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

CASE NO: CC67/2019

In the matter between

10 THE STATE

And

SIZWE SINZOKOHLE BIYELA

Accused 1

NKOSINATHI KHUMALO

Accused 2

VUYILE MALITI

Accused 3

JUDGMENT DELIVERED: THURSDAY, 3 AUGUST 2023

20 **NZIWENI, J:**

[1] This is a chilling and unfortunate case which involves a father who was fatally shot in broad daylight at approximately 07h39:37a.m. on 30 October 2018, by a gunman who approached his vehicle near a traffic stop sign.

[2] The targeted assassination of Mr P[...] M[...], hereinafter referred to as "the deceased", happened right in the open and occurred in the presence of his two minor children. The incident took
30 place near an intersection of Thornhill Road and Cavalcade Road,

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Green Point. The deceased was on route to drop off his children at R[...] H[...] School in Cavalcade Road.

[3] CCTV camera located at Backpackers in Thornhill Road Green Point, recorded the gunman's, callous and brazen act as he shot the deceased. The time stamp 7h26:37a.m., the gunman is captured on the Backpackers surveillance video footage, pointing something that resembles a firearm at the driver's window.

10 [4] The undisputed evidence establishes that the gunman came to the driver's window and then fired two shots from a semi-automatic pistol compatible with a 9mm calibre. The bullets struck the deceased to the head. The son of the deceased was also struck by a bullet that came from the same gunman. The deceased was pronounced dead at the scene and the investigators found two cartridge casings, both fired from a semi-automatic pistol.

[5] The Backpackers' surveillance video that captured the shooting of the deceased was played for the Court together with
20 other surveillance video footages.

[6] It is pertinent to note that the State led evidence that there was a discrepancy between the video footage's time stamp and real time. Nonetheless, the State established that the time stamp on the Backpackers' surveillance footage that captured the shooter in action, was 13 minutes behind the real time. Hence, there is some common ground that the shooting time is 7h39:37a.m., and not 7h26:37a.m.

30 [7] After the shooting the gunman is depicted on the surveillance footage running towards the pavement in Thornhill Road towards a Westerly direction.

[8] Based upon the evidence and the exhibits admitted in this matter there were two vehicles, believed by the State to have been actively connected in the killing of the deceased. One was a VW Polo and the other one was a Renault Clio.

[9] Within a few hours after the shooting, Mr Sizwe Biyela [accused one], was arrested at the Bellville Inter Cape Bus Terminals and Mr Nkosinathi Khumalo [accused two], was arrested at Sea Point police station. The last arrest occurred a week later after the shooting, when Mr Vuyile Maliti [accused three], handed himself to the police on or about 7 November 2018.

[10] In count 1, the case for the State is that Messrs, Sizwe Biyela, Nkosinathi Khumalo and Vuyile Maliti, (hereinafter referred to as "the accused"), acting in the cause of furtherance of common purpose or conspiracy, are all responsible for the killing of the deceased.

[11] Besides the charge of murder preferred against all the accused, the State has also indicted the accused on a slew of other charges. In counts, two and three, the accused are facing two counts of attempted murder. It is contended by the State that the accused unlawfully and intentionally attempted to kill the two minor children who were the passengers in the motor vehicle of the deceased at the critical time.

[12] Additionally, in respect of count two, the State further alleges that the accused committed the offence by shooting at the minor child and thereby inflicted serious and potentially life-threatening injuries, with the intent to kill him. In respect of count three, the State alleges that the accused committed the offence by firing shots in the direction of the minor child, with the intent to kill her.

[13] In counts four and five, the accused are charged with the

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contraventions of section 3, (possession of unlicensed firearm) and 90 (possession of ammunition), respectively. Both counts four and five are read with certain sections of the Firearms Control Act, Act 60 of 2000. In these two counts it is contended by the State that the accused, on 30 October 2018, at or near corners of Thornhill and Cavalcade Roads Green Point, were in possession of a 9-millimetre firearm and unknown quantity of ammunition without holding a license or permit to possess the said firearm and ammunition.

10 [14] The State further asserts that because count one was committed by a group of persons or syndicate acting in execution of furtherance of common purpose or conspiracy, the offence therefore falls within the purview of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997. The State therefore contends that life imprisonment is applicable as far as count one is concerned.

[15] Throughout these proceedings accused one was represented by Ms Luterek and accused three was represented by Mr Kriel. Accused two was initially represented by Mr van Rensburg, however,
20 during the course of the trial accused two terminated his erstwhile attorneys mandate and since 15 June 2022, accused two has been represented by Advocate Nel.

[16] All three accused pleaded not guilty to all the five charges preferred against them by the State. Accused one and two elected to exercise their Constitutional right and chose to remain silent and not to give any plea explanation.

30 In respect of accused three, a short plea explanation was given by Mr Kriel on behalf of accused three. He informed this Court during the plea explanation that accused three had nothing to do with the commission of the various offences. Additionally, Mr Kriel stated that accused three admits just prior to 30

October 2018, and on the day of the murder, he had contact with his co-accused, because accused one requested that he should sell Krugerrand coins on his behalf.

[17] Furthermore, each accused made formal admissions that the itemised billing from the service provider indicates his respective number, calls made, location, longitude and latitude co-ordinates and detailed power location linked to the respective numbers.

10 [18] The State in its endeavours to prove its case presented several witnesses that included crime scene witnesses, a traffic officer, a facial identification expert, statement which the State contends were deposed by accused one and two, still images taken from closed- circuit video surveillance camera at Thornhill Road, Cavalcade Road and at a synagogue situated at Upper Portswood Road, Green Point, modern technology evidence in the form of a cell phone records of the accused, expert witness to show which cell phone tower picked up the accused's cell phone activities and video surveillance recordings. Maps showing the relevant areas were also
20 admitted as exhibits.

[19] I turn now to consider the evidence as presented by multiple State witnesses and their testimonies. Starting with the evidence of Mr Stiaan Coetzee.

Stiaan Coetzee, a resident of Thornhill Road in Green Point, testified that on 30 October 2018, around 7h30 and 7h40 a.m., he was at his home, when he heard two distinct gun shots. He ran outside, and when he was at his pedestrian gate, he noticed a male person
30 rushing past his gate in a trot. The male person moved from the right-hand side of the gate to the left side where a vehicle was standing. The direction of the unknown person was away from Cavalcade Road, he remembers that the male person was wearing a

trouser and a shirt.

[20] He then saw a black Mercedes Benz and the young lady standing next to it screaming for help. The young lady was not injured. The scene of the crime was about 59.2 metres away from his house. He ran to the car and on his arrival, at the back door of the vehicle, he saw blood oozing from the neck of the boy. He asked the sister of the boy to put pressure on her brother's neck and he went to attend to the father. When he opened the driver's door, the engine
10 was still running, and the vehicle was still in driving gear and the deceased had his foot on the break. He switched the engine off.

[21] The deceased was still conscious, and he asked him if he was fine. The deceased just stared at him and stopped breathing. He saw two bullet holes on the window. On the deceased he saw two bullet holes, one on the side of his right jaw. As he removed the safety belt of the deceased a metal piece, which was on the deceased's head, fell down. The young lady asked if her dad was still alive. When he felt the deceased's pulse there was no pulse.
20 The boy was taken to hospital and the young lady went to a vehicle of a parent of her school mate, the neighbourhood watch and the police arrived.

[22] Frank Scherf, testified that on 30 October 2018, he was residing in a second-floor apartment in Thornhill Road, Green Point. Just before 7h40 a.m. as he was sitting in his lounge with its large sliding doors open, he heard what sounded like two gunshots. He ran out to his balcony and when he looked down, he saw a vehicle driven at a high speed down the road towards his building and passed
30 where he stood. He considered the vehicle suspicious.

[23] When he saw the vehicle, his phone reflected the time to be around 7h40 a.m. He could see through the front windscreen of the

driver's side that the vehicle had two occupants, the driver and a male person in the front passenger seat. He did not take note of what the occupants of the speeding vehicle were wearing. He had a clear view of the vehicle's number plate. He took down the details of the number plate he could see from the vehicle.

[24] The suspicious vehicle was a dark coloured hatch back French manufactured vehicle. Though he did not look at the insignia of the vehicle at that moment, he thought that it was a Peugeot. The
10 details of the registration number he managed to take were HR O[...].

[25] During his testimony, after he was shown a photograph of the Renault Clio [EXHIBIT], he testified that according to him a Peugeot and a Renault Clio look very similar. He also testified that the more he sees the model of a Peugeot 308 the more he becomes certain that the vehicle he saw was not a Peugeot but a Renault Clio.

[26] According to him when he first saw the French made vehicle it was travelling in a North Easterly direction from the direction of
20 Cavalcade Road, up towards his apartment in Thornhill and almost in front of his apartment building. After the vehicle had disappeared from his vision he ran Westerly on Thornhill Road towards Cavalcade, the direction he heard the gunshots coming from. He was heading towards a "T"-intersection formed by junction of Thornhill Road and Cavalcade Road.

[27] The crime scene was at the end of Thornhill Road just before Cavalcade Road and the stop sign regulating traffic. At that point, people had already gathered as it was drop off time for children for
30 school. On his arrival on the crime scene he found a black Mercedes Benz and saw a young girl and a boy. The boy, as far as he could recall, was seated in the back seat. He realised that the driver of the vehicle and the boy were shot, the young girl was not injured. The

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young boy was taken to hospital. At this point the police and the emergency services arrived.

[28] According to Mr Scherf, the deceased would mostly travel in his black Mercedes Benz the same time every morning in Thornhill Road towards R[...] School.

[29] Turning to witness Charlon Prins. He testified that he works as a police official at Sea Point police station. On the morning of 30 October 2018, he was doing patrols with his partner around Sea Point. Around 7h40 a.m. he received a call from his radio about a shooting at R[...] School in Green Point. On his arrival on the scene, he saw a boy with bullet wound. He escorted the boy to hospital. At the hospital they were informed that the boy had to be transported to another hospital to remove a bullet from his jaw.

[30] Warrant Officer Alli testified that she is attached to the Forensics Science Laboratory.

20 On 30 October 2018 around 8h15 a.m., she attended the crime scene on the corner of Thornhill and Cavalcade Road. She and her partner examined the scene. After examining the vehicle they found at the crime scene, they observed two entrance bullet holes on the driver's side window. One bullet hole was positioned slightly higher to the middle of the window and the other hole was positioned at the bottom edge of the window. They found a bullet cover on the road surface beneath the driver's side door. They also found two fired cartridge cases on the road surface adjacent to the victim's vehicle. A semi-automatic pistol would inject the cartridges that were found.

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It was also her testimony that a firearm that is compatible with

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9mm calibre that fired the cartridge cases could have been used.

[31] It was her expert opinion that the bullet which entered the vehicle through the bottom part of the window, is most likely the one that led to the child passenger being injured. She testified that the bullet, as it perforated the window and separated, and the core would most likely have hit the boy in the back seat.

10 [32] The Court is now going to the evidence of Mr Boy Makutu. He testified as follows:

He is in the employ of the City of Cape Town as a senior traffic officer at Gallows Hill Traffic Department, Somerset Road in Green Point. On 30 October 2018 he started his duties at 6:00 a.m. On that morning he had to go to a training that was schedule for 8:00 a.m. The back gate at is work is situated at the corner of Ebenezer and Prestwich Road.

20 [33] Around after 7:00 a.m. during peak hour traffic, when he was exiting his work premises through the back gate, he spotted two vehicles following one another. Both vehicles disregarded the stop sign and manoeuvred their way between other vehicles that were already on the stop sign.

The vehicles were a Renault Clio and a VW Polo. He immediately pursued both vehicles with his lights and siren on.

[34] The vehicle stopped and he directed the drivers to pull over to the curb. He pulled his vehicle and stopped between the two
30 vehicles. A Renault Clio hatch back with a bright colour was stationary in front of his vehicle and the VW Polo hatch back, silver grey in colour, with registration number CA2[...] was stationary behind his vehicle.

[35] He approached the driver of the Renault Clio first. Inside the Renault Clio he observed two men, the driver and the passenger. He directed the driver of the Renault Clio to produce his driver's license.

[36] The driver of the Renault Clio became known to him as Nkosinathi Khumalo, accused two. Accused two was wearing dark clothes. He explicitly recalled that the passenger of accused two was wearing a check shirt with bright colours. He thinks that the
10 passenger's trousers were light.

[37] He then directed the accused two to park properly so that he can issue him with a ticket. Accused two then parked the Renault Clio 20 metres within his sight.

[38] He proceeded to the VW Polo which had two male occupants, accused three was the driver of the VW Polo. He got the driver's license of accused three. Accused three told him that his address was number 2[...], T[...] Avenue, Bongweni, Khayelitsha.
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[39] On his way to fetch a traffic ticket book, he noticed that the Renault Clio was gone. Nonetheless, he proceeded to accused three with a ticket and at that time accused three and his passenger had alighted the vehicle.

[40] As he wrote out a traffic violation ticket for accused three, the driver of the missing Renault Clio, accused two, reappeared on foot. He then enquired about the whereabouts of the Renault Clio and accused two told him that his passenger drove away with it. He told
30 accused two that he needed the vehicle to be present to get its registration number. Accused two then made the call to the passenger at which time, accused two asked him [Makutu], if he could give him something and he understood this to be a reference to

a bribe. At that juncture there was no communication between accused two and three.

[41] When he was done with issuing a ticket to accused three, accused three drove off.

[42] He asked accused two again about the whereabouts of the passenger and accused two called his passenger again asking where he was and to return the vehicle.

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[43] He then suggested to accused two that he must tell the driver to stop, then he would go to wherever he was just to get the registration number and they can leave. Accused two obliged and called the person who was driving the Renault Clio. He could hear accused two telling the person who was driving the Renault Clio to stop and they would go to him. He then realised that the person who was driving the Renault Clio was not willing to come back, he decided to take accused two to Sea Point police station as it was the nearest, so that the driver can go there.

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At the police station accused two called the person who was driving the Renault Clio and told him that he was at the police station.

[44] From the stop sign until the police station, he estimates that the time he spent dealing with the two vehicles can be one hour. At all times during his interaction with accused two, he was not arrested. He got to hear about the shooting in question whilst they were at the police station and that led to him to hand accused two over to the police. Briefly that was his testimony.

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[45] Timothy Kinnear, an employee of Kenilworth Cash Gold testified that on 30 October 2018 around 13:00, a walk-in customer

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visited their shop in the company of two other males.

10 Their shop is not a busy shop, they can have one client a day. The owner of the business at the time was Marc Orton. He allowed one male to the back office and the other two males remained in front. The seller identified himself as V Maliti, it was his first time to meet Mr Maliti. The male said he had eleven Krugerrand coins and showed the coins to the owner. The owner told the seller the price for each coin and they agreed on a price of R200 000. They determined the value of the coins by looking at an application called "Gold Price org", every morning.

[46] Sheldon de Jager, an investigator from Avis Rent a Car, testified that on 27 October 2018 at 15:05, accused three rented a silver 1.5 Polo Vivo with registration number CA2[...] and it was returned on 31st October 2018.

20 [47] He also received information from the police related to registration number HRO[...], Renault Clio, to check. When he checked, it turned out that Avis had a grey Renault Clio with the same registration as part of their fleet. According to their data the vehicle was rented to a lady at OR Tambo International Airport on 30 October 2018 at 9:48 a.m. and the person who rented it returned it on 29 November 2018. He testified that their vehicles license plates are normally cloned by criminals, onto other vehicles.

[48] I now turn to the testimony of Warrant Officer Werner Höll.

30 He testified that his duties entail attending crime scenes and downloading surveillance video recordings. Whilst on duty on 30 October 2018 he was called to attend a crime scene. He testified that he obtained four various surveillances tapes from

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the morning of 30 October 2018 and viewed them at the request of the investigating officer. He then downloaded the surveillance video recordings from four properties in Thornhill and Cavalcade Road.

[49] The first address he attended at 9:15 a.m., was at Backpackers in Thornhill Road, Green Point. The property had two cameras viewing on the street. He acquired permission from the owner of the premises to view the surveillance footage.

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[50] He noticed that the surveillance system was about 13 minutes behind normal time. He then downloaded the footage relevant to the incident. The footage pertained to the time from when the deceased came into view on the first camera until after the shooting.

[51] The second footage he went to download was at 25 Cavalcade Road in Green Point. The footage there was five minutes behind normal time. Thereafter he downloaded footage from 11A Cavalcade Road and their footage was 10 minutes ahead of time. The last
20 address he obtained footage from was 19 Cavalcade Road and the time frame on their system was 1 hour and 56 minutes behind normal time.

[52] Having viewed the videos, he captured 39 still photographs of the suspect and possible vehicles that were involved, from the surveillance video recording.

[53] According to him, when he played the surveillance video recording of the Backpacker's surveillance footage; the video
30 recording at 7: 23:19 seconds, shows a man walking in Thornhill Road wearing amongst others a beige coloured pants and what seems to be a long-sleeved reddish check shirt, walking towards Cavalcade Road.

[54] At 7:23: 32 the same man is seen on the footage as if he is carrying a small black bag, in his left hand.

[55] At 7:26:19 image shows a silver-grey VW Polo followed by a black Mercedes Benz, the deceased vehicle.

10 [56] At 7:26:36 a black Mercedes Benz is seen stationary at a T-junction giving right of way to other vehicles in the intersection approaching from Cavalcade Road. Then an individual wearing a clothing resembling the same one worn by the individual seen earlier in the footage, is seen pointing an item looking like a firearm at the right window of the Mercedes Benz.

[57] The last image of the person in the footage is depicting him running towards the pavement in Thornhill Road towards Westerly direction. That is a brief synopsis of his testimony.

20 [58] Warrant Officer Wesley Arendse testified that he is a forensic analyst, attached to the scientific analysis section of the Forensic Laboratory in Platteklouf.

He testified that he has conducted numerous forensic investigations including image enhancement, video authenticity, inspection and audio enhancement. He testified that he has experience in image enhancement. The essence of his profession is image enhancement.

30 [59] Whilst on duty he received a DVD linked to this case and he was asked to enhance an image of the shooter, for facial recognition purposes. The software he uses to enhance an image does not alter an image but only enhances it. He then created an album with enhanced images, [EXHIBIT 5].

[60] Warrant Officer Nicolette Keyser is stationed at the Facial Identification Unit at the Criminal Record and Criminal Crimes Management in Cape Town.

She is employed there as a facial identification and forensic technician. Her duties involve facial compilations, facial comparison, facial sketches and the process of facial aging. She draws and compare faces on daily basis. She has 16 years of service at the facial identification unit. She has undergone extensive educational
10 training as a facial identification technician which included international exposure.

[61] In this case, she used a mythological method of facial comparison. According to her, a mythological analysis is a method where features of a face are described, classified and compared. It is her testimony that it is based on the assessment of the correspondence, shape, appearance, presence and or location of facial features and landmarks. Features will include the holistic face and the local facial components for instance, the nose and the
20 component characteristics, for example, the nasal base or the nasal tip.

[62] When comparing the facial images, she testified, there is no standard number of points of similarity generally accepted as establishing an identification. Her training in facial comparison helps her to reach a finding. They work according to the Facial Identification Science Working Group (FISWG), guidelines, that is an international body governing facial comparison. According to FISWG, they use a set standardised feature list for each comparison.
30 The standard feature list covers all components of the face, the head from top to bottom. She would then compare the questioned image and the control image following the morphological analysis. The morphological method looks at shape, appearance, presence,

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anatomical structures such as nose and mouth. They are using the morphological method because crime scenes are captured in uncontrolled environment.

[63] She would then evaluate all points that she has marked out to reach a conclusion. Her conclusion would then be verified by an independent review and peer review process to eliminate errors.

10 [64] As far as this case is concerned, she was requested to perform a facial comparison from the image depicted on the CCTV image and a controlled photo which was provided.

[65] She testified about the process that led to the identification match. It is her testimony that before she begins with a comparison, she obtained a photo album from the Forensic Laboratory compiled from the crime scene CCTV footage. She reviewed the photo album and decided if the CCTV image was suitable for comparison with the controlled image. The member of the Forensic Science Laboratory enhanced the image to make it clearer. The enhancement done by
20 the Forensic Science Laboratory would not influence her morphological process or analysis.

[66] She looked at everything presented to her in the CCTV image and the controlled image, and she followed the entire process by taking into account the similarities and dissimilarities on the images and marked them out.

[67] Keyser also testified that after comparing the CCTV image and the controlled image she found 16 points of similarities and one point
30 of dissimilarity. The one point of dissimilarity was clothing. Thus, her comparison produced a positive finding. Keyser's positive conclusion based on her experience and training and her comparison of the two images, found that the person in the CCTV image and the

control image depicts the same person.

[68] The State also called Jarred Marcus, who was at the time, worked as a security personnel at a synagogue situated at Upper Portswood Road, Green Point. He testified that the synagogue has a CCTV camera system and there is a school located further up the road.

10 [69] According to him, the CCTV footage from the synagogue dated 29 October 2018, at 07:16a.m. [EXHIBIT 6], depicts a grey hatchback VW Polo followed by a hatchback Renault Clio driving or travelling in a Southerly direction. The Renault Clio had a dark grey charcoal colour with a registration number HR0[...].

[70] On 30 October 2018, 7:37:20 a.m., the silver VW Polo is captured by the synagogue's CCTV system travelling away from Portswood Road, Green Point, and the synagogue in a Northerly direction. The Polo then dropped out of camera's view at 7:37: 25 a.m. The Polo was followed by a grey charcoal Renault Clio with
20 registration number HR06GPGP that disappears from the view of the camera at 07:37:40.

[71] He testified that he cannot confirm the time stamp displayed on the recording of the CCTV system. Thus, he cannot verify that the time stamp represents that actual time of the day the recording was recorded. He was not the one who downloaded the footage from the CCTV system.

30 [72] Sergeant Randal Roberts Basson testified that he is a video analyst for capturing of still images and downloading of surveillance footage. He identified Exhibits 6 and 7 as his products. He testified that Exhibit 6, is generated from the still image from Upper Portswood Road, captured from the surveillance footage that he

downloaded and which Mr Marcus from the synagogue testified about.

[73] As the surveillance footage was played in court, he narrated the events as they occurred. He testified that on 29 October 2018, at 07:16:10, a VW Polo with registration number CA1[...] can be seen on the CCTV footage followed by a Renault Clio travelling at an intersection up Upper Portswood Road.

10 [74] This Court's attention was drawn to image 12 and 9 of Exhibit 7, of the VW Polo with registration number CA1[,], captured on 29 October 2018. At 07:16:11, image 12 of Exhibit 7, depicts a mark on the roof of the VW Polo.

[75] Then in image 9 of Exhibit 7, of the same VW Polo, the Court was directed to the front grill of the vehicle and an object hanging from the rear-view mirror inside the VW Polo and the position of the licence disc sticker on the left side of the windscreen.

20 [76] This Court was also drawn to an image captured on 30 October 2018, in Upper Portswood Road at 7:34:41. The image depicts a VW Polo with registration number CAW [...], captured by the same CCTV that captured the VW Polo on 29 October 2018, heading towards the same direction in the same street, as the Polo on 29 October 2018.

[77] The image of 30 October 2018, shows that the VW Polo had a front grill, an object suspended from the rear-view mirror and the position for the licenced disc positioned on the left side of the
30 windscreen, located in the same space and looking the same manner as the VW Polo of 29 October 2018. Lastly, the VW Polo with registration number CAW [...] has the same mark on the roof on the same spot.

[78] On 30 October 2018, at 07:34:41, the VW Polo with registration number CAW [...] is captured by the CCTV at an intersection driving up Upper Portswood Road. Then immediately 43 seconds later, at 07:35:24, the deceased is captured driving his vehicle travelling up on the intersection of Upper Portswood Road, in the direction of Thornhill Road. Both vehicles are captured by the same camera.

10 [79] On 30 October 2018, at 7:40:28, the Renault Clio with registration number HR0 [...], is captured by the CCTV driving in Upper Portswood Road, towards the intersection in the opposite direction, from the one travelled by the VW Polo and the deceased vehicle.

[80] Turning to Brigadier Petrus Bergh.

He testified that he is the provincial commander of Priority Crimes Specialised Investigations. He has received training in software use
20 for analysis of communication data. He is an expert in the analysis of large quantities of data, interpretation of such data and visualisation of analysed data.

[81] The investigating officer provided him with cell phone numbers of all three accused and one other cell number. The numbers are the numbers which all three accused admitted as belonging to them. He had to determine if there was communication between the four different cell numbers from the period of 22 October 2018 to 30 October 2018.

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He was also requested to determine the location in relations to the cell phone towers for the four different numbers for the period 29 October 2018 and 30 October 2018. In his field, they only identify

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the tower that was utilised for the action of communication. According to him, the cell phone records, Exhibit DD, provides context regarding communication between the different numbers and indicates the vicinity close to a specific tower.

[82] After he had analysed the four phone numbers' cell phone activity between 22 October 2018 to 30 October 2018, he found out that accused one and three had 124, telephonic communications between them.

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[83] He testified that during the period in question; there was communication between all three accused.

On 29 October 2018 and 30 October, he looked whether the accused were using the same cellular tower and he found that there were times the accused were using the same towers. He also testified that if the towers are different every time, it means that the instrument is moving.

20 [84] Then he explained how cell towers pick up calls in layman's terms. He testified that if a person makes a call and the initial cell tower closest to the caller is overloaded, it will automatically go to the next available cell tower. The second cell tower then might be used, will be in the closest vicinity of the initial tower. For instance, if you are in Cape Town, it will not jump to Bellville.

[85] The SIM card triggers the three cell towers closest to it. Generally, the SIM card will utilise the cell tower, which is closest to it. If not, it will jump to the second or third one around it. The SIM
30 card speaks to the cell tower that serves the area it is in. A cell tower would reveal the location where the SIM card was utilised.

[86] Sergeant Van der Horst, testified that she is stationed at the

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Anti-Gang Unit.

On 30 October 2018, she visited the crime scene. She viewed the surveillance camera from Backpackers and took photographs of the suspect from the monitor with her phone. The suspect was wearing a red and white check long-sleeve shirt and beige pants. Colonel Kinnear told her that they should go to the bus terminals to be on the lookout for the suspect. They then went to the bus terminals in Bellville.

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[87] At the terminals they looked around to see if they would not spot the person they were looking for.

Colonel Kinnear noticed accused one outside the bus terminals. At that time, accused one was not wearing the same clothes that she saw on the photo. However, in her judgment the person in the terminals looked similar to the one depicted on the photographs she obtained from the monitor.

20 [88] They approached accused one, and Colonel Kinnear identified himself, informed accused one that they were investigating a murder that took place. Accused one denied being at the place which was identified by Colonel Kinnear. Colonel Kinnear conducted a search on accused one and a Nokia cell phone, and a loose SIM card were found in accused one's pocket.

[89] Accused one had an Intercape one-way bus ticket purchased at 14: 45: 15, dated 30 October 2018, on his person. The bus ticket indicated that he had to depart from Cape Town at 16: 30. Accused
30 one was then arrested. His rights were verbally explained. They left the bus terminals and went to Pinelands Police Station parking lot. From Pinelands Police Station accused one was taken to Cape Town Central Police Station.

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[90] Furthermore, Sergeant Van der Horst testified that on 1 November 2018, at 6:35 am, in the cells of Cape Town Central Police Station, she acted as Commissioner of Oath on Exhibit "T", [statement related to accused one]. The time specified in accused one's warning statement, as 6:35, is effectively the time all signatures were appended on it.

10 [91] On her arrival at the cells, she met Colonel Kinnear in front of the police station and they went together to the cells. However, Colonel Kinnear went to speak to the person in charge of the cells first. Kinnear then invited her to enter the same room he went to. Inside the room she saw Sergeant Hlahleneni together with accused one.

20 [92] When she received accused one's warning statement, it had already been completed, without signatures thereon. The questions and answers were already on accused one's warning statement [Exhibit "T"]. She then asked Hlahleneni to read the questions and the answers again in her presence to the accused. Hlahleneni then read the questions and answers in isiZulu but she did not understand isiZulu. As Hlahleneni was reading the warning statement, accused one would nod or say yes in English. She then assumed that accused one understood what Hlahleneni was explaining.

[93] After that everyone signed in her presence. Colonel Kinnear had a thumb print pad with him. In addition to the signature, accused one also provided a thumb print.

30 [94] She testified that on Exhibit "T", she also appended her signature on every page which had room for the Commissioner of Oath.

[95] Her name does not feature on the occurrence book of Cape Town Central because she did not go with Colonel Kinnear to the cell guard.

[96] When they were done with accused one, accused one was taken away by Colonel Kinnear and he returned with accused two.

[97] Accused two did not have any visible injuries on him. Colonel Kinnear gave her an already completed warning statement of
10 accused two [Exhibit "K"].

[98] The warning statement was completed and initialled except for the spaces for the signatures that were left blank. She then went through the document, and thereafter she confirmed from Hlahleneni that he went through and translated the statement to the accused. She asked Hlahleneni to explain part III of the statement to the accused. It appeared that accused two agreed with what Hlahleneni was reading. After everyone, including the accused two, had signed, she also commissioned accused two's warning statement [Exhibit "K".
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[99] Anelisa Zeleni was also called by the State.

He testified that in 2018, he was stationed at the anti-gang unit. He first saw accused one in the parking lot of Pinelands Police Station. On his arrival on the parking lot, accused one was already inside a vehicle. He was told that he should transport accused one to Cape Town Central Police Station. They did not travel in the same car.

[100] His first physical encounter with accused one was at the cells
30 of Cape Town Central Police Station. He was informed that accused one could not understand when his rights were explained in English. As a result, he had to step in and explain the rights of accused one in isiXhosa in accordance with SAP's notice of constitutional rights.

Accused one acknowledged that he understood his rights and he signed the notice of rights. It was his testimony that accused one was relaxed when he was explaining his rights to him. He gave accused one a copy of the notice of rights.

10 [101] He saw accused two for the first time in the cells of Cape Town Central. Accused two was with Constable Tshabalala. Tshabalala was waiting for the SAP 14 book from him. He did not see any visible injuries on accused two, but he did not focus upon him.

[102] Sergeant Tshabalala testified that he can speak both isiZulu and IsiXhosa. IsiZulu is his first language.

20 He is a detective with anti-gang unit and at work he always wears civilian clothing. On 30 October 2018, he attended the crime scene related to the deceased in this matter. He identified houses close to the crime scene with CCTV system. After doing that he was told to go to Sea Point Police Station as there was a person who was arrested by a traffic officer.

[103] He arrived at the Sea Point Police Station between 10:00 am and 11: a.m. On his arrival at the Sea Point Police Station, he was together with two other police officials. He found Makutu and accused two, sitting in a detective's office. Accused two had no visible injuries. When he found accused two, he [accused two], appeared scared and nervous. He calmed him down so that they could talk.

30 [104] He arrested accused two and read him his rights. Accused two waived his rights to legal representation. Accused two's cell phone rang continuously and he [accused 2], told him that the person who was phoning him was a person who left with the vehicle. He took the

phone of accused two whilst it was still ringing. On the phone there was a surname reflected on it. The surname was either Biyela or Sibiya. He sent the surname to Colonel Kinnear so that they can ping that phone number.

10 [105] From Makutu he received a traffic ticket with Maliti's surname and address in Khayelitsha. He was instructed to trace Maliti. His first destination was the address which appeared on the ticket. He also took accused two with so that he can show him the place he went to with Maliti which had a boom gate. Accused two was only handcuffed when they were preparing to leave with him. According to him, it is protocol to cuff an arrested person.

[106] The trip to Khayelitsha was a police business and had nothing to do with accused two. The purpose of the Khayelitsha trip was to look for Maliti. The trip to Blue Downs was done also because of what was said by accused two. They would not have known about the Bardale Village if accused two did not talk to them.

20 [107] He denies that accused two was assaulted at Sea Point Police Station. He adamantly denies ever assaulting accused two and, in fact, testified that the police were never alone with accused two as Makutu remained at the police station until they left. According to him, if there was such an assault on accused two, Makutu would have witnessed it. From the beginning till the end, he was the only one dealing with accused two. Around 11:00 a.m. they were still at Sea Point Police Station.

30 [108] They left the Sea Point Police Station in a convoy of police cars travelling to Khayelitsha. He was travelling with accused two and a colleague in a Nissan double-cab bakkie. They arrived at Khayelitsha around past 12 to one. In Khayelitsha, the uniformed members went into the address. He and accused two remained in

the vehicle. Accused two had no business in Khayelitsha, hence he always remained in the vehicle.

[109] Still at the Khayelitsha, at a certain point the uniformed members were moving freely in the property. He then considered the property secured and went in. Still, at that juncture, accused two never left the vehicle. On his arrival on the premises an unknown lady told that Maliti was not staying there but in Kuilsriver. They then left the address, and he told the members of the convoy to follow him.

[110] They then headed for Blue Downs. Accused two was directing him to the place where they slept. They went to Bardale Village. At Bardale Village the houses were similar and the accused was confused and kept pointing at different houses. Accused was then taken out of the vehicle for a better view of the houses. He pointed a house. There were no people inside. They used force to open the house. It turned out to be a wrong house. The search for the house was stopped. Colonel Kinnear then told him that the number he gave to him earlier was pinging at Shoprite in Langa.

[111] He then rushed to Langa. Colonel Kinnear sent him an image of the footage that was captured at Green Point during the time of the incident. He showed the image to accused two, and asked from him as to whether the person on the image is the person who came from KwaZulu Natal and slept at that same place. Accused two confirmed and also confirmed that the person on the picture was the person who drove away with his car.

[112] At Langa, they received information that the number was pinging in Bellville. Later, they were informed that the person was found at Bellville bus terminus. They then left for Pinelands Police Station.

[113] Accused two and three were then taken to Cape Town Central Police Station where they were detained. At Cape Town Central Police Station cells, accused two was calm and okay. At 18:55 he went through the document called notice of rights in terms of the constitution with accused two, (Exhibit "X"). Both he and accused 2 signed the document. Accused two was then handed over to the cell guard and everyone left.

10 [114] Sergeant Ricardo Angelo Davids, testified that at a critical time he was attached at the anti-gang unit.

On 30 October 2018, he was part of the convoy that went to Khayelitsha looking for Maliti as a possible suspect. According to him suspects were travelling with investigating officers. The uniformed members had no dealings with the suspects. No suspects exited the vehicles in Khayelitsha. On their arrival at the address, they surrounded the house. The convoy drew a crowd of about 10 to 15 people. They knocked at the house
20 and the female, who later became known as accused three's mother opened the door.

[115] He did not witness any assault upon accused two and he never participated in any attack. After they were done in Khayelitsha, they were told by the detectives that they were going to Kuilsriver. They then proceeded and followed the detectives to Kuilsriver. One of the detectives was leading the convoy. At the last complex they stopped. It was Bardale Village. One residence was forcefully opened and it turned out to be the wrong residence. They then
30 proceeded to Shoprite in Langa looking for a suspect. And no suspect was found there. From Langa they continued to Pinelands and from there they transported suspects to Cape Town Central.

[116] The State also called Captain Slabbert who had been in the police service for nearly 40 years and was stationed at the Sea Point Police Station.

10 He testified that accused one and two arrived at the Sea Point Police Station on 1 November 2018, after their court appearance at 10:00 a.m., he visited the cells with a colleague and there were no complaints from the inmates. He further testified when accused one and two came from court, they had no injuries or complaints.

[117] Sergeant Smith was also called as a state witness.

20 She testified that on 30 October 2018, she was stationed at Sea Point Police Station, as a Charge Office Commander. On 30 October 2018, accused one and two were never booked or brought to the Sea Point Police Station's cells. They also do not appear on the occurrence book of 30 October 2018.

[118] The State also called Sergeant Hlahleneni.

He testified that on 1 November 2018, he was stationed at Bellville at the Directorate for Priority Crimes Investigation, also known as HAWKS.

30 [119] On 31 October 2018, at approximately 22:00, he received a call from the erstwhile investigating officer of the case, the late Colonel Kinnear and he asked him to meet him the following day at Cape Town Central Police Station 4:30 a.m.

[120] Kinnear requested him to come and interpret from English to isiZulu, during an interview of a suspect. He speaks isiZulu and

understands it. Kinnear used him several times previously for the same purpose.

[121] Indeed, the following morning, he went to the room where identity parades are held. Accused two was brought to them from the cells. Accused two greeted them and he introduced himself to him. Accused two and Kinnear also introduced themselves. Accused 2 was fine and he looked relaxed. Accused two indicated that he can speak English, but it was agreed that he should interpret.

10

[122] Exhibit "K" was filled out by Kinnear in his presence. According to him everything during the interview with accused two happened as depicted in Exhibit "K". It is his testimony that accused two had no injuries, except for a scrape wound on his feet. Accused two lifted his trousers to show him the wound. When he asked the accused how and where he sustained the wound, accused two told him that he sustained it during his arrest.

20

[123] It was also his testimony that the contents of Exhibit "K" were related by accused two freely and voluntarily. The accused during the interview was relaxed and very calm. Accused two signed Exhibit "K" in front of him. Accused two was never assaulted in his presence. The interview did not have any interruptions and it lasted for about an hour.

[124] Following the interview with accused two, another interview was conducted with accused one. They dealt with accused one the same way they dealt with accused two.

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[125] The next witness I am going to deal with is, Sergeant Ambrose. Stationed at Cape Town Central Police Station.

He testified that on 30 October 2018, he and Sergeant Thomas visited cells where awaiting trial inmates were held. The purpose for the visit was to do a head count. Ordinarily, the cell visits are done on an hourly basis, but if there is an injured inmate, they are done every half an hour. To determine whether an inmate has an injury, they ask every received inmate if the inmate has an injury, complaint, or medical condition. If the inmate has an injury, it would be recorded on the occurrence book in order to protect him themselves.

10

[126] During the hourly visits they would still ask the inmates if they do not have any injuries or complaints. They communicate with the inmates in a language that is understood by the inmate. They do not receive a suspect with visible injuries without a medical document that the suspect was taken to hospital.

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[127] Accused one and two arrived at Cape Town Central Police Station on 30 October 2018, 18:30. When he personally visited the cells where the accused were held, they did not report any injuries or complaint. He also testified that there are no houses or rooms with baths situated at their police station.

[128] That brings us to the evidence of Colonel Singh, who testified that he has 34 years working experience with the South African Police Service.

30

[129] On 31 October 2018, at 2:25 a.m., he was the shift commander. As the shift commander he goes around and checks on whether the cell and operational commanders are doing what they are supposed to do. He testified that he noted on the occurrence book that accused one and two were brought at Cape Town Central Police Station on 30 October 2018, around 18:30, they [accused one and two] were not charged yet.

/...

[130] On 31 October 2018, he visited the cells to see if they [the cell] were running smoothly. The visit entails him going to each cell to establish that each inmate is well, there is sufficient food and there are no injuries. There were no complaints or injuries noted. To ensure the well-being of each inmate is looked after, he goes and introduces himself to them as the senior officer.

10 [131] According to him, if an inmate is brought to their cells and is carrying some kind of an injury. That inmate will never be allowed in the cells. The inmate must receive medical treatment before being allowed in the cells, regardless of whether it is a scratch or a bruise. Any visible injury must get medical treatment before any reception at the cells.

[132] It is his testimony that if an inmate is taken out of the cells, the officer taking him or her, should sign him out and when the inmate is brought back the corresponding entry should made. Thus, it is impossible that accused two was taken out, without the entry
20 being made or without being discovered.

[133] He also testified that because of the nature of the charges accused two was facing, if he was going to be taken out of the cells that would have to be done through him as the shift commander.

Everything which I have stated above was just a brief synopsis of the State's case.

30 [134] At the close of the State's case an application for the discharge of accused three was brought in terms of Section 174 of the Criminal Procedure Act, Act 51 of 1977.

At that stage of the proceedings, I intimated that I would only give the ruling and the reasons will follow in this judgement.

The reasons now follow;
Section 174 provides:

10 "If at the close of the case of the prosecution at any trial the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge. Or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[135] Obviously, when an application for the discharge of an accused person is brought, the sufficiency of the State's evidence is called into question. In my mind, the main purpose of Section 174 of the Criminal Procedure Act is to prevent an unwarranted marathon exercise where it is evident at the close of states case that there are no prospects for the State to secure a conviction. Likewise, it envisages a situation where the continuation of a full trial is short
20 circuited before it is completed.

[136] More importantly, it is settled that Section 174 of the Criminal Procedure Act also protects an accused person from being exposed in a situation where he would supplement a non-existing case of the State, where the requisite threshold or standard of proof is not met by the State.

[137] Thus, as indicated by the relevant provision, if at the close of the State's case the presiding officer is of the view that the State
30 failed to present evidence sufficient for a conviction or a guilty finding, Section 174 gives the court the discretion to avert the continuation of a pointless trial.

[138] It is established by now that the test and the most important and apt question to ask at the close of State case, is whether there is any evidence upon which a reasonable court could return a guilty verdict. Put differently, whether there is a case to answer for the accused.

[139] In the present case, at the close of the State's case, the following evidence was presented against accused three, that:

10 (a)he was linked to accused one and two through cell phone data;

 (b)he was in constant communication with the other accused before the shooting and after the shooting;

 (c)barely an hour after the shooting, he and accused two were simultaneously stopped by Makutu;

20 (d)they caught the attention of Makutu because they failed to stop at a stop sign and to pay due regard to the rights of other road users;

 (e)when he was stopped by Makutu he was driving a model of a car similar to the one that was captured on the CCTV on 29 October 2018 and 30 October 2018;

 (f)both his co-accused's visits to Cape Town from Durban had to do with him;

30 (g)at that stage of the proceedings accused one had been identified by facial recognition expert as the shooter;

(h)the evidence presented by the State pointed to a carefully plotted murder that was hatched way in advance;

(i)the visit of accused one and two in Cape Town led him to go to Kenilworth Gold Exchange to exchange Kruger Rand coins for an amount of R200,000.00; in approximately six hours after the execution of the deceased.

10 At that stage of the proceedings, I was acutely mindful of the fact that the evidence against accused three, is circumstantial in nature. I took into account that all three accused are indicted amongst others for furtherance of common purpose or conspiring to murder the deceased.

[140] In such circumstances, when considering an application for discharge by one of the several accused, the court needs to consider the cumulative effect of circumstantial evidence in the context of the totality of the evidence.

20 [141] Further reasons why I refused the application for the discharge will be revealed in this judgement still. The only thing which I will say now is that at that stage this court was satisfied and convinced that the application was totally unconvincing and at worst, it was fanciful and devoid of any merit whatsoever. I was also satisfied that Mr Maliti had a case to answer.

Summary of the accused versions:

30 [142] All three accused in this trial elected to testify on their behalf and in their testimony, they vehemently denied that they were involved in whatever way in the shooting involving the deceased. Accused one and two testified that they were Krugerrand traders and accused three testified that he acted as the middleman between his

co-accused and the buyers of the Krugerrands.

[143] Accused one and two testified that they arrived in Cape Town together on 28 October 2018. They were coming from Durban to meet accused three, as they wanted to sell their Krugerrands. It was the testimony of all three accused that on 29 and 30 October 2018, they had negotiations with two different buyers of Krugerrands. The meeting place was an off-street parking lot. On both occasions the meeting took place inside the VW Polo driven by accused three and
10 lasted less than 30 minutes. Accused two used a Renault Clio to travel to and from meetings.

[144] On 29 October 2018, the Krugerrands buyer did not struck any deal with them. The deal was only struck on 30 October 2018, with a different buyer, who indicated that he was going to buy accused one's 11 Krugerrands.

[145]. Accused one further testified that he used to get his Krugerrands from one, Lucas. He started to trade with jewellery and
20 then moved to Krugerrands. It was accused one's testimony that on his arrival in Cape Town his girlfriend met up with him near Lingeletu Police Station in Khayelitsha. On 28 and 29 October 2018, he slept at his girlfriend's place. On 29 October 2018, he went alone to the meeting and when he returned, he took a metred taxi.

[146] On the morning of 30 October 2018, the meeting with the buyer started just after 7:00 a.m. He travelled to the meeting with his girlfriend, using a metred taxi again. Whilst the negotiations were continuing, his girlfriend with whom he travelled to the city was
30 waiting for him at a close by garage. The VW Polo in which the negotiations took place, was within sight of the girlfriend's waiting location. A deal was struck with the buyer and the buyer was going to buy his 11 Krugerrands for R200 000.00.

[147] After the deal was struck with the buyer on 30 October 2018, he travelled with his girlfriend in a metred taxi to Langa. *En route* to Langa, he received a phone call from his home in Kwa Zulu Natal, informing him that his brother got injured. His brother situation was an emergency. As a result, he had to book a ticket as soon as he arrived in Langa, to KwaZulu-Natal.

10 [148] However, when they arrived in Langa, they went to get his girlfriend's hair done. It took a while to get her hair done and he waited for her in the salon. He cannot remember how long it took to have the hair done. When she was done, they then went back to book a ticket. At the ticket place there was a queue, and he bought the ticket at 14:40.

[149] He could not call his girlfriend to come and testify as an alibi witness, because her contact number which he had was on the phone the police took. He does not know her address because when he returned with a metered taxi from the meeting of 29 October 2018,
20 his girlfriend was waiting for him near the police station. He is not sure whether he could be able to find his girlfriend's house on his own. His girlfriend was working for a company at the time, but he does not know the company's details she worked for.

[150] When accused one was cross-examined about the fourth cell phone number, depicted on Exhibit "DD" [the cell phone data record], ending with 6530 with an unidentified user. Accused one mentioned that on 30 October 2018 whilst he was in Cape Town CBD, he had seven calls between the times 7:26 and 7:50. He was communicating
30 with the buyer who was interested in buying Krugerrands from him. The calls duration was 26 minutes. He was linked with the buyer by accused three.

[151] It was also accused ones' testimony that when he was arrested for this matter, it was his first time to be arrested. Therefore, he did not know that in the long run his girlfriend would be needed to testify as his alibi.

[152] According to accused one, he does not know the deceased. Accused one strenuously disputes that he is the shooter who is depicted in the surveillance footage. He [accused one] further denies that on the day in question he was wearing the type of
10 clothing worn by the shooter in the footage.

[153] He also denies that he was the passenger of accused two, when he was stopped by Makutu. He was nowhere near the place where Makutu pulled over his co-accused and he does not know how to drive. According to accused one, he only came with one set of clothing to Cape Town, which is the clothing he had on during his arrest. He further testified that he never received the money for his 11 Krugerrands. He vehemently denied that he is the source of what is written in the pretrial statement, Exhibit "T". Whilst he was
20 detained under arrest at the police stations, no police officer visited him or asked him about his well-being. That is a brief summary of accused one's testimony.

[154]. Turning to accused two:

He started to trade in Krugerrands around September 2018. He was introduced to Krugerrands trading by accused one. Accused one told him that he wanted R60 000.00 to buy him Krugerrands and he gave it to him. Accused one was at liberty to keep the change from the
30 R60 000.00. He expected to receive a profit of R50 000.00 or more from the sale of the eight Kruger Rands. Thus, he was going to sell them for R110 000.00. Before he came to Cape Town, he did not know accused three, nor spoke to him. He was also never at

accused three's house. The first time he went accused three's house was when the police went to show him where he [accused three] stayed.

10 [155] Accused two further testified that during his stay in Cape Town, he stayed in Khayelitsha. He testified that a friend of his borrowed him a red Renault Clio which he drove whilst in Cape Town. Since he arrival in Cape Town, he never had a passenger in the Renault Clio. Because his Krugerrands were not bought, he kept them on him.

[156] After the meeting of 30 October 2018, he left for Khayelitsha. As he was leaving the city, he was stopped by Makutu. He parked the vehicle and went to Makutu. When he looked again the vehicle was not there.

[157] When he left the vehicle, he left the key in the ignition. The Kruger Rands were in the bag in the passenger seat.

20 [158] He does not know what happened to the Renault Clio. He thinks that someone might have stolen it. He did not report the vehicle incident to Makutu because everything happened right in front of his [Makutu's] eyes. Makutu and him both went to the police station and he reported the incident at the police station.

[159] He was arrested at the police station where he reported the incident.

30 [160]. It was accused two's evidence that the signature that appears on Exhibit "K", is his. He maintained that he would say his signed Exhibit "K" because he sees his signature on it. He denies that he proffered the responses that appear in Exhibit "K".

[161] It is the testimony of accused two that he was assaulted by the police on three separate occasions. On the first occasion, when he arrived at the police station, he found three police officers dressed in civilian clothing. The police asked him if he killed a person. They then assaulted him with open hands and put a plastic bag over his head and face.

[162] Regarding the third assault, he testified that six police officers dressed in civilian clothing came to fetch him from the police station.
10 They took him to a house which had a bed and a bath. He was assaulted and his head was plunked in a bath with water. He was made to sign papers. The investigating officer of the case was present. When he got Exhibit "K", the portion of the answers had already been filled out. He is not the source of what is contained in Exhibit "K". The only thing of his, in Exhibit "K", is his signature and thumb print as stated above.

[163] Accused two further testified that he thinks that for the second assault that the police took him to a police station build with white
20 material. He was then taken to the backyard of the house with white material. He was then assaulted by uniformed police.

Accused three

[164] Accused three testified that in 2018, he was a taxi driver. He had three taxis and they also had a private vehicle which is driven by his wife. He first met accused one in 2016. In 2016 accused one sold him gold and some silver.

30 [165] Regarding the Krugerrands, accused three, agrees with the version of accused one and two, and further testified that he went to fetch accused one and two from the bus station on their arrival and took them to Khayelitsha. Accused one had 11 Krugerrand coins and

accused two had eight Krugerrand coins. Accused one and two had specific amounts which they intended to get for the Krugerrands. He was going to get 20 percent commission from the sales.

[166] He sells the Krugerrands on the black market. According to him, a black market is where they sell without papers. They do not sell on a retail price. In the black market they get far less amount than in the real market. He regards the Kenilworth Gold Exchange as a black market. It is his testimony that all Gold Exchange places are
10 black markets.

[167] He testified that, when accused one and two arrived in Cape Town, he realised that their Krugerrands were fairly new. On the days his co-accused were in Cape Town he was driving a VW Polo, which he had hired from Avis in order for him to go to a Jazz Festival in Khayelitsha. He is a person who likes to rent vehicles.

[168] According to accused three, on 29 October 2018, they had an early meeting with Mohammed to negotiate the terms of the sale of
20 the Krugerrand coins. He testified that they met at a Spar parking lot to negotiate the deal. Accused one came on foot, accused two came with the Renault Clio, and he [accused three] came with the VW Polo.

[169] Mohammed owns a gold exchange shop in the Cape Town CBD. He has known Mohammed for eight to 10 years. He does not recall Mohammed's surname. He decided that the meeting should be Spar parking lot because he did not want accused one and two to see Mohammed's shop. This is so, because he did not want accused one and two to go themselves to Mohammed's shop. The appointment
30 time for the meeting of 29 October 2018 was 7:30 a.m.

[170] It was further his testimony that Mohammed and he arranged the Spar parking lot because it was a convenient place to meet.

They were both familiar with the area and the area is not busy and the spot is easy to locate. The area is the area depicted on Exhibit 12. Ebenezer Road is about 300 to 350 meters from that place.

He arrived at the parking lot alone. Mohammed arrived first at the appointment. Then accused one and two were next arrived. When everyone was in the car, he introduced everyone.

10 [171] Accused one and two were not satisfied with Mohammed's prices. He then arranged a meeting with Baba, who has a gold exchange called Baba Gold Exchange. On the morning of 30 October 2018, he picked Baba up from his shop and they went to the Spar parking lot.

[172] After the negotiations accused one and Baba agreed on R200 000.00 price. Baba requested more coins but accused two said they should finish the R200 000.00 transaction first. He thinks that accused two had some misgiving about the transaction.

20 [173] After the negotiations he left with Baba to drop him off at his shop. On the way to Baba's shop, whilst they talked about the profit Baba was going to make for the purchase, Makutu pulled them over. Makutu issued him a ticket and he left.

[174] He cannot remember where accused two was when he left Makutu. He is not sure whether accused two arrived when Makutu was writing out a ticket for him. However, he recalls seeing accused two approaching. By the time he was stopped by Makutu he did not have accused two's cell phone number.

30 [175] After he had left Makutu he called accused one and informed him that he would call him back regarding the arrangements of payment. Accused one then told him that the car of accused two was missing. By that time, he had already dropped Baba.

[176] It was also his testimony that Baba dropped the deal related to accused one's Krugerrands because he was not going to make a profit. He then called the owner of Kenilworth Gold Exchange. Ultimately, the Krugerrands of accused one were sold at Kenilworth Gold Exchange. When he went to the Kenilworth Gold Exchange he went alone. He also testified that he used to get good prices from the Kenilworth Gold Exchange.

10 [177] Regarding his alibi witnesses, he testified that he tried everything to get them to come and testify, but all was in vain. That is a brief summary of the accused testimony.

The evaluation of assessment of the evidence:

[178] The main singular issue in this matter is whether the three accused were involved in the commission of the offences as alleged by the State. Another issue which only involves accused one and two, is whether they are the sources of Exhibits "K" and
20 "T".

[179] In any trial, the prosecution always bears the onus to prove the guilty of the accused person beyond reasonable doubt. The burden of proof that rests with the State does not apply to individual parts of the evidence presented but to the entire body of evidence. On the other hand, it is trite that an accused person does not have any *onus* to prove his or her innocence. The version of the accused only needs to be reasonably possibly true in order to be afforded the benefit of doubt, the Court does not
30 even need to believe their version.

[180] I turn now to consider the evidence pertaining to pretrial statements purportedly made by accused one and two,

/...

Exhibits “K” and “T”.

Pre-trial statements of accused one and two.

[181] As previously mentioned, the issue here is the issue of weight. However, the State also bears the *onus* to show that the statements made by the accused before the trial, were made freely and voluntarily in his sound and sober senses and without having been duly influenced thereto.

10

[182] It is now axiomatic that pre-trial statements obtained in violation of accused’s rights are generally inadmissible. During this trial, the State contended that accused one and two made statements at the time of their arrest. Upon the State’s introduction of the pretrial statements to the Court, this Court was advised that accused one denies that he made a pre-trial statement.

20 [183] It was accused one’s contention that on 1 November 2018, the late Colonel Kinnear paid him a cell visit. Though Colonel Kinnear came with another officer, in his cell, he went to a consultation room only with Colonel Kinnear. At that time, he was aware of his constitutional right, he told Colonel Kinnear that he wanted a lawyer, and he would only speak to his lawyer. Colonel Kinnear did not inform him of his rights and asked him to sign and place his palm and four fingers on various documents. He simply signed because the investigator of the case told him that he should sign on the papers.

30 [184] In addition, Ms Luterek strongly asserted that accused one signed the blank documents. There was never any discussion involving the shooting. Considering the assertions made by accused one, the pre-trial statement in respect of accused one

/...

was then admitted as Exhibit "T".

[185] Similarly, accused two contended that he was assaulted pursuant to his arrest as police were trying to extract a statement from him and that his constitutional rights were never explained by the police.

10 [186] More specifically, accused two emphatically denies that the contents of the statement originated from him. He alleges that the police after assaulting him on three occasions merely placed various documents for him to sign and he duly signed them. He denies that when he signed Exhibit "K", he knew what was contained in it.

[187] More importantly, accused two further asserted that notwithstanding the exertion by the police, he gave no information to the police and Exhibit "K" is fabricated by the police.

20 [188] In as much as accused one and two are attacking Exhibits "K" and "T", they do not by any stretch of imagination assert as the basis of their attack that the contents of the two Exhibits were coerced or involuntary.

[189] Accordingly, both accused one and two do not contend that the contents of Exhibits "K" and "T" were direct products of coercion. That being so, they do not allege that the statements were illegally secured thus tainted; and as such, they should not be used against them. It is plain from what I said above that the voluntariness of the statements were not relied upon by the
30 accused in rejecting them.

[190] For the above reasons, in my view, it is evident that accused did not challenge the admission of the statements as

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they firmly maintain that Exhibits “K” and “T” had been fabricated. Since the thrust of the accused defence to the statements was that the police fabricated them; as previously mentioned the determinative issue pertains to the weight to be accorded to the statements. For all intents and purposes, the assertions made by the accused, as far as the statements are concerned raised factual and credibility issues for the Court to determine.

10 [191] At this juncture, I wish briefly to state certain aspects which are significant to this case:

I consider it necessary to emphasise that, in cases where an accused person denies making a pre-trial statement to the police the contents of such statements or statement becomes admissible as the witness disavows the statement. In other words, the Court is not required to make any preliminary finding regarding voluntariness of the statements or whether the statement was obtained in accordance with the accused’s constitutional rights.

20 [192] Consequently, as mentioned above, owing to the contentions made by accused one and two the live issue between the parties called upon this Court to determine about whether the accused made the statements attributed to them or whether the statements were fabricated by the police. In such circumstances, the State may even use the statement on rebuttal by calling witnesses to testify that the accused made the said statement or on cross-examination of the accused to attack the credibility of the accused.

30 [193] In the circumstances, I therefore ordered that it was not necessary to hold a trial-within-a-trial, as admissibility was not an issue. The statements of accused one and two were then admitted and marked as Exhibits “K” and “T”.

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Witnesses' testimony

[194] Basically, all the witnesses called by the State in this trial made a good impression to this Court and stuck to their version. This Court got the distinct impression that they were testifying only about their experiences. I did not get the impression that they were embellishing their evidence to implicate or to disadvantage the accused. As far as I am concerned, I found all State witnesses to be completely truthful, honest and credible witnesses.

[195] For instance, Kotze's evidence demonstrates that he was just an honest witness who did not embellish his evidence for the purpose of helping to establish one side of the cause only. He did not testify that the male he saw outside his gate, was wearing a check shirt or gave a description of the vehicle the male was heading towards. Had the State had any intentions to falsely reinforce or to falsify its case, it could have produced evidence to the effect that the male that was seen by Kotze, was seen going towards a Renault Clio and was wearing a check shirt.

[196] I also find that Makutu was sincere in his testimony. In this case, Makutu's evidence regarding the two vehicles which he pulled over was consistent with other testimony presented by the State. His evidence does not reveal bias, prejudice or motive to falsify testimony. Thus, the testimony bore indications of reliability. He did not try to overreach. He provided a fact-specific and candid account of his encounter with the drivers of the VW Polo and the Renault Clio.

[197] Equally, van der Host testified that when she arrived on the

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morning of 1 November 2018, at Cape Town Central, both Exhibits “K” and “T” were already filled out. Had she wanted to lie she could have easily tailored her testimony to fit other evidence. For instance, she could have easily said that the contents of the Exhibits were completed in her presence.

Her testimony was consistent under rigorous cross-examination. Notwithstanding the fact that she did not make any police statement prior to her testimony; I was convinced by her power of recollection. After I had observed her on the witness stand, I got
10 the distinct impression that she was narrating the events accurately as they happened at Cape Town Central Police Station.

[198] There is nothing negative this Court can say regarding all State witnesses who were called by the State in this matter. This also includes all the police officials who were called by the State to testify about Exhibits “K” and “T”.

[199] It is also important to note that Tshabalala, van der Horst and Hlahleneni corroborate each other regarding what happened
20 at Cape Town Central Police Station. Tshabalala is also corroborated by Sergeant Davids about what happened at the residence of accused three in Khayelitsha and at Bardale Village.

[200] It is also significant to know that these police officials did not give a photocopy version of each other’s testimony. In my mind this shows that they did not collude with one another, against accused one and two.

[201] Furthermore, if regard is had to the testimonies of
30 Tshabalala and Davids, it is plain that there was no need to take accused two out from the police vehicle. As Tshabalala puts it, they went to Khayelitsha solely on police business. Moreover, the evidence of Davids reveals that there was a crowd that was

attracted by their presence at accused three's place. It is thus highly improbable that the police would assault a suspect who was, according to their evidence handcuffed in full view of spectators. What is even worse is the fact that that was also a house related to another suspect. What would really possess the police to act unlawfully in that fashion, at an address of an individual identified as a person of interest and in plain view of potential witnesses.

10 In this regard this version of accused two has so many improbabilities.

The contents of the pre-trial statements

[202] The alleged pre-trial statement of accused two reveals the following:

20 (a) He arrived in Cape Town on Saturday, 27 October 2018. He came to Cape Town to drive a taxi for Maliti a taxi owner, in Khayelitsha. Since his [accused two's] arrival in Cape Town, he stayed at Maliti's place, he knows Maliti because he [Maliti] used to go to Durban.

(b) He [Khumalo] used to drive taxis in Durban. On 29 October 2018, Maliti took him to Sea Point to show him where he was going to start when he drives a taxi. He does not know Biyela, he saw him for the first time in Sea Point. He travelled to Sea Point with Maliti in a grey Polo. They got to the grey Renault in Cape Town, a Xhosa male, white in complexion drove the Renault.

30 (c) From Cape Town to Sea Point, he drove the Polo and Maliti drove with him. In Sea Point they met up with Sizwe and the Xhosa male. In Sea Point they drove from Main

Road; and Maliti told him that there was a white man that had to be killed, he was scared.

(d) They drove around in Sea Point, then they went back to Khayelitsha.

10 (e) On 30 October 2018, he went to Sea Point with the Polo. In Sea Point, Maliti told him to drive the Renault Clio. Maliti also told him that they were going to kill the white man. Once again, he got scared and went back to the Polo.

(f) Maliti drove the Renault Clio and he drove the Polo. The Xhosa male drove with him, Maliti had a gun and gave it to Sizwe to shoot this white man.

20 (g) When the shooting happened, he was in the Polo. The Renault came with Maliti and Biyela. He followed them. They drove through a stop sign without stopping. A traffic officer stopped them and gave them a fine, Maliti drove the Renault away, from the traffic stop. The Xhosa man drove the Polo. He was still being given the fine when he was arrested.

[203] Plainly, the pretrial statement attributed to accused two contains language that could be construed to constitute an exculpatory statement. As far as accused two is concerned, his statement clearly negates rather than supports guilt on his part. He even mentions twice in Exhibit "K" that he became scared when he was informed that a white male must be killed.

30 [204] In Exhibit "K", he pertinently states that he came to Cape Town to drive the taxi for accused three.

[205] It is highly improbable that the police would fabricate such

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a highly mitigated statement. Surely if the police were so underhanded to fabricate a statement, they would say things that would point at the guilt of the deponent rather than his innocence. In Exhibit “K”, accused two does not implicate himself to anything, instead he portrays himself as a victim of circumstances.

10 [206] A question also begs that; how did the police know that he and Maliti were in the taxi industry if he did not tell them. Surely, at the time accused two attached his signature to Exhibit “K”, Exhibit “DD” [cell phone record data], did not yet exist. Therefore, the police would not have known that there was a fourth person, who was also involved in the shooting of the deceased. Surely, if Exhibit “K” was a figment of the police imagination; the police would not have been able to make such an elaborate reference to the existence of fourth person, in the plot to kill the deceased. Accused two would like this Court to believe that it was only by a stroke of dumb luck, that the police made such an accurate reference. In this regard, accused two’s version, would have perhaps had more force if Exhibit “DD” existed at the critical time.

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[207] Another disconcerting aspect about accused two’s evidence is that the trip to Langa, that the police testified about; does not feature in his evidence. As far as the trip to Langa with accused is concerned, Tshabalala indirectly supports the evidence of Makutu. This is so because Tshabalala testified that when he showed accused two the picture of the suspect they were looking for, accused two confirmed to him that the person depicted on the picture was the person who drove away with his car.

30 [208] This evidence also dispels accused two’s version that Makutu and him went to the police station and upon their arrival at the police station he reported the missing Renault Clio.

[209] Additionally, all the State witnesses corroborate one another that accused two did not have any injuries when he was in custody and that he was never booked out from the cells. Corroboration helps this Court to place reliance on the testimony of the witnesses.

[210] When it comes to accused one, the State witness who were present when the statement was made also corroborate each other that accused one was the source of the information contained in Exhibit "T". The State alleges that accused one stated the following in his statement [Exhibit "T"]:

(a) He arrived in Cape Town on 26 October 2018. It was his first time to visit in Cape Town and he stayed at a bed and breakfast.

(b) Initially the statement reflects that the deponent denied being at Sea Point on 29 October 2018. Later the pre-trial statement reflects that Khumalo told the police that in Sea Point there was a white man that had to be shot.

(c) They then went there to see what the set up was and where the man was going to be shot.

(d) He and Khumalo travelled in a grey Renault and two other people that he had met through Khumalo used a grey Polo.

(e) They then went back to Sea Point on 30 October 2018. They drove a Renault and the man from Cape Town together with another male who was white in complexion drove in a Polo.

(f) The driver of the Polo told him that he must kill the white man. He knew when to shoot the driver of the Mercedes because the driver of Polo told him that the Mercedes is coming soon.

(g) When the driver of the Polo told him that he was already in the street where he shot the white man. He got the gun from Khumalo, he fired two shots at the white man.

10 (h) He left the gun he used to shoot the white man in the Renault driven by Khumalo. When a traffic officer stopped him, he was in the Renault.

(i) He drove off with the Renault. Later, he went to the Polo. He then drove away in the Polo. Then the male, light in complexion, drove the Renault away.

(j) He left the clothes he wore when he shot the deceased with the driver of the Polo.

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(k) He was taken to Langa to buy a bus ticket. He would be able to identify the two men.

[211] When the State introduced the pre-trial statement, it was initially contended that Colonel Kinnear did not explain the rights of accused one.

30 [212] However, when accused one testified, he testified that when he was arrested by the late Colonel Kinnear, he can recall that he [Colonel Kinnear] informed him of his right to remain silent. It is possible that Colonel Kinnear could have explained more rights, he just cannot remember them.

[213] Whilst he was at Cape Town Central no one asked him about his wellbeing. However, this was never put to Colonel Singh when he testified. For that matter, Colonel Singh's testimony in this regard was never challenged.

[214] Regarding Captain Slabbert, accused one denied the evidence of Captain Slabbert. However, the evidence of Captain Slabbert was also never challenged when he testified.

10 [215] Additionally, in so far as Exhibit "T" [accused one's statement] is concerned, there is not a scintilla of evidence in this case to indicate that the police had information that there was a male who had a pale complexion that was involved in the commission of the offences. Even in this trial the State did not present such evidence. Evidently, only the deponent of Exhibit "T" could be the source of the information, regarding the male with the pale complexion. In my mind this information about the male with pale complexion, further reinforces the fact that accused one was the source of Exhibit "T".

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[216] The originality of Exhibits "K" and "T". must be viewed in totality of circumstances.

[217] The statements were produced at an early stage in the investigation of this case. They were signed during the early hours on 1 November 20,18 before accused three's arrest.

[218] It is my view, that the evidence given by the various State witnesses pertaining to Exhibits "T" and "K" are worthy of belief.
30 The trustworthiness of their evidence also satisfied the legal standard. In other words, their evidence satisfies this Court that the statements were made voluntarily, and that the accused were fully aware of their rights.

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[219] I am convinced that the signatures and initials appended to Exhibits “K” and “T” and the right warning document were intended to represent an acknowledgement that accused understood the warnings and were content with what was stated in their warning statements.

[220] Also, in this regard, I’m not convinced that the Exhibits “K” and “T” were manufactured by the police. I am also satisfied that
10 both accused were advised of their constitutional rights.

[221] Remarkably, there’s also other evidence presented by the State which support the admissions which accused one had made in Exhibit “T”.

The video footages

[222] Due to unreliability of human observation, misidentification has plagued the criminal justice system for years. Hence, every
20 evidence that involves identification should be approached with caution. This also includes evidence captures in a surveillance footage.

[223] In this matter, there is no eyewitness evidence that places any of the accused on the crime scene. From the onset I wish to state that surveillance footage in certain circumstances may be preferable to a fallible eyewitness account.

[224] Video footage evidence can play a useful and a vital role in
30 solving a criminal case. In a criminal case, a surveillance footage can serve as real and testimonial evidence. If there is no human identifying witness, as in this case, video footage can provide valuable evidence. Hence, the State in this case aptly and

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colloquially described the surveillance footage as "silent witness".

[225] In this case, there was no objection to the surveillance footages being shown to the Court.

[226] As previously mentioned, the surveillance footage leading to the shooting of the deceased, obtained from the Backpacker's premises, was played, stopped, and started several times during these proceedings. It was my observation that it is of good
10 quality and gives a clear picture of the shooter's movements and the shooter moments before and during the shooting. A person could make out the shooter's facial features on various sightings on the footage. For that matter, the shooter had nothing on his face or head.

[226] In the instant case, it is notable that there is another factor that fortifies the finding that the video footage was of sufficient clarity and quality.

20 [227] The evidence indicates that accused one, who was unknown to Colonel Kinnear and Sergeant van der Horst, was solely approached and apprehended at the Bellville bus terminals on the basis of a screenshot image of the shooter, taken directly by van der Horst from the Backpacker's surveillance video. Accordingly, van der Horst could identify the person at the bus terminals as the suspect they were looking for, solely based on the screenshot image they had.

[228] All of this in my mind, also attest to the quality of the video
30 footage that captured the image of the shooter. Notably, even accused one, when he testified under cross-examination, could tell the Court that the person identified as the shooter was wearing a pair of trousers which is cream or white and what he

calls a Scottish shirt, due to mixed colours in it.

[229] Interestingly, when accused one was asked if the person depicted on the picture was him, he did not say he could not see the image, but simply denied that it was him.

[230] Thus, when looking at the evidence in the present case, it cannot be said that the shooter's facial features were not visible on the surveillance material. This much was not asserted by
10 accused one.

[231] As a result of the foregoing, this Court finds that the video was a fair and accurate depiction of the events of that morning of 30 October 2023.

[232] Perhaps not surprisingly, Arendse also succinctly testified that when he received a DVD footage linked to this case, he did not alter the image of the shooter but only enhanced it with lighting, for facial recognition purposes.
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The facial recognition expert evidence

[233] It is so that Keyser's testimony is not an eyewitness account but an opinion of an expert. The origin of her testimony stems from the Backpacker's surveillance footage. It is thus not based on familiarity of the shooter.

[234] According to Keyser, the surveillance footage provided her with the best evidence of the identity of the shooter as she could
30 identify 16 areas of similarity and one area of dissimilarity. The one area of dissimilarity was the clothing adorned by the person.

[235] I did not get the impression that she lacked objectivity. She

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based her testimony on facts. She pointed out special characteristics which were similar to both the control image and the surveillance image she had.

The points of similarity were the following:

- (a) cranial vault in both images;
- (b) overall skin tone and overall shape of face;
- (c) forehead shapes with similar relative height and slope in relation to the rest of the face;
- (d) shape and distribution of short shaven hair;
- (e) overall shape and size of the left ear in relation to the rest of the face;
- (f) similar definition and shape of left jawline;
- (g) similar density and distribution of facial hair on the left side;
- (h) similar shape and spatial distribution of facial hair above the upper lip;
- (i) right cheekbone in similar prominence;
- (j) the forehead hairline has similar window's peak shape;
- (k) similar overall shape of left cheek relative to the rest of the face;

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(l) similar overall shape of the chin relative the rest of the face;

(m) similar cranial vault in right profile contour;

(n) similar overall shape of the face in the right profile contour;

10 (o) similar overall shape of the occipital bone that forms the back of the skull; and

(p) similar size and protrusion of the left ear in relation to the rest of the head.

[236] In this matter, it is common cause that the control image which was used by Keyser to compare with the surveillance image of the crime scene, was the photograph of accused one taken whilst the trial was running.

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[237] This Court finds Keyser's evidence to be clear and cogent evidence on the issue of identity. She's an expert witness with many years of experience. She impressed this Court as knowledgeable, forthright and truthful.

[238] She also gave reasons as to why she held the view that the shooter depicted in the videotape at the scene of the crime committing the offence, is the same image as the one depicted on the control image.

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[239] I am mindful that Keyser's facial recognition evidence needs to be considered in the context of all the other evidence. Her expertise was un-contradicted.

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[240] In this case, there is also a cogent body of circumstantial evidence that bolsters Keyser's findings. For instance, it is common cause that when accused one was arrested he was not wearing the clothing depicted on the surveillance footage. As previously mentioned, notwithstanding that fact, van der Horst was able to tell that the person at the bus terminals looked similar to the one depicted on the photograph she obtained from the monitor.

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[241] Essentially, this Court heard the same details testified to by van der Horst. Effectively, van der Horst, as done by Keyser, also identified accused one from a photograph that was cut from footage of the scene of the crime. The only difference between their identifications is that van der Horst did not use a control image to compare, but she had the accused.

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[242] In this regard, I did not get the impression that van der Horst and Keyser wanted to exaggerate their testimony against accused one.

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[243] As previously mentioned, it is so that van der Horst testified that when they arrested accused one, he was not wearing the same clothing as depicted in the photo she had. In the context of this case, it is not unreasonable for a person to change clothing, particularly if regard is held to what happened when the motor vehicles were stopped by Makutu. The contents of accused one's statement [Exhibit "T"], also attest to this. That he changed clothing after shooting and after they were stopped by Makutu.

[244] Therefore, as I recited previously, in addition to Keyser's testimony there is confirmatory evidence supporting her conclusions. The pre-trial statement of accused one also

reinforces Keyser's testimony, Accused one's statement also implicates accused one as the shooter.

[245] Considering the totality of the evidence it cannot be said that the identity of accused one as the shooter rests on a shaky foundation. In the context of all the circumstances, and with due regard to all the evidence in this case, I found Keyser's evidence liable and credible. As far as accused one is concerned, there's absolutely no likelihood of misidentification.

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[246] There is other evidence connecting the accused to the shooting and even showing that they were in the vicinity of the shooting at the time.

Cell phone records depicted in Exhibit "DD".

[247] It is discernible from the facts of this matter that the crime was carried out with 'military precision', which one or two people could not have exercised due to the apparent involvement of more planning in its commission.

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[248] Exhibit "DD" shows several frantic calls between the three accused before and after the shooting of the deceased. Surely, these calls cannot be calls made in pursuance of Krugerrands sale negotiations. Significantly, Brigadier Petrus Bergh testified that after analysing the cell phone activities between 22 October 2018 to 30 October 2018 he discovered that accused one and three had 124 telephonic communications between them.

30 The accused as witnesses

[249] On the other hand, the credibility of accused one and two was fairly impaired. During cross-examination of accused one, it

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became clear that he was not forthright in his testimony despite him being aware of the facts he was being asked about. For instance, he initially testified that he is able to tell whether a car is a Toyota, a Polo or a Renault from seeing it. Yet later on in cross-examination when he was asked if he remembered the type of a car that was captured on the video racing away down Upper Port Road. Initially he answered that he is not familiar with the models of the car. When he was reminded that he had previously identified accused two's Renault simply because he knew its design; he changed and stated that from watching the video, the car, was a Renault.

[250] I also found it rather strange that he could remember that Makutu testified that the passenger of accused two was wearing a pair of cream white trousers and yet he does not remember Makutu's testimony regarding the description of the shirt that was worn by accused two's passenger. In the context of this case, this lapse of memory is rather convenient in my view as the colour of the shirt of the passenger was a glaring issue in this trial.

[251] Accused one fared badly when he was testifying about his girlfriend who could have been his alibi, because amongst other things, he did not know that he needed to tell his attorney that he had an alibi; though he slept at the place of his girlfriend for two nights he did not know where her place was situated; he never communicated with her since he left her in Langa, before his arrest; he does not know where she worked even though they have been in a relationship for just less than a year.

[252] On cross-examination, when asked as to whether he informed his attorney during his first appearance in court, after his arrest, about his *alibi* and her name he literally lost his cool and answered:

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"I already answered that question ... I think as I am answering the gentleman ... he is writing down and everybody else also writing down and I have already answered that question."

[253] It so happened that he did not yet answer that question as it was the first time for it to be asked.

- 10 [254] On accused one's version, the reason why he came for his visit to Cape Town was because he trades in Krugerrands.

Initially in his cross-examination accused one stated that he started to trade in Krugerrands from 2015. Regarding the year 2015, he also testified that around 2015 he was making around R30 000 or R40 000. Later on in cross-examination he contradicted himself and testified that he began trading in Kruger Rands in 2016 and with jewellery he began in 2015.

- 20 [255] It cannot be said that this is an instance of a witness correcting his initial testimony. This is so because, accused one was adamant later on in cross-examination that he never testified that he started trading in 2015. The unfortunate part about this denial is that accused one, when he initially said he started trading in 2015. He even gave an elaborated version about the profit he used to make in 2015 as far as Krugerrands were concerned.

- 30 [256] For that matter, him trading Krugerrands in 2015 was mentioned several times and he confirmed it.

[257] Mr Biyela was also not convincing when he was probed about as to what type of the Krugerrands, he was dealing in. He

could only describe the coins by saying old coins and by making a circle with his fingers. When he was pushed for an answer by Mr Wolmarans on behalf of the State, he responded by saying:

"I do not know in which other way or which manner does this gentleman want me to explain. As I have said what type or how the gold coins that I was selling. The one that I have already described."

10 [258] At that point, it was clear to this Court that accused one was pushed into a corner. The version of accused one that he used to get his Krugerrands from one Lucas also lacks any ring of truth to it either. According to him, he gets the Krugerrands from Lucas, yet he does not know his surname, or his address and he would meet him whenever in the town.

[259] It became worse for accused one when he was asked how the value of the Krugerrands was determined between him and Lucas. The explanation he gave was entirely unbelievable. He
20 testified firstly that he would look at the price he bought it with then he would just up the amount a bit for profit.

[260] What further does not make sense about the version of accused one is that he receives news he considers urgent from his home.

It appears from his version the news caused him to abandon what he came to Cape Town for and decided to go home; albeit the business he came for in Cape Town was on the verge of being
30 finalized. What is mindboggling about this sudden decision of accused one is that he goes and hangs around at a salon even before he secures a bus ticket.

What make the sudden urge to leave Cape Town more outlandish

is that, the evidence in this matter shows that the departure time of the bus was 16:30. On the other hand, Kinnear from Kenilworth Gold Exchange testified that the transaction of the 11 Krugerrands was around 13:00. Surely, if the accused had time to hang around at a salon before he bought a bus ticket he could have also waited for the proceeds of his Kruger Rands.

10 [261] This sudden urge to leave Cape Town, even before he found out what was ultimately going to happen with his homeboy [accused two], really appears to be a spur of the moment decision involving no planning.

[262] It is clear in this matter that accused one lied about the reason for his sudden decision to leave. In the circumstances of this case his haste to leave Cape Town indicates a guilty mind. On his own version the purported conduct of accused one at this supposed salon before he purchased the bus ticket also undermines his own version of emergency.

20 [263] This Court cannot be faulted to conclude that in the circumstances, accused one was running away. The evidence in this matter evinces that Makutu's conduct put a spanner in the plot which was hashed. Makutu's traffic stop triggered a reaction of panic and haste.

Accused two

30 [264] The implausible scenario of events presented by accused two regarding the theft of the Renault Clio are immediately suspect. There is also a telling lack of detail in accused two's account of the event of the theft of Renault Clio. Furthermore, unlike the typical situation where theft of a motor vehicle happened nicodemously, the opposite is true in this case. Plainly,

the theft of the Renault Clio happened in full view of witnesses and during peak hour traffic.

[265] Importantly, Makutu testified that he told accused two to go and park the Renault Clio 20 metres away within his sight. Accused two then parked the Renault Clio 20 metres within his sight. This unchallenged evidence demonstrates that the purported theft of the Renault Clio happened within sight of Makutu and not far away from him. For that matter, before the
10 disappearance of accused two and the Renault Clio, Makutu had seen and talked to accused two.

[266] Yet, the testimony of Makutu reveals that when he was on his way to fetch a traffic ticket book, he noticed that the Renault Clio was gone. Surely, if the Renault Clio was stolen and accused two was left behind, Makutu should have seen accused two on the scene when he [Makutu], realised that the Renault Clio was gone. On the version of accused two, when the Renault Clio was gone, accused two should have remained on the
20 scene.

[267] Additionally, accused two should have been able to immediately alert Makutu and accused three about his misfortune. Yet, strangely enough, from the account of Makutu, there was no contemporaneous discernible response from accused two or anyone else, nor any evidence that anyone saw what purportedly occurred.

[268] Even accused three testified that he merely saw accused
30 two approaching when Makutu was issuing him a ticket.

[269] In the circumstances, one would have expected an immediate hysterical reaction. Particularly, in the presence of a

traffic officer and accused two's own middleman [accused three].

[270] As I have already recited, the scenario painted by Makutu regarding the whereabouts of everyone when he was busy talking to accused three, makes it improbable that no one else saw or was alerted to the theft of the Renault Clio.

10 [271] Obviously, it would have benefited him [accused two], to tell the traffic officer who had the powers and the means to immediately pursue and alert other authorities about the stolen Renault Clio.

[272] It is absolutely implausible that Makutu would elect to take accused two, to report theft of a vehicle which happened under his nose, to the Sea Point Police Station. Surely, to go to the Sea Point Police Station would be self-defeating, it would rather make it more difficult to recover the stolen vehicle.

20 [273] Makutu is a senior law enforcement officer. He had the skills and resources to broadcast and pursue a criminal act immediately. It is inherently impossible that someone like Makutu who has shown himself in this case to be an alert, dedicated law enforcement officer, a person who does not allow anything to stop him from pursuing someone who breaches the law, I find it hard to believe that Makutu would act in the fashion described by accused two.

30 [274] According to accused three, he went to fetch accused one and two from the bus terminus, and they came all the way from Kwazulu-Natal for accused three to act as their middleman in a business transaction. Yet, when he hears that accused two has lost his car whilst he, accused three, was still around Cape Town CBD, he only phones him and not offer any assistance.

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[275] What is further bizarre about accused two and three during their encounter with Makutu is that, Makutu categorically testified that when accused two came back after the disappearance of the Renault Clio, accused two and three never communicated. For that matter, the evidence reveals that accused two informed Makutu about the disappearance of the Renault Clio with his passenger, whilst accused three was still on the scene with Makutu. Makutu's evidence that accused two and three never
10 communicated with one another was never challenged.

[276] In the context of this case, the behaviour of accused two and three, in the presence of Makutu is very telling.

If things really happened the way accused two and three would like this Court to believe; then it is rather odd that accused two did not tell accused three about his misfortune and that they never even communicated.

20 [277] In addition, it is rather strange that accused two would tell accused one about his misfortune of losing the Renault Clio. Yet, according to their version, accused one was never on the scene, where Makutu was. One would have expected at least that accused two would at least tell accused three about the stolen Krugerrands.

[278] For that matter, that was the reason he came to Cape Town. Accused two's silent reaction to a crime that involved, on his own version, theft of coins worth more than
30 R100 000.00 in value, and a car, was very odd and so inherently improbable and contrary to ordinary human experience. There are many other improbabilities in the accused two's version, for instance who would leave eight Krugerrands, on the passenger

seat with a key in the ignition. Particularly, in an unknown area.

[279] Equally, it is also strange that accused one and three did not go out of their way to go back to accused two after they heard about him losing the Krugerrands and the vehicle of Qwabe. Accused one simply went to wait for hours for his girlfriend to do her hair and went and stood in queues for a bus ticket. On the other hand, accused three, simply went to Khayelitsha and thought that a mere phone call was sufficient under the
10 circumstances.

[280] It is so that accused two testified that he told Makutu that his vehicle was stolen. However, Makutu testified that accused two informed him that the Renault Clio was driven away by his passenger. In fact, accused two strangely never challenged Makutu's persistent version. Unlike accused two's testimony regarding what happened during the traffic stop, Makutu's version was consistent and detailed.

Makutu also testified that he could even overhear accused two
20 speaking with his passenger telling him to come back and also relating his [Makutu's] message that he can simply tell his passenger to tell them where he was so that they can go to him. It is settled that evidence that is unchallenged stands.

It is evident that accused two's version that he was accosted at the police station was never put to Makutu. Surely, if accused two was arrested at their arrival at the Sea Point police station, Makutu should have witnessed that. For that matter, there is no evidence in these proceedings to indicate that police at Sea Point police station were aware of the fatal shooting of the deceased,
30 when accused two arrived with Makutu. The only evidence before this court is that of Makutu, that the news of the shooting was announced on the police radio. He only handed the accused two to the police after they heard over the radio that there was a

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shooting and what vehicles were involved.

[281] Moreover, when he arrived at the Sea Point police station there was no reason for the police to ask accused two if he had killed the deceased. This is so because when he [accused two] arrived at the police station he was not under arrest, and he was merely brought there for a mere traffic violation.

10 [282] Thus, at that juncture there was no link yet between him and the shooting of the deceased. In the circumstances, it would be strange and improbable that the police would ask a random person if he was linked to the killing of the deceased to an extent of suffocating him with a plastic material. It is difficult to see why the police would have had an interest on him on his arrival. Moreso, if he is in the company of a traffic officer.

20 [283] As far as the second assault of the accused is concerned, during his evidence-in-chief, he gave somewhat hazy details and general description of what had happened. In chief, it was not really clear what was the connection of the police with him; why was he taken to that place?

30 [284] Regarding the third assault, the narration of accused two, simply begs the question why, if the police have already fabricated the contents of Exhibit "K", would they go to an extent of taking accused two to a house and plunk his head in water, just to get his signature. The evidence of accused two regarding his assaults contains serious improbabilities. It also seems improbable that the investigating officer of the case would obtain the signature of accused one without assault, but when it comes to accused two, he would be assaulted. It is worse in accused one's instance as according to accused one, he even refused to talk.

The evidence of accused two regarding his assault contains serious improbabilities. It seems improbable that the investigating officer of the case would obtain the signature of accused 1 without assault, but when it comes to accused 2, he would be assaulted. It is worse in accused 1's instance, as according to accused 1, he even refused to talk.

10 [285] During cross examination accused two testified that the first time he went to accused three's place was when the police took him to the place to show him. Tshabalala and other police took him to an unknown area and said 'here is Maliti's place'. This testimony of accused two, raises one fundamental question, which is; why would the police take him to show him accused three's house. There is no plausible explanation in accused two's testimony as to why that might occur. The testimony of accused two in this regard does not make sense at all.

20 [286] Yet on the other hand, the testimony of Tshabalala provided a more plausible and consistent explanation for the conduct of the police, when they kicked in a door at Bardale Village. The conduct of the police is consistent with an explanation that after accused two pointed a house as the house of accused three, the police kicked the door open.

30 [287] For that matter, Tshabalala testified that, the only address of accused three that they had was the one depicted on the ticket that Makutu had issued for a traffic violation. The trip to Blue Downs was done only because of what was said by accused two. They would not have known about Bardale Village if accused two did not talk to them. This evidence by Tshabalala was not challenged by accused two.

[288] Later on, in cross-examination, accused two added that the

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police would take him to places and would say:

"It is Maliti's place"

And after they [police] kicked in the door, they would ask him if it is Maliti's place. It just does not make sense that the police would start by telling accused two that a place belongs to accused three and then after kicking it open, they would ask him if it belongs to Maliti.

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[289] Accused two also testified in cross-examination that he did not tell his attorney about this trip with the police. Clearly, the evidence of accused two in this regard is another outright recent fabrication. Little wonders his attorney was not told about it. Why would you not tell your attorney about such bizarre behaviour from the police and only tell him about the assault.

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[290] Furthermore, when accused two was pushed into a corner by the State, his testimony did not make sense at all. He somewhat changed his version and testified as follows:

"The police officers, they asked me where Maliti stays and I told them that I do not know and then we took a drive to guess."

This is inherently improbable that the police would engage in a guessing game with the houses of citizens.

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[291] What is further improbable in the version of accused two, is that he would want this Court to believe that a buyer of Krugerrands would be prepared to forfeit R90 000 and buy 11 Krugerrands for R200 000.00, instead of buying eight coins for R110 000.00.

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[292] Accused two also contradicted accused three when it comes to the person he left with when he departed from the parking lot. According to accused two accused three came with an unknown Xhosa male to the negotiations. He testified that he also saw the male when they were pulled over by the traffic. He was adamant that it was not the buyer. It was his testimony that when the deal was struck the buyer left.

10 [293] According to him, the buyer and accused one had reached an agreement that the buyer was going to phone accused one later during the day, regarding payment. This evidence of accused two is in total contrast to the evidence of accused three who wanted to create the impression that he left the parking lot with the buyer to drop him off at his office. Additionally, it also contradicts the testimony of accused three that he did not want any communication between the buyers and his co-accused.

20 [294] What I found also odd regarding the testimony of accused two and one is the fact that accused two has a vehicle and he did not have any passenger on any of the two days in question. Their evidence also reveals that they [accused one and two] were both travelling the same direction for the meeting, but strangely enough, accused one took a metered taxi on 29 October and 30 October 2018.

30 [295] In this case there is an inescapable inference that accused one and two are trying very hard not to place accused one in the Renault Clio, that was driven by accused two when he was stopped by Makutu. Notwithstanding the attempts by accused two and one, there is evidence in this matter which undermines the accused version.

[296] Firstly, the evidence of Frank Scherf who resides in Thornhill Road essentially supports Makutu when he says he saw a passenger in the Renault Clio. This is so, because he testified that he is convinced that the vehicle which he saw was Renault Clio. When the evidence in this matter is considered in totality, I don't have a reason to doubt his testimony in this regard.

Particularly, if regard is had to Scherf's testimony when he testified that he captured the registration number of the Renault Clio that appeared suspicious and driven in a high speed in his street. For all intents and purposes, the registration number which Scherf recorded is similar to the registration number of the Renault Clio which is depicted in the Synagogue footage. The only difference between the number plate which he took down and the one that appears on the Renault Clio captured in the synagogue's footage are the last two characters, namely, 'GP'. It was his [Scherf's] testimony that he managed to take down the characters of the registration number that he could see. It therefore makes sense that the registration number which he took had two characters missing.

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[297] It is also significant that he spotted the suspicious Renault Clio at 7 h 40 a.m., racing down the street where the deceased was shot just a minute after he heard gunshots. This also bolsters the finding that the inference is inescapable that the Renault Clio seen by Scherf is the same as the one involved in the killing of the deceased.

[298] According to Scherf, he saw that the Renault had a passenger in front. Minutes after Scherf's citing of the Renault Clio, a Renault Clio that was driven in a manner that violated traffic regulations caught the attention of Makutu. According to Makutu, the Renault Clio had a passenger in front that was wearing check shirt and light trousers.

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[299] In the context of this case, it cannot be a sheer coincidence that:

(a) Renault Clio was captured on the synagogue's surveillance footage driving close to the vehicle of the deceased just before he was killed.

10 (b) Minutes after the deceased was shot a suspicious Renault Clio is seen speeding in the street where the murder was committed.

(c) A shooter is captured on the synagogue's surveillance footage wearing a check shirt.

(d) Makutu, not far from Thornhill Road, stops a Renault Clio and sees a passenger in it wearing a check shirt.

20 (e) It so happens that after Makutu stopped the Renault Clio it suddenly disappears with the passenger.

(f) After the Renault Clio suddenly disappeared accused one suddenly wants to leave Cape Town.

[300] The above evidence ties in quite well with Kotze's testimony, a resident of Thornhill Road, who after he heard gunshots saw a man wearing a check shirt and a pair of trousers coming from the side of Cavalcade Road [from the murder scene direction], passing his passenger gate in a trot going to a stationery vehicle.

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[301] Thus, the evidence of Backpacker's video footage depicting the gunman after he had fired the shot running in Thornhill Road pavement, Kotze, Scherf, Makutu fits like a jigsaw puzzle.

[302] This is so because, this evidence in the context of this case leads to the only reasonable inference that, the person that was seen by Kotze was the shooter and the vehicle that was spotted by Scherf with two occupants is the very same vehicle that was stopped by Makutu.

[303] Accused one and two were poor witnesses whose testimony cannot stand scrutiny.

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[304] Moreover, the pre-trial statements of accused one and two, clearly explain why they fared so badly as witnesses. The pretrial statements of accused number one and two wherein both admit that they were involved in the killing of the deceased, buttress the finding that accused one and two were not being truthful with this court when they testified. Both accused one and two's evidence is not credible. This Court cannot place any reliance on them.

Accused three

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[305] I will start off by saying the testimony of all three accused is manifestly false, this also includes accused three. This is so because, accused three puts himself together with accused one and two. He admits that he was also in telephonic conversation with them.

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[306] Accused three testified that during the afternoon on 30 October 2018 after the shooting of the deceased he went alone to the Kenilworth Gold Exchange to sell Krugerrands. However, according to Kinnear from the Gold Exchange accused three arrived there with three males. It is also significant to note in this regard that accused three also contradicted what was put to the State witness that accused three arrived there with another man.

Essentially, he was contradicting what was put by his counsel to the State witness.

[307] In the circumstances of this case, the testimony of Kinnear [from Kenilworth Gold Exchange] about three males makes sense, because if regard is had to Exhibit "DD", it is evident that before and after the shooting of the deceased, there were four people who were in consistent communication with each other. After the shooting of the deceased, accused two was then held up with Makutu.

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[308] It is common cause in this matter that accused three left Makutu's traffic stop with his passenger. I've already found that the evidence of accused one is not reliable. In the context of this case, the only reasonable inference which can be drawn from the proven facts is that, accused three was at the Kenilworth Gold Exchange with accused one and the person that has a number ending 6530.

[309] Accused three's testimony was also contradicted by both accused one¹ and two in certain instances as indicated herein above.

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[310] As already alluded to herein above, the two vehicles were involved in the shooting of the deceased. Makutu also stopped a silver VW Polo the same time he stopped the Renault Clio. According to Makutu the Renault Clio and the VW Polo were following each other whilst ignoring road traffic regulations.

[410] Furthermore, the accused, accused three would like this Court to believe that the negotiations involving 19 Krugerrands worth in excess of R300 000.00 according to their version were held inside a VW Polo at an open parking lot.

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Accused three cannot expect this Court to believe that a sale of precious and highly valuable coins was done at an off-street parking

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lot inside a VW Polo merely because he did not want the buyer to have contacts with his co-accused. Surely, he could have simply gone to the buyer with the coins and just ascertained from his co-accused as to how much they wanted for the coins. After all, that is what he ultimately did when he went to the Kenilworth Gold Exchange. Furthermore, according to Kinnear from the Kenilworth Gold Exchange there was nothing peculiar with the sale of the Krugerrands that was done by accused three, he was simply a walk-in client.

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[311] For that matter it appears as if the negotiations of the parking lot were quite pointless, because on accused three's own version the owner of Kenilworth Gold Exchange used to give him extremely good prices for gold, used to deal with him; he used to get preferential treatment, but strangely enough he goes and negotiates in the streets. Why undertake such an exercise, two days parking lot negotiations and drop it at the 11th hour after a deal was reached with Baba at the parking lot?

20 [312] Accused three would like this Court to believe that Baba suddenly had a change of heart and dropped the deal they reached at the parking lot. Plainly in this regard accused three wants to have his cake and eat it too.

Accused three testified that after they struck a deal with Baba for the 11 Krugerrands, Baba even wanted more coins, but accused two did not sell, as he had some misgivings. How is it now all of a sudden Baba is sceptical about this profit? Mind you, he is the owner of a gold exchange. That certainly makes no sense at all. Surely rather
30 than undertaking such a pointless and unbelievable exercise, it would have been perhaps more realistic if the Krugerrands were sold right from the get go at Kenilworth Gold Exchange.

[313] In my view, this is a single biggest factor in the demise of the Spar parking lot negotiations. Everything related to the accused's version pertaining to the Krugerrands negotiation is inherently unbelievable and incredible. It is evident from the totality of the evidence that the parking lot negotiation version is just a ruse. It was meant as an attempt to poke holes in the State's case. Importantly, this Court cannot ignore the significance of the evidence in the context of this case.

10 [314] The evidence of the parking lot negotiations is significant because all three accused through it placed themselves around the Green Point area on both the 29th and 30 October 2018. It is common cause that the deceased was killed in Green Point.

The evidence pertaining to the parking lot negotiation is also remarkable because it also places a VW Polo, a Renault Clio around Green Point area on 29 and 30 October 2018. Essentially that evidence alone places the accused and the vehicles and the vehicles they drove, not far away from the scene of the crime.

20 [315] It is well established that evidence, particularly circumstantial evidence cannot be evaluated in a piecemeal fashion. Thus, in a case involving circumstantial evidence it is not essential that each fact should directly point to the accused's guilt, but rather it is sufficient if the finding of the guilt is supported by the accumulative weight of all evidence.

[316] In the circumstances of this case, the only reasonable inference to draw from the proven facts is that; the Renault Clio and the VW Polo that were driven by accused two and three respectively
30 on 29 October 2018 and 30 October 2018 were involved in the shooting of the deceased. In the context of this case this is not a farfetched parallel. Surely, it cannot be a matter of a mere coincidence that on 29 and 30 October 2018 accused two and three

also drove vehicle models like those that were clearly involved in the shooting.

[317] Moreover, while the accused have no onus to prove anything, accused one and three could have but did not call their alibi witnesses to refute the State's testimony. In the context of this case, it is as clear as daylight that the alibis of the two accused are made up.

10 But the matter does not stop there. Although there is no obligation on the State to close every possible avenue of escape which may be open to an accused, in the instant case the State has a wealth of evidence against the accused.

For instance, the Exhibit "DD" which shows the frantic calls before and after the shooting of the deceased between the three accused and a number ending 6530, are not by any stretch of imagination consistent with people who are doing Krugerrands transactions. The timing of the calls it's very illuminating.

20 The evidence of the State also shows that the VW Polo and the Renault Clio were using the road which was used by the deceased on the 29 October 2018 and 30 October 2018.

[318] On 29 October 2018 and 30 October 2018, the VW Polo in question used different number plates, this is supported by the surveillance footage which shows that the Polo which is seen on the footage on 29 October 2018 is the same as that of 30 October 2018. The State suggests that the first trip of the 29 October served as a dry run for the morning of the murder. When the evidence is viewed holistically the State cannot be faulted for making this submission. It is evident that the execution of the crime was executed with military precision which required a dry run.

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[319] The accused put themselves together in Cape Town on both

the 29 and 30 October 2018. Some of their cell phone communications are picked up by York Street tower, Somerset Road tower, towers that are not very far from the trade of the deceased before and after he was shot. The accused tried to explain their evidence which puts them in Cape Town on 29 and 30 October 2018, but their accounts fall flat in the face of the State's evidence. Though the State in this matter had many key witnesses, I consider Keyser to have been the chief witness. In the circumstances of this case the shooter of the deceased had been revealed beyond
10 reasonable doubt, although she identified one assailant her evidence has got a domino effect for other accused.

[320] In totality of the evidence, the evidence of the accused, of accused three cannot be reasonably possibly true. I therefore reject the evidence of all three as false beyond reasonable doubt and accept all the evidence presented by the State as credible and reliable. I'm also satisfied that the State has proven beyond reasonable doubt that the three accused before this Court acted in
20 furtherance of common purpose.

[321] Lastly, the only count which was questioned by Mr Nel on behalf of accused two was the count related to the attempted murder of the deceased's daughter.

As correctly pointed out by Mr Wolmarans for the State, that the circumstances of a case would determine whether the State has discharged the onus of proving the element of particular offence. In this case two shots were fired in a closed-up space of an SUV vehicle by accused one. The space of a vehicle is very close, confined space. There is not much space to speak of between the
30 occupants. The fact that the deceased's son was struck by part of the bullets attests to this. Under the circumstances the deceased's daughter was very fortunate that she was not injured. The fact that she was not injured does not cancel the charge of attempted murder.

[322] After careful examination of the evidence in this matter it is reasonable to conclude that the killers of the deceased profiled him. There is no doubt in my mind that the killers knew quite well that when the deceased drove his car down among others Upper Portswood Road and Thornhill Road, he headed for Cavalcade Road to drop off his children at R[...] H[...]. When accused one fired the two shots he did not care if any other person other than the intended victim was hurt. It has been said that attempted murder requires
10 there be an intention to kill and not prove that a person was almost killed. In this case accused one and his cohorts had an intention to kill anyone who was in the deceased's vehicle. They had a take no prisoner attitude.

[323] This Court is thus satisfied that the State has proven all the elements of the offences preferred against all three accused.

In the results, ALL THREE ACCUSED ARE FOUND GUILTY ON ALL COUNTS PREFERRED AGAINST THEM.

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CN NZIWENI
JUDGE OF THE HIGH COURT

Appearances

Counsel for the State	Adv G Wolmarans
Counsel for Accused 1	Ms L Lutere
Counsel for Accused 2	Adv P Nel
Counsel for Accused 3	Adv C Kriel

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