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**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION FUNCTIONING AS MPUMALANGA DIVISION
OF THE HIGH COURT
MZUKALIQWA CIRCUIT, BREYTON**

CASE NO: CC 66/2017

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.
..... <u>25 January 2019</u>	
DATE	SIGNATURE

In the matter between:

THE STATE

And

**MKHETHENI SIBISI
BONGANI DLAMINI**

**(ACCUSED NO. 1)
(ACCUSED NO. 2)**

JUDGMENT

TV RATSHIBVUMO AJ:

Criminal Law and Procedure – Trial within a trial – Admissibility of a confession taken after the accused elected to have a legal representative. Admissibility of bail record in a trial after the accused was not warned in terms of section 60 (11B) (c) of the Criminal Procedure Act.

Law of Evidence – requirements for a conviction on circumstantial evidence. Prima facie case made for the State – the impact of closing the defence case without leading evidence – the right to remain silent. Failure by the State to allege ‘common purpose’ in the indictment or further particulars.

The two accused stood trial on charges of murder and conspiracy to commit murder. The deceased was shot dead at his home by two men who fled the scene in a motor vehicle driven by a third person, acting in furtherance of common purpose. Accused no. 1 was arrested after the getaway car was involved in an accident while driving away from the murder scene. A document was found in his possession linking him to the murder and also implicating accused no. 2. Accused closed their case without leading evidence.

Held, that a confession taken from accused no. 1 after he had chosen to have a legal representative, without affording him the opportunity to consult, was inadmissible.

Held further, that failure to warn accused no. 1 in terms of section 60 (11B) (c) of the Criminal Procedure Act results in the bail record being inadmissible in a subsequent trial.

Held further, that the accused cannot be convicted of murder based the doctrine of common purpose unless the State had alleged common purpose in the charge or further particulars.

Held further, that while a charge can be amended at any stage before judgment; the court will be slow to allow the amendment where it appears that it could be

prejudicial to the accused. The application to amend the charge brought after closing arguments was as such refused.

1. The two accused stood trial on three criminal charges.

- Count 1: Conspiracy to commit murder in contravening sec 18 (2) (a) of the Riotous Assemblies Act, no 17 of 1956 (the Riotous Assemblies Act). The State alleged that on 03 October 2016 at Singobile D, in the district of Amersfoort, the accused did unlawfully and intentionally conspire to aid or procure the commission of or to commit an offence, to wit, to unlawfully and intentionally kill Velly Thomas Nkosi, a male person.
- Count 2: Murder. It was alleged that on the date and place as per count 1, the accused unlawfully and intentionally killed Velly Thomas Nkosi, a male person.
- Count 3: Reckless or negligent driving in contravening sec 63 (1) (a) of the National Road Traffic Act, no 93 of 1996 (the National Road Traffic Act). The State alleged that on the date and place as per count no. 1, the accused did unlawfully and intentionally drive a vehicle, to wit, a white Hyundai i20 with registration no. FB 92 MX GP, recklessly or negligently.

2. The accused were legally represented throughout the trial. Mr. Venter, an attorney appeared for accused no. 1 and Adv. Jacobs for accused no. 2. Adv Poodhun appeared for the State.

3. The two accused pleaded “Not Guilty” in respect of all the charges and offered no plea explanation in terms of sec 115 of Act 51 of 1977 (the Criminal Procedure Act).

4. **Introduction:** The taxi industry can be very volatile and dangerous in South Africa. Those at the risk of losing lives are the taxi association bosses, taxi owners, taxi drivers and the commuters who get caught in crossfire. The sad part of it is that generally, the consumption of members of this industry cannot be blamed on some aliens; but they fall at the hands of their colleagues and members of the same industry. And so it was that on 03 October 2016, between 17h00 and 18h00, it was the turn of a taxi boss, a chairperson of a taxi association and a taxi owner from Daggakraal to meet his fate. The presence of his wife and children at home was not enough to stop the two men who entered the yard of Mr. Nkosi from firing several shots at him leaving him dead. The piercing scream of a wife in agony alerted the neighbours who watched helplessly when the killers were whisked away in a small white motor vehicle. The same motor vehicle was spotted by a man from the neighbourhood some 1,8 km away as a Hyundai i20 with GP registration number plate.
5. This triggered the search for a white Hyundai i20 with GP registration number plate. Some 30 minutes later and 25 km away, a white Hyundai i20 with registration no. FB 92 MX GP was found having overturned and next to it was accused no. 1. A document belonging to accused no. 2 found in his pocket only in the morning of the following day led to the arrest of accused no. 2. At the back of the document were the details of a motor vehicle belonging to the deceased: Maroon Chevrolet Cruze with registration number HVL 884 MP.
6. It turned out that accused no. 1 not only had accused no 2's document, but they are friends and colleagues in the taxi industry, with accused no 1 working for a taxi association and accused no. 2 being a taxi owner in the

same taxi association in Johannesburg. It also turns out that the two of them went together to Avis Car Hire in Sandton where the car (a Hyundai i20 with registration no. FB 92 MX GP) was rented out to accused no. 1's fiancé. Not only were the finger prints of the two accused uplifted from the rented car after it overturned, but the cell phone records reflect that they travelled together from Sandton to Mpumalanga that very day. No direct evidence implicating the two accused as the men who killed the deceased was led.

7. **Issues for determination:** The court is called upon to determine if these facts which to a large extent constitute circumstantial evidence, sufficient to bring about the conviction of the two accused. In other words, does the inference sought by the State exclude all other reasonable inferences? What are the consequences of the State's failure to aver in the indictment that the accused acted in furtherance of common purpose? The court also has to determine the consequences of the accused closing their case without leading evidence in light of the evidence presented by the State.

Summary of facts:

8. A total of 13 witnesses testified during the trial including those who testified in a trial within a trial. The two accused closed their case without giving evidence.

Case for the State

9. Thobile Josephine Madonsela: She testified that Velly Thomas Nkosi, the deceased, was her husband. On 03 October 2016 the deceased came home

from work between 17h00 and 18h00 and parked the car in the garage. As he walked from the garage to the main house door, two unknown men walked into the yard and approached the deceased outside the house asking him if it was Nkosi's house. The deceased asked them as to which Nkosi they were referring to. She then heard the gun shots. When she got out, the deceased, the father to her 4 children was lying lifeless in a pool of blood. The two men fled towards the mountain behind her house. At the time of his death, the deceased was a taxi owner who was involved in a business with Majuba Company. She knows that at the time of his death, the deceased had realised that his shares of the funds in Majuba were defrauded and he was fighting for them.

10.Raphael Sithole: He is a neighbour to the deceased. After the deceased was shot, he heard a voice of a woman in agony, calling out his daughter. As his daughter got out in response, he followed. He observed two men running out of the yard of the deceased towards a mountain and turn towards the road. A small white motor vehicle arrived and stopped waiting for the two as they ran towards it. The car left at a high speed taking the direction of Wakkerstroom, leaving a lot of dust behind. From where he was, he could not see the car registration numbers. He made two phone calls to Mr. Mnisi who stays on the side of the mountain on the direction taken by this motor vehicle in order to alert him. He described the small white car and also confirmed the pictures handed to him of a Hyundai i20 as resembling the motor vehicle in question.

11. Testifying on 2016 events in 2018, the 66 years old witness could not remember the finer details he gave in a statement he made to the police. A statement handed in during cross examination (see Exhibit J) elaborates that

he made a phone call to Mr. Mnisi and asked him to get the car registration numbers of a motor vehicle that was to drive past his house, since he stayed next to the road and that he made a second call to find out if he managed to obtain them.

12. Nhlanhla Vincent Mnisi: He testified that he left home in order to meet his girlfriend along the same road that leads to Wakkerstroom. He took his father's cell phone since his own phone was flat on battery. As he was walking home with his lover, a phone call came through from Mr. Sithole who, thinking that the phone was with the owner, spoke quickly asking him to get to the road and observe a white motor vehicle and see if he can take its registration number. As he was still on the phone, the white motor vehicle drove past at a high speed. All he managed to observe was that it was a white Hyundai i20 with GP (Gauteng Province) registration number plate.
13. Moments later, a police van drove past and the police asked him if he saw a motor vehicle whose description was that of the white Hyundai i20 that drove past, and he confirmed that he did. He described the area as being so rural that hardly 15 motor vehicles drive by on that road per day, let alone those with GP registration number plates since it is deep in Mpumalanga.
14. Bongani Solomon Mkhwanazi: He is a police officer holding a rank of a constable. He testified that he arrived at the scene where the deceased was shot dead and secured it. He is the one who searched the deceased and took out his wallet with cash and cell phones. He was also given a brown envelope by the deceased's brother, which he said contained information the deceased wanted to be given to the police in case he dies. The deceased was certified dead by members of EMS in his presence.

15. Tshimangadzo Ndou: He is a police officer who held a rank of a constable in 2016. He testified that on 03 October 2016 he was on duty patrolling in a police van when he received information from the police radio about a shooting incident at Daggakraal. He also received information that the hit men fled in a white Hyundai with a GP registration number which drove towards Wakkerstroom on a gravel road. He decided to drive along the same road towards Wakkerstroom. Before he reached Wakkerstroom at and around 18h20, he found a car matching the description he was given having overturned on the side of the road. It was a Hyundai i20 with registration number FB 92 HX GP. He also found accused no. 1 who was about 30 meters from the overturned motor vehicle and was hitchhiking.
16. He testified that he stopped the van and proceeded to search accused no. 1 and found in his possession, a firearm with no magazine. Accused no. 1 also told him that he was a driver of the overturned motor vehicle. His right wrist was injured and he had scratches on his arms. He also proceeded to search the overturned motor vehicle wherein he found a firearm magazine amongst other things. Accused no. 1 did not have a licence for a firearm or even a driver's licence. He then read him his constitutional rights and placed him under arrest.
17. A police detective, Cnst Kapa who was on standby arrived and he handed the scene over to him while he (the witness) took accused no. 1 to the police station for detention. He confirmed the photos of the motor vehicle in Exhibit B as reflecting the said motor vehicle he found having overturned that evening.
18. Under cross examination by accused no. 1's legal representative, the witness denied that he was in the company of another police officer when he arrived

at the scene where the car had overturned. He also denied that upon searching accused no. 1, he found a wallet or that accused no. 1 told him that his licences were in it. He also disputed that there were other police officers at scene who arrived before him. He denied that he assaulted accused no. 1 accusing him of murder or that he demanded information on others who were involved.

19.Bafana Josia Thabethe: He is a taxi owner who resides in Daggakraal. The deceased was a chairperson of their taxi association. On the night the deceased was killed, he received a phone call notifying him of the incident. He proceeded to the deceased's house where he was told of the direction taken by the assailants. He followed in his own motor vehicle in search of the motor vehicle the hit men were travelling in and turned back without finding it.

20.Later on, he and three other taxi owners proceeded again towards Wakkerstroom in order to assist the police in the search. This time, they reached where they found a Hyundai i20 having overturned and accused no. 1 was already arrested and kept at the back of a police van. When he confronted accused no. 1 as to where he was coming from, he told him he was from a girlfriend in Daggakraal. He suggested that accused no. 1 be taken to point out that girlfriend but the police refused.

21.Siphiwe Ben Ndlovu: He is a police constable attached to Amersfoot police station at the detective branch. He testified that he saw accused no. 1 at Wakkerstroom SAPS on 04 October 2016 after Cnst Kapa, the Investigating Officer, had requested him to go and take him to Amersfoort SAPS. When he collected him, accused no. 1 was clad in a blanket. At Amersfoot SAPS,

he took accused no. 1 to Cnst Kapa's office for interviewing purposes. As they were talking to him, accused no. 1 gave him a black plastic bag saying it contained his wet clothes. He asked the witness to hang those clothes for him to dry which he did.

22. Before leaving the office to hang the clothes; and in the presence of accused no. 1 and Cnst Kapa, he opened the plastic and found it contained jean pants, navy jacket, Nike cap and a pair of shoe laces. He searched the clothes and inside the right pocket of the navy jacket he found a folded paper which he opened. The said paper was written:

FARADAY TAXI ASSOCIATION:

ck no. 2206/03JHB 2190. 25 Aug 2016.

To whom it may concern.

This is to certify that Bongani Dlamini ID [...] has received an amount of R15 000 on behalf of BJ Dlamini's child.

Signed by BJ Dlamini.

At the back of the paper it is written:

France

[...]80.

Maroon

HVL 884 MP

Chev Cruze

23. He testified that he then asked accused no. 1 as to the ownership of this document and he told him that he received it from Bongani Dlamini. When asked as to who Bongani Dlamini was, accused no. 1 told him that Bongani Dlamini was one of his colleagues and was the person who brought him from Johannesburg to Daggakraal in Mpumalanga. As for the details at the back of the paper, accused no. 1 indicated he had no knowledge of anything therein. When he entered the car registration numbers found at the back of this paper, it reflected that these were the registration numbers of a motor vehicle belonging to VK Nkosi, the man who was shot dead a night before in Daggakraal. The said paper was accepted and marked as Exhibit K.

24. Ayanda Colleen Magudulela: She testified that she was involved with accused no. 1 who is also a father to her 4 year old child. She also knew accused no. 2 as a person that accused no. 1 introduced to her as his friend. She gave evidence on Exhibit C, a car rental agreement with Avis Car Rental that the police found in a motor vehicle after it overturned. She is the one who signed Exhibit C and rented out a car from Avis, Sandton branch on 03 October 2016. She made a payment using a credit card that belonged to her business named, Striving Mind. The car rented out to her was a white Hyundai i20, the same car in photo 1, 2 & 3 of Exhibit B. When she went to hire this car at Avis branch in Sandton, she was in the company of accused no. 1 and accused no. 2. In fact it was accused no. 2 who had brought accused no. 1 to her home that day.

25. She hired this car because she and accused no. 1 were to go to KZN to see a child that was injured. After hiring the car, the two accused got into the Hyundai i20 while she drove the Toyota Corolla belonging to accused no. 2 on her own. The two accused drove behind her to her home. Accused no. 2

left his car behind and drove off in a Hyundai i20 together with accused no. 1 on the same day. She does not know where they went to. The two did not return that day. She only saw accused no. 2 the following day as he came to collect his motor vehicle, a Toyota Corolla. All that accused no. 2 informed her was that accused no. 1 was involved in a car accident. She did not ask for further details or whether accused no. 1 was injured.

26. She testified that she then contacted Avis Car rental in order to ask them to track the whereabouts of the motor vehicle, and they informed her to contact Wakkerstroom Police Station. A certain Dlamini from that police station gave her the phone numbers of Cnst Kapa who told her to come to Amersfoort Police Station to make a statement, which she did.

27. She further testified on Exhibit D, being still pictures processed from a security camera inside Avis Car Rental. According to her, these photos were taken from Avis in Sandton and reflect the true events of the date of 03 October 2016. In Exhibit D, she identified herself as a lady with braids to the back. She further identified accused no. 1 and accused no. 2. Accused no. 1 is the man wearing a blue CRON jersey – see picture 11. In picture 13, she identifies accused no. 2 as a man leaning against the counter while accused no. 1 is walking from the door towards the counter where she was with accused no. 2. Accused no. 1 was on the phone in this picture. The Toyota Corolla in picture 21 belonged to accused no. 2.

28. She confirmed that her cell phone numbers were [...]79 and [...]11 as reflected in Exhibit C item 15. She also confirmed that accused no. 1 called her in one of these numbers on 03 October 2016. She also confirmed having talked to accused no. 1 on a landline phone starting with numbers, 017 after she received a call on her cell phone while on her way to Amersfoort Police Station.

29.Mohale Edwin Kapa: He is the Investigating Officer in this matter. He was in the company of Cnst Ndlovu when he went to collect accused no. 1 from Wakkerstroom police station. He investigated the cell phones belonging to accused no. 1 and accused no. 2 in order to establish if the two were together around the time the deceased was murdered. He applied for “sec 205 co-ordinates.” This application was done through the prosecutor and was authorised by the magistrate in Amersfort. The subpoenas were served on MTN and Vodacom’s the networks that the two accused’s cell phones used. This was for outgoing and incoming calls and tower locations in the first application. In the second application it was for the towers coordinates. He was given the coordinates and the towers addresses. He gave the information to Sgt Koch to compile a report.

30.Hendrick Johannes Strephanas Koch: He is a member of the SAPS holding a rank of a sergeant. He is attached to LCRC in Ermelo. He is a crime scene investigator who compiles maps, coordinates and crime scenes photographs. He has been compiling maps for the past seven years. He received in-service training and also trained himself on how to use google and google earth. He has 17 years’ experience as a police officer. He testified that he was approached by the Investigating Officer with request that he should compile a map with coordinates of cell phone data in relation to this case.

31.He gave evidence in relation to Exhibit M. He received pages 4-27 of this exhibit from Cnst Kapa, the Investigating Officer and proceeded to compile the rest of the pages himself with the help of Blue Earth application or software. Blue Earth only requires coordinates and it will show the map

which can be printed out. Page 4 has coordinates, addresses and towers' names from Vodacom.

32. Pages 4-8 are the records that he was informed pertain to accused no 1's cell phone which was a Vodacom number. He made compilations dating from 10h30 on 3rd October 2016 until midnight on the same day. From the records supplied, this would be until 20h42 since there are no records of accused no. 1 using the phone that day afterwards. He marked the times with arrows. The names of the towers used are 28 and he marked them A to BB on page 4. These allocated alphabets are also referred to in the actual calls made as he marked on the right side on pages 5 to 8. Pages 39 to 44 is the key to the map: Map 1 to 8 (pages 45 to 52).
33. Page 9 is the start of the second cell phone which he was told belonged to accused no. 2 which was an MTN number. The coordinates start from p. 11 to 25. The data usage of the second cell phone is reflected on pages 26-27. Pages. 11-25 are the records of cell phone towers and to these, he allocated numerical names: No. 1 to 15. The numbers he allocated to the towers are also reflected on pages 26 and 27 on the right.
34. The map on page 45 has 5 points being map A to E which are Vodacom towers. Page 44 contains a key to map on page 45, on page 43 is a key for map on page 46. Red colour is for Vodacom number while yellow is for MTN. The keys on page 42 are for maps on pages 47, 48 and 49. Tower V is on pages 47 and 48 for easy reference. X and Y are towers reflected on map 4 and 5 for easy reference. The same goes for Z which is on both map 5 and 6. On page 51 he zoomed into the same towers that are on page 50. On page 52 he reflected all the towers from A to BB. When the map is made smaller (zoomed out) like in page 52, the points make a cluster as on top left. These

figures reflect that the cell phone was within the tower's radius which is 30 km.

35. Towers overlap to allow continuous cell phone signal. From page 53 it is MTN towers, the key of which is on page 38. Tower 16 is a Vodacom tower being rented out to MTN. Its usage is on page 27. The coordinates on BB are the same as tower 16. Pages 59-65 are all the towers of Vodacom and MTN. Although these phones were activated around the same time in the same area, he could not estimate the distance between them, which required him to calculate using his laptop. An hour gap in the data transmission does not reflect a gap of an hour between them. It merely reflects that calls or messages came in only at that time. The conclusion he reached was that the cell phones in this case moved from Gauteng to Mpumalanga between the times he was asked being 10h30 to the end of their usage that day. He was also of the opinion that given the times they used the various towers between them, these cell phones moved from Gauteng to Mpumalanga together.

36. **Admissions:** The two accused made admissions which were noted in terms of section 220 of the Criminal Procedure Act – see Exhibits N. O and P. In terms of these exhibits, the two accused admit the identity of the deceased in this case; that the body of the deceased sustained no further injuries from the time it was found until the time the post mortem was conducted. The cause of death as recorded in the post mortem report (multiple gunshot wounds) was also admitted. The accused also admit that fingerprints were uplifted from the motor vehicle being a Hyundai i20 with registration no, FB 92 MX GP and samples thereof were taken for forensic analysis and compared with their finger prints taken by the police; and were found to match. The two

accused admit therefore being linked to this motor vehicle by way of finger prints.

37. Further admissions were made in respect of the records furnished by Vodacom and MTN in respect of data, calls made and received and texts made or received in respect of cell phone numbers, [...]24 (Vodacom) and [...]22 (MTN) as contained on pages 4-27 of Exhibit M. The two accused admit the correctness of the contents of these records as furnished by Vodacom and MTN.

38. **Trial within a Trial:** A trial within a trial was conducted in order to determine the admissibility of a statement – an apparent confession by accused no. 1. A number of witnesses testified for the State and for the defence. The court ruled against the admissibility of the said statement made to Cpt Phungwayo after he noted in a preamble to the said statement that accused no. 1 opted to have a legal representative, yet he proceeded to interview him without affording him the opportunity to consult the said legal representative. Accused no. 1 also admitted to have made a statement but indicated that had he known that what he was saying was being written down, he would not have made it since he had indicated that he wanted to meet a legal representative first. For these reasons, I do not see it necessary to proceed and deal with the evidence led in a trial within a trial any further than I did here.

39. **Admissibility of bail record.** The State brought an application for the bail record of the bail application made by accused no. 1 to be admitted as evidence in this trial. This application was opposed by the defence for accused no. 1 for reason that the court that heard bail did not warn the accused that bail proceedings could be used against him in a later trial. The

State conceded that from the record, it appears that accused no. 1 was not warned in terms of section 60 (11B) (c) of the Criminal Procedure Act that anything he says in a bail application can be used and shall be admissible in a later trial against him.

40. Section 60 (11B) (c) of the Criminal Procedure Act provides,

“The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.” [My emphasis].

In light of the failure to comply with the statutory provision during bail hearing, the application to admit the bail application record as evidence in this trial was dismissed. Failure to warn the accused as provided in section 60 (11B) (c) of the Criminal Procedure Act is fatal to this application. If bail record is to be admitted as evidence in a later trial, warning the accused of these provisions is not discretionary but a mandatory prerequisite - see *S v Agliotti* 2012 (1) SACR 559 (GSJ), *S v Madlala* 2015 (2) SACR 247 (GJ) and *S v Miya and Others* 2017 (2) SACR 461 (GJ).

41. With this evidence, case for the **State was closed**.

42. **Inspection in loco**: The legal representative for accused no. 1 asked for an *inspection in loco* in respect of road from the deceased's home to the scene where the motor vehicle was found having overturned, the second scene where accused no. 1 was arrested. This according to the defence for accused

no. 1, was in anticipation of an argument the State may present to the effect that the only inference that could be drawn is that the motor vehicle that was found to have overturned must have the same motor vehicle that drove from Daggakraal. The defence wanted the court to observe that there are other roads that feed into this road making a possibility for this motor vehicle to emanate from other directions other than Daggakraal unavoidable. This request was supported by counsel for accused no. 2 and not opposed by the counsel for the State. The request for *inspection in loco* was granted and conducted on 22 January 2019.

43. Findings from the inspection in loco: The distance from the deceased's house to where Mr. Mnisi indicated he spotted the white Hyundai i20 with GP registration number plate is 1,8 km. 11,8 km from the deceased's home, the road makes a - junction, the right of which goes to Volksrust and the left goes to Driesfontein. We took a turn to the left. 13.4 km from the deceased's home, the road makes another T-junction, the left of which goes to Amersfoot and the right goes to Wakkerstroom. We took the right direction. At 19.6 km, 23.5 km and 24 km, there are roads that join the road to Wakkerstroom, the road from Volksrust to the right, to Derde Hoek to the left and again, Volksrust to the right respectively. The scene of crash is 25.6 km from the deceased's house. At the time of the inspection, the road used was quiet. The only time we encountered other motorists was after we had travelled 24 km, and these were three motor vehicles. A fourth one drove past while we were inspecting parts of the wreckage left at crash site.

44. **Accused no. 1 and accused no. 2 closed their case** without testifying and they called no witnesses.

45.Closing arguments: Counsel for the State submitted that the accused should be found guilty as charged in respect of all the charges although he was non-committal in respect of count no. 3. He conceded that he should have indicated in the indictment that the State relies on the doctrine of common purpose but that for reasons he could not explain, he did not do so. Counsel for the defence argued that there was no case for their clients to answer and as such, no negative inference should be drawn on the basis that they closed their case without testifying. It was submitted that the accused should be given the benefits of doubt and be acquitted.

46.Application for the amendment of the charge. Following the engagement and the concession by the State to the effect that there should have been an indication that the State would rely on the doctrine of common purpose, there was an application brought by the State to have the charge amended so as to include this. The application was brought on the date of judgment moments before it could be delivered. Needless to say that the application was vehemently opposed by the defence for the two accused.

47.An amendment to the charge can be effected at any time before judgment. However, the probability that the accused person will be prejudiced is, of course, greater as the trial proceeds to its end because the defence would not have borne the amendment in mind. *In casu*, the accused chose to close their defence without leading evidence on the charges they faced without any amendment. It cannot be said that they would have conducted their defence the same way had the State indicated its reliance on the doctrine of common purpose. In cases where the accused face serious charges involving mandatory prescribed prison sentences, the central and decisive particulars have far-reaching and important consequences. Accordingly the court will be slow to allow an amendment at a late stage clearly because such an

amendment can prejudice the accused person – see *S v Samuels* 2016 (2) SACR 298 (WCC) para 10, and *S v Mpambanso* 2013 (2) SACR 186 (ECB). The application was as such refused.

48. It is trite that for a conviction to stand, the State must prove its case beyond a reasonable doubt. There is no duty on the accused to prove his innocence. In order to answer if a case for the State was proved beyond a reasonable doubt the court must be satisfied upon a consideration of all the evidence – see *S v Van der Meyden* 1999 (1) SACR 447 (W). It follows that it is wrong simply to ask oneself whether the State witness is to be believed and then to find accordingly. Evidence ought not to be looked at piecemeal and in isolation. All of it should be analysed and weighed together in determining whether the State has proved its case beyond a reasonable doubt – see *S v Radebe* 1991 (2) SACR 166 (T).

49. Facts Not Disputed:

- a. The deceased was shot dead at his home in Daggakraal by two men on 03 October 2016 between 17h00 and 18h00.
- b. The two hit men ran out of a yard and were whisked away by a white motor vehicle that sped off towards the direction of Wakkerstroom.
- c. The deceased's neighbour, Mr. Sithole saw the men being taken by the car and called Mr. Mnisi on the other side to observe the motor vehicle's registration numbers.
- d. Mr. Mnisi observed that the motor vehicle that drove past him was a white Hyundai i20 with GP registration number plates.

- e. Some 25.6 km from the deceased's house, a white Hyundai i20 with registration number FB 92 HX GP (Hyundai motor vehicle) was found by the police at about 18h20 having overturned.
- f. The Hyundai motor vehicle was hired from Avis Car Rental in Sandton that same day by accused no. 1's lover, Ms. Magudulela.
- g. Accused no. 1 and accused no. 2 went with Ms. Magudulela to Avis Car Rental when she went to hire out the Hyundai motor vehicle.
- h. After hiring out the Hyundai motor vehicle, Ms. Magudulela gave the car to accused no. 1 who drove off together with accused no. 2.
- i. Accused no. 1 works for a taxi association in Johannesburg whereas accused no. 2 is a taxi owner in the same taxi association.
- j. The deceased was a taxi owner and a chairperson of a taxi association in Mpumalanga.
- k. Finger prints of accused no. 1 and accused no. 2 were found and uplifted from the Hyundai motor vehicle after it had overturned.
- l. Accused no. 1 did not return home that day. Only accused no. 2 came back to Ms. Magudulela on the following day in order to collect his motor vehicle that he had parked at her place a day before.
- m. Accused no. 2 informed Ms. Magudulela that accused no. 1 was involved in an accident.
- n. Cell phone records of accused no. 1 and accused no. 2 supplied by Vodacom and MTN, reflect that the two cell phones used the reception towers in the same vicinity around the same times between Sandton in Gauteng and Wakkerstroom in Mpumalanga between 10h30 and 20h42 on 03 October 2016.

- o. The police found and booked in an exhibit, being an invoice in the letterhead of Faraday Taxi Association, Johannesburg; which reflects a payment of R15 000 having been made to BJ Dlamini (accused no. 2) – Exhibit K.
- p. Exhibit K contained car registration number, colour and make of a motor vehicle of the deceased written at the back thereof.

50.Facts in Dispute:

- a. Did the accused kill the deceased? There is dispute as to whether the accused were part of the three occupants of the Hyundai motor vehicle (including the driver) that whisked the two hit men away.
- b. Is the motor vehicle that the police found having overturned the same motor vehicle that whisked the two hit men?
- c. What was the purpose of the two accused in visiting Mpumalanga?
- d. Where did the police find the Faraday Taxi Association invoice – Exhibit K?

51.The impact of closing the case without giving evidence. The South African Constitution guarantees every arrested person a right to remain silent and to be presumed innocent. This right entails that no accused person is expected to prove his/her innocence, but the State should prove his/her guilt. The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any incriminating statement that could be used in evidence against that person. It arises again at the trial stage when an

accused has the right to be presumed innocent, to remain silent and not to testify during the proceedings.

52. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.

53. Similarly, if in the course of the trial there is evidence that a document was written by the accused, who in turn fails to challenge that evidence, or raise forgery as an issue, a court may be entitled to hold that in the absence of testimony from the accused the evidence is sufficient to prove that the accused was the author of the document. Whilst the evidence to the contrary need not be the evidence of the accused, there can be no quarrel with the principle that the absence of contrary evidence is relevant to the evaluation of evidence relied upon by the State for a conviction in a criminal trial. Once a *prima facie* case is made demanding answers from the accused, disputes by mere cross examination cannot suffice; unless it is repeated as evidence under oath and tested through cross examination. – see *S v Boesak* 2001 (1) SA 912 (CC) at p 914 para A-D.

54. This does not necessarily mean that once the accused closes the case without leading evidence then the case for State is automatically proved beyond a reasonable doubt. The State case still has to be evaluated if it proves the guilt of the accused beyond a reasonable doubt. The unfortunate position of the accused is that once there is dispute between the defence' version and that of the State, since the defence' version would be exhibited only via cross

examination and not evidence, the court has no other evidence to consider but that which has been tendered under oath. The accused in that case can only pin his/her hopes on that the State would just score own goals in either failing to prove the case against the accused, or through self-contradictions.

55.Circumstantial evidence: There is no evidence that directly implicates any of the two accused. Eye witnesses cannot point out or identify any of them. All that is laid before the court is circumstantial evidence. The ‘cardinal rules’ when it comes to inference to be drawn from circumstantial evidence, are trite, and were laid down in *R v Blom* 1939 AD (1) 188 at page 202-203, namely:

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

56.Just as it is the case in most instances, satisfying the first rule is usually easy. It is a fact that the deceased was killed and that the two accused are placed geographically not far from the scene of murder. The inference sought to be drawn that the accused killed him would be consistent with the proven facts for these reasons. To be consistent does not mean they did what is alleged, but merely reflect that facts proved do not exclude this possibility. Using the same principles in *Blom, supra*, the court now has to answer if the inference to the effect that the two accused murdered the deceased excludes other reasonable inferences that can be drawn. In evaluating evidence the court attempts to answer this very question on whether evidence proved exclude any other reasonable inference, than the one sought by the State to wit, the two accused killed the deceased.

57.The Faraday invoice – Exhibit K. Although accused no. 1 disputed the evidence by Cnst Ndlovu to the effect that he was the source of this document, I do not have evidence before me that gives an alternative source than that of Cnst Ndlovu. As highlighted above, when the disputed piece of evidence is the only evidence available, it stands to be admitted as such.

58.Argument by the defence for accused no. 1 to the effect that such a document cannot be admissible as evidence is rather a strange one. Evidence tendered is not about documentary evidence. It is evidence on what the witness observed or found. I do not see any difference between this kind of evidence and evidence in which a person testifies about any other item such as a cell phone, a book or a bank card that is found when a suspect is searched. It is unheard of that the court can rule any such cell phone, a book or a bank card so found to be inadmissible as evidence. The only question to ponder on is about whether there was such an event as a matter of fact. The argument would be well placed if it is to the effect that the court should reject it is maybe because the witness is not credible. The least said on this argument the better.

59.Beside the reason that the only evidence giving the source of this document is tendered by the State, there are more reasons why the court should accept the version by Cnst Ndlovu that he found the paper in the clothes of accused no. 1 after he had asked him to hang his wet clothes outside. Cnst Ndlovu proved to be a reliable witness whose credibility remained intact throughout his cross examination. He proved to be a witness who does not hesitate to tell a fact as it is irrespective of the damage it does to the case for the State. It is partially because of the honesty of Cnst Ndlovu that the court ruled to

exclude the evidence on confession allegedly made by accused no. 1 in that according to him, accused no. 1 had a swollen cheek.

60. The evidence by accused no. 1 in a trial within a trial to the effect that he was sprayed with water finds some corroboration from Cnst Ndlovu who testified on the clothes being wet and accused no. 1 being clad in just a blanket. When a witness is willing to give evidence favourable to his opponent when it is deserved, the court will find it difficult to reject his version when he gives evidence that could be detrimental to the same person. This becomes compelling when accused no. 1 chose not to testify to deny that he was the source. The court accepts that Exhibit K was found in a pocket of accused no. 1 by Cnst Ndlovu.

61. The contents of the Faraday invoice are very damning. It is no wonder the defence was very adamant in opposing its acceptance as evidence. About 30 minutes after the murder of the deceased at his home, accused no. 1 is found some 25 km from the deceased's house. In his possession is an invoice apparently issued to accused no. 2 by the Faraday Taxi Association. It appears on the face of the document that accused no. 2 was paid R15 000 and signed to confirm receipt. The details of accused no. 2 are not disputed. The signature in this document also resembles his signature where he had to sign the documents containing admissions made in this trial. This in essence makes a strong case that this document could not have been just a piece of paper that accused no. 1 picked by the side of the road, but a document that was issued to accused no. 2 by the Faraday Taxi Association. Circumstances under which it moved from accused no. 2 to accused no. 1 are unknown to the court.

62. Even more damning is the fact that the Faraday invoice contained the details of a motor vehicle driven or owned by the deceased in this case – a maroon

Chevrolet Cruze with registration number, HVL 884 MP. None of the accused gives information on why the details of the deceased or his car were in this paper. It does not always follow that if one has the details of another then he meant to harm that person. One may have had the details in order to approach the said person in order to apply for a job, especially when the person holds an authoritative position like a chairperson of a taxi association. But if there is any positive and godly reason, it should be communicated. None of the accused came clean to communicate such reasons. This cannot be surprising since some 30 minutes before accused no. 1's arrest, the owner of a motor vehicle with the details of which accused no. 1 was carrying in his pocket, was shot dead. The question is whether this could be a coincidence or not. I pause to explore the possibility of existence of other inferences that can be drawn from these facts and whether these are reasonable.

63. The defence for accused no. 1 raised an argument to the effect that given a number of other roads that feed into the road towards Wakkerstroom, it cannot be inferred as the only possibility that the motor vehicle that drove from Daggakraal must have been the one that overturned, some 25 km away. This argument suggests that the Hyundai motor vehicle may have been coming from other directions such as Volksrust as opposed to coming from Daggakraal. It is for this reason that the court was called to conduct an *inspection in loco*.

64. I am of the view that even without an *inspection in loco*, this argument could have been validly raised by the defence. This is because although Mr Sithole did not mention the two T-junctions and three other roads that feeds into this road before reaching Wakkerstroom or the point where the car overturned, he had made it clear that there were small roads that feed into this road coming from the farms alongside the road. It can as such be equally argued

that the car that overturned could have emanated from one of these farms and not Daggakraal.

65. This argument however ignores the fact that there is evidence under oath by Mr. Thabethe to the effect that when he confronted accused no 1 as to where he was coming from, accused no. 1 informed him that he was from Daggakraal, where he was visiting his girlfriend. I do not have evidence by accused no. 1 to the effect that he did not make such an allegation. The only evidence I have in respect of this aspect is that he said so. The court simply has to accept this assertion since it is the only evidence before it. Without any further analysis of all other inferences regarding where the Hyundai motor vehicle emanated from, the statement by accused no. 1 to Mr. Thabethe excludes all of these.

66. Perhaps the court has to now analyse as to whether there is a possibility that accused no. 1 would allege that he came from Daggakraal while he was from elsewhere, in line with what I said above, so as to establish if there is “own goals” by the State in this regard. I find this possibility to be unlikely. There is evidence already on record to the effect that the motor vehicle that drove past Mr. Mnisi was a white Hyundai i20 with GP registration number plate. Thirty minutes later, a white Hyundai i20 with GP registration number plate had overturned some 25 km away along the same road that one would use when driving from Daggakraal to Wakkerstroom. I say this mindful of the fact that the road from Daggakraal had ended into a T junction and one had to join another road by turning left. It is clear that these are the obvious turns one would have to take when going to Wakkerstroom or to Johannesburg for that matter.

67. I am also mindful of the fact that accused no. 1 would have been slow to incriminate himself by placing himself at the murder scene - Daggakraal.

But this is not a man from the local area. Besides Daggakraal which is the only area he came for, where else would he have told Mr. Thabethe that he was coming from? It appears in my view that he had to say he was from Daggakraal not only because it was the truth, but also because he did not anywhere else. This should explain why he was quick to distance himself from the crime scene by adding that he was visiting a girlfriend.

68.The collusion between the two accused: The two accused did not coincidentally find themselves in Mpumalanga, using the same or network towers not far from each other around the same time on the 3rd of October 2016. According to Ms. Magudulela, they are friends. They also work for the same taxi association in Johannesburg where accused no. 2 is a taxi owner while accused no. 1 is said to be an employee. The two accused's conduct on the date of murder appears to have been a cooperation right from the start on whatever arrangement they were attending to in Sandton.

69. When Ms. Magudulela was tasked with the role to hire out a car from Avis Car Rental in Sandton that day, both accused no. 1 and accused no. 2 were there tailing her. What happened thereafter makes it obvious that the purpose for hiring this motor vehicle was not to go to KZN although this may have been the reason Ms. Magudulela had. Accused no. 1 and accused no. 2 had other reasons for which they immediately used the motor vehicle for. In extending this cooperation, accused no. 2 left his motor vehicle at Ms. Magudulela's house and took a ride in the hired motor vehicle, heading to Mpumalanga. What happened next is exhibited by the cell phone networks companies:

70. The two accused (or at least their cell phones) travelled to Mpumalanga to as far as Wakkerstroom together. At some point, either on this day or before,

the Faraday invoice belonging to accused no. 2 found itself in the hands of accused no. 1. Thirty minutes after this motor vehicle had left Daggakraal, it overturns while driving towards Wakkerstroom / Johannesburg (which is the same route). Around the same time that this motor vehicle was in Daggakraal, the owner of a motor vehicle whose details were penned down in the Faraday invoice – the deceased, who also happened to be a taxi owner too, was being gunned down.

71. While both the accused did not return back to Ms. Magudulela that day, accused no. 2 did return the following day to give a report that accused no. 1 was involved in an accident. The finger prints of both the accused were found inside the Hyundai motor vehicle after it had overturned. Accused no. 1's DNA were also found in the blood samples taken from the said motor vehicle.

72. Credibility of State witnesses: I have already alluded to the fact that the credibility of State witnesses has to be weighed against the evidence tendered by other witness to see if there are no “own goals” in the form of contradictions or being unreliable. There is nothing upon which an argument can stand to the effect that any of the State witnesses may have been unreliable or not being a credible witness. The court takes notes of the differences between the evidence of Mr. Sithole against his own statement made to the police and against that of Mnisi.

73. The fact that there are discrepancies is not indicative of lies or that such evidence should be thrown away. The totality of evidence and circumstances under which such statements are made should be taken into account. See *S v Mkohle* 1990 (1) SACR 95 (A) where it was held that contradictions *per se* do not lead to the rejection of a witness' evidence; they may simply be

indicative of an error. Not every error made by a witness affects his/her credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. As Williamson J pointed out in *S v Oosthuizen* 1982 (3) SA 571 (T), contradiction also reflects independence of witnesses and lack of conspiracy against the accused. For this reason, I do not deem it necessary to evaluate every loophole, contradiction or discrepancy, no matter how trivial in this judgment.

74.Mr. Sithole, a senior citizen aged 66, gave evidence in 2018 on events that took place in 2016. Given the lapse of time, one would understand minor discrepancies in his evidence. It could also be that what appears to be discrepancies could be a mere misunderstanding between him and counsel cross examining him. He testified that he called Mr. Mnisi on his phone and did not find him, yet in his statement to the police; he wrote that he called Mr. Mnisi and told him to go and observe the number plates of a motor vehicle that would drive by his place.

75.Mr. Mnisi on the other hand gave evidence that supports Mr. Sithole's statement to the effect that a call came through instructing the receiver (whom Mr. Sithole thought was his father, Mr. Mnisi the senior) to go to the road and observe the motor vehicle driving by. Interestingly the defence for accused no. 2 is also critical of Mr. Sithole for not indicating when he gave evidence that as Mr. Mnisi later told him it was him (the son) who received the call; he should have told the court that he called Mr. Mnisi but found the son.

76.What if the evidence given by Mr. Sithole was his way of doing exactly what counsel for accused no. 2 says he should have done? Mr. Sithole whose

statement to the police makes it clear that he called and instructed Mr. Mnisi to go and observe the car on the road, may have noticed by the time he came to give evidence that when he called Mr. Mnisi, he could not find him since the son told him (about a month later – according to the son) that he is the one who answered the phone, not his father. I do not find any malice if a person alleges that he called another and could not find him if all that he means is that the phone was answered by his son.

77. Equally, the criticism of Mr. Sithole over his evidence on the route taken by the getaway motor vehicle regarding the U turn, the turn or driving straight is unfair. The reason for this is that counsel for accused no. 2 bases its criticism on the *inspection in loco* conducted by the court in which he argues that the route observed does not match the picture painted by this witness. When the court granted a request for an *inspection in loco* it was for the reasons placed on record by Mr. Venter to wit, to observe that there are other roads that feed into this road. Had a request been made for *inspection in loco* for reasons that counsel now criticises Mr. Sithole's description of the road, the court would have needed the presence of the witness involved to point to the court the locations testified on. Since this was not the purpose of the *inspection in loco*, the court did not even observe the aspects that counsel for accused no. 2 is basing its criticism on. What was observed was placed on record and both legal representatives were allowed an opportunity to add if anything was left out; and nothing was placed on record which could form the basis of this criticism.

78. The court has also noted the criticism of Mr. Mnisi by counsel for accused no. 2 to the effect that if he was on the road and had observed this Hyundai motor vehicle, he would have observed a motor vehicle driven by Mr. Thabethe. While I have noted the discrepancy in this regard, I have also noted that counsel for accused no. 2 failed to confront Mr. Mnisi with this

state of affairs so he could respond. Was he going to confirm that he did see Mr. Thabethe's car and that maybe he forgot, or he was not referring to local motorists, or that by the time Mr. Thabethe drove by, he was not there? We do not know because he was not confronted about this. In giving the defence the benefit of a doubt, this discrepancy is not of material nature. Perhaps this could also explain why the defence did not even confront Mr. Mnisi over it.

79. I am however satisfied that when the police drove in pursuit of the getaway motor vehicle, it was after a message was received over the radio saying the assailants fled in a white Hyundai i20 with GP registration number plates. When Mr. Thabethe went on to search for this car, he was looking for a white Hyundai i20. This is clear in that on his way back to the deceased's chome, the police asked him if he did not see a white Hyundai i20 and he told them he was also on a lookout for it.

80. Clearly, someone must have conveyed the word which finally reached the police, Mr. Thabethe and everyone in the know, that the getaway car was a white Hyundai i20 with GP number plates. This communication and the search took place before accused no. 1 and his overturned motor vehicle could be found. If Mr. Mnisi is lying about having seen this car, the question would be who then gave these details to Mr. Thabethe and to the police who spread the word over the police radio. The only evidence I have points to Mr. Mnisi, and I will accept it.

81. The explanation given by Mr. Mnisi on why he did not want to involve his lover in this matter is a reasonable one. It may not be what counsel for accused no. 2 may have preferred. But Mr. Mnisi did not want the parents of his lover to know that she was visiting him through this case, for they were unaware of her visits to him. To suggest that Mr. Mnisi's father should have been called to give evidence is to take it too far because I do not see

anything of relevance that he could help the court with on the guilt or innocence of the accused.

82.Lastly, the argument by counsel for accused no. 2 to the effect that Mr. Sithole testified that he saw young boys running out of the deceased's house deserves no comment since it is not elicited out of the facts of this case and is misplaced in my view. What the record reflects is "men" not "boys". The court adopts the same approach to argument by the defence for accused no. 1 to the effect that evidence on the ownership of the motor vehicle the registration number of which was found in accused no. 1's pocket is hearsay in that Cnst Ndlovu asked someone to check for him, is not elicited from the facts of the case. The facts are to the effect that Cnst Ndlovu went to a computer where he confirmed the car ownership before coming back to confront accused no. 1 again.

83.Findings: Applying the principles above to the facts of this case, I make the following findings: The Hyundai motor vehicle was hired out of Avis Car Rental in Sandton by Ms. Magudulela, accused no. 1's fiancé and handed over to the two accused who had a mission to accomplish in Mpumalanga. The motor vehicle went as far as Daggakraal in Mpumalanga. The details of a car (a maroon Chevrolet Cruze) belonging to another taxi owner in Daggakraal were penned down in accused no. 2's invoice. This invoice ended up in the hands of accused no. 1.

84.Two men entered the house of the deceased and asked the owner of this maroon Chevrolet Cruze (the deceased) if it was Mr. Nkosi's house; and when he would not give a direct response, he was shot and died instantly. The two men fled the scene and where whisked away in a white Hyundai i20 with GP registration number plate. About 30 minutes later and some 25 km

away, a white Hyundai i20 was found having overturned. Only accused no. 1 was at the crash scene and with him was the Faraday invoice that was only retrieved from his clothes the following morning.

85. With all this evidence, the two accused gave no evidence. I do not have their version to explain their presence in Mpumalanga, why they moved together from Sandton, why the details of the deceased's motor vehicle were in accused no. 2's invoice and why the said invoice was with accused no. 1 or at least evidence in denial of this.

86. Each piece of evidence on its own might not be enough to establish the guilt of the accused but the cumulative effect of all the pieces concludes the puzzle. This leads to only one reasonable inference to wit, the two accused planned and executed the murder of the deceased. In the words of Watermeyer CJ in *R v De Villiers* 1944 (A) 493 on pp. 508 – 509, (quoted with approval by Desai J in *S v Van Breda* (SS17/16) [2018] ZAWCHC 87 (7 June 2018) para 759),

“Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weighs but as a feather - join them together, you will find them pressing on the delinquent with the weight of a milestone ... It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them.”

87. Just as the court took to task counsel for the State, failure on the part of the State to allege in the indictment or throughout the trial that the accused acted in furtherance of common purpose has fatal effect to the charge of murder. Three people were involved in this murder one of whom as a driver of a

getaway car. The driver of a getaway car can only be guilty of the crime of murder with the application of the doctrine of common purpose – see *S v Thebus and Another* 2003 (2) SACR 319 (CC) and *S v Mzwempi* 2011 (2) SACR 237 (ECM). From the evidence before me, I cannot tell if any of the two accused may have been the driver of the getaway car and if so, which one. I do not have information on the roles played by each of the two accused.

88.The court does not know how the accused would have conducted their defence had it been alleged in the indictment or had the indictment been amended before the case for the State could be closed, to include its reliance on common purpose. A possibility that the accused could have chosen to give evidence under oath cannot be excluded. Failure to aver the common purpose in the indictment or further particulars means the State cannot rely on common purpose at the end of the trial – see *S v Ndaba* 2003 (1) SACR 364 (W) at para 102.

89.It is on this technicality that the two accused stand to be acquitted on a charge of murder. Had the State alleged its reliance on the doctrine of common purpose, the court would not hesitate to convict. This failure has therefore denied full justice to the deceased and the people of Daggakraal and the citizens of South Africa as a whole who are tired of crime. Equally, not an iota of evidence was led in support of a charge of reckless and negligent driving against any of the accused. They stand to be acquitted on this charge too.

90.The court is however satisfied that in planning the murder of the deceased and taking all the steps reflected above, obtaining a hired car from Avis Car Rental in Sandton, acquiring the details of the car driven by the deceased

and exchanging this between themselves, embarking on a journey to Daggakraal together and getting the deceased killed either by themselves or through other parties, the accused completed all the elements of the crime of conspiracy to commit murder in contravening section 18 (2) (a) of the Riotous Assemblies Act, no 17 of 1956.

91. The court finds therefore that the case for the State was proved beyond a reasonable doubt in respect of count no. 1.

92. **Verdict:** Count 1: Guilty as charged – all the accused.

Count 2: Not Guilty – all the accused

Count 3: Not Guilty – all the accused.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Dates Heard: 12-15, 21-22 February; 25-26 September; 01-05 October 2018; 21-24 January 2019.

Judgment Delivered: 25 January 2019

For the State: Adv. Poodhun

Instructed by: Director of Public Prosecutions
Mpumalanga

For Accused no. 1:

Mr. Venter

For Accused no. 2

Adv. Jacobs