

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASENUMBER:

SS93/2008

5 DATE:

10 MARCH 2010

In the matter between:

THE STATE

10 versus

1. MTHETHELELI GONI2. LELETHU MAGOQOZA

15

JUDGMENTLOUW, J:

The accused in this matter have been charged on six counts.

The first count is robbery with aggravating circumstances, the allegation being that on the 30 September 2006 they robbed
20 Nolobabalo Kokolo and Yamkaleni Kokolo of a DVD player, cash and keys.

Counts 2 and 3 are counts of murder and it is alleged that on the same day and at the same place the accused murdered the
25 abovementioned two persons.

Count 4 is an attempted murder, it is being alleged that the accused attempted to murder Xolani Apleni on the same day and at the same place.

5 Count 5 and 6 relate to the unlawful possession of firearms and ammunition, it being alleged that on the same day and at the same place the accused were in the unlawful possession of firearms and ammunition.

10 The charge sheet also mentions that the provisions of Section 51 of Act 105 of 1997 are applicable to the charges of robbery and of murder. The accused who are represented by Legal Aid counsel pleaded not guilty to all the charges. They both chose to exercise their right to remain silent and they did not provide
15 any plea explanation.

The charges relate to an incident which occurred at approximately 9 p.m. on Saturday night the 30 September 2006 at the home of Ms Tokozile Kokolo. She gave evidence on
20 behalf of the State and explained that she and her family lived at a house at No. 173 J Nontulo Street, New Crossroads, Guguletu. Tokozile Kokolo left her home earlier that evening to visit her boyfriend who lives in Philippi. Among the persons who were at home in her absence were her five year old
25 daughter, Yamkelani Kokolo and her 15 year old sister,

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Nolobabalo Kokolo and a relation, the 10 year old Bomikazi Kokolo. Bomikazi was called by the court in terms of Section 186 of the Criminal Procedure Act to give evidence after the State and the accused had closes their cases. She was born
5 on the 9 June 1996 and was 13 years and 9 months old when she gave evidence. She is presently in Grade 7 and after hearing the evidence of her father, Mr Isaac Dambili Gagula, I ruled that she give evidence with the assistance of an intermediary, Ms Linda Dwangu. She gave evidence through
10 close circuit television in terms of the provisions of Section 158 and 170A of the Criminal Procedure Act. Her evidence was not challenged at all and she impressed us as an intelligent and confident young person. Despite the traumatic events of the 30 September 2006 she impressed us with the
15 clear account she gave and we have no hesitation in accepting her evidence.

Bomikazi Kokolo described what happened at their house that night. Three young men arrived at their house. They said
20 they were looking for a brother Siyabulela to whom they referred as Siyabonga. He was living in the house at the time but he was not present that night. The men came to the front door of the house but were told to go to the back door through which they then entered the house. Two of them had firearms,
25 the one was a gold-coloured firearm approximately 20

centimetres in length. The other firearm was larger, approximately 50 centimetres in length. The men swore and threatened to shoot the young girls if they did not say where Siyabulela was. Bomikazi Kokolo then took the opportunity to
5 flee out of the house and she went to neighbours down the road. The three men were not known to her before the incident and she has not seen them since the incident. She was not asked to identify the men in court. She did not see the men take anything from the house and she also did not
10 hear any gunshots that night. It is clear from all the evidence that after Bomikazi Kokolo managed to escape from the house the two remaining young girls that were left behind were shot dead in the bedroom of the house by these men.

15 The post-mortem reports done by the pathologist were admitted as evidence with the concurrence of the accused. These reports show that the two young girls were both killed with single perforating gunshot wounds to the head.

20 The police arrived on the scene at about 10.45 pm that night. At the time one of the children was still alive. The investigating officer, Capt Jonker, also arrived between 10 and 11 o'clock that night. Medical personnel on the scene later declared that both victims were dead. The position of their
25 bodies are depicted on photographs taken at the scene and

admitted by the accused. Jonker found two discharged bullet points in the pool of blood left by the victims. It is common cause that the fired bullets were of different calibres, namely 7.62 mm and .38/.357 mm. The only reasonable inference to
5 be drawn from all the evidence is that the two victims were killed by the three young men who had come to look for Siyabulela.

The most important issue in dispute in this case is the identity
10 of the men who had killed the two victims. The State called two witnesses as to the identity of these people. The first was Tokozile Kokolo who was 24 years old at the time of the incident and who was 28 years old when she gave evidence.

15 She testified that she returned to her home and approximately twenty to nine the night of the 30 September 2006 in a mini-bus taxi which dropped her in the street close to her home. In front of her home she met a young man by the name of Xolani Apleni. She recognised him because he lived in the vicinity.
20 She recalls that he had a fancy cell phone and she made a comment to him about it. She then entered the front gate to the yard of her home. As she approached the passage between her house and the flats which are also situated on the premises she saw a dark complexioned young man whom she
25 did not know. She spoke to him and said, "And now?" and the

young man replied words to the effect, "Your man is looking for you at your house." There is a light on the outside of her house which shines into the front yard and this light was on that night.

5

She described the man to be of dark complexion, not tall or short and not taller than she is. She initially said that she could not remember what clothes he was wearing but she remembers that he had nothing on his head. Later when she
10 was being cross-examined she said that he wore black pants. He had nothing in his hands but when she turned around to look at him as he walked away towards the exit to the road, she saw something in his right hand back pocket which she described as a remote control. She also replied to his earlier
15 comment that a man was waiting for her, that there is no man of hers who would come looking for her at her place.

After she had walked past this young man she entered through the gate into the passage between her house and the flats.
20 This passage was pointed out at the inspection *in loco* and is approximately 1.5 metres wide. While she has walking down the passage, something told her to look through the kitchen window. This window was pointed out at the inspection. It faces into the passage. She looked through this window with
25 her head close to the glass and her two hands next to her

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head. There were no curtains to the window and the lights in the house were all on. The whole house was lighted up on the inside. She saw a young man with a light complexion standing at the door to the entrance to the bedroom. He was unknown
5 to her. He stood with his side towards her.

At the inspection it was clear that she would have had a clear view of the place where the man was standing. She says that she was about three to four metres away from him and her
10 estimate of the distance was confirmed at the inspection. He had a silver firearm in his hand. It was about 10 to 15 centimetres long and he was spinning a part of this weapon. She says that the man had a scar of about five centimetres in
15 level of his ear to level with his mouth. The man was tall but not that tall, about five centimetres taller than she is. He had nothing on his head.

After she had seen him she heard a gunshot which came from
20 the inside of the house. She cannot say that it was the man who had fired the shot but she said he was in the house with the firearm. She ran away after she heard the one shot and found Xolani Apleni who was then still in the vicinity of the front gate of her house and she told him that they were
25 shooting in her house.

According to her, Xolani replied that they were not shooting at her house but somewhere at the back. She proceeded to the house right next door but the gate was locked. She then went
5 to the second house and there she found a man whom she called Tyson and his girlfriend. These houses were pointed out at the inspection and are situated to the west of her house. Xolani also came into the house and she asked Tyson to please go and see what was happening at her home. Tyson
10 and Xolani then went out and she followed them. Outside in the street near an old car that was parked on the sidewalk the young man whom she had previously seen with the firearm in the house came towards them with the firearm in his hand facing down to the ground.

15

According to her Xolani then spoke to this man and said words to the effect, "Nankwenkwe, why are you doing this in my house?" Later she said that he said, "Nankwenke, is it you, brother, that is doing this at my home?" The young man then
20 turned around and while running backwards, pointed the firearm at Xolani with a straight arm and she heard a shot go off. Later she explained that the firearm didn't go off but twice made a noise as if the man was trying to shoot with the firearm. There are no street lights in the road in front of her
25 house and at the inspection a spray light was pointed out

approximately 200 metres to the west. She says that she was not able to see the young man properly outside in the street because she was scared.

5 The young man then ran away and she went to her aunt who lived next door and told her of the shooting at her house. The police were then called and when she was on her way back to her house the police arrived. She first looked through the window of her house and then went into the house and in the
10 bedroom she found her five year old daughter and her 15 year old sister in a pool of blood. A white substance came from the head of her daughter and her sister's arm was still moving. She found afterward that a Weige DVD player that her sister had bought and of which she did not know the value, an
15 unknown amount of money that was in the drawer of the dresser in the bedroom and the keys to the house were all missing. All of these items were at her home when she left earlier that same evening at approximately six o'clock.

20 Her brother also lived at their house but she does not know where he was at the time of the incident. She found the young Bomikazi who had also been at the house next door at neighbours. She was asked later that night by the police whether she would be able to point out the two persons who
25 were at her home. She did not give a description of the men

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to the police but did say that she would be able to point them out if she should see them again. She was taken to the offices of the detectives of the Guguletu police and Xolani Apleni was also taken there. She cannot remember whether Xolani was in
5 the same vehicle as she was on the way to the police station but she remembers when they left the police station he came from a different part of the building and they then left together. At the police station she was asked to look at five or six colour photographs of persons and to see whether she can point out
10 any of the two unknown persons she saw earlier that night. She pointed out the photograph of one person as being the one she met outside her house when she was on her way to the passage between her house and the flats. She said that this was the man who she saw outside in her yard and who had
15 said to her, "Your man is looking for you in the house." It is common cause that the photograph she pointed out, Exhibit B4 is a photograph of accused number 2. She also pointed out accused number 2 in court as the person whom she had seen outside the house and who had spoken to her.

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In March 2007 the witness was again asked by the police to look at photographs. I must just explain here that the Guguletu police station is some distance away from the police barracks in Guguletu and it was at the police barracks where the offices
25 of the detectives are situated.

Captain Jonker testified that the witnesses were not taken to the police station itself but were in fact taken to the offices of the detectives and it is also there that she looked at the
5 photographs. On the second occasion the proceedings were recorded with a video camera and we had an opportunity to look at the recording which is Exhibit 1.

It is common cause that she pointed out Exhibit C photograph
10 8, which is a photograph of accused number 1. She signed on the photograph itself and on the page on which the photograph was. It is clear from the video recording that the witness looked at a number of photographs but that when she came to the photograph of accused number 1 she without hesitation
15 pointed out the photograph as the man who was in the house that night.

The witness also pointed out accused number 1 in court as the person whom she had seen in the house. She says that she
20 did not know the two accused before the incident and only saw them again in court.

The policemen involved in this photo identification which took place on the 15 March 2007 is Insp Johnson, Insp Japhta, who
25 recorded the photo identification on video, and Insp Ainslie.

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They all testified as to what happened. Accused number 1 was also represented by an attorney at the identification parade. We are satisfied that the photo identification parade was conducted in a manner which rendered it reliable.

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Captain Jonker explained that problems with getting accused number 1 to come from prison for a formal identity parade was the reason why the police eventually decided to rather have an identity parade with photographs.

10

He also explained where he obtained the 12 photographs (two were of policemen) that were used. The photographs used are in our view of persons who are of sufficient similar appearance to render the parade fair. Capt Jonker also pointed out in his evidence that accused number 1's attorney, who was present at the parade, did not object to the photographs and appear to have been satisfied with the photographs.

Tokozile Kokolo was cross-examined about her identification of accused number 1. She said that she did not give the police a description of the person she saw in her house that night but did say that she would be able to identify both men if she saw them again. It was put to her in cross-examination that she had seen both the accused going in and out of court since 1 February 2010. It was not suggested to her in cross-

examination by counsel for accused number 1 that she had seen the accused at court earlier at the hearings in the Magistrate's Court Athlone where they had appeared on a number of occasions. Capt Jonker testified that he had been
5 present at court at all the occasions that the two accused appeared in the Magistrate's Court and he had taken steps to prevent Tokozile Kokolo from coming into court where the two accused were appearing until after the photo ID was done on the 15 March 2007. He also explained that the hearings took
10 place in the Athlone Juvenile Court. This Court has covered windows so that one cannot see into the court from the passage outside the court. He only allowed the witness to sit in court while the accused were in court after the photo ID parade had taken place. Counsel for accused number 1 put it
15 to Capt Jonker that Tokozile Kokolo regularly attended court and that she sat inside the court when the matter was called. Jonker denied this. Counsel further stated that articles had appeared in the press about the case and although he could not himself say whether photographs of the accused were
20 published, his instructions were that there was a photograph of accused number 1 in the newspaper which no longer exists, namely the City Vision. Capt Jonker said that he did not know of any photographs of the accused in the press.

25 Because Tokozile Kokolo had already pointed out accused

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number 2 on a photograph in the early hours of the 1 October 2006 at the Guguletu police station, Jonker did not hold an identity parade in respect of accused number 2. According to Jonker, on this first occasion, the witness was given a stack of
5 photographs to go through. These photographs came from the police records of people who had previously been arrested. She was asked to look at the photographs and to see if she recognised anyone who was involved in the crime and then to say, if she did recognize, one what the person did. According
10 to Jonker, she looked at seven photographs and then returned to the fourth photograph. This is Exhibit B4 and she said that he was the one. She signed on the original page on which the photograph appears and Jonker also signed below her signature with the time which was 02h08 and he dated it the 1
15 October 2006. It is common cause that photograph B4 is a photograph of accused number 2. It was suggested to Jonker in cross-examination that the photograph may have been substituted onto the page. Jonker denied this with reference to the original page with the photograph printed on the page.
20 This page was signed by both himself and the witness.

In cross-examination of Tokozile Kokolo on behalf of accused number 2 it was put that he was not at the scene of the crime on the 30 September 2006. The witness was adamant in reply
25 that he was there. She stated that she had spoken to him

when they passed close to one another. She spoke to him and she looked at him because she did not know him. In cross-examination she explained further about the remote which she saw in his back pocket. She said and also demonstrated that
5 it was in his right back pocket sticking out approximately 10 to 15 centimetres above the line of the pocket. The buttons on the remote was facing his body, it was white in colour and she recognised it as the remote of their DVD player. She did not notice a scar on accused number 2's lower lip but she said she
10 did notice his ears the tops of which, according to her, were bent slightly forward. She again conceded that she did not give a description of accused number 2 to the police but she said that she told the police that she would be able to recognise him if she saw him again. It was soon thereafter
15 that she was asked to look at the photographs of people who had previously been arrested by the police and it was said to her that with luck she may be able to identify a person involved.

20 Counsel for accused number 2 in argument emphasised that Tokozile Kokolo was in respect of accused number 2 a single witness in respect of identification. He emphasised the danger in relying on an identification of an unknown person seen at night in a brief encounter. He pointed to the real danger of an
25 honest but mistaken identification in such circumstances. I

will bear these considerations in mind when evaluating the evidence.

The second identification witness was Xolani Apleni who will
5 be 26 years old later this year. It is common cause that he
knew accused number 1 and that they used to live in the same
street, 1st Avenue, New Crossroads Guguletu and played
soccer together on occasion. This was confirmed by accused
number 1 when he later gave evidence. Xolani Apleni said
10 that he was at a gathering of friends in 1st Avenue drinking
beer on the night of the 30 September 2006 when he received
a phone call from his girlfriend to meet her halfway to the
shop. They went to the shop and his girlfriend and a friend
continued walking while he stood talking to a friend, one
15 Tyson, who has since died, in J Nontulo Street. It was
between eight and nine o'clock that night when a minibus taxi,
to which he referred as a cockroach, stopped and Tokozile
Kokolo got off. They spoke to one another and she went into
her yard and after about five minutes, that is his estimate,
20 Tokozile Kokolo came running out of the yard saying that they
were shooting at her home.

She first went to the locked gate of the house next door and
then went on to the next door neighbours and came out with
25 Tyson's eldest brother and another friend and she went back

into her yard. Xolani followed Tokozile Kokolo and when he was about at the gate to her yard he saw accused number 1 come out of the yard. He had a firearm in his hand and Xolani called out to him, using his nickname, Namkwenke, and said
5 word to the effect, "Are you doing this shit, this shooting here?" accused number 1 then turned towards him, pointed the firearm at him and attempted twice to pull off a shot. He says that he told the police that night that he would be able to point out the person involved. He was then asked to look at
10 photographs and after he looked at about six photographs he pointed out the photograph of accused number 1. This photograph was not an exhibit before court. Jonker explained that the photograph was given to another unit of the police in order to trace accused number 1. The photograph was,
15 however, not returned to him.

According to Xolani he did not see that accused number 1 held anything apart from a firearm. He did notice, he said that accused number 1 appeared to him to be hiding something
20 under his arm. He testified that he did not hear any gunshots at the scene and that he asked Tokozile if she had heard shots from the back street.

In cross-examination Mr Ramova on behalf of accused number
25 1 highlighted the differences between Xolani's evidence and

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that of Tokozile and also the differences between his evidence in court and the statement, Exhibit N, he had made to the police at 1 pm the day after the incident on 1 October 2006.

The statement which was taken from Xolani Apleni reads as follows:

“On Saturday, the 30 September 2006, at approximately one o'clock I was with my girlfriend Bolewa Bebeza at No. 17 1st Avenue New Crossroads where we were attending a party. With me was also a friend of mine, Siya, of number 173 J Nontolu Street, New Crossroads. We were all socialising together. Then later on that day at approximately 20h30 me and my girlfriend left 17 1st Avenue New Crossroads and Siya did not come with us. We were walking down J Nontulo towards her home. She was walking in front of me and I was walking behind her. We walked past 173 J Nontulo Street. When I was about five metres past No. 173 J Nontulo, I heard two shots that sounded like gunshots coming from No. 173 J Nontulo. Upon hearing the two shots coming from 173 J Nontulo Street I turned around and faced the house where I saw Tokozile Kokolo getting out of a taxi. I asked Tokozile what the sound was that sounded like the gunshot coming from her house. She said, yes, she heard the shots and when I asked her who was in her

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house she said that it was only small children. I then saw one man known to me only as Mthetheleli come out of the yard. I went into the yard and found the back door open. As far as I know, Mthetheleli now lives in Samora.

5 I called Mthetheleli by his name on which he turned to face me and pointed a firearm at me. He pulled the trigger but the gun did not fire. He then turned and ran from me. I then went into the house at No. 173 J Nontulo where I found two children shot, bleeding. I ran from the

10 house to Tokozile and told her that two children were shot in 173 J Nontulo. Upon hearing this, Tokozile screamed and ran into the house crying. She was followed by other neighbours. I then contacted the police who arrived promptly."

15

Xolani confirmed that he made this statement, that he had read through it and signed it. He understands English and he has reached standard nine at school. There are clearly a number of differences between his evidence and the contents of the

20 statement. These include that in the statement he says that his girlfriend was with him at a party in 1st Avenue. According to the statement, he and his girlfriend left the party and on their way walked along J Nontulo Street. He then heard two gunshots which sounded like they were coming from number

25 173. It was only after he had heard the shots that he saw

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Tokozile Kokolo getting out of the taxi. It is then, he says in his statement, that he asked her what the sounds were. There are other differences in detail also. There are also differences between his evidence and the evidence of Tokozile Kokolo.

5 According to her he was standing with two males when she arrived while he says that he was only with Tyson. According to her she found Tyson inside his house and not outside with Xolani. There is also the difference about when shots were fired and what they said to one another about it.

10

In cross-examination it was put to Xolani that he had seen accused number 1 on the previous day, that is the Friday, at a traditional ceremony which was held in J Nontulo Street. Xolani says he remembers the ceremony but not that he saw
15 accused number 1 there.

Accused number 1 testified. It is common cause that he made a warning statement to the police soon after he was arrested on the Monday the 2 October 2006 and that he then raised the
20 alibi that he was at home with his girlfriend on the 30 September 2006. He testified that he had slept over with the mother of his child who was not his then current girlfriend, in Philippi on Friday the 29 September 2006 and that he returned to his home at Samora Machel where he lived in a roomed
25 shack in the back of his parents' house at about between 10

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and 11 on the Saturday morning. According to his evidence he then spent the rest of the day and night in his room with his girlfriend who was upset because he had slept away from home the previous night. He lied to his girlfriend about where
5 he had been saying that he had been at his sister's place in Philippi. They listened to the radio all day and did not watch TV. He said that it was possible to leave the premises without someone in the main house knowing that he had left. He confirmed that he knew Xolani at the time he lived in 1st
10 Avenue and stated that although they were not friends he had no problems with Xolani and that he had seen him the Friday before the 30th at a traditional ceremony at J Nontulo Street. He does not know Tokozile Kokolo and he has never been to her house. He confirmed that his nickname is Namkwenkwe.
15 He says that Tokozile pointed him out because she went to court every time his case was postponed and saw him in court. He says that people who stood outside court in the passage were peeping through the door to see him in court. He went to the police on 2 October 2006 of his own accord after he had
20 heard that the police were looking for him. He says he did not know accused number 2 at all and that he met him for the first time during November 2006 when accused number 2 appeared with him in court. Jonker testified that accused number 2 was only arrested during November 2006. Accused number 1's
25 then girlfriend Zimibimi Xalisile was called by accused number

1 as a witness. She confirmed his evidence and stated that they went to bed early at approximately 7 pm on the Saturday night the 30 September 2006 and that she fell asleep at approximately nine o'clock that night after accused number 1's
5 mother had given them food. Accused number 2 did not give evidence and called no witnesses. It was put, however, in cross-examination, on behalf of accused no 2 that on the night of the 30 September 2006 he was at home and not on the scene of the crime.

10

I turn to consider the position of accused number 1. He was identified by the direct evidence of Tokozile Kokolo and Xolani Apleni as being a participant in the events of the night of 30 September 2006. He and his girlfriend gave evidence that he
15 was elsewhere. The approach to be followed is set out in S v Van der Meyden 1999(1) SACR 447 (W) at 450A which case was subsequently quoted with approval in a number of SCA judgments. See for instance S v Van Aswegen 2001(2) SACR 97 (SCA) at 101A–E. In S v Van Tellingham 1992(2) SACR
20 104 (C) at 106A–H the position is summarised as follows:

“The fact that an accused’s evidence when viewed in isolation cannot be criticised does not mean that there can be no question of a positive rejection of his evidence. The quality
25 and weight of the opposing evidence may be so persuasive

that the court is compelled to eliminate the possibility that the accused's version may be true. Everything depends on the impact of, on the one hand, the State's evidence and, on the other, that of the accused."

5

Mr Ramova submitted that the evidence of Tokozile Kokolo should be treated with extreme caution. She saw the person who she says was accused number 1 through the kitchen window from the side. The chances are that it was his right side that she saw. Nevertheless, she says he does have a scar on the right side of his face. This is not correct. Accused no 1 has a prominent scar on the left side of his face. Later that night she did not give a description but said she would be able to point him out. If she had seen the very prominent scar on his left cheek it is unlikely that she would not have mentioned the scar to the police, Mr Ramova submitted. She then pointed him out more than five months later on the 15 March 2007 on a photograph. There must be serious doubt in the mind of the court, Mr Ramova suggested about whether she did not in the interim see the accused at court. Added to this, he said there are the discrepancies in her evidence when compared to her statement and the differences between her evidence of the sequence of events and where she went and who she was with and the evidence of Xolani Apleni.

25

The fact is, however, that her identification of accused number 1 does not stand alone. Xolani Apleni who knew accused number 1 well also saw him on the scene with a firearm which he used to try and shoot Xolani Apleni. It is true as Mr

5 Ramova argued that Xolani Apleni's evidence equally suffers from discrepancies between his statement and his evidence and differs in some respect from the evidence of Tokozile Kokolo. In the case of Xolani Apleni, his identification of accused number 1 cannot be a mistake. It must be an outright

10 lie if his evidence is to be rejected. This is so because he knew accused number 1 and according to him addressed him by his name. This means that he must on accused number 1's version have decided right from the outset that night that he was going to falsely implicate accused number 1. He gave

15 accused number 1's name to the police that night and by pointing out his photo to the police he put a face to the name which enabled the police to trace accused number 1 first to his previous home in 1st Avenue and then to his parents' home in Samora Machel. There is no reason suggested why Xolani

20 Apleni should have falsely implicated accused number 1 right from the start. The existence or the absence of a motive to tell a deliberate untruth is part of the probabilities that should be considered by the court. The importance of the evidence of Tokozile Kokolo is that the man she saw in her house was later

25 called by Xolani Apleni by his name. On Mr Ramova's

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argument these two witnesses must have conspired to falsely accuse number 1, a person who was at the time unknown to Tokozile Kokolo.

5 In my view the differences between the evidence of Xolani and Tokozile relate to peripheral details that do not detract from their identification of accused number 1 as being present on the scene taking part in what was going on there. The differences between them are of the kind that one would
10 expect to exist between witnesses who observed a constantly changing and extremely traumatic event. The differences between their evidence and their statements which in the case of Xolani Apleni was quite considerable are nevertheless of the kind to be expected three and a half years after the
15 events. The crucial evidence of accused number 1's presence and his participation did not change, however, from the beginning. The evidence of accused number 1 and his girlfriend could not be broken down in cross-examination. They told a very simple and uncomplicated story which they
20 stuck to. Their evidence must, however, not be approached on its own and in a piecemeal manner. In S v Van der Meyden to which I referred earlier, the following was said:

"A court does not base its conclusion whether it be
to convict or to acquit only part of the evidence, the conclusion
25 which it arrives at must account for all the evidence."

Later on, in the same judgment it is said:

“The proper test is that an accused is bound to be convicted if
5 the evidence establishes his guilt beyond reasonable doubt
and the logical corollary is that he must be acquitted if it is
reasonably possible that he might be innocent.”

The evidence of Tokozile Kokolo and Xolani Apleni read
10 together, although they differ in non-material detail
complement one another in regard to accused number 1's
presence on the scene. The line of cross-examination and
argument was that Tokozile Kokolo was able to point out
accused number 1 because she had seen him as an accused in
15 court. In other words, it was only after she had seen him in
court as an accused that she was able to identify him and
implicate him as being present on the scene.

Now the statement she made to the police on the 1 October
20 2006 was put to her in cross-examination. It was, however,
only a very small part of that statement to which reference was
made. It was never suggested in cross-examination that she
did not in her statement give the version that the person whom
she had seen in the house with the firearm shortly thereafter
25 tried to shoot Xolani and that Xolani called him by his

nickname which, it is common cause is accused number 1's name. In our view the quality and weight of the evidence implicating accused number 1 is so persuasive that accused number 1's evidence that he spent the whole of Saturday from
5 approximately 11 o'clock a.m. until the next morning, the Sunday, in his room with his girlfriend listening to radio and talking and later going to bed at 7 o'clock, simply cannot be true.

10 In our view, the State has proven beyond reasonable doubt that accused number 1 was present and participated in the events at number 173 J Nontulo Street on the night of the 30 September 2006. The only reasonable inference from all the evidence is - and in our view it is clear beyond reasonable
15 doubt - that accused number 1 was one of the three men who were in the house that Bomikazi Kokolo testified about. In our view, further, the single witness evidence of Tokozile Kokolo that it was accused number 2 who was outside her home that night is equally compelling. She saw accused number 2 in her
20 front yard where there was adequate lighting. They passed one another at very close quarters. She looked at him because he was an unknown person in the yard of her home and she challenged him and spoke to him. He answered her and although he was unknown to her she pointed out his
25 photograph soon afterwards from photographs shown to her.

Her evidence presented a strong *prima facie* case.

Accused number 2, as he was entitled to do, chose not to give evidence. The fact that he has not given evidence cannot
5 count against him, but it does have this consequence, namely, that in the absence of evidence to the contrary, Tokozile's evidence stands uncontroverted. That evidence is compelling and must, in our view, be accepted and places accused number 2 on the scene. Tokozile Kokolo says that accused
10 number 2 had their remote control in his back pocket. This evidence which, again, is not controverted is likewise accepted.

Having accepted the evidence of the State I turn to consider
15 on what charges the accused must be found guilty. I deal first with accused number 1. Count 1 is a charge of robbery. An element of the crime is the intention to steal the property of another through the use of violence or threats of violence. Further, the property must be obtained as a result of the
20 violence. The evidence of Bomikazi Kokolo is clear, namely that the three men came to the house not to rob but to find Siyabulela. They threatened to shoot if they were not given information about him. The threat of violence and the eventual violence was therefore not directed, on the evidence before
25 this court, to the theft of property from the house. The only

reasonable inference from the evidence is that at some stage the money, the DVD player and the keys were stolen by the men who had come into the house.

- 5 In our view robbery has not been proven. Accused number 1 was one of the men who had come into the house and he is therefore guilty of theft only. The only reasonable inference is that although the men did not come to rob, the goods were stolen in the execution of a common purpose to steal.
- 10 Whether or not accused number 1 physically took any of the items himself does not matter since he was clearly acting as part of the common purpose to steal.

- Counts 2 and 3 are the charges of murder. The only
- 15 reasonable inference is that two of the three men, that is the ones who had firearms, shot the victims. Accused number 1 was one of the men who had a firearm in his possession. The children were both shot in the head. The only inference is that they were shot with the direct intention to kill them.

20

- Accused number is therefore GUILTY of the murder of both children even though he probably only shot one of the victims. The men clearly acted in the execution of a common purpose to kill both children. It is, however, also clear that the murder
- 25 of the children was not planned or premeditated within the

meaning of Part 1 of Schedule 2 of Act 105 of 1997. The Concise Oxford Dictionary Tenth Edition gives the meaning as premeditated as:

- 5 "To think out a plan (an action, especially a crime) beforehand."

And it gives the meaning of the word "plan" as:

- 10 "To decide on and arrange in advance."

It is clear from the evidence that the men who went to that house did not go there with a plan which they had decided on beforehand, namely to kill the children. They went there to
15 find Siyabulela.

Count 4 is the attempted murder of Xolani Apleni. It was clearly proven through the evidence of both Tokozile Kokolo and Xolani Apleni himself. Accused number 1 pointed the
20 firearm at Apleni at close range and twice pulled the trigger. The only reasonable inference is that he intended to shoot Apleni and he must at least have foreseen that he could kill him if he should manage to shoot him.

25 Counts 5 and 6 relate to the unlawful possession of a firearm

and ammunition. The evidence of Tokozile Kokolo and Xolani Apleni as well as by inference the evidence of Bomikazi Kokolo establishes that accused number 1 did have a firearm in his possession. He also had ammunition because the weapon he
5 had was used to shoot and kill one of the children.

Accused number 1 did not testify that he had a licence for the firearm and in terms of Section 250(1) of the Criminal Procedure Act it must be found that he did not have a licence.
10 Accused number 1 is consequently GUILTY on counts 5 and 6.

I turn to accused number 2. He was seen outside the house in the front yard of 173 J Nontulo Street. He had the remote control of the stolen DVD player in his pocket. This shows
15 that he had probably been inside the house. His comment to Tokozile Kokolo when she spoke to him shows that he had knowledge of the intruders in the house. Although there is therefore a strong suspicion that he may be one of the three men who were seen inside the house by Bomikazi Kokolo, we
20 are of the view that it is not the only reasonable inference to be drawn from all the evidence that he was in fact one of those men.

Count 1 is the charge of robbery. For the same reasons as set
25 out in respect of accused number 1, this was not proven to be

a case of robbery. The evidence shows, however, that he is guilty of the theft of the remote control of the DVD player. Counts 2 and 3, the murder of the two children, the men came to look for Siyabulela. It has not been proven beyond
5 reasonable doubt that accused number 2 was inside the house at the time the threats were made to shoot the children. He cannot be found to have been aware of the fact that the children may be shot even if he were involved with the men in the house.

10

In our view, it is not the only reasonable to be drawn from all the evidence that accused number 2 foresaw the possibility that the two children would be killed in the process of searching for Siyabulela. Not having been proved to have
15 participated in or being present at the time the children were killed accused number 2 cannot be found guilty on counts 2 and 3 on the basis of common purpose.

Count 4 is the attempted murder of Xolani Apleni. It is
20 common cause that accused number 2 did not participate in the attempt to kill Xolani Apleni and he must be found NOT GUILTY on count 4.

Counts 5 and 6, the possession of a firearm and ammunition,
25 there is no evidence that accused number 2 was in possession

of firearm and ammunition. There is no evidence to justify the inference that he intended to possess the firearms through accused number 1 and the other person who had a firearm in his possession. Accused number 2 must consequently be
5 acquitted on counts 5 and 6.

To sum up, therefore, **ACCUSED 1** is found guilty as follows:

COUNT 1: **GUILTY** of theft of an unknown amount of money,
10 a DVD player and the keys to the house at No. 173 J Nontula Street, new Crossroads.

COUNT 2: **GUILTY** of the murder of Nolobabalo Kokolo.

COUNT 3: **GUILTY** of the murder of Yamkelani Kokoli.

COUNT 4: **GUILTY** of attempted murder of Xolani Apleni.

15 **COUNT 5:** **GUILTY** of contravening Section 3 read with Sections 117, 118, 120 and 121 of Act 60 of 2000.

COUNT 6: **GUILTY** of contravening Section 90 read with sections 117, 120 and 121 of Act 60 of 2000.

20 **ACCUSED 2** is found guilty as follows:

COUNT 1: **GUILTY** of a theft of a remote control of a DVD player.

COUNT 2: **NOT GUILTY**

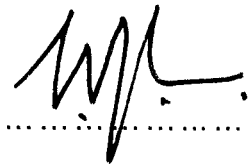
COUNT 3: **NOT GUILTY**

25 **COUNT 4:** **NOT GUILTY**

COUNT 5: NOT GUILTY

COUNT 6: NOT GUILTY

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