**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: SS03/2013

DATE: 19 NOVEMBER 2014

In the matter between:

**THE STATE**

and

**MZIWABANTU MADIBA MNCWENGI** Accused 1

**MZIMASI MADIBA MNCWENGI** Accused 2

**BUYELWA NOKWANDISA MNCWENGI** Accused 3

**LUMKO BAMBALAZA** Accused 4

**XOLANI RASTA MAKAPELA** Accused 5

**MAWANDE SIBOMA** Accused 6

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**J U D G M E N T**

**BOQWANA, J**:

The accused were arraigned for trial before this Court on an indictment consisting of altogether 8 counts namely; four counts of kidnapping count 1, 2, 3 and 4; one count of assault with the intent to do grievous bodily harm count 5 and three counts of murder counts 6, 7 and 8 read with section 51 of the Criminal

Law Amendment Act 105 of 1977. It is alleged that the killing of the deceased was committed by a group of persons in the execution of a common purpose.

The State alleges in respect of count 1, 2 and 3 that the accused during the evening of Wednesday 14 March 2012 and at or near Harare Khayelitsha wrongfully and intentionally deprived Sivuyile Rola, Luxolo Mpontshane and Mabhuti Matinise of their freedom of movement by tying their hands with wire and keeping them against their will. In respect of count 4 it is alleged that the accused on the same date and evening wrongfully and intentionally deprived Mphuthumi Nobanda herein after referred to as Mphuthumi, of his freedom by keeping him against his will and in respect of count 5 that the accused on the same date and evening wrongfully and intentionally assaulted Mphuthumi Nobanda with blunt objects with the intention to do grievous bodily harm.

In respect of count 6, 7 and 8 the State alleges that the accused on the same date and evening and at or near Macassar Sand Mines at Macassar in the district of Khayelitsha wrongfully and intentionally killed Sivuyile Rola ('hereinafter referred to as Mshwele and also known as Vido'), Luxolo Mpontshane ('hereinafter referred to as Luxolo'), Mabhuti Matinise ('hereinafter referred to as Mabhuti'), all male persons by hitting

them with blunt objects. All the accused were legally represented. They all pleaded not guilty to all the charges. Only accused 5 gave a plea explanation.

The trial commenced on 14 August 2013 with the Court constituted of the Judge and two assessors Mr H Swart and Ms S Solomons. After the trial had run for over seven months and in the middle of a trial-within-a-trial I received a medical certificate from a certain Dr P C Ndomile on 17 March 2014 stating that Ms Solomons was booked off sick due to acute anxiety disorder from 17 to 19 March 2014. On the same day of 17 March 2014 Ms Solomons contacted the Court's registrar and advised her that she had collapsed the previous weekend and could not attend court for the period she was booked off sick. The matter was accordingly postponed to Monday 24 March 2014 also taking into account the fact that counsel for accused 5 had been involved in another matter that same week.

The office of the registrar attempted to contact Ms Solomons for the duration of that week to ascertain the nature of her sickness and the period of her envisaged absence to no avail. On Monday 24 March 2014 Ms Solomons did not attend the trial proceedings, the registrar attempted to contact her on the telephone numbers that she had provided to no avail. An attempt was made to contact the magistrate's court in Upington

where she was suspected to be. Ms Solomons had indicated in the past week that she was offered a position to act as a magistrate in Upington and requested the presiding Judge to release her from the trial which request was declined. Indeed she was found to be at the Upington Magistrate's Court where she was appointed as an acting magistrate. Had it not been for the attempts made by this Court to locate Ms Solomons this Court would not have known of her whereabouts as she failed to answer her calls.

As an explanation for her absence Ms Solomons furnished this Court with a letter requesting to be excused from further attendance of the proceedings permanently for the following reasons:

1. When she was requested to act as assessor it was communicated to her that the estimated duration of the trial would be six to eight weeks. She was not aware that the matter would run for such a lengthy period, it having run and having been more than six months on the court roll. It is not clear from her letter who communicated this to her as it certainly was not an instruction from this court.

2. She is a practicing attorney. In the interim she has lost income, clients and financially is not doing well. She was

offered several positions which she had declined however, when she was offered a position to act as a magistrate in the Upington District Court she stressed, panicked and thought about her four children and her financial difficulties as well as her future in the legal profession and she decided to accept the job offer.

She stated that she did not take this decision in isolation but with due regard to the rights of the other parties involved in the matter that is the accused, the defence, advocates, the State prosecutor. She further advised that her decision was based on the fact that she was aware that there were other trials in which only one assessor was sitting and her wish was for the matter to proceed in her absence. In her view, the rights of the accused would not be affected as there was still one assessor remaining. She apologised for the manner in which she dealt with the situation and pleaded to all interested and relevant parties to accept her reasons and absence from the case.

When it was apparent that Ms Solomons would no longer avail herself to continue with the trial the presiding Judge requested the State and defence counsel to present argument on the effect of her absence in the proceedings in light of section 147 of the Criminal Procedure Act 51 of 1977

and the prevailing case law. The matter was argued extensively. The State submitted that section 147 was not applicable in this instance as it dealt with incapacity or death of the assessor. It however submitted that taking into account that no prejudice would be suffered by any of the parties the Court may release the assessor from her duties and with reference to the accused rights to a fair trial the trial should not start *de novo* as it had already run for a lengthy period, some of the accused are in custody and witnesses might have to be recalled.

There was consensus from defence counsel acting on behalf of accused 1, 2, 3 and 4 that it would not be in the interest of justice for the trial to start *de novo* taking into account the rights of the accused to a fair trial and balancing those with the interests of the society and the administration of justice. The most common view held by the respective counsel on behalf of the accused was that the accused would be far more prejudiced if the trial were to start *de novo*. At the request of counsel for accused 5 and 6, the Court requested further particulars from Ms Solomons regarding her absence and requested release from the proceedings. She responded on 14 April 2014 by confirming that she would not be able to further attend in the matter due to her decision that was taken on 17 March 2014 that she had signed a contract on 17

March 2014 and she was currently working as an acting magistrate and was bound by the contract. She stated that she could not breach that contract as it may have an adverse impact on her future in the magistrate's profession.

The matter was argued further on receipt of Ms Solomons' further representations. Counsel for accused 5 and 6 were doubtful as to whether the Court was empowered to release Ms Solomons as an assessor based on the reasons that she had put forward. Counsel for accused 5 suggested that arrangements could be made for Ms Solomons in her position as an acting magistrate to be seconded in terms of the Public Service Act 1994 to complete the case as assessor. Having considered Ms Solomons' letter and argument on this issue, I directed that the trial proceed in the presence of the remaining members of the court and reserved reasons for later, here follows my reasons.

The Court in this matter was faced with untenable and a unique situation. Although Ms Solomons' letter was couched as a request to be excused from further attendance in the trial she had already made herself absent and gave a clear indication that she would not be able to return. Effectively the decision I was faced with was not whether or not to release her but to determine and give direction on the status

of the trial and whether it was to proceed in her absence or be set aside and proceed *de novo* before a newly constituted court. Perhaps before I continue I should mention that the proposal made by counsel for accused 5 was not applicable in this case as the provisions of the Public Service Act 1994, that he referred to applied to permanent government officers and are not applicable in this instance. Furthermore, Ms Solomons had indicated that she was unable to continue as assessor in the trial. I must also state that she was given an opportunity and was requested to address the situation with the relevant authorities in charge of her acting appointment before she sent her final letter of 14 April 2014 confirming her inability to continue sitting as an assessor in this matter.

Paramount to this Court when a decision was made was the fairness of the trial to all the accused persons, the interest of justice, the administration of justice and the circumstances placed by Ms Solomons before this Court regarding her absence and her inability to continue to act as an assessor going forward. The relevant provision that deals with the assessor's inability to act in the Criminal Procedure Act is section 147. Section 147(1) provides as follows:

"If an assessor dies or in the opinion of the presiding judge becomes unable to act as an assessor at any time

during the trial the presiding judge may direct:

a) That the trial proceed before the remaining member or members of the court or;

b) That the trial starts *de novo* and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor."

The issue to be determined was whether the assessor became unable to act within the purview of section 147. The meaning of the words 'unable to act' has been deliberated in many cases. In S v Malindi and Others 1990(1) SA 962 (A) Corbett CJ held that:

"The word "unable", in the context of section 147(1) conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as for example indefinite detention here or in a foreign country."

I do not read S v Malindi to limit inability to act to physical or mental impairment. The list of examples provided in that case includes a situation where an assessor is detained for an

indefinite period here or abroad. The detainment situation has nothing to do with illness, it has to do with an unforeseen situation that restricts an assessor from being physically able to act, such as his or her detention here or abroad which may be indefinite or permanent. I venture to say that situations of the assessor's inability to act are not limited to physical sickness or mental impairment. Clearly, any other situation that prevents the assessor from being physically or mentally present to act as an assessor for an indefinite or permanent period could constitute inability to act in my view. Each case would need to be treated on its own facts.

It is also important that in this Constitutional dispensation section 147 is not mechanically interpreted, fairness of a trial to the accused, policy considerations, interest and administration of justice become important. The judge, in my view, should in the circumstances balance all these factors in coming to an appropriate decision. To support this view, I refer to a decision of S v Jeke 2012 JDR 1551(GSJ) at para 15 in that case Mbha J said the following:

> "Moreover the peculiarities of the reason for the absence of the assessors ought to be a crucial factor because any concept of unable must be fact specific an aspect addressed more fully hereafter. Furthermore, sight must

not be lost of the important fact that the Act does give a court discretion to formulate an opinion as to whether or not under the circumstances prevailing at the time it can be said that an assessor is unable to act as an assessor. The proper formulation of an opinion about an inability of an assessor to continue participating implies more than a mechanical fact-finding process. The magistrate unavoidably must make a value choice informed by policy considerations about the administration of justice and chiefly about the avoidance of a failure of justice. In Malindi the policy choice excluded factors pertinent to grounds for recusal. Furthermore, the approach I adopt in fact is informed by the minority in the judgment of MT Steyn JA in S v Gqeba and Others 1989(3) SA 712 (A) at 718-719 where an assessor sought, during a trial, to be discharged on the ground that he wanted to be with his only child, a daughter, who was in hospital having been diagnosed with terminal cancer. The learned judge referred to the Oxford English Dictionary Volume XI definition of the word unable meaning *"not able, not having ability or power to do or perform (undergo or experience) something specified (chiefly of persons),"* and after considering the emotional attachment that existed between the assessor and his daughter he held that:

a) The ability to pay proper attention to judicial

proceedings is essential for the due performance of an assessor's task; and

b) Should an assessor become incapable of paying such attention he would whilst such ability lasts be *unable* to act as an assessor. (emphasis added)"

The court in the Jeke matter was of the view that the approach adopted by the minority decision in S v Gqeba, *supra,* fell within what Corbett CJ had envisaged in S v Malindi, *supra,* when he spoke of an ability deriving from a mental condition or any situation which physically prevented the assessor from attending the trial. The majority in Gqeba found that the assessor was released on compassionate grounds and not on inability. In the Jeke matter the magistrate had formed an opinion that the assessors had become unable to act based on a number of factors. Firstly, the withdrawal from the court of the services of the assessors after the collapse of the pilot project in terms of which the lay assessors had been appointed as a result of a depleted budget. The magistrate found that the collapse of the budget also collapsed their ability to serve, that is, as fulltime assessors.

Secondly, claims by assessors for court services would not be paid due to their unavailability of budget. Thirdly, there were no prospects of the pilot project being resuscitated in the near

future. Fourthly, the magistrate could not cause the assessors to continue to act at his own expense. Fifthly, the court could not order the assessors' participation at their own expense. It followed that if an assessor cannot be compelled to attend then from the perspective of the administration of justice such assessor is unable to participate. Finally, the trial was at a stage where the State had called their last witness. The appeal court agreed with the view taken by the magistrate. Although that case dealt with section 93 ter (11) (iii) of the Magistrate's Court Act 32 of 1944 the principles adopted therein are similar to those required by section 147 of the Criminal Procedure Act.

The most important principle stated by the court in the Jeke case, which I find to be equally important to the present matter, is that where it is impossible to obtain or secure the assessor's presence the court may in the interest of justice direct the proceedings to continue before the remaining member or members of the court or direct that the proceedings start afresh. The Court found it would have been impossible to procure the presence of the assessor and furthermore, because the matter was almost at the end of the State's case, it would not have been in the interest of justice, which is the chief and overriding factor, to order that the trial start *de novo*. See paragraphs 15, 16, 18 and 19 of the Jeke decision.

Another important decision with circumstances similar to those in the present matter is that of S v Matakati and Others 2007 ZAWCHC 328 (1 January 2008) which is a decision from this division by Ndita J. In that case an assessor had indicated to the court that in view of the trial having continued for longer than two years, which was more than he had predicted, his legal practice as an attorney was heavily impacted to the point that he had been reported to the Law Society by clients, magistrates were complaining about his matters being constantly postponed, he had lost clients and was unable to pay staff salaries and other expenses, due to income being severely affected. Ndita J held in those circumstances at paragraph 8 that:

> "The consistent approach of the courts to the release of an assessor is understandable as the issue of an accused having his case considered by a properly constituted forum is crucial and conflated with the right to a fair trial. Indeed it would be most undesirable to have assessors willy-nilly deciding to be excused from trial when it suited their purpose to serve. Neither should an accused be unnecessarily deprived of the benefits and safeguards arising out of a trial with a judge and two assessors. However, this issue is not only a matter for form, but also of substance as well because two assessors can overrule a judge on the merits. Each matter should of course be

decided on its merits. In the present matter, it is not a question of Mr Godla willy-nilly deciding to excuse himself, the substantive reasons he has submitted clearly demonstrate that a lot of injustice will result to his person, legal firm and clients whose cases he cannot attend to. For all it is worth, Mr Godla has, to his detriment served far more than the estimated duration of the trial. That to his credit shows commitment. It is not only a question of his compelling personal reasons but also about justice being denied or delayed to numerous clients whose cases he cannot attend."

What makes the present matter slightly different from the Matakati matter is that unlike Mr Godla who requested to be released by the court due to his compelling personal reasons Ms Solomons in essence deserted from her duties as an assessor without being formally released by the judge albeit for reasons similar of Mr Godla in the Matakati decision. While it is desirable that the trial should be completed in the presence of all members who constituted the court at the beginning of the trial, unforeseen circumstances do arise. Section 147 was introduced to deal with eventualities specified in that provision that is death and inability to act as assessor. See S v Baleka and 4 Others 1988(4) SA 688 (T).

There is also no mechanism available for a judge to force a member who has made her intentions clear that she would not be returning to continue sitting as an assessor to do so. Letting that assessor go is not to condone irresponsible behaviour but to focus the Court on its primary function which is to ensure that the rights of the accused are protected and the administration of justice is attained and not compromised by the assessor's absence. A situation like the one prevailing in this case enjoins the judge not only to look at the circumstances of the assessor but also to balance the rights of the accused to a fair trial with the interests and administration of justice. I am in agreement with Ndita J's remarks in the Matakati matter where she found that circumstances like these call to question whether a person under such emotional and mental distress would be able to apply his or her mind fully to the facts and the evidence.

Ndita J held as follows at paragraph 11:

> "Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that every accused person has a right to a fair trial. In my view, the substantive right to a fair trial demands from a trier of facts a complete presence of the mind and being alive to the facts presented at trial. Whilst the *dicta* referred to above reflect a commitment by the courts to the strict

enforcement of procedural safeguards aimed at ensuring a fair trial, it is in my mind doubtful that in the circumstances of this case, the accused's right to a fair trial will be better served by the continued presence of an assessor whose commitment to the trial is questionable."

She went on to state that at paragraph 13:

"When regard is had to the notion of basic fairness and justice, I am not of the view that an assessor who lacks commitment to a trial is capable of delivering justice to an accused. This renders him incapable of functioning as such. Whilst acknowledging that there has been consistency in judicial decisions that the word "unable" relates to the assessor's physical and mental inability, I am of the firm view that the dictum in Zuma, *supra,* justifies that the scope of section 147 include eventualities such as inability of the part of an assessor to deliver justice. In my opinion, Mr Godla is unable to act as an assessor due to his inability to deliver justice to the accused in these proceedings. Thus, I made the direction that the assessor in this matter was unable to continue with the trial."

In the same manner the continued presence of Ms Solomons in

this trial would not have served the interest of justice and those of the accused as her commitment was questionable. Moreover, she departed not having been released by the Judge. It would not have served the interest of justice and the accused for Ms Solomons to be forced to sit in a trial in which she was not committed. I must stress that Ms Solomons was not released by this Court due to her unwillingness to act as assessor or due to lack of interest rather, she advised having absconded that she could not come back citing financial distress arising from loss of clients, wrong estimation of the trial duration which had caused her stress and emotional distress and her appointment to act as a magistrate in Upington.

Like Ndita J, my view is that the meaning of the word unable to act in section 147 of the Criminal Procedure Act should be interpreted to include inability to deliver justice to the accused. It must also be borne in mind that four of the accused persons had been in custody for just over two years awaiting finalisation of the trial. The trial had been running for about seven months and the State was nearing the close of its case in the main trial and the trial-within-a-trial had commenced when the assessor became absent. Witnesses had given extensive evidence some of whom individually testified for a number of days. The procedural safeguards in the form of the provisions for the appointment of assessor in section 145 of the Criminal

Procedure Act are without a doubt designed to ensure a fair trial although such a right is not listed in section 35(3) of the Constitution. As Tshabalala JP observed in S v Khumalo 2006(9) BCLR 1117 (N) if section 145 is a procedural safeguard then section 147 is a limitation to the protection afforded by that safeguard. Section 147 of the Criminal Procedure Act permits a trial to be continued in the absence of an assessor in certain specified circumstances.

Tshabalala JP in S v Khumalo, *supra*, emphasised the point that the fact that there was only one assessor remaining should not be a threat to the fairness of the trial because in terms of section 146(d) of the Criminal Procedure Act a judge is obliged to give reasons for the decision or findings of the assessor that is remaining where there is a difference of opinion. The court in Khumalo found that on the balance a significant threat to the administration of justice would have resulted if the trial started *de novo*. A similar situation would have prevailed in this matter.

Concluding on this matter it might perhaps serve the legislature well to revisit the heading of section 147 of the Criminal Procedure Act which reads "*Death or incapacity of assessor*" as such wording might be the reason the provision tends to be interpreted in narrow terms. The language of the body of the section itself however makes no reference to incapacity but

rather refers to a judge forming an opinion that the assessor is unable to act as an assessor which in my view is clearly broader than the heading. For the reasons above I directed that the trial proceed in the presence of the remaining members of the court being myself and Mr H Swart.

Reverting back to the main judgment the State altogether called 25 witnesses. The State indicated that Morris Maxela ('hereinafter referred to as Morris'), who was originally charged as accused 7 would be called as a State witness in terms of section 204 of the Criminal Procedure Act and withdrew the charges against him. Morris gave evidence as a State witness and was warned by the Court in terms of section 204 of the Criminal Procedure Act. Accused 1, 2, 3 and 4 testified in their own defence. Accused 2 also called an *alibi* witness. Accused 5 and 6 elected not to testify. The Court conducted an *inspection in loco* on 12 September 2013 in the areas of Harare Khayelitsha and Macassar Sand Dunes. The observations made were agreed to by all the parties and were read into the record and marked as exhibit J. The Court will not summarise all the evidence that was led as this was a lengthy trial and all the evidence is on record but the Court will focus on the aspects of the evidence that are relevant to its findings.

Dealing with common cause facts it is common cause that

accused 1's house in Harare was broken into on 10 March 2012 and his plasma TV was stolen whilst he was in the Eastern Cape at the time. Accused 2, who is the younger brother of accused 1, and who discovered the missing TV then reported the stolen TV to the police the next day. Accused 2 then informed his brother accused 1 of the missing TV which led to accused 1 coming back to Harare. Accused 1 then arrived in Harare on 14 March 2012 between 1:00 and 2:00 in the morning. The two brothers are referred to as Madiba senior and Madiba junior respectively in the community. Accused 3 is married to accused 2 and their house is situated next to accused 1's house at Pumza Street in Harare. Accused 1 is the owner of two taxis. Accused 2 was a driver of one of the taxis. It is also common cause that the other accused also reside in Harare.

It is further common cause that the bodies of the three deceased, Luxolo, Mabhuti and Mshwele who resided in Harare were found at Macassar Sand Mines at approximately one o'clock in the morning on 15 March 2012. According to the post-mortem findings Luxolo and Mabhuti died as a result of multiple injuries and Mshwele died of a head injury and consequences thereof. These three young men were regarded at some stage or the other as troublemakers in the community. By agreement between the parties the State submitted three affidavits in terms of section 212(1) of the Criminal Procedure

Act which identified the bodies of each of the deceased as follows: the first is the body tag number WC/12/0090/12 belonging to Luxolo. The second body tag number WC/12/0091/12 belonging to Mabhuti and the third body tag number WC/12/0092/12 belonging to Mshwele.

The State's case is that the accused committed the offences that they are charged with. All of the accused denied being the perpetrators of the alleged offences. No formal admissions were made.

At the end of the State's case an application was made in terms of section 174 of the Criminal Procedure Act for discharge on behalf of accused 2 in respect of all the charges, on behalf of accused 5 in respect of charges 4 and 5 and on behalf of accused 6 in respect of all charges. With regard to accused 2 discharge was refused on all counts. In the case of accused 5, discharge was granted in respect of counts 4 and 5 and with regard to accused 6, discharge was granted in regard to counts 4 and 5 and refused in respect of counts 1, 2, 3, 6, 7 and 8.

During the trial all the accused except accused 5 challenged the admissibility of the warning statements pertaining to them which the State sought to introduce as evidence. It was agreed between all the parties that only one trial-within-a-trial should

be held in respect of all the warning statements of the accused concerned. After a trial-within-a-trial was held the Court ruled that all the warning statements were admissible. Reasons for the ruling were reserved. These are the reasons that follow.

The objections raised on behalf of the accused 1, 2, 3 and 4 were similar and they were that the accused never made statements but were simply asked or told to sign documents which contained information and that their Constitutional Rights were not explained to them. It was argued on behalf of accused 6 that the version in the statement belonged to the investigating officer Constable Nceba Gojo and not to the accused and that his Constitutional Rights were not explained, that he was not afforded a right to legal representation and that his right to a fair trial was infringed. It was also argued on behalf of accused 3 that her warning statement amounted to a confession and therefore inadmissible. Counsel for accused 3 and 6 also argued that the warning statements were not translated by a qualified interpreter or a translator from Xhosa to English and *vice versa*.

In terms of section 219(A) of the Criminal Procedure Act for evidence of any admission of an offence made extra judicially to be admissible in criminal proceedings it must have been voluntarily made. See S v Yolelo 1981(1) SA 1002 (A) and R v

Barlin 1926 (AD) 459 at 462. In terms of section 35(5) of the Constitution *"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."*

The State called Constable Gojo who testified that all the accused's Constitutional Rights were complied with and the statements were made freely and voluntarily without any undue influence. Sergeant Andrew April, Constable Khanyiso Nyudwana and Constable Tony Bobotyana were called as witnesses to support Gojo's evidence. To support his objection to the admission of the statement accused 1 testified that he was assaulted by Gojo and April on the morning of 15 March 2012. He testified further that Gojo came to fetch him, accused 2 and 4 from the cell where they were all held on Saturday 17 March 2012 and took them to his office. Other accused were taken out of the office and Gojo gave him documents to sign. He did not know what was contained in those documents but signed because he was instructed to do so. He also testified that he spoke to his lawyer Mr Godla on Saturday 17 March 2012 and Mr Godla asked to speak to Gojo who refused to talk to him.

In the Court's assessment of the evidence, Gojo's testimony

that he explained the rights of the accused is convincing. He stated that he explained the accused's Constitutional Rights several times before he was charged and most importantly reminded him of his rights before taking the warning statement. Furthermore, that accused 1 was not forced to make a statement. Gojo was challenged by Ms Losch in cross-examination that he did not mention that the accused had the right not to be compelled to make a confession or admission in his evidence-in-chief. In response thereto Gojo mentioned that although he did not mention it he did explain the rights to accused 1 and that right also appeared in the form of the warning statement. On perusal of the warning statements of other accused submitted as exhibits that right is clearly stated in that document.

In addition to Gojo's evidence, Bobotyana testified that rights are explained to an arrested person before he is put to the cells by an investigating officer. The arrested person is also required to sign the SAP14A form which he also called Book of Rights. The SAP14A is a document referred to as a notification of Constitutional Rights. According to the occurrence book entry 901 dated 15 March 2012 signed by Apleni, accused 1 was detained at 5:25 and an entry was made which refers to the issuing of SAP14A/QC797620 and that the suspect, accused 1, was free from any visible injuries and had no complaints. On

the same date reference to the issuing of SAP14A/Q679762 appears in register SAP14 also known as movement register or custody book at entry number 261 in column 7 under the heading Constitutional Rights. Both the occurrence book and SAP14 register reflect the same information regarding SAP14A notice number Q679762.

Although the State did not lead evidence on whether the Constitutional Rights were explained by Apleni to accused 1 when he was detained on the morning of 15 March 2012 reference to SAP14A/Q6797620 in both registers is a clear indication that such a document outlining SAP14 list of rights was issued. Furthermore, in paragraph 70 of her heads of argument and during oral argument Ms Losch submitted that the accused was aware of his right to legal representation and that he was advised to exercise his right to remain silent. Accused 1 was informed by Apleni when he was arrested on the morning of 15 March 2012 of these rights. Notice of rights SAP14A section 3(a) and (b) handed in as exhibits in respect of other accused clearly states the right to remain silent and not to be compelled to make a statement. From documentary evidence it is clear that the accused was aware of his rights.

The likelihood of the assault having taken place is questionable for the following reasons: First, Gojo and April deny that the

accused was assaulted. Both Gojo and Bobotyana testified that if a person was assaulted there was a specific procedure to be followed. A report will be made to the cell guard and/or a duty officer in charge who would record the complaint in the occurrence book and attend to such complaint. Accused 1 would have had several opportunities to report the assault to the cell guard and/or duty officer. Accused 1 testified that he reported the assault to Bobotyana. Bobotyana could not recall whether or not accused 1 made such a complaint to him about the assault and whether he had taken it further. There was nothing recorded in the occurrence book regarding injuries sustained by accused 1 or complaints made by him. In fact, entry number 914 made on 15 March 2012 at 11:02 (the time that accused 1 was brought back to the cells) indicate that he was free from injuries at that stage. Then on the same day entry number 916 made at 11:50 and signed by Captain Mokoena indicates that there was a cell visit by Captain Mokoena and Bobotyana when accused was in the cells and again no complaint or injury were recorded in the occurrence book.

On the same day at 12 noon entry number 919 indicated another cell visit by Bobotyana and again nothing was recorded regarding an injury or complaint. On Friday 16 March 2012 in terms of entry number 959 there was another cell visit by

Captain Mokoena at 8:45 and again no complaint or injuries were recorded. On the same day at 15H00 another cell visit by Bobotyana was recorded and no complaints or injuries were noted at this time as well. On Saturday 17 March 2012 at 19H00 there was another cell visit by Bobotyana and no complaints were recorded. It is interesting to note that accused 1 did not mention to his attorney Mr Godla that he was assaulted and scared of Gojo and that he did not know the reason for his detention.

None of the accused except his brother accused 2 gave evidence about noticing injuries on accused 1's face. His version in this regard is not supported by any other evidence. Another important point is that when Gojo was cross-examined by Ms Losch the allegation of the assault was not strongly put to him. The details of how, when and who assaulted accused 1 were not put to Gojo. Ms Losch simply put to Gojo that accused 1 said he was assaulted on 15 March 2012 and that he was scared of Gojo. The scanty manner in which this was put to Gojo by Ms Losch is not very convincing.

According to accused 1, during the assault April uttered the words '*thetha boetie thetha'* meaning 'talk brother talk'. The accused did not say anything in response because they did not give him a chance to talk. This evidence of accused 1 does not

make sense, it begs a question as to why Gojo and April would assault the accused in order for him to talk and then not give him a chance to talk so that they could obtain the information that they wanted. In light of the above evidence it is in the Court's view, highly unlikely that an assault took place as alleged by accused 1. This, together with the fact that he was allowed and made a phone call to his lawyer in Gojo's presence and then not inform his lawyer about the assault and his fear of Gojo leads one to conclude that his version of events regarding the assault and his fear of Gojo is false.

Accused 1 denied that his Constitutional Rights were explained to him or that he made a statement. His evidence is that he was presented with documents to sign. The version of the accused is inconsistent in that on the other hand the accused alleges that he made no statement at all but on the other hand he says his Constitutional Rights were not explained to him. Although accused 1 was made aware of his right to remain silent by Apleni as confirmed by Ms Losch in argument, it was not Gojo's evidence that the accused wanted to exercise that right during his interview with him. Gojo testified that when he explained accused 1's Constitutional Rights the accused replied 'I have nothing to say but if I say something it will be out of my own free will.'

Ms Losch took Gojo's to task about the meaning of this statement. In cross-examination Gojo explained that, that was not what he testified and that it could have been misinterpreted. Gojo's explanation was that accused 1 had said that he did not want to exercise his rights and they must proceed. Ms Losch argued that Gojo tried to explain it away. In the Court's view whether Gojo's statement was misinterpreted or not the inference that can be drawn from Gojo's evidence is that accused 1 freely proceeded to give information regarding the alleged offences. There is no evidence on record that accused 1 was forced, prompted, unduly influenced to make a statement or that accused 1 informed Gojo that his lawyer told him not to make a statement. The phone call to his lawyer was made in the presence of Gojo who did not prevent him to make the call and therefore his version that he was afraid or scared of Gojo is not convincing.

The personal particulars of the first page of the warning statement is personal information that must have been obtained and submitted by accused 1 to Gojo and the explanation that Gojo would have received those particulars from some unknown person from the accused's house is speculative. Accused 1's version that Gojo completed the papers on 17 March 2012 for court appearance is highly improbable because the occurrence book and SAP14 register support Gojo's version that he

prepared the accused for court on Friday 16 March 2012. Accused 1's version that these entries are false cannot be accepted because entries would have to be made out of sequence in relation to other prisoners. Secondly, different people completed the registers other than Gojo. It is also highly unlikely that other police officers who made entries would have made subsequent entries knowing that the dates in the occurrence book were wrongly recorded.

According to the evidence of accused 1's lawyer Mr Godla, accused 1 contacted him whilst he was detained at Harare Police Station. It was over the weekend of 17 or 18 March 2012, late in the afternoon and he spoke to accused 1. Mr Godla did not mention in his evidence that accused 1 told him that he was assaulted or that he was scared of Gojo. Mr Godla testified that he had no knowledge that accused 1 made a statement. Further that if he was aware of such a statement he would have challenged it at the bail hearing. Even if his lawyer had told him not to make a statement it would have been after the event that took place on Friday 16 March 2012 as the statement would have already been made. It is unclear why accused 1 would wait until 17 March 2012 to call his lawyer when he was aware of his right to contact the lawyer since the time of his arrest on the morning of 15 March 2012. It is also highly unlikely that everything that was recorded in the police registers and supported by the evidence of the witnesses was

false.

In view of the totality of evidence in relation to accused 1 the Court found that accused 1 was not assaulted and that his Constitutional Rights were explained to him before a statement was taken and that he made the statement freely and voluntarily. It is for those reasons that the Court ruled that the warning statement was admissible.

In brief accused 2's case is that on Saturday 17 March 2012 he was taken from the cells together with the other accused which is accused 1 and 4 and they met with accused 3 at the cell guard room. Gojo then wrote something in the book and took all three of them to his office. Gojo then told him to tell the truth about the beating of the boys. Accused 2 then replied that he was not present and was at work as a taxi driver. He further testified that he never saw the warning statement with his personal details on it. He admitted that the signatures on the documents were his signatures. He stated further that no rights were explained to him. It was not read back to him in Xhosa. He did not ask any questions and just signed as he was told to do. He was not thinking when he signed and he was not happy. Accused 2's evidence accordingly amounts to a total denial of the events.

Gojo's evidence that he explained Constitutional Rights to accused 2 when he came back on 15 March 2012 from his investigation is supported by the form of rights SAP14A issued to accused 2 on 15 March 2012. This is also confirmed by entry number 926/967 in the occurrence book. Although the SAP14A document is not very legible one can assume as stated by Gojo that the original that was given to accused 2 would be legible and clearly state his rights and the charges of murder and kidnapping in the first paragraph. Paragraph 3 sections (a) and (b) clearly state that the accused had the right to remain silent and is not compelled to make any statements.

Accused 2's signature appears on the SAP14A and he admitted that it was his signature. The certificate part of the document is signed by Warrant Officer Bobotyana to certify that rights were explained by him and Gojo signed at the bottom as a third person. On the face of it the SAP14A was clearly issued to the accused and explained. The denial of accused 2 regarding the receipt of SAP14A appears to be false and his version in this regard is not acceptable.

Whilst the practice of having the SAP14A notice being signed by the person who did not explain the rights is not desirable that does not invalidate the fact that the accused was informed of his rights when he was detained. The warning statement itself

contains a list of rights. With regard to the warning statement the document speaks for itself. Accused 2 confirmed his signatures on the document. Gojo failed to sign at the bottom of the front page of the statement and he explained it as an oversight on his part. He did however put his initials on the front page and signed the document on the last page as a peace officer. The Court is nevertheless of the view that the omission of Gojo's full signature is not fatal to the admissibility of the document.

As regards the content of the document the first page of the statement contains personal information of the accused. Gojo would have obtained this information from the accused as there is no evidence that he obtained this information elsewhere other than from the accused. The probabilities also do not favour the accused's denial that he made a statement, in that it would not make sense for Gojo to demand to know the truth from the accused whilst interviewing him, only to present him with a document that had already been filled in, without hearing from the accused what the truth was, that he was demanding.

In summary the accused had no objection getting into the vehicle when arrested. He never asked why he was detained. He never complained about his shoes being taken by Gojo at the cell guard's office. He on his version saw accused 1 complaining to the cell guard about assault so he would have

known that he also could complain but he did not do that. The version that he simply did what he was told to do without protesting and without knowing what he was signing or what was being done is highly unsatisfactory.

In the Court's view, although Gojo did not delete all the non-applicable parts on the statement his evidence was clear that he did apprise the accused of his rights. In view of the aforementioned the Court is satisfied that accused 2 when he was arrested received his rights and that his rights were explained to him before Gojo took his warning statement and the statement was made freely and voluntarily without any undue influence. It is on that basis that the Court ruled that the warning statement was admissible.

Accused 3 testified that she did not know that she was going to make a statement and she was just told that she was being prepared for court. She stated that she did not make a statement but on Saturday 17 March 2012 she was asked to sign a document that had already been completed and she was never told about her rights at any stage. The analysis of the evidence indicates that the accused was aware of the reason for her arrest. Gojo in fact introduced himself and told her why he was taking her to the police station. The evidence that accused 3 did not know why she was arrested and detained cannot be

true. It further makes no sense that after two full days in the cells, if her evidence that she was not aware of why she was being arrested were to be accepted, that she did not think to ask for the reason for her arrest. Furthermore, she never objected or protested to being arrested and being locked up.

The accused in her evidence-in-chief did not give much detail regarding the circumstances under which the documents were signed. More information came out in her cross-examination. It was put to Gojo by her counsel that the accused gave her identity number to him. It is highly improbable that Gojo would only ask the accused for her identity document and nothing else. The accused could not remember whether Gojo had asked for her address or her cell number. It can be reasonably concluded that all the personal information in the document was given by the accused to Gojo.

It is also reasonable to conclude that other information was also completed in the accused's presence. Also, what is important is that accused 3 testified that she was not compelled to sign the document. She signed freely and gave no reason why she would just sign except to say that she did what she was told to do. It was contended on her behalf that the information contained in the statement was nothing new but information that would have been known to Gojo as he had been busy with the investigations

and gathered information from the neighbours. No evidence was presented to support this contention. It therefore remains a speculation.

Turning to the issue of the statement being recorded in English, whilst the conversation between Gojo and the accused was in Xhosa and the statement being interpreted back to the accused by Gojo. Mr Van Rensburg argued that this manner of taking the statement is fatal to the legality of such a statement. The case law that Mr Van Rensburg has referred this Court to mainly deals with evidence that is led in a trial and during the hearing of a matter in a court and not necessarily when statements are being taken down outside of the court process. There was no evidence adduced during the trial-within-a-trial that the investigating officer who took down the statement in English did not properly translate what he was being told by the accused from Xhosa into English. There was also no evidence that in order to take statements the police officer must be a qualified or certified interpreter.

Brigadier Solomons who was called to testify for accused 6 testified that the requirement that the statement be written down in the language of the suspect or that there be an interpreter if it is recorded in another language is not a standing order but ideally it would be expected. The Court's view is that without

any evidence to suggest that the content in the statement was not properly translated, the Court cannot simply come to that conclusion that the accused's Constitutional Rights were violated.

In dealing with the issue of whether or not accused 3's statement amounted to a confession Mr Van Rensburg urged the Court to consider the approach followed in S v Yende 1987(3) SA 367 at 372(c-f) where the court remarked that a strikingly simple definition in R v Becker 1929 (AD) was problematic. The court agrees that the statement must be assessed objectively with surrounding circumstances taken into account. Surrounding circumstances however should be taken into account only to place the words in the correct context without reading into the statement words or circumstances that are not there. Facts which stand apart from the words cannot be considered as giving the words another meaning. See S v Montasa 1963(2) SA 579 (T) at 584-585.

In the Court's view, the statement of accused 3 does not amount to a confession. The content of the statement is such that on charges against the accused it is still open for the accused to raise possible defences of dissociation from the commission of the crimes, which are based on common purpose. The Court accordingly disagrees with Mr Van Rensburg's submission that

the statement can be read to be an admission of guilt on the charges. In light of the above evidence the Court was of the view that the statement was made freely, voluntarily and without undue influence and the accused was informed of her Constitutional Rights and accordingly the Court ruled that the warning statement was admissible.

Accused 4's version is that the interview with Gojo took place on 17 March 2012. As with all the other accused he testified that Gojo fetched him together with accused 1 and 2 from the cell which they were all held. Whilst in the cell guard's office he was greeted by a lady with whom he had had a business relationship. This lady allowed accused 1 to use a telephone. Accused 1 used the phone to call his lawyer whilst Gojo was busy writing something on the document. Gojo took them to his office. He took them out again and placed them in different places or offices. In this other office where he was placed he found April and noticed a bottle of Bells Whiskey which was half full. Gojo then asked him why he had assaulted the children and killed them. He told them he did not know why he was arrested. Gojo and April then assaulted him with fists and open hands with April saying 'we'll *moer* you today'. He was handcuffed whilst this was happening.

In order to stop the assault he asked for forgiveness and told

them that he knew about the beating of the children. Upon him saying those words Gojo and April stopped assaulting him. He was then presented with an A4 size paper and told to sign. He signed because he was afraid of being assaulted again. His rights were never explained to him. He confirmed that the signature appearing on the warning statement was his. He testified that the document presented to him already had information on. He denied having signed the SAP14A nor receiving it on 15 March 2012. He testified that he reported the assault to Bobotyana and later to Mokoena who promised to sort it out. The accused version amounts to a bare denial.

The version of accused 4 is marred with numerous inconsistencies. The accused kept changing his version as he went along during his testimony. He introduced a lot of new evidence in cross-examination and contradicted earlier statements materially. Unlike the accused, Gojo stuck to his version and was not materially shaken in cross-examination. April's evidence as to his involvement and on the issue of the alleged assault was clear and was also not disturbed during cross-examination. The accused in his evidence stated consistently that he was shocked and could not remember everything. He however conveniently could remember evidence that supported his or other accused's version such as remembering that all the accused were handcuffed when they

were arrested.

It is also important to state that accused 1 who was inside the police vehicle when Gojo went to apprehend accused 4 at his house never testified of seeing accused 4 being pushed by Gojo. The evidence of accused 1 was that when they reached accused 4's house Gojo spoke to accused 4. Accused 4 went to his house and came back. None of the other accused testified about Gojo smelling of alcohol or being under the influence of alcohol or not walking properly. The accused's version that he and his co-accused were taken to Gojo's office on 17 March 2012 and later to another office where he was assaulted and asked to sign documents should be rejected for the following reasons:

1. It has already been established from documentary evidence which supports Gojo's evidence that the interview with all the accused took place on 16 and not 17 March 2012.

2. Both April and Gojo testified that Saturday was their off day and it would make no sense for them to come to work on that particular day for the purposes of assaulting accused 4.

3. None of the other accused testified about seeing accused 4 swollen after they were grouped back together. The assault, if reported, would have been recorded as is the norm in all likelihood, by the police officer it was allegedly reported to.

No such report was reflected on the occurrence book of 17 March 2012. Ms O'Neill tried to steer Bobotyana into conceding that the matter was reported to him. It is clear from Bobotyana's evidence when read in context that he could not recall whether such a report was done but when pressed he testified that he reported the matter to Mokoena as he would in the normal cause. Bobotyana's response in the Court's view was based on an instruction put by Ms O'Neill on behalf of accused 4 that Bobotyana had gone to call Mokoena. It is unfortunate that Mokoena passed away and therefore that issue could not be verified. Police records of the actual day when the interview took place,which is, 16 March 2012 contained no complaint regarding accused 4. Furthermore, no complaints were recorded from cell visits on that day. The accused's version that he was assaulted is therefore rejected as being false.

Turning to the issue of whether rights were explained to the accused. First, an SAP14A was issued. It contains the

signature of the accused. Factually, the accused denied that he signed anything on 15 March 2012 alleging that all documents were signed on 17 March 2012. Then he changed his version to say he was not sure if he signed anything on 15 March 2012 as he was lost and then he went back to his denial. This attempt by the accused to deny everything did not create a good impression. It should be accepted that the accused was notified of his rights when he was detained. SAP14A serial number Q6797628 bears the accused's signature and furthermore under the heading Constitutional Rights of the custody book column 7 the same notice number is reflected.

As regards the warning statement, Gojo testified that he explained the rights to the accused and even quoted from the form itself. The rights were explained in the language of the accused. The warning statement by the suspect bears accused 4's signature on the first and second pages. The explanation given by the accused about where Gojo obtained his personal information does not make sense. The accused testified that when Gojo went to apprehend him he asked for Mzongozi which would be an indication if the accused's version is accepted that Gojo did not know the accused's name, therefore his full names on the warning statement must have come from the accused.

No evidence was presented that Gojo in fact was given the accused's identity document by accused 4's brother. The

brother was also not called to support that evidence. Gojo interestingly did not solicit information about *'this thing'* that the accused said he knew but instead presented him with a paper to sign. The accused's version is false and must be rejected. In the final analysis there is no reason not to accept Gojo's evidence that the rights were explained to the accused before he made the statement and that the accused made the statement freely and voluntarily without any undue influence. In the result the Court ruled that the statement of accused 4 was admissible.

Accused 6 was arrested together with Morris Maxela on 5 September 2012. Accused 6 testified that his Constitutional Rights were not explained to him before Gojo took the statement and that he was forced to make a statement and ended up signing documents where an X was made. He was in a state of shock when he saw that he was charged with three counts of murder and three counts of kidnapping on the SAP14A document. It then came to his mind that he was being threatened by Gojo because for a long time he asked him to make a statement so he thought those were threats. Further, that Gojo took him into the cells because he wanted to force him and Morris to make a statement. He did not know that he was a suspect in the case but thought Gojo took him to the police station merely to get a statement from him. He was afraid of

Gojo and remained silent and eventually gave Gojo the statement he was looking for.

He gave Gojo the statement because he thought he could get rid of him. He testified that when Gojo fetched him and Morris, he was angry but did not force him to get into the vehicle. He testified that he slept over at the police station and did not ask why he was being held and was afraid of Gojo. According to him, when making the statement Gojo already knew all the information and kept on interfering and telling him what 'the correct version' was referring to accused 1 and 4. No questions were posed to him by Gojo and Gojo was difficult with him and he could see that Gojo was even about to assault him. He stated that he was not relaxed as Gojo had testified. He was stressed because of Gojo's threats to him.

Gojo testified that he did explain accused 6's Constitutional Rights on his arrest and before taking a statement and that he elected not to exercise any of his rights. Gojo's evidence is supported by documentary evidence. It is noted that the certificate of detention (Part 2) on SAPS14A was signed by Nyudwana as the person who informed the detainee of his Constitutional Rights. Both Gojo and Nyudwana testified that the rights were explained to accused 6 by Gojo and he handed to him the document. When questioned about this Nyudwana

testified that when it is busy at the police station and there are a number of persons to be attended to, the police officers would assist each other. One police officer would explain the rights whilst the other would complete and sign the applicable documents. Nyudwana stated that this was normal practice at the police station and he saw nothing wrong with the procedure.

Ms Givati took Nyudawana to task about this procedure. Although the document does not correctly reflect the name of the person who informed accused 6 of his rights, the Court is of the view that the signing of the document by an officer who did not inform accused 6 of his rights does not in itself negate the fact that accused 6 was informed of his rights as detailed in the document. Although this procedure is not desirable the Court is of the view that the evidence of both Gojo and Nyudwana to the effect that accused 6 was informed and aware of his rights regardless of who signed the document notifying him of his rights cannot be disregarded. Furthermore, accused 6 in his testimony admitted that a piece of paper was handed to him reflecting the charges. That piece of paper contained his rights. The notice of rights in terms of the Constitution refers to SAP14A/Q7038786 dated 5 September 2012. The accused confirmed the signature on this document as his. He also confirmed the time and date on the form.

In view of this documentary evidence it is clear that accused 6 was detained to be charged and for no other reason. Furthermore, before the warning statement was taken Gojo testified that he again informed the accused of his rights. He further stated that he did not force, pressurise or threaten the accused into giving a statement and that the information in the statement came from the accused. The fact that Gojo arrested accused 6 on 5 September 2012 which was about 6 months after the incident took place is a clear indication that he had not been harassing him to be a State witness as it is suggested on behalf of accused 6. To the contrary, this factor shows that there was no urgency on Gojo's side to obtain a statement "at all costs". Gojo testified that he never asked accused 6 to be a State witness. The fact that he arrested accused 6, detained and charged him supports this version. Accused 6's version, that he did not know that he was arrested as a suspect in this case, must therefore be rejected. The explanation by accused 6 that he eventually told Gojo what he wanted to know is not plausible.

Although Morris testified that when they were detained they were handed a document containing their rights without those being explained to them, his evidence did not deal with what actually happened when accused 6's warning statement was being taken as he was, according to him, seated with Nyudwana at another table. The picture that accused 6 tried to paint to the

Court, throughout his evidence that Gojo over a period of time forced, threatened or influenced him to make a statement is not convincing. In his evidence he initially testified that he saw Gojo seven or eight times during this period, that is before being arrested. He however conceded in cross-examination that it was actually only two times they had a conversation, that is, once at the Khayelitsha Court and the second time when Gojo was driving past his house. No evidence was placed on record of any form of direct force, pressure or threat to accused 6 to persuade him to make a statement. The evidence that in his mind the accused thought Gojo's behaviour amounted to threats is not supported by any evidence. The accused further testified in cross-examination that he was not forced to sign the statement.

On the issue of the interpreter Ms Givati argued that the fact that an interpreter was not used when Gojo took the warning statement is a violation of accused's Constitutional Rights. The case law quoted by her refers to trials and not to instances of when police officers are taking down statements or conducting their investigations and is not relevant to the facts of this case. According to Brigadier Solomons who came to testify for accused 6, the correct procedure in statement taking would be to record the statement in the language of the suspect. He however stated that that was not a standing order but practice.

He conceded in cross-examination however that most of the statements that he has seen are written in English than in the language of the suspect during the interview.

In the Court's view, therefore the mere fact that a qualified interpreter was not present during the taking of the statement does not in itself make the procedure followed invalid and/or render the statement inadmissible. Furthermore, the absence of the entry in the occurrence book to the effect that the person did not want to consult with a legal practitioner does not mean that the rights to communicate with a legal practitioner of his choice was not explained or afforded to him nor does it affect the fairness of the trial. If it happens that a police officer did not follow a standing order it is an internal disciplinary matter. Failure to make an entry in the occurrence book was unfortunately not put to the relevant State witnesses for them to comment when they gave evidence in the trial-within-a-trial and so were many other aspects that Brigadier Solomons testified on. In any event Brigadier Solomons testified broadly on standing orders and acceptable police practices. It must however be mentioned that when the issue of an expert witness was raised during Gojo's evidence only evidence relating to pocket books and diaries was put to the witness. The Court does however take notice of Brigadier Solomons' evidence regarding the applicable standing orders and expected

practices. The alleged non-compliance with those does not, in the Court's view, affect the fairness of the accused's trial and the admissibility of the warning statement in the present case.

On the issue of the accused being in the same room when statements were taken the evidence is that accused 6 and Morris were sitting apart from each other and at separate tables, although in the same room. This is not an irregular procedure and no evidence has been placed on record on how this procedure affected accused 6's case negatively in any way.

Accused 6 was not a good witness. He was evasive, inconsistent in his evidence and clearly tried to craft his evidence to his benefit. Mr Ntela had to repeat questions several times. The accused contradicted himself on numerous occasions in material respects and in some instances blamed his counsel for failing to put certain instructions. His evidence was not credible. He did not come across as a reliable witness and his version was not convincing. The Court is of the view that accused 6 made the warning statement freely and voluntarily without any undue influence and that his Constitutional Rights were explained to him prior to making a statement and none of his rights were violated in any way. The statement was therefore ruled to be admissible.

Turning to the main trial. The evidence presented by the State before this Court begins with the two incidents that allegedly occurred at the Nobanda and the Matinise households in Harare during the early hours of 14 March 2012 where it is alleged that Mphuthumi was apprehended and assaulted by accused 1, 2, 3 and 4 and Mabhuti by accused 1, 2 and 4 and continued to the events at accused 1's house, the footbridge in Ntlazane Road and until the deceased's bodies were discovered in the early hours of the morning of 15 March 2012. The Court will first deal with the incidents at the households of the Nobandas and the Matinises. The State's case in regard to these incidence is based on the evidence of four witnesses Nolusapho Matinise ('hereinafter referred to as Nolusapho'), her daughter Nomvelo Matinise ('hereinafter referred to as Nomvelo'), Nomthunzi Nobanda ('hereinafter referred to as Nomthunzi') and her daughter Lindiwe Nobanda also known as Lindelwa ('hereinafter referred to as Lindelwa').

Nolusapho is Mabhuti's mother and Nomvelo his sister and they all lived together in the same house in Bengezela Street in section 33 Harare. Nomthunzi is Mphuthumi's mother and Lindelwa his younger sister. Lindelwa and Nomthunzi lived in Hlula Street. Nomthunzi has another son called Nkululeko who had a shack behind the main house. Mphuthumi did not live with his parents at the time of the incident. Mphuthumi died in

2013 in circumstances unrelated to this case. The streets where the houses of the Nobandas, the Matinises and that of accused 1, 2 and 3 are situated in the same area and not far from each other.

Nolusapho and Nomvelo Matinise testified that at approximately 1a.m. on 14 March 2012, accused 1, 2 and 4 visited the Matinise home. They questioned Mabhuti who was sitting in the TV room about a missing TV. He denied any knowledge of the TV and the three accused dragged and pulled him out of the house whilst they were assaulting him with blunt objects. According to Nomvelo the accused tried to put Mabhuti in the Quantum vehicle but he managed to free himself and ran away. Mabhuti came back limping, his shirt was torn and had blood on it.

With regard to the second incident Nomthunzi and Lindelwa testified that accused 1, 2, 3 and 4 visited the Nobanda household. According to Lindelwa, she saw them at approximately past 1:00 and Nomthunzi testified that she was woken up by her husband Mbhele at about 3 o'clock in the morning alerting her to a noise that he heard outside. She went outside and saw Lindelwa at Nkululeko's shack pushing the door. She then heard fighting inside and Mphuthumi crying inside the shack saying 'why are you assaulting me'. She and

Lindelwa pushed the door unsuccessfully. The door eventually opened and Mphuthumi came out. He was grabbed by his belt by one of the accused although she could not say who it was. Accused 1, 2, 3 and 4 struggled with him towards the gate and Mphuthumi tried to free himself at the gate and he grabbed the vibracrete wall. Whilst holding onto the vibracrete wall the accused assaulted him with irons and sticks. He freed himself and ran away.

Lindelwa testified that she went to Nkululeko's shack which is next to the house. She then saw Mphuthumi next to the door of Nkululeko's shack. She saw also accused 1, 3 and 4 in the light of the floodlights. She noticed that Mphuthumi was red with blood. Accused 1 and 2 took Mphuthumi into Nkululeko's shack which was closed. She confirmed her mother's evidence that they tried to push the door open. Then accused 1 and 2 got out of the shack with Mphuthumi and they started assaulting him with sticks and accused 3 also had a stick and a stone. Lindelwa supported her mother's evidence that Mphuthumi got hold of the vibracrete wall. Whilst holding onto the wall accused 1, 2 and 4 assaulted Mphuthumi with sticks and accused 3 hit him with a stone on his hand which was about 10 centimetres in width which caused him to loosen his grip from the wall. Eventually he freed himself and ran away and they followed him.

Nomthunzi and Lindelwa then saw accused 1, 2 and 4 go into the Matinise home. The accused came out with Mabhuti who managed to free himself and ran away. According to Nomthunzi at about 11:30 a.m. accused 1 arrived at her house to apologise for assaulting Mphuthumi and said it was because of his TV that was stolen. Accused 1 then said he was in the Eastern Cape and only arrived at home that morning. He informed her that he had met Mshwele under the bridge who told him that Mabhuti, Mphuthumi and someone else had stolen the TV. She requested accused 1 to allow them to handle the matter in their way and should he see Mshwele he must bring him to her.

Mshwele was also a relative of the Nobanda's. Accused 1 later came back with accused 2 and Mshwele and accused 2 left. She called two elderly persons Thelma and Nonkululeko and told them what had happened earlier that morning. Mbhele, her husband, and her brother-in-law Ncedo were also present. Mshwele was asked if he saw Mphuthumi with a TV and he said that the TV was at Endlovini. It was then suggested by those present, to accused 1, that he takes them to Endlovini to look for the TV, but he did not accept the proposal. Lindelwa supported her mother's evidence regarding these events.

Lindelwa also stated that the time accused 1 came back was

around four o'clock in the afternoon. Lindelwa then left to go to her friend's place, Wendy. According to Nomthunzi accused 1 left with Mshwele. Nomthunzi, Thelma and Nonkululeko followed accused 1 and Mshwele. On their arrival at accused 1's place they noticed accused 1 and 3 assaulting Mshwele. She told accused 1 not to assault Mshwele. Nonkululeko also tried to stop accused 1 and 3 whilst they were hitting Mshwele badly on his head. She did not enter accused 1's house as she was scared of blood but stood at the gate. By then there were a lot of community members in front of the yard. She then saw accused 1 wrestling with Luxolo in the street and it was apparent that Luxolo was overpowering accused 1. Then accused 3 came from inside the yard and grabbed Luxolo and she and accused 1 helped each other to bring Luxolo inside accused 1's yard.

Accused 3 hit Luxolo with a short iron at accused 1's garage. Nomthunzi then told accused 1 not to assault the children and that she was going to meet with their parents in order to pay for the TV. At that stage accused 4 and accused 5 arrived. Accused 5 and accused 1 tied the children up. Accused 1 then took his bakkie out of the garage. Luxolo and Mshwele were loaded and put into the back of the bakkie by accused 1, 4 and 5. Accused 1, 3, 4 and 5 left with them to Endlovini. Accused 4 was driving the bakkie. She and the rest of the community

remained standing at the gate of accused 1. The bakkie was away for a long time.

Accused 2 then came with a Quantum kombi and asked where his brother was. He was told that they might be at Endlovini. The bakkie later returned followed by the kombi and Mabhuti was standing on the bakkie. There was also an unknown young man on the bakkie. The residents asked Mabhuti, Mshwele and Luxolo to tell the truth about the TV and they said they never took the TV and Mabhuti said the TV he had, was given to him by his sister. Before the bakkie left again accused 1 came out of his house with a rope. Then Lindelwa and Morris, accused 1, 3 and 5 got onto the bakkie where Mabhuti, Luxolo and Mshwele were and accused 4 was the driver. The bakkie then left. Lindelwa and Morris later returned to accused 1's gate and said that accused 1 said that 'those with a heart of their mother must get off the bakkie because they are going to work now'. They waited for accused 1 to return with the children from the work he said he was going to do but he did not come back with the children.

Later on she went to the shop Kwa 10 and she met accused 3 at the door of the shop as accused 3 was about to exit. There were many people in the shop. Accused 3 was shouting and saying 'we killed the children, we burnt them and left them in

Macassar'. She was not sure to whom accused 3 was speaking as the person she was talking to was inside the shop. Nomthunzi then went home and told the people what she heard and they went to tell Luxolo's father. At approximately 4 a.m. the police came and informed them about the bodies of the three young men that were found in Macassar.

According to Lindelwa, whilst she was at Wendy's place they heard Vido crying. Lindelwa went back home from Wendy's place which is not far away. She asked her mother whether accused 1 had come with Vido so that he could assault him. Her mother said that she told accused 1 not to assault Vido. She then walked with Mabhayi to accused 1's place. Mabhayi's other name is Nonkululeko. On their way to accused 1's place she saw accused 1 and 3 calling Luxolo. Luxolo was about five metres away, Luxolo could not hear because he had earphones in his ears.

Accused 1 then got out of the yard and grabbed Luxolo and took him to his house. Lindelwa was at that stage standing in the road and she and Mabhayi followed accused 1 and Luxolo. When they arrived at accused 1's place, Vido was already inside the garage and bound with a yellow colour rope and wire. Luxolo was then also tied up by accused 1 and then accused 1 and 3 assaulted them. Accused 1 had a stick and accused 3

had an iron pipe. The iron pipe was about half a metre in length. They were hitting Luxolo on his head and legs. Nothing was said to Luxolo. She then asked accused 1 why he was assaulting Luxolo without asking any questions. Accused 1 and 3 did not stop and carried on assaulting Luxolo.

Morris then arrived and without asking questions slapped Vido. At that stage inside the yard of accused 1's house, were accused 1 and 3, Lindelwa, Mabhayi, Luxolo and Vido. Outside the yard were a lot of community members. She asked Morris why he slapped Vido without asking any questions. Morris did not answer. It appears that Morris left. When Morris came back he said that Mabhuti was on the bridge. They knew the bridge that he was talking about. They drove to the bridge. Accused 4 arrived and took a stick from accused 1 and he also assaulted Luxolo. As they were still tied up and being assaulted Vido then said that the TV was at Endlovini.

Luxolo and Vido's feet were untied by accused 1 and they walked to the bakkie. They were then told to get onto the bakkie. Their hands were still tied behind their backs with a wire. The bakkie was parked outside accused 1's house. Lindelwa asked if she could get on the bakkie because she wanted to see where the TV was. She then got on the bakkie with accused 1, accused 3, Vido or Mshwele and Luxolo,

accused 5, accused 6, Morris, accused 4 and two unknown persons. She further testified that when they approached the bridge at about 5 p.m. she saw Mabhuti sitting on the stairs on top of the bridge. The bakkie then stopped at the bridge.

Accused 5 and Morris got off the bakkie and moved to the top of the footbridge where they caught Mabhuti and brought him to the bakkie. Accused 1 then told him to get on the bakkie and he then tied Mabhuti up with the wire. Accused 6 then used vulgar language on the bakkie and said 'I will hit you bra's until you shit'. She was on the bakkie all the time. Accused 1 then said 'that the one who is not going to do job must get off the bakkie'. She then got off the bakkie as she thought that accused 1 meant that everyone on the bakkie must take part in the assault of Mabhuti, Luxolo and Mshwele.

Morris and the two unknown persons also got off the bakkie. The bakkie then proceeded to Endlovini and she walked back to Harare. Accused 4 was the driver of the bakkie. The people that remained in and on the bakkie were Vido, Luxolo, Mabhuti, accused 1, accused 3, accused 4, accused 5 and accused 6. When she arrived home she told her father Mbhele and her mother Nomthunzi about what accused 1 had said at the bakkie. They, as a family sat at their place until sunset. Lindelwa then heard the people of the community screaming 'yoh yoh'. She

went outside to check and saw that the bakkie had come back to accused 1's place.

She walked to the bakkie and saw Luxolo, Mabhuti and Vido on the bakkie red with blood. When she got to the bakkie accused 1, 3, 4, 5 and 6 were on the bakkie. She then went back home and phoned the police. The police did not come. When she arrived back at accused 1's place the bakkie was no longer there. At about 10 p.m. she saw accused 2 and 5 washing the bakkie. She looked at them from about 10 metres away and asked 'did you finish the job', they did not answer. There was light coming from a long pole with floodlights not far away from accused 1's house so she could see them. She was walking alone at the time and then walked home. At home she told her mother Nomthunzi, her father Mbhele, her uncle Ncedo and her brother Nkululeko that she saw accused 2 and 5 washing the bakkie.

The next witness Lithule Mafethe testified that he stays in Harare. On 14 March 2012 past 4 to 5 p.m. he went to see Luxolo as he had not seen him for a long time. They went to Kwa 10 shop to buy cigarettes. As they exited the gate at Luxolo's place they met accused 1, accused 5 and Thulani Blayi. Accused 1 was looking for his TV set, accused 1, 5 and Thulani went with Luxolo to his place to look for a TV. After

three minutes they returned. Mafethe and Luxolo proceeded to Mabhuti's house. Mabhuti was not there. Mafethe and Luxolo went back to Luxolo's place and after a while they went again to Kwa 10 shop to buy cigarettes. When they exited the shop they met accused 1, he was carrying a stick of about one metre long and was aggressive. He pointed the stick and Luxolo saying that he wanted him. Accused 1 left with Luxolo holding him by his t-shirt and took him to his garage. Mafethe followed accused 1 and Luxolo. Accused 1 told Mafethe to turn back. Mafethe then ran to Luxolo's uncle Sanele's house and asked him for a phone to call the police. Accused 3 was standing in the yard of accused 1 behind the vibracrete wall. Accused 3 held an iron pipe in her hand and she was talking but he, Mafethe, could not hear what she was saying. He phoned the police because he could see that Luxolo was in trouble and that accused 1 and accused 3 were going to assault him, judging from the manner in which accused 1 was holding Luxolo by his t-shirt. Police said they were coming. He then left to go to Athi's place because he could not stand watching Luxolo being assaulted. Mafethe did not witness the actual assault. Athi lived in their area.

He sat at Athi's place until late. He was not sure about the time but it was not dark yet. The light was still visible when he saw the white bakkie passing. Accused 4 was the driver of the

bakkie. At the back of the bakkie he noticed accused 1, 2 and 5. He did not see the other people that were in the bakkie. In cross-examination he testified that he could see the three accused as they were sitting at the tailgate of the bakkie with their backs facing him. He recognised the three accused because he knew them. There were also other people on the bakkie but he could not see them as they were seated on the floor of the bakkie.

Sanele Twetwa testified that at about 2 p.m. on 14 March 2012 he was lying on his bed where he lived with Lindile Mpontshane's mother. Luxolo was also present lying in his bedroom. Accused 1 with three other men arrived. Accused 1 entered his bedroom and the other three men remained outside. He greeted him and then went to the bedroom where Luxolo was and asked him where his TV was. Luxolo responded by saying that he did not steal accused 1's television. Accused 1 then left. After about 20 to 30 minutes accused 1 arrived back again looking for Luxolo. He told accused 1 that Luxolo left with Mafethe.

After about 30 minutes Mafethe arrived at Twetwa's house rushing and out of breath saying that accused 1 and accused 3 had taken Luxolo as they were walking past accused 1's house and he then asked him to phone the police. Twetwa gave his

cell phone to Mafethe to phone the police himself. Mafethe phoned the police in his presence. Luxolo's father arrived with Thulani, a family brother, Sabelo who is Luxolo's brother and Khanyiso a cousin brother of Luxolo. They asked the police to accompany them to accused 1's house to find out where accused 1 had left the children after assaulting them. They found accused 1 who informed them that the children had ran away to the side of Macassar.

At about 3 o'clock in the morning police arrived at his house and informed him that three children were found dead in Macassar. They asked for Luxolo's description, the police then requested him to accompany them to the scene where he identified the bodies of Luxolo, Mshwele and Mabhuti. He was able to identify them because he knew all of them. During his observations of the bodies he noticed that they were assaulted. He noticed that Luxolo's eye was injured. He further noticed that Mshwele was clothed and his shoes were next to him. Luxolo was not wearing his t-shirt, it was shifted around his back. Mabhuti was not wearing anything on the top part of his body.

The next witness Thulani Blayi testified that on the morning of 15 March 2012 he was called by accused 2. Accused 2 informed him that there was a break-in at the house of accused 1 and his TV was stolen. He further said that he was

suspecting Mphuthumi. They went to Mphuthumi's house to enquire about the missing TV but they failed to complete their enquiries as Mphuthumi ran away before they could complete their enquiries.

Morris, a section 204 witness, testified that on 14 March 2012 and around 4 p.m., he woke up to go to his work as a security officer. He felt hungry and decided to go to the shop Kwa 10. When he arrived at the shop he saw about 30 community members outside the gate of accused 1 and accused 2's place. Inside the yard were accused 1, accused 3, accused 4, accused 5 and accused 6 and also Mshwele and Luxolo. He then opened the gate to the yard and asked accused 1 what was happening. Accused 1 then told him that Mshwele and Luxolo had stolen his TV and that at that stage they were being assaulted by accused 1 and 4 with sticks and by accused 3 with an iron pipe of about 56 centimetres long. They were assaulting and hitting them at the same time. Accused 5 and accused 6 were just standing there. Mshwele and Luxolo were bleeding and there was something wrong with Luxolo's one eye.

Whilst he was talking to accused 1 the assault stopped. Mshwele and Luxolo were tied up with a rope on their legs and they were sitting next to each other in a space next to the garage. He then spoke to Mshwele because he was his friend

and said to him that he has spoken to him several times. He then slapped Mshwele with his open left hand because he would not listen. Luxolo and Mshwele were crying and saying that they knew nothing about the TV. Mshwele then asked him if he did not see Mabhuti and he told him that he would go and look for Mabhuti at his house.

When he arrived at Mabhuti's place he found Mabhuti standing next to his home in Bengezela Street. He greeted Mabhuti and told him that Mshwele was calling him and that Mshwele and Luxolo were being assaulted. Mabhuti said he was not going back to the place where he was already assaulted the day before. Mabhuti then ran away. His t-shirt, which was hanging over his right-hand shoulder, fell on the ground. He then picked up the t-shirt and went back to Mshwele. He later gave the t-shirt back to Mabhuti.

On his arrival at accused 1's yard he saw Mshwele and Luxolo on the back of the bakkie sitting on the floor behind the back window of the bakkie. He then also got on the bakkie as his friend Mshwele was there. It was an open Toyota bakkie with no canopy. At that stage the people on the back of the bakkie were Mshwele, Luxolo, accused 1, 3, 5, 6, Denjenje also known as Dlamini, Pasika, himself and Lindelwa. Accused 4 was alone in front and he was driving the bakkie. He asked where the

bakkie was going and he was told by accused 1 that the bakkie was going to Endlovini to fetch the missing TV. The people on the bakkie were sitting down.

The bakkie then drove off. Mabhuti was noticed by someone on the bakkie on top of the footpath bridge across the railway line. Accused 1 instructed accused 4 to stop the bakkie. The bakkie stopped under the bridge. Accused 1, 3 and 6 got off the bakkie. Mabhuti began to run. Accused 6 went across the railway line and got onto the bridge on the other side. Accused 6 then opened his arms and blocked Mabhuti at the left-hand side of the bridge about 30 metres away. Mabhuti just stood there. When Mabhuti was apprehended he, that is, Morris, got off the bakkie. Accused 1 got on the footbridge at the left-hand side. Accused 1 got hold of Mabhuti by his arm and brought him to the bakkie walking with accused 6 and 3. Mabhuti was then loaded onto the bakkie.

Accused 1 then said if he did not find the TV at Endlovini he will assault and injure them, referring to the three deceased, and anyone who was going to interfere must get off the bakkie. Accused 1 was sitting at the back of the bakkie in the corner. As a result of the words uttered by accused 1 Morris then decided to get off the bakkie, Denjenje, Pasika and Lindelwa followed. He walked home. Accused 1, 3, 5, 6 and the

deceased Mshwele, Luxolo and Mabhuti remained on the bakkie. Accused 4 drove the bakkie and he could still see them sitting in the bakkie as they drove off.

Morris then went to look for Luxolo's father Lindile and he was at work. Lindelwa then told him that accused 1 and the others had returned with someone but without the TV. He then ran to accused 1's place. He was not sure of the time but it was before sunset. On his arrival he saw an unknown young man on the bakkie wearing a Kaizer Chiefs t-shirt. At that stage accused 1, 3, 4, 5 and 6 were in and on the bakkie with Mshwele, Luxolo and Mabhuti. When he arrived at accused 1's place he saw a lot of community people and the bakkie was parked in front of accused 1's gate. About five minutes later the bakkie drove off and left. During the five minutes nothing happened. Only this unknown young boy with the Kaizer Chiefs t-shirt was crying and said that he knew nothing about the TV. Luxolo, Mshwele and Mabhuti were sitting at the back of the bakkie and blood was flowing from their heads. When the bakkie drove off again accused 1, 3, 4, 5, 6, Mshwele, Mabhuti, Luxolo and the unknown young man were on the bakkie.

At that stage the community members dispersed and he went to Hlula Street to watch a soccer match. After the game ended and on his way home past 9 p.m. he walked past accused 1 and

accused 2's place. He saw accused 1 washing the inside of the back of the bakkie with a hosepipe. Accused 2 was just standing there next to the front of the bakkie. He walked home to go and sleep. The following morning he heard that the children, that is Luxolo, Mabhuti and Mshwele were killed.

During cross-examination he stated that he did not see any sticks or iron pipes in the possession of the community members who were standing at accused 1's gate watching what was happening to the people who were being assaulted. Further, that the community members were not angry, the community members at the gate were shouting that the parents must pay for the stolen TV. They were noisy and watching but no feelings of animosity. He agreed that Luxolo and Mshwele were known in the community as troublemakers but he did notice when he arrived on the scene that the community members were angry with them. The community members were worried and wanted the TV to be found. When the bakkie left they were shouting 'please do not kill them'.

He testified that he only saw the sticks and iron pipes in the possession of accused 1, 3 and 4. Accused 1, 3, 4, 5 and 6 were inside the garage. He did not see Lindelwa at the stage when he entered the garage. He disagreed that she spoke to him about the slapping of Mshwele. Mshwele asked him to go

and fetch Mabhuti and he decided to do so because if he knew something about the TV the assault may stop. He denied that he was one of the persons who chased Mabhuti on the bridge. He testified that Lindelwa was lying and mistaken if she said so.

Ms Losch put to the witness that her instruction from accused 1 was that the community members questioned and assaulted Luxolo and Mshwele. The witness stated that he did not see that, maybe it happened before he arrived. He confirmed that he saw accused 1 beating them. Accused 1 was furious and very angry. He maintained that the three deceased who were on the back of the bakkie were red with blood flowing from their heads. He stated that he did not see accused 5 when the bakkie was being washed. Mr Colenso put it to the witness that accused 5 agreed with 90% of his version but the reason why he, Morris, got off the bakkie was that there were too many people on the bakkie and that he wanted to go and watch a soccer match. It was also put to the witness the only involvement of accused 5 was to interrogate Mshwele to make the TV come out, so that it could be handed over to the rightful owner. The witness denied all this.

He stated that all the accused were on the bakkie except accused 2. He did not see accused 6 again after they left with the bakkie. At that stage the men on the bakkie had blood

pouring from their wounds. He was not on the bakkie when it left on the last trip. He was telling the truth and had no reason to lie. Further that no promises were made to him to become a section 204 witness. He further stated that what normally happened in the community in such situations was that discussions would be held at a meeting to resolve the issue but they do not assault people. He has been living in this area for 22 years and was not aware of such procedures.

Lindile Mpontshane testified that on Wednesday 14 March 2012 he came from work after 7 p.m. Mafethe then told him that accused 1 and 3 had come to fetch his son Luxolo. He called Thulani, Khanyiso and Sabelo and informed them that Luxolo was taken by accused 1. They decided to go to the Harare Police Station and requested the police to accompany them to accused 1's house. They all left with the police to accused 1's house. All of them entered accused 1's house with the police. Mpontshane asked accused 1 where the children were and accused 1 said they ran away in the direction of Macassar. Police officer Apleni told accused 1 that if the children were not found the following day he would be arrested. At about 3 a.m. his brother's elder son came to him and informed him that the bodies of the three children had been found in Macassar in the direction accused 1 indicated to them the children had ran towards.

The three police officers returned, accused 1 was in the van. The police left with Sanele Twetwa. On Thursday he, Sanele and Mabuya went to the mortuary at Stellenbosch. He then confirmed that one of the deceased was indeed his son Luxolo. Under cross-examination he confirmed that Luxolo had been punished at Ezinkukwini before. According to him, the community was not angry. Normally the children would be taken to Ezinkukwini to be punished if there was an allegation against them. He further conceded that it was not written down in his statement that the police said that the Madiba's would be arrested if the children were not found the following day. It is also not recorded that accused 1 said the children ran away to Macassar. It was put to him that in paragraph 5 of his written statement he did not mention that he was woken up by Sanele Twetwa. He responded by saying that the police did not write down everything he told them. He also testified that he left out some of the things in his statement because he was upset. He also confirmed that Thelma is his neighbour and a community member.

Bodies of the three young men were discovered by security officer inspector, according to his testimony, Bandile Koko. Koko testified that on 15 March 2012 he was on his way to a site at Macassar Sand Mines at about 1:00 in the morning for a

routine visit travelling in his vehicle. Before he reached the container of the security guards he observed a figure like object next to the road. His vehicle lights were on. He stopped the vehicle and inspected the body of a person whose upper body was naked. He made his observations through lights of the vehicle and with a flashlight.

The body of the deceased was covered with ants. He saw bloody marks and injuries over the body and face of the person. The body had lacerations as if the person was assaulted. He noticed wires around the wrists of the body. He also saw marks on the ground which looked as if somebody was dragged. He looked around and about five metres away he noticed another body dressed in tracksuit, the clothing was torn. The body also had lumps and lacerations over the head. He did not see wires around the wrists of the body. Near the bodies he observed broken sticks of 40 centimetres to 1 metre in length and about 2 to 3 centimetres in thickness. He came to the conclusion that the sticks were used to assault the persons.

According to him he could see that the incident happened some time ago and he estimated that it could have taken place about five hours earlier. He observed no other people in the vicinity. He then arranged with his operation controller to call the police. The securities on duty reported that they did not see or hear

anything. He then left the scene and went to Macassar Police Station to fetch the police. He led the police to the scene where the bodies were lying in an area which was bushy and partly open field. He pointed out the bodies to the police. The police then discovered a third body in the bushy area. A female police officer picked up all the broken sticks. He then gave a statement to the police about the incident. Under cross-examination he confirmed that it was part of his duties to patrol the area where the bodies were found on 15 March 2012 after 1:00, midnight. He confirmed the position of the bodies as depicted in photograph 1 of exhibit S. He stated that he did not see an iron pipe on the scene.

Pakama Sharon Mkosana testified that she is a constable stationed at Macassar Police Station. On 15 March 2012 at about 2 a.m. she was on patrol by car in the Macassar area when the commander called her back to the police station. She was then informed that a security officer discovered two bodies in the bushes. The security officer Bandile Koko who had discovered the bodies led the way in his vehicle to the scene. On the scene Koko pointed out the bodies to them. The lights of the vehicles and flashlights were on. She, the security officer and her passenger started to search the area with flashlights. They then discovered a third body.

The bodies were not lying far from each other. The one was lying next to the road, one in the middle of the road and a third body not far from the road in the bushes. She then saw bloody wooded sticks of about 1 metre long near the bodies but was not able to recall the thickness. The first body was half naked with a firearm tattoo on the left-hand side of the chest. Ants were moving up and down his body from his mouth and eyes. She noticed bruises all over his body and open wounds on his head. The second body had ants coming in and out of his mouth. His shirt was torn on the left-hand side. The third body also had bruises over his body.

They then collected sticks and stones which were put into a forensic bag for handing in at the police station and for recording in the SAP13 exhibit register. She also informed her commander Warrant Officer Fortuin about the incident. An ambulance arrived on the scene and the ambulance official declared the persons dead. Harare Police arrived on the scene and confirmed that the three males were reported to be missing. She thereafter handed the scene over to Warrant Officer Rosenberg. She made a statement regarding her observations on the scene.

She mentioned that the area where the bodies were found was a quiet area near the bushes. To get to the area one had to

travel along a tarred road and then turn into a gravel road that leads to the scene. Under cross-examination she stated that she and Warrant Officer Rosenberg picked up the sticks and stones with gloved hands. The sticks and stones were spread over the area not very close to the bodies. She further remembered that only one of the bodies had wires around his wrists. She confirmed the position of the bodies as depicted in photograph 1 of exhibit S. She was not able to say whether the sticks and stones were tested for fingerprints. She was also not aware of a security guard container at the scene and only noticed other security guards on the scene.

Mhlangabezi Rola testified that on 16 March 2012 he went to the forensic pathology laboratory in Stellenbosch after he was informed that his sister's child Sivuyile passed away to identify his body. He and his sister then went to the mortuary. At the mortuary he noticed injuries of assault all over the body, scratches from beatings and also a hole on the left part of his head. Under cross-examination he testified that Sivuyile was born in 1985 and that he had the nicknames of Mshwele and Vido. He was Mshwele's uncle but in their culture he was regarded as the father because the child did not have a father.

Bulelani Sandlana testified that he was Mabhuti's brother and identified his body at the mortuary in Stellenbosch. He noticed

that under Mabhuti's feet were signs that his feet were burned. The feet were also black because of burn wounds. The body had marks of beating. His clothing was full of blood and red on the inside. The way the clothing looked like, one could think that this person was attacked by an animal. In cross-examination he testified that he never saw or heard of the practice where the police would stand by and let the community discipline the thieves. If he had a problem he went to the police station. He agreed the police were supposed to come when there was an incident of community members beating up or assaulting someone.

Simphiwe Msolo testified that he was a detective sergeant and on 14 March 2012, the day of this incident, he was on duty as a detective in the crime office at Harare Police Station. A complaint was received between 9 and 10 p.m. at the charge office command centre from Lindile Mpontshane about his missing son. The complainant told him that he was informed at about 5 p.m. that his son was missing and that he was assaulted by members of the community. He then referred Mpontshane to the charge office to open a case in respect of his missing child Luxolo.

At about 2 a.m. on 15 March 2012 he heard on the police radio that three bodies were found at the side of Macassar. He then

rushed to the scene. When he arrived at the scene the Macassar Police were already on the scene. He was given permission to look at the bodies. He saw the bodies of three young men, they had bruises on them. He noticed broken sticks, stones and rocks of about 5 centimetre by 5 centimetre in size next to the bodies. The broken sticks were of different sizes some were longer and others shorter with lengths of about 20 centimetres, half a metre and 1 metre. The thickness differed between 1 centimetre to 2 centimetres and 5 centimetres. The stones and sticks were not lying far from the bodies; they were about half a metre away. He then returned to the Harare Police Station and contacted Sergeant Apleni to enquire whether they traced the missing child Luxolo. He then rushed to number 33 the house of Mpontshane. He and Sergeant Apleni then took Mpontshane and other family members to the scene at Macassar. Mpontshane identified the body of his son Luxolo and other bodies as those of his friends.

Under cross-examination he testified that on 14 March 2012 he did not receive any information or complaint regarding any incident at Phumza Street. He was on duty in the crime office and calls of this nature were received by the charge office. Further, that if a call was made of such an incident it would have been recorded in the occurrence book which is kept in the charge office. He was not in a position to say if the charge

office received such a call. He fully explained the procedure regarding the different ways on how to report a complaint and the handling of complaints by the police. If such a call was made he was not in a position to say why the police did not respond.

Mzukisi Apleni testified that he is a sergeant in the SAPS stationed at Harare Police Station Khayelitsha. On 14 March 2012 he was on duty busy patrolling when he was called to the charge office, it was between 10 and 11 p.m. On his arrival at the office he was asked by Msolo to go with Lindile Mpontshane to attend to a complaint about his missing son. Mpontshane laid a complaint stating that upon his arrival home from work he found that Luxolo his son was not at home. He was told that his son was assaulted by accused 1 at his house. He left with Mpontshane to point out the house where his son was assaulted earlier on that day. They arrived at the house of accused 1.

Accused 1 informed Apleni that the three young men broke into his house. He asked accused 1 ‘where are these three young men now’, accused 1 said that they ran away. Apleni asked accused 1 whether he has opened a case regarding his stolen TV to which accused 1 answered yes. Apleni asked accused 1 why they did not take the young men to the police station, he did not answer. He told accused 1 that if Mpontshane was

going to open a case he, Apleni, would have to arrest accused 1 as accused 1 was the last person to see these young men. This conversation between Apleni and accused 1 took place in the presence of Mpontshane.

On 15 March at about 4 a.m. Apleni was called again by Sergeant Msolo who informed him that Mpontshane opened a case of kidnapping and they had to go and arrest accused 1. Apleni went to the house of accused 1 arresting him for kidnapping. After informing accused 1 of his rights he locked him up in the holding cells. The rights of accused 1 were read out to him as contained in the document called SAP14A. The accused understood these rights and he signed the document. He handed a copy of the signed rights to accused 1 and left him at the holding cells.

James Agus testified that he is a constable at the Local Criminal Record Centre in Somerset West SAPS and was a criminalist expert. On 15 March 2012 he was requested by Constable Mkosana of Macassar SAPS to attend at a crime scene and the Sand Mines Macassar. Mkosana pointed out to him the scene. He made a rough sketch of the scene and he took photos 1 to 10 in the exhibits on the scene. He also collected forensic exhibits on the scene and these included two Nike training shoes and two Nova trainer shoes.

These exhibits were sealed within the swabbing evidence collection kit with kit number 10DCAA4073EB. He also collected six alleged blood swabs from six sticks which were sealed in swabbing evidence collection kit number 10DCAC4355EB. Saliva swabs from cool drink bottles were also collected. These were booked in at Somerset West SAP4591658A/2012. Agus testified that he got on the scene at 03:50 a.m. and processed the scene from 03:50 a.m. until 05:07 a.m. On 16 March 2012 from 09:10 until 10:20 he was at Stellenbosch Forensic Pathology Services where he photographed the deceased as indicated to him by Dr Anthony. All photographs as depicted in exhibit S photographs 11 to 82 were taken by him.

Helgaard Brummer testified that he is stationed as warrant office at the Criminal Record and Crime Scene Management at the SAPS. On 15 March 2012 he took a video recording, photographs and collected evidence at 33-730 Phumza Street Harare. He compiled a photo album and three affidavits in this regard which were handed in as exhibits. He further testified that photographs of a white Isuzu LDV bakkie with registration number CA756973 were also taken and evidence was also collected on the same day at the SAPS vehicle safeguarding unit at La Belle Road Stikland.

He then compiled an affidavit and forensic report marked in this regard which were handed in as exhibits. Amongst others from the bakkie he collected presumed blood by means of a swab from swabbing evidence collection kit 10DCAC3746CD. In cross-examination Brummer testified that the samples collected of presumable blood were forwarded to the forensic science laboratory to determine if that was blood or not. They requested that the results be forwarded to the investigating officer and that ended his involvement in this matter.

Igshaan Kenny testified that he is employed at the SAPS as a forensic analyst and stationed at Forensic Science Laboratory at Plattekloof. His duty is to interpret the results on DNA process and to compile reports. On 20 July 2012 during the course of his official duties he received a CAS file Harare CAS313/03/2012 with a lab reference number 96122/12. He also received results after the DNA process and he then interpreted the DNA results. He then explained the contents and findings of his report. The document was handed in as exhibit BB1. He confirmed that he evaluated the results from the samples that were subjected to the DNA process and that the only results that matched of the analysis were in respect of the training shoes and the t-shirt.

The DNA result of the evidence swab D 10DCAC3746CD and one training shoe FSG598758 [“E2”] matched the DNA result of reference number 11D4AB7957MX (WC12/0091/2012). The DNA result of 11D4AD0405MX (WC12/0090/2012) is read into the DNA mixture from the other training FSG598758 [“E1”]. The DNA result of reference sample 11D4AB7957MX (WC12/0091/2012) is read into the DNA mixture result from a t-shirt FSG598759 [“D”].

In cross-examination Kenny explained that swab D was a swab collected from a white Isuzu bakkie with registration number CA56973 which was received on 19 September 2012 under cover of a letter with other exhibits from Warrant Officer Brummer. Ms Losch asked Kenny to explain why two different reports were sent to the Prosecution. He testified that the first report that was sent had an error on the table, the error was on the third row of the table in respect of training shoe FSG598758 (“E1”). He stated that the error came as a result of a simple of copy and paste mistake on the table. When the error was discovered it was reviewed. They accidently sent the mistaken version to the Prosecution the first time. He stated that the results can be trusted as they were double-checked by someone else.

Brendon Craig Ruffer testified that he is an emergency medical

practitioner employed by Metro Emergency Medical Services for the past 15 to 16 years. On 15 March 2012 he did declarations of the deaths of the deceased on the scene.

Dr Daphne Anthony testified that she is a senior forensic specialist at the Stellenbosch Mortuary since 1 May 2009. On 16 March 2012 she examined a body of black adult male approximately 22 years of age identified to her by forensic officer R Roelofse as WC12/0090/2012. The WC number is the number from the mortuary death register allocated to each body. The body had wires on the wrists. She completed a post-mortem report of findings. She fully explained the contents of her report regarding the body marked WC12/0090/2012. Post-mortem report was handed in as exhibit W. She testified that as a result of her observations she concluded that the cause of death was due to multiple injuries caused by blunt trauma.

She testified that on the same day she examined the body of another black male of approximately 23 years of age. The body was identified to her by forensic officer E Meyer as WC12/0091/2012. She compiled a post-mortem report. She explained the contents of her report. Post-mortem report was handed in as exhibit X. Her finding was that the deceased died as a result of multiple injuries caused by blunt trauma. She testified that on the same day and at the same place she

examined a third body of a black male approximately 23 years of age identified to her by forensic officer G De Villiers as WC12/0092/2012. She compiled a post-mortem report of her findings. She explained the contents of her report. Post-mortem report handed in as exhibit Y. She concluded that the deceased died as a result of a head injury and consequences thereof. Her report also stated that the deceased had a brain injury.

In cross-examination she testified that in respect of the body WC12/0090/2012 she noted remnants of a material on different parts of the body which appeared like burnt plastic. It was burnt and attached to the skin. The body also had superficial fresh burn wounds on the wrists, back and arms. In respect of the third post-mortem exhibit Y body WC12/0092/2012 she noted lacerations on the surface of the skull caused by forced blunt trauma that was inflicted on the skin. Further that she was of the opinion that in this instance death was not instantaneous. The deceased lost consciousness immediately but died later. She stated that it was a severe brain injury.

Mr Colenso for accused 5 put to Dr Anthony that accused 5's version was that it was not the intention of the accused to kill the deceased but to make them suffer and that is the reason why they were apparently left alive. She stated that if you

inflict trauma to the head and numerous parts of the body you must realise that there can be serious complications especially if it is not a single infliction of trauma. In this instance the cumulative effect of the injuries caused the death. Further that exposure could be a contributing factor to the death of the deceased depending on the ambient temperature. The deceased lost some blood and it triggered shock and the shock combined with injuries caused the death.

Aaron Mtati testified that he worked at the Lingelethu West Police Station at Khayelitsha as a captain. On 31 October 2012 he conducted a pointing out when accused 5 was brought to him. They went to accused 1's place accused 5 then pointed out the garage where Mshwele and Rasta were allegedly assaulted. They then left there and went to Macassar. Accused 5 pointed out a road on the right-hand side after they crossed Baden Powell Road. They entered this road and then accused 5 stopped them and he pointed out three places where he indicated that the deceased were assaulted at an area outside the township at the sand dunes.

The location was in the veld at the bushy area. The document where the pointing out was recorded was handed in without any objection from accused 5. Mr Colenso placed on record that his instructions from accused 5 were that the statement was indeed

made freely voluntarily and with no undue influence. In cross-examination Mtati testified that Macassar was not the same as Makhaza. Mr Colenso put to the witness that he testified in court that the three deceased were assaulted but in the statement made during the pointing out at pages 8 and 9 his words are that they were beaten up. Mtati testified that according to him the two words had the same meaning.

Mzoleli Matomela testified that he was stationed at Lingelethu West Police Station as a captain. On 31 October 2012 he took a confession from accused 5 which was not objected to and it was handed in as an exhibit. During cross-examination Matomela explained that in the Xhosa language there was no difference between assault and beat up and that assault can also be read as beat up. Further that he has seen people being assaulted by the community but he denied that the police tolerated this practice.

Nceba Gojo testified that he is a constable in the detective section of the SAP Services and stationed at Harare. On 15 March 2012 at 7H00 he was instructed to investigate the case of three young men who were kidnapped and the bodies found at Macassar. At that stage accused 1 was already arrested. He arrested accused 2, 3 and 4 where they lived in Harare. April accompanied him. When they arrived at accused 4's place he

noticed bloodspots on the t-shirt accused 4 was wearing and requested him to hand it over and put on another one.

Other police members were requested to come and assist and they were directed to the house of accused 1. Whilst back at accused 1's place, Gojo noticed bloodspots on accused 2's takkies and requested accused to hand over the takkies for further investigation. Accused 2 handed over the takkies to him. He placed the takkies and the t-shirt in a forensic bag and booked them in the SAP13 register at the police station in Harare for safekeeping. He then took the exhibits entered in the SAP13 register and forwarded them to the laboratory at Plattekloof for DNA analysis.

The area around accused 1 and accused 2's place was cordoned off with a tape and the forensic team searched for more evidence while Gojo was questioning the neighbours. It was between 10:00 and 12:00 in the morning. He spoke to the family of the victims and he took statements from people who mentioned the names of the suspects who were at that stage in the police vehicle. Information received confirmed the incident. The community also gave the name of Rasta, accused 5, and pointed out his shack. Accused 5 was not there. He noticed the forensic people lifting blood samples in the garage where a white van was standing. They took photos and they placed the

collected items in the forensic bag.

He then received information from a detective in Macassar that linked his case of kidnapping of the three boys at Harare with the death of three boys at Macassar. These two cases were then combined into one case with the Harare case number. As the investigating officer he was then taken to Macassar to the place where the bodies of the deceased were found. The positions of the bodies were pointed out to him. The forensic team also took photographs at the scene where the bodies were found. He proceeded with his investigation and went to the mortuary in Stellenbosch. There he met Dr Anthony who conducted the post-mortem examinations where he observed bodies with wounds of a beating. The doctor also drew blood from each deceased for purposes of DNA. Each blood sample was placed in a blood sample kit and he sealed each blood sample kit and marked the blood sample in respect of each deceased.

He then proceeded to look for accused 5. He went to the Eastern Cape with Constable Khanyiso Nyudwana who is a detective constable at the Harare Police Station to look for accused 5. Accused 5 was not there but he was eventually arrested in Fish Hoek. Nyudwana who was also called to testify as a witness confirmed Gojo's evidence in this regard. Further

information was received with statements also linking accused 6 to the commission of the offences. He obtained information from Morris regarding accused 6. He was also assisted by Nyudwana to arrest accused 6. Accused 6 was detained at Harare Police Station with Morris.

He testified further that Makhaza and Macassar are two separate places. Makhaza is a normal residential area while Macassar had a police station. He was not present at the pointing out by accused 5 but only saw the document of the pointing out that mentioned Makhaza when he placed it in the docket. He testified that he gave his testimony in Xhosa and maybe when he pronounced the name it was translated as Makhaza and not Macassar. The dockets from Macassar and Harare were combined. The scene of the crime was at Macassar and the photographer who photographed the crime scene confirmed to him that he collected the sticks and that he was going to forward those to the laboratory. He was not in charge of the exhibits in respect of the Macassar docket.

On 16 March 2012 he went to the mortuary at Stellenbosch to collect blood samples of the victims and they were marked with a reference of each victim. He did not make a statement in this regard. At the mortuary the blood samples were handed to the forensic officer R Roelofse who recorded it in a register and

signed it out for DNA analysis. The contents of the warning statements pertaining to accused 1, 2, 3, 4 and 6 that were ruled to be admissible were read into the record by Gojo and handed in as exhibits. That concludes the summary of the evidence by the State witnesses.

Moving to the defence case, accused 1's version is that when he was called by his brother about his stolen TV he decided to leave the Eastern Cape and travel to Harare. He arrived from the Eastern Cape between 1 and 2 a.m. he went to sleep and woke up at 12, midday. When he woke up at 12 noon he phoned accused 4 to drive for him to Site C as he was tired from the Eastern Cape trip. Accused 1 testified that whilst he was on his way to Site C with accused 4 driving they were stopped by a young man called Mshwele who allegedly told them that he had heard allegations that he was the one that stole accused 1's TV but that was not the truth. He informed accused 1 that he could show him those that were responsible for stealing his TV. Mshwele got into the bakkie and led them to a street where he pointed out four young men standing on the street.

Two of the young men, Mabhuti and Luxolo told accused 1 that they sold the TV at Makhaya and they would show him where they had sold it and they got on the back of the bakkie with

accused 1. Accused 1 testified that he instructed that they first go to his house so that the young men could show him how they entered his house before driving to Makhaya. When they arrived at accused 1's house the community people arrived with them at the same time and they all entered the yard together. When asked about how and why the community people were there he said that he did not know but he thought that they were there because they knew about the TV that was lost.

In cross-examination accused 1 gave different explanations regarding the stage at which the community people arrived at his yard. He first stated that there were no people when they arrived at his house and again testified that they arrived there at the same time with the people and all entered the yard together but he could not say where the people came from.

As they had entered the garage with Luxolo he heard a scream behind them. When he looked back he discovered that it was Mshwele and his nose was bleeding. He testified that he did not see who assaulted Mshwele. Accused 1 went on to testify that when he saw the bleeding on Mshwele he told the community people 'if you are now assaulting them it is better for us to turn back and go to the place where they say they sold the TV'.

They then got into the bakkie and drove to Makhaya. Accused 1, Luxolo and Mabhuti got onto the back of the bakkie while Mshwele sat in front with accused 4 who was driving and they all went to Makhaya. Upon their arrival at Makhaya at a place where the TV was allegedly sold they were told by the neighbours that the people they were looking for had left a long time ago and the neighbours did not know when those people would return. According to accused 1 he then decided to take the young men back to where they had picked them up in the first place. According to accused 1 the route to the place where the young men were picked up goes *via* his house. As they were travelling past his house community people blocked the bakkie and prevented them from continuing further, forcing them to stop in front of his house. Members of the community asked if they had retrieved the TV and accused 1 said 'no'. The people started assaulting Luxolo and Mabhuti who were on the back of the bakkie with sticks and later Mshwele who also got out of the bakkie. Luxolo and Mabhuti were eventually dragged off the bakkie, accused 1 and 4 decided to intervene but the community members also started to beat them with sticks.

He could not see who the community people who assaulted the young men and them were. When it was apparent that the people were unstoppable he and accused 4 decided to leave for Site C to go and eat and they left with the bakkie. They left the

young men in the hands of the community people whilst the assault of the victims carried on. They managed to drive slowly past the people in front of the bakkie. An opening was made when they left. After that he did not see the victims again.

He stayed at Site C. Accused 4 then left approximately at 4 p.m. Accused 1 left a bit later than accused 4. When he got home he saw accused 3 in the yard for the first time since his return from the Eastern Cape and asked her about what happened to the children. She told him that the children managed to get away and ran. Police came at night and asked him about the children that were assaulted and he replied that he did not assault the children but the community members did. Then police left and came back at about 5 a.m. and told him to go with them to identify the children. He never got off the bakkie. He was then taken to Harare Police Station.

Accused 1 denied the evidence of all the State witnesses who testified about his involvement in this case and stated that they were all lying. He never had a quarrel with them and did not know why they would lie against him. The only quarrel he referred to was in relation to the Nobandas whom he said had an argument with him relating to airtime that Nomthunzi bought from his Vodacom container and that happened four years ago.

Dealing with the version of accused 2. Accused 2 denied that he played any role in the incident of the afternoon of 14 March 2012 or any related incident at all. He testified that he was at work driving his brother's taxi as he normally did. His evidence was that he would normally get up at 3:00 in the morning and go to the taxi rank to register and queue. He would pick up contract people from Khayelitsha to Town until 12:00 midday and after 12:00 he would be in Town at the taxi rank. He would then wait for the passengers in order to take them back and would normally get home at 9 p.m.

He testified that on the day of the incident he was at the taxi rank far from Harare and no other place. He knocked off at 9 p.m. He went home, took a bath and before he went to bed he was told by his wife, accused 3, that the thugs were beaten by the community members. He then went to bed. He only saw his brother on 15 March 2012 for the first time after he had gone to the Eastern Cape in a police van. He testified that his witness Bulela Phanginxiwa saw him at the taxi rank in the morning and afternoon on the day of the incident.

He testified further that if his memory did not fail him they last saw each other just after 6 p.m. in the evening. Bulela was also a taxi driver. He testified that Bulela was called in the bail application and testified that he saw accused 2 at the taxi rank

that day. Accused 2 also stated that he knew nothing about what the Nobandas and the Matinises testified about regarding Mphuthumi and Mabhuti. Accused 2 knew Mafethe but denied that he was a passenger on the bakkie and testified that witnesses that said they saw him on the bakkie were lying. Accused 2 also denied that he informed Thulani or spoke to him about the stolen television. He also denied showing Thulani at accused 1's house that the television set was gone.

In cross-examination Mr Ntela put to accused 2 that instructions had been put by his counsel to Thulani that accused 2 met him on 10 March and that Thulani went with him to accused 1's house. He further stated in cross-examination that he informed the committee members Denny and Mabhayi on 11 March 2012 about the stolen TV and they inspected accused 1's house. Accused 2 did not notice how entry was gained into the house. There was no forced entry. After he discovered that his brother's TV was stolen he informed the police but they never came to investigate. Accused 2 denied all the allegations made by the State witnesses against him and stated that they were lying. He knew of no reason why the State witnesses would be lying against him.

Bulela testified that he knew accused 2 from work at the taxi rank for about two years. He stated that he was driving a

contract taking specific workers to work at 6:00 in the morning and he took them back at 4 p.m. The route was from the taxi rank at Site C to Cape Town and back. According to him accused 2 worked the whole week of the 11th March 2012 and he never took time off. On 14 March 2012 he was working as a taxi driver at the rank and he started work at 4:00 in the morning and finished at the rank between 5 p.m. and 6 p.m. He saw accused 2 that day at the taxi rank until they finished work just after 5:00 before 6 p.m. if his memory did not fail him.

Bulela testified further that during the day between trips he went back to Site C taxi rank and then saw other drivers. He also saw accused 2 during the day, from time to time, they met and had a chat a bit. Accused 2 used to register him at the taxi rank as he was not on good terms with the clerk who kept the books at the taxi rank. He was dependent on accused 2. According to the procedure they must register in the morning. Bulela confirmed that he started to work at 4 a.m. at the taxi rank and on arrival he and accused 2 did the registration. In cross-examination he stated that he, after knocking off at 6 p.m., at that time he normally left accused 2 at the rank and he did not know what accused 2 did after he left him.

Accused 3 testified that on 10 March 2012 in the morning she opened up accused 1's house whilst he was in the Eastern Cape

and that everything was in order. Between 4 and 5 in the afternoon whilst not at home she received a call from her husband who informed her that accused 1's house was broken into and his TV was missing. Enquiries were made from neighbours and the matter was also reported by her husband accused 2 to committee members. Accused 2 reported the stolen TV to the police the following day. She did not see when accused 1 came back from the Eastern Cape but noticed his kombi parked in the garage when she was hanging washing at about 11:00 in the morning.

On 13 March 2012 she went to bed early and woke up at 9:00 on the morning of 14 March 2012. She denied being involved in an assault of any of the victims and being on the bakkie at any stage whatsoever. According to her all the State witnesses that testified that she was involved were lying and making a mistake. She testified that on 14 March 2012 she heard a noise while she was inside her house and went outside to check. She saw a lot of community people entering accused 1's yard. She could not specify who those people were. According to her they were very loud, angry and spoke at the same time.

Just as she exited her house accused 1, 4, Luxolo, Mabhuti and Mshwele together with members of the community were on their way back from accused 1's garage to the gate. When it was put

to her by Ms O'Neill that accused 4 will testify that he did not have an opportunity to enter the yard she maintained that she saw them going to the gate. In cross-examination she testified that she did not see blood coming from Mshwele's nose as she was not walking with them. Blood was not visible from the side of his face that she could see. She saw accused 1 at that stage for the first time after his return from the Eastern Cape. She only remembered seeing Nomaliviwe from the community people. She also noticed Morris. The other people lived there in the same neighbourhood but she was not able to say who they were as it happened long ago.

According to accused 3, accused 1, 4, Luxolo, Mabhuti and Mshwele got into accused 1's bakkie. Accused 4 got into the front of the bakkie with Mshwele and accused 1, Luxolo and Mabhuti at the back. Accused 4 was driving the bakkie. Morris did not get onto the bakkie. She did not know why people were there and she did not ask any of them, she also did not ask accused 1 what was going on as it did not occur to ask him. The bakkie drove off and the community people remained in the street. Morris remained along with them. She did not see any weapons carried by the people at that stage. She went inside her house, came back again and continued to stand next to Nomaliviwe by the vibracrete wall.

After approximately 30 minutes the bakkie came back again with the same occupants and came to a standstill in front of accused 1's gate. Before the bakkie stopped people were standing next to the road and did not block the road for the vehicle. Community people moved closer to the bakkie. They started to assault accused 1, Luxolo and Mabhuti whilst on the bakkie. Accused 4 and Mshwele disembarked when they saw the beating and Mshwele also got beaten. The people had sticks with them. She did not know where they got the sticks from. They kept on asking where the television set was saying 'where is the TV'.

There were a lot of people there and she could not say who did the beating. She saw accused 1 being beaten at the back of the bakkie also but she did not intervene because there were a lot of people and she would not succeed in stopping the beating. It never occurred to her to phone her husband accused 2. When accused 1 got off the bakkie the beating stopped against him. The beatings continued against the three young men on the other side of the bakkie in the road. She did not notice if accused 4 was beaten. Whilst the beating continued she saw accused 1 and 4 got back into the bakkie. She did not hear them say anything because there was a lot of people.

When the bakkie left a lot of people remained behind and the

victims were being beaten by the people with sticks. She did not hear anything as the people were all speaking at the same time. After accused 1 and 4 left, after a few minutes, she went back to her house. She heard people running and that made her to come out of her house again. She then heard from Nomandla that Luxolo, Mshwele and Mabhuti managed to escape and ran away. Accused 1 arrived before dusk and asked her what happened to those children who were being beaten there and she said to him they were beaten and escaped and he then left.

Accused 2, her husband, arrived after 9 p.m. She informed him that Mabhuti, Luxolo and Mshwele were being beaten. She denied that she knew why accused 1 was arrested. She only heard that he was taken by the police. She testified in cross-examination that women only formed part of the meeting called by the community to decide on the punishment of an offender they did not take part when thugs are beaten. She denied the evidence of the State witnesses who testified about her involvement in the incidents and testified that she knew nothing about what they were talking about. She testified that she came along well with the Nobandas and they had no quarrels. She testified that all the State witnesses were lying and she could not tell the reason behind that.

Accused 4 testified that he was friends with accused 1 as they come from the same area in the Eastern Cape called Cofimvaba. He testified that between 2010 and 2011 he was a member of a development forum and a street committee. He explained that people who stole property were taken to the committee where they would be interrogated and beaten with sticks by the residents and some of the members of the community until they told the truth as to where the stolen goods were. Goods were not recovered every day. The beatings would stop when goods were recovered.

In 2010 the committee members reported about three times that Luxolo stole items and they found them in his house. Accused 4 testified that he was involved in building construction and had his own company with 20 people working for him. His day to day duties were to supervise and to see if work is done properly. His workers knocked off at 5:00 in the afternoon. He would then take them back to their homes and would only arrive back at his house at about 8 o'clock in the evening. Regarding 14 March 2012 he testified that accused 1 phoned him at 2 o'clock in the afternoon. Accused 1 then told him that he was on his way to him and that he just arrived back from the Eastern Cape. He was very tired and he requested accused 4 to drive his vehicle to Site C to have lunch.

Accused 4 stated that he did not see accused 1 for more than three weeks before that day. When accused 1 arrived at accused 4's house with his bakkie accused 4 drove the vehicle and accused 1 was in the passenger seat. On their way to Site C a young man tried to stop the vehicle. Accused 1 then told accused 4 to stop and he brought the vehicle to a standstill. The young man came to accused 1's side of the bakkie and spoke to accused 1 and said that he heard allegations that he was implicated in connection with the lost television set but that he was not involved. The young man said he would go and show accused 1 the people who had stolen the television set.

At that stage they were standing outside the vehicle. Accused 4 testified that he knew the young man as Mshwele. Then both of them, that is, accused 1 and the young man entered the vehicle in the front. Madiba, accused 1, was seated in the middle of them. Mshwele gave instructions and he turned left from Ntlazane Road and then turned left again, when he noticed four young men standing on the pavement smoking. Mshwele instructed accused 4 to stop the vehicle and Mshwele and accused 1 then got out of the vehicle. Accused 4 remained in the vehicle. Mshwele and accused 1 had a conversation outside the vehicle with four young men. Accused 4 could not hear what the conversation was about.

Accused 1 and Mshwele came back to the bakkie with two of the young men. The other two were left behind. He did not notice the mood they were in at that stage. The two young men were referred to as Luxolo and Mabhuti. Accused 1, Luxolo and Mabhuti got onto the back of the bakkie and Mshwele joined accused 4 in front on the passenger side. Mshwele told him to drive to accused 1's place. At that stage he did not know what was happening and he did not ask Mshwele because he was lost in view of the fact that they were on their way to Site C to have lunch.

At accused 1's place he parked on the left-hand side of the road in front of his house in the street. Accused 1, Luxolo and Mabhuti disembarked from the bakkie. They entered through the gate on their way to the garage and at that stage Mshwele alighted as well and he joined them. Accused 4 testified that he was in the process of disembarking the vehicle when he saw members of the community also entering accused 1's yard. Accused 4 recognised some of the people namely Nomasimi Mqwambe, Dlemthwaleni, Ntomntwana, Bhodligazi, Ndutsu and Nomakacinge.

He knew the faces of some of the other people but could not attach names to them. Accused 4 followed accused 1, Mabhuti, Luxolo and Mshwele into the yard but when he arrived at

accused 1's gate. They turned around and accused 1 and the three young men came back to the vehicle so he did not go inside accused 1's yard. Accused 4, whilst at the gate heard cries but not for long. They returned back and accused 1, Mabhuti and Luxolo got back onto the back of the vehicle. Mshwele got into the front and he saw Mshwele bleeding from his nose. He also thought that Mshwele had a bloodspot on his clothes but could not remember. Accused 4 asked Mshwele what happened to him and Mshwele said he was assaulted in the garage. It did not cross his mind to ask Mshwele who assaulted him and why.

Mshwele then told him to drive to Makhaya and he gave instructions on their way to look for the TV. They arrived in Makhaya and Mshwele told him to stop at a certain house. Accused 1, Mabhuti and Luxolo disembarked from the vehicle and Mshwele followed them and they proceeded to the people sitting outside the house. After a while they returned to the vehicle. They were at a distance and he could not hear any conversation. When accused 1 and the three young men came back he heard when they were talking to each other that the person who allegedly had the TV was not known by those people. Accused 4 then asked Mshwele what their conversation was about and he confirmed that the person who allegedly had the TV was not known. Accused 4 did not notice accused 1's

mood at that stage but he could see that accused 1 appeared to be disappointed.

Accused 1, Luxolo and Mabhuti got back on the vehicle and were seated on the back and Mshwele seated in front. Accused 1 instructed that they must go back to Harare to take the young men back to where they had found them and accused 4 drove back to Harare. As he was driving towards accused 1's place up Phumza Street and just as they were about drive past accused 1's house, there were a lot of community members in the road. He did not notice them when he came into Phumza Street. They blockaded the road and he could not drive past as they surrounded the vehicle. The community members moved closer and forced the bakkie to a standstill. He did not look if the seven people that he recognised the first time at accused 1's house were still there.

As he was about to stop the bakkie the residents started to beat the young men on the bakkie and he could hear the blows and the bakkie was being shaken. They were using sticks. Accused 1 disembarked and started to intervene. Accused 4 saw the beatings and also a spot of blood on a glass window behind the driver's seat. The occupants on the back of the bakkie were bleeding. Accused 4 then disembarked to assist accused 1 in stopping the residents from beating the young men. Accused 1

and 4 tried to intervene to stop the community from continuing with their assault and they also got beaten. He and accused 1 were using their hands to try and stop the residents. The residents kept on beating the boys and dragged Luxolo and Mabhuti off the bakkie.

After accused 4 disembarked he was at the front of the bakkie when the boys were still being beaten with sticks and dragged. Mshwele was also there and accused 4 saw him also being beaten by the members of the community. The community members all spoke at the same time and he could not hear what they were saying. The community members were also uncontrollable and angry. The boys kept on running towards them and then they would be dragged away by the community members and that is why he ended up with blood on his t-shirt. The community did not say anything to him directly, the community members were angry because they brought the boys without the TV that they went to look for at Makhaya.

It was put to accused 4 that if no conversation took place between the two accused and the community people how did they know that the accused and the young men came back without the television set. Accused 4 responded by saying that maybe they did not see a TV like object in the vehicle or they might have asked people seated at the back of the bakkie.

According to accused 4 it became clear to him and accused 1 that the residents were overwhelming them. They gave up and left the young men with the community members who continued beating them. The residents were so angry and they would not have allowed them to take the young men with them.

Accused 1 and 4 got into the bakkie and proceeded to Site C to eat at Sasa Restaurant. They were able to leave with the bakkie because the community members were behind the bakkie at that stage. Accused 4 then left Site C with a taxi to return to his workplace in Makhaza just before knockoff time at 5 p.m. He heard about the death of the three young men the following day when a detective with accused 1 arrived at his house. The detective said to him he was looking for Mzongozi and accused 4 replied that he was not Mzongozi. The detective then manhandled him to the vehicle and took him to the police station where he was locked up.

Accused 4 testified that all the State witnesses were lying about his alleged involvement in the commission of the crimes. He testified that the Nobandas reason for lying against him was as a result of an incident that took place when he as a member of the ward development forum allocating jobs to the different street committees. Nomthunzi lashed out at him because her children were not employed and she said he was discriminating

against her son Nkululeko and her daughter Lindelwa. She was angry and scolded him and said that he did not want her children to succeed in life. That happened at the end of the year of 2010 and beginning of 2011. According to him Nomthunzi remained angry ever since and they never spoke to each other again.

With regard to the Matinises the reason for them lying against him related to an incident that took place in 2011 where Mabhuti broke into the house of the next door neighbour and ran away with a DVD player. The street committee went to Mabhuti's home and he ran away. Accused 4 was part of the committee. Mabhuti's mother Nolusapho offered to pay for the DVD player and she paid the money. After this incident his relationship with Nolusapho was not good at all she was angry and did not greet accused 4 anymore and said that he wanted the members of the community to beat her son and pressured her to pay the money. That was the reason why the Matinises mislead the Court.

Accused 5 and accused 6 elected not to testify. That was the summary of all the evidence.

Starting with the events that took place in the morning hours of 14 March 2012. The Nobandas placed accused 1, 2, 3 and 4 on the scene as having held and assaulted Mphuthumi with sticks

and a stone at their house. The Matinises testified that their home was also visited by accused 1, 2 and 4 who assaulted Mabhuti. The four witnesses Nomthunzi, Lindelwa, Nolusapho and Nomvelo impressed the Court as being truthful and reliable witnesses. With regards to the events of the early hours of that day they corroborated each other's testimonies in material respects.

It was argued on behalf of the accused concerned that the evidence of the four State witnesses should not be accepted by the Court because of various contradictions between them with regards to:

1. The events;

2. The evidence they gave in-chief and in cross-examination and;

3. Differences between the testimonies they gave in court and the statements they made to the police.

It was argued that they were evasive in certain respects and furthermore the Nobandas in particular were not objective witnesses and were emotional because of the death of Mphuthumi. The State accepted that there were discrepancies between the evidence of the witnesses and the statements made

to the police. However; it argued that the mistakes or omissions made in the statements were adequately explained by the witnesses. The State referred to the judgment of S v Bruiners en Ander 1998 (2) SACR 432 (SE) at 437(h) where it was held that it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court.

The witnesses of the State did contradict themselves on certain aspects. One of the main contradictions submitted by the defence counsel was in relation to the time upon which the homes of the Nobandas and the Matinises were visited by the accused concerned. It must be kept in mind that not every error by a witness, and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. The contradictory versions must be considered and evaluated on a holistic basis. In this regard see S v Govender and Others 2006(1) SACR 322 (ECD) at 325(G).

The contradictions of the Nobandas and the Matinises regarding the times the accused visited their homes are in the Court's view not so material if one has regard to their evidence as a whole. What is important is the fact that the Nobandas corroborated the version of the Matinises that the three accused being accused 1, 2 and 4 went to the Matinise home and came

out with Mabhuti. This according to the Nobandas happened after the accused had gone into the Nobanda household and assaulted Mphuthumi who later freed himself. In the Court's view the four witnesses were consistent on the fact that it was accused 1, 2 and 4 that went to visit the Matinise home taking Mabhuti who also managed to free himself. This is significant corroborative evidence that strengthens the State's case that indeed those accused were there that morning.

There was a discrepancy in the testimony of Nolusapho and Nomvelo as to which objects were used for the assault. Nomvelo testified that the accused used wooden sticks while Nolusapho in her evidence-in-chief said that the accused used iron pipes. Under cross-examination she testified that she could not differentiate between iron pipes and sticks as there was chaos in her house. It was put to her that in her statement to the police she had indicated that sticks were used and she never mentioned iron pipes. In the Court's view, whether sticks or iron pipes were used, the fact of the matter is that weapons that inflicted injuries on Mabhuti were used.

Mabhuti was seen by Nolusapho and Nomvelo returning home limping. According to Nomvelo his shirt was torn and he had bloodspots on his t-shirt. With regard to the alleged assault and alleged kidnapping of Mphuthumi, Nomthunzi testified that one

of the accused that were there held Mphuthumi by his belt and accused 1, 2, and 4 assaulted him with sticks and an iron pipe. Lindelwa's evidence on the other hand was that Mphuthumi was assaulted with sticks by the accused concerned and accused 3 hit him with a stone on his hand whilst he held on to the vibracrete wall, situated next to Nkululeko's shack.

Once again the Court is satisfied that the nature of the weapons used whether sticks and iron pipe or a stone caused bodily injuries to Mphuthumi because he was seen by Lindelwa covered with blood. The witnesses testified that they could see what was happening although it was still dark outside. Nolusapho testified that the light in her house came from TV which was switched on as well as the light from the bedroom and from the light coming from the long pole outside the house which shed light through the window of the TV room. Nomvelo confirmed that evidence. Nomthunzi testified that it was still dark outside but there was light coming from Nkululeko's shack and her kitchen area.

Nomthunzi's sight problem was also raised as an issue that should raise doubt as to whether she could properly see what was taking place. Nomthunzi admitted during the course of her cross-examination that she was short-sighted and diabetic and could not see quite far. There was no evidence adduced as to

the extent of the condition of her eyesight. Whilst cross-examined by Mr Colenso for accused 5 about the later events she was asked whether she could see the time on the wall clock of the court room about 9 metres away. She testified that she could see the world clock but could not read the finer detail of the time. From this her evidence that she could see the events and the people involved whom she knew from the area cannot be discounted based only on her short-sightedness.

Furthermore, Nomthunzi's evidence was corroborated by Lindelwa's evidence as to the identity of the accused. Lindelwa testified that she saw accused 1, 3 and 4 in the light of the floodlight, accused 2 was also identified. The Court and the parties observed during the *inspection in loco* the existence of the pole with six spray lights estimated to be 40 metres in height situated at the corner of Phumza and Bengezela Streets which could be seen from the Nobanda and the Matinise properties.

In terms of the evidence the witnesses and the accused concerned have lived in the same area for some time. It was observed during the *inspection in loco* that the houses of accused 1, 2 and 3 and those of the Nobandas and the Matinises were in close proximity with each other. Exhibit H, that is, the street map, also depicted the location of the streets

where the houses are situated, which was around the same area. It is reasonable to conclude that the witnesses would be able to recognise the accused concerned although the incidence occurred after midnight.

According to the Nobandas the events of the day carried on with accused 1 coming to their house during the course of the morning to apologise for assaulting Mphuthumi earlier that morning and later on in the afternoon coming back to their house with Mshwele and accused 2 after which accused 2 left. Even if it could be argued that Nomthunzi was mistaken as to the identity of accused 1 and 2 in the early morning the coming back to their house would confirm the involvement of accused 1 and 2 in the incident of the early morning. Nomthunzi also had a conversation with accused 3 in front of the gate of accused 3's house during the course of the morning about why the accused concerned assaulted Mphuthumi and accused 3 responded that these young men normally passed by her house looking in her direction only to find that they had stolen accused 1's TV.

The version of accused 1 insofar as his time of arrival from Cofimvaba to Cape Town is concerned does not necessarily confute the evidence of the State witnesses about what happened that morning. On his own version the accused was in

Harare between the hours of 1 and 2 a.m. His time of arrival in fact confirms their evidence that he was back in Harare at least at the time the alleged incidence occurred. The exact time in the Court's view is not material especially because the time that accused 1 allegedly got back to Harare is not too far apart from the time it is alleged that the incidence occurred. The version of events as provided by the State witnesses regarding the incidents of the early hours of 14 March 2012 is more convincing than that of the accused. More so, that accused 1 left what he considered to be important in the Eastern Cape to attend to his stolen TV. It is not farfetched that immediately after his arrival he wanted to find the culprits who stole his TV.

The Court did not observe the Nobanda's as not being objective and emotional in court and no basis was laid for this viewpoint. Furthermore Mphuthumi's passing away in 2013 has nothing to do with this case. The Court is accordingly satisfied that the accused concerned were at the Nobanda's and Matinise's households in the early morning hours of 14 March 2012 and that they assaulted Mphuthumi and Mabhuti. The Court will deal later with the issue of the alleged kidnapping of Mphuthumi.

Continuing with the events of the day. The Court now deals with the events that allegedly occurred in the afternoon to the evening of 14 March 2012 at accused 1's house, at the bridge in

Ntlazane Road, the driving of the bakkie allegedly to and from Endlovini and the discovery of the bodies of the three deceased at Macassar Sand Mines on 15 March 2012.

In regard to the events at accused 1's garage, Nomthunzi, Lindelwa and Morris were consistent about the fact that Mshwele and Luxolo were in accused 1's garage during late afternoon of 14 March 2012. According to Lindelwa it was from approximately 4 p.m. and according to Nomthunzi it was when her grandchildren had just come back from school and Morris testified that he witnessed the events at accused 1's house after he had woken up at 4 p.m. to go to work that evening as a security guard. From this it can be safely concluded that the afternoon events at accused 1's house started at approximately 4 p.m. Secondly, the three witnesses corroborated each other's testimony that Mshwele and Luxolo were tied up. According to Lindelwa they were tied up with a red rope and wires. Morris testified that they were tied up with yellow ropes and Nomthunzi's testimony was that the two were tied up with wires. The discrepancy regarding the colour of the ropes is not material in the Court's view. The point is that, there is corroborating evidence that they (the deceased) were tied up.

Nomthunzi testified in-chief that Luxolo and Mshwele were tied up by accused 1, 4 and 5. In cross-examination she testified

that accused 5 was doing the tying up. Morris however stated that accused 5 was just standing. It must be borne in mind that Nomthunzi and Morris did not arrive at accused 1's place at the same time. Accused 5 in a document that was regarded as a confession but which appeared to be exculpatory in nature and in his warning statement made a statement which ties up Nomthunzi's version that he was asked to assist with the tying up of the victims as approximately 16H00.

The mentioning of the tying up by accused 5 in his statements gives credence to Nomthunzi's testimony that he had something to do with the tying up upon being asked by accused 1 to assist. Accused 5 elected not to testify in order to gainsay Nomthunzi's testimony. It must however be stressed that accused 5's denials put to the witness by Mr Colenso during the cross-examination of Nomthunzi cannot be equated with the evidence. Nomthunzi maintained her testimony that when she was cross-examined by Mr Colenso on this issue that accused 5 did the tying up. The evidence of this witness on this issue must stand.

Nomthunzi and Morris corroborate each other that accused 1 and 3 assaulted Mshwele in the garage. According to Lindelwa accused 1 assaulted Luxolo with a stick and accused 3 with an iron pipe on his head and legs. The iron pipe was about half a metre long and Mshwele was already in the garage tied up with

a yellow rope and wire when Lindelwa arrived. Morris confirmed the evidence by Lindelwa that accused 1 used a stick whilst accused 3 used an iron pipe to assault Mshwele and Luxolo. According to Lindelwa accused 4 arrived and took a stick from accused 1 and started assaulting Luxolo. As they were still tied up and being assaulted Mshwele said the TV was at Endlovini.

Morris supported Lindelwa's testimony that accused 4 assaulted both Mshwele and Luxolo using a stick and that the two young men were tied up with a rope. Nomthunzi testified that as this was happening she and the members of the community were shouting to the accused not to assault the children. This accords with Morris' evidence that the community people gathering at accused 1's place did not participate in the assault but were more interested in the TV being found and even shouted 'please don't kill them' when the bakkie left the last time.

Nomthunzi testified that accused 1 and 3 assaulted Mshwele badly on his head. The post-mortem report in relation to Mshwele concluded that the cause of death was as a result of head injury and consequences thereof. Morris also noticed an injury in Luxolo's left eye. The post-mortem report in relation to the external examination of Luxolo's body confirmed that there was haemorrhage around the left eye and the laceration

approximately 30 by 10 millimetres on the upper aspect of his left eye. Dr Anthony explained this to mean that the skin was torn.

Ms O'Neill submitted on behalf of accused 4 that the State cannot rely on the testimonies of both the Nobandas in relation to what happened in accused 1's garage because according to Ms O'Neill, Lindelwa said her mother was not present at accused 1's house. The Court's reading of the evidence is that Lindelwa never said that her mother was not there but that she did not go to accused 1's place with her mother, and her mother never entered accused 1's house. Therefore it is possible that Lindelwa did not see her mother. First it appears as though Lindelwa was at Wendy's place when her mother arrived at accused 1's house for the first time and secondly according to her mother's evidence she never entered the yard but remained with the members of the community outside the gate of accused 1's house. Therefore there does not seem to be a discrepancy there.

Morris testified that during the events at the garage accused 6 was just standing and watching. Morris confirmed Lindelwa's evidence about who got on the bakkie during the first trip; that it was accused 1, 3, 5, 6, the three deceased, Lindelwa, Morris and two other men, accused 4 was driving. Although Nomthunzi

did not mention all the names of the people on the bakkie during the first trip that Lindelwa and Morris mentioned, she later on with reference to the second trip mentioned Lindelwa and Morris as being on the bakkie that was going back to Endlovini. There is a discrepancy between the evidence of Morris and Lindelwa as to who apprehended Mabhuti at the footpath bridge in Ntlazane Road.

According to Lindelwa, Morris got off the bakkie with accused 5 and moved to the top of the bridge where they caught Mabhuti and brought him to the bakkie. Accused 1 told him to get into the bakkie and tied Mabhuti up with a wire whilst on the bakkie. Morris on the other hand testified that it was accused 1, 3 and 6 that got off the bakkie and accused 6 went across the railway line and blocked Mabhuti. Accused 1 got hold of Mabhuti by his arm and brought him to the bakkie walking with accused 3 and 6. In his second statement to the police however, Morris mentioned that he also got off the bakkie with accused 1, 3 and 6 in order to catch Mabhuti.

Even though there might be discrepancies as to who were involved in the catching of Mabhuti the fact of the matter is that Mabhuti was apprehended at the bridge and placed on the bakkie where accused 1, 3, 5, 6, Lindelwa, Morris and two community members were, with accused 4 being the driver

according to the witnesses. On the back of the bakkie, according to Lindelwa, accused 6 used vulgar language to the effect that 'I will hit you bra's until you shit'. Accused 6 did not come and testify in order to refute what Lindelwa said. There is therefore no reason not to accept Lindelwa's evidence in this regard.

Both Morris and Lindelwa testified that accused 1 uttered words that led them and two other gentlemen to get off the bakkie. There is a slight difference as to the exact words that were uttered by accused 1. Whatever words were said it appears that they were interpreted by both Morris and Lindelwa to mean that assault was to take place on the victims and it had the effect of them getting off the bakkie. Morris mentioned in his warning statement that accused 1 said the following words 'if there is anyone who's going to stop him in what he is going to do, he must climb out of the bakkie' and from that Morris deduced that something worse was going to happen and he decided to get off.

In his second statement Morris stated that accused 1 said 'as the journey goes to Endlovini to trace a television and if it could not be found he will assault these victims (1) Luxolo, (2) Sivuyile, (3) Mabhuti very strong and badly also more than he already did, so those who had a will or soft heart, they may rather remain behind'. This is also the report that Nomthunzi

said she received from Lindelwa when she came back after she had gone with the bakkie. Accused 6 in his warning statement also confirmed Lindelwa's and Morris' evidence in this regard which he also states is a reason why he got off the bakkie. The overwhelming evidence is that the people that got off the bakkie did so because of accused 1's threats that the victims were going to be seriously assaulted and everyone that remained on the bakkie was expected to participate in the assault.

Lindelwa testified that when the bakkie came back to accused 1's place she saw Luxolo, Mabhuti and Mshwele on the bakkie red with blood. Morris supported this evidence by stating that blood was flowing from the heads of all the three young men including Mabhuti. If one takes into account the fact that Mabhuti was not in the garage when the assault on Mshwele and Luxolo took place and that there was no evidence that when he was caught at the bridge he was assaulted there at the bridge or injured before the bakkie took off again, it can be concluded that assault on Mabhuti and further assault on Luxolo and Mshwele must have taken place between the time of leaving the bridge and returning to accused 1's place. This coincides with the words that the witnesses say accused 1 uttered at the bakkie before they got off to the effect that the victims were going to be assaulted and injured if the TV was not found at Endlovini. Nomthunzi also mentioned that the bakkie was gone

for a long time before it returned back again at accused 1's place.

Defence counsel for accused 1 contended that there was no evidence that accused 1 actually went to Endlovini. Accused 1's version is that they looked for the TV at Makhaya. While it is so that the State witnesses got off the bakkie before it proceeded further, evidence is overwhelmingly that the remaining members of the bakkie were on their way to Endlovini to look for the TV and they came back without the TV but with an unknown young man who denied that he knew anything about the TV. Ultimately the location of the place they went to to look for the TV whether Endlovini or Makhaya has no real relevance.

Morris testified that when the bakkie left the second time accused 1, 3, 5 and 6 were on the back of the bakkie and that accused 4 was the driver. He at that stage did not see community members with sticks and iron pipes. In fact according to him the community members were worried that the TV should be found and when the bakkie left the second time they were shouting 'please do not kill them, please do not kill them'. According to Morris accused 2 was not there. Nomthunzi mentioned in her evidence-in-chief that when the bakkie left again Morris, Lindelwa and accused 1, 3, 5 were on the bakkie with accused 4 driving and Lindelwa and Morris came

back saying they got off the bakkie upon accused 1's utterances and the bakkie never came back again with the children alive.

In cross-examination by Mr Caiger however Nomthunzi stated that when the bakkie returned followed by the kombi the kombi was parked at accused 1's house and accused 2 also got on the bakkie. When the question about who was on the bakkie the second time was asked again by both Mr Caiger and Mr Ntela in re-examination Nomthunzi mentioned that the occupants of the bakkie were accused 1, 2, 3, 4 and 5. Lindelwa and Morris were not mentioned this time which corresponds with their evidence that they were not on the bakkie on the last trip.

Mafethe's evidence in regard to who he saw on the bakkie is also relevant. Mafethe testified that while sitting at Athi's place late afternoon to early evening he saw a white bakkie driven by accused 4 passing. The occupants that he could see were accused 1, 2 and 5 with their backs turned to him. Mafethe gave a reasonable explanation as to why he could not see the other people on the bakkie including the deceased as they were seated on the floor of the bakkie. He also explained that he recognised accused 1, 2 and 5 even with their backs turned on him as he knew them. The argument therefore that he was a poor observer, selective in his observations or evasive on this aspect is not convincing. Mr Caiger in fact submitted in his

argument that when cross-examined on this issue Mafethe remained adamant of his version.

Viewed together with the evidence of Nomthunzi there is consistency that accused 1, 2 and 5 were on the bakkie driven by accused 4. Taking into account that there were other people on the bakkie that Mafethe did not see, Nomthunzi completes the picture as to who those others on the bakkie were being accused 3 and the three victims. That is also supported by Morris who said accused 1, 3, 4 and 5 were on the bakkie that drove off the last time. Furthermore Morris testified that accused 6 was also on the bakkie. However, accused 6 did not come to testify in order to rebut Morris' evidence. According to the State witnesses the bakkie never came back with the three victims.

The bakkie was later in the evening seen by Lindelwa and Morris at accused 1's place. Lindelwa testified that she saw accused 2 and 5 washing the bakkie at accused 1's place at approximately 10 p.m. and she asked them 'did you finish the job' and there was no response. Morris on the other hand testified that after 9 p.m. he saw accused 1 washing the bakkie inside using a hosepipe and accused 2 was just standing next to the bakkie. Morris testified that it was possible that Lindelwa had seen the bakkie washed by accused 2 and 5 because they

did not walk past there at the same time. This explanation by Morris is reasonable.

Accused 1 confirmed during his testimony that he washed the bakkie because it had blood that came from the victims who according to him were assaulted by the community members whilst on the bakkie.

If one looks at accused 1's version it is questionable that a person after sleeping for approximately 12 hours would still be so tired that he was unable to drive his vehicle for a short distance to Site C. It was peculiar that he did not after having woken up at 12 midday enquire from his brother, accused 2, or accused 3 as to what happened with the issue of the missing TV. It is also very strange that those accused of stealing the TV by Mshwele would without any protestation willingly get onto the bakkie without much discussion between them and accused 1.

Another anomaly is that Mshwele who said he knew nothing about the TV offered to give directions while sitting in the front of the vehicle with accused 4 by leading them to where the TV was sold whilst the culprits who informed accused 1 of where the TV was sold sat on the back of the bakkie with accused 1. Instead of driving directly to Makhaya accused 1 directed that

they start at his house first. A number of questions arise regarding this decision, the first being that the main reason for coming from Eastern Cape was to find his TV. He got the information about the whereabouts of the TV that it was sold at Makhaya but he decided to go to his house first. The second being, that the culprits who would have known that they were in trouble would be so compliant and so subdued well knowing that something serious could happen to them due to their wrongdoing.

It is farfetched to suggest that community people would just arrive, at the same time with the bakkie at his house, which was supposed to be on its way to Makhaya, without being informed that the accused would be going to his house at that particular time and without knowing the reason for him being there and that the people with him on the bakkie were the culprits that stole the TV. In cross-examination accused 1 gave different explanations regarding the stage at which the community people arrived at his yard. He first stated that there were no people when they arrived at his house which gives an impression that people suddenly appeared from nowhere. The second explanation was that they arrived there at the same time and all entered the yard together but he was not able to say where the people came from.

According to accused 1, as they had entered the garage at his house with Luxolo he heard a scream behind them. When he looked back he discovered that it was Mshwele and his nose was bleeding. He testified that he did not see who assaulted Mshwele. Once again it is peculiar that members of the community who had no conversation with accused 1 about the reason why he was there at his house with the young men would without asking any questions and out of the blue assault Mshwele. Accused 1 went on to testify that when he saw the bleeding on Mshwele he told the community people 'if you are now assaulting them it is better for us to turn back and go to the place where they sold the TV'. They then got into the bakkie and drove to Makhaya.

This does not make sense because according to accused 1, he had no prior conversation with the community people about the stolen TV. Furthermore, the person that was assaulted was Mshwele who according to accused 1, had earlier professed to have had no involvement in the stealing of the TV. Accused 1 and the three young men went to Makhaya with accused 4 still driving the bakkie. Mshwele still sat in front of the bakkie whilst the other two young men sat on the back of the bakkie with accused 1. Upon their arrival at Makhaya at a place where the TV was allegedly sold, they were told by the neighbours that the people they were looking for had left a long time ago and the

neighbours did not know when those people would return.

According to accused 1, he then decided to take the young men back to where they had picked them up in the first place. What is strange about this is that, firstly, he did not get his TV and that the people to whom the TV was allegedly sold had left long time ago, which means the TV could have never been sold at that address as it was stolen only some four days earlier that is on 10 March 2012. In this regard the young men would have made a fool of him by taking him to a wrong address. It is therefore unlikely that he would not have been angry at them. After all this he gently decided to take the young men back to the place where they had picked them up to drop them off. He testified that he was interested in retrieving his TV. It is therefore strange that he would decide to let the young men who admitted to have sold his TV to go freely without any questions and without taking them to the police as his brother had already laid a charge. Furthermore he remained on the back of the bakkie with Luxolo and Mabhuti. He gave no satisfactory response as to why that was still necessary. The inference that can be drawn is that he remained at the back of the bakkie to ensure that they did not escape.

The explanation given by accused 1 on why they went to his house before driving to Makhaya in the first instance was for the

young men to show him how they gained entry to his house. It was never placed on record that in fact the route from where the young men were picked up to Makhaya went *via* accused 1's house in the first instance. It is in the Court's view convenient to suggest that the road back from Makhaya to where the young men were picked up had to go *via* accused 1's house. Accused 1 could not recall the names of the streets were these young men were picked up. Another concern that the Court has with accused 1's version is that he testified that when the community people had assaulted Mshwele earlier at his house, he took them away from the community people giving an impression that he was removing them from danger of being further assaulted. However, after not retrieving the TV he saw it fit to go past his house on his way to dropping the young men off at the place where they had picked them up. He should have known that there might be further assaults on the young men especially because the TV was not retrieved.

Another issue is that it is not convincing that accused 1 did not see the community people who were at his house earlier and who were assaulting them and the young men on their return. It is highly unlikely that he would not look to see who was at his house and who was beating them. It is once again convenient for him to suggest that he could not see even one person or a few people whilst he could observe the young men's movements

during the altercation, in order for him to intervene. The community people could not have been strangers to accused 1. It must have been people from the neighbourhood as they would have been the only people who knew about the stolen TV after they were informed by his brother accused 2. Furthermore, he testified that at some point he distanced himself from the people who were doing the assault. It is highly improbable that he did not identify any person at that stage when he was just an onlooker.

The next issue is that if he was so concerned about the victims it makes no sense that he decided to leave them behind in an injured and bleeding state whilst in the hands of violent attackers to go and eat at his usual restaurant at Site C and made no contact to the police or emergency assistance or inform the relatives that their children were being beaten by the community members. This was especially necessary because of the fact that his attempts to intervene had failed and that him and accused 4 were overpowered by the community people. The safety of the young men should have been foremost in his mind as he was the person that brought the victims *via* his house in the first place. The unstoppable behaviour of the community members should have indicated to him that something bad could happen to the victims.

It is also important to compare the evidence given by the accused at the bail hearing with the evidence he gave at the trial in respect of the events of 14 March 2012. The following differences in the versions at the bail hearing and the trial have been noted. Firstly, at the bail hearing he testified that people were at his house because they also wanted to see how the young men broke in. Secondly, he testified that when they got to Makhaya, he was told by the neighbours that the people they were looking for were not known. Thirdly, he testified at the bail hearing that, after coming back from Makhaya they went back to where they came from, to which the Court (at the bail hearing) asked where that was and he said that it was in front of his house. He never mentioned a vehicle being blocked by the people. At the bail hearing the destination was his house and not the place where they had picked up the young men.

Fourthly, he testified at the bail hearing that on arrival at his house the second time he addressed the community people as follows; 'it was full of people and we told the people that these people were not showing us these things and that these things are not where they were saying these things are that's when they got assaulted by the people'. Fifthly the impression he created during the trial was that he was not angry about the stolen TV but was calm and friendly at all times. But at the bail application during cross-examination he admitted that he was

angry and annoyed because his house was broken into due to the loss of his TV that was valued at approximately R6 000,00 to R7 000,00.

The difference in versions given by accused 1 during bail proceedings and during the trial is material especially with regard to the destination from Makhaya. The contradictions are glaring and unfortunately go to the route of the crucial issues before the Court. In the bail application it was very clear that from Makhaya they were headed to accused 1's place and not to drop off the children as testified by accused 1 in the trial. This recent version creates an impression that it is a fabrication designed to justify why the young men were at accused 1's place the second time after the TV was not found in Makhaya.

Ms Losch on behalf of accused 1 argued that the fact that only a few bloodspots were found in accused 1's garage as opposed to those found outside his yard supported his version that the community assaulted the young men outside the yard. The fact that bloodspots were found in the garage is consistent with the evidence that assaults did take place in the garage. The young men were taken from the garage whilst bleeding to be loaded onto the bakkie outside the yard. That could explain why blood was also found outside the yard.

Accused 1 denied the version of the State completely and testified that the witnesses for the State were all lying. It is very clear from the assessment of the evidence that the versions of the State and that of the accused were very different regarding the events that took place on 14 March 2012. However, as it has been shown in the evaluation of the evidence above that the State version on the events of 14 March 2012 is more compelling than that of the accused in view of the totality of all the evidence that happened during the afternoon to evening of 14 March 2012. The version of accused 1 cannot be reasonably possibly true and therefore is rejected.

Accused 2 painted a picture to the Court that he never leaves his work during the day at the taxi rank and that he is on duty from 3 o'clock in the morning until 9:00 in the evening. According to his evidence, should he leave the rank he would lose his position in the queue as he must register. Accused 2 called an *alibi* witness Bulela to support his evidence. His version however that he never leaves his work is contradicted by the following incidents. The first one is that he was able to report to the police the housebreaking and stolen TV at 8 o'clock in the morning. Secondly, he saw his brother in a police vehicle. The evidence is that his brother was arrested after 5 a.m. which is after the time he leaves home for work. Thirdly, accused 2 testified that on 10 March 2012 at 6 p.m., he went to

his brother's house and then discovered that the TV was gone.

It is reasonable to expect that a person would in certain circumstances such as the crisis at home or any other compelling reason leave work to attend to such situations that may arise as has been borne out by the evidence of accused 2 that he was at home at 6 p.m. when he discovered his brother's TV missing. Accused 3 also testified that she was phoned by accused 2, her husband, between 4 and 5 p.m., to come and see for herself that the TV at his brother's house was missing. This is another indication that he sometimes left work earlier.

The evidence of Nomthunzi was that on 14 March 2012 accused 2 arrived there at accused 1's place with a kombi and asked where his brother was and that he later returned with the kombi following the bakkie and left with the bakkie during the second trip. He was also identified by Mafethe according to his evidence. The evidence of these witnesses placing accused 2 on the bakkie late afternoon to evening is therefore not unreasonable. Furthermore, Bulela's evidence was that he would leave accused 2 at the taxi rank between 5:00 and 6:00 and knockoff and then he would not be aware of what accused 2 did after he left him. This is important because from about 5 p.m. in the afternoon he was not aware of accused 2's whereabouts.

According to the evidence adduced by the State witnesses as already mentioned the bakkie left on the last trip in the afternoon at dusk which would have been after 5:00 or later. It is further obvious that it was impossible for Bulela to know the whereabouts of accused 2 for the whole day because they transported people in separate vehicles. In his own evidence Bulela could not say where accused was during the lunch hour and after 5 p.m. Furthermore, while Bulela would be behind accused 2 in the queue at the rank in the morning, taxis would fill up and leave at different times. They could not be following each other at all times. Bulela gave an impression that he was aware of accused 2's movements at all times and failed to acknowledge that there could be situations that required a taxi driver to leave work before knockoff time. In any event, from the evidence it appears that the events of 14 March 2012 carried on until the evening. His evidence is therefore not convincing.

The evidence of Gojo was that on the day he arrested accused 2 he noticed bloodspots on his takkies and asked accused 2 to hand over the takkies for investigation. This was not disputed by accused 2. Gojo testified that he placed the takkies in the forensic bag and booked them in an exhibit in the SAP13 register at Harare Police Station. He then sent the exhibits to

the forensic laboratory at Plattekloof for purpose of analysis.

Kenny testified that on 20 July 2012 he received the exhibits in sealed bags from Harare Police Station under CAS file number CAS313/03/2012 laboratory number 96112/12 and these exhibits were subjected to DNA analysis. In the forensic bag were two training shoes marked reference number FSG598758[“E2”] and FSG598758[“E1”]; a t-shirt with reference number FSG598759[“D”]. He also received Evidence Swab D 10DCAC3746CD[“12”] collected from the white Isuzu bakkie by Brummer. The analysis reflected that the training shoe FSF598758[“E2”] matched with blood sample 11D4AB7957MX which belonged to Mabhuti. Training shoe FSG598758[“E1”] matched with blood sample 11D4AD0405MX which belonged to Luxolo. The reference blood sample belonging to Mabhuti was read into the mixture of DNA results coming from the t-shirt.

The Court was concerned about whether or not a link was established as to which training shoes were sent for analysis, that is, whether those obtained from accused 2 by Gojo or those that were collected on scene at Macassar by Agus. According to Mr Caiger the link was not established and Ms O’Neill also argued that there was no documentary proof linking the exhibits from the police station to the laboratory. The State also conceded that there was no documentary link.

Upon the Court's diligent perusal of the documentary evidence coupled with the evidence by Gojo, Kenny and Agus on this issue, it is clear that the three training shoes collected at Macassar by Agus were sealed in exhibit bag FSD850102 and placed in the swabbing evidence collection kit number 10DCAA4073EB and booked in at Somerset West Police Station under number SAP4591658/2012. Kenny testified on the other hand that on 20 July 2012 he received a CAS file pertaining to Harare Police Station CAS313/03/2012 lab number 96122/12.

From this information it can be concluded that the DNA analysis done by Kenny related to the training shoes received from Harare Police Station and not those from Somerset West Police Station. The only training shoes received from Harare Police Station according to the evidence are those that were booked in by Gojo which he got from accused 2. Based on the totality of the evidence relating to accused 2 it can be concluded that he was on the bakkie during the second trip and therefore his version that he was not there at all is not reasonably possibly true and it is therefore rejected.

Dealing with accused 3, it is hard to believe that accused 3 who knew accused 1's TV was stolen did not even think that what was happening there related to the missing TV. It is even

harder to believe that whilst people were talking outside she never asked anyone what was happening especially as this commotion was taking place in the yard and in front of her brother-in-law's house, whom she had not seen for about two weeks. Secondly it is strange that she could only see accused 1, 4 and the three young men, Morris and her neighbour Nomaliviwe amongst the community members. It is highly unlikely that she was not able to identify any other person from the neighbourhood whilst just standing around and talking to Nomaliviwe for about 30 minutes after the bakkie had left.

Furthermore, only people from her neighbourhood could have known about the missing TV and they were surely not strangers to her. She, in any event admitted that the people from her neighbourhood were there and were the ones doing the assault. In that regard she would have been expected to identify some of these people. Her evidence in cross-examination slightly changed when she said that she knew that the community members were from her neighbourhood but could not recall their faces as it was a long time ago but could see accused 1, 4 and the three young men at all times. It is also quite strange that when she saw people the first time she did not notice them carrying any sticks.

A question then arises as to where did the people who were

standing there the whole time get the sticks from, which they used to assault the three young men and accused 1 with. More so, accused 3 was standing looking at these people the whole time and that is why she could see Morris amongst them. It is also telling that Morris who was a section 204 witness was the only community member identified by accused 3 other than Nomaliviwe. This leads one to conclude that accused 3 was either hiding the identity of those from the community who did the assault in order to protect them or to protect herself or others involved regarding the assault on the young men.

Accused 3 confirmed that no meeting was called by the committee to discuss the missing TV because if such a meeting had been called she would have been aware of the meeting as it was normally held in the house in front of their house. From her evidence the people just gathered there without a meeting being called. If that is the case how did the people know that they must gather at accused 1's place to assault the young men when the bakkie arrived the first time and to stay there and wait for the bakkie to return? The evidence therefore that people just out of nowhere started assaulting the victims together with accused 1 on the bakkie makes no sense.

Accused 3 also agreed that it was strange that the person whose TV was stolen would also be beaten but according to her

that was what she saw. Accused 3 testified that she normally went to open accused 1's house at 09:30 or so, every day. On 14 March 2012 however it is unclear why she did not open accused 1's house at the same time as she normally did but only went out of her house for the first time at approximately 11 a.m. to hang the washing which is when she noticed accused 1's kombi parked in his garage. Accused 3 also stated that she could not hear what the community members were talking about as they all talked at the same time. She later stated in cross-examination that the community members started asking 'where is the TV' as they were beating the young men and this is a contradiction.

Gathering from accused 3's evidence, accused 4's intention was clearly to stop the bakkie at accused 1's gate. In this regard she contradicted accused 1 and 4 who stated that the bakkie was blocked by the community members forcing it to come to a standstill and this is a material contradiction. It is also unlikely that a person who witnesses an assault on people would just walk back to her house without any further interest or take action that would show that she was concerned about the victims and what was taking place outside her brother-in-law's yard.

Regarding the bail proceedings accused 3 was accused 4. A

number of discrepancies were pointed out to her by Mr Ntela. In her bail application accused 3 testified that accused 1 and 4 came with the young men and while the young men were showing accused 1 and 4 how they got into the house the people were assaulting them and one started bleeding through his nose. This is contrary to the evidence she gave in this court when she testified that she heard a noise outside and when she got out she saw community people in accused 1's yard, and accused 1 and 4 and the three young men were coming from the garage towards the gate. Furthermore, she testified during the trial that she did not see any assault or that Mshwele's nose was bleeding, which is clearly a contradiction.

She also testified during the bail hearing that accused 1 and the community members said the young men must go and show them where they had put the items that they had stolen as the young men had said they had stolen the items. None of these details were given when the accused gave evidence in this court. She also mentioned at the bail hearing that accused 1 and 4 and the victims came back saying that the people that the young men allegedly gave the items to were not known in Makhaya. At the trial she made no mention of any interaction between accused 1, 4 and the community members.

In her evidence at the trial she stated that people started

beating the young men and she could not hear what they were saying as they all spoke at the same time. At some point the only words she heard were 'where is the TV' whilst the assaults were taking place. She further testified at the bail hearing that accused 1 and 4 went to Site C leaving the young men with the community, which details she never mentioned during the trial. At the trial she stated that she never had a conversation with accused 1 or accused 4, she therefore could not have known where they were going to. It was obvious that accused 3 tried to tailor her evidence to be in line with that of accused 1 and 2 and adapted her version of events in cross-examination. There were material contradictions in her evidence at the bail hearing and her evidence at the trial. Based on the totality of the evidence in relation to accused 3 her version is rejected as not being reasonably possibly true.

Accused 4 contradicted himself and changed his version many times during his cross-examination. At one point he testified that the community people whilst assaulting the young men were all talking at the same time and he could not hear what they were saying but at another time he testified that the residents said that they would assault the young men until they told them where the TV set was. Accused 4 also stated that he did not go to the police because the people would have regarded him as an informer. Surely he could have made an anonymous call to the

police. His response that the police always requested the person's identity when reports were made was not supported by any incidents, which he had personal knowledge of.

According to him, community members had lost trust in the police because they would call the police for assistance when they lost their goods but would not get any help. It would take the police up to a week to respond and that is why the Khayelitsha residents decided to look for their stolen goods themselves and take their own decisions. Whilst there is evidence that police did not always react on time or at all when complaints were lodged it is always incumbent upon any person against whom a crime has been committed to call the police as the law enforcement agents. Even if police do not respond no one is entitled in the course of resolving issues by themselves to assault people.

Further, accused 4 stated that he did not think he was the one who was supposed to call the police because he thought that if they were in the hands of the community they were in good caring hands and protected. He did not think they were going to be beaten to death. The behaviour of the accused is very strange in this regard. It was irresponsible to leave the young man whom he had brought there at accused's place together with accused 1 being assaulted by the community and then go

and eat at Site C without calling for any help to rescue them if he was concerned as he claimed. Furthermore his testimony at the bail hearing that he left the young men in the hands of the community because the community will have a way of getting answers from them contradicts his testimony that he was concerned about the young men being assaulted.

This version of leaving the young men in the hands of the community whilst they were beaten and bleeding is therefore unconvincing, so is his explanation of how the blood got to be on his t-shirt. The version that he left with the bakkie that had blood on the window and him having blood on his clothing, to go to a public place to eat is also implausible. Accused 4 testified that when a complaint was laid involving a person who had stolen someone else's property, a meeting would be called where the suspect would be interrogated before he was beaten. Therefore beatings did not take place randomly. Clearly if his version were to be believed the young men in this case would not have been beaten up before a meeting was held. The evidence that the young men were beaten before being questioned about the missing TV is at odds with his testimony. The fact that a meeting was not held was confirmed by accused 3's testimony that if a meeting was held she would have known as the house where the meetings were held was in front of her house. The lengthy evidence which accused 4 gave in relation

to the process followed by the committee when a culprit is apprehended does not assist his version regarding the events of 14 March 2012.

There were various contradictions between his evidence in the bail hearing and his evidence in the trial to such an extent that accused 4 apologised and asked for forgiveness when these contradictions were put to him by Mr Ntela. He was accused 2 at the bail hearing. At the end he gave an explanation for these contradictions by saying that it happened a long time ago. He was frightened and scared at the time. He could not remember everything and he was beaten to a pulp.

The first issue to be highlighted is that at the trial he testified that when they were stopped by Mshwele, Mshwele took the front seat and accused 1 sat next to him whilst Mshwele sat by the door. He testified at the bail hearing that accused 1 and all three young men sat at the back of the bakkie. Again he testified in the bail hearing that Mshwele went into the back of the bakkie with the others at accused 1's place and the 'guys' at the back of the bakkie told him at the window saying 'let's go' and when he asked; 'where they were going to' they told him, 'to Makhaya' to the person to whom the items were sold. At the trial he testified that Mshwele gave him directions while sitting at the passenger seat in front.

He also testified in the bail proceedings that when they approached a shack and called a name the community members said 'no there's nobody with that name in this house'. In this court he testified that he did not hear the conversation between the young men, accused 1 and the neighbours when they stopped the vehicle. He overheard them when they were coming back to the vehicle and from Mshwele when he asked him. Furthermore, in his evidence-in-chief he testified that he heard that those people were not known by the neighbours but later changed his version under cross-examination to state that in fact the neighbours said those people they were looking for were gone for a long time. He again testified at the bail proceedings that he then asked, that is after coming back from Makhaya, where they were going to and he was told that they were going back to Harare. As he was driving he saw a few people, a group of people standing next to accused 1's house. He stopped the car again on an open space on the field. The community themselves then came to the car, accused 1 tried to explain to them that the items were not there. In this court accused 4 testified that they were on their way to drop the young men where they had picked them up and the road went *via* accused 1's place. As they were about to pass accused 1's place the community members crowded the vehicle such that he was forced to bring it to a standstill. This is a material

contradiction as it goes to the heart of the issues placed before this Court.

He further testified at the bail hearing that after some time as he was busy with a cell phone in the bakkie and when he looked at the back he saw hands with sticks moving up and down. As he was looking he saw blood and blood also spattered on him. In this court he testified that blood got on him because the young men were running to him and accused 1. He further testified at the bail hearing that the spots of blood got through the window to him and onto his right cheek and to the left of his t-shirt. He never mentioned the blood spatter on his cheek in the trial. He further stated at the bail hearing that he went out of the vehicle because he felt the blood. This he did not mention to this Court.

He further testified at the bail hearing that when they drove to accused 1's place the first time he never got off the car and that the bakkie was parked outside at an open field. He did not take note as to who was bleeding but assumed that one of the young men was bleeding. In this court he testified that he noticed that Mshwele was bleeding when he got into the bakkie in front. He stated further at the bail hearing that he told the people please do not assault them; he did not push anyone because they had *kerries* in their hands; they were next to the car when

he spoke to them and he did not go closer to them to stop them.

In this court he testified that he intervened and the boys were running to him and accused 1. He also got beaten because he was intervening and members of the community would pull the young men from him and accused 1. He further stated that he only felt some hit of the *kerries* when he got out of the car whereas he told this Court he got hit because he tried to intervene. He testified further at the bail hearing that he did not see accused 1 pushing anyone he was simply shouting that they must not be assaulted. In this court he testified that both and he and accused 1 intervened and were assaulted in the process.

The different versions noted in the bail hearing and the trial cannot be dismissed as mere shortcomings or minor discrepancies but go to the heart of the issues. Accused 4 clearly tried to distance himself from the events of 14 March 2012 in this court. He painted a picture of being a bystander who simply followed instructions from Mshwele whom he did not know very well and conveniently stayed in the vehicle or did not see who assaulted the young men or what they were saying or for what reasons they were being assaulted. It is very strange for accused 4 not to have asked accused 1 about what was going on. It was also strange not to ask Mshwele about who had assaulted him when he noticed blood on him and to simply

drive as if nothing happened and admiring cars in the process, according to him. This does not make sense.

It is strange that he noticed seven people the first time they had gone to accused 1's place but did not take notice of any person during the assaulting, when they came back the second time. Accused 4 was a member of a development forum in the street committee for two years and he must have known most of the people living in that area. Accused 4 was also very evasive as a witness. He also changed his version several times. He clearly attempted to tailor his evidence to be in line with that of accused 1. His version was therefore not reasonably possibly true and is therefore rejected.

Accused 5 and 6 elected not to testify. It was held in Naude and Another v S 2011(2) All SA 517 (SCA) at para 37 that the court was unlikely to reject credible evidence which an accused has chosen not to deny. In such instances an accused's failure is bound to strengthen the prosecution case. In S v Boesak 2001(1) SACR 1 (CC) at para 24 it was held that:

> "The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused

person chooses to remain silent in the face of such evidence a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."

Having regard to the totality of the evidence the issue that remains for consideration is whether the State proved its case against each of the accused beyond a reasonable doubt. The State's case rests both on direct and circumstantial evidence. There is direct evidence of eyewitnesses regarding events of 14 March 2012, when the bakkie was seen leaving accused 1's place for the last time with the three deceased on the back of the bakkie, who at the time were still alive, injured and bleeding as well as the accused 1, 2, 3, 5 and 6 being on the bakkie with accused 4 driving. With regards to the events that follow thereafter circumstantial reasoning must be applied. Furthermore the doctrine of common purpose is also applicable. In this instance, both the State and defence counsel referred to a well-known decision of R v Blom 1939 (AD) 188 to 203, which established the two cardinal rules of logic which must be satisfied when dealing with inferential reasoning.

The first principle is that the inference sought to be drawn must be consistent with the proved facts. If it is not, the inference

cannot be drawn. The second principle is that the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct. It is also well established that the Court would look at the conspectus of all the evidence presented before it, in order to come to a decision. In S v Reddy and Others 1996(2) SACR 1 (A) at 8c-e Zulman AJA held as follows:

> "In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the often quoted *dictum* if R v Blom 1939 (AD) 188 at 202-203 where reference is made to two cardinal rules of logic which cannot be ignored."

The principles regarding the doctrine of common purpose are settled in our law. In this regard see S v Sefatsa and Others 1988(1) SA 866; S v Mgedezi 1989(1) SA 687 (A) at 705(i) to 706 (b) and Thebus and Another v S 2003(6) SA 505 (CC) at

para 45. Moseneke J warns against the collective approach in the Thebus matter. He urges the trial court to determine the active association in respect of each individual accused and all the facts in relation thereto.

It is therefore imperative to consider the totality of the evidence to determine whether the State proved its case beyond a reasonable doubt against each of the accused.

Starting with the charge relating to the kidnapping of Mphuthumi. Kidnapping is defined as consisting of unlawfully and intentionally depriving a person of liberty of movement. See Jonathan Burchel, Principles of Criminal Law, 3rd Edition, 2005 at page 166. Regarding the alleged kidnapping of Mphuthumi, the Prosecution has not argued exactly what evidence it relies on to suggest that Mphuthumi was unlawfully and intentionally deprived of his freedom of movement whether it was being held inside Nkululeko's shack with the accused's concerned or by being held by his belt or pulled until he freed himself at the vibracrete wall. Whilst removal of a person is usually effected by force, use of force and, duration of the depravation is not necessarily a requirement in proving kidnapping. The time period in which a person is held may in some instances become relevant in distinguishing kidnapping from other cases of assault involving a transient and incidental

seizure of a person for a short period. See Snyman CR Criminal Law Fifth Edition page 481 to 482.

Mphuthumi was able to free himself during the alleged assault. There is some serious doubt by this Court that the evidence before it satisfies the requisite elements to justify a conviction on count 4. The Court's view is that the accused are entitled to the benefit of doubt and the accused are therefore entitled to be acquitted of the charge of kidnapping of Mphuthumi in relation to count 4.

On count 5 of assault with intent to cause grievous bodily harm against Mphuthumi it must be noted that there was no complainant as Mphuthumi died later in 2013 in circumstances not related to this case. Despite that, evidence is overwhelming that accused 1, 2, 3 and 4 were at the Nobanda household and assaulted Mphuthumi with blunt objects. Each of them took part in the assault. There was an issue regarding the charge referring to the evening of 14 March 2012 whereas the evidence led showed that the incident on Mphuthumi occurred in the early hours of the morning. In the indictment the State did not separate the Nobanda incident with the afternoon to evening events.

In terms of section 88 of the Criminal Procedure Act, *'where a*

*charge is defective for want of an essential ingredient of the relevant offence, the defect shall unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred'.* In view of the provisions of section 88, the defect pointed out has in the Court's view, been cured by evidence. Accordingly, there should be no prejudice on the accused if the Court convicts on what is borne out by the evidence, which is not materially different from what they are charged with.

The second important issue raised was that there was no medical evidence to support the charge of assault on Mphuthumi. There was, however, evidence adduced by the State witnesses that Mphuthumi was injured, bleeding and had a broken arm after this incident. Despite the absence of medical evidence with regard to injuries sustained by Mphuthumi, the Court is of the view that the State proved beyond reasonable doubt that he was assaulted by accused 1, 2, 3 and 4 with the intent to do grievous bodily harm.

The Court will then deal with the murder counts. In respect of the murder counts 6, 7 and 8 the issue for determination is whether the evidence establishes the accused's guilt beyond a reasonable doubt. It is common cause that Luxolo and Mabhuti died of multiple injuries and Mshwele of a head injury and

consequences thereof. Dr Anthony's testimony in relation to Luxolo was that his hands were tied with a wire around the back. Remnants of material which appeared to be burnt plastic were noted on the body and evidence of superficial burn wounds was noted on the wrists, back and arms. Various and extensive abrasions, lacerations and contusions were found all over the body and scalp area. Extensive haemorrhage was noted into the soft tissue of the chest, extremities and buttocks.

Insofar as Mabhuti is concerned, multiple focal abrasions and lacerations were found all over his body and there was, amongst others, extensive haemorrhage noted into the soft tissue of both upper legs. With regard to Mshwele, chief post-mortem findings were, *inter alia,* intensive brain injuries and had collapsed lungs. He also had multiple abrasions, lacerations and contusions all over his body. The evidence of Dr Anthony was overwhelming that these three deceased were tortured all over their bodies, over a period of time with blunt objects which ultimately caused their death. If one has regard to the findings of Dr Anthony and the evidence of the State witnesses of tying up with wires and ropes, the inescapable conclusion is that all three deceased were subjected to severe and sustained assault whilst defenceless.

According to Dr Anthony the fact that the deceased were left at

Macassar in that condition meant that they were exposed and loss of blood further contributed to their eventual death. The evidence of the eyewitnesses clearly established that the assault on the three deceased was over an extended period of time on that day. The evidence regarding injury to the heads of the deceased show that further assaults must have taken place after the bakkie left the bridge. The evidence regarding the injury to Luxolo's left eye seen by Morris in the garage of accused 1 was also noted during the post-mortem by Dr Anthony. Furthermore, post-mortem found that he was tied up with wires around his wrists, which coincides with the evidence of Lindelwa and Morris that the victims were tied with wires, amongst others, at accused 1's garage.

The evidence by Nomthunzi regarding Mshwele being beaten very hard on the head ties up with the cause of death reflected in his post-mortem report. It is further evident that the young men were also assaulted in Macassar because broken sticks and stones were found next to their bodies. In the Court's view, there are a number of parallels between the condition in which the bodies were found in Macassar, including objects found next or on the bodies and the events that took place during the afternoon to evening of 14 March 2012. The pieces of evidence seem to complete a story that runs like a chain of events from the early morning of 14 March 2012 to the evening ending with

the bodies being found at Macassar Sand Dunes.

The first one is that the witnesses who testified about the assault on Luxolo and Mshwele in the garage testified that the victims were tied up, *inter alia*, with wires on the wrists as the Court has already mentioned. One of the bodies found on the scene had wires around the wrists according to the witnesses who were at the scene in Macassar and identified the bodies. It is reasonable to conclude that sticks that were found on the scene at Macassar were used to assault the three deceased. Some of the wooden sticks found on the scene next to the bodies in Macassar were broken and bloodied according to the witnesses who were at the scene where the bodies were found.

The third parallel is that the witnesses saw assaults on Luxolo and Mshwele in the garage with sticks and iron pipes being used. One of the witnesses even mentioned that Mshwele was being assaulted very badly on his head. As the Court has already stated, according to the post-mortem report Mshwele died of a head injury and consequences thereof. It is clear that the victims were injured whilst on the bakkie as they were seen red with blood running from their heads when the bakkie came back to accused 1's place from Endlovini. The evidence that Mabhuti was also assaulted at his home early in the morning cannot be ignored.

At the scene the bodies were found with bruises all over, which was consistent with sustained assaults according to Koko and Mkosana and all other witnesses who saw the deceased's bodies at Macassar and at the mortuary. Dr Anthony confirmed a sustained assault on the deceased by blunt objects. On the whole the State witnesses gave a satisfactory account of the events. They did not appear to have fashioned their evidence to be identical even though some of them were related. It is furthermore accepted that Morris' evidence as a section 204 witness was to be treated with caution. His evidence however was corroborated by other State witnesses in a number of material respects. The mosaic of the body of the evidence being the direct evidence by the eyewitnesses before the bakkie left on the last trip and the formal evidence of when and after the bodies were found in Macassar viewed together seemed to complete the picture.

The role that each of the accused played before the bakkie left for the second time was outlined by the eyewitnesses. The role pertaining to each of the accused before the bakkie left is as follows: (as the Court has already mentioned, the events that followed thereafter require inferential reasoning). Starting with accused 1; the accused was seen by the witnesses at the Matinise house assaulting Mabhuti. Then he captured Mshwele

and Luxolo and took them to his garage. He tied them up with ropes and wires and assaulted them with sticks and then loaded them onto his bakkie. He was on the bakkie and present when Mabhuti was loaded at the bridge and he was seen tying up Mabhuti as well. Again accused 1 was heard uttering words to the effect that he was going to assault and injure the young men if the TV was not found and/or whoever was not going to do the job must get off the bakkie.

Furthermore, he was there on the bakkie when it came back to his place and when the three young men were seen red with blood or with blood flowing from their heads. The bakkie left for the last time with accused 1 and others, with the young men still alive and badly assaulted and that was the last time they were seen until accused 1 was seen washing the bakkie some hours later that evening at his place. A few hours later the young men were found dead. Even though none of the State witnesses saw the young men being driven to Macassar by any of the accused or being assaulted there, the only reasonable inference that can be drawn from the proven facts, which have been outlined already, is that accused 1 was at Macassar and participated in the further assault of the three young men and in fact left the three victims to die in Macassar. The possibility that anyone else other than those that were involved in the events from the afternoon to the evening would have assaulted, injured the

young men and transported them to Macassar in the condition they were, is remote.

The links between the events of the day and the discovery of the bodies in Macassar as outlined by the Court are so striking and glaring to the point that there can be no other reasonable conclusion than that the perpetrators of the assault were those who held the young men against their will on the bakkie and left with them for the last trip. In view of the evidence it is clear that accused 1's involvement and actions from the beginning of the events until the bodies of the young men were discovered at Macassar runs like a golden thread through the events of this case. He was there throughout the commission of the crimes at all times and was the conductor of the affairs of that day.

Evidently he was fully aware of the kidnapping and assault on the victims. He did not only intend to make common cause but was actually leading the assault and the kidnapping of the victims. He manifested the common cause by apprehending, tying, assaulting, kept them against their will and loading them on the bakkie and by being on the bakkie and later dumping the deceased at Macassar. The evidence given by Mpontshane also cannot be ignored that when accused 1 was asked about the boys that were allegedly assaulted by him he responded that they ran to the direction of Macassar. In addition thereto the

warning statement which the Court ruled to be admissible placed accused 1 on the scene in Macassar.

Finally, accused 1 must have subjectively foreseen the possibility of the death of the three young men ensuing from his conduct and must have reconciled himself with that possibility because after the brutal assaults and blood loss he left them unattended in an open secluded bushy area where chances of being rescued or found were remote. On the conspectus of all the evidence this Court is satisfied that the State proved accused 1's guilt beyond a reasonable doubt on counts 6, 7 and 8.

In respect of accused 2 the evidence shows that without a doubt he was on the bakkie when it left accused 1's place the last time. Most importantly DNA belonging to two of the deceased was found on his takkies and he was seen by Lindelwa washing the bakkie with accused 1 later that evening. By being on the bakkie accused 2 must have been aware of the assault and the kidnapping of the victims. He made common cause with the actions of the others by being on the bakkie during the last trip. He was not seen assaulting any of the deceased at any stage nor was he seen participating in the tying, capturing or loading of the deceased on the bakkie.

However, he went on the bakkie when the purpose at that stage was clearly not to go and find the TV anymore. He therefore actively manifested his active participation by getting and staying on the bakkie that had bleeding and injured young men on it. The accused chose to distance himself from the incident by stating that he was not there which is found to be false. Accused 2 was an unreliable witness. Accused 2 also participated in the assault of Mabhuti in early morning hours of 14 March 2012. This was indicative amongst others of his association with the events early on.

Getting on the bakkie was a further manifestation of his involvement with other accused during the last trip. An inference can be drawn that by being on the bakkie he must have either been a perpetrator to the further assaults on the victims or must have been aware of the assault and associated himself with the actions of others involved. Furthermore he must have subjectively foreseen that his actions or that of the others involved would cause the death of the victims and must have reconciled himself with that possibility. Accordingly the Court's view is that his individual involvement manifested an active association with the acts of the other accused which caused the death of the deceased and the accused is also found guilty of counts 6, 7 and 8.

Dealing with accused 3, the State witnesses were able to show that accused 3 was present at the garage of accused 1 when Mshwele and Luxolo were tied up. She in fact not only assisted with the apprehension of Luxolo but participated in the assault of the two victims by beating them with an iron pipe. It can never be argued that beating a human being with a hard blunt metal object is not dangerous. Accused 3 was also on the bakkie and was present when Mabhuti was captured and loaded later at the bridge. When words were uttered by accused 1 to the effect that anyone who was not going to do the job, indicating assault on the victims, must get off the bakkie she did not get off the bakkie but remained.

Further when the bakkie came back at accused 1's place the second time she never got off. When the bakkie came back to accused 1's place from Endlovini she never got off. When the three victims were seen red with blood after the trip to Endlovini she was there and she was also seen on the bakkie when the bakkie departed the last time. She was also heard by Nomthumzi although she denied it, telling someone at Kwa 10 shop that they burned the children and left them at Makhaza. Although the witness referred to Makhaza it was clear from the evidence that she must have been referring to Macassar. This evidence is reliable because it is in accordance with the medical evidence of Dr Anthony that one of the deceased had remnants

of burnt plastic on the body.

Furthermore, Mabhuti's brother Sandlana testified that when he observed the bodies in mortuary he noticed that Mabhuti's feet had signs that they were burnt and were also black underneath because of burn wounds. Accused 3 actively participated from the beginning by being at the Nobanda's house in the early hours of the morning. The overwhelming evidence of the State was that accused 3 was there and actively participated in the assault. She was on the bakkie at all times and especially on the last trip when it was clear that the accused that remained on the bakkie were on a mission which was not to find the TV anymore as that had been done.

Her actions from the outset and throughout the day showed that she intended to make common cause with others in the commission of the crimes. She should have foreseen the possibility of the death of these young men due to being beaten over a long period all over their bodies, more so, with an iron pipe and being left at Macassar with a remote possibility of being found and rescued. She indeed reconciled herself with the possibility of their death when leaving them seriously injured, bleeding and exposed in a secluded bushy area. The warning statement pertaining to accused 3 that the Court ruled to be admissible also places her in Macassar. From the

conspectus of the evidence, the Court is of the view that, for the reasons mentioned the accused is guilty of counts 6, 7 and 8.

In regard to accused 4 he was seen at accused 1's garage assisting with the tying up. One witness testified that accused 4 also participated in the assault and another one testified that accused 4 helped with the loading of Luxolo and Mshwele on the bakkie. Apart from this evidence by the State witnesses, there is consistent evidence that accused 4 was the driver of the bakkie throughout the events of the day. In light of the evidence, the Court is of the view that he was at all times, aware of the fact that the victims were apprehended and beaten because of the missing TV of accused 1. He intended to make common purpose with those who were actually perpetrating the assault and manifested his sharing of the common purpose by first being at Matinise house with accused 1 and 2 and assaulting Mabhuti and by being at accused 1's place assisting with the activities in the garage, loading the victims and agreeing to drive the bakkie throughout events with the badly assaulted victims. Furthermore it was not disputed that there was blood on accused 4's t-shirt that Gojo had asked him to hand over when he arrested him.

DNA analysis was conducted on the t-shirt together with the training shoes that came from Harare Police Station and the

blood on it was found to be that of Mabhuti. Accused 4's version on how the blood got to be on his t-shirt has been rejected by this Court. Accused 4 was either directly involved on the further assaults of the victims after the bakkie left for the last time or was aware as to who was involved in the perpetrating of the assault on the victims before they were eventually found dead. He must have subjectively foreseen the possibility that the sustained assaults by the perpetrators on the victims could lead to their deaths and indeed reconciled himself with that possibility. In addition to that the warning statement that was ruled by the Court to be admissible places accused 4 on the scene in Macassar. The accused is found guilty of counts 6, 7 and 8.

Dealing with accused 5. The accused did not testify. The evidence of the State witnesses and accused 5's warning statement as well as a statement which was taken as a confession but appeared to be of exculpatory nature painted a bleak picture regarding the events. The evidence against accused 5 is that he was at accused 1's garage and he helped with the tying and loading of the victims. In his own statements he admitted that he was there right from the outset and assisted in the looking for the TV. He was at accused 1's garage and was asked to help with the tying. He admitted that he was on the bakkie on both trips.

According to the State witnesses he remained on the bakkie when accused 1 stated that those who were not going to do the job must get off the bakkie. The State's case regarding accused 5's participation in the tying and loading of the victims on the bakkie and his remaining on the bakkie despite the words uttered by accused 1 when others got off is credible and there is no reason for the Court to reject it. Accused 5 was on the bakkie when the deceased were seen bleeding profusely from their heads from Endlovini. He admitted being on the bakkie on the last trip and he placed himself on the scene in Macassar.

The bakkie came back to accused 1's place and there was a further opportunity for accused 5 to get off but he remained on the bakkie still when it was clear that the search for the TV had been done. Clearly the reason for the last trip was clearly not to look for the TV anymore. Accused 5 associated himself with the actions of the others by being on the bakkie that had young men assaulted and bleeding. It was argued on his behalf that the evidence before the Court showed that he was just an onlooker. In the Court's view this is not supported by the evidence.

The inescapable conclusion is that he actually associated himself with the assaults and subsequent deaths of the

deceased by being on the bakkie when it left for the second trip. He must have been aware of the assaults on the victims and associated himself with the actions of others involved. He must have subjectively foreseen the possibility that the sustained assaults by the perpetrators on the three victims could lead to their deaths and indeed reconciled himself with that possibility. This Court is satisfied that he is guilty of counts 6, 7 and 8.

Accused 6 also elected not to testify. He was seen on the bakkie and according to the State witnesses he remained on the bakkie after accused 1's utterances that the Court has already referred to. There is evidence that he was part of the people that helped to apprehend Mabhuti at the bridge. He was also heard by Lindelwa making some utterances that 'I'll hit you bra's until you shit'. These utterances are not taken in isolation but with other evidence involved. According to the State witnesses, he went to Endlovini with the bakkie and was on the bakkie when the bakkie came back from Endlovini when the three victims were seen red with blood. He was seen by Morris on the second trip when the bakkie left for the second time.

According to the State witnesses he remained on the bakkie. The evidence of the State witnesses is credible and there is no reason not to accept it. The accused's failure to testify strengthens the case of the State regarding his involvement.

Accused 6 was at the garage and was aware of the assault and the kidnapping of Mshwele and Luxolo. He got on the bakkie and he made common cause with the actions of other accused by helping to apprehend Mabhuti at the bridge so as to be loaded on the bakkie and he did not get off the bakkie when others got off when it became clear that there was an expectation that those that remained would do the job of the assault on the victim.

He left with the bakkie the second time from accused 1's house and never got off when it was clear that the remaining accused were on a mission which was no longer to look for the missing TV. He must have subjectively foreseen the possibility that the sustained assaults by the perpetrators on the three victims could lead to their deaths and indeed reconciled himself with that possibility. The only reasonable inference to be drawn is that accused 6 associated himself with the assault on the deceased which led to their ultimate death. He is also found guilty of counts 6, 7 and 8.

Although the evidence regarding the kidnapping of Luxolo, Mshwele and Mabhuti is linked to the charges of murder, the two offences should be seen as separate from each other. On the charges of kidnapping there were a number of eyewitnesses regarding the events or parts of the events until the bakkie left

for the second time. Evidence of the State eyewitnesses is overwhelming that Luxolo and Mshwele were captured, kept and tied up at the garage of accused 1 against their will and then loaded on the bakkie. Mabhuti was then captured later also tied and also loaded on the bakkie and that was clearly against their will. They were deprived of their freedom for a long time from afternoon till evening. From this evidence, the Court is satisfied that the State proved beyond a reasonable doubt all the elements of kidnapping against all the accused and they are accordingly all found guilty of kidnapping on counts 1, 2 and 3.

The Khayelitsha Commission Report was mentioned by accused 5's counsel. The Court does take judicial notice that the report exists however, it is of the view that that report is irrelevant on the question of whether the accused should be convicted of the crimes they are charged with as the inefficiency of the police is not a justification for any person to take the law into their own hands. In conclusion the Court finds as follows:

**ACCUSED 1 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNT 5 IN RESPECT OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM; AND ON COUNTS 6, 7, AND 8 IN RESPECT OF MURDER; AND IS ACQUITTED ON COUNT 4 OF KIDNAPPING.**

**ACCUSED 2 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNT 5 IN RESPECT OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM; AND ON COUNTS 6, 7 AND 8 IN RESPECT OF MURDER; AND IS ACQUITTED ON COUNT 4 OF KIDNAPPING.**

**ACCUSED 3 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNT 5 IN RESPECT OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM; AND ON COUNTS 6, 7 AND 8 IN RESPECT OF MURDER; AND IS ACQUITTED ON COUNT 4 OF KIDNAPPING.**

**ACCUSED 4 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNT 5 IN RESPECT OF ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM; AND ON COUNTS 6, 7 AND 8 IN RESPECT OF MURDER; AND IS ACQUITTED ON COUNT 4 OF KIDNAPPING.**

**ACCUSED 5 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNTS 6, 7 AND 8 IN RESPECT OF MURDER.**

**ACCUSED 6 IS FOUND GUILTY ON COUNTS 1, 2 AND 3 IN RESPECT OF KIDNAPPINGS; AND ON COUNTS 6, 7 AND 8 IN RESPECT OF MURDER.**

**WITH REGARD TO MORRIS MAXELA WHO WAS A SECTION 204 WITNESS ON BEHALF OF THE STATE THE COURT EVALUATED THE QUALITY OF HIS EVIDENCE AND THE COURT IS GENERALLY SATISFIED WITH THE MANNER IN WHICH HE ANSWERED QUESTIONS AND THEREFORE HE IS DISCHARGED FROM PROSECUTION.**

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BOQWANA, J