

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

SS07/2011

5 **DATE:**

9 FEBRUARY 2012

In the matter between:

THE STATE

and

10 **TAMARA MAPEYI**

Accused 1

LUKHANYO DIBEKILE

Accused 2

THANDA KRWECE

Accused 3

J U D G M E N T

15 **STEYN, J:**

I am grateful for the assistance of my assessors, Adv R Berg and Mr S Collins.

20 The three accused were charged with:

1. Murder, alternatively incitement to murder, alternatively conspiracy to murder.
2. Housebreaking with the intention to steal and theft.
- 25 3. Possession of an unlicensed firearm.

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4. Possession of ammunition in contravention of the Firearms Control Act.

5. Accused 1 was also charged with attempted murder.

5 The state alleged that the three accused, as a group with a common purpose in a premeditated murder, killed a male person, Mr Msuthwana ("the deceased"), the husband of accused 1, by shooting him with a firearm on 28 October 2009 in Makhaza, Khayelitsha, Cape. In the first alternative, it is
10 alleged that the accused conspired with one another and/or Sivenatha Gxotha and Siyasanga Mngese to aid or procure the commission of, or to commit the offence of conspiracy to murder, alternatively incited, instigated, commanded or procured each other and/or Sivenatha Gxotha and Siyasanga
15 Mngese to commit murder.

It is further alleged that the three accused broke open and entered the premises belonging to Mr Massimo Caverni in Newlands, Cape, on 27 October 2009 and stole a firearm,
20 being a 7.65 mm pistol, a camera and cash to the value of R4 500,00, the property of Mr Caverni, who was the employer of accused 1 at the time. It is alleged that the accused were in illegal possession of a firearm, a 7.65 mm pistol and ammunition for such firearm. Finally, it was alleged that the
25 first accused ("number 1") attempted to murder the deceased

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by poisoning him with rat poison.

The three accused pleaded not guilty to all charges without explaining their pleas. Admissions in terms of section 220 of Act 51 of 1977 were handed up on behalf of each of the accused (Exhibits A, B and C). Apart from some formal admissions by all the accused, accused 2, also known as Lucks, admitted that he appeared on a properly constituted identity parade with accused 3 on 7 March 2010 at Harare Police Station in Khayelitsha, where he was positively identified. (It was later established that he was identified by Sivenatha Gxotha). He also admitted that he was the owner of a Nokia 1200 cell phone with number 0735073106 and that this phone was found on him on 19 November 2009 when he was arrested in Mitchells Plain. He admitted that the cell phone records pertaining to the mentioned cell phone are true and correct; that he new number 1 as in "Mamzy", who resided in Khayelitsha and that she phoned him several times during October 2009 and November 2009 on this cell phone. He admitted that during October and November 2009, he contacted accused 3 on his cell phone with number 0747814518. Accused 3 admitted that he was arrested and found in possession of a cell phone with number 0747814518.

It is not disputed that the deceased died of a gunshot wound to
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the head on 28 October 2009. Undisputed ballistic analyses (Exhibit G), established that the fired cartridge case found at the murder scene was that of 7.65 millimetre calibre firearm (the same calibre firearm stolen from accused 1's employer the day before).

State witnesses:

Nomonde Nofemele passed Grade 12, is 48 years old and lives in Makhaza, Khayelitsha. She was acquainted with Tamara Mapeyi ("number 1"), who lived in the same area. She, number 1 and the husband of number 1 (now the deceased) sometimes walked to the taxi rank in the mornings on their way to work. She occasionally ordered vegetables from the deceased, who worked at Fruit & Veg City. It was later testified that the deceased sometimes used a truck from his employment to travel to and from work.

Ms Nofemele visited number 1 in her house. On a few occasions, when they were alone, number 1 told Ms Nofemele that she wanted to kill her husband as he was abusing her. Ms Nofemele warned her to be careful, because she could be arrested.

Later number 1 also told her that she had put rat poison in her husband's food in order to kill him. The attempt was

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unsuccessful. This shocked Ms Nofemele, who stopped visiting so frequently. Number 1 told her that there had been an incident where her house was robbed and mentioned that if her husband had been killed in the robbery, she would not have minded. Ms Nofemele was scared. She thought accused 5 1 was a nice person and she did not know if she was only talking when she made these statements.

Number 1 did not tell Ms Nofemele in what way she had been 10 abused by her husband and no injuries were visible. It seemed that number 1 and her husband lived in a friendly environment. She denied the proposition by the advocate for number 1 that there was any special relationship between herself and the deceased and there is no reason to doubt her evidence in this 15 regard.

On the morning of 28 October 2009, Ms Nofemele was at her home preparing to go to work, when she heard that the deceased had been shot.

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It was put to her that it is strange that accused 1, knowing that she was friendly with her husband, told her that she wanted to kill him. She could not say what accused 1 was thinking. It was denied that accused 1 told her these stories or told her 25 she had poisoned her husband, but the witness was adamant.

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After these statements were made to her, she avoided going to number 1's house.

Ms Nofemele did not think about warning the deceased or
5 going to the police, as she was not sure whether accused 1
was serious. She denied any reason to fabricate her version
and no reason was shown. She was surprised and shocked
when she heard what had happened. Ms Nofemele was a
good, intelligent witness, whose testimony remained
10 consistent.

Kholeka Makhosi was the next door neighbour of accused 1.
On 28 October 2009, just before six in the morning on her way
to work, she met the deceased and they walked together
15 towards the taxi rank. When they turned a corner, they saw
two young black males standing there, not doing anything.
She estimated their ages at between 19 to 20 years. As they
walked closer towards the two men, one passed them. Ms
Makhosi looked back and saw that the person who had passed
20 them, was standing behind the deceased, holding a firearm to
the deceased's head. She heard a shot being fired and started
running.

The two men were unknown to her and she could not identify
25 them in court or at an identity parade. She did not see

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accused 1 that morning. She thought the deceased and accused 1 were nice people. Although she visited accused 1's house, they were not close neighbours. She is not aware of any problems between accused 1 and the deceased, nor of any
5 fighting, physical or verbally, between them. It was evident that she had been traumatised by the incident.

During cross-examination she said she did not see anyone else outside when she and the deceased were walking to the
10 taxi rank. It was only her and the deceased and the two young people in the side street. She did not see them leave, as she ran away. She and the deceased were only one metre away from each other. There was no problem to see as the area was lit and it was already light. Ms Makhosi testified that the
15 deceased did not often walk with her to the taxi rank, as he sometimes used the truck from his place of employment, Fruit & Veg City, to travel to work.

Massimo Caverni and Elona du Toit lived in Newlands Estate,
20 Claremont in the Cape. Accused 1 had been working for Mr Caverni as a domestic two days a week from 2002. There were no problems between them. On 27 October 2009, at about 09:00 in the morning, accused 1 telephoned Mr Caverni at his work to inform him about a break-in at his home. He
25 went home and noticed that a window had been broken of the
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main bedroom. There was glass on the floor and clothes all over the floor. Accused 1 told him that she had found the break-in when she arrived at the home. He noticed that his handgun, a Browning, 7.65 millimetre, the cartridge of the
5 firearm and bullets that had been next to the firearm, as well as a Sony camera and cash, notes to the value of R4 000,00, were missing from the safe in the main bedroom, which was built into a clothes cupboard.

10 There are two sets of keys to open the safe. Mr Caverni normally has the one set of keys in his pocket. The spare key hung behind a painting in the spare bedroom that he thought only he knew about. The safe had been opened with the spare key. Cupboard doors and the safe door were opened in the
15 main bedroom. The spare key was on the floor. In the spare bedroom belongings were strewn around and paintings were on the floor. The painting behind which the safe key had been hanging was on the bed. Nothing, apart from the mentioned items, was missing. This included jewellery of Ms Du Toit in
20 the spare bedroom.

On the particular day, Mr Caverni went to work at 07:00. Ms Du Toit left just before eight o'clock in the morning. They did not know how the burglar/s gained entry to the premises.

25 There is a wall, a locked gate and an alarm system that was
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activated by Ms Du Toit when she left, with the home neat and tidy, doors and windows closed and everything locked. Accused 1 was expected to arrive at work at about nine and had a spare key to the gate and the front door. She knew how
5 to deactivate the alarm, which is positioned next to the front door by pressing the relevant buttons.

The police were called. The properly functioning alarm had not been activated by the burglary and the alarm company had
10 not been called. Mr Caverni and Ms Du Toit do not know accused 2 and 3. Mr Caverni thought accused 1 seemed afraid, uneasy and edgy, but did not think she was involved in the break-in. Accused 1 and Ms Du Toit did not discuss the matter, or the setting of the alarm. Accused 1 informed her
15 that she had found the house in that state when she arrived at work.

Ms Du Toit knew that there was a safe, but she did not know where the key to the safe was. Ms Du Toit testified that
20 accused 1 stopped working for them after this particular day and they never saw her again. She could not understand why accused 1 did not arrive for work on the next occasion and she did not telephone or send a text message. Ms Du Toit phoned accused 1 on her cell phone, but she never answered. This
25 aspect was not denied or explained on behalf of accused 1.

Siyasanga Mngese, who occasionally seemed very reluctant to testify and sometimes mumbled under his breath, testified that he left school in Grade 11. He is 24 years of age. He lived in Makhaza and knew accused 1 as "Mamsy", the wife of Taturabi, the deceased. He used to borrow small amounts of money from her between 2008 and 2009. (The testimony in court indicated that both accused 1 and the deceased were money lenders). He had been going to accused 1's house over a long period of time. The last time he borrowed money was before Taturabi was killed. He borrowed R30,00.

She then asked him how one would be able to see if a firearm had been used. He told her he did not have any knowledge about firearms and was shocked at the question. He did not ask why she wanted to know. By the time that he was asked about the firearm by number 1, he had already been told by Sivenatha Gxotha, a friend who also lives in Makhaza and who was familiar with accused 1, that he had been approached by accused 1 to kill her husband. Siyasanga and Sivenatha discussed this matter. It was in 2009. Siyasanga told Sivenatha that accused 1 had asked him about a firearm.

Sivenatha wanted Siyasanga's cell phone and he gave it to him. When he later returned with the phone, a Cell C SIM card

had been inserted into the phone. Sivenatha told Siyasanga that he had received the SIM card from accused 1. He said he inserted the SIM card for communication purposes between himself and accused 1. Shortly thereafter Sivenatha went to
5 the Strand with a friend, Amos Wana, because he was trying to avoid accused 1. Siyasanga kept the cell phone with the SIM card for the free airtime. It kept on ringing and he answered it, because he was curious about the arrangements between Sivenatha and number 1 relating to the killing of her husband.
10 Sivenatha had told him that accused 1 would phone and he concluded that it was accused 1 who spoke on the phone, but he later also testified, repeatedly, that he recognised her voice. She said: "come, I have left the door open", or "come, I have left the door unlocked".
15
He was scared and switched the phone off. When he later saw Sivenatha, he told him about the call. They ignored it. He had no further contact with accused 1. The only times he saw her again was at a distance. When she came in their direction,
20 they avoided her. Siyasanga does not know of any reason why accused 1 wanted her husband dead. On the day of the shooting, he was sleeping when he heard a commotion outside. He found out that the deceased had been shot. He saw the body covered with a blanket. He later saw accused 1
25 on the scene when the police had arrived. Then he went to
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Sivenatha's house to talk briefly about what had happened. Amos Wana was there as well, but he did not talk to him. Sivenatha told Siyasanga that he had been on the scene and that he had told the detectives that accused 1 had asked him
5 to kill her husband and that she had also spoken to Siyasanga about a firearm.

Siyasanga thought accused 1 probably asked Sivenatha to kill her husband, as she may have thought that they were "thugs"
10 due to the fact that they were using marijuana. He does not know either accused 2 or 3. The deceased was a kind man and troubled nobody. Accused 1 also never troubled anyone prior to the cell phone and firearm problems. He never heard how much accused 1 offered for the job she wanted done and
15 he was never present when accused 1 asked Sivenatha to kill her husband. Sivenatha did not tell Siyasanga what he responded to accused 1's request that he should kill her husband. He only knew that he fetched a SIM card to use in the phone to continue discussions with number 1.

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According to Siyasanga, accused 1 once told Sivenatha that he was a coward and she said that since he could not accomplish the mission, she had to find someone else.

25 Siyasanga was reluctant to speak at times and explained that

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he did not like speaking in front of a lot of people. To the court he seemed scared. He repeated that he knew about accused 1's request to Sivenatha before he went to ask for money. After her inquiry to him about firearms, he gathered
5 that accused 1 was really planning to have her husband killed. He did not consider telling the police or the deceased of these matters, as he was scared. He does not know exactly when accused 1 gave the SIM card to Sivenatha as it happened long ago, but Sivenatha told him that accused 1 wanted to kill her
10 husband and that he must organise it.

When Sivenatha returned the phone to him, the SIM card (allegedly given to Sivenatha by accused 1), was in the phone. It was less than a week before Sivenatha took the SIM card
15 and told him that he had given it back to Mamzy, accused 1. He does not know if Sivenatha had reached an agreement to commit a murder. The only person he, himself, told about the firearm discussion with number 1 was Sivenatha. The police questioned Siyasanga about the shooting of the deceased,
20 which took place in front of his home, after Sivenatha told them that accused 1 had asked him about firearms. It was denied on behalf of accused 1 that she asked him about the firearm and she denied that she gave a SIM card to Sivenatha for the purposes as testified. He confirmed his version, which
25 was the same version that he told the police when they

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questioned him about the murder. Throughout his testimony, his version never altered. Siyasanga stated that he knew nothing about firearms. He did not know why accused 1 would want to get rid of her husband. The deceased was killed more
5 than two months after the incident involving Sivenatha, the cell phone and SIM card.

Sivenatha Gxotha is 24 years old and passed Standard 4 at school. He is very unsophisticated, appeared to be unwell,
10 was yawning, ill-dressed and sick or tired. At one stage the court adjourned to give him the opportunity to recover, subsequent to which his testimony was more coherent. He was unemployed in 2009 and stayed in Makhaza with two aunts. He knew accused 1 as "Mums" and he was a friend of
15 the son of the deceased, whom he had known for a long time. He was approached by accused 1 and told that she wanted Taturabi to be killed. He was shocked. He did not reply to the request, but told some people, including his aunts. He decided he was not going to do what she asked. The first time when he
20 was approached he was alone and the second time he was standing with Siyasanga. She then called him aside and asked him if he had involved Siyasanga as well, which he denied. On that day she gave himself and Siyasanga her phone number.

25 He said he did not have a phone and accused 1 normally
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phoned him on Siyasanga's phone. He did not want to be involved in the matter with Mumsi. While he was in the Strand, he had Siyasanga's phone. He did not receive any calls on the phone while he was in the Strand, but he received
5 from an SMS from Mumsi that read: "come, I did not lock the door."

When he returned to Cape Town, he returned Siyasanga's phone and told him about the SMS that Mumsi had sent about
10 the unlocked door. Siyasanga was shocked. He saw Mumsi after his return from the Strand. She told him and Siyasanga that they were cowards or fools. She had found young men to do the job. She added a comment about finding money, which testimony was not canvassed or explained. Accused 1 had
15 previously offered Sivenatha R7 000,00 for the job.

Sivenatha said that there was airtime on Siyasanga's cell phone, because Sivenatha obtained a SIM card from one of the boys in the area. He had the SIM card for a short time and
20 kept it because of the airtime. This was the phone that he took with him to the Strand. He could not remember the time periods between the approaches of accused 1 to him. He thought that accused 1 was angry when she asked him to have her husband killed.

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On 28 October 2009, Sivenatha and Amos went to buy electricity early in the morning, but the machine was out of order and they had to return. On their way back they saw two young males, who passed them, running, chatting and
5 laughing. They ignored each other. He could not estimate their ages. When Sivenatha and Amos went around the corner, an agitated woman "Dubs", who was standing in her yard, inquired from them about two guys, referring to the two
10 young men who had just passed them. They told her that they had seen them and they could still see them in the distance and pointed towards them. She made a report to them. It was between 5 a.m. and 6 a.m. They could see and did not need a light, as it was just getting light. The one man was wearing something on his head, but not the other. He recognised the
15 person who was not wearing a "beanie". He does not know his name. He identified him at an identity parade on 7 March 2010 and in court as accused 2.

There was a man called Lanele, who usually transported
20 school children, who was listening to the report by Dubs. They drove with him to the scene of the crime and discovered that it was Taturabi who had been shot. Sivenatha said to the people gathered there that the "lady" really meant what she wanted them to do. The people in the area were asking questions
25 about accused 1. He told them to wake Siyasanga, who would

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confirm what he was telling them. That was how Siyasanga was woken up. The police were not on the scene yet, as it had just happened. Sivenatha was only there for 15 minutes before he went home and told his aunt that the lady who had
5 asked them to do something, had done it by sending other people. He could not recall seeing Siyasanga again that day, which does not mean that he did not see him. Siyasanga said it was a brief visit.

10 The first day when accused 1 asked him to kill her husband, she asked him specifically to kill him and that she was offering R7 000,00. She said that her husband chased them out of the house when he was drunk. Sivenatha did not know the deceased as a person who got drunk. He told his aunts about
15 the request. Later accused 1 called him aside while he was standing with Siyasanga and asked him if he had involved Siyasanga. That was when she left her phone number and took Siyasanga's number, after she had asked for someone with a phone. Mumsy asked himself and Siyasanga if someone
20 had used a firearm before and how does it happen that it can be untraceable to the police. They did not know the answer. It was after this incident that he went to the Strand where she sent him an SMS.

25 He never had any personal problems with Mumsy. He denied
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that there had been problems to get him to come to court or that he had been running away from the police. He admitted that he smoked marijuana with Siyasanga, but not other drugs. It was put to him that there were many instances that his evidence was contradictory to the evidence of Siyasanga. He was questioned regarding the differences between their versions, including the version relating to the SIM card, which according to Siyasanga was given to Sivenatha by accused 1, while Sivenatha himself said the SIM card was given by boys in the area. He denied that he received the SIM card from accused 1. Siyasanga had said the SIM card was provided to organise the killing of her husband, which Sivenatha did not agree with. He did not explain why he acquired the SIM card.

The version relating to him going to the Strand, differed between the two men, in that he denied that he went away to get away from accused 1 and he said he kept the phone in his possession, contrary to Siyasanga's version, who said that he kept the phone and was telephoned by accused 1 and informed by her that the door was not locked. According to Sivenatha, these words were text to him in an SMS by accused 1. He told Siyasanga about this SMS later. Sivenatha wanted to warn the deceased, but Siyasanga warned that such a story would break up the marriage. He also did not think that number 1 would continue to ask somebody else to do the deed. He denied that

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he and Siyasanga had fabricated the version to court, but there were aspects where he could not explain discrepancies.

Despite some differences, I do not believe Siyasanga and
5 Sivenatha's evidence can be rejected. The incident happened
sometime previously and must have been shocking to them.
Considering their obvious lack of sophistication and cognitive
ability, I think their evidence on material issues and relevant
important aspects corroborate each other. The discrepancies
10 indicate to us that the version was not fabricated together, but
rather recalled differently.

Sivenatha was adamant that he specifically recalled that he
saw accused 2 passing him and laughing just before they saw
15 the crime scene. When he was told that number 2 denies that
he saw him at all he replied that he did not know him, but he
saw him. It was then put to him that number 2 frequents the
Makhaza area, where he sells bags and clothes at the taxi
rank. It was never put to him by any counsel that number 1
20 was a client of accused 2, as later alleged. It was also never
put where accused 2 was on that morning, if he was not on the
scene.

Accused 1 denied that she asked him or anyone to kill her
25 husband, or that she exchanged phone numbers with him and

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Siyasanga, or that she sent any SMS.

During further cross-examination, Sivenatha testified that after accused 1's request, he did not want anything further to do with her. He did not want to do what she required and did not have an agreement with her. Her SMS surprised him, because there was no agreement.

As regards the text message from accused 1, he indicated that her name was recorded as Mumsy on the phone, so when she sent an SMS, it was written Mumsy. This was written at the end of the SMS as well. Siyasanga had the phone for a few days with free airtime, but he disagreed that Siyasanga received a call from accused 1, as Siyasanga had testified. He says he, personally, received such an SMS. There is, of course, a possibility that a call, as well as an SMS were sent on two different occasions, or that the one man told the other about the SMS or call, as testified by both men, and that they then recalled that he had himself received the message.

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Amos Wana also lives in Makhaza and he is friends with Sivenatha Gxotha. He knows accused 1 from seeing her in the street and he knew her husband, to whom he referred as Taturabi, by sight. He knows Taturabi was killed on 28 October 2009. On that morning he and Sivenatha were

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together. He repeated the exact same version of Sivenatha relating to how they attempted to buy electricity, but returned home when there was no electricity available and how, as they were about to turn a corner they saw two men running around
5 the corner. He confirmed that the shocked "Dubs" called Sivenatha and asked him if he knew the guys who had just passed them. Sivenatha replied then that one of them seemed familiar. Amos did not know the two guys who were chatting and laughing. The men were young men, about the same age
10 as himself.

They went to the place where a person had been shot and Sivenatha said it was Taturabi. Amos confirmed that Sivenatha said to the people present: "this lady has really
15 done what she wanted me to do". They were not on the scene for very long before they left. He knows Siyasanga Mngese, but did not see him that day. He does not know accused 2 or accused 3. He knows Lanele, the man who transports children, and he saw him there that morning in his car outside
20 Dubs' house and later at the scene where the dead person was, but he recalled that he and Sivenatha walked to the crime scene, they did not drive there. He thought Sivenatha was mistaken.

25 He and Sivenatha visited his brother at Strand once. As they
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were on their way before they reached the Strand, Sivenatha received a call. Amos asked him what it was about and he was told by Sivenatha that it was a lady residing in his area, who wants him to be part of the deal. She was not going to lock
5 the door. He did not hear the voice of the caller, but he was told that it was the lady of Taturabi. Later Sivenatha received an SMS, but he did not inform Amos of the contents thereof. The testimony of Sivenatha that he only received an SMS was put to Amos, but he stuck to his version. He and Sivenatha
10 went to their place after the crime, but he did not recall that Siysanga arrived. (Siysanga did recall seeing Amos there).

Elethu Mapeyi is the 21 year old daughter of accused 1. She previously lived with her mother and the deceased, her
15 stepfather, in Makhaza in Khayelitsha. She came to stay with them in about 2007. She enjoyed a good relationship with her mother and the deceased. The deceased was good to her and she liked him. She was not aware of any problems between her mother and the deceased. When the deceased passed
20 away on 28 October 2009, she was sleeping. She was in Grade 12 and it was just before the end of year exams began. She was woken by a neighbour who told her what had happened. She went to look, cried and was very shocked. Her mother, accused 1, was at the clinic. The previous evening
25 she had told them that she was going to the clinic in Athlone.

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Later that morning she saw her mother at the house. She could not remember times and she said she did not speak to her, which we found strange. She stayed in her room.

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Ms Nofemele often visited both her parents at their home and spoke in general to the two of them. She does not know accused 2 or accused 3. She knows Siysanga and Sivenatha as people she used to see in the street. She said her
10 stepfather had injured his arm the weekend before the murder when he fell on a coffee table and received treatment for the injury. This aspect is confirmed in the *post-mortem* report, Exhibit D. The truck was not at home on the evening before or the day of the murder. The court concluded that it may have
15 been as a result of the injury that the deceased did not drive on the day of the murder.

In the two weeks after the murder, before the funeral in the Eastern Cape, Elethu stayed with her mother in the house.
20 They were in the Eastern Cape for about a week before they returned to Makhaza. She was present when accused 1 was arrested shortly after their return and was taken away by a detective. She went to live with her aunt, as members of the community demanded the key of the home. She said her
25 mother was not informed of her rights when she was arrested.

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In 2009, her mother used a Nokia cell phone and the service provider was Cell C. She heard about the burglary in the house while she was not there. Nothing was broken, but the door was opened and people entered. She was told by
5 accused 1 that a cell phone had been taken. The burglary at their house had been a few months earlier. She visited her mother in Pollsmoor a few times and her mother denied the charges. Elethu avoided answering questions relating to her mother's demeanour after the incident. She could not explain
10 why she and her mother had not discussed what had happened to her father. She does not know of any reason why her mother would have wanted to kill her stepfather. Elethu is aware that members of the community are accusing her mother of killing her father. It was apparent to us that Elethu was sad
15 and very upset about the death of her stepfather.

Detective Sergeant Andries Hlako ("Hlako") testified that he was stationed at Harare Police Station in Khayelitsha in October 2009. He had been the investigating officer in the
20 murder docket in this matter since November 2009. He also took over the investigation into the Caverni break-in case in Claremont in the beginning of 2010. It was never indicated how the two cases became linked. Hlako perused the documentation and the witness statements in the murder
25 docket and concluded that accused 1, the wife of the

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deceased, might possibly be involved in the killing of her husband.

On 19 November 2009, a Thursday afternoon, Hlako and
5 Constable Kutwana ("Kutwana") went to the house of accused
1 at about 15:00. Her daughter was present. After introducing
himself, he asked her to accompany him to the police station
at Harare for an interview. She accompanied him voluntarily.
At his office she agreed to be interviewed. She was relaxed
10 and the interview proceeded in Xhosa, her language. Accused
1 relayed some crucial information. Hlako then warned her of
her constitutional rights. She still wanted to tell him all the
information and indicated that she would assist him to get the
people who killed her husband. He warned her of her rights
15 again and he repeated these rights in court. She was not
forced, threatened or assaulted, was willing and co-operative
and elected to point out to him the people who were involved.
She did not know the full details of these people and Hlako
tried to figure out how to get hold of them.

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Fortunately accused 1 knew accused 2's cell phone number by
heart. He requested her to contact number 2 in his presence
on her cell phone and suggested that they should arrange a
meeting with the people where Hlako and she would be
25 present. She agreed and in his presence arranged to meet the

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people at Promenade Mall in Mitchells Plain in front of the FNB Branch at 16:00 the same day. Hlako arranged with other members of the police station to accompany them to the meeting place. The purpose of the meeting was to arrest the
5 suspects involved in the killing of the deceased. These suspects were unknown to him and the other detectives, but accused 1 was willing to point out the people responsible for the death of her husband.

10 Hlako and the other detectives who accompanied him were in civilian clothing. They drove to the meeting place in different unmarked police vehicles. Number 1, himself and Kutwana were in one vehicle. Before they left for the mall, and at the mall, accused 1 was warned of her rights again, which she
15 understood and she was still willing to co-operate. On their way to the mall, accused 1 received a telephone call, presumably from accused 2, to say where he was. They took up position in front of the FNB Bank on a bench and waited for the suspects to arrive. Phone calls were coming and
20 according to accused 1 the calls were from accused 2, indicating where he was. The other detectives were in the area. Kutwana was behind them.

They sat there for about an hour. Eventually accused 1
25 received another phone call and then put the phone off. She

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signalled with her eyes and said: "there are those children". Hlako stood up and approached the two men that number 1 had indicated. He produced his appointment certificate and warned them of their constitutional rights before they were
5 lawfully arrested. He explained the charges against them and they were taken to the waiting vehicles. Both had a cell phone. The two accused said that they knew nothing of the charges after they were told that the charge was murder that occurred at Makhaza on 28 October 2009. Hlako did not give
10 them the name of the deceased.

Number 1 was called and made a report, from which it was concluded that the correct people had been arrested. The three cell phones of the three accused were seized and sealed
15 in a numbered forensic bag in front of the. Their cell numbers were recorded in Hlako's statement, which he used to refresh his memory. Accused 1 had a black Nokia cell phone with number 0721729829. She also gave Hlako the number of a spare SIM card that she had been using with the number
20 0747632865. Accused 2 had a Nokia cell phone with number 0735073106 and accused 3 had a Samsung cell phone with number 0747814518. Accused 1 and 2 confirmed to him that the phones belonged to them. Accused 3 denied that the phone that he had with him belonged to him. He said he was
25 using it.

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Hlako took the three accused to Harare Police station, where they were detained. He took the cell phones to the war-room in Cape Town to have the information on the cell phones and of the extra SIM card number of accused 1 downloaded. At the police station, the three accused were each given a SAP14A form, setting out their constitutional rights, which they signed. They were then detained in the cells as recorded in the occurrence book. Hlako did not interview the accused at this stage, it was late and he wanted to go to Cape Town to the war-room to attend to the phones, whereafter he went home. The other detectives also went home.

Early on 20 November 2009, Hlako interviewed the three accused and they all indicated that they were willing to give statements, which he realised were incriminating. He explained their rights to them and they understood (it was not disputed that accused 1 and 2 wanted to make incriminating statements at one stage). Hlako testified that accused 3 made an incriminating statement that was recorded to a senior police officer. The admissibility of the statement was disputed by the representative of accused 3 on the basis that it was not freely and voluntarily made, that he had been assaulted and was influenced by an unknown white police officer at the police station to make the statement. The court heard evidence in a

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trial-within-a-trial to determine the admissibility of this statement of accused 3 to Captain Van Wyk.

Trial-within-a-trial: Accused 3:

5 On 20 November 2009, after Hlako interviewed the three accused separately early in the morning in Harare Police Station Cellblock's office, he explained their rights to them, which they said they understood. Accused 3 was willing to make a statement. During the interview he gave information
10 that was incriminating. He was stopped and warned of his constitutional rights. He was relaxed and free of visible injuries and not threatened. Hlako called Captain Van Wyk ("Van Wyk") of Elsie's River Police Station, a neutral person, who had no involvement in this matter and arranged that he
15 would hear the statement at the Harare Police Station. Hlako also arranged with Sergeant James, from the Mitchells Plain Police Station, a neutral person and photographer, to video the statement. Hlako was not further involved with the taking of the statement.

20

At 09:30, Kutwana booked number 3 from the cells to be interviewed by Van Wyk in the office that had been made available for him. Hlako inquired with a doctor at a nearby hospital before the interview was conducted about an
25 examination of the accused, but he was informed that they

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were short staffed and he would have to wait long hours. In addition, all arrangements had already been made with Van Wyk, an interpreter, Mr Nzimane, also from Elsie's River Police Station and the photographer. Waiting in a queue at the
5 hospital presented a flight risk.

After the statement had been finalised, Kutwana booked number 3 back into the cells. Hlako saw him later. He had no complaints, was free from visible injuries, was relaxed and in a
10 good mood. Hlako said he asked him and the reply was nobody assaulted him, influenced him or pressurised him and that he had made the statement out of his own free will. The accused all appeared in Khayelitsha court on Monday 23 November. Hlako was present. Number 3 was free of visible injuries. The
15 magistrate asked some questions and number 3 did not complain.

As regards the allegation on behalf of accused 3 that he had been influenced by an unknown person, Hlako testified that he
20 did not know anything about such a person. An investigating officer normally left a note in the cell that nobody may interview the accused. He left such a note with the cell guard. The accused would be his accused and he must be left alone. Accused 3 never told him that anyone had interviewed him
25 aside from himself. It would be indicated on the occurrence

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book if anybody else booked him out for an interview and there was no such indication.

Sergeant Hlako was not aware of any injuries to accused 3 before or after he gave the statement. He confirmed that they arrived at Harare Police Station after the arrest of the three accused at about 17:45. The accused were booked into the cells after documentation and administration details were attended to, including the completion of SAP14A forms, setting out the constitutional rights of the three accused, which documents were signed by them. Copies of these documents were handed in. After he booked in the accused, Hlako took their cell phones and SIM cards to the war-room in Cape Town.

He did not interview accused 3 that evening, as he was tired and went home to sleep. The first time he was interviewed was early on the morning of 20 November. He interviewed accused 3 in a section of the cellblock and did not book him out. Accused 3 wanted to make a statement. He was busy with him for about an hour. He also interviewed accused 1 and 2 the same morning. He could recall that there were other people in the cell with accused 2 and 3.

When Hlako interviewed number 3, he was very relaxed. Hlako thought he had a good relationship with him. He never

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complained despite being given the opportunity and told Hlako that he was "more than happy". On the day of the arrest, the assisting detectives waited in the mall with Hlako and accused 1. When accused 1 spotted accused 2 and 3, she signalled and Hlako approached them. He informed them who he was and produced his appointment certificate. It was put to him that accused 3 will say he was grabbed by the belt by the other detectives and shouted at and that guns were pointed at them. Hlako replied that these were malicious allegations and lies.

10 The area was full of people, including children, and there was no need to shout or point firearms. He also denied that he pushed number 3 into the motor vehicle and shouted and screamed at him then, as was alleged at one stage.

15 At the police station, the other detectives went home. Hlako travelled in a car with accused 1 and Kutwana and the other two accused travelled in a car in front of them. It was put to Hlako that there was an Officer Bobotjana on duty at the prison cells and that the police officers were calling his name to

20 unlock the cell door, which is how accused 3 knew his name. Hlako agreed that there was a Warrant Officer Bobotjana employed at the police station, but he was not on duty and was not seen at the time when the accused were detained. Officer Jacobs was on duty and received the accused.

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According to Hlako nobody visited accused 3 after he had been put in the cells on 19 November 2009. Hlako saw him again on 20 November. Number 3 did not report to him that anybody had seen him. The only person who had contact with him was the cell guard on duty. If somebody wanted to see the person in the cell, the procedure is that they will talk to him, Hlako, about the matter as the investigating officer. It was put to Hlako that number 3 would say that Hlako did not leave the cells immediately after the accused were booked in, but that Hlako and three other detectives, in plain clothes, stayed behind with accused 2 and 3 and assaulted them by slapping number 3 in the face, by tightening the handcuffs on the accused and by putting a bag filled with pepper spray over their heads and that they shouted at the accused and asked where the gun was that they used. Hlako denied these allegations categorically and added that the accused was not asked about a firearm at that stage.

It was put to him that he kept on asking where Lwandile was. Hlako said that he only heard about Lwandile later and he was charged later. (In due course it was shown that the charges against Lwandile, based on allegations made by accused 3, were dropped due to a lack of evidence). When Hlako was asked why accused 1 was taken to the magistrate's court and not accused 3, he replied that police officers can take

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statements, as well as magistrates. Accused 1 had taken tablets that day and there was a concern that she had tried to commit suicide. There is a shortage of magistrates at the Magistrate's Court and he arranged to take accused 3 to a police captain instead. Accused 3 particularly wanted to make a statement at that stage and told him so. He was warned of his rights, but he wanted to continue.

On behalf of accused 3, who was 18 years old at the time of his arrest, it was alleged that he was in Grade 11 at school at the time of his arrest. Hlako said this was not certain. The accused was not at school on that day. He behaved like a reasonable man during the interview and was mature and relaxed. He never told Hlako that he was at school. It was then put to Hlako that on the Thursday, 19 November, after the accused had been booked into the cells, and after Hlako and the three other officers had left, three more police officers, part of the team of Hlako, came to the cell of accused 3. They came to ask about a gun. Hlako said the allegations of assault and police intruders were lies. It was the first time he heard these allegations that were never related to any of his seniors for investigating purposes and neither did number 3 mention these allegations at his appearance at the Magistrate's Court.

Other people did not have access to his docket and could,

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therefore, not ask about a gun. He suggested that the accused should point out the alleged detectives that were involved. This the accused was not able to do. Hlako repeated several times that about 10 minutes after the accused
5 had been detained, he came to Cape Town to the war-room with the cell phones. The other detectives went home. It was after 18:00. He denied the two incidents of assault, or that any part of his team entered the cells and asked the accused about the gun. The cell guard, Jacobs, would have told him if
10 other people had been involved. He had been assisted by plus/minus seven officials during the arrest and named Sergeants Davids and Petersen, Constable Kutwana, Sergeant Neethling, Colonial Tobias and Constable Gojo. (It was later testified that there was also a Warrant Officer Scheepers).

15

It was put to Hlako, and denied, that accused 3 has marks where Hlako put handcuffs on him that he tightened so much that it hurt. He was asked to look at the hand of accused 3 in court and it was noticed that there was a mark on the top of
20 the right hand that looked like a small scar. Hlako denied that he caused this mark, that did not look like a mark left by handcuffs. It was just a scar on the top of the one hand. It was then put to Hlako that accused 3 will say that at 18:30, he was visited by an unknown white police officer, a tall blond
25 man in his 30's. Hlako said he did not have any clue about

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such a person. No young white officers were at the Harare offices and no such officer was involved in the investigation. He doubted that number 3 would know the time as he had no watch. Hlako was not there at that time and had left a note
5 that no one was allowed to visit the accused.

It was noticed throughout the trial that the legal representatives of the accused frequently obtained instructions from them by speaking to them in English and they were
10 apparently able to understand.

It was put to Hlako that according to the accused, men came into the cells at half past six that evening and that they questioned him. He was told that he was involved in a very
15 serious case that carried a life sentence and he was advised that if he makes a statement, he may be used as a state witness. The accused then told the men that he was still at school and he was told that if he made a statement, he would go back to school and would only need to come to court when
20 it was needed to testify.

Hlako said he had not been informed of such an interview and did not know who the accused was talking about. Hlako would have been contacted and involved if others had arrived. It
25 was further alleged that accused 3 was influenced and advised
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by a white man a day before he gave his statement. He told Van Wyk about this incident in the statement that he made to him. Some uncontentious parts of the contents of the statement of number 3 to Van Wyk were put to Hlako, 5 indicating that number 3 expected benefits from talking, namely that he would like to be a state witness. Hlako responded that if the accused wanted any benefits from making a statement, it was his hope only.

10 It was alleged that number 3 would say that on the evening of 19 November, a few minutes after the interview with the white person, Hlako entered the cell again and addressed the accused in a civil manner, wanting to know if it was true what the white detective told him, namely that number 3 wanted to 15 make a statement. Hlako denied this allegation and repeated the version of his whereabouts after the accused were detained. Hlako said that the next morning, 20 November 2009, accused 3 asked to make a statement and could not wait to make a statement, which was denied on behalf of the 20 accused.

Hlako also denied that he told number 3 not to take a legal representative and said he was warned of his rights relating to legal representation. The same morning, Hlako called Captain 25 Van Wyk to come to Harare Police Station to take the /bw /...

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statement of number 3. He denied the version of accused 3 that Hlako visited him again on the 19th and made arrangements with Van Wyk to take the statement the next day, being the 20th. Hlako testified that the cell phones of the
5 accused were booked in at the war-room sometime before 19:00 on 19 November. There is no blond white detective at Harare Police station.

Sergeant Neethling is stationed at Harare Police Station. He
10 is one of several detectives who assisted Hlako with his duties on 19 November 2009, after the station commander, Captain Tobias, called them together and asked them to assist Hlako to arrest suspects in a murder case. He said the suspects would be at Promenade Mall in Mitchells Plain. A transaction was
15 going to take place where money would be handed to the suspect by accused 1. The other detectives who accompanied them were Davids, Scheepers, April, Gojo, Kutswana and Tobias.

20 Neethling was posted outside with Davids in the parking area to observe. They were dressed in civilian clothes and used unmarked cars. He drove a blue Honda Civic, with Davids as a passenger. They arrived after 03:30. All the people were deployed to different areas. Scheepers, Tobias, Kutswana,
25 Gojo and Hlako were inside the building. April was outside.

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They waited more than an hour. The men at the mall were armed, but it was not necessary to use the firearms. Neethling noticed Hlako, Tobias, Gojo and Kutwana come out of the mall with two black men who were cuffed. Hlako informed them that
5 they were the two men that he had been looking for. The men were shocked and looked nervous. They were put in the Honda Civic. At one state the elderly female lady, in her 40's, who was with Hlako, pointed to the vehicle.

10 Neethling drove the men to Harare Police Station to detain them. Davids was the passenger. The apprehended men were speaking Xhosa very loudly. He did not understand and told them to be quiet. The accused and police officers did not talk to each other. At the police station, Hlako asked him to go
15 with him to the cells with the suspects. He did not enter the cells. When the cell was opened, Neethling left. Hlako went to the cell with the accused. They arrived at Harare just after five and he went home. He never saw the suspects again and was not further involved in the matter.

20

He said no firearms were pointed at the mall. The detectives had firearms in holsters. Sergeant Davids went to his office and when Neethling the offices, Davids had already gone. Of the seven or eight people that assisted Hlako, he does not
25 know how many stayed at the police station, as he left. He

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said there was no white blond male at the station and there were no white investigators. Davids cannot and did not speak Xhosa. It was put to Neethling that accused 3 would say that Davids asked him about a firearm while in the car, which he
5 denied. He also denied that the men were pushed into the car or shouted at as alleged. He confirmed that other people are not allowed to speak to the accused after their detention without Hlako's consent.

10 Sergeant Davids also assisted Hlako in his duties on 19 November 2009 and he confirmed the testimony of Neethling regarding the events at the mall and the people who were involved. They were informed that the suspects were coming to Promenade Mall and that a lady will hand over a sum of
15 money to them and that they should be on the lookout for African males at the centre. He confirmed that Hlako and Kutwana came out of the mall with two handcuffed suspects and Hlako said "these are the two suspects", who were the put in the vehicle. Hlako searched the suspects and recovered
20 cell phones. He informed the suspects that he was looking for the cell phone to see if the number of the lady who had been sitting inside, was on their cell phones.

The suspects seemed shocked and confused. Initially they
25 were resisting. He is not aware of anybody at any stage

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assaulting or manhandling the suspects. Afterwards they were talking Xhosa loudly, which he and Neethling did not understand and Neethling told them to be quiet. They were taken to Harare Police station, where Hlako took them to the
5 cells. He, himself, went to his office for five or 10 minutes and then went home. He could not remember the name of the cell guard and had no further contact with the suspects. He confirmed that when you visit a suspect, you have to speak, to the investigating officer and the cell guard. He does not know
10 about people who were shouting and screaming at the accused when they were in the police vehicle and nobody asked them about a gun. He and Neethling did not address the suspects. He did not hear anything subsequently regarding any assault of any of the men and knows nothing about a tall blond white
15 man at the police station.

Colonel Tobias ("Tobias"), the commander of the detective services at Harare in November 2009, testified that on 19 November 2009, he assisted Hlako, at his request, by
20 gathering members to go with Hlako to Mitchells Plain, where a transaction would take place between a lady and two suspects. The suspects would collect money from the lady. He repeated the version of how the suspects were apprehended at the mall and who were present and where. Hlako and the lady waited
25 opposite FNB Bank for the suspects. Kutwana and Gojo,
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himself and Scheepers were also at the centre.

They waited quite some time. They saw a commotion and then outside the mall they found Hlako and Kutwana walking with
5 two persons who were handcuffed. Hlako said that he had his people. Tobias never mobilised a white policeman. He did not see anyone being assaulted. He recognised accused 1 as the lady with Hlako, who had to hand over money to the suspects. He, himself, was not part of the investigation.

10

Tobias did not go back to the police station after the arrest, as he had another appointment. He left with Warrant Officer Scheepers, who also assisted Hlako with the arrest. Scheepers confirmed the version of Tobias. He was dropped
15 off at the station after the arrest, where he got into his own vehicle and went home. He did not see or hear of anyone assaulting the suspects.

Sergeant Petersen assisted Hlako and waited at the main
20 entrance of the mall for about an hour. Hlako and Kutwana exited the mall with two young black males, who were taken to the police station. He went back to his office at the station for about five minutes, whereafter he left for home. He did not see any assault at any time. He could not recall exactly when
25 he went home, but by the time he went home, most-of the

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people at the station had left.

5 Constable Gojo also assisted Hlako with the arrest of the suspects on 9 November 2009. He did not have a very clear recollection of what happened. He was at the mall for about an hour when he noticed two African males who had been arrested by Kutwana and Hlako. Since he realised that there were enough members to attend to the situation, he excused himself and went back to the station. He recognised accused
10 1 as the woman whom he saw in the mall before the arrest. At the police station at Harare, he got into his private vehicle and went home. He never assisted in detaining any of the suspects and was not further involved in the matter.

15 It was put to Gojo that accused 3 will say that he, Gojo, was a passenger in the car that took the two suspects to the police station and that he spoke to the suspects in Xhosa and asked about a gun. This was denied by Gojo. (Despite the fact that accused 3 frequently gave instructions to his counsel in court,
20 it was not put to Gojo that he had been part of the assault on the accused at the police station as was later alleged. It was also not disputed that he had left for home).

Sergeant April stated that on 19 November 2009, Tobias gave
25 him an order to assist Hlako with an arrest. He could not

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accompany them due to other commitments. He left the offices at four o'clock that afternoon and was never part of the arrest team.

5 Constable Kutwana ("Kutwana") was asked to assist with the arrest of suspects and drove with Hlako and accused 1 to Promenade Mall. On their way number 1 made a phone call and said that she was on her way to Promenade Mall in a taxi. She spoke Xhosa, which Kutwana understood.

10

At the mall, he, Hlako and accused 1 waited in front of the FNB. The "lady" and Hlako sat on a bench, while he stood six metres away behind them, watching the entrances. After observing for approximately 30 minutes, he saw the lady speaking on her cell phone. As he watched, he saw two African males coming from the one entrance, approaching Hlako and the lady. The lady was on the phone and he noticed that one of the guys was also on his phone. When the lady stopped her call, the guy also stopped his call. The lady was looking in the direction of the two men.

The guys passed in front of the lady while looking at her. They walked in the direction of Pick n Pay, then stopped, both still looking at her. They then walked past in front of him behind the lady. As they were passing, their eyes were on the lady

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and she was looking at them. They stopped a few metres away and turned back. Hlako and the lady stood up and met the guys. Hlako showed them his appointment certificate and told them they were under arrest for murder. Hlako grabbed
5 the one suspect, while Kutwana grabbed the other. The suspects were shocked and did not resist. They were cuffed. Hlako searched them and found a cell phone in each suspect's pocket. People started screaming and they walked out of the centre.

10

Outside they met Neethling and Davids and the suspects were put into their vehicle. Himself, Hlako and the lady got into their own vehicle. The lady was not handcuffed. At Harare Police Station he assisted Hlako to take the suspects to the
15 cells. Hlako detained the suspects and Kutwana went home, as it was already late in the afternoon. There were no other detectives at the police station when he left, only uniformed policemen. He confirmed that Tobias did not come back to the station after the arrest.

20

On 20 November 2009, he booked accused 3 out of the cells at the station at approximately 08:30 to give his statement. He and Hlako went to the cells. Hlako informed the cell guard that Kutwana would book out accused 3 for a confession and left.
25 The cell guards were two ladies. Accused 3 looked relaxed

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and did not complain. The cell guard recorded in the occurrence book that the suspect was booked out for investigation. She brought the suspect into the reception area.

- 5 After he saw that accused 3 had no injuries, he signed the occurrence book and then informed the accused of his constitutional rights before he was cuffed. At about 09:30 accused 3 was taken to an office, where his statement would be taken and the handcuffs were removed. Kutwana
10 collected him again at 11:45 and took him back to the cells. He noticed that the accused was still free from visible injuries and had no complaints. Documentary proof in this regard was provided to the court.
- 15 At Promenade Mall, the detectives did not use their firearms or point their firearms at anyone. Kutwana recognised accused 1 and accused 3, but not accused 2. He did not notice that the lady signalled with her eyes, but he could say that she looked at the men and spoke on the cell phone and that they were
20 looking at her. Kutwana became suspicious when he saw their eyes on each other. He saw number 3 and number 1 talking and stopping a cell phone call simultaneously. It was put to Kutwana that accused 3 will say that he, Kutwana, was part of the three police officers who assisted Hlako in the cells after
25 the suspects had been detained. He denied this. He also
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denied that Hlako booked number 3 out of the cells for his statement, as alleged. Kutwana himself instructed the cell guard.

5 It was put to Kutwana that accused 3 will say that he did not put handcuffs on, but leg cuffs, which he denied. It was alleged that accused 3 will say that he showed his hand to Kutwana where he had an injury, where he had been assaulted by Hlako and the three policemen, including Kutwana, to which
10 he replied that when he cuffed him, he examined number 3 and noticed that he had no injuries on any visible parts. It was also put to Kutwana that accused 3 will say that he does not know the lady, which Kutwana could not respond to.

15 Kutwana was not present after the suspects were placed in the cells and was not present when the 14A forms were given to them or signed. He recalled that the charge was read to the suspects at the mall, but they were not informed of the name of the person who had been killed. Kutwana impressed the
20 court as a thorough, perceptive witness, who gave clear reliable evidence.

Sergeant Jacobs ("Jacobs") was a cell guard on duty at the cells at Harare Police Station on 19 November 2009 from
25 about 05:45 in the morning to 18:00 in the evening. Copies of

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the occurrence book for the relevant date were handed in, marked Exhibit T. With reference to this exhibit, he explained that the three accused were booked in at 17:55. It was recorded that their three cell phones were taken to the war-
5 room. There were seven prison cells at Harare, 12 males in cell 2, seven juveniles in cell 3 and two females in cell 4, as reflected in Exhibit T. On 20 November he was on duty during the evening shift from 18:00. Constable Hewulana was on duty on 19 November after him, as appears from the occurrence
10 book, Exhibit T, which indicates Hewulana, assisted by Jacobs, checked the cells at 18:00 on 19 November.

The next morning, 20 November, Constable Bobotjana took over duties as a cell guard at 05:45 to six o'clock. It was put
15 to the witness that accused 3 would say that he and number 2 were held on their own in the last cell, which he denied. He said all 12 male suspects were in cell 2. It was put to him that accused 3 would say that he, Jacobs, was not on duty the evening when he was detained and that Bobotjana was on
20 duty. This he denied and said that he and Bobotjana did not work the same shift. Bobotjana came on duty the following morning at six, as recorded by his signature in the occurrence book. Jacobs never saw Hlako go into the cell as alleged by number 3, while he was there. You cannot go into the cell, but
25 only to the passage outside the cell. The person will be taken

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out of the cell if he needs to be spoken to.

Warrant Officer Bobotjana, to whom number 3 referred frequently, testified. This witness was not well spoken and
5 some difficulty was experienced to understand exactly what he was saying at times. Bobotjana is employed as a cell guard at Harare Police Station. An SAP15, marked Y, was handed up to court to record the duty times of cell guards at the cells at Harare Police Station on 20 November 2009. He confirmed
10 that, as indicated on this exhibit, he was on duty from 05:45 until 18:00 on Friday, 20 November 2009. He said he was not on duty 19 November or when the accused were booked in or thereafter. He did not go to the police station when he was not on duty. Exhibit X was handed up, which contains photocopies
15 from the occurrence book dating from 19 to 20 November 2009, confirming his testimony.

Warrant Officer Bobotjana testified that he took over from Constable Hewulana at 05:45 on the morning of 20 November
20 2009. He arrived at the station just after five o'clock. He visited the cells at 05:45 and at eight o'clock in the morning to see how the prisoners were and there were no problems or complaints. The males were in cell number 2. There were three other cell guards on duty, another male and two females.
25 The females were Ndlewa and Mamsy. They all visited the cell

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from time to time. According to him, if a detective wants to speak to a prisoner, he would take the prisoner to the detective. He could not recall seeing Hlako visiting the cells on that day. Kutwana booked out accused 3 for the statement.

5

Bobotjana said nobody was assaulted while he was a cell guard. The investigating officer could not interview a suspect inside the cell as alleged. He did not know if accused 3 was interviewed that morning of 20 November 2009. Despite the fact that accused 3's counsel took instructions from him during Bobotjana's testimony, it was not put to Bobotjana that he witnessed three officers, including Hlako, entering the cell of accused 2 and 3 in a way that indicated an assault was imminent, as alleged by number 3 at one stage.

15

Namsi Ndwele was a reservist who booked prisoners in and out of the cells at Harare Police Station in November 2009. She said an investigating officer cannot interview a suspect in the cell itself. She does not know if accused 3 was interviewed by Hlako on the morning of 20 November 2009. If he did, somebody else opened the cells for him. She did not book him out and nothing on the record indicates that accused 3 was booked out of the cells before 09:30 on 20 November 2009. It was put to her that accused 3 will say when he arrived at the cell between five o'clock and six o'clock on the evening of 19

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November 2009, she was at the cells, but she denied the allegation. It was also put that accused 3 will say that she was the person who opened the door for a white detective who visited accused 3 in the cell on 19 November 2009 in the evening. She responded that she was not on duty on 19 November 2009 and she was not there.

Sergeant Nobathla was a cell guard during the dayshift on 20 November 2009 with Bobotjana at Harare Police Station. He and Bobotjana took over from the personnel who worked nightshift, between 19 and 20 November. He said there were two female reservists on duty with himself and Bobotjana.

Constable Hewulana ("Hewulana") is based at Harare Police station, where his duties include the duties of a cell guard. A duty roster, marked Y, was handed to court, from which it is apparent, as testified to by him, that on 19 November 2009 he came on duty at 17:45. Officially he was on duty from 18:00 that evening until six o'clock the next morning. 20 November 2009, he was on duty with Constable Matseko. Hewulana was present when the three accused were detained. He and Sergeant Jacobs visited the cells where the accused were held. Jacobs handed over the accused to him. He inspected each and every cell and counted all the awaiting trial prisoners before he signed the handover. He also referred to the SAP14

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book, which had the names of the people in the cells. The three accused were part of the prisoners that were counted. They had not complaints and no injuries.

5 Only himself and Matseko had the keys to the cells. Sergeant Matseko is now deceased. No detective or officer came to the cell, unless it was through one of them. There were no complaints at the times when the accused were visited in the cells. Hlako did not approach him that evening, when the
10 prisoners were in the cells, to see them. According to Hewulana, the two accused were kept in cell 2, with several male prisoners. He could not say exactly what time Hlako left the cells after the detention of the suspects and he could not remember who accompanied Hlako when he brought in the
15 suspects. He and Jacobs took the three accused to the cells. As far as he recalls they were detained at 17:55. That was about when his duties started.

Accused 3's counsel took instructions from accused 3 and it
20 was put that accused 3 will say that he did not see Constable Hewulana at the cells, but that he only saw Bobotjana there on the 19th. Hewulana confirmed that he was there and that Bobotjana only took over from him the next day at six o'clock.

25 Reservist Constable Ndela testified that she was a cell guard

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on 20 November 2009 at six o'clock in the morning at Harare Police Station. She started her shift with Constable Bobotjana. She did one cell visit, recorded on Annexure Y, with Namsi, the other female cell guard who testified. There
5 were no complaints. She recognised all the accused. She remembered number 2, who did not talk a lot, but he did say that if his family came to see him, he wanted to change his clothing. Accused 3 talked a lot. He had no complaints and complimented her on her looks. He never said anything about
10 having been assaulted. She did not speak to accused 1. Despite the fact that the counsel for accused 3 again took instructions, the testimony of this witness was not disputed by accused 3 at this stage.

15 Captain Van Wyk testified that on 20 November 2009, while he was stationed at Elsie's Rivier Police Station, he was contacted by Harare Police Station to take a statement. He was at Harare at about 10 o'clock that morning. Mr Nzimane, a clerk from his offices, accompanied him to Harare in his car. He
20 was the interpreter. Kutwana brought accused 3 to the office. The accused and Nzimane and he, himself, were waiting for the photographer, Sergeant James, who was late. The accused was not handcuffed and was very relaxed. He was told why they were waiting. Van Wyk spoke in English and the
25 interpreter translated. The accused understood.

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After the photographer arrived, they started with a statement that was recorded by video. It was 11:00. Van Wyk used a *pro forma* form to question the accused. This completed form, excluding the part of the document that contained the actual statement of the accused, was handed to court as Exhibit "U". The form records the questions by Van Wyk to the accused that were translated by the interpreter, as well as the answers of the accused. As appears from this document, it was testified that every page was signed by the interpreter, Captain Van Wyk and the accused and the thumb print of accused 3 also appears on each page. At the end of the document, there is a certificate by Van Wyk and the interpreter to certify that everything was in order.

15

According to Van Wyk, the accused was spontaneous. When he was giving his statement, he spoke so quickly that he had to be stopped, since his version had to be translated and Van Wyk had to write it down. It appeared to him that the accused had a lot of information and Van Wyk found it difficult to write down everything. His impression was: "hy wou sy hart skoonmaak". The only request by the accused was that he would like to be a state witness. He had no complaints and understood everything. Van Wyk also noticed that the accused understood English. One of the contentious issues in this

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statement appears on page 5 of the document "U", where the accused said that he was advised to make a statement. Van Wyk did not question him about this comment, but merely recorded it.

5

The accused had no visible injuries and did not complain. When the accused said he would like to be a state witness, Van Wyk did not question him about the comment. The video of the proceedings dated 20 November 2009, was shown in
10 court. The recording started at 10:40. The accused is seen sitting on a chair next to Van Wyk, sitting at a table. The interpreter can be seen. The hands of the accused are visible several times and it is noticeable that he has no injuries on either hand. He appears to be relaxed. It is clear that it took
15 a while for Van Wyk to write down the answers of the accused and there were often long periods when Van Wyk was writing and the accused was waiting for him to finish.

The accused seemed to be listening intently. The accused
20 stated that he was never assaulted in any way and did not complain at all. He repeatedly said that he understood and he was giving his complete co-operation. The one instance where it was recorded by Van Wyk that the accused had said that he had complaints was incorrectly filled in and he had in fact
25 answered that he had no complaints. Van Wyk testified that

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the accused had told him that his highest qualification was Grade 11. The video showed that the accused had said at one stage that he wanted to be a state witness and at the end of the statement, before he started giving his disputed statement, the accused said he was writing exams, wanted to finish his exams and would not run away. He was informed by Van Wyk to speak to the investigating officer. After the statement had been recorded, the accused was asked whether he was satisfied with everything and he replied "yes, sure, yes". The recording was finished at 11:25.

Mr Simon Nzimane ("Nzimane") is a clerk at Elsie's River Police Station. He was asked by his commander, Van Wyk, to help on 20 November 2009 with the translation of a statement at Harare Police Station. He confirmed that the accused was calm, free of injuries and very co-operative. The accused was warned of all his rights in his presence, by Van Wyk. Another policeman took a video recording. The statement took about an hour. The accused indicated that he understood and was not unhappy. Nzimane translated what was said from English into Xhosa and from Xhosa into English. Captain Van Wyk asked questions.

The pages of the statement form and translation certificate were filled in and signed by him, Van Wyk and accused 3.

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Nzimane had no knowledge of the case. No complaints were lodged on behalf of the accused relating to the translation. Sergeant James was the photographer and/or video operator, who assisted in this matter by taking a video recording of the statement by accused 3 to Van Wyk on 20 November 2009 at the Harare Police Station. He arrived at about ten to eleven and started with his recording at about 11:00. He was finished by about 11:46. Captain Van Wyk and the interpreter were present. The accused was calm and had no complaints. He did not notice any injuries on the accused, who was not handcuffed during the interview.

After this evidence, the state closed its case in the trial-within-a-trial.

15

Accused 3, Thanda Krwece testified as follows: He was 18 years old at the time of the incident and was in Grade 11 at Zola Business School. He stayed in Delft with his mother and four sisters. He had contact with his father, who stayed in Makhaza, Khayelitsha. On 19 November 2009 he was window shopping for initiation clothes at Promenade Mall in Mitchells Plain. After he left the mall, on his way to the taxi rank, he met accused 2, who said he had a customer that he wanted to meet in the mall. Accused 3 went with number 2 to meet the customer. On their way to the mall, number 2 kept calling the

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customer from a cell phone and inquired about the person's whereabouts. Number 2 made his last call from accused 3's phone, as he had no airtime left on the phone.

5 Accused 2 saw the person he was looking for and went in that direction. There were three people sitting on a bench, including accused 1, whom accused 3 said he did not know, and Hlako, the investigating officer, whom he did not know then. They went directly to accused 1, whom accused 2 was
10 supposed to meet. Then the police grabbed them. Some were pointing firearms and others were searching them. They were shocked, trying to find out what was going on and trying to get away. They were handcuffed and searched. His cell phone was removed.

15

Some police were holding firearms and others were holding on to the belts of the accused. The two of them were forcefully placed in a vehicle. Accused 1 arrived. It was inquired from her if they were the young people the police were looking for.
20 Number 1 responded by saying "here is the person I was phoning", while pointing to accused 2. The driver of the motor vehicle was an unknown Coloured male. The passenger was the Detective Gojo. Gojo was reprimanding them, asking in Xhosa why they had killed the husband of Tamara. Number 3
25 was shocked and responded by saying that they had no
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knowledge of that and Gojo said "you are going to know about it".

During the drive to the police station, Gojo continued
5 reprimanding them and also asked about a firearm, as well as
Lwandile. On their arrival at Harare Police station, Hlako,
Kutwana and Gojo accompanied them. A fourth person who
accompanied them, did not testify in court. They went to the
last cell at the police station. Accused 1 and 2 and the four
10 detectives entered the cell. They were handcuffed. The police
were inquiring about a firearm. They were assaulted. The
detectives pressed their handcuffs down on their hands to
injure them. A plastic bag was sprayed with pepper spray and
pulled over their heads. They told the police that they had no
15 knowledge of the matter after the bags were removed.
Eventually the four detectives left.

After a while the next three detectives arrived, who also
assaulted them in a manner so as not to injure them. Hlako
20 was still at the police station. Now and then number 3 used to
see him. The other three detectives asked questions. They
also tightened the handcuffs and used the plastic bag/pepper
spray method. Eventually they gave up and left. When it was
late an "elderly" white person arrived and entered the cell. He
25 inquired if they knew how serious the matter was and that the

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sentence could be life imprisonment. There were only the two of them and this white gentleman in the cell. Number 3 was shocked and scared and worried about his exams. The white person proceeded by saying that if they played open cards, maybe by being a state witness, number 3 could write exams. He saw it as a way to get out of the case and away from the assaults and agreed to talk. (His description of the man differed from the previous description put to witnesses).

Hlako arrived again. He went to stand in the passage with number 3 (contrary to previous allegations that he entered the cell) and inquired whether what he had been told by the detective was true. Number 3 said yes. He asked how the incident with the accused 1's husband happened and number 3 explained to him the same version that he later repeated in the statement to Van Wyk. On 20 November 2009, Hlako and Kutwana arrived. They took him to a room used for cooking at the cells at Harare Police Station. Kutwana cuffed his legs. Hlako said he must narrate everything to Van Wyk and tell them he did not want an attorney. Because he did not know the law, he could not quarrel. He wanted to go home.

He was taken to the office where Captain Van Wyk was. The video man and the interpreter had not yet arrived. He was unhappy with the way Van Wyk treated him, as he was only

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interested in a statement. The interpreter and photographer later arrived. He was asked by Van Wyk if he had been assaulted, but because he did not trust him, he could not tell him. He asked to be allowed to write exams, but Van Wyk
5 merely said he should speak to the investigating officer, and he had been the one who assaulted him. He said he answered questions and made the statement.

Some of the policemen who testified in court were unknown to
10 him. He is not saying they were not at the mall, as he did not take note of all the police officers there. He was reminded that it had been testified that Gojo was not present in the vehicle that he was driven in and repeated that Gojo was the one who spoke to them in Xhosa in the vehicle. (This was
15 denied by Gojo, Davids and Neethling). He heard that the cell guards testified that he was kept with other male prisoners, which he denied. He did not even know the cell guards who testified. He only knew the one called Bobotjana .

20 When accused 3 arrived at the cells on the 19th, he noticed that Bobotjana had a key and the detectives who entered the cell, called out his name. Hlako assaulted him and only stopped after he promised to make a statement. (This evidence was actually contrary to his previous evidence). It was put to
25 him that Hlako said everybody had left after the accused were

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put in the cells on the 19th. He said Gojo, Kutwana and Hlako were lying. Some of the people who assaulted them in the cells were unknown to him and some did not testify in court. The people who assaulted him first were Kutwana, Gojo, Hlako
5 and then unknown people. He could not explain to Bobotjana, as he could see that he was assaulted when he opened the cell door. (This testimony was not put to Bobotjana when he testified).

10 When the detectives entered the cell, they asked questions and kicked them (contrary to previous allegations of being slapped). From the manner they entered the cell, Bobotjana could see that they were going to assault them. The evidence that Bobotjana was not on duty on that day surprised him. He
15 also said that he did not complain to Van Wyk, as he was immediately scared of him and he did not speak up at the magistrate's court as he was only asked if he wanted an attorney.

20 During cross-examination the accused said he had been writing exams during November 2009. On the 19th he was not writing and would only write again on Tuesday the 24th. When he was arrested, he had a timetable in his pocket, which he never showed to anyone. He went alone to the mall at about
25 half past 12. He does not know how long he was at the mall,

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he had no watch. He met accused 2 at the taxi rank. He said he spends weekends in Crossroads and when he is in Crossroads, he used to meet accused 2. He does not know what he does, as he only saw him on weekends and they did not talk about his job, but number 2 told him that he had a customer in Khayelitsha. He was selling bags, the sort that women use when they go to work. (Dresses were not mentioned).

10 He does not often go to Promenade Mall and lives mainly in Delft. The taxi took 20 to 30 minutes to get to the mall. There was no real explanation why he specifically wanted to go to Promenade Mall all the way from Delft. He also had no explanation for why he wanted to accompany number 2 back into the mall. He said he was going to spend the weekend in Crossroads to see his grandmother and he and number 2 would travel together. Number 2 phoned, presumably the customer, as they entered the mall. Accused 3 said most of the calls made by accused 2 were to inquire about the whereabouts of the customer. In total he made three calls, including a last call from the phone of accused 3. Number 3 gathered that number 2 had found out where his customer was after this third call.

25 When number 2 saw her, he said "there is the person" and /bw /...

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indicated in her direction. He saw two females and a man, that he did not then know was Hlako, sitting on a bench. As they were about to reach them, the police, including Hlako and Kutwana lunged and pointed firearms. There were many
5 detectives and a lot of noise of police and public. They did not say that they were the police and they did not show their certificates. The accused were searched and handcuffed. He tried to resist as he did not know why he was being arrested, but he did not sustain any injuries. They were taken to the
10 vehicle, but they were not formally arrested.

In view of the fact that his counsel had said that Neethling was the person who spoke to him in Xhosa, he explained that at that stage he did not know the names of the detectives and he
15 thought he was referring to Gojo. The person in the car, Gojo, asked about the firearm and the whereabouts of Lwandile. As stated previously, Gojo, Neethling and Davids deny this allegation. At the police station they were taken straight to the cell by Kutwana, Hlako and Gojo and a fourth unknown person.
20 He did not notice or recall who opened the cell doors (contrary to previous evidence that it was Bobotjana). He saw Jacobs for the first time in court and said Jacobs had lied, although it was pointed out to him that Exhibit X and the testimony of other cell guards confirmed the testimony of Jacobs.

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He said the detectives who arrived were calling out the name of Bobotjana, he was the only guard that he can recall. In new, adjusted testimony, he stated that he could not recall if he saw Bobotjana on the 19th or the 20th, but he definitely saw him during the weekend and he had the keys of the cell. It was put to him that Hewulana checked the cells throughout the evening of the 19th and that his testimony was confirmed in the occurrence book that was handed in, but accused 3 could not recall him. As regards the assault in the cell, he testified that the plastic bag was placed over his head by Gojo in the first group of detectives who assaulted them. Gojo assaulted them a lot. Hlako did as well, but he also asked questions. Number 2 was also assaulted in the same way. It was just the two of them in the cell. (During the cross-examination of Gojo, it was never put to him that he assaulted the accused in the cells or even that he went to the cells with them). The accused persisted that they were placed in the last cell. When shown documentary proof that he was not, he alleged that the people who filled in the occurrence book, made incorrect entries.

20

The evidence of number 3 relating to his injuries changed. He stated that the handcuffs were pressed down hard, especially by Gojo, who was lying when he denied that he was there. He said he told his legal representative what Gojo did to him. (There was no explanation why this testimony was never put to

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Gojo when he testified). Kutwana assaulted him and asked questions, namely where is the firearm and where is Lwandile. He said they were looking for Lwandile, who is a friend of his, who lives in Khayelitsha. (It was shown later that any
5 involvement by Lwandile was not known until after accused 3 had made a statement). The pressing down of the handcuffs caused an injury on his hand and he indicated in court the right hand wrist, but said both wrists were injured. (Previously he alleged there was a scar on his hand, but during the
10 viewing of the video, it was evident that there was no injury on the top of his hand). During his testimony he mentioned black marks on his wrists, no bleeding or a scar.

When the first group left, he was still alone in the cell with
15 accused 2. The second group of people who assaulted him, were all three involved in the arrest at Promenade Mall. The cell guard, Hewulana, is not familiar to him. He did not see him after the arrest and disputed that he visited his cell eight times during the night, despite the recorded contents of the
20 occurrence book. This was never put to Hewulana. After an assault by the second group of detectives, they unlocked the handcuffs. He thought they had given up. The explanation of how the second assault took place, was incoherent and unconvincing. He did not tell anyone about the assaults, as
25 they did not talk nicely to him, evidence that similarly sounded
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unbelievable.

He denied the evidence of the lady cell guard who testified about her visit to his cell on 20 November, as recorded in
5 Exhibit X, at 09:05 in the morning. He also denied complimenting her and said he had never seen her before and his situation was such that he could not have praised her. (Her evidence was never denied in court). He alleged that he had explained to her legal representative that he did not know
10 her, an aspect that was not clarified by the representative.

Regarding the "elderly white" unknown officer, who he had previously alleged was a man in his 30's, he said this man arrived after the second group of assaulters had left. He tried
15 to adjust his previous testimony by saying the person was older than himself. The evidence in court had been that the only white males at the station were older men. Number 3 said that the officers are all lying about the non-existence of this person.

20

He repeated that the person who advised them that there was a possible sentence of life long imprisonment, told him that if he speaks he may be a witness and may only be required to testify in the case. He thought he could go home. He did not
25 regard this person as someone he could report something to,

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but he accepted his advice. The man informed them about the seriousness of the matter. Along the passage he heard him calling the name of Bobotjana, but he did not see who opened the cell. He listened to the man, but number 2 was scared.

5 The man conversed with him. He and number 2 were not speaking. Number 3 repeated his testimony that Sergeant Hlako returned after the man left and wanted to know if it was true that he wanted to make a statement. Hlako spoke to him in the passage. He told Hlako his version. He did not tell
10 number 2 what he told Hlako, as they were not on speaking terms. (There was no indication why he and number 2 were not speaking. This evidence was not addressed on behalf of accused 2, who also never alleged, denied or confirmed, that he was assaulted in any way in the cells).

15

On his way to Van Wyk, he was full of hope that he would be allowed to go home. He was still in "pain", but there was no indication what was painful. He said his pain was not important. Life in prison scared him. He thought he had made
20 a plan to solve the problem. He could go home and finalise his exams, which was the reason why he told Van Wyk that he had no problems. Van Wyk did not treat him well and he did not trust him. It was pointed out to him that he looked very comfortable and relaxed on the video talking to Van Wyk, and
25 he replied that he hoped at that stage that he was going home,

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although he realised that Van Wyk was not well disposed towards him.

The interpreter was helpful. Number 3 said he understands
5 English, but with some things he needs an interpreter. He
denied that he wanted to "clean his heart". He was saying
things to allow him to go home. He did not tell Van Wyk that
he just wanted to make a statement to be able to go home, as
Van Wyk was not somebody you could open up to. He
10 consistently denied that the interpreter was present while he
and Van Wyk waited for the video man.

The state advocate read to accused 3 from Annexure "U",
completed by Van Wyk. He confirmed the contents of the
15 document, that he heard and understood everything and that
everything was explained to him in Xhosa. He maintained that
he did not inform Van Wyk that Hlako had told him not to ask
for a legal representative, as he is not used to colliding with
the law and did not know the importance of an attorney. It was
20 important to him to make a statement and go home.

His explanations as to why he did not tell the magistrate,
during his first appearance, about injuries and assaults, were
unconvincing. The gist of number 3's evidence remained that
25 he made a statement, trusting that it would open the way to go

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home. He told Van Wyk that he was advised to make a statement, as noted in the document "U". Number 3 specifically said that the white gentleman did not make any promises to him. He explained to him that if he were a state
5 witness, he might be able to go home, but will be expected to testify. No promises were made as recorded in Exhibit "U". However, he did expect certain benefits and would have liked to be a state witness.

10 He said to explained to Hlako what had happened. Hlako did not write it down. He never advised the court, until much later, that he actually told Hlako a fabricated version. He agreed that it was his own version. He was asked by Van Wyk if the contents of the statement were his own experience and replied
15 in the affirmative. However, after some questions during his testimony, the accused said his story to Van Wyk was a lie, fabricated, in order to get out of jail and to be able to write exams. He had the timetable in his pocket, although he did not show it to Van Wyk, because Van Wyk had ignored the
20 school issue. This, despite the fact, that writing the exam was the main reason for making the statement. He could not remember what subjects he still had to write. Considering that he intended to spend a weekend away from home with no books in the middle of exam time, we are not convinced that
25 writing exams was a priority with accused 3.

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Accused 3 was also asked about Annexure N3, the SAP14A form, which number 3 denied knowledge of. He said this document was not explained or read to him. He could not recall when it was signed or at what time. He alleged that he had informed his legal representative that he had no knowledge of this document. (The document signed by number 3 was never disputed or more details required from state witnesses during cross-examination). Number 3 alleged that there were a lot more policemen at the mall than the seven or eight that testified in court. All the detectives who testified were lying on the subject. This proposition was not put to state witnesses, who corroborated each other. He also denied that he was on the phone at the same time as accused 1, as alleged by Kutwana.

During further questioning, accused 3 stated that accused 2's number was on his phone that was given to him by Lwandile. Although he repeatedly referred to the phone in his possession as his phone, he testified that he told the detectives that the number of the phone, and not the phone itself, belonged to him. He bought airtime for the phone with pocket money given by family members. From his testimony it seemed highly unlikely that the phone belonged to anyone other than himself. He maintained that he did not know accused 1 or her children

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or husband or the fact that there had been a death in the family.

Accused 3 testified that he did not tell the white policeman, who advised him to make statement, anything about the matter. He did, however, later fabricate a story in which he incriminated himself and told Hlako this fabricated version shortly after the white policeman had left. He gave the same fabricated version to Captain Van Wyk, who took it down in writing. He claimed that he was able to make up this story quickly, as he knew the information the detectives were looking for, based on questions they had asked him since his arrest. He made sure he "gave them what they wanted". He decided to lie to get out of the situation. He had not previously divulged in court that the story was fabricated, as he had been advised by his legal representative that the trial-within-a-trial proceedings will be about whether the statement was voluntary or not, not about the contents.

He could not explain why he told Van Wyk, in response to his questions, that his statement would comprise of events within his personal experience, observation and knowledge. When asked if he was nervous about saying a lot of things that were not true, but yet were incriminating, he replied by saying that he was trying to get away from life in prison. He was nervous,

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but he would not let it be a stumbling block. He confirmed that he made the statement to Van Wyk, mainly because the white policeman had told him that he might be sentenced to life imprisonment. There was no reference to assault or undue
5 influence.

There were many discrepancies in accused 3's case in the trial-within-a-trial. The aspect of the alleged Xhosa speaking detective in the vehicle they drove in to the police station from
10 the mall changed. First he alleged that it was Davids, then it was Gojo, who denied this, as did the driver and passenger of the vehicle. It was never put to Neethling or Davids, that Davids was not in the car and that it was Gojo. The accused first insisted that Bobotjana, the one cell guard at Harare
15 Police Station was on duty on the evening of 19 November 2009 when he was booked into the cells. During cross-examination he could not recall if he saw him or only heard them calling out his name.

20 In evidence in chief, the accused explained that he did not complain of the assault to inspector Bobotjana, because he opened the cells and could see the accused was assaulted on the 19th. In the cross-examination of Inspector Bobotjana, it was put to him that accused 3 would say that he (Bobotjana)
25 opened the door for the white male detective, who visited his

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cell on the evening of the 19th. Accused 3 did not in fact give this evidence. He referred in his evidence to one of the female detectives. The evidence of a number of policemen and women who were on duty on 19 and 20 November, as well as a
5 copy of the duty register, showed clearly that Inspector Bobotjana was in fact only on duty on 20 November from 05:45 until 18:00. As regards the SAP14A form, setting out constitutional rights, Hlako testified that the first thing he did when he detained the three accused, was to give them these
10 forms to read and sign. Accused 3's signed form was handed in (uncontested) and marked Exhibit N3. Hlako was not questioned about these documents. During cross-examination the accused indicated a complete lack of knowledge about this form and told the court that his legal representative was aware
15 of this fact.

Constable Ngelwa started cell duty at six o'clock on 20 November 2009. She made one visit to the cells that morning, as recorded in the occurrence book. She told the court that
20 she remembered accused 3, because he spoke a lot and told her that she was pretty. Ms Ruiters took instructions from the accused in English before informing the court that she had no questions for this witness. When the accused was cross-examined on this issue, he said he had no knowledge of her
25 visit to the cell and that he was surprised by her testimony.

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He said that when he saw her in court, it was the first time he had ever seen her and he had told his legal representatives that he did not know her. His testimony in this regard is rejected.

5

Regarding the alleged late arrival of the interpreter, Captain Van Wyk testified that on the morning of 20 November 2009, he and Mr Nzimane, the interpreter, went to Harare Police Station together to take a statement from the suspect. They
10 were waiting for the photographer, who was running late. This aspect was not denied by the representative of number 3, yet during his cross-examination, the accused was adamant that he spent time alone in the office with Captain Van Wyk, because the interpreter and the photographer arrived late.

15

The change in testimony of the accused relating to the alleged assaults and a scar on his hand, which scar was notably absent when the video was viewed, was further proof of fabrication of testimony by him. Number 3's testimony that
20 almost everybody but himself were lying, is rejected. In addition, accused 3 could not explain satisfactorily why he went to Promenade Mall, nor why he had no books or clothes with him when he was going to spend time away from home allegedly in the middle of his exam period.

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The court was accordingly not satisfied that the evidence of accused 3 was reasonably possibly true, while there was no basis on which to reject the evidence of the many state witnesses who corroborated each other on all material issues.

5 It was clear that number 3 did not give his statement as a result of assault or any other form of undue influence. He was anxious, as alleged by the state, and confirmed by the accused to make a statement, according to him, because he wanted to and thought he could avoid the possibility of a severe

10 sentence. Clearly he wanted to be able to go home.

The court accordingly ordered that the requirements of the admissibility of the statement of accused 3 to Captain Van Wyk on 20 November 2009 had been met and the statement of

15 number 3 was ordered admissible in evidence. No new evidence was presented that indicated to the court that the statement should not be admissible in evidence in the trial and the previous finding in this regard is, therefore, confirmed.

20 The evidence given in the trial-within-a trial by the state was incorporated into the main trial by agreement. It was not agreed that accused 3's evidence in a trial-within-a-trial would form part of the main trial. The state continued with the main trial.

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The full video recording of the statement of accused 3, including the section that dealt with the incriminating statement was viewed. Difficulties were experienced to hear and follow the comments made by the accused, the interpreter
5 and Van Wyk. It appeared as though the translation of the comments of accused 3 were not always correct. The state advocate and the legal representatives of the accused agreed to go through the relevant section of the video recording, together with the interpreter, used by the court at the hearing
10 and the interpreter used for the translation during the recording of the statement, Mr Nzimane.

Subsequently the court was advised that it had transpired, during the viewing of the recording by all the advocates, that
15 further information, apart from the information contained in the written statement of the accused as recorded by Van Wyk, had been given by the accused. In due course the recorded evidence of accused 3 became more sensible and understandable. Mr Nzimane was called back to testify with
20 the agreed informal input of a court interpreter, Mr Qwashu. Nzimane translated the comments of accused 3 to Van Wyk. While the video recording was shown, Nzimane told the court exactly what words the accused was using in Xhosa and how the words were translated. It was evident, listening to the
25 video recording of the actual contested statement, that
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accused 3 was speaking animatedly, but not always coherently and clarification was often asked by Nzimane from him during the translation.

- 5 Eventually the entire statement was dealt with as recorded in the video. The statement was transcribed and handed to the court, by agreement of the representatives, incorporating the agreed, correct translation of the comments of the accused, Exhibit ("AA").

10

Accused 3 commenced his statement by saying that he wanted to tell what happened and who did it. Lwandile knew accused 1. "They" (referring to accused 2 and accused 3) knew Lwandile through his brother who was arrested, but they
15 continued to visit Lwandile. Lwandile told them that "the mother", who was arrested, asked Lwandile to kill her husband. They used to "hang around" with Lwandile. The first time Lwandile went with his friends to kill the husband, he did not do it. He does not know what prevented him, but they robbed
20 at the house.

On another day they were with Lwandile near "that house". "The mother" phoned Lwandile to go there the next morning. They were scared of Lwandile and could not refuse to go with
25 him. They left with Lwandile and an unknown friend early in
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the morning and split in two groups. Lwandile and his friend had the firearm and were standing near the house. Accused 2 and 3 were standing further on a corner and were "a bit scared". When they heard a shot, they ran away.

5

They could not say "no" to Lwandile. He liked to send them, if the lady was going to give money, as he thought she could get him arrested. The lady does not know them, or their names, or where they live. She gave them money. Lwandile is the person who shot. He took all the money and gave each of them R500,00. They spent it in a week. The "mother" had said she would give R5 000,00 for "that thing". When she called the previous day and said she would give R5 000,00, Lwandile was suspicious, as she had already given R5 000,00 and he did not go to Promenade Mall. He asked number 2 and 3 to go and fetch the money and gave number 3 his cell phone, so that number 3 could receive calls on the phone. That is how they were arrested. He added that Van Wyk should not tell Lwandile what he told him and asked if he could be given an opportunity to finish his exams, the would not run away.

After the statement by accused 3 was completed, he said, more than once, that he was satisfied and had no complaints. Van Wyk explained to him that he should talk to the investigating officer about his exams. According to Van Wyk,

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confirmed Nzimane, he read the statement to he accused and it was translated to him by Nzimane before it was signed by the accused.

5 Sergeant Andries Hlako continued to testify in the main trial.

He repeated his previous evidence about how he concluded that accused 1 might be involved in her husband's murder and how accused 1 was interviewed at Harare Police Station with her full co-operation. They spoke in Xhosa for one to two
10 hours to make accused 1 feel at ease and he frequently explained her rights to her. After she gave crucial information, he wondered how to arrest the two suspects that she had implicated and asked her to assist, which she was willing to do. They agreed to set u a trap for the suspects by arranging
15 a meeting with them at Promenade Mall in Mitchells Plain, based on a promise that she would pay them more money. He gave her a cloth moneybag filled with folded pieces of paper, to make the two suspects believe that she was in possession of money.

20

Accused 1 agreed to indicate with her eyes or head when the suspects arrived, so that he would be able to identify them. She remembered accused 2's cell phone number from memory without checking the number on her cell phone and Hlako
25 wrote down the number. She dialled the number and accused

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1 spoke to accused 2 on the telephone, in the presence of Hlako, and told him that she wanted to give more money and that she would need the suspect/s at Promenade Mall in front of FNB Bank. She told Hlako that accused 2 had agreed to
5 meet and that he would be accompanied by his "partner in crime", accused 3.

The evidence of how other detectives were involved in the arrest and how accused 1 was communicating with accused 2
10 or 3 or both on her cell phone on their way to the meeting, was repeated. She kept updating Hlako and Kutwana on the progress of the two men. Several calls were made. At the mall everybody went to their positions. Hlako had to sit and wait on a bench with number 1 until she pointed out the
15 suspects. He was careful not to alert others that they were together. Kutwana was observing the area and was mostly behind them. Accused 1 was looking around and speaking on the phone or checking her phone. She had the fake moneybag in her hand.

20

After she received calls, she updated Hlako about the whereabouts of the suspects and eventually told him that they were on their way. When the two arrived, shortly after she had put her phone off, her eyes were glued on them. She said to
25 him in Xhosa "those are the young boys". Hlako repeated his
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testimony about how the two men were then lawfully arrested by himself and Kutwana. Accused 1 was also arrested.

The accused were informed that they were arrested for a murder committed at Makhaza, Khayelitsha on 28 November 2009 in the morning. Their rights were explained to them before they were searched. A cell phone was found in the possession of each of the three accused. Accused 2 and 3 denied the allegations against them while they were at the vehicles outside the mall. Hlako called accused 1, who again pointed them out freely and voluntarily. The accused were transported to Harare Police Station. No documentation or money or anything else was found in their pockets.

Hlako took the three telephone and placed them in a forensic bag. He informed the accused that the records of the phones would be downloaded and asked them what the numbers of their cell phones were. He wrote down these numbers on a piece of paper. He required the information when the phones were taken to the war-room, Command Centre, in Cape Town and when applying for a section 205 subpoena for detailed billing records. The number of accused 2, previously provided by accused 1, corresponded with the number that she had given to Hlako.

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On their way to Harare Police Station, accused 2 and 3 were in a vehicle driven by Sergeant Neethling. Hlako drove with Kutwana and accused 1. She indicated that she was okay and seemed relaxed. She confirmed that she had pointed out the correct suspects. Hlako asked her whether there were more suspects, but she said there were not. She said the men were very dangerous. On their arrival at the police station, the three accused were escorted to the cells by Kutwana and Hlako. Subsequently Kutwana and the people who were assisting with the arrest left. Jacobs, the cell guard, opened the cell gate and booked the suspects in. They supplied their details and were charged. Hlako explained their rights to them in terms of SAP14A and the constitutional rights forms were filled out and then signed by each accused, who retained a copy of the form, while one was filed in the docket. Hlako repeated his evidence relating to a note on the notice board in the cells that stipulated that nobody was allowed to interview the accused. He then left for the war-room in Cape town, where the three cell phones were booked in. (Exhibit Q).

Hlako repeatedly testified that he did not go back to Harare Police Station until the following morning.

Before the accused were booked in on 19 November 2009, accused 3 was quite relaxed and chatting to Hlako freely. He told Hlako that he knew the alleged transaction was going to

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be a trap, since he had already received money from accused 1. He did not think she would be giving more money, but he needed money and wanted to try his luck, hoping it was a bonus. Hlako said he did not incorporate this information in his statement, as it was incriminating. On the morning of 20 November 2009, Hlako interviewed the three accused individually in the early hours of the morning. They had no injuries or complaints. All three accused were willing to make a statement. The interviews were conducted in an office with a table in the cell block and not recorded in the cell documentation, because the accused were not taken out of the cell block building.

After the three accused indicated that they wanted to make statements, they were warned of their constitutional rights. They were not influenced or intimidated or promised anything and acted out of their own free will. As previously testified, Hlako, then arranged with Captain Van Wyk of Elsies River Police Station that he would take down the statement of accused 3. He was an officer able to take statements by virtue of his rank and he was a neutral person of another station, with no knowledge of the case. Hlako repeated the testimony relating to the photographer who was late and the reason why the accused were not taken to a medical practitioner for a check up.

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Accused 2 did not eventually make a statement, as he requested legal representation. Hlako could not obtain legal representation for him at that stage and did not compel him to
5 carry on. Accused 1 took an overdose of medication and was taken to the hospital. She was not in a "right state of mind" and was, therefore, not compelled to make a statement. She had previously indicated to Hlako that she had a medical condition and he had phoned her family members to take
10 medication to her. It was his impression that she overused these tablets. It was never denied or explained by the representatives of accused 1 and 2 why they wished to make incriminating statements at one stage.

15 The three accused appeared in the Magistrate's Court on Monday 23 November 2011 and on 7 March 2010 there was an identity parade. Accused 2 and 3 were on the parade. Sivenatha Gxotha pointed out accused 2 at the parade.

20 At one stage Lwandile Mandla was a suspect in the case due to the statement by number 3 to Van Wyk. He was only arrested on 17 November 2010. He was released on bail three weeks after his arrest. The case against him was eventually withdrawn as there was no evidence implicating him. The first
25 time Hlako heard of Lwandile was when he received accused

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3's statement from Van Wyk. He asked number 3 who Lwandile was, to follow up on the details that he had provided in his statement.

5 Hlako is also the investigating officer in the Caverni housebreaking case in Claremont. No fingerprints were found on the scene. The stolen items were never retrieved. Hlako has worked at Harare Police Station from 2002, but to his knowledge, number 1 has never opened a case relating to a
10 burglary or theft at her own home in Makhaza. Hlako checked the system for the entire period of 2008 and 2009 and if a case had been opened, it would have been recorded in the system.

The three cell phones were booked into the SAP13 at Harare
15 on 24 November 2009, after they were returned from the war-room. The full details were recorded in Exhibit "O". It was not denied that the particular phones were found on the accused. Hlako testified that the information that he received from the technical unit relating to the downloaded data on the cell
20 phones, applied for in terms of section 205 subpoena, helped him with his investigating as, according to these cell phone records, it was shown that the three accused were in contact with each other during the relevant period when the housebreaking occurred and when the murder was committed
25 the next day.

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He dealt with certain aspects of the recorded information, indicating the whereabouts of the accused and the contact between them at relevant times, which seemed highly
5 suspicious. With this information, Hlako drew certain conclusions and submitted that the accused had some explaining to do.

Exhibit "HH" was handed up by number 1's representative, a
10 statement of Hlako, dated 7 November 2010. He was asked about Lwandile Mandla's involvement in the matter. At this time he said he was following the information of accused 3 that implicated Lwandile.

15 With regard to the difficulty that he had to apprehend Lwandile, Hlako said that people are afraid of police officials and Lwandile told him that he was scared. He had previously been arrested for a crime that he had not committed. He was employed and did not want to be arrested. Hlako said that
20 further investigation into the matter could not link Lwandile to the matter at all. He denied that Lwandile was frequently arrested as alleged by the accused.

He was aware that Lwandile had been implicated in other
25 cases in Harare, but these were withdrawn due to insufficient

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evidence. There was no evidence against Lwandile in the present matter. Hlako said Lwandile was not identified at the identity parade and after interviewing him, Hlako concluded that he was not involved in the matter. Hlako testified further
5 that Luwandile told him that he had previously, some weeks prior to the murder, disarmed accused 3 of a firearm and that that may be the reason why accused 3 was angry with him and implicating him.

10 Hlako was adamant that he had written down the number of accused 2 on a piece of paper, when accused 1 gave him the number. It was put to him that accused 1 would say that he went through the numbers of her cell phone, questioned her and then found the telephone number of accused 2. She told
15 him she owed this person money. Hlako responded that he did not recall that accused 2's number was stored at the phone at all. She dialled the number from memory. (The number is in fact not stored on the phone. The expert testified later that it had been deleted and the number must have been dialled from
20 memory).

It was put that accused 1 would say Hlako told number 1 to phone number 2 and tell him he must meet her in the mall so she can give him the money that she owed him. Hlako said it
25 was a joint decision to phone number 2 and accused 1 was co-
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operating willingly. It was alleged that accused 2 had to provide accused 1 with an African dress of R350,00. She had phoned him to ask about such a dress. She owed him R250,00 of the R350,00. Hlako knew nothing about such an arrangement. Their purpose was that she would point out suspects in a murder. It was alleged that accused 1 and 2 had communicated a few weeks before the arrest (presumably about the dress), but that previously there had been no communication. (As will be shown hereunder, this was contradictory to the information contained in the cell phone records).

It has to be noted that initially, at the start of the court proceedings, the representative of accused 1 informed the court that No. 1 would say she identified/pointed out accused 2 at the mall as the person who sold bags to her. A dress was not mentioned. It was alleged on behalf of accused 1 that when they were sitting at the mall, she had never met accused 3. Hlako said he could not arrest a person out of the blue. The testimony at court shows that accused 1 pointed out accused 2 and 3. Hlako was adamant that number 1 said "these are the two young boys" and that she did not point out only one man as alleged. She verbally indicated that those were the men and at the car she also pointed to the two and said that they were "the right men". In the car en route to the

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police station she again confirmed that those were the correct two men. Number 1 denied that she said the men were dangerous, but Hlako added that she had also said he must guarantee her safety.

5

Hlako confirmed that he did explain number 1's rights to her repeatedly and particularly when she told him she had crucial information. On behalf of number 1 it was denied that she contacted accused 3 at the mall, but Hlako pointed out that her
10 cell phone records showed that she knows both accused well and had previously communicated with them both. Number 1 also denied any involvement with the killing of her husband or any involvement with the housebreaking at her employer's home. Hlako testified that the safe at the home was well
15 hidden in a cupboard. The burglar must have received information from someone who knew the house. In addition, the cell phone records of accused 1 indicated her involvement with the burglary. Hlako said his interview with accused 1 was not recorded in the prison cell records, since the interviews
20 were inside the cell block where there is an office. It was not denied that accused 1 was interviewed by Hlako in the cell building or that she took an overdose of tablets.

It was alleged that number 2 would say that number 1 was a
25 customer of his and that he sold clothes to her, contradictory

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to the previous statement that he sold bags. He was contacted by number 1 to meet him at the mall, since she had the balance of his money. Hlako said the meeting was set up for the murder suspects to receive more money. He was not told
5 about any business deals between number 1 and 2. Neither of them gave him this innocent explanation. That this explanation was not given to Hlako at the time, was not denied. Hlako said number 2 did not have any business and they all went to the mall to apprehend suspects, not to meet a
10 business contact.

On behalf of number 2, it was alleged that he went to the mall and met accused 3 at the taxi rank and asked him to accompany him to meet his customer. (The cell phone records
15 of the accused, that I will deal with hereunder, show the movement of the accused and show that this testimony was not true). It was put that accused 2 denies killing anybody and denies any involvement in the breaking-in and theft at the home of number 1's employer. However, despite the detailed
20 record of his cell phone contact with accused 1 in the area of Newlands on the day of the alleged housebreaking and their contact the next day and the days thereafter, accused 2 elected not to explain his contact with accused 1, or his whereabouts on the day of the housebreaking, or the next day,
25 the day of the murder.

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Accused 3's version that he was interviewed in the passage of the cell block was denied by Hlako, who said they went to the office. There were no tables or chairs in the passage and the
5 interview lasted for plus/minus an hour, a fact that was not disputed. Hlako said he was at work very early the morning of 20 November 2009 and interviewed accused 3 then. He denied interviewing accused 3 the previous evening as alleged. He was at the war-room at about 19:00 the previous evening and
10 did not return to the police station.

Accused 3 never told Hlako that he was attending school or that he had an exam timetable. Number 3 told Hlako that he knew something was going on, since they had already received
15 money and he was suspicious about why they would receive more money. This information came back to Hlako as he was recalling what had happened and was focusing on the case. Number 3 denied that he told Hlako this and said that he was too shocked at the time, to which Hlako responded that he was
20 relaxed and smiling, although he had been shocked at the mall.

That number 3 was relaxed and talkative is corroborated by the testimony of the one female cell guard, who testified that
25 accused 3 was relaxed and talkative and complimented her.

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Accused 3 denied that he gave Hlako his cell number and alleged that it was not his phone, but Lwandile's phone. Hlako confirmed that he gave the cell phone number, although he did tell him after the arrest that it was Lwandile's phone. On
5 behalf of number 3, it was alleged that he did not contact number 1 at any stage, while Hlako said that the cell records show the opposite, which is the case indeed.

Constable Kutwana testified again when the trial continued.
10 He confirmed his previous evidence and corroborated the version of Hlako relating to his interview with number 1 and his assistance with the arrests at Promenade Mall. Kutwana was also on the scene of the murder on 28 October 2009. He and another police officer were on duty, tracing suspects at 05:30
15 in the morning in the Makhaza area, wearing civilian clothing and driving an unmarked car. When they turned into Loliwe Street in Makhaza, a lady, crying, who turned out to be Ms Makhosi, stopped the vehicle. She pointed to where a man was lying on the street and told them that it was her
20 neighbour. It was the deceased in this matter. She told them that the man had been shot by unknown African men. While Kutwana was at the scene, he saw accused 1 arriving by taxi. She arrived approximately one hour after Kutwana, and she was crying. The people on the crime scene said that she was
25 the wife of the deceased.

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Summary of the Cell Phone evidence against the three accused:

The evidence shows that when the three accused were
5 arrested by Sergeant Hlako on 19 November 2009, they were
each found in possession of a cell phone. Hlako knew one of
accused number 1's cell phone numbers prior to her arrest.
That was the number he initially contacted her on, that was on
the police docket. When she was arrested, number 1 was
10 found in possession of a cell phone with the number
0721729829. She gave Hlako another cell phone number that
she also used, 0747632865, the number Hlako was familiar
with that appeared on the docket. Accused 1 also gave Hlako
the number of accused 2 before his arrest, namely
15 0735073106. He was later found in possession of a cell phone
with this number.

Accused 3 was found in possession of a cell phone with the
number 0747814518.

20

Accused 2 admitted formally that he was the lawful owner of a
cell phone with cell phone number 0735073106, the phone
confiscated by Hlako. Accused 3 admitted to being in
possession of a cell phone with the cell number 0747814518.
25 He later testified that he received the phone instrument from
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Lwandile, but that the number was the number of his personal SIM card.

Hlako sealed the three seized cell phones in a forensic bag,
5 wrote down the numbers and details of the respective cell phones and took the phones to the war-room in Cape Town on the evening of 19 November 2009 for the downloading of all the information on the cell phones.

10 Warrant Officer Swanson, who worked nightshift at the war-room on 19 November 2009, confirmed this aspect of Hlako's evidence and added that the sealed forensic bag with the three cell phones was placed in the safe and remained there until the next morning when Colonel Linnen collected it. Colonel
15 Linnen, a member of the SAPS, who is trained and qualified to download information sorted on cell phones, explained the details relating to the downloading process in court and testified that on 22 November 2009, he broke the seal on the forensic bag retrieved from the safe, accessed the three
20 handsets and successfully downloaded the information off the cell phones and he repeated the numbers 0721729829, 0735073106 and 0747814518. (I will mainly refer to the last four digits for the sake of convenience).

25 The data extracted from accused 1's cell number, ending in
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9829, is contained in a report handed in and marked Exhibit "LL". It shows that accused 1 was in frequent contact with accused 2 since at least 1 January 2007. Colonel Linnen explained that accused 2's number, ending in 3106, is not listed in the contacts page of accused 1's phone, because she knew the number by heart, confirming Hlako's evidence in this regard and confirming his testimony that he did not go through her cell phone to find accused 2's number as alleged by number 1.

10

The data extracted from the cell number of accused 3, with the number ending in 4518, is contained in a report marked Exhibit "MM". Accused 1 was a listed contact on accused 3's cell phone. The data extracted from the cell number of 2, ending in 3106, is contained in a report handed in and marked Exhibit "K", which shows that accused 2 received multiple text messages from accused 1 (referred to as "Mams" with the phone number ending in 9829) in the early hours of the morning of 17 November 2009 (04:07) and 19 November 2009 (01:30, 01:32) and that he made a call to accused 1 at 03:19 on the morning of 19 November 2009. (It is highly improbable that the two accused would communicate about the buying of a dress at these hours).

25 Accused 2 also made contact with someone identified as /bw /...

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"Mamz FFF", with an unknown number. Linnen explained that this could be another number used by accused 1, or it could be a different contact. (This aspect was never addressed on behalf of accused 2).

5

Hlako applied at the Khayelitsha Court for a total of four section 205 subpoenas to obtain detailed billing records and other relevant data from the respective cell phone networks and service providers of the accused. The first section 205 subpoena for the cell records for accused 1 was requested on 10 17 November 2009 and the other two on 25 November 2009. As stated, a cell phone number of accused 1 was on the file when Hlako took over the matter. She was phoned on this number to update her on the progress of the matter. Hlako 15 suspected that she might be involved in the crime and wanted to check who she was contacting and what her movements were. He repeated that when she was arrested, accused 1's cell phone number was the number ending 9829, and that she had another number that she told him about, namely the one 20 ending in 2865, the number on the police docket.

The results of the detailed billing pertaining to the cell number ending in 2865 is contained in a report marked Exhibit "DD" and Ms Makhubu testified in this regard. The number of 25 accused 2's cell phone was 0735073106 and the number of /bw /...

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accused 3's SIM card, of the phone found on him, was 0747814518. Accused 3 himself gave the number to Hlako. The three accused did not deny that these were the numbers they were using.

5

On 25 November 2009, Hlako; applied for three subpoenas regarding the cell numbers ending in 9829 (accused 1), 3106 (accused 2) and 4518 (accused 3). I am referring to Exhibit "GG". The data extracted from accused 1's cell phone number with the number ending in 9829, was done by the forensic services division of Vodacom. A detailed report of the findings is contained in Exhibit "BB". Ms Petro Heyneke, a forensic liaison officer, employed by Vodacom, testified as an expert witness in this regard. A similar exercise was conducted by Cell C in respect of the cell phone number of accused 3 ending in 4518. The detailed billing report and other relevant data are contained in Exhibit "EE". Ms Sibongile Makhubu, the law enforcement agency support specialist from Cell C, testified as an expert witness in this regard. The service provider MTN was requested to provide detailed billing records pertaining to the number of accused 2, ending in 3106. The resulting report was handed in with consent and is marked Exhibit "L". No expert witness was called in this regard. The expert state witnesses all testified, and it was not disputed, that the information obtained from the cell phones could not be altered

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or tampered with and that the printed reports reflected true and reliable information stored on the respective cell phones/SIM cards.

- 5 Exhibit "BB": detailed billing records in respect of cell number ending in 9829 and more particularly contact between accused 1 (9829) and accused 3 (4518):

Exhibit "GG" shows that the SIM card with the cell phone number ending 9829 is registered to Tamara Mapeyi, who is
10 accused 1. The detailed billing was only obtained from 6 November 2009 until 20 November 2009. In that period there was contact between accused 1 and 3. On 19 November 2009 accused 3 contacted accused 1 seven times between 14:52 and 15:56. These seven calls were all picked up by the
15 Promenade Mall Base Station. These facts are relevant in the light of statements put to witnesses by both counsel for accused 1 and 3 that these two accused do not know each other, nor have they had prior contact with each other. Accused 3's version that number 2 made a call on his phone to
20 number 1 when his airtime ran out, was shown to be untrue as two calls were received by number 1 from number 2's phone after the last call from number 3's phone. Several calls were made between accused 1 and 2, while there was also contact between accused 1 and 3.

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Contact between accused 1 on 9829 and accused 2 on 3106:

Exhibit "BB" shows that in the time period 6 to 19 November 2009 there were 14 contacts between accused 1 and 2. On the day of their arrests, there were six contacts between the accused on these two cell phone numbers, starting at 12:35 and ending at 16:07. The calls were picked up by different base stations, terminating at Promenade Mall. The substantial contact between accused 1 and 2 indicates that she did not only contact him to collect money from her for a dress.

10

Exhibit "DD": detailed billing records in respect of accused 1's cell number ending in 2865: more specifically contact between accused 1 on 2865 and accused 3 on the number ending in 4158:

15 Exhibit "DD" is an itemised printout of all incoming and outgoing calls to and from the cell number of number 1 ending in 2865 from 1 July 2009 to 16 November 2009. This was the number on the police docket. When Hlako arrested her she was using a number ending in 9829 and told him that she had also been using the 2865 number. It was shown that accused 1 and 2 contacted each other on the 9829 number since 2007, but contact between them on the number ending in 2865 only started on 21 October 2009. Between 21 October and 26 October there was contact between accused 1 and accused 2 on more than 30 occasions on this number, sometimes as early

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in the morning as 03:28.

Contact with accused 3 on his number ending in 4518, the person whom she allegedly does not know, started on 28 October at 05:13 in the morning the deceased was shot and killed. (I refer to page 26 of Exhibit DD). The first recorded contact with number 3 was an incoming SMS to number 1's phone, 2865, from number 3's phone, 4518, just before she SMS'd number 2's number (3106) at 05:15. At 05:18 she called number 3 and had a discussion with him and then called number 2 at 05:33. At 06:02 she texted number 3 and then called him. Later that night between 20:58 and 22:16, accused 1 contacted number 3 twice and he contacted her once.

On 29 October 2009, the day after the murder, there were seven contacts between numbers 1 and 3 in the afternoon between 17:16 and 17:32. On 30 October was the last recorded contact between numbers 1 and 3 on the number of accused 1 ending in 2865. Contact continued on her 9829 number.

Contact between accused 1 on 2865 and accused 2 on 3106 from 27 October 2009, the day of the Caverni burglary:

The first contact between accused 1 and 2 on 27 October was an outgoing call from number 1 on 2865 at 06:02 from /bw /...

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Khayelitsha. The contacts continued as follows: 07:29 an incoming SMS from No. 2 on his number ending in 3106, and 07:32 and 07:35 outgoing calls from number 1 to number 2. These later contacts were all picked up by the base station in
5 Claremont. This means that accused 1 who, according to her employer, was only due to arrive at work at about 9 a.m. was in Claremont, in the area of her employment, from at least 07:30 that morning.

10 The next three contacts between number 1 and 2 occurred at 09:03, 09:04 and 09:35. The first one was an SMS from number 2 to number 1 and the next two calls were from her to him. All registered in Claremont. These contacts were made around the time that Mr Caverni received a call from accused 1
15 to tell him that his home had been broken into. It is unthinkable that any person, upon entering the home of her employer and discovering that it has been broken into, would think to call someone from whom she sometimes purchases clothing. Neither accused sought to explain this suspicious
20 coincidence. The remaining 11 contacts between accused 1 and 2 on the same day were from 16:26 to 21:08. The recorded base station names indicate that accused 1 communicated with accused 2 while she was still in Claremont that afternoon and continued contacting him until she reached
25 her home in Khayelitsha.

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On 28 October, the day accused 1's husband was killed, she made contact with accused 2 at 05:15 and again at 05:35 in the morning. At 07:45 she received an incoming SMS from him (page 26 of Exhibit "DD"). They remained in contact with each other thereafter. Ms Makhubu explained, with reference to Exhibit "DD", and more particularly the different IMEI numbers reflected in the detailed billing, that accused 1 used the same SIM card in three different handsets in the period recorded. She also testified, in essence, that accused 1 used the same handset on the Cell C network, as she did on the Vodacom network, from 7 November 2009 to 19 November 2009. Accused 1 changed her handset, cell number and network provider frequently, within short periods of time.

15

Exhibit "EE": The detailed billing records in respect of cell phone number of number 3, ending in 4518, reflecting contact between accused 3 and accused 1.

This exhibit is an itemised printout of incoming and outgoing calls to and from the cell number of number 3, ending in 4518, from 1 August 2009 to 20 November 2009. Accused 3 formally admitted that when Hlako arrested him, he was in possession of a cell phone with a number ending in 4518. Although it was put to a number of witnesses that the cell phone handset found in his possession belonged to Lwandile Mandla, Lwandile /bw

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denied this convincingly when he gave evidence. In any event accused 3 testified that it was his SIM card and, therefore, his number in the phone.

5 No recorded contact between accused 3 and 1 was shown on or before 27 October 2009, the day of the housebreaking incident, on this, the only known number of number 3. The recorded contact between accused 3 (4518) and accused 1 (2865) on 28 October, up to and including 19 November, as
10 detailed in Exhibit "EE", is identical to, and confirmed by the information contained in the detailed billing of the number ending in 2865 (number 1's phone) in Exhibit "DD" as set out above. The recorded contact between 4518 (number 3) and 9829 (number 1) on 19 November, as reflected on page 7 of
15 Exhibit "EE", is identical to, and confirmed by the information on page 15 of Exhibit "BB", which is the detailed billing report for the number ending in 9829 of number 1, which has been discussed above. These cell phone records show that accused 1 and 3 had regular and frequent contact from 28 October
20 2009 to 19 November 2009. They cannot claim not to know each other or never to have contacted each other.

Contact between accused 3 with number 4518 and accused 2 with number ending in 3106:

25 Exhibit "EE" shows that accused 2 and 3 were in regular
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contact from 11 September 2009 onwards. On 27 October 2009, the day of the housebreaking, and the night prior to the murder, they communicated with each other during the evening, with five contacts between 19:27 and 21:23. On 28
5 October, the day of the murder, they also communicated in the evening at 19:38 and 19:58. It is noticeable that number 3 contacted number 1 three times soon after her contact with number 2 on the evening of 28 October. On 31 October, accused 3 contacted accused 2 immediately after contact with
10 accused 1. The remaining contact as recorded in Exhibit "EE", was constant and frequent and at all hours of the day and night.

On 19 November 2009, the day of their arrest, they began
15 communicating at 00:33. They continued at 06:14 and 09:39 and thereafter. They contacted each other shortly before 16:00 that day, in between contact with number 1, at 15:47, 15:48 and 15:56 (page 13 of Exhibit EE), which would suggest that they were not yet in each other's company at that time.
20 The cell phone base station record shows that accused 3 was not at the mall from about midday, as was alleged on his behalf, but he was in fact travelling from Nyanga and only entered the Mitchells Plain area at about 15:36.

25 Exhibit "L": Detailed billing records of cell number of accused

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2, ending in 3106, reflecting the contact between number 2 (on 3106) and accused 1, with numbers ending in 2865 and 9289, as well as accused 3 on number ending in 4518:

Exhibit "L" is an itemised printout provided by MTN of all calls
5 to and from the cell number of accused 2 ending in 3106 from
9 October 2009 to 19 November 2009. Exhibit "L" confirms the
contact between accused 2 and accused 1 on the morning of
27 October, the day of the housebreaking, from 06:02, when
accused 2 was still in Nyanga and thereafter when he was in
10 Newlands and Claremont. This information has already been
dealt with above, when the contents of accused 1's cell
records were discussed and it was shown that accused 2 went
to Newlands early in the morning of 27 October 2009. He was
there by 07:35 and he left Newlands before nine and returned
15 to Nyanga, while in cell phone contact with number 1. The
record shows that accused 2 was in contact with accused 1
five times between 06:02 and 09:35 on 27 October and he had
nine further contacts with accused 1 on that day and two
contacts with accused 3.

20

At 05:15 on the morning of 28 October 2009, accused 1 called
accused 2 while he was in Khayelitsha, yet he allegedly lives
in Nyanga. She called him again at 05:33, while he was still in
Khayelitsha (this aspect remains unexplained). There was no
25 further contact between accused 1 and 2 that day, but they

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continued to communicate up to 19 November 2009, which is the last recorded day of the detailed billing on Exhibit "L" and is the day of their arrest.

5 Accused 3 called accused 2 twice on 28 October, once at 13:01 and once at 19:38 (page 8 of Exhibit "L"). On 19 November 2009, accused 2 was in frequent contact with accused 3. The first contact was made by accused 2 at 00:33 and the last contact was made by accused 3 at 15:54. There
10 was no indication during the trial why number 3 phoned number 2 from Promenade Mall and it is contrary to the evidence of number 3. Exhibit L shows that accused 2 arrived in Mitchells Plain at approximately 15:47 on 19 November 2009. On the same day he was contacted by, and made
15 contact with accused 1, who was using the number ending in 9829. He received his first call from her at 12:35 while still in Nyanga. The last contact from her was while he was in Mitchells Plain at 16:07.

20 In essence, the cell phone records show that accused 1 and 2 contacted each other frequently in October and November 2009. On 27 October, accused 2 and accused 1 started contact at 06:02, while accused 2 was in the area of his home in Nyanga. Then they contacted each other at 07:32 and 07:35
25 when they were both in Newlands/Claremont. At 09:04 he was
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contacted again by accused 1 and when accused 1 contacted him at 09:35, he had reached Observatory before returning to Nyanga. Accused 2 and 1 were in contact with each other five times between 06:02 and 09:35 on that day and had nine
5 further contacts on that day. Accused 2 and 3 were in contact on the evening of 27 October no less than five times. The first recorded contact between accused 1 and accused 3 is earlier on the morning of 28 October 2009 at 05:13 and 05:18 and two contacts between them at 06:02. Both accused 2 and accused
10 3 were in Khayelitsha earlier that morning. Neither of them lived in Khayelitsha.

Accused 1 called accused 2 twice between 05:15 and 05:33 on 28 October. The three accused remained in frequent contact
15 with each in the days to follows. On the day of their arrest, accused 2 and 3 arrived in Mitchells Plain just before 16:00 and in the minutes leading up to the 16:00, they were each in contact with accused 1 and with each other.

20 The last witness for the state, Lwandile Mandla, who was implicated in the murder by accused 3 in his statement to Van Wyk, is 28 years old and passed Grade 10 at school. He is employed as a chef at a restaurant in Sunset Beach, Cape Town and has been so employed since August/September
25 2009. Initially he appeared uneasy and sometimes spoke very
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softly. It was my impression that he may have been somewhat confused about the sequence of events at times, but his evidence was very specific and detailed and remained consistent throughout his testimony and cross-examination.

5

Lwandile knows accused 2 and 3 through his "cousin's brother", Zwelethu. They are not close friends. He met accused 1 through a friend, Kolekeli, at a shebeen during 2009. On an occasion, at a date that he later estimated as 10 August 2009, the date of a friend's birthday, he was socialising with his friends at his home, when accused 2 and 3 arrived. They enquired after Zwelethu. Soon after their arrival, accused 1 arrived, coming from a prayer meeting at a nearby house where a child had passed away. She enquired about 15 Kolekeli and then asked to be accompanied to the taxi rank nearby. Lwandile, his friend Papi, accused 2 and 3 accompanied her. On their way to the taxi rank, she asked Lwandile if Kolekeli had told them about "that thing". He replied that he had been told. (Nobody asked him what she 20 was referring to during the trial).

After accused 1 had left in a taxi, while they were on their way back to his home, accused 2 and 3 told Lwandile, and spoke to him about the fact that number 1 wanted them to have her 25 husband killed as he was abusive and assaulted her. Lwandile

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told them to ignore the "old woman". They showed him her phone number on their phones. They did not tell Lwandile how much they would be paid for the job, but they said they would be paid within 48 hours of the deed. Lwandile continued
5 socialising at his home. Accused 2 and 3 became involved in a quarrel with their friends who were present. Number 3 drew a firearm and pointed it at the vehicle of his friends, while some of them were inside the vehicle. Number 2 was standing next to the vehicle. One of the men asked Papi to tell number
10 3 to hand over the firearm as his brother wanted the firearm. Number 3 refused and the vehicle left. The socialising continued.

The next morning Lwandile saw that accused 3 was still there.
15 He asked him to go with him to his friend's house nearby, as he did not want to leave him alone at his home. The friend was working on a vehicle and needed Q20. Lwandile went back to his home to fetch the Q20. As he left his home, on his way back to his friend, he saw a white Corolla vehicle driven at
20 high speed. This vehicle collided with another vehicle in the area. Two young men got out and approached Lwandile. One of them had a firearm. The man inquired about accused 3 and the whereabouts of the firearm that he had used the previous evening. Papi and the brother of accused 2 were in the
25 vehicle and Lwandile told the men to ask them. The men ran
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away before the police arrived to investigate the collision.

When Lwandile returned to his friend's house with the Q20, number 3 was still there. He told him what had happened and
5 that the men had a firearm. That afternoon, Lwandile was present when, outside his home, number 2 and his brother approached number 3. Accused 2 asked accused 3 where the firearm was. They were talking hurriedly and mentioned Site C in Khayelitsha. Lwandile's 13 year old brother then went to
10 fetch a firearm that number 3 had given to him (the brother) for safekeeping. Lwandile took the gun from him and told accused 2 that the firearm was "an issue", since the owners of the firearm had been there to inquire about it, presumably referring to the men in the speeding vehicle. He did not want
15 them to discuss the firearm issue further, as he did not want his mother to overhear and told them to leave. Later he gave this firearm to his cousin's brother, Fezile Rhani, who was arrested for possession of this firearm in due course. According to Lwandile, this was the last time that he saw
20 accused 2 and 3. He also did not see accused 1 again.

On 28 October 2009, he was not staying in Khayelitsha any more. He had commenced his employment in Sunset Beach. He had nothing to do with the murder of the deceased and did
25 not know him. He denied that he ever gave a cell phone to

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accused 3 and did not see him on or about 19 November 2009. During cross-examination, Lwandile was referred to his warning statement and some perceived contradictions and discrepancies in the statement compared to his evidence. The
5 statement had been taken after he had been arrested for the murder on 17 November 2010, a year after the arrest of the three accused. He was in custody for three weeks prior to being released on bail, while the matter was considered by the DPP, who took their time, as can be concluded from the
10 frequent postponements recorded. The charges against him were dropped in April 2011. He appeared at, and was not identified at an identity parade.

Lwandile said he had phoned Hlako prior to his arrest to
15 advise him that he had nothing to do with the matter and explained to him what had happened, namely that he had removed a firearm from accused 3 and that he thought that was why he was implicated in this matter. It appears from Lwandile's testimony that before Hlako called him, he had
20 been advised that the police had been to his house with accused 3 in connection with a firearm. He informed the court that both accused 2 and 3 had previously been arrested in another matter and on "every occasion" when they are arrested, they implicate him. He also told the court that he
25 had made more than one statement to the police and that in

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his statements to the police, he replied to their questions on matters that they regarded as relevant.

His last statement was a summary of matters that were of
5 interest to the police, which explained why certain aspects of
his evidence did not appear in this statement. He also said
the last statement that he was asked about, was done in a
hurry at his place of employment. I do not believe the
contradictions/inconsistencies in his statements are at all
10 material. He was an intelligent, good and convincing witness,
whose evidence was so detailed and consistent that it lent
credence to his version. He denied the allegation by accused
1 that she had never met him, or that his version of their
meetings was a fabrication. On behalf of accused 2 and 3, it
15 was admitted that they had been to Lwandile's house, but they
denied that they were ever at his house when accused 1 was
present and they denied the entire version of their
accompaniment to the taxi rank, the discussions about killing
the husband, pointing of the firearm or discussions about a
20 firearm.

Lwandile stated in cross-examination that he was not friends
with accused 3, who arrived with accused 2. Accused 3 again
denied that he knew accused 1 or that he has ever had any
25 contact with her and denied that he was arrested in connection

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with a firearm or that he ever went to the house of Lwandile with the police. Finally, it was put that accused 3 would say that on the day of his arrest in November 2009, he had a phone with him that, contrary to Lwandile's testimony, had
5 been given to him by Lwandile. No further explanation for this allegation was given, such as why or when the phone had been given to him. No explanation was given about the SIM card that he said was his own and why his SIM card was inserted in Lwandile's phone. There can be no doubt that the allegations
10 of accused 3 on this aspect, were a fabrication.

When Lwandile was arrested, his cell phone was confiscated by Hlako. The numbers that he used were obtained and the information was downloaded (Exhibit CC). The deponent to
15 the exhibit did not testify and the exhibit was introduced by the representative of accused 1 during the testimony of Ms Heyneke. From the questions put to the witness, it was established that there was no contact between accused 1 and Lwandile at any time reflected on the cell phone exhibits.
20 Lwandile confirmed that he had no cell phone contact with any of the accused and they never alleged such contact, or showed any record of such contact.

The state closed its case and counsel representing accused 1
25 and 2 applied for their discharge in terms of the provisions of
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section 174 of the Criminal Procedure Act. The state opposed the application. After considering the arguments on behalf of the accused and the evidence presented in the trial, the court was not convinced that they were entitled to a discharge.

5 Judgment was given refusing the applications. Accused 1 and 2 elected not to testify and their cases were closed without calling witnesses. The court explained to them the possible danger of closing their cases at the request of their counsel and they indicated that they understood. Accused 3 elected to

10 testify.

Accused 3, Thanda Krwece, testified that he was an 18 year old scholar at the Zola Business School at the time of the commission of the offences. He lived with his mother and

15 sisters in Delft. His father lived in Makhaza, Khayelitsha. He denied knowing accused 1 on the day that he was arrested. He became acquainted with her during the proceedings in court. He knows accused 2. On 19 November 2009, he was arrested at Promenade Mall in Mitchells Plain. He was there in

20 order to window shop to purchase clothes for initiation purposes. He could not say what time he had gone to the mall, as he did not have a watch. He left and was on his way to the taxi rank on his way home, when he unexpectedly met accused 2, who was surprised to meet him and informed him that he

25 had to meet a customer and requested him to accompany him.

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On their way into the mall, accused 2 was making calls on a cell phone to establish the whereabouts of his customer. He ran out of airtime on his phone and borrowed the phone of
5 accused 3 to call the customer one last time, before handing the phone back to accused 3. Number 2 pointed in the direction of a chair where the investigating officer, Hlako, whom he did not know at the time, was sitting, as well as accused 1, whom he also did not know. They approached, but
10 before they reached them, the police drew firearms, grabbed them and handcuffed them. They were searched during the arrest. He could not recall how many policemen there were, but he said there were many. They were taken to a nearby police vehicle and were placed inside the vehicle.

15

Accused 1 arrived and the detectives inquired from her as to "are these the people", while they were pointing at them. Accused 1 replied: "here is the person that I have called". She pointed out accused 2 only. Accused 2 and 3 were in the
20 vehicle with two detectives. One was the Coloured person who had testified in court (Neethling) and the other was a Xhosa speaking person, Mr Gojo, who also testified in the case. In the vehicle Gojo reprimanded accused 2 and 3, asking them questions, such as why did they kill Tamara's husband, where
25 Lwandile was and where the firearm was that was used in the

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○ killing. Accused 3 was shocked and said "we have no knowledge of that". Gojo kept on asking questions until they reached the police station.

○ 5 At the police station they were still handcuffed and were taken to the cells. They were accompanied by four detectives, Hlako, Kutwana, Gojo and a fourth unknown detective who did not testify in court. At the cells accused 2 and 3 were assaulted and questions were asked, including where is
10 Lwandile, where is the gun and where were they on the morning of the 28th. Accused 3 repeatedly replied that he had no knowledge. They were assaulted by all four detectives. Eventually the four detectives left, but after a while four other
15 Lwandile. He did not know the other detectives. They also assaulted them and asked questions, but eventually gave up and left.

○ Subsequently a white person arrived and entered the cell.
20 Accused 3 thought the person might assault them. Only accused 2 and 3 were inside the cell. The person managed to get into the cell as it was opened by police officer Bobotjana, the cell guard who testified in court. Accused 3 did not know Bobotjana, but saw him at the police station and knows his
25 name, because the detectives called out his name in order to
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enter the cells. The white detective asked accused 3 whether he was aware of the seriousness of the matter and that he was facing life imprisonment. Accused 3 was shocked and scared. This detective then said that if accused 3 opened up, he could
5 be used as a state witness, maybe allowed to go home and would only be asked to testified in court. Accused 3 thought that that was how he could be exonerated from the matter and not sit in jail for life. He did not talk to the man or say much, but he decided that he would open up. He thought that talking
10 would save him and he told the man that he wanted to talk. The man then left.

After a while Hlako arrived and took accused 3 out of the cell. They stood outside in a passage. He enquired from accused 3
15 as to whether it was correct that he had told he other detective that he wanted to make a statement. He confirmed this and told Hlako a summary of what had happened. He knew what the detectives required and said that the crime had been committed by Lwandile and that the gun was with Lwandile.
20 Hlako then left. In the morning hours Hlako returned, accompanied by Kutwana. The removed him from the cell and went to a room used as a kitchen in the same cell block. Kutwana was busy putting cuffs on his legs, while Hlako talked to him. He told him to tell everything and to say that he does
25 not want an attorney. Number 3 did not know anything about
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the importance of an attorney and that is why he decided to tell Van Wyk that he did not want an attorney.

Kutwana took him to the office in the police station where he met Captain Van Wyk, who was on his own and who did not talk to him until the interpreter arrived. The contents of the revised statement of accused 3, AA, was not disputed. Ultimately accused 3 testified that the reason why he decided to make a statement was because he wanted to get out of jail.

10 Accused 3 says he decided to lie and to say things about Lwandile. Van Wyk told him that he had to say what he personally witnessed, but he thought that Van Wyk would then not believe him and, therefore, decided that he would say he was also present. He, therefore, made the statement that had

15 been handed in to court. He told them that he knows Lwandile, that he gave him a cell phone and that Lwandile said that they should fetch his money at promenade Mall.

Accused 3 said because the detectives asked him about

20 Lwandile, he told them that Lwandile is known to accused 1 and that is why he said that Lwandile committed the crime and was the one who was planning the killing of Tamara's husband. Listening to accused 3's evidence at this stage of the proceedings, the court could understand why the statement

25 that was made to Captain Van Wyk seemed so incoherent. It

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was difficult to understand what he was saying at times. Accused 3 said that he told Van Wyk that they were at Lwandile's place and that they were scared of Lwandile. Early one morning Lwandile said that they must wake up and go to 5 Makhaza. He said the four of them went there, including himself and accused 2. They waited at a corner, while Lwandile went with a firearm to the old lady's house (referring to accused 1). X

10 He confirmed that he said in his statement that he and accused 2 heard a gunshot and ran away. He explained to the police that Lwandile gave him a cell phone and told them to fetch his money at Promenade Mall. Accused 3 said he lied when he said in the statement that Lwandile had received money, 15 because he thought the detectives might ask him why Lwandile would trust him with money. (An incomprehensible comment). He also told Van Wyk that Lwandile did not go personally, as he was suspicious of the reason why he had to go to Promenade Mall. Everything that he told Van Wyk was not 20 true, but a story that he made up from what he heard during the questioning by the detectives. He was then asked whether everything was untrue or just parts of the statement and replied that his version was not true, but based on information that he gathered from the questioning by the detectives.

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Lwandile is his friend and the last time they saw each other, they did not quarrel. He was shocked at Lwandile's evidence in court and shocked at the things he said that were unknown to him. He repeated that the cell phone that he had with him
5 when he was arrested at Promenade Mall was received from Lwandile, who has many phones. He could not recall, however, when he received the phone or why and could supply no further details in this regard. It was put to accused 3 that Gojo and Hlako had said that they were not involved in any
10 alleged assault of accused 3 at the police station and they had left, and he said they were lying, as well as Kutwana. It was put to him that the police officers said that there was no white detective who worked with them at Harare Police Station at the time and he said that they were lying.

15

As regards Hlako's version of a note, indicating that other people were not allowed into the cell to interview the accused, he also said that was a lie. Accused 3 said he could not tell anybody else about the assaults, as he did not trust any police
20 officer. The other detectives witnessed what happened. He did not inform the magistrate of the assaults, as he thought that he would explain about it when the matter was tried in court. As regards the evidence that Bobotjana was not on duty on 19 November 2009, he said that this information shocked
25 him as that was the person that was on duty on the evening

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and he does not know the other people who say that they were the people who locked him into the cells. Jacobs, who testified that he was on duty when accused 3 was arrested and placed in the cells, was unknown to him.

5

Accused 3 also said that Hlako was lying when he said that he first talked to him on the morning of 20 November 2009. He also lied when he said Kutwana took him out of the cells to take his statement, as Hlako and Kutwana took him together, 10 and he lied when he said they were not talking in the kitchen, since that is where he was cuffed. He knows Lwandile and has visited his house, but Lwandile's version relating to having drinks and what then ensued, was denied. He does not know anything about a firearm as testified to by Lwandile. He 15 denied that he ever met accused 1 and did not meet her at any stage as she passed Lwandile's house as testified to by Lwandile. The whole incident relayed by Lwandile in this regard was denied, including that he showed Lwandile the telephone number of accused 1 as it appeared on his cell 20 phone.

Accused 3 specifically testified that he never had the phone number of accused 1 and that it was not stored on his phone. He did not know the deceased, does not know anything about 25 the murder of the deceased and was very surprised when the

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detectives asked him if he was involved in a murder. He denied any knowledge of a firearm taken at a house in Newlands and only heard about that in court. He has never been in possession of a firearm or ammunition. He denied that

5 he conspired to kill the deceased. He denies that he has any knowledge of what transpired in the matter and he did not know that he would land in jail in a matter of which he has no knowledge. The statement he made to the police, that he knew about the matter and was on the scene, was a lie.

10

During cross-examination, accused 3 testified that he stays mainly with his mother in Delft and visits his father now and then in Khayelitsha. On 19 November 2009, after he had been to Promenade Mall, he was going to Crossroads to sleep over

15 until he had to write his next examination a few days later. (Accused 3's version is improbable, especially since he had no extra clothes with him and no school books in order to study). Accused 3 denies that he was pointed out by accused 1 at Promenade Mall. His testimony throughout was that he did not

20 know accused 1 at all. He did not explain to Hlako what he was really doing at the mall, because they did not approach him in an orderly manner and he was not granted an opportunity to speak. Furthermore, his rights were not explained at the police station. (The testimony of accused 3

25 about arriving at the police station and being placed in the

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cells before being assaulted by two sets of detectives, without any reference to the signing of a form 14A, constitutional right forms, was improbable and clearly fabricated).

5 He could not explain how his signature appeared on the 14A form and could not recall signing the document, Exhibit M, at all. Although he could not recall signing the document or where it may have been signed, he said that his rights had not been explained to him as stipulated on the form. He did not
10 deny his signature. He could also not recall whether a copy had been to him and could not explain why it had not been put to Hlako that he had not received a copy of the form as testified to by Hlako. He reiterated that the cell phone with him that had been confiscated at Promenade Mall, was given
15 to him by Lwandile. However, the SIM card inside the phone was his own. The cell number on the phone ending with the digits 4518, therefore, belonged to him. He testified that he had a school timetable in his pocket at the time when he was searched and arrested. He could not explain why this
20 timetable had not been shown to any police detective, including Van Wyk or the magistrate, at any stage during the initial proceedings to show that he was in fact a scholar.

Accused 3 said he knows Lwandile and he knows Papi. There
25 were never any problems between him and Lwandile. He is not
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aware of any problems between Lwandile and accused 2. He and accused 2 sometimes visited Lwandile together. Accused 2 and 3 contacted each other by cell phone. He does not know Lwandile's phone number as he changes phones. The three
5 accused closed their cases without calling witnesses.

Legal Aspects:

The court determines the factual basis of a case before pronouncing a finding, by evaluating the evidence and
10 probative material presented during the course of the trial. The court's findings are based on factors such as the credibility of the witnesses, their reliability and the probabilities. The finding on the credibility of a witness will depend on the court's impression about the truth of the
15 evidence of the witness. That, in turn, will depend on factors such as the witness' demeanour, internal and external contradictions with established facts or with extra-curial statements, the probability or improbability of aspects of his version and the calibre of his performance compared to that of
20 other witnesses testifying about the same incident. The court must analyse and evaluate the probability or improbability of each party's version on disputed issues and will assess the weight of the probative material, in order to determine whether the party carrying the burden of proof, has proved its
25 allegations in accordance with the applicable standard of

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proof.

In a criminal case the state has to prove the guilt of an accused beyond reasonable doubt. Linked to this is the well known principle that if the version of an accused is reasonably possibly true, he is entitled to be acquitted. No onus rests on the accused to convince the court of the truth of any explanation he gives. Even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

The court need not believe the version of the accused, as long as there is a reasonable probability that his version is true. The fact that his version is improbable, does not mean that it should be rejected. I refer to the case of S v Shackell 2001 (2) SACR 185 (SCA) on 194g-i. The court need, however, not be satisfied that there is no doubt whatsoever about the guilt of the accused.

In S v Mark & Another 2001 (1) SACR 572 (C) at 580F-H, Davis, J agreed with, and referred to the comments of Rumpff, JA in S v Clegg 1973 (1) SA 34 (A) page 38(h)-39(a):

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“Die begrip “redelike twyfel” kan nie presies omskryf word nie, maar dit kan wel gesê word dat dit 'n twyfel is wat bestaan weens waarskynlikhede of moontlikhede wat op grond van algemene gangbare menslike kennis en ondervinding as redelik beskou kan word. Bewys buite redelike twyfel word nie gelyk gestel aan bewys sonder die allerminste twyfel nie, omdat die las om bewys so hoog gestel te lower, prakties die strafregbedeling sou verydel.”

The state also referred me to S v Phallo 1999 (2) SACR 558 (SCA) at 562g-563b, where Olivier, JA referred, in agreement, to R v Mlambo 1957 (4) SA 727 (A) and more specifically at 738A-C, where Malan, JA found:

“It is sufficient for the court to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.”

The judge continued to find that the accused's claim to the benefit of the doubt, must not be derived from speculation but

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must be based on the solid foundation created by positive evidence or gathered from reasonable inferences which are not outweighed by the proven facts of the case.

- 5 The approach of a court to circumstantial evidence, such as the evidence in this matter, is set out in the often quoted R v Blom 1939 AD 188 on 202-203, as stated by Watermeyer, JA:

10 "In a reasoning by inference, there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn;
- (2) The proved facts should be such that the
15 exclude every reasonable inference from them, save the one sought to be drawn. If they do not ... then there must be a doubt whether the inference sought to be drawn is correct."

20

Inferences drawn must not be based on speculation, presumptions of perceptions. There can be no inference unless there are objective facts from which to infer the other facts, which is sought to establish. In some cases the other
25 facts can be inferred with as much as practical certainty as if

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they had been actually observed, but sometimes an inference is no more than a reasonable probability. I refer to S v Essack & Another 1974 (1) SA 1 (A) on 16D.

5 In a case such as the present where the state's case rests mainly on circumstantial evidence, the cumulative effect of the evidence needs to be weighed carefully. The trial court's approach to the case should be holistic. S v Chabalala 2003 (1) SACR 134 (SCA) at 139. Evidence must be weighed in its
10 totality, taking into account the probabilities, reliability and the opportunity for observation of the respective witnesses, as well as the other factors that I have mentioned above.

The legal representatives in this matter agreed that the court
15 will have to assess circumstantial evidence to make a finding to establish whether or not the state has proved its case beyond a reasonable doubt. It has often been said that circumstantial evidence is not necessarily weaker than direct evidence. Inferences are, and may be drawn, from
20 circumstantial evidence. Certain rules of logic must be followed as noted above. The court should consider the cumulative effect of all the items of circumstantial evidence. No circumstance is considered in isolation in order to then give an accused the benefit of a reasonable doubt as to the
25 inference to be drawn from each circumstance. The state must
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satisfy the court, not that each separate item of evidence is inconsistent with the innocence of the accused, but only that the evidence taken as a whole is beyond a reasonable doubt inconsistent with such innocence. See S v Mtembu 1950 (1) SA 670 (A).

With regard to the assessment of the credibility of witnesses, and more particularly the witnesses Mngese, Gxotha and Wana, the defence argued that the evidence of these witnesses be rejected as a result of some contradictions in their evidence. The state referred to the comments of Nicholas, JA in an article titled "Credibility of Witnesses", published in the 1985 SALJ page 32. The learned author referred to the frailties of human evidence and reminds the reader that error does not in itself establish a lie. It is in the nature of mankind that mistakes are made by witnesses. The court should establish whether the essence of testimony is reliable. An argument based solely on a list of contradictions between witnesses, leads nowhere as far as veracity is concerned. It must be established if the witnesses are lying about material issues. The author commented that there is no rule that where a witness has lied, his testimony must be rejected without more ado - all that can be said is that a witness whose evidence has been shown to be deliberately false on one point, is liable to be regarded with suspicion and

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distrust and the trier of fact may, not must, conclude that his evidence on another point cannot safely be accepted:

5 "The question is not whether a witness is wholly
untruthful in all that he says, but whether the court
can be satisfied, beyond a reasonable doubt in a
criminal case ... that the story which the witness
tells is a true one in its essential features." (Page
35).

10

The author points out that images can be introduced into memory, for instance by post-event information, including discussion and reports or rationalisation or reconstruction of events.

15 In this matter, two of the charges against all the accused are
the unlawful possession of a firearm and ammunition of the
firearm. The court will have to establish the aspect whether
each person in the group possessed the firearm, which in turn
will be decided with reference to whether the state has proved
20 facts from which it can properly be inferred by a court that the
group had the intention to exercise possession of the firearm
through the holder thereof, and whether the holder of the
firearm had the intention to hold the firearm on behalf of the
group. If these requirements are fulfilled, the court can find
25 joint possession involving the group as a whole. In other words

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the court may find that the group had a common purpose to possess the firearm and ammunition. We were referred to S v Khambule 2001 (1) SACR 501 (SCA), page 503e-g, where Olivier, JA found:

5

"There was no reason why, in appropriate situations, and if the principle of common purpose was applied, the common intention to possess the firearms jointly, could not be inferred. If it was the intention of the members of the group to use firearms in the execution of a robbery or murder, to the advantage of all of them, they associated themselves with the possession of firearms. Possession of the firearms accordingly had to be taken by one or more members of a gang and on behalf of, and to the advantage of the group...(Then) The inference of an intention to jointly control and possess the firearm and ammunition, was unavoidable."

20

On behalf of accused 1, it was submitted that the state had not shown that she had a motive to end the life of the deceased and that this fact should count in her favour when a possible involvement in the murder was considered. Her representative suggested that the court should be slow to convict a person

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where there is no proven motive for a crime. The general rule is that a person's motive, whether good or bad, is irrelevant to criminal intent. The reason for ignoring motive in the matter of determining criminal liability, is that individual motives are too
5 complex and obscure to provide a reliable basis for determining liability for punishment. The principle of legality militates against assigning liability on a basis of personal and individual ethics and motivation. I refer to Principles of Criminal Law, 3rd Edition, Jonathan Burcell.

10

Evidence of the accused's motive in committing a crime is admissible and may prove important in implicating the accused in a commission of the crime or establishing his intention, but intention may be proved without reference to motive.

15

As regards the failure of a party to testify and the constitutional right of an accused to refuse to testify, it was held by Holmes, JA in S v Mthetwa 1972 (3) SA 766 (A) 769A-E:

20

"Where the state case against an accused is based upon circumstantial evidence and depends upon the drawing of inferences therefrom, the extent to which his failure to give evidence may strengthen the
25 inferences against him, usually depends upon

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various considerations. These include the cogency, or otherwise, of the state case after it is closed, the case which the accused could meet if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt ... Where, however, there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general, *ipso facto* tends to strengthen the state case, because there is then nothing to gainsay it and, therefore, less reason for doubting its credibility or reliability.

15 Schwikkard and Van der Merwe, Principles of Evidence, page 543).

Since the finding in the Mthetwa judgment, the court has found that no adverse inference can be drawn against an accused merely by virtue of the fact that he has exercised his constitutional right to refuse to testify. However, if an accused exercises his constitutional right to silence, the court is left with nothing but the uncontroverted *prima facie* case presented by the state, and the court will be called upon to decide whether the uncontradicted *prima facie* case of the prosecution must harden into proof beyond reasonable doubt.

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Of importance is the fact that the accused's constitutional right to silence cannot prevent logical inferences. The circumstances of a case may be such that a *prima facie* case, if left uncontradicted, must become proof beyond reasonable doubt. This happens not because the silence of the accused is considered an extra piece of evidence, but simply because the *prima facie* case in a particular case is, in the absence of contradictory evidence, on logical grounds, strong enough to become proof beyond reasonable doubt. I refer to S v Boesak 2001 (1) SACR 1 (CC) at [24]. See also Schwikkard and Van Merwe, *supra*, page 545.

Clear authority exists for the proposition that in certain circumstances an accused's refusal to testify when the prosecution had established the *prima facie* case, could be a factor in assessing guilt.

The Constitutional Court has pronounced on more than one occasion that trial silence may have untoward consequences. In S v Tebus 2003 (2) SACR 319 (CC), paragraph 58, the court found that:

"If there is evidence that requires a response and if no response is forthcoming ... [Then] the court may be justified in concluding that the evidence is

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sufficient in the absence of an explanation to prove
the guilt of the accused."

One of the difficulties for the court in this matter is the fact
5 that the accused have failed to explain a multitude of proven
facts, not only by not testifying, but also by not even putting to
witnesses their possible version. The court does not have to
consider the probability of their version, as on many aspects
there is no version, such as where they were at a particular
10 date or time or what the explanation is for recorded telephonic
contact between them.

Housebreaking Charge:

With regard to the housebreaking charge, the state conceded
15 that theft would be a more competent verdict, since the
elements of this offence, namely actual breaking and entering
were not established. The state also conceded that the
evidence linking accused no. 3 to this crime, was too tenuous
for a conviction. Although no fingerprints were found on the
20 scene of the housebreaking, accused 1 and 2 are implicated by
their cell phone records, which show that they were in the
vicinity and in contact with each other on the day of the
housebreaking, as well as in contact on the days before and
after the housebreaking.

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Between 21 October 2009 and 26 October 2009, there was very frequent cell phone contact between accused 1 and 2, including contact on 15 occasions on 22 October. From Exhibit "L", it is interesting to note that number 2 had contact with number 3 and number 1 in the days before 27 October while he was in Nyanga, where he resided. On 26 October, he and number 1 communicated twice and on the day of the housebreaking, 27 October, accused 1 and 2 contacted each other 17 times (Exhibit "DD"), starting with a call from number 1 to number 2 at six o'clock in the morning, while she was still at home in Khayelitsha and he in Nyanga. At 07:29, 07:32 and 07:35 there was contact between them and by now both accused had arrived in the Newlands area. At 09:03 accused 1 sent number 2 an SMS from the Newlands area while he was in Rondebosch, having ostensibly just left Newlands. By 09:35, when accused 1 again contacted number 2, he was already in Observatory area, from where he returned to his home in Nyanga. The last contact between accused 1 and 2 of a successive series of 10 calls, that is the last 10 calls between them on 27 October, was at 21:28, she had returned to Khayelitsha and he had also arrived in the same area where he did not live.

This extensive cell phone contact was not explained by the two accused and accused 2 never denied or explained his

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presence in the vicinity of Mr Caverni's home on the morning of 27 October 2009. Accused 1 never explained why it was necessary to contact number 2 repeatedly immediately before and after her employer's house had been broken into and why, 5 with only a few exceptions, he was the only one that she called that day on that particular number of hers.

Mr Caverni testified that he was the only person who knew where the key to the safe was, even his live-in partner did not 10 know. The evidence was that the Mr Caverni and Ms Du Toit had a good relationship with accused 1. She had worked for Mr Caverni for eight years by the time of the burglary and was a person who could access the premises and disarm the alarm. She would most probably be aware of where Mr Caverni kept 15 not only his safe, but also the spare key to the safe and she must have ascertained what he kept in the safe. This is the only explanation how the house was accessed without activating the alarm, that in the past had functioned effectively. This explained why the paintings in the bedroom 20 were removed and the key found, and why only the items in the safe were removed, despite the fact that Ms Du Toit's jewellery was there for the taking.

It was the undisputed testimony of Ms Du Toit that after the 25 break-in, accused 1 never returned to work and never alerted
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her employers to the reason for her absence and that she did not respond to calls from them. Accused 1 was only arrested some three weeks later and, from her cell phone records, we know that she was not averse to using her cell phone and at 5 times called from two numbers during this period.

Finally, the husband of accused 1 was killed the very next morning with a firearm, using the same cartridges as the calibre firearm and cartridges stolen from Mr Caverni's home 10 the previous day, in circumstances where number 2 was shown to have been in the area of the murder, both by virtue of his cell phone records and by virtue of an eyewitness. It has also been shown that the deceased was murdered within less than an hour after cell phone contact by number 2 with number 1, 15 who had by now made sure that she was not in the area.

The only reasonable conclusion from the testimony presented to court in the absence of any explanation from either accused 1 and 2, is that accused 1 and 2 planned that number 2 would 20 steal Mr Caverni's firearm and that with the assistance of accused 1, he did just that.

It is, therefore, our unanimous finding that accused 1 and 2 are guilty of the theft of the items from Mr Caverni's safe and 25 that their unexplained denial of this charge falls to be rejected.

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Both accused 1 and 2 are accordingly found guilty of theft in regard to this charge. Due to a lack of evidence against accused 3, despite some suspicions in this regard, he is found not guilty on this charge.

5

Murder Charge:

The state alleged a common purpose, premeditated murder by the three accused. Incorporated in the argument of the state is a submission that the three accused planned to steal the
10 firearm in order to use it to kill the deceased almost immediately after the theft. It was not disputed that the cartridge case found on the scene after the deceased had been shot and killed, was a cartridge case of a 7,65 calibre firearm, the same calibre as the stolen firearm. The court was
15 asked to conclude and find that the same stolen firearm was used to kill the deceased, although the stolen firearm was never found.

The evidence presented by the state was that accused 1
20 repeatedly informed her friend, Ms Nofemele that she wanted to kill her husband, that if he had been killed during a burglary, she would not have minded, and even that she had tried, unsuccessfully, to murder him with rat poison. Ms Nofemele was a good, intelligent, unshaken witness, who
25 never deviated from her highly believable version and who had

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no discernable motive to discredit accused 1.

A further building block in the version of the state of accused 1's desire to end the life of her husband, was the testimony of
5 Siyasanga and Sivenatha. Of these two, Siyasanga was the more intelligent. He had heard from the less sophisticated Sivenatha, that accused 1 had asked him to assist to kill her husband. When he, himself, went to number 1 to ask for a small loan, he was asked about the operation of a firearm. He
10 and Sivenatha discussed the matter. Sivenatha could not go through with such a deed, especially since he knew the son of the deceased. Both of them testified to an instance where number 1 contacted them by cell phone and told them to come "the door is open". It is true that their testimony on this aspect
15 differs, but in material respects, their evidence corroborate each other and we believe they may have recalled the evidence differently as a result of time delays, shock and discussion on the subject.

20 Of importance is the testimony of Sivenatha that when he arrived at the scene of the murder, shortly thereafter, he said to the people gathered there that "the woman has done what she planned to do", or words to that effect. That he said this was confirmed by Amos Wana. We were informed, during the
25 hearing, that the community blamed number 1 for the murder

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of her husband and we know that Sivenatha told his version to the police and also told the police of accused 1's request to Siyasanga. Siyasanga also confirmed his version to the police. Both Sivenatha and Siyasanga testified that accused 1
5 called them cowards and told them that she found other people to do the job.

The deceased was murdered on his way to the taxi rank. The evidence showed that he did not catch a taxi to work every
10 day, but sometimes used a truck from his employment. On the fateful day, he did not use the truck. His assailants must have known that he would not be using the truck on that day and they also knew where on the route to wait for his arrival. The deceased had a good relationship with his stepdaughter, with
15 whom he shared the home with accused 1. The only person who could have advised the assailants of the presence of the deceased en route to the taxi rank, and the time that he would leave, was accused 1. She telephonically contacted accused 2 many times the previous day and evening and contacted both
20 accused in the short period of time before the deceased was killed in the early hours of the morning. It can only be concluded that she was the person who advised the assailants what the movements of the deceased would be on the particular morning.

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There is also the testimony of Lwandile, that he admitted to number 1 that he had heard about "that thing", which apparently referred to accused 1's wish to have her husband killed. This was apparently a reference to a discussion that he
5 had had with his friend, Kolikeli, who was also a friend of accused 1. The discussion with accused 1 on this subject, was just before accused 2 and 3 discussed, with Lwandile, that accused 1 wanted to have her husband killed and had offered to pay them for the job, showing him her number on their
10 phones. From the cell records we know that the number or numbers were known to them, despite their denials of this testimony.

Not only did Sivenatha identify accused 2 as one of the two
15 young men that he saw running away from the very street where the murder had been committed, directly after the murder of the deceased, but the cell phone records of accused 2 and 3 show conclusively that they were both in the area where the murder was committed during the relevant early
20 hours of the morning, in an area where they had no business to be at that stage. Their presence was never denied or explained to the court. I will not dissect the cell phone evidence again, save to point out that the contact between the three accused started very early on the morning of 28 October
25 2009 and continued until the date of their arrest. Extensive
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contact that was not explained, and in fact in regard of accused 3, was denied, although the contents of the cell phone records were not denied and showed the contrary.

5 Although accused 3, the only accused who testified, struck me as a shrewd witness, who exhibited more intelligence and maturity than one would expect considering his relative youth. He was astute to perceive when certain aspects of his evidence was open to challenge and at times he changed and
10 adjusted his version to make it more believable. The many contradictions in his evidence with the testimony of state witnesses and with recorded documentary evidence, indicated to the court that he was an unreliable, untruthful witness.

15 Some aspects where his version is clearly fabricated and contradictory to believable state evidence include:

1. His testimony that he did not know accused 1 and did not have her cell phone number.
- 20 2. That Lwandile gave him his phone.
3. That he only went to the mall, because number 2 asked him to accompany him.
4. That he was at the mall, window shopping, some time before his arrest.
- 25 5. That it was Gojo who reprimanded him in the car in

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Xhosa en route to the police station, evidence contradicted by several state witnesses.

6. That the police asked about Lwandile before he gave his statement.
- 5 7. That Bobotjana was a cell guard on 19 November.
8. That he was not warned of his constitutional rights in terms of SAP14A at the police station. There is documentary signed proof to the contrary.
9. That he was assaulted by numerous detectives, most of
10 whom he could not identify in court and contradictory to the testimony of eight detectives that the detectives left the police station after the arrest.
10. That Hlako remained at the station and called Van Wyk on 19 November to take his statement, contradictory to
15 Van Wyk's own testimony.
11. That he did not compliment a female cell guard.
12. That he did not know the cell guards who booked him into the cell and that he shared a cell with only number 2 initially.
- 20 13. That the interpreter did not arrive with Van Wyk.
14. His version in court that the entire statement to Van Wyk was fabricated, was clearly untrue, only sections implicating Lwandile were, on the face of it, fabricated. The bulk of the contents of the statement confirmed the
25 state's evidence.

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15. His evidence that accused 1 did not point him out as a culprit at the mall, was shown to be false and is rejected.

The statement of accused 3 to Captain Van Wyk was admitted
5 by the court, as on his own evidence he was not influenced
unduly to make the statement, but made it, as he thought it
was a way he could escape incarceration. No further evidence
or document in this matter has persuaded the court that the
acceptance of the statement was a mistake. As stated,
10 accused 3 testified that the statement was mainly a
fabrication. Despite the fact that he alleges that his statement
to Van Wyk was a fabrication, he confirmed many aspects of
the statement during his testimony, including the obvious
falsehood that Lwandile gave him his phone. There is no
15 indication whatsoever why Lwandile, who denied this, would
have given his phone to accused 3. As noted previously, the
accused did not have telephonic contact with Lwandile at any
relevant time, if ever.

20 The statement of accused 3 corroborates the cell phone
evidence of his presence at the scene of the murder. We also
know that Sivenatha saw a man running away with accused 2.
His allegations that the contents of the statement were
fabrications based on what he heard from detectives who
25 questioned him, is not only improbable, it borders on the

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preposterous and is rejected. In essence, the version of accused 3 supports and corroborates the evidence presented by the state, with the only exception being that he implicates and involves Lwandile in the matter and minimises his own
5 role. He confirmed that the murder was early in the morning, that he and number 2 were standing on a corner, that a shot was fired and the two of them ran away and that accused 1 paid the perpetrators for the deed. He even knew that accused 1 telephoned on the day of his arrest to advise the
10 perpetrators that she would pay them more money for the deed, an aspect he was suspicious about. This statement, accordingly, shows the involvement of accused 3 in the murder of the deceased and his presence at the scene where the murder was committed at the relevant time, as stated, a fact
15 confirmed by his cell phone records that remain unexplained.

The court accepts the evidence contained in the statement of accused 3 to the extent that it is consistent with the evidence of the state witnesses. The evidence of accused 3 in the
20 statement which is contradictory to the state's evidence is rejected.

The court is accordingly satisfied that accused 3 admitted his presence in the area where the murder was committed,
25 although he tried to put the blame on Lwandile, for reasons

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that were explained by Lwandile, even from before his arrest, on the telephone to Hlako. In addition, accused 3 has never denied being in the area where the deceased was killed at the time of the murder and has not provided the court with any
5 explanation for his presence in the area. Accused 3's evidence relating to his denial of his involvement in the matter, is not reasonably possibly true and is rejected.

The fact of the involvement of all three accused in the murder,
10 is further strengthened by the pointing out in Promenade Mall. Accused 1 agreed to point out the people involved in the killing of her husband. In fact, she told Hlako "these are the young boys" and that there were no other culprits. She agreed to pretend that she would pay them more money. Accused 3 later
15 said to Hlako he thought it was a trap, but hoped he would be lucky. In his statement he pretended that it was Lwandile who was suspicious about this aspect. Accused 1 told Hlako, by indicating and verbally, on three occasions, that accused 2 and 3 were the correct suspects. She even asked for protection as
20 they were dangerous. Subsequent to their arrest, all three accused agreed to make incriminating statements. There was no denial or explanation for this testimony.

The evidence of the state was well presented to provide the
25 different blocks of the puzzle in this matter. No possible

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evidence was ignored. The police witnesses generally impressed me as honest and reliable. Sergeant Hlako worked hard and left no stone unturned to make sure the investigation was thorough. He gave his testimony in a calm and composed, consistent manner. He testified on the same set of facts and circumstances on two separate occasions within the space of a month and a half, because of the trial-within-a-trial proceedings. On both occasions, he was in the witness box for more than a day. Notwithstanding this, and vigorous cross-examination, his version remained consistent and he was unshaken. His evidence, and that of other police witnesses, as well as documentation, corroborated each other and there were very few, if any, discrepancies in their evidence. The court has no reason to doubt his credibility or reliability, nor do we doubt the credibility or reliability of the other state witnesses on material aspects.

Accused 1 and 2 elected not to testify and relied mainly on their denials in court for their acquittal. They chose not to explain their frequent, highly suspicious, cell phone contacts with each other and accused 3 at critical times, not even by putting a version through their legal representatives. Number 2 chose not to explain where he was at the relevant times on either 27 or 28 October 2009, if he was not where the cell phones indicated, and if he was not running away from the

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scene of the crime, as testified to by a witness. No innocent explanation was given for his presence on these days. The version alleged by number 2 and number 1 relating to why he agreed to meet number 1 at the mall, namely to pay for a dress, was shown to be a lie. Number 1's version that she did not know and did not contact number 3, was a lie. There is no reasonable possible version or innocent explanation of any accused before court. In the premises, their denials of their involvement in the murder of the deceased are rejected.

10

The state argued that the accused acted with a premeditated common purpose to murder the deceased. The argument advanced was that an agreement to commit the crime can be inferred from their actions and from their proven regular telephonic contact at crucial stages, as well as from the fact that the evidence shows that accused 1 paid the accused for their services after the event. It is, therefore, argued, correctly in our view, that the state showed a causal connection between the accused with common knowledge of the crime they were planning to commit. The court can conclude from the evidence presented, that the three accused all contributed to the crime and associated themselves with the fatal consequences of their attack on the deceased.

25 It is trite law that common purpose can be inferred by the court

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from joint actions. In the circumstances, each of the accused is liable for the acts which the other performed in the furtherance of their common purpose. In this matter, it cannot be argued that any accused was indifferent to the act or
5 consequences thereof.

The three accused, accordingly, in our view, each acted with *dolus directus* in a premeditated murder. THE THREE ACCUSED ARE ACCORDINGLY ALL FOUND GUILTY OF
10 MURDER AS CHARGED.

Attempted Murder:

Although the state has shown that accused 1 wished to end the life of her husband and even told her friend, Ms Nofemele, that
15 she had poisoned his food, which was not proved to have had any detrimental effect, THE STATE HAS NOT PROVED THE CHARGE OF ATTEMPTED MURDER AGAINST ACCUSED 1 AND ON THIS CHARGE SHE IS ACQUITTED.

20 Counts 3 and 4 of the charge sheet: unlawful possession of a firearm and illegal ammunition:

With reference to the judgement referred to above, S v Khambule, the state requested the court to find, by inference,
25 that all three accused are guilty of the charges of unlawful
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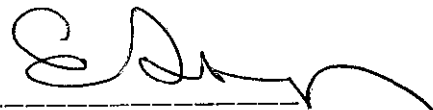
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possession of a firearm and ammunition. By virtue of the facts and legal principles set out above, and the finding of the court relating to the theft of a firearm and the murder of the deceased by the use of a firearm and ammunition by one of the

5 three accused, while the three accused were acting with a common purpose with the intention to murder the deceased, the court finds that the three accused jointly exercised possession of the firearm. ACCORDINGLY THE COURT FINDS THE THREE ACCUSED GUILTY ON THE CHARGES

10 RELATING TO POSSESSION OF A FIREARM AND AMMUNITION FOR SUCH FIREARM, as these charges were set out in count 3 and 4 of the charge sheet.

15



STEYN, J