IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

[REPORTABLE]

CASE NO: SS06/2019

DATE: 2019/12/11

In the matter between

THE STATE

and

MAWANDA MAKHALA Accused 1

VELILE WAXA Accused 2

VELA PATRICK DUMILE Accused 3

JUDGMENT

HENNEY, J: The deceased Mr Mzukize Victor Molosi was the chairperson of the school governing body of Concordia High School in Knysna. He was also a councillor for the African National Congress ("the ANC") representing Ward 8 which forms part of the Concordia township in the Knysna Municipal Council. He was also the ANC's mayoral candidate for the Knysna Municipality for the 2016 municipal elections.

On 23 July 2018 at about 18h30, he attended a school governing body meeting at Concordia High School. When the meeting adjourned at 20h30, he got a lift with another governing body member who dropped him off at a church near his home. While walking towards his home he was fatally shot in front of his home. Shortly after the shooting a person was seen running away from the scene. The cause of death was gunshot wounds of the left chest and brain.

10 Shortly after the murder was committed Captain Quinn ("Quinn") was appointed as investigating officer in this case and he was assisted by Sergeant Petros ("Petros"). Later in that same week a task team was appointed by the South African Police Services to investigate this murder, which also comprised of detectives from the Provincial Task Team in Cape Town. One of these officers was Sergeant Wilson ("Wilson") who ultimately took charge of the investigation of this case and he was based in Cape Town.

20 Petros during the course of the week after the death of the deceased received information that accused 1 was seen in the company of two unknown persons over that weekend prior to the murder of the deceased at Pop Inn Tavern in Concordia, which is situated not far from the place where the deceased was killed.

According to this information, these people were seen driving around with a white Renault Stepway with registration number CA 933 291. The information he also had at that stage was that one of the persons that was in the company of accused 1 over that weekend was his brother who lived in Cape Town.

Petros was tasked to take a statement from accused 1 whilst Wilson was tasked to trace accused 1's brother. On 2 August 2018 Petros took a statement from accused 1, who at that stage was not a suspect in the murder investigation.

In this statement, which was handed up as Exhibit A1 in these proceedings, he gave an explanation to Petros about these two unknown people and what they were doing in the area during the weekend prior to the murder of the deceased.

The court will at a later stage deal with the contents of the statement. Before that, however, on 1 August Wilson managed to get hold of accused 1's brother, who became known as Luzuko Makhala ("Luzuko").It is also important to note for any person who would be reading this record that this person was also referred to as Jomo.

Luzuko also gave an explanation to Wilson confirming that he was in the area during the weekend before the murder of the

deceased and how it came about that he and the unknown person came to visit the area. The court will also deal with this explanation given to Wilson at a later stage.

Upon further investigation Wilson, based on evidence he had collected, found that the initial explanation given by Luzuko at that stage to a colonel either attached to the unit of Wilson or attached to the Langa police station, was not correct and when he confronted him he gave a different explanation which was later written down in a comprehensive statement, the Section 204 of the Criminal Procedure Act 51 of 1977 ("the CPA") statement made to Colonel Ngxaki ("Ngaxaki").

The statement was made during the evening of 13 August 2018 and the morning of 14 August 2018. In the statement this witness implicated himself, accused 1, accused 2 and accused 3 in the conspiracy to murder the deceased as well as the murder of the deceased. This statement was also admitted into evidence as Exhibit G1, which forms a pivotal part of the state's case in these proceedings together with another statement, Exhibit G2 made by this witness. This court will at a later stage deal in detail with these two statements.

As a result of this statement made by the witness Luzuko accused 1, 2 and 3 were arrested. The three accused were

thereafter arraigned before the High Court sitting at Knysna on the charges as set out in the indictment, being a charge of murder, alternatively conspiracy to commit murder and possession of a firearm and ammunition.

All three accused pleaded not guilty to these charges and denied any involvement either in the conspiracy to murder the deceased or in the murder of the deceased.

I will deal now with a summary of the evidence. A lot of evidence was presented in these proceedings and the court will not repeat or give a summary of all of it. Most of the evidence was not disputed, especially those relating to the evidence about the cause of death, the post mortem that was conducted on the deceased, the findings of the pathologist and the ballistic evidence about the ammunition that was used to kill the deceased.

A large portion of the evidence was given by Warrant Officer Van Niekerk, a cell phone analyst attached to the South African Police Services, about the cell phone activity between the various accused and especially between accused 2 and Luzuko prior to the weekend of 23 July 2018 and thereafter. That was also not disputed.

The accused also made various admissions in terms of the provisions of Section 220 of the CPA. Some evidence also as the trial progressed became common cause and was not disputed by the accused. The court will not deal with this evidence in detail, will give a summary of it and will only refer to it when necessary in the judgment.

A great deal of the court's proceedings were also taken up by the prosecutor's application to declare the witness Luzuko a hostile witness in terms of the provisions of Section 190(2) of the CPA and his credibility as a witness, which forms an important part of the evidence in this case. This was after he recanted the two statements made in terms of the provisions of Section 204 of the CPA in which he implicated himself and all three accused in the commission of the offence.

Some of the evidence presented was only relevant to some of the accused and others not. In this regard I want to refer to the evidence in respect of the identification of accused 3 and the evidence in respect of the political activity of accused 2 and the deceased.

The further evidence about collateral issues such as accused 2 and the deceased's political activities will only be referred to where necessary, also in the light of what was argued

yesterday. I will not go into that in any detail.

During this judgment the evidence of the following witness who testified for the state is of importance, Luzuko , Ngxaki, Sergeant Mdokwana ("Mdokwana"), Wilson, Petros, Quinn, Nozuko Thelma Kamini, Zamabuntu Blaai, Dumisani Molosi, Nomande Molosi, Warrant Officer Jacoba Bosman [who later became Captain], and also her husband, a Captain Bosman, attached to the fingerprint unit in Mossel Bay. The evidence of Xolile Mpela and Monica Neku, that worked at the Pop In Tavern, and to which the court will refer to a later stage. I will not refer to the evidence of all these witnesses in detail, I will just where necessary give a brief summary of it.

Apart from the oral evidence various other pieces of documentary evidence, which included documentary evidence about the cell phone activity of the cell phones used by the various accused were handed up as well as photographs of the scene of the crime and the area of Concordia when the crime was committed. As said earlier the most important pieces of documentary evidence were the statements that were made by the witness Luzuko to Ngxaki and Mdokwana.

All of the accused testified in their own defence and accused 3 also called Mr Philo Beukes as a witness.

I will now furthermore deal with the evidence as far as possible in a chronological manner. The most important piece of evidence in this case was the statements Luzuko made to Ngxaki, which I will refer to as the "first statement" and to Mdokwana, which I will refer to as the "second statement" which this witness during his evidence in court without the prosecutor being made aware of it prior to him giving evidence, recanted and it was for this reason why the prosecutor requested this court to have this witness declared a hostile witness. This was done in order for the prosecution, at a later stage to rely independently only on the statements of this witness as evidence to be admitted as hearsay in terms of the provisions of Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988("the LEAA").

I will now deal with the evidence of Luzuko, which he gave in court and immediately thereafter deal with the two statements he made to the police. He testified that he used to stay in Knysna during the period 2004 and 2005 and he stayed with his brother accused 1. He left the area in 2009 and moved to Cape Town and before that he used to stay in the Eastern Cape.

He further stated that he knows the deceased because they played soccer together. He also knows accused 2. He got to

know accused 2 through his brother accused 1 because his brother at some stage used to work for accused 2. He furthermore testified that accused 3 is not from Knysna but from Cape Town and is a friend of his.

During the June school holidays in 2018, he travelled from the Eastern Cape to Cape Town and received a call from accused 1 on his way back to Cape Town. He stopped over at accused 1's place in Knysna who told him that he must come to Knysna because he wanted to see him in connection with his shack he owned in Knysna. He enquired from accused 1 who the ward councillor is for the area in which the shack was situated so that he can speak to him regarding that.

He eventually came to Knysna and he and accused 1 thereafter left for Cape Town whereafter he hitchhiked a lift back to Knysna. Thereafter he called accused 1 and asked him if he could lend him R5 000 which he needed to fix his motor vehicle whereupon accused 1 told him that he did not have any money but there is a person who usually assists him when he is in need of money and that person is accused 2.

Accused 1 then told him that he will enquire from accused 2 whether he will be able to assist him with money. Accused 1 then gave the telephone number of accused 2 to him. He

called accused 2 and asked him whether he could give him R5 000. Accused 2 said he was only able to give him R1 000. Accused 2 informed him that he will send him the money via the Shoprite Money Market on the following day.

He received the further R3 000 from his sister, which he used to fix his car. Sometime thereafter he came back to Knysna and he called accused 1 and informed him that he would be coming to Knysna to attend to the affairs of his house. Accused 3 accompanied him on this trip.

On 22 July 2018, he and accused 3 then proceeded to drive to Knysna and when they reached Caledon he requested accused 3 to drive further. When they reached Swellendam, however, accused 3 saw a traffic officer and realised that he did not have his driving licence with him. He then proceeded to drive from Swellendam and stopped at a garage in Mossel Bay where he met a lady friend.

After he made arrangements with this lady friend to also come to Knysna they then proceeded to travel further to Knysna. When they arrived in Knysna they went straight to accused 2's office and found that he was not there. It was a shipping container that was converted into an office.

He called accused 2 who called him back at a later stage. They waited there at the office until accused 2 came. He spoke to accused 2 about his house but found that accused 2 was not of great assistance and he referred him to someone in the street committee. During the time when he was talking to accused 2 accused 3 was sitting in the car and he did not introduce accused 2 to accused 3.

He further testified that he met accused 2 on a previous occasion when accused 2 was in the company of his brother accused 1. After meeting accused 2, he and accused 3 went to Pop Inn Tavern.

Accused 1 joined them at the tavern and they spent the rest of the afternoon there. At some stage during the course of the day he went to meet this lady from Mossel Bay. He and accused 3 then slept over in Knysna on the evening of 22 July 2018, after he made arrangements for them to sleep at different places. Accused 1 went to sleep at his girlfriend's place.

The whole of the next day, which was 23 July 2018, he spent in Knysna and he was drinking alcohol continuously during the course of the day. During the course of the evening he went to Oudtshoorn where he spent the night and accused 3 once

again spent the night in Knysna.

The next morning on 24 July 2018 they travelled back to Cape Town. Sometime thereafter he received a call from a police officer who wanted him to come and see him at the Langa police station in Cape Town. He went to the police station where he met a colonel who said that the police said they were not looking for him but for a person he gave a lift and he said that he did not know who it was.

The police further stated that they were looking for someone who he gave a lift that was involved in the shooting in Knysna, whereupon he replied that he does not know the person because there is a lot of people he gave a lift to. The police did not ask him any further questions and said that they will come back if they needed any more information.

About a week thereafter he met the same colonel with some other police officers at the same police station. Wilson was also one of the police officers that accompanied the colonel. They once again enquired about the person that they were looking for earlier. They also proceeded to search him and they also went to his house and conducted a search of his house.

Eventually they took him to accused 3's house because they were able to trace him through his cell phone. He says he eventually made his first statement and they said that they were not looking for him but for the person that shot someone in Knysna as well as the person that was the middleman. They told him that they know who did it, but they were looking for the person that was travelling with him.

He realised at that stage that he was in trouble and that there was no way out for him and knowing that the people that are attached to the police Organised Crime Unit would beat up a person he made his first statement, as he put it, "in the manner he did". He was asked questions and was led by the police into giving specific answers.

Throughout his interview with the police they had knobkerries with them and they threatened to assault him whereupon he told them what he thought would satisfy them. The statement was not sworn or signed by him.

During his evidence this witness was taken through each paragraph of his statement and confirmed which paragraph that was written down by Ngxaki was correct and which paragraph he disagreed with. At a later stage I will deal more fully with the contents of both statements. I will just at this

stage give a brief summary of the relevant contents of the first statement and his reaction thereto.

In the first statement he made on the evening of 13 August 2018 and the morning of 14 August 2018, he implicates himself as well as the other accused as co-conspirators who formed a common purpose in the form of a prior agreement based on the instructions of accused 2 to kill the deceased, which he denies. Although he does not deny everything that was written down by the police, he denied that he was involved in the planning and conspiracy to commit the murder of the deceased after he was informed by accused 1 that accused 2 was looking for somebody that can kill the deceased as written down in the statement.

In particular, he denies that he indeed said to the police that he said to accused 1 that he knows a person which later emerged to be accused 3 who had been used by taxi owners in Cape Town as a hit man to kill other taxi owners. He further denied that he indeed recruited accused 3 on behalf of accused 2 to kill the deceased. He furthermore denied that he had telephoned accused 1 and accused 2 after he recruited accused 3. And that it was for that specific purpose, that accused 2 had sent him the amount of R1 000 to travel to Knysna with accused 3. He says that he met accused 2 at his

office, but accused 3 remained behind in his vehicle and he (Accused 3) was never in their company. He alone had a meeting with accused 2 as the municipal councillor for the area about the electrification of his shack in Knysna.

The version that is contained in the statement about him saying to the police that he and accused 3 met accused 2 to discuss the killing of the deceased is not true and was placed in the statement by the police. He further denies that in this meeting, which according to the statement he had with accused 2 and 3, accused 3 had told accused 2 that it will cost R80 000 to kill the deceased. And that accused 2 in reply to this said that the amount is too much and that he wanted to negotiate for a lesser amount.

He also denies that accused 3, after purportedly making a phone call to someone, came back and said that they can do the job for R50 000. It is also not true that he told the police that in reaction to this accused 2 told them that he only brought R10 000 and accused 3 in reaction to that requested to accused 2 to arrange an additional R5 000 to make the amount R15 000.

He further denies that after they had a meeting with accused 2 and while they were at Pop Inn Tavern accused 2 called him

and informed him that he and accused 3 should come fetch the money for the killing. He also denies that in reaction to this he said that they should rather wait for accused 3 to first kill the deceased before the money is paid over. He furthermore denied that he also said to the police that accused 1 thereafter took accused 3 to the address of the deceased to show where the deceased stays and that they later came back to the tavern whereupon accused 3 confirmed to him that he had seen the address.

This witness in his evidence also denied that he told the police that accused 3 thereafter on several occasions went to verify the address where the deceased stayed. He furthermore denied that accused 3 at a certain stage came to him and told him that the vehicle of the deceased was not at his residence. He also denies that accused 3 furthermore told him that he wanted to know from the wife of the deceased where he was.

This witness also denies that he told the police that accused 3 told him that upon asking the wife of the deceased she told him that he attended a meeting at the school that is not far from home. This witness furthermore denied that he at some point could see that the meeting of the deceased had come to an end when he saw the people coming from the meeting.

He also said that he never told the police at that stage that accused 3 had already taken up a position at the place of the deceased. He also never said to the police that shortly thereafter, he heard three gunshots going off and that he knew at that stage that accused 3 was shooting the deceased. He also did not tell the police that he knew it was accused 3 at that stage because he saw that he had a revolver in his possession.

He furthermore denied that he told the police that shortly thereafter accused 3 called him and that he ignored these calls because he was with Sandile Steadman. And at that time he did not want to communicate with accused 3 while he was in the company of this person. The witness also said that it is not true that he told the police that thereafter when he and accused 3 was alone, accused 3 told him that he shot and killed the deceased.

He furthermore confirmed as correct that he said in the statement that he left accused 3 to sleep at the house of one of his friends whereafter he went to Oudtshoorn. He furthermore denies that, the next morning, 24 July 2018, he was called by accused 2 who told him to come and get the money. He also denies that he said in reaction to this that his brother accused 1, would be coming to fetch the money. It is

also not true, as recorded in the statement, that his brother indeed went to fetch the money and brought the money to accused 3 who proceeded to count it. It is also not true, as contained in the statement, that accused 3 wanted to find out from him how much he should be paying for the petrol and that he in reaction to that told accused 3 that there was no need because he in any event had to come see his brother.

He also denied that accused 3 gave him R2 000. It is also not true that he told the police that accused 3 promised him that he would be paying the outstanding amount later at the time when they departed from Knysna. Although he confirmed as recorded in the statement that accused 3 and he travelled back to Cape Town, he denies that he, during the trip back to Cape Town, asked accused 3 how he killed the deceased, whereupon accused 3 would have told him that he shot him three times and the last shot was on his head.

Regarding the second statement this witness did not deny that he made second statement to Mdokwana on 17 August 2018, after their return from a trip to Knysna in connection with this case. This witness also disputed the correctness of some of the information that the police said he gave to them, which was written down in the second statement and some of the information as contained in this statement was not disputed by

him. In his evidence he confirmed that he received a call from accused 2 on 18 July 2018 at about one o'clock to tell him that he is going to deposit R1 000 into the Shoprite Money Market account but he denies that he said that this money was for petrol so that they can drive to Knysna with accused 3.

He furthermore confirmed that he indeed went to Shoprite at Langa to draw the money on Friday 20 July 2018. He furthermore confirmed as correct that after he had received the call from accused 2 he was contacted by accused 2 who wanted to know whether he had received the money. He further stated that accused 2 sent him a number and the pin which he should use to draw the money. As mentioned earlier, due to the fact that this witness recanted these two statements the state proceeded to prove that he indeed made the statements to the police by calling Wilson, Ngxaki and Mdokwana in an effort to have this witness declared as a hostile witness.

I have already referred to the evidence of Wilson in the earlier part of this judgment about how he became involved in the investigation of this case. I will now deal with the evidence of Wilson regarding the circumstances under which the witness made a statement and how he traced this witness.

According to Wilson immediately after the commission of the offence they received information from the police Crime Intelligence Unit about strange people that were in the area over the weekend prior to the murder of the deceased. They acted on this information, which led them to accused 1 from whom Petros took a statement. He was trying to find out who the other two persons were that were with accused 1 over that weekend.

On 1 August 2018, he received a phone number from a specific person and they also learnt that this person is a reservist at Langa police station. It was then that they managed to trace Luzuko Makhala and he requested a colonel to have an interview with him. The information that the witness gave to the colonel was given to him and he followed it up. In the meantime Petros obtained a statement from accused 1 and he observed that the information that Luzuko had given to the colonel was the same information that accused 1 had given to Petros. This information was that Luzuko had picked up an unknown man in the Eastern Cape when he came to Knysna over that weekend and they travelled in Renault Stepway motor vehicle with registration number CA933 291.

He furthermore, after Petros had taken the statement from accused 1, also spoke to accused 1 who confirmed what he

had said in his statement, which is that he did not know the person that came with his brother Luzuko because his brother gave this person a lift. He also says he found it strange that Luzuko would give an unknown person a lift and that the person would stay with him in Knysna for the whole time. He then upon further investigation had a look at video footage captured by cameras that were installed along the N2 freeway during that time that was connected to a central system, situated in an office which is situated in Cape Town.

According to him if one would be looking for a specific vehicle with a specific registration number it would be fed into the system and the system would automatically uplift and identify the movement of that specific vehicle on the freeway at specific times and on specific dates. According to him, the cameras would take a photograph of all the cars that would pass it and it would be able to show when and where and at what time that vehicle moved along the N2 freeway. It will take pictures of the vehicle and from the information they received, this vehicle in which this witness was travelling from Heidelberg towards Riversdale on the N2 on 22 July 2018 at 8.39 a.m in the morning, in the direction of Knysna and not from the Eastern Cape towards Knysna as indicated by this witness and accused 1. They were therefore able to establish that they were travelling from Cape Town to Knysna on 22 July

2018.

He furthermore established that when a vehicle enters Knysna there are closed circuit television cameras that monitor vehicles that enter Knysna and he established that this vehicle entered Knysna at 11.32 a.m. on 22 July 2018.

After having obtained this information he went back to Cape Town on 13 August 2018 and contacted the same colonel who initially spoke to Luzuko to once again talk to him and he agreed to speak to the colonel who came to see him at 14h00 that afternoon at Langa police station.

Wilson informed this witness that he is the investigating officer in this matter and asked him once again to repeat what he had previously told the colonel about his trip to Knysna. He once again said that he was travelling from the Eastern Cape towards Cape Town and on his way to Knysna he picked up a person in Port Elizabeth. He furthermore told him that he did not know the name of the person and that he dropped this person in Mew Way in Khayelitsha in Cape Town.

He furthermore specifically asked him what date it was and he said it was on 22 July 2108. Wilson said he furthermore asked him in what vehicle he travelled and he informed him

that he was driving a white Renault Stepway that was his wife's vehicle. He also gave him the registration number of this vehicle. This vehicle was parked outside of the police station and he went to the window and pointed out the vehicle and the registration number he gave to him. It was consistent with the registration number that was on the vehicle.

After that, Wilson confronted him with the information he had, which was that he did not come from the Eastern Cape but he was indeed driving from Cape Town towards the Southern Cape. Wilson then asked him to explain to him what the correct situation was. He then told the colonel that he wanted to apologise to him and he admitted that he was coming from Cape Town and not from the Eastern Cape. Wilson then realised that this witness is implicating himself and he explained his rights to him. Luzuko then said that he wanted to talk and he wants to tell everything.

He thereafter told him about his involvement, that of accused 1 and 3 in this crime. At this stage this witness told him everything and he contacted Advocate Riley at the office of the Director of Public Prosecutions in Cape Town and requested her advice on what to do. He was then told that this witness should be treated as a Section 204 witness and that a statement should be taken from this witness on the grounds

that he would be a Section 204 witness.

At that stage, he requested that a senior officer be utilised to take the section 204 statement from this witness. Ngxaki, who was not attached to their unit, was contacted. He was attached to the Kraaifontein Detective Unit and called out to take down the statement. Wilson says he asked this witness if he knows what a Section 204 statement is and he indicated that he has been a reservist for a long time and he knows what it is.

This witness was taken to the Delft police station where he made the first statement to Ngxaki. During this time when the witness made the statement Wilson testified that he and his colleagues were outside of the police station sitting in a car. He also confiscated the cell phones of this witness. After this witness made a statement they made attempts to get hold of accused 3 and they could not find him at his house.

The following day he received a call from this witness who told him that he spoke to accused 3 and that he would contact him if accused 3 arrived. Later at about 12 o'clock this witness once again contacted him and told him that accused 3 is at the Langa police station and he must meet him there. Upon his arrival at Langa police station he found accused 3 there and

he arrested accused 3. He also confiscated the cell phone of accused 3 and accused 3 was taken to Knysna where he was detained.

When he arrived at Knysna accused 2 was already arrested. He was also later handed the statement this witness made to Mdokwana and the cell phone which this witness gave to him.

When the accused appeared in court for the first time Wilson said he suggested to the prosecutor that no photographs should be taken from the accused in court, that the accused should be kept in the cells and only be brought up after the magistrate had entered the courtroom.

He further testified that steps were taken that no witnesses would be present in the courtroom and the doors were closed. The witnesses Dumisane Malosi and his mother Nomonde Malosi were not at court on that date. The magistrate also made an order that no photographs be taken of the accused and no photographs of the accused were to be distributed on social media.

On 22 August 2018 he arranged for a photo identification parade to be held in respect of accused 3 because the son and the wife of the deceased, mentioned in the previous

paragraph, indicated that someone was at their house to look for the deceased.

In view of this, he deemed it important because reference was also made in the first statement by Luzuko that accused 3 was at the house of the deceased. He further testified that they decided to hold the photo identity parade in terms of the new photo identification system of the South African Police Services. He says that he found it difficult to hold a normal identity parade because in his experience accused persons would usually want to choose with who they want to stand on an identity parade and it was not easy to find people who would volunteer to stand with an accused person at an identity parade.

He further testified that on 20 August 2018 while he was attending one of his cases in the Bellville magistrate's court he was approached by Advocate Ngumane who told him that he is representing accused 3 in the case involving the murder of the councillor of Knysna. Wilson said he then immediately informed him that they are going to hold a photo identity parade with two of the witnesses and this gentleman informed him that there is no need for him to drive from Cape Town to Knysna to attend this identity parade. And he should proceed with the holding of the identity parade.

He furthermore told him that the identity parade would be held on 22 August 2018 because the accused would be appearing in court on 23 August 2018. He also informed Quinn about the fact that accused 3's legal representative would not be attending the identity parade. All the phones of the accused were confiscated and all the information with regard to messages were deleted and the phones were taken to the so-called war room of the police as well as the DPCI, ("the Hawks"), but they were unable to retrieve any information from it. He was in constant contact with Luzuko and he was also present in consultations with him but this witness never informed him that the statements he made were not correct prior to testifying in court.

He furthermore found that the information given to him by a witness that the shooting incident took place at the time when the Generations programme was on SABC TV, which was between 8 o'clock and 8.30 on the evening of 23 July 2018. He furthermore testified that Luzuko made the statement freely and voluntarily and gave his cooperation to police.

Ngxaki, as mentioned earlier, was the police officer that took down the first statement from Luzuko. He testified that he has 25 years' experience of which 22 years was as a detective. He confirmed that on 13 August 2018, he was approached by

Wilson to take a statement from the witness Luzuko and for this purpose he went to the Delft police station. There, he was taken to an office and this witness was brought to him to make a Section 204 statement.

Ngxaki testified that he informed this person about his constitutional rights, which was the right to legal representation, the right to remain silent and the right not to incriminate himself. He first listened to what the person had to say and Luzuko said to him that he did not make a statement before he had come to him. He was by his sound and sober senses and he made the statement to him freely and voluntary.

He started taking down the statement at 21:40 on the evening of 13 August and finished with the statement at 00:50, on the morning of 14 August 2018. They communicated with each other in isiXhosa. After he made the statement, Luzuko said to him that he was satisfied that the statement was recorded correctly and he was further satisfied that the statement sets out an accurate account of the events that he had described. He furthermore told him that he has no complaints with regards to the nature and the manner in which the statement was recorded.

He furthermore testified that Luzuko explained to him what happened and he wrote down exactly what he said to him. According to Ngxaki, Luzuko displayed an element of remorse for being part of the crime that was committed. He further testified in cross-examination that when he was called to take a statement from this witness he was not warned in advance what might happen. He cannot say why Wilson did not want to take down the statement himself. He furthermore explained the provisions of section 204 of the CPA in isiXhosa and Luzuko understood what he explained to him.

After he was finished, he handed the statement over to Wilson and he cannot say what happened to it. Colonel Ngxaki says he does not know anything about the allegations made by Luzuko, which is that he was told by the police what they wanted him to say and he simply repeated that and that the witness was threatened to say what is contained in the statement. Ngxaki testified that the information that the witness gave him came directly from him and he does not know anything about the allegation that knobkerries was present when this witness made the statement.

Mdokwana testified that he is a police officer attached to the Provincial Detective Unit and has 14 years of service. On 14 August 2018 he went to Knysna with the witness Luzuko. He

went with them to Knysna to visit his family and he was going to stay with them in George. He did not come with them to Knysna for an official purpose and the understanding was that he would find his own way back to Cape Town.

On their way to George he changed his mind and he asked whether he could get a lift back home with them. According to Mdokwana, Luzuko travelled with him back to Cape Town on 16 July 2018. While they were travelling from Langa to Knysna they were involved in a conversation and Luzuko explained to him what happened and how it happened, in reference to the crime that was committed. When they travelled back on 16 August he told him that he forgot to tell Ngxaki when he made his initial statement that he received a call from Velile Waxa at about 13h00 on 18 July 2018 who told him that he is going to send him R1 000 so that he can use it as petrol money to drive to Knysna with accused 3.

He furthermore told him that on Friday 20 July 2018 he went to Shoprite at Langa train station to draw R1 000 and he lost the slip but he already approached Shoprite for a duplicate. He also said that Luzuko told him that he received a call from accused 2 who wanted to know whether he had received the money. Luzuko further told him that the phone that he was using he left at his home in Langa.He then asked Luzuko if it is

possible that he could give the phone to him and in reply Luzuko said he could give it to him the next day. He also asked him to give him his contact number.

The next morning between 8 and 9 a.m, they met each other at The Plaza Mall in Nyanga. At that stage there was a robbery taking place in the mall and the witness was not allowed by the Tactical Response Unit of the police to enter the building but with his intervention, Mdokwana says he managed to get the witness into the building where after they went to sit in his vehicle.

Mdokwana then asked whether he is willing to give a statement about what he told him and he agreed. In the vehicle he gave him his Nokia cell phone. He took a statement from the witness and he confirmed the correctness thereof. The state handed the document up as Exhibit G3 during the trial. Mdokwana further testified that he had never seen the first statement this witness made to Ngxaki.

He furthermore understood what this witness said to him during the trip to and from Knysna and that had he already explained who the persons were that were involved. He understood that the money that he was referring to in the statement was the money that accused 2 had paid him for

petrol to take the hit man to Knysna. After that they had contact with each other on several occasions and this witness became a friend of his.

He further testified that Luzuko as recently as three weeks before the date of him giving evidence in court called him. He never complained to him about the statement he made and they never talked about the case, before him giving evidence. He also handed in the cell phone that Luzuko gave to him as evidence and he made a statement to that effect on 19 July 2018.

Petros testified that he is stationed at the Knysna police station and attached to the Detective Unit. He has 15 years of experience. He testified that on 2 August 2018, he took a statement from accused 1, who was not a suspect at that stage, and they communicated in isiXhosa. After he wrote down the statement he read it back to accused 1 and requested him to sign it. The statement was handed in as Exhibit A2 during these proceedings. In the statement accused 1 stated that on 22 July 2018, his brother Luzuko arrived in Concordia. He went outside to his brother's vehicle, which was a Renault Stepway with registration number CA 933 291.

He saw his brother sitting in the driver's seat with another African male sitting in the front passenger seat. Luzuko told him that he was coming from the Eastern Cape, from their parents' house, and that he wants the key of his house because he is going to sleep over. After he gave the keys he asked him who this other person was that was with him and he said it was a person that he picked up at the hiking spot in Port Elizabeth and that the person is going to Cape Town but he is willing to sleep over because he is not in a hurry.

Petros further testified that after accused 1 gave the statement they proceeded to look for other witnesses and in the meantime, Wilson was looking for Luzuko in Cape Town who they eventually managed to get hold of.

On the morning of 14 August 2018 at about 7 a.m. he was contacted by the other members of the investigating team in Cape Town and was told that they managed to speak to Luzuko, who implicated accused 1 and accused 2 in the killing of the deceased and the gentleman that was with Luzuko over that weekend. He was then requested to monitor the movements of accused 1 and 2 whilst the team from Cape Town were on their way to Knysna that evening. He then received information that there was a truck at the house of accused 1 and he was busy loading his furniture onto the

truck.

Petros testified that he rushed to the house of accused 1 and when he was about 50 metres away from his house he observed the truck moving away from his house. He then managed to stop the truck, he went to the truck and he found accused 1 in the truck. He spoke to accused 1 and he wanted to know where he was going to and he said he was taking his furniture to the township. He then informed him that according to their information he is a suspect in the killing of the deceased and he must come with him to the police station so that they could talk. He then had an interview with him before the other detectives from Cape Town arrived.

At that stage he did not arrest him and he was going to have a discussion with him. He also at that stage informed him of his rights and told him that if he found further information that implicates him, he is going to arrest him. He thereafter informed him about his constitutional rights.

His colleagues arrived from Cape Town with the witness Luzuko and accused 3. He furthermore noticed that when accused 3 was arrested he was not limping and was walking like a normal person. He could not notice anything about his arms because he was handcuffed behind his back. He knew

accused 1 before that day by sight and they stayed in the same area. He denies that accused 1 was not sober at the time when he made a statement to him. He furthermore said accused 1 did not appear to him to be confused when he made the statement when it was put to him that accused 1 was confused about the time and date his brother arrived in Knysna.

He furthermore denied during cross-examination by accused 3's attorney that when accused 3 was brought to court that people took photos of him and he further denies that the magistrate did not tell the people not to take photos in court. He further testified that according to his information accused 3 and Luzuko were in the Concordia area but they were in the company of a person who was known in the area, which was accused 1.

He further testified that when he received the information that accused was moving out of the area it was after he was informed that accused 1 was implicated by his brother and he found it very suspicious. He said that he confronted him with this fact and accused 1 told him that he was called by his brother who informed him that the police were on their way to arrest him because his brother had told them everything.

He further testified in cross-examination that accused 1 never told him that the reason he moved out of the area was because the community regarded him as a suspect in the death of the deceased. He furthermore has no knowledge that accused 1 told the head of detectives that he is going to move out of the area because he would have informed him about that fact.

The witness was further adamant that in his consultation with accused 1 he was told by accused 1 that his brother called him to tell him that the police were on their way to arrest him and his brother had told them everything.

Quinn testified that he was part of the initial investigating team and on the evening of 23 July he went to the Knysna Hospital where the deceased was pointed out to him. He observed that the deceased had a gunshot wound on his chest and on his head and he was identified as Victor Molosi. He thereafter went to the murder scene and conducted some further investigation there. He also attended a post mortem examination conducted by Dr Hurst who found a spent cartridge in the body of the deceased, which he sent to the South African Police Services Forensic Laboratory. At that stage he started with the further investigation in this case.

On 14 August he was informed that accused 2 had been implicated in this matter, which caused him to arrest accused 2. He also confiscated his cell phones. Later that evening Wilson arrived from Cape Town with accused 3 and he was requested to take a warning statement from accused 3. He wanted to know from accused 3 if they needed an interpreter and he said he understands English. He explained his constitutional rights to him and he wanted to know whether he wanted to say anything about the murder of the deceased.

He furthermore informed him that he wants to ask him some questions, to which he agreed. He asked him where was on 23 July 2018 and he said that he went to Knysna but he cannot remember the date. He furthermore gave an explanation as to what they were doing in Knysna, which he had written down in his warning statement marked Exhibit C2.

He never had any consultation with Luzuko. He furthermore testified that the time when he was sitting in the conference room when accused 3 came walking into the room he walked normally. He was also requested by Wilson to make arrangements for a photo identity parade to be held in respect of accused 3.

He was further informed by Wilson that accused 3's legal representative is in Cape Town and he told him that they can proceed without him. He then made arrangements for a photo identity parade to be held.

Dumisane Malosi, the son of the deceased, testified that on Sunday 22 July 2018 he was at home and it was around seven o'clock the evening when someone knocked at the front door. At that stage they were careful to open the front door because his father had warned them that before he opens the door he must first see who it is. The front door had a window that was fitted in the middle of it, of which the opening was 60 centimetre by 20 centimetre in diameter. He peeped through this window and he saw a tall person and he spoke to him through the window. This person was looking for his father because he was sent to look for a proof of address in order to apply for a job. He told this person that his father was not at home but in George at a meeting and when he told him this this person was reluctant to leave.

This person walked back slowly and even looked back as if he thought he was lying. He carefully looked at him until he walked onto the gravel road in front of the house. He then quickly went upstairs where he opened the sliding door that entered onto a balcony and he observed this person walking

down the road. He was walking in the direction of the church towards Concordia Road. At the church he met a black person that he described as a short and fat person, who came from a dark spot. He talked to this person.

The person that came to knock at the door was wearing a cream jersey, navy skinny jeans, a black beanie and a pair of black shoes. They spoke for about five minutes. The reason why he went up to the balcony was to check in which direction this person was walking because he said he lives in Ndloveni. He wanted to check if this person went into that direction.

The person indeed walked into the direction of the Pop Inn Tavern which is situated further down in Concordia Road and which is near to the place they referred to as the Show House. He furthermore observed that these two persons stood at the Show House and he thought they were waiting for a taxi but when a taxi came they remained standing there and did not get in. He furthermore explained that the Show House is about 25 metres away from the church before one goes up to a hill. He then wondered whether they were waiting for a car and he thought they were going towards Ndloveni, but they walked into the direction of the Pop Inn Tavern.

At the time when this person was at their house, his mother was busy in the kitchen. Later in a discussion with his mother

they remarked that this person's voice sounded like that of a female and they laughed about it.

He further testified that on 23 July 2018 at about 18h50 in the evening someone once again knocked at the front door and his mother went to the door. His mother then told the person that he should open the door himself and he recognised the voice of the person as that of the same person that was there the previous night. He could hear what they were talking about and he could he hear his mother saying that he is not here, referring to his father. The person then left.

At about 20h45, it could have been earlier, he heard the firing of gunshots. He heard one shot then it was quiet, then he heard a second shot and thereafter he heard someone screaming "Yoh Yoh". He could hear it was a man that was screaming and it was very near to their house. It was quiet for a few seconds then he heard a third shot going off. He decided to go upstairs but this time he did not go to the sliding door but went to the window and peeped through the window.

He observed that someone was running towards the main road and then went to the other side of the house, still on the top floor which faces Concordia Road and then he saw that this person was still running. Thereafter, he went back to the front

section of the house while his mother made some calls to his father's phone but there was no answer. She also called a person by the name of Tsengwa, to find out where his father was and they said they dropped him off at the church.

At that stage, she did not know what his father was wearing but his brother recognised his father's clothes. He then went downstairs and outside he saw that his father was lying there in the road. He was still breathing at that stage and he was taken to hospital. He further testified that the person that he saw running down the road was a tall person.

On Sunday 22 July 2018 when he spoke to this person that came knocking at their door they were standing a metre away from each other and they were facing each other. The light of the lounge where he was standing was on and the light on the stoep where this other person was standing was also on. He spoke to this person between 30 seconds to one minute. It later emerged during argument by the prosecutor that this witness made a statement on 26 July 2018 about four days after the incident about the person that was at their house on 22 July 2018.

On 22 August 2018 he went to the police station to attend a photo identity parade. His mother was also there. She first

went into a room. Later he was also taken into the same room where he saw a female police office, his mother was not there and the two of them were alone in the room. He sat next to the female police officer in front of a computer. On the screen of the computer there were photographs of about 12 persons and he pointed out the photograph of the person who came knocking on their door on the evening of 22 July 2018.

During his evidence, he was referred to Exhibit N2 and confirmed that it was the photo of the person that he identified and it was marked X. Furthermore in court he identified this person that he pointed out during the photo identification as accused 3 before court. He furthermore testified that he was unable to identify the person that he saw running away after the shots were fired.

He said previously there was a threat against his father and because of that he was very vigilant. He furthermore said that although the person that was there on the evening of 22 July 2018 had the same built as the person that he saw running away after he heard the shots he cannot say whether it was the same person.

He furthermore, when it was pointed out that he said in his statement that the person that ran away does not fit in with the

structure or built of the tall guy he said it is a mistake. He was furthermore adamant when it was put to him that accused 3 will deny that he spoke to him on 22 July 2018 and that he never visited their home, that it was accused 3 that he saw because he recognised him by his height as being skinny and his voice. He furthermore testified that he did not attend court at any time before he came to testify and furthermore did not see any photographs off accused 3 on social media.

Nomonde Malosi testified that she is the wife of the deceased, who was also known as “Freeze”. She testified that on the evening of 22 July 2018, her husband attended a school governing body meeting that started at 17h30. He left for the meeting at that time. Later that evening at about 19h15, she heard someone knocking at their front door and she heard her other son saying that the person must come in and she could hear that this person was enquiring about her husband.

At that time she was in the kitchen and she moved to the lounge area where she saw this person. He greeted her and asked her how she was and she replied that she is well and she also asked him how he was. He then said that he wanted to see the councillor because he would like to have a proof of address for a job application somewhere in Knysna. She then told him that the councillor is not there and that he is at a

school governing body meeting, whereafter this person left.

She found it strange that this person was referring to her husband as the councillor because all the people refer to him as “Ta Freeze”. She also found his voice very peculiar because he sounded like that of a female, and explained that he did not have” a voice like a man would usually have”. This person was not a person that was from the area and it was someone she did not know. She further testified that he was there for about a minute.

The lights were on in the house and she could clearly see who she was talking to. After the man left, later that same night after the Generations programme on television had finished, she heard shots going off and she heard someone “crying” at that stage. This witness made a statement about this incident to the police on 8 August 2018, which statement could only be commissioned at a later date because of her not being able to do so as a result of the psychological trauma that she had suffered.

On 22 August 2018 she was taken to the police station in Knysna and asked to attend a photo identity parade. She was taken into a room with a white lady who showed her a computer. On the computer screen there was a set of

photographs and she was requested to point out the person that she saw on 23 July 2018. She recognised the person who she described as dark in complexion and who according to her had a pair of big ears and big mouth. She also described him as a tall and slender person.

She further testified that since the death of her husband her life and the lives of her children have changed. She lives on constant medication and she also stopped working because she could not carry on.

At the police station, when she was asked to identify this person she was alone, her son went into the room before her and thereafter she went in (contrary to what her son had testified). She testified that when he came out she immediately went in. And after the person left on that evening, her son said to her that he recognised that person by his voice as the same person that was there the previous evening. According to her, because the light on the stoep was switched on one would be able to see a person standing in front of the door. She furthermore pointed out accused 3 as the person that was at their house. She also stated that the area around the house is lit with municipal flood lights and she furthermore testified that she did not see anything funny in the manner that this person was walking on that particular evening.

On the evening when she talked to this person she was about four to five metres away from him and the children were also in the same room when she talked to this gentleman. At that stage her attention was focused on him because she was talking to him. She persisted when it was put to her that accused 3 will deny that he was there on that particular evening that it was him. She furthermore in cross-examination testified that no one told her to point to a specific photo.

The evidence of Captain Bosman (Jacques Bosman) and that of Captain Jacoba Bosman will not be dealt with in great detail except that Captain Jacoba Bosman, it seems who is the wife of Captain Jacques Bosman who compiled the photos for the identification parade, said that the photo identification parade comprised of nine photographs of certain persons who had the same identity traits.

The evidence of Mr Zamabuntu Blaai was just to the effect, apart from the evidence of the political activities of the ANC in the area was just to confirm that the deceased attended the meeting on that particular evening, which started at 18h30 and ended at 20h20 on that particular evening. And he testified and also later pointed out the place where he dropped of the deceased after the meeting,which was not far from the deceased's house.

The evidence of Nozuko Thelma Kamini, was about the fact that Luzuko was at her place at the time the shots went off and at some stage he received a telephone call, which he did not answer. That Luzuko at one stage did answer a telephone call and that he at a later stage spoke to a person and he asked this person “are you done, my boss”.

The evidence of Monica Neku and Xolile Mpela was to the about the presence and the movements of the accused, especially accused 1 and accused 3, on the evening of 22 July 2018 and 23 July 2018, while they were at Pop Inn Tavern.

The other important witness was Bulelane Sekota. She testified that she was the secretary of the Happy Valley Street Committee during July 2018. She knows accused 1 and she knows where the house was where he stayed. She was responsible for delivering services to that area which falls under Ndloveni. According to her, the people believed that the deceased was responsible and the ward councillor for that specific area. Accused 2 never had any meetings in that area and she was the secretary of the street committee in that area.

She further testified that on 22 July 2018, which was on a Sunday, that she called accused 1’s brother whose name is

Nfuyo. She wanted his details and he gave it to her over the phone. He further told her that there is another brother of theirs who is the owner of the house that was occupied by accused 1 and he would tell his brother to contact her.

On Monday at about 12 p.m. a gentleman who identified himself as Jomo (Luzuko) who said he was accused 1's brother contacted her. She wrote down his details in their books and she asked for a copy of his identity document which he said he did not have. He left his contact number with her and said that she should contact him if there is anything that she wanted to know. He further said that his brother should not be contacted because it is his house, he also never discussed anything with her about needing a proof of address.

She furthermore testified that the reason why she called the other brother of accused 1 and Luzuko on the Sunday was because she was the secretary of the street committee and they had enormous problems with someone who would occupy a house who is not the owner and they wanted to register the name of the owner in their books as street committee. They wanted people to inform them if someone else would occupy the property and they wanted the owner to come with the person to verify that such a person will be occupying the property. At that time municipality's list about who was

occupying a specific structure was not updated and complete. According to her, if accused 1 wanted to discuss the problem of this house, he could have come to her or any other member of the street committee.

She further testified in cross-examination that she made queries because someone else was occupying the house of the witness Luzuko and the reasons why she did that on the Sunday was because she had difficulty getting hold of people because they would be working during the week. She further testified that accused 1 and she were practically neighbours, they used to use the same toilet and she stayed not very far from where he was staying in the house of Luzuko.

He also never came to tell her or any of their members that there was a problem and he knew that she was a member of the street committee. According to her if there was a problem people would come to them or they would have gone to the ward councillor of Ward 8. During that time she never heard of anyone going to the ward councillor of Ward 4 if they had any problems because most of the people were still under the impression that area fell in the boundaries of Ward 8. Luzuko never told her that he was referred to her by accused 2 to come and see her.

The court will now deal with the evidence given by the respective accused and the further witness accused 3 called to testify in his defence.

I will start with the evidence of accused 1. He testified and said that he does not know anything about the murder of the deceased and he only heard about it afterwards. He heard about it from a colleague he used to work with. He says that it was on Tuesday 24 July 2018 at 07h30 while he was waiting for his brother Luzuko to drop off his keys at his work when he was told about the death of the deceased. He furthermore knows that his brother made a statement to the police and before he came to testify in court he told him about it. His brother told him that when he made a statement he was assaulted and he was led into saying those things as contained in the statement.

He said that accused 2 became known to him when he started to work for him for the Knysna Municipality in 2003. His other brother initially worked for the Municipality and later also arranged for him to be employed at the Municipality.

He was initially requested to assist with the demolishing of shacks that were unlawfully erected. He then proceeded to work on a casual basis with accused 2 during 2005 to 2006. A

vacancy arose in July 2005 and he was permanently appointed.

He further testified that he knows accused 3 and he knows that he is from Cape Town. He met him when he went to Cape Town at some stage to visit his brother. On the weekend of the deceased's murder Luzuko came from Cape Town to sort out his affairs of his house because he phoned him to tell him that they were about to install electricity in the houses. At the time when he called him he wanted to know who the councillor of the area was and he told him that it was accused 2 and that he is the councillor for Ward 4.

Luzuko informed him that when he arrived in Knysna he went to accused 2 and accused 2 informed him that he must go to the street committee member for that area who was Bulelane Sekota. He then left them at the tavern and went to speak to this person. He thereafter came back to him and he thinks that he informed him that this lady was there and left a message. He furthermore testified that he does not have any knowledge whether his brother had anything to do with the deceased. Accused 3 was with him that weekend because he accompanied Luzuko to sort out his house affairs.

Regarding the statement he made to Petros, accused 1 testified that before he made the statement to Petros they first had a conversation about Luzuko's movements the previous week and he told him that there was a gentleman that came with his brother from Eastern Cape and that he also told him that he came to Knysna with accused 3. He thinks Petros did not include this in the statement and that he said this during the conversation.

He further denies that he ever went to show accused 3 where the deceased stays. He also never went to collect any money after the death of the deceased, which they divided between themselves. I will at a later stage during the evaluation of the evidence, further deal with the evidence accused 1 gave during cross-examination.

Accused 2 testified and denied all the charges against him. He said that he did not kill and was not involved in the killing of the deceased. He denied the further charges leveled against him. He further testified that he knew the deceased for a very long time, which was since the time he was a teacher at Percy Mdala High School during the period 1993 to 1997. At that stage the deceased was a student as well as a good soccer player. He retired as a teacher in 1997 and took up a post as administrative officer with the Knysna

Municipality. In 2000 he became a housing official also with the Municipality until he entered politics in 2011 on a full time basis. He became a proportional representative councillor for the ANC. It was during this time when he met the deceased again. He was the councillor for Ward 4. The deceased at that stage lived in Ward 7 and he subsequently moved to Concordia where he stayed until his death in Ward 8.

From 1996 until 2016 Ward 4 was controlled by the ANC until he won the elections in 2016 as an independent councillor. The deceased entered politics just before 2011 but they were not in the same branch. According to accused 2 he served as a councillor for the ANC until two months before the 2016 municipal elections when he resigned and he stood as an independent councillor in the 2016 municipal elections.

The deceased was part of one faction of the ANC and he was part of another faction of the ANC. Prior to the 2016 municipal elections the deceased did not serve as an ANC councillor. Due to him standing as an independent councillor he was automatically suspended from the ANC in terms of the ANC rules and constitution. At that stage the deceased served on the Regional Executive Committee of the ANC. Accused 2 says as a result of this his position as a councillor representing the ANC was terminated and he stood in the

election as an independent councillor.

After the 2016 elections the deceased became an ANC ward councillor for Ward 8 and he was an independent councillor for Ward 4. He further testified that he as an independent councillor could not advance any further politically whereas the deceased could go further.

6The deceased therefore after the 2016 municipal elections was not an obstacle in his way politically. He did not harbour any resentment to anyone, especially to the deceased, and furthermore he did not hold it against anyone that he was expelled from the ANC, even though he and the deceased were from different factions within the ANC. There were some people in his faction that had disagreements with him.

Regarding the interview he had with the blogger Mike Hampton, he explained that what he was trying to say to Hampton was that he had been removed and he gave the reasons why he thinks he had been removed. This was because firstly, he would have been an ANC mayoral candidate and secondly because of a building project that was due to start in the northern areas of Ward 4 where the councillor of the area automatically would be part of the project steering committee. He says that it was for those reasons that people

removed him from the ANC list of nominations for ward councillor. He furthermore testified that even though he was properly nominated and elected by the people to stand as ward councillor the ANC did not want him to stand as ward councillor for Ward 4.

According to him, people in the Regional Executive wanted to further their own personal business interests and it was in their interests that he not be selected. He furthermore said that it was not he, during the interview with Hampton, who first mentioned the name of the deceased and that the deceased wanted him out of the ANC but Hampton himself and he just added that of course the deceased had a hand in it as the Deputy Regional Secretary to have him removed.

He furthermore testified that the person that was selected by the ANC to stand as ward councillor for Ward 4 was the deceased's mother-in-law. He further stated that the deceased would have had a very realistic chance to become the mayor with the support of the other parties of the Knysna area.

After the elections he was approached by many parties to form an alliance with them in the municipal council. He eventually had discussions with the DA and they offered him a position of Deputy Mayor, which he turned down, and he suggested to

them that he come chairperson of the Housing Committee because he had experience in housing. He also after the elections became the mayoral committee ("MAYCO") member for housing.

At one stage, because of a complaint lodged against one of the members of the Housing Committee that was connected to the DA, he was removed from the post and after some time during 2017 he was reinstated as a MAYCO member. Thereafter he was removed because of a vote of no confidence in the then mayor which succeeded and which resulted in the dissolution of the MAYCO. The deceased was not one of the persons that was behind the vote of no confidence but a member of the ANC which was supported by other minority parties.

The disciplinary proceedings which were instituted against him which led to his dismissal as ward councillor was instigated by two other ANC councillors regarding two complaints that was lodged against him.

The disciplinary procedure recommended his removal from council, which eventually happened pending a decision by the MEC for Local Government. None of these charges which led to his ultimate removal was instigated by the deceased.

He further testified that he and accused 1 had a long relationship with each other. During the period 1998 to 2001, he approached accused 1 to assist him with work while he was working for the Department of Housing of the Council. The work accused 1 used to do was to assist him in the removal of illegal shacks. Accused 1's younger brother used to work with him but he could not do the work any further and accused 1 was recommended by his brother to assist him.

After he became ward councillor, his relationship with accused 1 continued and he trusted him very much. He furthermore knows that accused 1 is a heavy drinker.

Regarding his relationship with accused 1's brother Luzuko he testified that he knew him when he was involved in soccer. He also found that although Luzuko himself did not want to come and play for his team there was a younger member of his family and he requested Luzuko to convince him to play for his team. Luzuko stayed in Knysna for a long time and he does not know when he left Knysna. He never kept contact with him after he left Knysna. Before he again made contact with him in the middle of 2018 he last saw him about ten years ago and during this time he never spoke to him. On 18 July 2018 after many years had passed and after he had no contact with Luzuko he received a call from him about five days prior to the

death of the deceased when he told him that he heard from accused 1 that they are going to electrify shacks and he wanted some information regarding this.

It was the shack which at that time belonged to Luzuko wherein accused 1 stayed and he called him to ask him for his advice as ward councillor for the area to have his shack electrified. When he was about to advise him about this, Luzuko stopped him and said that he ran out of airtime and he would be coming to Knysna that Friday and he would be in Knysna over the weekend. He received this call on the Wednesday before that weekend. He said Luzuko said he would be specifically coming to Knysna for the purpose of making enquiries about the electrification of his shack.

In his further discussion with Luzuko, Luzuko told him that he needed his advice because he wanted to rebuild his shack and he feared that accused 1 might sell it. He wanted to protect himself against that. He furthermore conceded in questions asked by this court that he could have given Luzuko all the information over the phone which would not have made it necessary for him to drive all the way from Cape Town to Knysna for that purpose.

During the same discussion but before he ran out of airtime Luzuko asked him to lend him about R5 000. He said he could not lend him R5 000 but R1 000 and the reason why he lent him the R1 000 was because he had a good relationship with accused 1 who is his brother. After he spoke to Luzuko he spoke to accused 1 and told him that he is going to give Luzuko R1 000 and that he is going to hold him responsible if Luzuko does not pay back his money. The next day, 19 July 2018, he deposited the R1 000 into the Checker's Money Market account. Thereafter he sent two SMS messages because he forgot to send him the PIN which would have enabled him to withdraw the R1 000.

He furthermore subsequently called him also on 19 July 2018 because he wanted to confirm whether he received the money and he further testified that he is not a loan shark or money lender. Luzuko did not come on the Friday as he promised and on the Sunday he called him because he promised that he would come on the Friday. This was because he borrowed money from him and when he called him, he was in Mossel Bay at that stage, on his way to Knysna. He then called him before 13h00 or 14h00 on the Sunday and he said that he is on his way to the township. At that stage accused 2 says he was in town and he told him to wait for him at his office. When he arrived at his office, he saw two cars parked near to his office

and he was not sure which car belonged to Luzuko. After he told him that it was the car with the CA registration number he told him to come to his office. He also observed that there was another person in the car but Luzuko was alone when he came to his office. He also did not meet this person and he asked him who this other person was and he told him it was a family friend. He never had any discussions with this other person. After he came out of his office, this person was still in the car.

He cannot say how long the meeting between him and Luzuko lasted but it was a short meeting and they discussed the issue about his shack and he asked him about the electrification of the shack. Luzuko said to him that he knows that he is the chairman of the Housing Committee and also the ward councillor. Accused 2 says in answer to this, he told him that he is no longer the chairman of the Housing Committee but the ward councillor and he told him that he must go to the street committee member for that area and he should go to accused 1 to show him who this person is.

On Monday 23 July 2018 at 09h25 he received a call from Luzuko and also on 24 July 2018 at 08h52 he then returned this call. The reason for this call between them was to enquire about the money he owed him and also to find out whether he

went to the person about the electrification of his house. He furthermore testified that when he called Luzuko on 24 July 2018 about his money he (Luzuko) said to him that he has a problem and he has to go back to Cape Town and he told him he will pay the money but he is leaving for Cape Town.

Accused 2 further testified that the statement Luzuko made as a Section 204 witness is not correct where it is stated that he (accused 2), wanted to know about a hit man. And whether he would be able to find one for him. He further testified that he never called him and requested him to bring a hit man to Knysna. Furthermore it is not correct as stated in his statement that he, Luzuko, introduced him to accused 3 and he told accused 3 that he wanted a councillor who is competition with him killed. He further denies accused 3 told him that it would cost R80 000 and that he responded by saying that that is too much.

He furthermore denies that he, after accused 3 went outside to make a call and said that they will do it for R15 000, said he only managed to withdraw R10 000 from the bank. He further denies that accused 3 in reaction to that told him he must add another R5 000. He furthermore denies that he later called Luzuko and asked him to collect the money and that Luzuko told him that they must let accused 3 first do the job. Accused

2 also denies that on 24 July 2018, he called Luzuko to come and fetch the money and that accused 1 was sent to fetch the money.

He lastly also denies that he promised that the balance of the money owed will follow and that he testified that he cannot remember why on 22 July 2018 at 20h08 he made a call that lasted for 44 seconds to Luzuko. He later said that it may have been to enquire about the money. I will deal with the further evidence given by accused 2 during cross-examination during the evaluation of the evidence.

Accused 3 testified that on 22 July 2018 he accompanied Luzuko to Knysna. This was after he was requested by Luzuko, who is a good friend of his, to accompany him to Knysna to attend to the affairs of his house. He asked whether it was just a one day trip and whether he would come back on the same day. He assured him that he is going to come back on that same day. He picked him up at his girlfriend's house in Eerste River and travelled to Knysna with him. They drove along the N2 and at Grabouw he took over the driving until they reached Swellendam because his driving licence had expired and he did not want to drive any further. When they, at that stage saw a traffic officer in Swellendam. Luzuko proceeded to drive to Mossel Bay and thereafter straight to

Knysna. They entered Knysna between 11 and 11.30 of that morning. Thereafter they went to the township and stopped at a school that was situated next to a shipping container. After a while Luzuko went into the container. He (accused 3) only got out of the car to urinate but went back into the car. He never went to the container. After about ten minutes Luzuko came back to the car and they went to the tavern.

At some stage he asked Luzuko whether he had finished his business in Knysna because he was bored and he was not a drinker. He wanted to go back to Cape Town. At some stage accused 1 came to the tavern and he was drunk. Later they went to eat at the house of friends of Luzuko. At about one o'clock they went back to the tavern and he asked Luzuko to take him home because he wanted to rest.

At some stage, he went to sleep in a shack and after a while he woke up and called Luzuko and Luzuko said to him he was drunk and that he must wait until the morning before he goes back to Cape Town. He was left alone in the shack and did not have any medication. Luzuko just disappeared and left him there. Later, at about eight o'clock that evening Luzuko came to the shack and he was drunk and said that they cannot go back to Cape Town. He further said he did not have any money for petrol and that he was going to sleep with his

girlfriend from Mossel Bay somewhere in Knysna.

The following day Luzuko came to pick him up at the place where he was sleeping and they went back to Pop Inn Tavern. He once again said to him that he wanted to go to Cape Town because he is bored but Luzuko said to him that they will go back later because he is waiting for somebody that is giving him some petrol money.

At that stage he confronted Luzuko by telling him that he does not have any money for petrol but he has money to buy some alcohol. Luzuko once again left him at the Pop Inn Tavern with a R20 to buy some airtime. At some stage, accused 1, arrived but he was sitting with his friends. Later between half past three and four o'clock, Luzuko came back and he asked him once again to take him to a place where he can take a nap because he also did not have his medication with him.

He once again assured him that they were going to leave between 6 and 7pm, but he was still looking for some petrol money. He was taken back to a shack where he left him. In the meantime he tried to call Luzuko to find out where he was, but he would not always pick up his phone and at the time when he picked up his phone he said he would come.

He eventually came between 9 and 10pm that evening with a unknown person to the place where he was. He then told him that he must leave the shack where he was taken to a shack with electricity. He furthermore told him just to hang in there, he was going to Oudtshoorn and in the morning when he comes back they will leave for Cape Town. He was once again left alone and he spent the night in the other shack. He further testified that he did not know anyone in Knysna and that it was his very first time in the area. The next morning Luzuko came back with some friends and accused 1 dropped off his brother and they headed back to Cape Town.

He furthermore disputed that he came to Knysna over that weekend to shoot someone. He sustained an injury to his head in 2013 and as a result of this he is very slow in everything he does. He cannot use his left arm because he was assaulted by the police. He walks with a limp in his left leg. He furthermore cannot properly see through his left eye and he was never in possession of a firearm. It is not true as stated in the statement of Luzuko that he went to Knysna to shoot someone. He thinks Luzuko framed him because at some stage they had a problem in the township, which they ended up sorting out. He says that both the son as well as the wife of the deceased is telling lies if they are saying that he was at the house on 22 July 2018 and on 23 July 2018

respectively.

He furthermore says that Wilson was lying when he said that his lawyer told him (Wilson) that he will not be present at the identity parade. The court will also deal with his evidence given in cross-examination during the evaluation of his evidence.

Accused 3 also called a further witness, Philip Beukes, a physiotherapist who had examined accused 3 for the first time on 5 December 2018 and as a result of this examination he compiled a report about the condition of accused 3. In his opinion after an examination of accused 3, he is of the view that accused 3 is unable to run and if he is not able to run now, he would not have been able to run at an earlier stage, which was about 18 months ago.

He furthermore testified that it is not possible to falsely pretend or give out the condition in which accused 3 found himself in. He further conceded in cross-examination that accused 3 is not a patient that tried to improve and that he may be under performing. He furthermore testified that he cannot say what his condition was 18 months ago and he furthermore cannot say with a degree of certainty that he could

not run 18 months ago.

He testified that accused 3's right hand was normal but he told him that he is left-handed. The injury that was caused to the brain resulted in him having difficulty moving his left side of the body. According to him, there is no connection between the brain and his extremities on the left side of his body.

That was then a summary of the evidence that was presented in this case of at least the most important and relevant evidence. I will now deal with the evaluation of the evidence.

Evaluation

This is indeed a unique case in the sense that the state's case does not hinge on the evidence of witnesses who would in the ordinary course have confirmed and testified to the charges by giving oral testimony but rather it is based on two statements that a witness, Luzuko made to the police.

In this particular case, the witness Luzuko recanted the statements he made to the police in support of the latter evidence that he would have given in court. What is also clear is that this witness had taken the prosecutor by surprise when he, without the prosecutor being forewarned, recanted these statements in court. This witness says that the version as

contained in the statements wherein he incriminates himself as well as the accused in the commission of the offence were placed in the statement by the police and that the police had altered the statement to suit the version that would implicate him as well as the accused and that the version that is accorded to him which implicates him and the other accused was a fabrication of the police.

He furthermore said that the police either intimidated or forced him to say what was contained in the statement. There is no truth in the allegation by this witness that the version as contained in these two statements does not originate from him and that the police have fabricated the evidence against him and the accused in the statements to falsely implicate them. The truthfulness and genuineness as to whether the incriminating evidence as contained in the statement could be accorded to this witness depends on the credibility on the one hand of himself and on the other hand of Ngxaki, Wilson and Mdokwana. As well as the surrounding evidence that supports the version given by this witness in his two statements to assess the veracity thereof.

The court will first deal with that issue. Thereafter the next question that the court has to consider is whether the statement has sufficient probative value for the court to accept

it into evidence. I am not convinced that the witness Luzuko did not freely and voluntarily and was forced to make the statement to Ngxaki and Mdokwana. I find the evidence of these two policemen as corroborated by Wilson is overwhelming convincing. It is not correct that this witness was not the author, originator or principal source of these two statements.

I find the evidence of these three police witnesses to be truthful and sincere about the manner in which they dealt with this witness. Ngxaki came across as an honest and sincere witness who was not involved in the investigation of this case and it was exactly for that reason that the police under the guidance of the Director of Public Prosecutions decided that an independent person not attached to the same unit and not involved in the investigation of this case take the statement from this witness.

This witness is also a commissioned officer in the South African Police Services and is attached to the Kraaifontein Detective Services. There is no reason to doubt his evidence when he said that the witness Luzuko made a statement freely and voluntarily and he was very cooperative with the police. This witness Luzuko was a reservist in the South African Police Services, and it seems he was somewhat embarrassed,

ashamed and remorseful when he was caught out to have lied to the colonel when on Wilson's request he was asked once again to talk to the Colonel and confront him with the information he had, which was the other Colonel and not Ngxaki, which assisted Wilson in the initial questioning of this witness. The version which was put to him was that he did not travel from the Eastern Cape over that weekend towards Cape Town but from Cape Town towards Knysna.

According to Wilson when this happened this witness (Luzuko) apologised that he lied to the colonel and it seems that this witness as a result of this wanted to make up and compensate for having been caught out to have lied and misled the colonel as well as Wilson. He was very cooperative and it seems that this witness as a result of this wanted to come clean and give his full cooperation to the police. It was for this reason that he made the Section 204 statement.

It was also for this reason and for having given his cooperation to the police that it was decided because of the attitude of this witness he can be trusted and that he can be used as a state witness in terms of the provisions of Section 204 of the CPA. What further made this witness's version as set out in his statements trustworthy was his unsolicited utterances he made to Mdokwana when he was travelling with him in a separate car

on their way to and from Knysna when he was given a lift to George wherein he once again without having been asked described what happened and how the incident involving the death of the deceased occurred.

He came across as being honest when he out of his own told Mdokwana that he forgot to mention in the statement that he made to Ngxaki that accused 2 had on 18 July 2018 deposited an amount of R1 000 to be used for petrol money for them to undertake the trip to Knysna.

It is further highly unlikely that the police would only have included in the statement those sections of the statement in which he incriminates himself and the accused and not those sections of the statement where he does not incriminate himself or the accused. There is therefore no reason to accept that this witness did not make both these statements, including those sections thereof in which he incriminates himself and the accused.

It is clear that this witness was part of a conspiracy based on the statement with other accused to murder the deceased and he was intricately involved in the conspiracy and execution thereof and he was honest when he made these statements to the police based on the circumstances at that stage in which

he found himself when he was accosted by the police.

Before dealing with the reasons as to why this court in terms of the provisions of Section 3(1)(c) LEAA 45 of 1988 admitted the statements of this witness I need to briefly mention my findings in relation to the evidence that was presented by the other witnesses. None of the evidence of the following witnesses was seriously disputed by any of the accused.

This is the evidence of Quinn, Luzuko, NozukoThelma Kamine, Sibantu Blaai, Dumesane Molosi, Nomande Molosi, Warrant Officer Van Niekerk,Petros, Mzulu Mpela, Captain Jacoba Bosman and Captain Jacques Bosman and I will only make reference thereto in my judgment where necessary and if such evidence were disputed I will deal with it. It was mainly evidence of a circumstantial nature, none of which directly implicates any of the accused.

It would be prudent at this stage to once again have a look at the provisions of Section 3(1)(c) of the LEAA. This section confers a discretion on the court to allow hearsay evidence if it is in the interests of justice to do so. In considering whether it in the interests of justice to admit such evidence one should take into account the factors set out in that sub-section. These factors are the nature of the proceedings, the nature of the

evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reasons why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to any party which the admission of such evidence might entail and any other factor which in the opinion of the court to be taken into account.

At the onset before dealing with the provisions of this section it is so that in terms of the provisions of this section, there seems to be a conflation in the assessment whether evidence should be admitted between the probative value of the evidence, in other words it is an assessment one has to make in order to make a finding whether this evidence should be admitted, and ultimately which would play a role in the totality of such evidence in coming to certain conclusions.

Differently put, the probative value of this evidence needs to be considered with the totality of the all the evidence, that is presented in a court which would include the evidence of the accused. So the probative value of the evidence in my view for the purposes of this section cannot be viewed in isolation. In my view there is no other way that this can be done and it seems that the legislature by doing this conflated the concepts of admissibility with the evidential value of evidence.

A lot has been said by our courts over the years about this kind of evidence. One of the first cases is the case of Hewan v Kourie N.O. & Another 1993 SA 233 TPD at p 239 B-G. It is a long quotation regarding the approach a court should have to this type of evidence where it says in regard to paragraph (vii):

> *"Section 3(1)(c) requires the court in the exercise of its discretion to have regard to the collective and interrelated effect of all the considerations set out in paragraphs (i) to (vi) and also to any other factor which should in the opinion of the court be taken into account.*
>
> *When doing that the reliability of the evidence will no doubt play an important role*."

Paragraph (iv) requires the court:

> "*... to have regard to the probative value of the evidence. It stands to reason that the less reliable the evidence the less its probative value will be. However, probative value and reliability are not static well-defined concepts. There are numerous degrees of reliability. The legislature recognises this in requiring the court to have regard to all the factors mentioned in Section 3(1)(c). A proper application of the provisions of Section 3(1)(c) will result in the court having proper regard to the reciprocal influences that the various factors have on each other in determining the interests of justice in every case. Thus the court, having regard to the nature of the proceedings,*

the purpose for which the evidence is tendered, the reason why hearsay is tendered and the prejudice to the other parties might be inclined to admit evidence which by its nature is less reliable where the evidence is tendered in motion proceedings but in order to prove a central issue in a criminal case the court would in turn probably require a high degree of reliability or a substantial probative value before exercising its discretion in favour of admitting evidence. Section 3(1)(c) introduces into the rule against hearsay a flexibility which should not be negated by also introducing in addition to the requirements of the section reliability as an overriding requirement. The difficulty encountered by the court in applying the exception to the common law rule against hearsay underline the dangers in categorising and labelling acceptance to the hearsay rule."

And with this in mind, I will now deal with the hearsay evidence which is crucial in this case.

In a criminal trial in considering all the factors as set out in Section (3)(1)(c) in determining whether it would be in the interests of justice to admit the hearsay evidence the overriding factor in assessing each of these factors would be whether it would impact on an accused's right to a fair trial in terms of Section 35(3) of the Constitution. In this regard, the court will also refer to the case of *S v Molimi 2008(2) SACR 76*

CC, a case of the Constitutional Court with specific reference to paragraphs 36 and 42.

I will now deal with the factors as set out in Section 3(1)(c) and its applicability to this case.

THE NATURE OF THE PROCEEDINGS

If one should have regard to the first factor, which is the nature of these proceedings, in considering the nature of these proceedings, this being a criminal trial, it is apparent that such evidence is of an incriminating nature and it may be, if sufficient weight is attached to it, considered as evidence which may lead to a conviction of the accused. The court is well aware of this fact and the general reluctance a court should have in permitting such evidence as warned in the case of *S v Ramavhale 1996(1) SACR 639 A*.

THE NATURE OF THE EVIDENCE

The next factor the court should consider is the nature of the evidence. The nature of the evidence is that of two statements made by a person as a co-conspirator or participant with the accused when they formed a common purpose on the instructions of a co-accused to murder the deceased. It is

further evidence of two statements of which some of the contents thereof was not confirmed under oath by the witness Luzuko, who recanted the version he gave to the police as it is contained in the statement. It seems that some of the non-contentious issues and non-incriminating evidence as contained in these statements were confirmed under oath, when the witness testified in court.

The reasons why this court has to view this evidence with the greatest amount of caution and suspicion are the following. Firstly, as stated earlier it it is evidence of a co-participant which has to be viewed with the necessary caution. Secondly, it is single evidence which is not corroborated by any other witness. Thirdly, it is a statement made to the police by a person who has shown to be an untruthful and dishonest witness and lastly it is evidence which cannot be relied upon unless it is sufficiently supported and sufficiently corroborated to reduce the risk of a wrongful acceptance thereof to convict the three accused before court and upon which the probative value will depend, to which I will refer at a later stage.

I will also at a later stage in dealing with the probative value of the evidence deal specifically with the question of the cautionary rule and the applicability thereof in a case like this where the evidence the state relies on is contained in a

hearsay statement made by a participant or a conspirator.

Before I, however, deal with the contents of the first statement I must remark that it was written down and recorded in a very haphazard, incoherent and to a certain extent very unintelligible manner. The roneoed forms that were used for the purposes of taking down the so-called Section 204 statement that is being used by the South African Police leaves much to be desired and the manner in which it had been used by Ngxaki led to much confusion and created an incoherent flow of the version of the witness in the statement he made to this. The court had difficulty in the manner in which the statement was prepared and constructed to follow a coherent line and the police should discontinue making use of this particular roneo form. It is very confusing and it may lead to a situation where a court might not accept evidence of a Section 204 if it is presented in such a manner.

A further aspect which played a role in this case was the court did not have the assistance, as is any other case, of a witness because of the attitude of Luzuko to better understand the statement and the typed version that was created was also not of much assistance, it was badly written. This witness in my view, however, cannot be blamed for this and much of the blame must be laid for the manner in which the statement was

taken down at the door of Ngxaki, who is a very senior police officer in the South African Police Services and he should as a colonel and head of a Detective Unit with many years of experience should have taken better care in the manner in which he drafted the statement.

As I said, the police should be discouraged from making use of this form to record a statement in terms of the provisions of Section 204. What is also of concern to me is that this statement, because it was contained in the roneo form took the form of a warning statement, which would usually not be commissioned. This is a witness statement, it has to be commissioned. It does not deal with the statement of an accused person. Notwithstanding these shortcomings, the court at the end after a lot of effort made sense of what this witness was trying to convey in the first statement once again this court is reminded of what was said in the matter of *S v Mafaladiso 2003(1) SACR 583*, an Afrikaans judgment where the SCA said the following and I quote from the head note:

> *"The adjudicator of fact must keep in mind that the previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witnesses and the person taking down the statement which can stand in the way of what precisely was meant and that the person giving the*

statement is seldom if ever asked by the police officer to explain their statement in detail."

THE PURPOSE FOR WHICH THE EVIDENCE IS TENDERED

The next aspect which the court has to look at in terms of Section 3(1)(c) is the purpose for which the hearsay evidence is tendered. The obvious purpose for which it was tendered was to show that all of the accused, together with Luzuko, conspired with each other on the instructions and at the behest of accused 2 to murder, and in fact murdered the deceased. The state wanted it to be admitted as crucial evidence to prove the guilt of the accused. It was further used as a basis to link other surrounding circumstantial evidence to complete the picture of what really happened to the deceased. This is clearly important evidence because as was pointed out by Alexander, J in *S v Mpofu 1993(2) SACR 105 (N)* where he held the following:

"Insofar as the purpose for which the evidence is tendered I cannot, with respect, agree that the importance of the evidence is an aspect militating against its admission. Evidence that is otherwise relevant should not depend for its reception on its importance in the case."

THE PROBATIVE VALUE OF THE EVIDENCE

I will now deal with the probative value of the evidence. In assessing the probative value of the statements I must also heed the warning as pointed out by not only the legal representatives of the respective accused but also the prosecutor and that is due to the nature of the evidence the qualities and mendacity of this witness as well as the fact that this witness was a participant in the commission of the offence that his evidence should be viewed, especially based on the statements, with extreme caution and that the ordinary rules of evidence with regards to the acceptance of such evidence in this particular case be applied with even more circumspection.

Apart from the warning in the case of *S v Ramavhale* about the acceptance of such evidence the Supreme Court of Appeal in the case of *S v Libazi 2010(2) SACR 233*, whilst that matter dealt with the acceptance of the hearsay statement into evidence of a co-accused, which is not applicable in this case, but the court's view about the cautionary rule is very much applicable to the evidence of an accomplice or participant where such evidence is based on hearsay. The court said the following at paragraph 14:

"*An even more compelling consideration against the wholesale application of the rule in Ndhlovu is rooted in the injunction courts to treat as a co-accused or accomplice evidence with caution, while the prejudice to be accused of admitting the co-accused statement is very high… various cautionary rules operate to make the probative value of the co-accused statement very low*."

Similarly, *Brand JA* in *S v Mamushe (53/04) [2007] ZASCA 58; [2007] SCA 58 (RSA); [2007] 4 All SA 972 (SCA)* (18 May 2007*)* said the following about the applicability of the cautionary rule of this type of evidence albeit in the context of evidence of identification at [18] where he said … "*I am prepared to accept, without deciding, that, despite her denials, Ms Martin probably did make the statements to Sergeant Moolman and that she was probably telling the truth when she did so. Untruthfulness, however, is not the only danger. The other danger is that she might have been mistaken. Particularly with reference to identification evidence, the danger of mistake has been underscored by our courts again and again (see eg S v Mthetwa* ***1972 (3) SA 766*** *(A) at 768; S v Charzen* ***2006 (2) SACR 143*** *(SCA) para 11 at 147i-j). By its very nature, hearsay evidence cannot be tested in cross-examination. The possibility of mistake can therefore not be excluded in this way. The result is, in my view, that hearsay evidence of identification can only be admitted if the possibility of mistake can be safely excluded in some other way, eg with reference to objectively established facts."*

In this particular case, in my view, the evidence is not the same as in the case where the evidence could not have been tested. In this particular case, the evidence of the Section 204 witness Luzuko could have been tested during cross-examination. It has to be distinguished from the matter referred to above. In this case the version of what was contained in the statements was indeed tested.

The court therefore in its assessment of the probative value in order to overcome the danger inherent in accepting such evidence has to rely on the objectively established facts in a specific case, to which I will refer particularly in this case to at a later stage.

Furthermore in the assessment of the probative value of the hearsay evidence in this case the court has to in my view have regard to the manner and circumstances under which the statements were made, which in my view plays a crucial role in such an assessment. When the witness made these statements it was after he had been caught out trying to mislead the police. This in itself can be a negative factor that should militate against the acceptance of the trustworthiness of these two statements under normal circumstances. This fact was highlighted by all the legal representatives of the accused and that is that this witness was dishonest from the

onset and that anything he would say further cannot be regarded as trustworthy, especially in the light of the fact that in court he openly and unashamedly lied. Even if it is so it would be too a simplistic evaluation of the evidence as presented by the statements of this witness. It must be remembered based on the evidence of the police, especially Wilson, Mdokwana and Ngxaki about the circumstances under which these statements were made, which was as I said earlier, where this witness after having been caught out that he misled the police wanted to play open cards with the police. He was contrite and he wanted to give his cooperation to the police.

I one has to have regard to the content of these statements the witness did not hide his role and contribution in the commission of the offence. In fact it seems based on the first statement he made to the police, he played a very important, if not the most important role, in the commission of the offence where he was the one that accepted the offer of accused 2 to acquire the services of the so-called hit man on his behalf. He took it upon himself to transport the so-called hit man to Cape Town and make arrangements for him to meet with accused 2. He played an active role in facilitating this process by providing accommodation and food to this person here in Knysna. He furthermore monitored the process by making sure

that accused 1 point out to accused 3 where the deceased stayed. He was in contact with accused 3 prior to the assassination of the deceased and immediately thereafter.

After the murder of the deceased he transported accused 3 back to Cape Town. He did not try to water down or minimise his role in the commission of the offence. It is exactly for these reasons why the cautionary rule against the acceptance of the evidence of an accomplice or participant is important, especially in a case like this. It is for these reasons which appear to be genuine, sincere and honest, that the police believed him when he made these statements to them. One can then safely say that at the time when this witness made the statement he was a participant in the crime, he played an active role, he did not hide his role, for which is the very reason for the existence of the cautionary rule.

The cautionary rule against the acceptance of the evidence of a participant or a co-perpetrator has come into effect where such a person's evidence should be treated with the utmost caution because such a person, having intimate knowledge of the case, might be using it to better his position to falsely implicate his co-participants and to embellish a version against them in order for him to come out escape liability or responsibility in commission of the crime. This is not what

happened in this case.

If one should look at the statements of this witness he did not hide his role. He played open cards. This is a further factor that strengthens the probative value of the evidence of the witness, based on the first as well the second statement. He was extremely cooperative and volunteered information which the police would not have known about even with their best endeavours to investigate a case like this. He also gave unsolicited information in an additional statement he made to the police about the fact that accused 2 had paid an amount of R1 000 towards the petrol money to transport him and accused 3 from Cape Town to Knysna. This information the police would not have known about until it was revealed and disclosed by this witness.

The police furthermore would not have known about accused 3 had it not been for the fact that this witness disclosed his identity to them. He furthermore went to point out the address of accused 3 and he on his own accord, made arrangements and took steps to have accused 3 report at the Langa police station to have him arrested. On the one hand, we have this kind of extremely admirable and heroic display of courage, so much so that he would have sacrificed his own freedom and even the freedom of his brother accused 1. On the other hand

we have his recantation and dishonest behaviour in court. Which it seems was brought about by the fact that he could not withstand the pressure and did not have the courage and strength of character to continue to tell the truth at the expense of accused 1 his brother and it came as no surprise, given the circumstances and ultimate price that he had to pay.

Notwithstanding the fact that he led the prosecutor and the police to believe up to the very end that he would persist with the version he had given to the police in the statements and it was only because of human frailty that he buckled under that pressure which led him to deviate from the version he gave in those two statements. He would have displayed extreme courage, valour and a high degree of integrity to have persisted with the truth by having to betray his brother. All of these circumstances in my view clearly demonstrate that at the time when this witness made these two statements he was telling the truth.

These facts and circumstances mentioned above in my view play an important role in the assessment of the probative value of these two statements.

The court in the matter of *S v Rathumbu 2012(2) SACR 219* (SCA) were confronted with a similar situation where a witness

under similar circumstances in order to protect her brother recanted a truthful statement she made to the police on an earlier occasion, which "recanted statement" the court ultimately accepted as the truth notwithstanding the witness's in terms of section 3(1)(c) of the LEAA

The probative value in my view of this evidence, does not only depend on these factors I pointed out that was present at the time when this witness made these two statements to the police but also on the totality of the evidence that was presented in this case. This would include the evidence of the other state witnesses, the circumstantial evidence and circumstantial factors and especially where such evidence is closely related or similar to that which the hearsay statement refers to, and lastly the veracity and truthfulness of the evidence given by the individual accused during this case. Only then in my view can the court attach some value to this evidence after heeding the warning of *Schultz, J* in the case of *Ramavhale* (supra) where the learned Judge said at page 639A that a *"judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so"*.

There are strong objective circumstantial evidence which strengthens the version of the witness as contained in the first statement. There are also the non-contentious and non-incriminating portions of the statement which were not disputed either by the witness or any of the accused.

Then there is the evidence to the following effect which was presented by Petros in respect of accused 1, which is that after Luzuko made the first statement to the police in Cape Town he informed accused 1 about it by saying that he told everything to the police and that the police will come and arrest him. Thereafter the police received information that accused 1 was busy packing up his house and trying to flee. I will later in this judgment deal with the version of accused 1 in response to this.

This is a strong indication that accused 1, after he had been informed that the police were on their way to arrest him after his brother Luzuko had told him that he told the police everything, which included the role that accused 1 played, that he wanted to flee and evade arrest. This is strong evidence to support the probative value of the statements, especially the first statement that was made to the police.

Furthermore, there was evidence that accused 1 on the evening of 22 July 2018 had taken accused 3 to the place of the deceased to show where the deceased was staying. This evidence is contained in the first statement and it is supported beyond reasonable doubt by the identification evidence of the son of the deceased, Dumisane Malosi, that accused 3 had been at their house on that particular evening to enquire about the whereabouts of the deceased. This is independent objective evidence which does not come from this witness but from another witness and which was made at the time when the police were not even aware of the this witness.

Dumisane Malosi told this to the police on 26 July 2018, about three days after the killing of the deceased and as I said, before the police became aware of the fact that the witness Luzuko was involved with accused 3 in this case.

Similarly, Mrs Nomonde Malosi also identified accused 3 as the person that came to her house to enquire about the whereabouts of the deceased on the evening of 23 July 2018, shortly before he was killed. This is also strong independent evidence outside and independent from the first statement, which corroborates an utterance this witness made in the statement to Ngxaki. In both instances, on 22 July 2018 and 23 July 2018, he was told that the deceased was not there.

Independently without this statement, this is confirmed by Mrs Malosi, the widow of the deceased, and her son. The witness Luzuko in his first statement he made to the police says that accused 3 went to the house of the deceased on the evening of 22 July 2018 to find out the whereabouts of the deceased. He also said that accused 3 reported back to him and said the deceased was not there and he was attending a meeting. This is also what Mrs Malosi says and her son on both instances the deceased attended a meeting.

Nozuko Thelma Kameni, and according to the undisputed evidence also of the son of the deceased, three shots were fired during the time of the assassination of the deceased. The post mortem report objectively revealed that the deceased died as a result of two gunshot wounds, one on his chest and the other one on his head. Luzuko also in his first statement says independently that he wanted to know from accused 3 how he shot the deceased and accused 3 told him that he shot the deceased three times and the last shot was on his head.

This is further strong and objective evidence to substantiate and corroborate the hearsay statement, especially the first statement, made by Luzuko.

The evidence about the fact that one of the shots that was fired at the deceased was in his head could not have been within the knowledge of Luzuko in order for him to have made it up and it clearly shows that it was only information that fell within the intimate knowledge of accused 3 at that stage about how he went about to murder the deceased, which no one else would have known about. Especially in a case like this where there were not any eye witnesses. This is clearly evidence about the manner in which the deceased was killed, which accused 3 could not have known about if he was not the person that killed the deceased, which is mentioned in the first statement of Luzuko, which is supported by the objective and undisputed evidence.

The probative value of the recanted statement also should be measured and assessed against the totality of the evidence presented during the course of the trial, like I said which include the evidence that has been given by the accused during the proceedings which I will deal with later in this judgment.

The evidence must also be viewed against the background of the allegations made by the accused as well as the witnesses that the police had fabricated this evidence against him and the police officials to whom the witnesses made hearsay

statements had conspired to fabricate the evidence against them. It is highly improbable that the police would conspire to fabricate hearsay evidence made by this witness, which would ordinarily be inadmissible and of no or little evidential value. One would expect the police to fabricate direct strong circumstantial evidence not evidence that can be easily discounted. One would expect the police if they wanted to plant evidence or fabricate evidence to do a proper job, given the resources and the abilities of the police which would have made the admissibility thereof much easier and less arduous. This fact further strengthens the probative value of this evidence.

THE REASON WHY THE EVIDENCE WAS NOT PRESENTED IN THE ORDINARY MANNER

I will now deal with the further factor that the court has to take into consideration in admitting this evidence, and this is the reasons why the evidence was not presented in court in the ordinary course.Usually in matters like these where there is as application to have such evidence admitted, the reason would be that the witness is no longer available because the witness would be deceased or infirm and unable to remember what he or she said in their earlier statement. In this particular case, however, we are dealing with a witness who clearly in an

underhand and dishonest manner led the prosecution to believe that he on the basis of the provisions of Section 204 of the CPA where he was a participant in the crime and as one of the co-conspirators. And where he gave an undertaking assist the state in the prosecution of the other offenders. On the basis that he would be granted indemnity who then later after he was influenced and relented under pressure to proceed on this path, recanted the evidence that was based on statements he made to the police in which he implicated all of the accused, including himself.

Furthermore, under circumstances where the witness in a deliberate manner attempted to derail the prosecution's case which was based on the statements he made to the police, displayed a hostile attitude towards the state's case.

These in my view are proper and justifiable reasons why the evidence of this witness could not be presented in the ordinary course other than to resort to the provisions and assistance as provided in of Section 3(1)(c) of the LEAA. The court will at a later stage deal with this aspect under the heading "any other factor".

THE PREDUJICE TO THE PARTY AGAINST WHO SUCH EVIDENCE IS ADMITTED

The further factor the court will have to deal with is the prejudice the admission of such evidence might have. This evidence without a doubt is prejudicial to all the accused, as with any incriminating evidence. The only difference is that it is hearsay incriminating evidence.

The difference, however, is that the witness had the opportunity in this particular case to testify under oath other than evidence in a case where the hearsay evidence of a deceased person is admitted, who does not testify. And his version on which the state now relies as set out in both the first and second statements, was challenged by all the accused even though the witness in the witness box displayed a favourable attitude towards all of the accused, under circumstances where he recanted the version that he gave to the police in both these statements. And where his sole purpose was to exonerate all the accused.

The prejudice to the accused would not have the same effect by the admission of the statement as it would have in the case where a witness who made a hearsay statement but did not testify.

In my view therefore, this serves as a safeguard and filter to ameliorate the harsh effects of admitting the hearsay evidence that could not be properly challenged. Given these safeguards in my view the interests of justice justifies the admission of this evidence.

In this regard in *S v Ndhlovo & Others* which I referred to earlier the court held at paragraph 50 at p347 the following:

> "*The suggestion that the prejudice in question might include the disadvantage ensuing from hearsay being accorded it's just evidential weight once admitted must be discountenanced. However, a just verdict based on evidence admitted because the interests of justice require it cannot constitute prejudice. In the present case Goldstone, J found it unnecessary to take a final view but accepted that the strengthening of the state case does constitute prejudice. That concession to the proposition in question in my view was misplaced. Where the interests of justice require the admission of hearsay evidence the resultant strengthening of the opposing case cannot count as a prejudice for statutory purposes since in weighing the interests of justice the court must already have concluded that reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled the very fact of*

the hearsay justifiably strengthens the proponent's case warrants its admission since its omission will run counter to the interests of justice."

*(*own underlining)

In my view, even though the evidence is prejudicial to the accused there is no risk that their fair trial rights were infringed if the court in the interests of justice admits the evidence as set out by *Cameron, JA* in the matter of *Ndhlovu.* It is under the overall protection that any prejudicial evidence is admitted during a criminal trial, obviously with the added caution that such evidence is hearsay and the court should be vigilant in admitting such evidence without any good or compelling reason.

ANY OTHER FACTOR

This brings me to the last factor the court should take into consideration in terms of the provisions of the Act and this is whether there is any other factor which justifies the admission of this evidence in the interests of justice.

In my view, a factor which heavily weighs in favour of admitting this evidence is the circumstances of this case, where a group of people planned and conspired in a

clandestine manner to commit a crime, and where the only witnesses to the crime were the participants. In this case one of them availed himself to testify against the others in order to proceed with the prosecution against the group who later recants his statements which he voluntary made upon which the prosecution of the other members of the group would be based. It would be in my view, in the interests of justice, that such a statement be admitted in terms of the provisions of the Act as evidence against the others.

Usually in cases like these where during the conspiracy and planning stage to murder someone there are no witnesses to the intimate knowledge about such planning and conspiracy, except the participants therein, like the witness Luzuko It is not an ordinary case where you have an eye-witness who observes the commission of a crime because in the nature and in the manner of a conspiracy it is clandestine, it is underhand,where people would wipe away their tracks like in this case the cell phone evidence was wiped out. They close their tracks and in such cases where you do not have any witnesses like this.

It is in the interests of justice where a person who came forward who was part of that group and who was willing to testify makes a statement to the police, which results in the

arrest and prosecution of other members of that group. Who then later without any justification recants such statement in the absence of any other further evidence or eye-witnesses that such recanted evidence, if found to be reliable, convincing and trustworthy, be admitted provided that there would be no other reason in law to prohibit the admission of such evidence. This is in my view, a compelling reason, together with the other factors set out above, that such evidence be admitted in the interests of justice, which in my view, is relevant evidence which has sufficient probative value.

This factor in my view, together with the other objective and strong circumstantial evidence, strengthens the probative value of these two hearsay statements together the further evidence which reduces the inherent risk and dangers of accepting such evidence. It is evidence indeed which plays a decisive and significant part in convicting the accused, which in my view can be regarded as compelling justification for accepting such evidence. As I said in cases like these, once again one must warn against the wholesale acceptance of such evidence as has been pointed out by the courts.

It is for these reasons that I admitted the hearsay evidence of those two statements made by the witness Luzuko to Ngxaki and Mdokwana into evidence. The evaluation of the probative

value of the evidence also will now play a part in the overall evaluation of the evidence in this case which would include the evidence of the accused, and I will now deal with that.

I will now deal with the evidence of the individual accused and the witness that testified on behalf of accused 3. None of the accused impressed this court as witnesses. I will firstly deal with the evidence of accused 1.

His evidence that he was drunk for most of the weekend preceding the killing of the deceased is highly exaggerated and had been used as a convenient excuse for him not to account for some allegations made against him. Like the version of accused 2 I find his evidence as to how it came about that Luzuko borrowed money from accused 2 is highly problematic. I find it strange that he would have advised his brother to have borrowed money from accused 2 who his brother hardly knew and that his brother could not raise the money from somebody in Cape Town where he stayed, which seems he after all managed to raise and find the other R4 000 according to his evidence.

He further states that if Luzuko did not have any money on 18 July 2018 that he suddenly would have lots of money on 22 July 2018 to spend on lots of liquor. He furthermore could not

explain, based on the cell phone records, why his brother was calling him on 22 July 2018 if he and his brother were both together in Pop Inn Tavern. He could not explain this but later tried to state that he does not know when his brother left and he cannot remember what happened around him in the tavern because he was drunk.

What is strange is that he remembers everything until before he came to the tavern, for instance that he remembers that he drank a bottle of VAT 69 whiskey, he remembers that he was taken home by his brother at 21h00 and taken to his girlfriend's house in the location but he conveniently cannot remember what happened between the time he came to the tavern where his brother was up to the time when he left the tavern. This it seems he could conveniently not remember when he was confronted with the contents of the statement of Luzuko where it is stated that at some time on the evening of 22 July 2018 he and accused 3 left the tavern so that he can go and show accused 3 where the deceased stays.

When he was confronted with the cell phone evidence which stated that his brother called him at 18h36 and 18h37 which shows that he could not have been in Pop Inn Tavern with his brother if his brother in this time called him on his cell phone, which the prosecutor then put to him was the time according to

the statement of Luzuko he had been with accused 3 to show him where the deceased stays. His evidence in this regard is unreliable because it would have been highly unlikely if he and his brother would have been at the Pop Inn Tavern at the time when these calls were made. And that his brother would have called him on his cell phone when they were almost in each other's company.

Accused 1 was further not a very impressive witness and his version in my view does not unsettle the allegations made by his brother Luzuko against him in the first statement made to the police. He furthermore came across as a pathetic and unconvincing witness, in fact there is objective evidence which piles up against him which tends to show that the allegations that are made against him in Luzuko's first statement are true. His conduct was also highly suspicious after his brother called him and told him that he told the police everything, including that he was involved in the commission of the crime and told him that the police are on their way to arrest him.

And while the police were on their way to arrest him accused 1 packed his belongings and tries to flee. He later gives an unconvincing version why he packed his belongings as to why he tried to move out of the area. He says that his life had been in danger because of the statement he made to the police

on 2 August 2018 and because of another person that had been arrested in an unrelated case involving the conspiracy to murder the deceased.

These reasons accused 1 gives in my view, are unconvincing for the following reasons; It cannot be a mere coincidence that on the very same day that his brother had implicated him in a statement to the police whereafter his brother had called him to say watch out the police are on their way to arrest him that he decides to flee. And it cannot be that he feared for his life because when he made a statement to the police he did not admit his guilt. It also cannot be because of the fact that the police arrested someone else on a charge of conspiracy to murder the deceased in a matter unrelated to this case. It does not make sense.

In my view, this is strong evidence and his conduct is not consistent with that of an innocent person that were not involved in this matter after he was informed that the police knows about his involvement, whereafter he tried to flee. This is strong circumstantial evidence to prove the reliability and to provide a guarantee for the truthfulness of the first statement Luzuko made to the police.

His evidence as to why he tried to mislead the police in the statement he made on 2 August 2018 to Sergeant Petros about the movement of Luzuko and who accompanied Luzuko over the weekend the deceased was killed is also not reliable and it is unconvincing. He furthermore tried to mislead the police as to the identity of accused 3, knowing that accused 3 was with Luzuko over the weekend in Knysna when the deceased was killed. Why would he want to hide this fact.

He knew accused 3, he knew him long before, the time of the offence. Why would you want to hide this fact and why would one want to hide the identity of accused 3. He furthermore did not tell the police that Luzuko came to see accused 2 over the weekend in connection with his house. If it was for an innocent purpose that Luzuko came to see accused 2, why would he hide this fact from the police. His conduct by hiding the true identity of accused 2 and 3, whom Luzuko says was involved in the killing of the deceased, is not consistent with that of an innocent person.

Once again this fact is a guarantee for the reliability of what Luzuko had mentioned in the statement about the involvement of all three of the accused.

There are many further aspects of the evidence, especially given by accused 1 in cross-examination which are of an unsatisfactory nature. It is on record. The evidence of accused 1 is not reasonably possibly true and it is rejected as false.

Accused 2 was an equally unimpressive witness. His version is riddled with inconsistencies and it is highly improbable. The merits of his version in my view does nothing to unsettle the strong evidence which has piled up against him, especially that which is set out in the first statement of Luzuko. His evidence as to how it came about and the reason as to why Luzuko called him is not convincing and highly improbable.

I am in agreement with the prosecutor that it seems that on the objective evidence it seems that Luzuko indeed had an issue with his house to sort it. All of the accused latched onto this quite opportunistically to fit in with the version of accused 2 as to why it was necessary for Luzuko to come and have a meeting with him.

I find it quite astonishing that he would have made a special arrangement to meet Luzuko on Sunday 22 July 2018 to advise him about his house problems if he on his own admission could have given him that advice over the phone. And that he would

have gone through all the trouble to contact Luzuko more than once on the Sunday prior to the meeting, to find out where he is so that he can discuss this problem. Where in fact and indeed he had been told by Luzuko on 18 July 2018 what the essence of the problem was over the phone. His insistence that it was necessary to have a meeting with Luzuko for that specific purpose is highly improbable.

One would not have expected that a municipal councillor of such high calibre as he was to convene a meeting with a person who came all the way from Cape Town to attend to a problem with him which he could easily have disposed of over the phone within a few minutes.

If one goes back to Luzuko's evidence he says accused 2 on his own dishonest version was not much of assistance to him. If one sits back and looks at the totality of what he says it seems that ultimately accused 2 could not help him with his housing problem, if there was such a problem, because he referred Luzuko to Bulelane Sekota. He could easily right from the onset have referred Luzuko to that person.

So I find the reasons he, accused 2 as well as accused 3 gave, as to why it was necessary to have a meeting with Luzuko immediately after he came into Knysna as preposterous to say

the least. Why was all the telephone contact between them on more than one occasion, necessary for such a simple issue Luzuko needed to resolve, which as said earlier, Accused 2 could not ultimately assist him with. By doing this, he was trying to hide the real reason as to why he had to meet Luzuko, and that reason, I found to be more probable that the reason why they met each other and why Luzuko had to go to Knysna was that which Luzuko stated in his first statement he made to Ngxaki. Which was to discuss and plan with accused 3 the assassination and murder of the deceased, and for no other reason.

I find it ludicrous and preposterous that he would have done this and it seems that his further explanation about the numerous calls that he made after the meeting, which was to discuss this housing problem further, laughable. Luzuko calls him at 17h21 on 22 July 2018, later again at 17h31 once again to discuss this housing problem. Then he at 19h27 again calls Luzuko to once again to ask him if he indeed was able to get help. This is totally unconvincing

Then at 20h09 Luzuko calls him back, once again to discuss this housing problem. This is an unconvincing and childish reason he gives this court why these calls were made between him, which was that he wanted to find out if Luzuko had indeed

found the person of the street committee or housing committee he referred him to. He is a councillor, a respected man in Concordia. He could have referred Luzuko to an assistant or to someone else but his insistence to speak to Luzuko and Luzuko's persistence to speak to him does not make sense. It must have been for another reason and the only plausible reason is the reason which Luzuko has given in his first statement to the police. Like I said it is highly childish and laughable reasons as to why these calls were made between the two of them.

What I also find highly implausible is the version of accused 2 that coincidentally at the same time when Luzuko made a call to him on 18 July 2018 to enquire whether he could assist him with his housing problem. Luzuko with whom he had no contact for about ten years, would quite fortuitously asked him, to lend him R5 000. This is preposterous and also highly implausible that that could have happened. And then he comes again with this childish and laughable explanation that when Luzuko asked him to advance him this loan he did not ask him why he wanted the money.

He just gives this money then on top of it all he goes to the extra trouble to go to Shoprite to have this money paid in through the Money Market. He had to go stand in the queue to

go through all this trouble when this person says will come to Knysna over the weekend. Once again highly implausible, not convincing the reasons as to why he says he advanced this R1 000.

If regard once again is to be had to the statement of second the second statement Luzuko made to Mdokwana,, he says it was an amount of R1 000 to pay for petrol for Luzuko to travel with accused 3 from Cape Town. That in my view is an exceptionally plausible reason as to why one would advance a person R1 000. Then rather belatedly, he says this money was paid back to him which was not fully canvassed with Luzuko.

If one looks closely at this explanation, it seems Luzuko should have given him the money over the weekend when he was in Knysna. Strangely, after the deceased was killed, Luzuko travels with accused 3 back to Cape Town. Luzuko tells him he cannot give him the money at that stage. The purpose was right from the onset that Luzuko would pay back his money over that weekend.

Then rather belatedly, he says Luzuko had to go back to Cape Town because something came up. And that he (Luzuko) will pay back his money sometime in the future. Then he comes up with this far-fetched childish excuse and reason, he says

Luzuko was one day in Queenstown and Luzuko called him and asked if he knows anybody in Queenstown because he wants to pay back his money, then Luzuko pays that money to a person by the name of Lita in Queenstown. This was never also put to the witnesses and Mr Dercksssen, an experienced attorney of this court, in my view, would have put it to this witness. This clearly is a fabrication and accused 2 made up this story while he was in the witness box. Like I said, the reasons proffered by Luzuko in his statement as to why this R1 000 was advanced is more plausible and acceptable and convincing than the reasons accused 2 says the R1 000 was advanced to Luzuko.

The evidence of accused 2 in my view is not reasonably possibly true and the court rejects it as false.

Accused 3 was also not a very impressive witness. His evidence to the extent that due to his injury he could not have committed this offence does not impress this court. It is exaggerated and opportunistic. It seems that he was using this misfortune that befell him to his benefit. I say this in the light of the overwhelming evidence against him about his involvement in this offence.

I have already earlier in this judgment referred to the strong evidence against him, the evidence of the identification of Mrs Malosi and her son, who identified him there on the evening of 23 July 2018 to have made enquiries about the whereabouts of the deceased literally minutes or within the hour before the deceased was killed.

I also find it highly unlikely that a very sick person, which he tries to portray himself, would undertake the long journey to Knysna from Cape Town without his medication and furthermore that he would have been satisfied to have been left at Pop Inn Tavern for most of the time during the course of the weekend while the person that he accompanied, which was Luzuko, was gallivanting in Knysna by drinking alcohol, entertaining and sleeping with women, and he would be sitting like a meek lamb and doing nothing about it. That is an exaggerated version which no person in his or her rightful mind would believe.

He does not convince this court that he merely came to Knysna as an innocent person without any specific reason, just to be ignored by the person who asked him to accompany him. His evidence about why he was pointed out by Mrs Malosi and her son is incoherent and inconsistent. He first tried to convince this court that the reason why he was pointed out was because

the witnesses were in court at the time of his first appearance but then again he says it may have been that photos would have been taken of him in court which might have appeared on social media which the witness would have seen prior to them pointing him out at the identity parade. He then ultimately says that he cannot dispute the evidence of these two witnesses when they say they did not attend court and that they did not see any photos of him on social media.

He was unable to explain why these witnesses said that he was at their house on the evening of 22 July 2018 and 23 July 2018 respectively to find out if the deceased was home. I am satisfied that these two witnesses had enough time to identify accused 3, they gave a proper description of the way he looked, the lighting in and around the house at the time of the identification when they observed him was good and they had a proper opportunity to observe him.

It was not a fleeting observation of a person running away. He came there and he had a discussion with both of them, he even properly and in a very polite manner greeted Mrs Malosi and asked her how she was. These witnesses thereafter, after a proper photo identification was held, identified him as the person that was at the house of the deceased.

This fact as pointed out earlier furthermore strengthened the version of Luzuko where he says in his statement that accused 3 went to the house of the deceased on the evening of 22 July 2018 and also on the evening of 23 July 2018, he went back to look for the deceased, which is a further guarantee as I said for the correctness and genuineness of the evidence and the truthfulness of this witness based on the statement.

The question then was for what purpose was he visiting the house of the deceased on these two occasions. According to Luzuko it was to find out whether the deceased was at home so that he could be killed. That once again is the only probable reason and it is to be found in this first statement of Luzuko. His further evidence as to his movements on the evening of 23 July 2018 and the number of calls he made to Luzuko and the reasons therefore is not convincing.

Furthermore, and I must highlight this fact, the mere fact that he might have been disabled to the extent that he could not properly walk or run does not mean that he could not have used a firearm to kill the deceased. This fact is borne out by the evidence as referred to earlier in the first statement of Luzuko, where he said he asked accused 3 how he killed the deceased whereupon accused 3 said he fired three shots of which the last one was in the head.

As I said earlier, these facts could only have fallen within the knowledge of the person that killed the deceased. I find the version of accused 3 implausible and not reasonably possibly true. The evidence of the physiotherapist, Mr Philip Beukes, shows that accused 3, due to his physical condition as a result of an incident he was involved in 2013, was unable to run at the time when he conducted a physical examination on him on 5 December 2013. That evidence in my view, does not destroy or negate the forceful and overwhelming evidence against him that he was the person that was at the house of the deceased on the evening of 22 July 2018 and that he was there within the hour of the killing of the deceased on the evening of 22 July 2018, This comfortably fits in with the version of Luzuko in the first statement he made that accused 3 was indeed there on these two occasions and that accused 3 was the person that was used as an assassin to kill the deceased.

The evidence in my view against all three of the accused is overwhelming. The state has proved its case against all three accused beyond reasonable doubt on the following basis. That accused 2 had acquired the assistance of accused 1 and his brother Luzuko to procure the services of accused 3 to assassinate the deceased, Victor Malosi, on 23 July 2018 and furthermore I am satisfied that all three of them together with

the witness formed a common purpose by means of a prior agreement to murder the deceased. I therefore find all three accused GUILTY on the main count of murder of Mr Victor Malosi.

This brings me to the question whether all three accused should be convicted on counts 3 and 2 and 3 even though accused 3 on the evidence was found to be the person that was in possession of a firearm from which ammunition was discharged and which was used to kill the deceased. It is clear as said earlier from the evidence that there was a common purpose based on a prior agreement on the instruction of accused 2 to murder the deceased. From the evidence and circumstances of this case the only reasonable inference that could be drawn was that a firearm should be used.

In my view, it would be nonsensical to come to a different conclusion, although this fact is not stated directly in the first statement of Luzuko, such an inference can without a doubt be reasonably inferred. And all 3 of them were in joint possession of the firearm although it was in the actual physical possession of Accused 3 at the time of the commission of the crime.

In *S v Ramoba 2017 (2) SACR 353 (SCA)* the Supreme Court of Appeal had the following to say in this regard:

"[12] *The principles of joint possession in relation to the crime of unlawful possession of firearms in instances of robbery committed by a group of people, as in this case are trite. They were aptly explained by Marais J in S v Nkosi who, after finding in that case that there was actual physical possession (corpus) of the three guns by the three robbers individually, stated that the only question to be decided was whether there was the necessary mental intention or animus to render their physical possession of the guns, possession by the group as a whole. The learned judge then said that the question of whether the group (and hence the appellant) possessed the guns had to be decided with reference to the issue of whether the State had established, on the facts from which it could be inferred by a court, firstly, that the group had the intention (animus) to exercise possession of the guns through the actual detentor and secondly, the actual detentors had the intention to hold the guns on behalf of the group. Marais J applied the principles set out in R v Blom for drawing an inference from proven facts, namely:*

> *'1. The inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn.*

2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[12] In convicting the appellant for (unlawful) joint possession of the Norinco pistol and the R4 and R5 rifles, the court a quo relied on S v Khambule where it was held, incorrectly in my view, that there was no reason why in appropriate situations and if the doctrine of common purpose was applied, the common intention to possess the firearms jointly could not be inferred. The court a quo then concluded that if it was the intention of the members of the group to use firearms in the execution of a robbery or murder to the advantage of them all, they associated themselves with the possession of firearms. Possession of the firearms accordingly had to be taken by one or more members of the gang and on behalf of and to the advantage of the group. In S v Khambule it was reasoned thus: the only and sole inference that can be drawn from the proven or established fact of common purpose, is that there was joint possession of firearms used in the commission of the robbery.

[13] S v Khambule was correctly critised in S v Mbuli where Nugent JA, stated that while he agreed that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, he could not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of them all would suffice for a conviction for unlawful joint possession of firearms. He then concluded that on the facts of that case, it could not be said that the only reasonable inference from the evidence was that the accused possessed the hand grenade jointly. Importantly, Nugent JA said that mere knowledge by the others that one of their own was in possession of a hand grenade and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, was not sufficient to make them joint possessors of the hand grenade. As there was no evidence which showed which of the accused there was in possession of the hand grenade, Nugent JA set aside that appellant's conviction of unlawful possession of a hand grenade."

And as said earlier the only reasonable inference based on the facts of this case is that it is clear that there was a common intention to possess the firearm and ammunition jointly for the benefit of all the accused.The intention to exercise possession

of the gun through the actual *detente* in this case accused 3, and secondly the actual *detente*, in this case accused 3, had the intention to hold the gun on behalf of the group. In order for accused 3 to have executed this murder and to give effect to this common purpose he had to hold these guns on behalf of accused 1 and 2. In the result the only reasonable or inference that the court can draw is that based on the principle of common purpose accused 1 and 2 also possessed this firearm and ammunition the state alleged.

In the result therefore, I find all three GUILTY also on counts 2 and 3. Therefore all three accused are found guilty on all three charges.

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HENNEY, J

JUDGE OF THE HIGH COURT

DATE: ……