accused to the Toyota Corolla. The State, according to Mr Khathi, apparently did not know of the existence of this evidence and was content to close its case without leading it even when it found out about the existence of this evidence. It was only through good fortune and not good planning that such evidence came to be led.

[109] In addition, Mr Zakwe testified about the SAPS finding blood-stained trousers in the defunct Opel Corsa parked in his yard in which accused 2 and 3 had allegedly slept. The results of the testing of those trousers were never presented to the court.

[110] The overall impression was that the investigating officer had no interest whatsoever in investigating the matter. He attended the scene and walked WO Mbaleni through the crime scene. He would have known therefore that she had dusted for fingerprints. He appears to have shown no interest in following up with her regarding any possible matches. He also seems to have taken no steps to expedite the analysis of the blood stained trousers from the Forensic Sciences Laboratory. I need say nothing further about the debit cards.

[111] Viewed dispassionately, it appears that the investigating officer was shielding the accused and had deliberately refrained from fully investigating the matter. It is totally unacceptable that evidence that may implicate persons in the commission of extremely serious offences is not presented to a court tasked with trying that offence. In fact, it is disgraceful that this should have occurred and that it is now necessary for this court to have to offer up this criticism.

[112] I pointed out to Cst Sibiya that when the facts pertaining to the fingerprints are viewed in conjunction with the debit cards that were not investigated and the identification parade that was not held, it appeared that he was not intent on assisting the State in properly investigating the matter and presenting its strongest version of events to the court. He denied this. But his conduct and these unattended to issues leaves the impression that he has not intent on performing his duties for some reason that is not clear to me. I leave that to others to investigate and consider.

Conclusion

[113] I accordingly:

(a) Find each accused guilty on counts 1 to 5.

(b) Direct that in terms of the provisions of section 204(2) of the Criminal Procedure Act 51 of 1977, the State witness, Mr Musawenkosi July Zakwe, is discharged from future prosecution on any charges arising out of the kidnapping of Mr Osama Mohamed Zaky Taha Elbitawu and Mr Shaker Samieer, the murder of Mr Elbitawu and the attempted murder of Mr Samieer and the robbery of both men on 15 July 2022.

(c) Direct that the Registrar of this court send a copy of this judgment to Brigadier A Holby, the head of SAPS detective services in KwaZulu-Natal, and whose offices are situated at C. R. Swart Square, Durban, to investigate and consider the conduct of the investigating officer, Constable Sibongiseni Sibiya of the detective branch of SAPS Greytown.

MOSSOP J

APPEARANCES

Counsel for the State	:	Mr J Khathi
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Counsel for accused 1	:	Ms D S Franklin
Instructed by	:	Legal Aid

		Pietermaritzburg
Counsel for accused 2	:	Mr R Stuurman
Instructed by	:	Legal Aid Pietermaritzburg
Counsel for accused 3	:	Ms T M Citera
Instructed by	:	Legal Aid Pietermaritzburg
Dates of trial	:	2, 3, 4, 5, 6, 11, 12, 16 October 2023
Date of Judgment	:	16 October 2023