

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case NO: SS54/2016

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
05.06.23

In the matter between:

THE STATE

versus

MOTAUNG LLYOD THATO

FIRST ACCUSED

and

MOKUBUNG MONKI DAVID

SECOND ACCUSED

NEUTRAL CITATION: *State vs Motaung Thato Lloyd & Another* Case No:
SS054/2016) [2023] ZAGP JHC 681 (05 June 2023)

JUDGMENT

SIWENDU J

Introduction

[1] On 10 July 2015, a group of armed men forcefully entered Kariah Chemicals CC (business premises), at Roodekop Industrial, Leondale to rob the business of its laptops, cell phones and money. Other members of the group were seen stationed outside the gate of the business premises in a white BMW. In order to gain entry, they threatened Thabo John Letlotlo (Letlotlo), a security guard employed at the business premises, forced him to open the gate, and thereafter involuntary took him into a white BMW. They covered his face and forcefully took his cellular phone.

[2] Constable Eric Fanie Moswang, a police officer who was on patrol in the area with his colleague, Constable Lerato Monyane heard an explosion, followed by gun shots. They decided to investigate by attending at the scene. Mapindo Isaac Dlodlu, a private security officer who had attended at the business premises was fatally shot in the head, perforating his skull and the brain¹. He died at the scene. Constable Moswang, was also fatally shot on the right side of the head and subsequently died at Union hospital in September 2015.²

[3] On 29 May 2015, preceding the robbery of 10 July 2015, a white BMW 320 series Registration [...] (BMW) belonging to Tshepiso Mosikatsana had been forcefully taken from him in Tsakana by three men clad in Balaclava. On 21 September 2015, approximately three months after this incident, a unit of the

¹ Exhibit B.

² Exhibit C.

South African Police Services (SAPS) found the BMW near Mariston Hotel in Hillbrow. Llyod Thato Motaung (Accused 1), the driver of the BMW was arrested. The State alleged that David Mokubung (Accused 2) was inside the BMW and was arrested with accused 1. Amongst the items found inside the BMW were (a) a 45mm calibre vector R4 Assault Rifle, (b) 70 rounds of live ammunition (c) black balaclava, (d) black and yellow gloves, (e) two cell phones and money. The accused were arrested by Const Fourie and Pretorius (nee Fouche) and later taken to Hillbrow Police Station, after photographs and fingerprints were taken from the vehicle.

The Charges

[4] The accused were charged as follows:

- (a) Count 1 — Kidnapping read with s 51(2) (c) of Act 105 of 1997 as amended. It is alleged that on 10 July 2015, the accused unlawfully and intentionally deprived Kabo John Letlotlo of his freedom of movement by threatening him with a firearm and holding him against his will.
- (b) Count 2 — Robbery with aggravating circumstances as defined in s 1(1) of Act 51 of 1977 read with s 51(2) of Act 105 of 1997. It is alleged that the accused unlawfully and intentionally assaulted Kabo John Letlotlo and used force and violence to take from his possession his Samsung cell phone.
- (c) Count 3 — House Breaking with intent to rob read with s 260 and s 262(1) of the Criminal Procedure Act 52 of 1977 (CPA) and further read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. It is alleged that the accused unlawfully and intentionally broke and entered into the business premises at Kiarah Chemicals CC and or Martin James De Oliveria with intent to rob.
- (d) Count 4 — Robbery with aggravating circumstances related to the unlawful and intentional assault of Mapindo Isaac Dlodlu and/ Kabo John. It is

alleged that the accused took possession of lap tops and cell phones belonging to or in lawful possession of Kiarah Chemicals CC using force and violence.

(e) Count 5 — Murder, in respect of the unlawful and intentional killing of Mapindo Isaac Dlodlu.

(f) Count 6 — Attempted murder. In respect of an attempt to kill Lerato Monyane by shooting at her;

(g) Count 7 — Assault and murder. In respect of the unlawful and intentional assault of Eric Fanie Moswang who subsequently died in hospital on 4 September 2015;

(h) Count 8 — Unlawful possession of fully automatic firearms, in respect of 5.56 x 45mm calibre Vector R4 Assault rifle (serial number obliterated and/ or 5.56.39mm calibre automatic or semi- automatic rifle, a make unknown to the state without a license issued in terms of ss17, 19 or 20(1)9b) of the Act;

(i) Count 9 — Unlawful possession of a 9mm parrabellum Calibre CZ model 75 semi-automatic pistol with an obliterated serial number without a license, permit or authorisation in terms of Act 60 of 2000;

(j) Count 10 — Possession of ammunition being 5.56mm x 39mm calibre ammunition (live rounds) and 9mm parabellum (live rounds) without a license.

(b) permits to possess ammunition; (c) a dealer's licence manufacturer's licence, gunsmith's licence, import, export or in transit permit or transporter's permit issued in terms of this Act; (d) or is otherwise authorized to do so;

(k) Count 11 — Theft of motor vehicle during the period 29 May 2015 to 21 September 2015 in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 BMW 320i registration number [...] belonging to Tshepiso Lerato Mosikatsana together with contents therein;

(l) Count 12 — unlawful possession of 5.56 x45mm calibre Vector R4 Assault Rifle with an obliterated serial number. In that, on 21 September 2015, near Hillbrow;

(m) Count 13 — Unlawful possession of ammunition being approximately 70 x 5.56 x 39mm calibre cartridges without a license they were charged with; and
(n) Count 14 — Possession of explosives. It is alleged that the accused unlawfully and intentionally endangered lives and property. An explosive charge was placed in the drop safe at the business premises which exploded and caused damage.

[5] The charges against the accused are based on the incidents of 29 May 2015, 10 July 2015 and 21 September 2015. The State alleges that the offences were committed in furtherance of a prior criminal agreement, even though at the time, the exact details of where, what or in what manner the agreement was entered into and with who were not known.

[6] The accused have been in custody since their arrest on 21 September 2015, and first appeared before this court to plead on 27 February 2018. They pleaded not guilty to the charges and elected to exercise their right to remain silent. They did not to tender plea explanation in terms of Section 115.

Admissions 220 admissions³

[7] The accused, who were first represented by Mr Vorster made the following admissions in terms of s220 of the CPA; namely that:

- (a) Maphindo Isaac Dlodlu, for whose death they were indicted in respect of count 5, died on 10 July 2015 as a result of a bullet wound of the brain and cervical spine sustained at the premises.
- (b) The post mortem conducted by Dr Pieterse and his report correctly reflects the facts and findings in respect of the death.

³ Exhibit A to Exhibit F.

(c) Eric Fanie Moswang in respect of whose death they were indicted in count 7, died on 4 September 2015 from unnatural causes and meningitis and ventriculitis following a head injury caused by a gunshot wound to the head sustained on 10 July 2015 near the business premises. They admit that the post mortem conducted by Dr Akmal Khan on 8 September 2015 and his report correctly reflects the facts and findings in respect of the death.

(d) W/o CF van Rensburg, stationed at CR and CSM CSI Gauteng attended the arrest and took photographs of the scene on 21 September 2015. He compiled an album which accurately depicts and describe the scene in question⁴.

[8] Both the accused admitted that Constable S Zulu from the SAPS Local Criminal Record Centre at Germiston Attended at the scene on 10 July 2010⁵ and took photographs⁵ at Corner Berry and Nederveen Street, Leondale to compile an album. The photograph of the scene were compiled into an album which accurately depicts and describe the scene in question⁶.

[9] Mr Vorster who represented the accused at the time, confirmed that the above admissions were explained to both of them. They in turn confirmed making admissions. Further admissions in terms of s 220 were negotiated between the State and the defense and were made on 14 March 2018. The first set related to the BMW and the investigations conducted by Constable Phathela which found that:

(a) The registration number on the motor vehicle was false.

(b) The identification mark on the motor vehicle was partially removed.

⁴ Exhibit "D".

⁵ Exhibit "E".

⁶ Exhibit "E".

(c) The chassis number of the vehicle which is WBA3B1600N559317 was tested and found to be positive.

(d) It was robbed on 29 May 2015 in Tsakane docket CAS number 667/05 of 2015. That the owner of the motor vehicle was Mr Tshepiso Mosikatsana.

[10] The accused made additional admissions⁷ relating to the break-in and entering at the business premises, namely that:

(a) On 10 July 2015 at approximately 01:30 the business premises of Kiarah Chemicals CC and/or Mr DJMJ de Oliviera in Industria Alberton was broken into and entry gained inside the premises.

(b) Entry into the premises was gained by cutting through the steel gate at the rear of the property and then cutting the roller shutter door, allowing access into the factory.

(c) A laptop and various cell phones were stolen from the office area.

(d) An explosive's charge was placed in the drop safe at the front of the store to open the safe. That the explosive was ignited and did explode inside the safe.

(e) The s212 statement of Lieutenant-Colonel Alberts in respect of the explosives that was found on the property⁸.

(f) The total amount of the damage caused on the premises amounted to R82 871.92 as indicated in an email by Mr D Naidoo with photographs depicting the damage.⁹

[11] Part B of the admissions related to the ballistics tests conducted. They admitted that:

(a) On 21 September 2015 at about 00:30 a R4 rifle with serial number obliterated was recovered at the scene of their arrest in the white BMW. The

⁷ Exhibit G

⁸ Exhibit "H"

⁹ Exhibit "E"

exhibit was sealed at the scene in a forensic bag by the photographer, Warrant-Officer van Rensburg with seal number PAR000079789G¹⁰.

(b) On 10 July 2015 at the premises of Kiarah Chemicals CC, a 9-millimetre firearm with serial number filed off and a magazine with 14 rounds inside was recovered and packed and sealed by the photographer, Constable Zulu in a forensic bag with serial number PA5001808551¹¹.

(c) Constable Zulu further recovered cartridges on the scene which he marked and sealed was follows: (i) Exhibit A, a cartridge case marked D, packed and sealed inside exhibit bag, PA6002450356. (ii) Exhibit B, a cartridge case marked E packed and sealed inside exhibit bag PA6002450362. (iii) Exhibit C, a cartridge case marked D1, packed and sealed inside exhibit bag PA60010448900. (iv) Exhibit D, two cartridge cases 10 marked C1 and C2, packed and sealed inside an exhibit bag, marked PAD001631593.

(d) The exhibits by W/o van Rensburg and Constable Zulu respectively were then handed in at the Forensic Science Laboratory, ballistics Unit in Pretoria for analyses. The exhibits were kept in safe custody at all times until the analyses was conducted thereupon by the various ballistic.

[12] The contents of the s212 statements of the following ballistic results were admitted and marked as follows:

(a) The statement by W/o Rululu, that is marked Exhibit K is attached in the bundle.

(b) Statements by W/o Sibiya, marked Exhibits L1 and L2.

(c) A statement by W/o Moloto Exhibit M and a statement by Lieutenant Ntudi, that is marked Exhibit N.

¹⁰ Exhibit D.

¹¹ Exhibit E.

[13] The admissions were confirmed through their legal representative at the time and by the accused themselves.

[14] The States's case against the accused rests on the above admissions and the evidence of, amongst others : Mr Tshepiso Mosikatsana, Constable Lerato Monyane, Sergeant Itumeleng Hlole, Warrant Officer Masondo; Constable Loward Khoza ; Kabo John Letlotlo ; Constable Hein Fourie ; Sergeant Madeleine Pretorius; Lieutenant Colonel Siphungu; Sergeant Mohutsiwa; Colonel Richard Ramukosi ;Constable Makhusha; Warrant Officer Kgwoedi; Captain Mvana; and Warrant Officer Veroshni Naidoo (Naidoo); Constable Manaka Malesela Hendrick.

The State's Evidence

[15] Mosikatsana, a tax consultant, and the owner of the BMW driven by Accused 1 testified that in September 2015, he received a short message system (SMS) from a tracking company that the missing vehicle had been located. He last saw the BMW on 29 May 2015 at about 9pm while parked on the street outside his cousins' house in Tsakane. A black polo came speeding and stopped in front of his vehicle while he and his cousin were inside the BMW. Three men wearing balaclava jumped out of the Black Polo. One of them had a gun in his hand, and he came to Mosikatsana's side as the driver and pointed the gun at him, ordered him out of the BMW and demanded the car key. They were forced to move to the back seat of the BMW.

[16] The assailants drove with them for a while, demanded their wallets, bank card pin numbers and cell phones. He had an Apple 6 Plus (estimated value of R12k) and a Samsung (estimated value R1.4k) with him together with R3k. He

had just given his cousin approximately R1.5k. These amounts were taken from them. After a while, the assailants stopped, pointed a fire arm at him and transferred him to the boot of the Black Polo. They withdrew approximately R2000.00 from each of his FNB bank accounts while he was in the boot. At about 2am, after driving around for approximately 2 to four hours, the assailants dropped him and his cousin off in Duduza and drove off in the BMW. They walked to one of the houses for assistance. They called Police and a case was opened at Duduza Police Station.

[17] The BMW was not returned to him but was retained at the Johannesburg Police Station because the insurers had replaced the vehicle. Even though he was not physically harmed, the incident affected him negatively psychologically which in turn affected his business. He has not recovered the items taken from him. During cross examination, he confirmed that he could not identify the assailants. The photos in Exhibit D were shown to him. He confirmed that other than the registration number which had been altered and the contents found the vehicle was his

[18] Letlotlo, a security guard employed by iBongo Security, a private security firm was deployed to guard the business premises. He had been working for iBongo Security for 2 and a half years. On 10 July 2015, he was the only one on duty, having reported at 6pm that evening. He was stationed in the guard room, located 8 meters from the main gate. At about 11pm, a white BMW came to the main gate which was closed. He went to investigate but could not see its registration number. Four men came out, and three of them had firearms similar to those carried by police. The fourth man carried a small firearm. These men pointed the firearms at him and asked him to open the gate. They spoke to him

in Sesotho and demanded that he gets inside the back seat of the BMW and he obliged. He could not see their faces as he had focused at the firearm pointing at him. They covered his head with a beanie-hat. The BMW drove off with him and he could not state where it took him. However, he could hear one of them from the front seat talking over the cellular phone in Sesotho asking ‘*Did you get in.*’ Even though he could not see, he presumed the conversation was with others inside the business premises. He also heard one of them asking: “*Can we Come?*” He could not identify the person talking.

[19] When they returned to the premises after 1am, the assailants dropped him at the corner of Berry and Nederveen roads. He was still covered with the beanie hat. The two of the men got out of the BMW while the driver remained. One had asked him to move and they had proceeded to the gate and they had walked from the corner of the tree to the tree opposite the gate¹². He does not know where he went because they had asked him to sit by the fence. He was lying with his face down and could hear the two people also lying on the ground. They were in possession of long firearms. He heard one of them making a call to the persons inside saying: “*Shoot it*” The reason he said the person was inside is because he heard the alarm going off. He is familiar with the sound of the firearm. He did not know what they were shooting at. After a few minutes, the electronic armed response arrived, and he confirmed this after the shooting because he could not see at the time.

[20] The next witness Constable Monyane, a police officer of 9 years of experience was stationed at Alberton Police Station in July 2015. She, together with Moswang who was the driver, were on patrol in a marked police vehicle.

¹² Exhibit F photo 4.

They were both armed and in uniform. After midnight, near Heidelberg Rd at Roodekoop in Leondale, while parked near the traffic lights, they noticed a motor vehicle approaching the traffic lights. When this vehicle turned and they became suspicious. At that point they heard a sound of two gunshots being fired and Constable Moswang called for backup over the radio. They drove towards the direction of the sound, near the business premises. On approaching the business premises, they observed there was a vehicle belonging to a private security firm. They heard multiple gun shots fired from different directions. She could not identify which direction the shots emanated from. Even though they were a distance away, she could see a security officer on his knees outside of the vehicle around the same time the shots were fired. At first, she was confused, and had checked to establish the direction of the gun fire. She then saw that Constable Moswang was bleeding profusely.

[21] Initially, she thought the shots were also from the security guard but soon saw a male figure ran across the road from the business premises. This male fired shots at the direction of their vehicle. There was a steel clad wall along the road where the assailant ran. A second male, tall in stature also in possession of a fire arm ran out of the business premises to join the first assailant. Both took cover across behind this steel- clad wall. At some point one of them stood up and both assailants fired at the police vehicle. Constable Monyane took out her service fire arm and returned fire from inside the police vehicle. The assailants jumped over to the Berry Marais side of the road traversing Heidelberg road. The two assailants eventually escaped. Constable Moswang had been shot in the head and died later. She also discovered that the security officer whom they saw kneeling had been fatally wounded in the gun fire. The window of the passenger side of their service vehicle was shattered by the gun fire. She had escaped unharmed. The front of the vehicle was also shot.

[22] Constable Monyane could not identify or point out the assailants. She could only provide a general description of their silhouette. One of the assailants was short, tough and well-built. The second assailant was taller but was not as well built as the first one. She had no knowledge of how they escaped the scene. She received information after the incident that incident involved a robbery of Kiarah Chemicals business. She was not able to go back to work for a long time after the incident. She received counselling and was transferred to the EMPD in 2016.

[23] Constable Khoza had been with the SAPS for 10 years stationed in Alberton. On 9 July he commenced duty at 17:45 together with his crew member, reservist Constable Fenyane. During the morning hours while driving from Alberton, he received a call from Constable Moswang, a colleague who had heard gunfire near a company he was patrolling and immediately drove to the scene. He arrived less than five minutes after the call. Other than the police vehicle, there was an armed response vehicle. He drove his vehicle towards where Constable Moswang was parked. As he arrived, he heard gun fire and called for more back- up. He had reversed his vehicle because he saw a person with an assault rifle shooting randomly from behind the barricade but directing the shots towards the police vehicle. He could see the person because some street lights illuminated the area along the road. There was no other person he could see. He did not see other shots fired.

[24] He approached Constable Moswang's vehicle after the gun fire ceased. Constable Moswang had been shot on the left-hand side of his brain. Even though he does not know how many shots were fired, his estimate was that there

was a round of shots and the bullets had entered the bonnet of the vehicle. He discovered, after the body of Constable Moswang was removed that the private security officer had been fatally wounded as well. As far as he was aware, there were no shots fired by the police because it looked like an ambush. He had communicated with the Joint Operation Centre (JOC), his commander and called an ambulance to attend to Constable Moswang. They had cordoned off the area of the incident scene to prevent pedestrian from walking the scene and called other stakeholders to attend to the respective aspects of information gathering.

[25] A fire arm and a cellular phone were found after the Dog Unit arrived. The Local Criminal Record Centre had attended to finger prints, these appear in Exhibit D which were guarded and kept secure until their arrival. The exhibits were parallel to each other separated by the road. He saw the LRC securing the exhibits in evidence bags. I note that the area where the firearm and the phone were found corroborates the evidence so far]. He witnessed the process as he was standing in full view. There was nothing for him to do at the scene after the exhibits were taken, as the Provincial Task Team took over the scene. Even though he had testified that no shots were fired by the police, he conceded that if police had opened fired, this was not done in his presence. He also conceded he could not identify the assailants nor could he dispute Constable Monyane's account of what transpired as she would have fired the two shots and was the crew member. Nothing contentious turned on his evidence during cross-examination.

[26] Constable Hlole who was stationed with the Johannesburg Canine Unit testified that he was on duty with W/o Masondo on the 10th of July 2015. They

were patrolling near Houghton when they received a call reporting an incident. The Alberton crew required their assistance. It took them some time to get to the scene as the person who give them directions could not provide accurate directions. When they arrived at about 2:30 a.m there were members of the Alberton and Germiston Police Stations present. A policeman had been shot inside of a police vehicle. A security officer whose company he could not remember had also been fatally wounded. They were requested to track the suspects who were reported to have escaped on foot. They could not do so because the dogs can only track an area where there is grass they cannot track on a tarred road.

[27] Constable Hlole and W/o Masondo inspected the area near the business premises on foot and discovered a blue cellular phone next to the road on the grass. He had called one of the policeman to the area where the cellular phone was found. He confirmed exhibit E, photographs 4, 5, and 6 was the police van on the scene at the Cnr of Berry and Nederveen Road. He also confirmed that a cell phone found at the scene¹³. Towards the entrance of the premises, he came across footsteps and followed the trail (track). The footsteps were from the gate of the premises until they reached a pole along the fence at the bottom of the premises. They found a black pistol¹⁴

[28] Upon finding the foot-steps, he had gone to the police vehicle where there was a suspect inside. He took one of the suspect's takkies to match it with the foot prints but did not interact with the suspect. He confirmed under cross examination that he was present when the cell phone was found and pointed out,

¹³ Exhibit F photos 134 and 6. Exhibit E photo 13.

¹⁴ Exhibit E4 photograph 49 and also exhibit F photo 7.

but was not present when the phone was put in the evidence bag. He has no knowledge who placed it in the evidence bag. He had gone inside the premises where he found a safe and noticed explosives near the safe this is all that he observed. The prospect of the contamination of the evidence of foot prints arose during cross examination. Defense agreed that the suspect whose takkie was matched to the foot print was one Mpho Gumede. He was subsequently released and was not before this Court. In any event, nothing turns on the evidence of the foot prints in this case.

[29] Constable Masondo was stationed with the Johannesburg K9 Unit in Langlaagte and had been with the crime prevention unit for 25 years. On the 10 July 2015, he was on duty and in full uniform when they were called during early hours to the business premises. He substantially, confirmed Constable Hlole's evidence that they had walked around the area using torches after they were briefed about what had occurred. He was with Constable Hlole when the blue Nokia was found on the side of the road on the grass. After marking it with a cone, they called the people who were in control of the crime scene and continued with the search. They moved towards separate directions he found, what he thought was a norinco firearm next to the pole outside the premises. He called Constable Hlole immediately after the discovery. The items were not far apart, were parallel to each other even though on opposite side of the road. He was not present by the time the exhibits were bagged, there was no one to interfere with the exhibits at the time he was in the area. He had not entered the business premises. Amongst the relevant items found at the scene, photographed, collected, packed and sealed for forensic investigation were:

- (a) A blue Nokia Cellular phone
- (b) 9mm pistol
- (c) Empty cartridge case one of which was found along Nederveen Street

(d) Nike bag

[30] Constable Fourie, a member of the task team charged with arresting dangerous criminals had been part of a team that received a briefing on the missing BMW which had been high jacked. On 21 September 2015, at midnight, he was in an unmarked white bakkie with a crew member, Sergeant Pretorius (previously Fouche). The missing BMW was identified in Hillbrow. They followed it to a parking area where it stopped. Constable Fourie went to the driver's side and asked the driver to open the door shouting that they were the police. The driver did not comply with his instruction. The interior of the vehicle was not visible as the BMW had tinted windows. When he opened the door, there were two occupants. He saw an assault rifle near the gear and had to act fast. This is when he forcefully removed the suspect who was later identified as Accused 1. He was the driver of the BMW. Upon forcefully removing him from the vehicle and landed him to the ground, he restrained him. It is common cause that Accused 1 got injured in his eyebrow during the arrest. According to Constable Fourie, Accused 1 refused medical assistance.

[31] Constable Fourie disputed that Accused 1 co-operated with him during the arrest by coming out of the BMW with his hands raised. Since he refused to get out of the vehicle he had to be grabbed out of it forcefully. He also disputed that Accused 1 was hit with a blunt force behind the ear, assaulted and kicked by two other white police officers before he was taken away. It was put to him that Accused 1 became unconscious as a result of the assault. He denied this. He also disputed the version by Accused 1, that he bought the vehicle from Temba and or 'was about to buy it from him.' Constable Fourie testified that the vehicle driven by Accused 1 was linked to the hijacking incident in Tsakane

under Case Docket No 667/05/2015. When it was found, it had false number plates.

[32] As a member of the crew with Constable Fourie, Sgt Pretorius (who was based with the Organised Crime, Violent Crime Investigation Unit and previously with the National Investigation Unit in Pretoria) took charge of the passenger side of the BMW. This is where she found Accused 2 seated on the passenger. The two accused were together. The following relevant items were amongst those found¹⁵ inside the BMW; namely:

- (a) R 4 Assault Rifle next to the passenger seat
- (a) 3 R 4 Rifle magazines
- (b) 72 live rounds
- (c) A pair of black and yellow Nike gloves
- (d) Black balaclava at the front of the passenger seat; and
- (e) Money
- (f) 2 cellular phones

[33] Sgt Pretorius testified that she found a golf key on Accused 2. Accused 2 denied that he was arrested inside the BMW. He claims to have been arrested at another street as he came out of Maxima club. The challenge to Sgt Pretorius was that Accused 2 did not appear in any of the photographs taken at the scene of the arrest. The keys found were of a Polo and not a golf as Sgt Pretorius testified.

¹⁵ Exhibit D.

[34] A common cause fact is that approximately 4 hours after their arrest, the accused were booked at Hillbrow Police cells by Cst Fouche at 4.20 am on 21 September 2017¹⁶. Even though they later disputed that they were informed of their Constitutional rights, both accused signed the respective Notice of Rights¹⁷ at approximately 4:10am. They did not dispute their signatures. The same day of their arrest, Lt Col Siphingu, then stationed at Provincial Organised Crime Investigation Unit got involved in the investigation concerning the matter. He received information around midday that one of the suspects involved in a matter he was investigating was arrested in Hillbrow. According to Lt Col Siphingu, there were ongoing investigations of an ATM bombing and a murder of a police official in Alberton and a case was already before court in respect of the incident.. He tasked a member of his team, Constable Thoka to bring them to Chamdor, Krugersdorp for an interview .What transpired from the time the accused were booked out to Chamdor became the subject of the trial within a trial.

[35] Before I deal with that evidence, I should mention that W/o Kgoedi testified that the day following the arrest, on 22 September 2015, he booked both accused out to conduct DNA tests at the H. E. L. P Centre, a Clinical Forensic Medicine centre in Hillbrow. Each one of them were examined and saliva DNA specimen obtained. The respective J88s¹⁸ following their examination show the accused were examined by different doctors.

[36] At the trial, the State sought to introduce into evidence two statements in Exhibit U and Q allegedly made by the accused at Chamdor after their arrest. The statements were taken on 21 September 2015 by Col Ramukosi and Capt

¹⁶Occurrence Book 1070.

¹⁷ Exhibit S1 and S 2.

¹⁸ Exhibit V1 and V 2.

Mvana respectively. The accused disputed that they made the statements, and denied the information therein. They also challenged the admissibility of the statements on the grounds that they were not made freely and voluntarily made. They claim that after their arrest, they were ‘brutally assaulted’ by five police officers in Col Siphungu’s office in Chamdor. In addition, they disputed they were informed of their rights before making these statements. Given this, a trial within a trial followed to determine the admissibility of the statements.

Trial within in a Trial

[37] It was the admissibility of the statements on the evidence of Col Ramukosi, Capt Mvana, Const Thoka, Const Makhuse and W/o Kgoedi that were to be determined. Both accused adduced evidence to support their allegation. On 9 April 2019, I ruled that statements were freely and voluntarily made and should be admitted into evidence. The reasons for the ruling were to form part of the final judgment. I deal with those reasons first.

[38] The accused did not dispute that when a statement of a confession or an admission is to be obtained from a suspect, the practice within the SAPS is to call a commissioned officer from an outside division to take the statement. Lt Col Siphungu, was charged with overseeing the group dealing with ATM bombings and cutting, theft from volts, chain stores and double murders. The reason the case was assigned to his division in Chamdor was not due to the double murder, but the use of explosives. He had tasked Const Thoka to book the accused out of Hillbrow and to bring them to Chamdor to be interviewed. Even though the accused challenged the rationale for taking them out of Hillbrow for this purpose, they did not dispute the evidence that Hillbrow Station lacks the office facilities to conduct the interview nor did they dispute Lt Col Siphungu’s responsibility to oversee such cases.

[39] The Occurrence book¹⁹, reflects in occurrence number 1089 that the accused were booked out of the Hillbrow cells at 12:50 with no complaints. Constable Thoka testified that he could not remember where he was, when he received a call from Lt Col Siphungu to book out the accused from the Hillbrow cells, but believes he may have been around the Johannesburg CBD. He was in a Chevrolet Avio, a state motor vehicle. The accused did not complain to him at the time. Even though the time was recorded as 12:50, it was not the time he left Hillbrow Station. He would have left more or less 13h20 to 13h30. He testified that a warrant officer at the Hillbrow cells would have written the entry of the booking and he had signed it.

[40] Lt Col Siphungu confirmed that Const Thoka brought Accused 2 to his office located on the first floor. Accused 1 was left in another office next door. After introducing himself, he explained to Accused 2 the purpose of the interview which was linked to a matter of an ATM bombing already before the courts. He then read him his Constitutional Rights listed in the SAP 14A, which Accused 2 had in his possession, and translated them to him in seSotho. Lt Colonel Siphungu's evidences was that Accused 2 acknowledged that he understood and informed him that the rights in the SAP 14A were explained to him during the detention. Lt Colonel Siphungu testified that when Accused 2 started to incriminate himself, he stopped him and asked him if he was willing to make a statement regarding the incident. Accused 2 agreed, after which he made calls to organise outside help to assist obtain his statement. There were no complaints raised during the interview and he could not recall any visible injuries from Accused 2. He did not make a request for medical assistance. Lt Colonel Siphungu confirmed however, that one of the accused he met was

¹⁹ Exhibit T.

injured or that he had observed the injuries on his face. Accused 2 was also calm and positive and showed no sense of duress.

[41] After he spoke to Accused 2, Accused 1 was brought to his office and he followed the same procedure as with Accused 2 and explained to Accused 1 his Constitutional rights in the SAPS 14A in seSotho. He then informed Accused 1 about the cell phone found at the scene of the crime during the incident in Alberton. He too incriminated himself and mentioned names of other people involved in the incident. Lt Col Siphungu stopped him, and Accused 1 agreed to make a statement. Lt Col Siphungu confirmed that Accused 1 was injured around the forehead. He had inquired how he sustained the injury. Accused 1 advised him that the injury was caused by the officers during the arrest. According to Lt Col Siphungu, he formed the opinion that the injury occurred some hours before, and did not require medical assistance. The conduct of Accused 1 was positive, he communicated well and voluntarily. There were no signs that he was under threat. Lt Col Siphungu did not deal with the accused after that. He was not aware of anything that transpired to the accused while they were at Krugersdorp.

[42] Lt Col Siphungu had made external calls to get help to obtain the statements. He secured assistance from, Col Ramukosi and Capt Mvana. Col Ramukosi obtained a statement from Accused 2 while Capt Mvana obtained one from Accused 1. Col Ramukosi testified that he indeed received a call from Lt Col Siphungu after 16h00 on 21 September 2015, to attend at his offices in Chamdor to obtain a statement from one of the suspects. An office was provided to him on arrival to conduct the interview. The suspect whom he identified as Accused 2 was brought to the office by an officer whose name he could not

recall. He was not aware of what he was arrested for. He introduced himself and informed Accused 2 of his Constitutional rights as a standard practice.

[43] Col Ramukosi had a pro forma document generally utilised by commissioned officers of the rank of captain upwards. The pro forma was admitted into evidence, without the admission of the accompanying statement.²⁰ He confirmed his hand writing thereon, his signature as well as that of Accused 2 and thumb print. It reflects that Accused 2 was brought to him by Const Manaka. Accused 2 appeared as 'a normal human being', at ease and there was nothing suspicious about his wellbeing. He informed Accused 2 about the pro-forma, and that he was going to ask him certain questions. Whatever was not applicable to Accused 2, was deleted as "not applicable" and Accused 2's thumb-print placed thereon to confirm his signature. This was a precautionary measure in case the signature is disputed at some stage. Accused 2 had accepted the explanation and had produced the SAP14A he obtained from Hillbrow which had a charge number. They went through the pro forma from 17h30 and spoke to one another in se Sotho with no communication breakdown. The personal information on the pro forma was obtained from accused 2. He did not request to go to the Magistrate.

[44] Accused 2 informed him that he did not expect any benefit for making the statement. Col Ramukosi was emphatic that whenever he takes these statements he would make sure that the person understands their rights and splits the questions under Section 35 in particular that: (1) Right to remain silent was explained. He chose to give me the statement. He chose to give the statement (2) Right to appoint a legal representative. He was advised to get

²⁰ Exhibit I.

Legal Aid or appoint a lawyer. He chose to give a statement without one. There was no need for support by next of kin because he was 39 years of age. (3) He confirmed that he is giving the statement freely and voluntarily without being influenced.

[45] Col Ramukosi confirmed that Accused 2 had a bruise on the left cheek. However, Accused 2 advised him that he sustained the bruise during the arrest when he was made to lie down on the ground. In Col Ramukosi's observation, the bruises were not serious but were minor scratches. Col Ramukosi denied that Accused 2 was assaulted to induce the statement. He testified that there had been no mention of an assault throughout the interview, but instead Accused 2 confirmed that he was making the statement voluntarily.

[46] The version by Accused 2 that he had been severely beaten was put to Col Ramukosi. He disputed it, stating he would have noticed the signs of an assault, and Accused 2 did not inform him of this. He had spent approximately 1 hour and 30 min with him and completed the formal process at 19:01, after which Accused 2 was handed over to Const Manaka. Col Ramukosi testified that Accused 2 had nothing to fear because he was independent of the case and they were the only people in that room.

[47] Another version put to Col Ramukosi was that this Accused 2 referred to the Hyundai on the pro-forma deliberately, as the only way he would be able to say that the confession and admission was not voluntarily made. Col Ramukosi could not comment about the discrepancy between the time he completed the process and what appeared in the warning statement by the investigating officer,

which reflected at 19:00, but agreed that the time would have been impossible though.

[48] Captain Mvana who dealt with Accused 1 confirmed the practice to use someone independent of the case and for that officer to prepare and bring their own documentation. The suspect whom he identified as Accused 1 was brought to him by Constable Mowitsiwa. He confirmed that the pro forma statement was in his hand writing (Exhibit U) and that he had only met one suspect, Accused 1 whom he had interviewed. He had introduced himself to Accused 1 and obtained his personal particulars. His language of preference was seSotho and he conducted the interview in that language but wrote in English as Accused 1 was speaking. He started the interview at 17:59. Accused 1 was in his sound and sober senses. Capt Mvana presented his appointment certificate as required and confirmed, that he had no knowledge of the case. Accused 1 could speak to him freely. Accused 1 then informed Capt Mvana that he was arrested for unlicensed firearm and ammunition. He requested the SAP 14A in his possession where he confirmed the information provide to him by Accused 1.

[49] Captain Mvana testified that he saw that Accused 1's left eye was swollen and recorded this. He described his demeanour, emotional state as "relaxed." He observed that Accused 1 was in leg irons but did not have his shirt on even though he was wearing pants. There were no other injuries other than the visible ones nor were any others indicated. Accused 1 did not show signs that he was assaulted. He had informed him of his rights and that anything would be used against him in a court of law. He also advised him of his legal rights and the right to obtain a lawyer and that one could be appointed. Accused 1 stated that he wanted to explain his innocence and would appoint a lawyer during the trial.

He confirmed he understood the answers given. He had explained to Capt Mvana that he was not involved in the shooting and/or murder of the police officer and that he had already made a statement before to the arresting officers to this effect. After completing of each page, Capt Mvana used his thumbprint to show that he confirms his understanding on each page. He read the statement it to him, thereafter, Accused 1 also read it by himself and confirmed he had no complaints with the manner in which the statement was taken or its interpretation. It was completed at 19:14 minutes. If there was something unusual about Accused 1 for example, if he walked in an unusual manner, he would have recorded it. He would have recorded any dissatisfaction or things not accepted in the pro forma document. Captain Mvana testified that Accused 1 had only mentioned being charged for firearm and ammunition but not murder and robbery.

[50] During cross examination, Captain Mvana was challenged for failing to record that Accused 1 was not wearing a shirt. His response was that this was not unusual of suspects and it did not concern him since often, accused would come without clothes or without shoes in the cause of their arrest. As a result, he did not ask where his shirt was. Captain Mvana also referred to statements Accused 1 allegedly made ‘to arresting officers’ – when in fact Accused 1 claimed to have made same to ‘the investigation officers.’ He was emphatic that Accused 1 spoke of a group of people but did not mention their names. Captain Mvana was not in a position to say where Col Siphungu received the information that the murder and robbery were involved, and the documents in his possession did not mention murder and robbery.

[51] The version put to Capt Mvana was that Accused 1 made the statement to explain his innocence, and those facts appear in the statement. Challenged to explain how a quest to explain his innocence end up as a confession, his response was that it was not his place and duty to contradict the accused about what he had to say or what he was arrested for. He does not decide what is relevant or not but merely takes down whatever is said. He had no prior knowledge of what Accused 1 would say. To the allegations of a 'brutal assault' by Lt Col Siphungu, he testified that Accused 1 was free to inform him of this but did not mention it.

[52] On the other hand, Lt Col Siphungu testified that Accused 1 was the suspect he was looking for. Accused 2 was called into Chamdor because both were arrested with a similar vehicle used in another offence and the firearms used were similar to those found in the other offence they were investigating. The BMW was used in the incident the police were investigating. The justification for taking the accused to Chamdor was because there was no space for engaging with suspects at Hillbrow, there is no interviewing room and available office is used by cell officers.

[53] It was put to him that the accused could have been taken to a Magistrate at the Hillbrow Court, next to the Hillbrow police station. His response was that he was not aware that a confession by a Magistrate has more weight than that by another commissioned officer. Furthermore, he was not aware that one could walk to any magistrate's office and ask for the Magistrate to do a confession at 3pm in the afternoon. He disputed the version that when the accused arrived, there were 5 people present, including a white officer in shorts who had asked "why are you calling me I am on leave." He also denied that

they were assaulted or tortured in any way or that he referred to Accused 1 as a member of the Boko haram gang.

[54] In his evidence Accused 1 testified that he was alone driving a white BMW which he had bought from Temba when he was arrested. A white S3 vehicle followed and flickered at his vehicle. He turned left into the parking bay and stopped. A white police officer physically removed him from the vehicle and hit him with something hard behind the ear. He fell on the ground and was left to lie there for three to four hours and later put inside a police van. He had two cell phones in his possession. He met accused 2 whom he had not seen until then inside the van.

[55] Accused 1 claims that at 8am that morning, Constable Mabaso arrived at the cells and booked him out to interrogate him about a certain Jacob who was investigated for another offence relating to a stolen vehicle. Accused 1 had blood all over his face. He was accused of killing police officers and threatened, that they would take him to Lt Col Siphungu where he would 'defecate his pants.' He says this was to force a confession out of him. He had asked Constable Thoka to take him to a Magistrate where he would tell the truth. Constable Thoka booked him out and took him to Chamdor instead. On the way they kept referring to them having killed police officers.

[56] On arrival he was taken to Col Siphungu's office who accused him of being tied up with Bokoharam. He was made to sit on the floor. W/o Kgwoedi, Constables Maratalala, Const Mahitiwa, two white males and another person who he could not identity were present. Accused 2 remained in Siphungu's office. He was taken to another office and accused 2 remained in Siphungu's

office. He could hear accused 2 screaming and yelling from the other office and a banging of the wall which lasted for about 45min to an hour. He was informed he would be next. He met Accused 2 on the way and could see his face was swollen.

[57] When he returned to Lt Col Siphungu's office, Const Mahutiwa tripped him and asked if he was a member of the Boko haram gang responsible for killing police in Alberton. He assaulted him and threatened that Accused 1 would 'defecate his pants.' He testified that he was suffocated with an evidence bag of approximately 50 centimeters which was put over his head and face. Even though he had fainted he could hear a voice saying 'Can you not see that that person is dying?' Col Siphungu and Const Mahutiwa were responsible for the assault. When he regained consciousness, he could not tell how he got out of the office. According to him, there was Detective Barnard and another police officer in the other office. This evidence and these threats were not put to any of the state's witnesses, in particular Col Siphungu and W/O Kgwoedi.

[58] Accused 1 denied furnishing the statement and claims the police wrote whatever was in it and asked him to sign. If he refused, they would take him back to the office where he was tortured and this time around, they would kill him. He did not ask for medical assistance because it was of no use doing so. They could not assist him with a mere a glass of water. He did not sign the statement freely and voluntarily.

[59] In cross examination, he testified that when he got to Chamdor his face was full of blood, yet this was not put to the state witnesses. He stated for the first time that he had a fracture as a result of the assault and was attending ENT

Clinic at Bara hospital. The fracture was not amongst the injuries referred to in the J88 after he was examined by the Doctor²¹. It was not mentioned at any stage in any of the reports, warning statements and statements given, nor was this put to Lt Col Siphungu when he gave evidence.

[60] He testified that he was booked out of the cells in Hillbrow by Const Mabaso, such was not recorded in the occurrence book. When challenged, he stated that the interrogation happened in the same building where the cells are located. Even so, this would have been in the occurrence book. This evidence contradicted the version put to Col Siphungu and W/O Kgoedi.

[61] Even though he denied that he was made aware of his rights, he confirmed that he was aware of the alternatives available to him, at that early stage, namely that he could if he wished make a statement to a Magistrate or remain silent, had the right to make a statement to a police officer. He disavowed knowledge of the Notice of Rights²² even though it bore his signature. When asked about the confession he testified he wished to make to the Magistrate, he stated that he wanted to confess to the possession of a stolen vehicle. However, the pro forma states that he wanted to explain that he was not involved in the shooting of the policeman. That he was deprived of water was contradicted by the fact that the cells have internal water facilities he has access to. He contradicted himself on the number of people in Col Siphungu's office, and he attributed this to the injury to his left eye.

²¹ ExhV.1

²² Exhibit S1.

[62] Accused 2, (David Monki Makobong aka Mdeva) testified that he was arrested outside Mariston hotel as he came out Maxima club to his motor vehicle just as he pressed the immobiliser of the vehicle, he heard voices of police, stopped and lifted his hands up. They searched him, took two of his cellular phones one of which was a Nokia, put a balaclava over his head to another SUV vehicle. He denied that he was arrested with Accused 1 and taken out of the BMW driven by Accused 1. He was not injured during the arrest. Sgt Pretorius testified that he was arrested with Accused 1. Car keys were found in his pocket.

[63] He disputed providing information about the robbery in the statement taken by Col Ramokosi but agreed that he signed a pro- forma. His evidence in chief was confined to the time he was booked out of Hillbrow until he was booked back. He stated that he travelled in a blue city golf with Const Thoka and Hendriks Menaka to Chamdor. He was in leg irons and hand cuffs. They entered an office with three police officers one of whom was Lt Col Siphungu. W/o Kgwoedi was behind Lt Col Siphungu. Constable Motshiwa whom he got to know of in court was present. They were made to sit down. Lt Col Siphungu asked whether Accused 1 was Thato Motaung Bokoharam and asked who he was. He gave him his nick name "David Mdeva." Col Siphungu signalled with his head and whispered to his ear. Then Constable Hendriks Menaka took Accused 1 out and asked for him to remain. It was then that Col Siphungu introduced W/o Kgoedi to him and explained his role as the investigating officer. W/o Kgoedi had a writing pad in hand.

[64] Lt Col Siphungu asked him to kneel down and started to question him about "a lady and what happened on 10 July 2015 regarding the robbery and the

murder.’’ He denied knowledge. Col Siphungu wanted to know if they were to resolve the matter “human to human or the police way.” Constable Motshiwa started to insult him, then stood up and pushed him until he fell on his face. That is when they attacked him accusing him of killing a police officer, thereafter denying it. He testified that they had kicked him until he said he knew about it and will tell the truth. When he promised to disclose the truth W/o Kgoedi commenced writing what he said. Col Siphungu left the office and he was taken to Col Ramukosi who had some documents with him. Later, W/o Kgoedi joined Col Ramukosi. He was made to sign the forms they had filled up. He saw accused 1 held on both sides like someone being balanced, walking down the passage. They returned to Hillbrow around 23:00.

[65] In cross examination, he confirmed that when he was booked out of the Hillbrow Cells to Chamdor he was fine even though he could not walk properly because his legs were cuffed in leg irons. He confirmed that at Hillbrow, he was given the SAP14A which he had signed²³He says the document was not explained to him but he read it, understood what was written before he signed it. They found W/o Kgwoedi at the Chamdor even though W/o Kgwoedi testified that he only arrived at about 17:00. Lt Col Siphungu had pointed Accused 1 with a finger calling him Thato Motaung Bokoharam. Accused 1 was taken out of the office while he remained inside.

[66] His evidence was that Lt Col Siphungu had introduced W/o Kgoedi as the investigating officer. He was instructed to kneel down which he did. Lt Col Siphungu asked him if he wanted to “sort this matter in a police way” or in the “human to human way.” He wanted to know about the 10 July 2015 incident,

²³ .Exhibit S1.

and when he denied knowledge, as a result Constable Mogotsiwa pushed him to the floor, he fell on his face and “they assaulted him.” He testified that he was only kicked. Nothing else happened to him. He confirmed that he was not thrown against the wall and could not say there was banging on the wall. He sustained a scratch to the right eye.

Reasons for the Ruling

[67] The Accused rely on the events that allegedly occurred subsequent to their arrest at Chamdor. It was not suggested that the use of force to restrain them influenced the statements nor is there evidence to this effect. To be admissible, a confession must comply with the stringent requirements of s 217(1).²⁴ The question therefore is whether (a) the statements were made freely and voluntarily (b) the accused were informed of their constitutional and the right to legal representation²⁵ (c) were they in their sound and sober senses and without having been unduly influenced when they made them. The *onus* rests upon the State to prove beyond reasonable doubt, that it had been “freely and voluntarily made (by appellant) in his sound and sober senses and without having been unduly influenced thereto”²⁶ as a condition of the admissibility of the tendered confession.

[68] Ultimately, it is whether, in all the circumstances, the accused has had a fair trial. Significantly, the Court in *S v Mcasa and Another*²⁷ held that:

“In my view, an officer before whom a confession is made, be it a commissioned officer or magistrate, is not expected to embark upon the

²⁴ 217 Admissibility of confession by accused -

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.

²⁵ *S v Magwaza* 2016 (1) SACR 53 (SCA).

²⁶ *S v Zuma & others* 1995 (2) SA 642 (CC).

²⁷ 2005 (1) SACR 388 (SCA).

interrogation of a person wishing to make a statement. Nor is it desirable or permissible to encourage the deponent to speak, although aspects which are unclear should of course be clarified. It seems to me that after ensuring that the person who wishes to make a statement is in his or her sound and sober senses and wishes to make the statement freely and voluntarily, without having been unduly influenced thereto, the taking of the statement can then be proceeded with. The *caveat* to consider at all times is of course that the person wishing to make a statement has to be apprised beforehand of his or her rights, and most importantly the right to remain silent.”

[69] A court must assess and adopt an objective approach, consider the statement as a whole, and have regard to the facts stated by an accused rather than the intention behind the statements and if the facts which he admits amount to a clear admission of guilt, it does not matter that in making the statement, he acted exculpatory.²⁸ All that is required of the accused is for them to present a version that was reasonably possibly true, even if it contained demonstrable falsehoods.²⁹ In addition, I determined whether an admission would render the trial unfair and trample on the fair trial rights of the accused.

[70] On a conspectus of the evidence as a whole I am unable to find fault with the evidence tendered by the State. The statements were made to commissioned officers who were not involved in the investigation of the case. Accused 1 had an interview with W/o Kgoedi³⁰ and agreed that his rights were explained to him. Accused 1 disputed the contents of the statement made to Captain Mvana and claims the pro forma was not explained to him in seSotho. He agreed that

²⁸ S v Yende 1987(3) SA 367 A.

²⁹ S v Gcam- Gcam 2015 (2) SACR 501 (SCA) Para 48 at 512.

³⁰ Exhibit W 1.

he had provided his name and address. He had used different signatures as an indication of the absence of consent and that the statement was not signed voluntarily. Exhibit U which indicates the notice of his rights reflects the SAP14 A which could have been only obtained from the accused. These denials were raised for the first time during his cross examination and were not put to the state witnesses.

[71] Despite the denial above, the version put to Capt Mvana was that Accused 1 made the statement to explain his innocence that he was in possession of a stolen vehicle but was not involved in the murder of the police officer. Under cross examination, the Accused 2 agreed that the denial that Col Ramukosi read to him his rights, including the right to legal representation was never challenged when Ramukosi was cross examined. The Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* emphasised that:

“The institution of cross examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that imputation is intended to be made to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct...”

[72] Whether the accused were assaulted, and there was an undue influence in making the statements largely rests on their account of the assault at Chamdor. I found their account was not reasonably possibly true in the following respects:

(a) Demonstrating the manner of perpetrating the assault, Accused 1 showed the Court that Constable Mahutiwa allegedly got from behind and entered his legs between his arms which were handcuffed. The manner in which this occurred was such that there would have been no room for Constable Mahutiwa to manoeuvre to lift Accused 1's legs and back towards him.

(b) There were no injuries to the hands or arms of Accused 1 from the handcuffs which supports that version. He claimed to have been kicked in his manhood area, but when challenged why he did not report this to Capt Mvana, he stated he was no longer in pain when he saw Capt Mvana.

(c) Although he alleged he was suffocated but regained consciousness, and identified Lt Col Siphungu as one of his assailants, he did not inform the doctor who examined him of this fact. Instead, he stated that he was assaulted during the arrest. His reasons for failing to do so, namely that he was accompanied by W/o Kgoedi are belied by the fact that W/o Kgoedi remained outside while Accused 1 consulted with the doctor.

(d) He claimed to have been carried out to the next office by two people but could not tell how he came to know he had to be carried. He later testified that he heard it from Accused 2, even though he did not state so in his evidence in chief.

[73] Accused 1 testified that he was not arrested with accused 2 and met him for the first time in the police van that morning. When challenged about how he could identify the screams he alleged to have those of Accused 2, he claimed to know his tone of voice. He could not explain why he could hear Accused 2's voice when with the same breath he could not hear other voices speaking from

the room. He conceded however that even though he heard a banging sound, he was not in a position to tell whether the banging was of a door or the wall or who was responsible for it. This evidence was contradicted by Accused 2 who did not hear or was a part to such banging or screaming. As to the facial condition of Accused 2, his evidence was that the police officers were responsible for the injury even though he accepted he was not inside the room to see it. That evidence did not correlate with the account by Accused 2.

[74] Lastly he claimed to have informed W/o Kgoedi of the assault, and that the reason for W/o Kgoedi's failure to include it in the statement was because W/o Kgoedi witnessed the assault. Yet:

- (a) There were no complaints of assault made to the magistrate on his first day of appearance.
- (b) He agreed that he understood the allegations behind his arrest and since he had already made a statement to this effect, he would not repeat that.
- (c) He agreed that he signed the statement "so that they should just leave him alone so that I can go out on that day." I found his version not to be reasonably possibly true and that there had been no undue influence in making the statement.

[75] With regards to Accused 2, he also claimed to have been assaulted and had he demonstrated to the court how he had fallen forward, landing on his hands. Realizing the improbability of this version, given that his hands were hand cuffed from behind, he adjusted his evidence to show that his hands were behind him when he fell.

- (a) The version of the assault was not put to Mogotsiwa when he testified. With the same breath his evidence was that he did not see who assaulted him.

When challenged he said he was informed to say so by Col Siphungu and W/O Kgwoedi. This version came out for the first time during cross examination.

(b) Even though he claims to have been assaulted to disclose the truth about the event of 10 July 2015, and the assault stopped once he had made the statement about the incident, he denied that he had disclosed that information to Col Ramukosi.

(c) Accused 2 testified that he told W/o Kgoedi everything about the incident and he had recorded and made a statement to W/o Kgoedi to this effect. This denial was never put to W/o Kgoedi. The statement by W/o Kgoedi recorded a denial of the allegation and that he was aware of the reasons for his arrest. It is also recorded that he sustained the bruise on his face during the arrest³¹. He had informed Col Ramukosi the bruising on the left cheek occurred during the arrest³². Despite these denials, the statement made to Col Ramukosi bore his signature.

(d) Furthermore, when Col Ramakosi gave evidence it was put to them that Accused No 2 had mentioned a Hyundai in the statement he made to him as an indication of the absence of his consent. He confirmed he had mentioned the vehicle to Col Ramukosi when he filled the pro forma even though with the same breath he denied giving the statement.

(e) There were no other injuries were not in the J88, yet he implied that he informed the doctor and was given medication for the injuries even though this was not recorded in the occurrence book when they returned to the cells and would have been searched is not the procedure. I agree with the argument by the State that this was a fabrication of the evidence fashioned in the course of the cross examination.

³¹ Exh W2.

³² Exh Q Par 9.1.

[76] It is for the above reasons that I concluded that the version of the assault and in turn that their assertion that the statements were not made or were not voluntarily made was not reasonably possibly true. In particular, I considered the implications of admitting the statements vis a vis the right of the accused to a fair trial. I have found that an admission in this instance did not prejudice their right to a fair trial. In doing so, the question remained this – What would have motivated the accused to make these Statements? The impression the Court has on the evidence as a whole and the conduct of both the accused is that when they arrived at Chamdor, a specialist unit adept with organized crime, they were confronted with a trail of evidence pointing towards their involvement in a serious crime linked to a tragic death of two people. According to Lt Col Siphungu's he informed them of the reason why they were investigated and why they were brought to Chamdor for questioning. The cell phone linked to them was found at the scene of the shooting. They would have known at that time that it was missing. They never disputed this explanation. The manner in which they conducted themselves throughout indicates that they may have at that stage formed a view that the evidence against them was damning, only to later change their minds. The subsequent change, if there was one, does not alter that the jurisdictional requirements of admitting the statements were met and were present when they were made.

Trial Evidence

[77] Both accused were part of a group that hatched a plan to rob the business premises. According to Accused 1, they held meetings one at the KFC in the East rand with Skuta, Sthe, Accused 2 (aka as Mdeva) and two other males to plan the robbery of the certain firms including the business premises. The other meeting, of which Accused 2 was a part of was held at Khehla's place in Soweto. They considered Khehla's place a "safe house." Before the robbery,

they had allocated each other various roles, in terms of who amongst them would (a) transport them to the business premises, (b) kidnap the security guard to remove him from the gate and (c) enter the premises to do to take the money. On the day of the incident, Accused 2 was in a double cab, and had dropped some of the people who were responsible for the internal robbery with the necessary tools in preparation of “the job.” When they were done, Accused 2 collected them to Johannesburg while the other two remained behind.

[78] Accused 1 was in the BMW with Langa, Sthe and another unidentified male who had a pistol. Langa had the rifle in his possession. They pointed the security guard with a firearm and took him in the BMW driven by Accused 1 and drove around with him until he received a call from those who were inside to return. He had offloaded the security officer and others near the premises while he parked a distance away. Accused 1 heard an explosion and gunshot fired. He later found Langa and Sthe on the veld, picked them up and drove away. They informed Accused 1 that people were injured and a cell phone was left at the scene. He was not involved in the murder.

[79] The statement by Accused 1 is substantially consistent with the evidence and account given by Thabo John Letlotlo, the security officer employed at the business premises and the subject of the kidnapping charge.

The Merits

[80] Only Accused 1 testified during the trial. In sum, his version was that he was alone in the BMW when he was arrested. He met Accused 2 for the first time during the arrest and did not know him before the incident. He agreed that the pair of black and yellow gloves found inside the vehicle belonged to him.

He used them to play snooker in Randfontein the night of his arrest. The BMW belonged to Temba whom he had known since 2010/11. Temba had the keys and the papers for the vehicle. He had agreed to buy the BMW from him for R250 000. He contacted Temba after his arrest to advise him that there was a problem with the car and that they found a rifle in it. Temba confirmed there was a rifle in the boot, and when Accused 1 asked Temba to come and explain this to the police, Temba hung up on him. He closed his case without calling any witnesses.

[81] After first launching an unsuccessful application for recusal of the Court which he did not appeal, he followed the application for recusal with an attempt to secure a postponement of the case on grounds of ill health. The State led evidence by Mr Miya, a nurse at the Operations Centre of the Correctional Services which revealed that the assertions by Accused 2 could not be believed. In fact, he had made contrary representation to a therapist that he feared *his* attorneys were going to delay the trial. Accused 2 declined to give evidence. His Counsel confirmed that he was advised of his rights and the consequences of the failure to testify. Accordingly, his case closed without leading evidence. After the trial, Accused 2 subsequently filed an affidavit with the Registrar. The affidavit is not evidence for the purpose of the trial and it is not necessary to consider its contents...

Evidence on Merits

[82] Lieutenant Nthaudi reported in his s 212 statement that on 1 April 2016, he performed a ballistic test and examined the fired cartridge cases in respect of the:

- Two 5, 56 x 45mm Calibre Test Fired Cartridge Cases Marked 839TC1 and 839TC 2 ; and

- Two 5, 56 x 45mm Calibre Fired Cartridge Cases Marked 164184/15D and D1 respectively

He found that the Calibre Fired Cartridge case Marked 164184/15D and D1 was fired in the same firearm as the test Cartridge Case Marked 839TC1 and 839TC 2. The State relies on this evidence that; the R4 firearm rifle found in the BMW driven by Accused 1 on the day of his arrest was linked to the robbery at the business premises.

[83] As W/o Kgoedi testified, DNA samples were obtained from the both accused after their arrest. Initially, six s 212 statements regarding the forensic DNA evidence by:

- W/o Francois Van Rensburg, in respect of exhibits and swabs collected on 21 September 2015 at 02:00am from the BMW which included those relating to the black and yellow gloves, sealed in bag PA4000468942T and the in respect of the black balaclava found on the front seat of the BMW, sealed in bag PA4000468941S as well as swabs in respect of the R4 Rifle
- Ms Annastacia Modeigi Mashishi, an administrative clerk at the Biology Section at the Forensic Science Laboratory, Pretoria, in respect of the sealed evidence bag PW4000131032S received on 25 September 2015 from W/o Kgoedi for Hillbrow case no 789/09/25.
- Ms Johanna Lindiwe Mahlangu, administrative clerk at the Biology Section at the Forensic Science Laboratory, Pretoria in respect of the sealed evidence bag PAB000219437 received on 23 September 2019 from Captain T W Beheydt for Hillbrow case no 789/09/25.
- W/o Ngoveni, a forensic analyst at the Biology Section of the Forensic Laboratory, Pretoria in respect of the sealed evidence bag PW4000131032S for Hillbrow case no 789/09/25. The sealed evidence

bag contained various reference samples belonging to Accused 1 and Accused 2

Capt Sutton a Senior Forensic Analyst at the Biology Section of the Forensic Laboratory, Pretoria in respect of samples taken for the Alberton Case 182/07/2015

[84] These statements were handed into evidence,³³ and there had been no objection against the exhibits, except for the s 212 affidavit by W/o Phineas Able Mothoa regarding the analysis of the swabs taken from the Nokia cell phone. Accused 2 disputed that the DNA found on the Nokia cell phone and indicated he wanted his own expert to analyse the exhibit. In addition, requested calibration certificates for the equipment that was used to analyze all these DNA evidence pertaining to this case and the State was called to prove the whole chain of evidence.

[85] W/o Naidoo a Forensic Analyst and Reporting Officer based at the Forensic Science Laboratory (Laboratory) in Pretoria, testified that a number of exhibits D and E for Hillbrow Case 798/09/15 were handed to the forensic laboratory in Pretoria. The laboratory received outer bag number PAB 000 219437 on the 23rd of September 2015 and outer bag number PW 4000 131032 S on the 25th of September 2015. The DNA in these exhibits was extracted to get the results. She then accepted the samples through the biometric system. A specialised DNA analyst system or machine is used to 'run' the samples [process]. She receives the case file through this system to compile the DNA reports. She does not handle the exhibits but compiles a reports based on the DNA results.

³³ Exhibit AA 1 to 6.

[86] She presented her report³⁴ which shows that reference samples from both Accused 1 and Accused 2, whose gender markers were that of males were subjected to the DNA analysis in respect of the (a) the glove; (b) the balaclava and (c) the Nokia cell phone. The results can either reveal a single donor profile (shown by two numbers) or a mixture of DNA results from more than one contributor. She testified that mix contributor results do not interfere with the ability to isolate the results to identify a suspect. First, the DNA results of the reference sample obtained from Accused 2 matched the mixture DNA results obtained from the balaclava inside the BMW. The most conservative occurrence for the DNA result from the balaclava for all possible contributors to the mixture DNA was 1 in 400 million people. Second, the DNA results of the reference sample obtained from Accused 2 matched the mixture DNA results obtained from the Nokia cellphone swab. The most conservative occurrence for all possible contributors was 1 in 100 million people. Third, the DNA results of the reference sample obtained from Accused 1 matched the mixture DNA results obtained the glove. The most conservative occurrence for all possible contributors was 1 in 170 billion people

[87] W/o Naidoo was cross - examined on the number of loci required to make a positive identification relative to the standard adopted in the USA. She testified that she was not familiar with how many loci the USA utilizes to make the identification. However, while a consideration of 10 loci areas of DNA is in line with internationally accepted standard, the Laboratory examines 16 areas of DNA and has a better DNA kit. It was suggested during cross examination that she was merely a “compiler of a report on results found by other people” Her evidence is that the results are generated from the testing system, so when the

³⁴ Exhibit Z.

sample undergoes DNA analysis, it is incased into the machines, the results generated at the end are the results that she uses to compile the report. The processes are validated. The equipment is calibrated. The individual performing each tasks undergo regular internal and external proficiency tests. There is a quality management system that they have to adhere to. It was also suggested that she could not vouch for the swabs when the seals were broken as she did not do so herself. In the absence of contrary evidence, nothing turned on this cross examination. I have found the evidence cogent and accepted it as prima facie proof of facts required to be established.

[88] The DNA of Accused 2 matched that found on the balaclava that was found in the passenger seat of the BMW. The only reason his DNA could have been on the balaclava was because he was seated in the passenger seat. This belies his evidence that Accused 1 was alone and the evidence that he first met Accused 2 when they were arrested. The version by Seagant Pretorius is supported by this evidence. It is to be preferred.

[89] In so far as the DNA evidence found on the Nokia cellular phone, Accused 2 objected to the s 212 statement by W/o Mothoa which statement shows how the sample and swabs were taken from the Nokia Cell phone were kept and tested on account that the DNA found on the Nokia Cellphone was not his. I found the objection misplaced (a) W/o Naidoo testified about the results' (b) the evidence is admissible against him (c) the only manner to challenge it was to present evidence to the contrary. This he failed to do. I find that irrespective of the admissions dealt with above, the accused can be convicted on this evidence alone.

Legal Principles and analysis

[90] The State seeks a conviction of both accused based on common purpose evidenced by the prior agreement with their accomplices to rob the business premises. On this score, the State carries the burden of proving same beyond a reasonable doubt. The application of the doctrine of common purpose means that acts of an accused will be imputed to the other as a matter of law. In this case, that imputation is based on the admission that there was a prior agreement amongst the assailants and both accused were a part of the group that planned and executed the robbery of the premises. In *S v Safatsa*³⁵ the court held that an act of giving moral support to the perpetrator was sufficient.

[91] The R4 Rifle was found in the BMW driven by Accused 1. As I have found, contrary to his denial, Accused 2 was arrested inside the vehicle, with the R4 Rifle near the gear lever on the passenger side. His DNA, found in the balaclava inside the BMW confirms his presence. The ballistic test results which linked the R4 Rifle to cartridges fired at the scene of the robbery where two people died, point to their involvement and association with the incident. This evidence, is to be considered in conjunction with the evidence of the security officer, Kabo John Letlotlo which remained unchallenged, and must stand, regardless of the admission statement of Accused 1.

[92] The DNA evidence of the Nokia cell phone found at the scene of the robbery points to the involvement of Accused 2 at the scene of the robbery. How else could his phone have been found if he did not participate or if he was not present at the scene of the fatal shooting? To the extent that is said it is circumstantial evidence of the presence of Accused 2 at the scene of the shooting, two points about circumstantial evidence are relevant here.

³⁵1988 (1) SA 868 (A).

[93] First that evidence must be considered based on the principles in *S v Mthethwa*³⁶ where this Court held that:

‘Where the State[s] case against an accused is based upon circumstantial evidence and depends upon the drawing of inferences therefrom, the extent to which his failure to give evidence may strengthen the inferences against him usually depends upon various considerations. These include the cogency or otherwise of the State case, after it is closed, the ease with which the accused could meet it if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt.’

[94] Second, the consequence of an accused election to remain silent and not to testify was considered in *S v Boesak*³⁷ where Court held that:

‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during the trial. If there is evidence calling for an answer, and an accused 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 an accused. Whether such conclusion is justified will depend on the weight of the evidence.’

[95] To find whether there is requisite *mens rea* on the part of the accused, it is sufficient that intention takes the form of *dolus eventualis*.³⁸ In *Sv Du Preez*³⁹ the court emphasised that ‘the subjective foresight of resultant death which constitutes *dolus eventualis* must be established by the State beyond reasonable

³⁶ 1972 (3) SA 766 (A) at 796 para B.

³⁷ 2001 (1) SACR 1 (CC) at para 24.

³⁸ *Snyman* ibid at 229.

³⁹ [1972] 4 ALL SA 542 (A); The judgment refers to *S v Dlodlo*, 1966 (2) S.A. 401 (A.D.) at 405, and *R v Du Plessis*, 1944 AD 314 at p 318 with approval.

doubt; and that although, like any other factual issue, such subjective foresight may be proved by inference, the inference must be the only one reasonably to be drawn from the facts of the particular case. What would have been the purpose of participating in the robbery where dangerous explosives, a pistol and a deadly R4 Rifles is used? The Accused foresaw that the acts they had associated themselves with may result in death and took account of this into the bargain, thus reconciled themselves with the possibility that people may die in this incident and were reckless of those consequences.⁴⁰

[96] The version by Accused 1 falls to be rejected, it was contrived, and in most instances a fabrication tailored to meet the rigors of cross examination. He failed to lead witnesses, in particular, Temba from whom he allegedly purchased the BMW.

[97] Accused 2 conducted himself similarly during the trial within the trial. He then refused to testify in the main trial. Absent evidence from him, the court is entitled to draw an inference from the evidence that is before it as a whole and consider whether the inferences drawn are consistent with all proven facts. I find that they are and the State has discharged the burden placed on it to prove their guilt beyond a reasonable doubt.

[98] It is essential to say something about the inordinate duration of the trial which is in part attributable to the conduct of both accused. From 27 February 2018 to 26 March 2018 which period was envisaged to be adequate for the duration of the trial, the accused pleaded to the charges and the State led its evidence as follows:

⁴⁰ *S v Ngubane* [1985] 2 All SA 340 (A).

- (a) On 27 February 2018, adjourned to 5 March 2018 and postponed to 7 March 2018;
- (b) 7, 8, 9 March 2018 postponed to 12 March 2018
- (c) 12, 13 March 2018 adjourned to 15 March 2018
- (d) 19, 20, 22 March 2018 and adjourned to 26 March 2018

[99] Given that the accused disputed statements made to the Commissioned Officers, a trial within a trial was held into the admissibility of the statements as follows

- (a) On 26 March 2018, 16 April 2018 for the trial within a trial which proceedings were adjourned to 20 August 2018, and thereafter adjourned to 9 October 2018 adjourned to 15 October 2018;
- (b) On 25, 26, October 2018 adjourned to 10 December 2018,
- (c) On 10 December 2018 adjourned to 15 January 2019
- (d) On 16, 17 January 2019 adjourned to 24 January 2019
- (e) On 24 January 2019 adjourned to 25 February 2019 for argument, adjourned to 19 April 2019
- (f) On 19 April 2019 a ruling in the trial within the trial was rendered and the proceedings were adjourned to 6 May 2019. Following the ruling, the accused changed their attorneys, electing to appoint a private attorney of their choice.

[100] Proceedings of the main trial took abeyance to facilitate the transcription of the record for the incoming attorney and to ensure that the attorney has been placed in sufficient funds sourced by Accused 2. The court embarked on a case management process to facilitate the procurement of the record. Notwithstanding, representations made to the court, the counsel of their choice withdrew, necessitating intervention from Legal Aid. Further adjournments ensued as follows:

(a) On 6 May 2019 the case was adjourned to 27 May 2019 to facilitate the change and transcription of the record and thereafter was adjourned to 29 July 2019

(b) On 29 July 2019, the accused changed their counsel, appointed in May, and the case had to be adjourned to 7 October 2019.

[101] The accused then belatedly elected to put the production of the chain evidence relative to the DNA at issue, with the consequential delays arising from the Forensic Laboratory. I must mention that representations were made that they would secure their own expert to disprove the DNA evidence. The case proceeded thus:

(a) On 7 and 8 October 2019, adjourned to 7 December 2019

(b) On 7 December 2019, adjourned for reproduction of chain evidence further adjourned to 15 December 2019.

[102] It bears mention that while awaiting the production of this chain evidence, between 2019 and 2020, the Covid -19 pandemic struck. The newly appointed counsel had no access to the accused due to restrictions put in place by prison regulations. Even though the case was again set down for September 2020, he contended that he was at risk due to his age and could only consult under certain circumstances. Accordingly, the case remained under case management to assist facilitate consultation. On 15 December 2019 the case was adjourned to 14 June 2021 for continuation of the trial.

[103] On 14, 15 June 2021, Mr Wilgemoed withdrew as Counsel and assistance from Legal Aid was sought once more. The transcription of the record was

facilitated with the case adjourned to 22 September 2021. At this time, the accused had appointed private counsel of their choice. The case proceeded and was adjourned to 7 March 2022. On 7 March 2022 Accused 2 sought a postponement on the grounds of ill health. The argument advanced was that he would not be able to follow Accused 1's evidence. The effect of the application would have affected the continuation of the trial in respect of accused 1.

[104] Between 7 and 9 March 2022, the State had to subpoena a State witness from the Department of Correctional Services to provide evidence regarding the health of Accused 2, and the case had to be adjourned to 11 March 2022. Following the evidence of Mr Miya, the trial continued over the 11, 14, 15 March 2022 and Accused 1 led evidence in his defence. When Accused 2 was called upon to testified, he launched an application for recusal. This was brought on 15, 16 March 2022 and the case was adjourned to 9 April 2022 for judgment in the recusal application. The case was then adjourned to 26 May 2022 for the continuation of Accused 2's case. At the hearing on 26 May 2022, the case was adjourned to 1 December 2022. At this hearing, Accused 2, refused to testify in his defence, and the case was adjourned for argument to 9 January 2023. Judgment was reserved to 1 June 2023 but postponed at the instance of the court to 5 June 2023 due to commitments in another court.

[105] Despite numerous postponements to procure the chain of the evidence, Accused 2 failed to call experts to disprove the DNA evidence. The State contends that this was a deliberate attempt by Accused 2 to delay the proceedings. I agree with this submission which must be viewed together with (a) the persistent change in legal representation (b) the adjournments detailed

above, and the penchant to impugn lawyers either appointed on his behalf or he himself had selected.

[106] As to the merits, I find as follows in respect of the charges:

Count 1 — Kidnapping, unlawfully and intentionally depriving Kabo John Letlotlo of his freedom of movement by threatening him with a firearm and holding him against his will;

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 2 — Robbery with aggravating circumstances as defined in s 1(1) of Act 51 of 1977 read with s 51(2) of Act 105 of 1997. It is alleged that the accused unlawfully and intentionally assaulted Kabo John Letlotlo and used force and violence to take from his possession of his Samsung cell phone.

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 3 — House Breaking with intent to rob read with s 260 and s 262(1) of the Criminal Procedure Act 52 of 1977 and further read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. It is alleged that the accused unlawfully and intentionally broke and entered into the business premises at Kiarah Chemicals CC and or Martin James De Oliveria with intent to rob.

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 4 — Robbery with aggravating circumstances related to the unlawful and intentional assault of Mapindo Isaac Dlodlu and/ Kabo John. It is alleged that the accused took possession of laptops and cellphones belonging to or in lawful possession of Kiarah Chemicals CC using force and violence.

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 5 — Murder, in respect of the unlawful and intentional killing of Mapindo Isaac Dlodlu.

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 6 — Attempted murder. In respect of an attempt to kill Lerato Monyane by shooting at her;

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 7 — Assault and murder. In respect of the unlawful and intentional assault of Eric Fanie Moswang who subsequently died in hospital on 4 September 2015 Accused 1 guilty as charged

Accused 2 guilty as charged

Count 8 — Unlawful possession of fully automatic firearms, in respect of 5.56 x 45mm calibre Vector R4 Assault rifle (serial number obliterated and/ or 5.56.39mm calibre automatic or semi- automatic rifle, a make unknown to the state without a license issued in terms of ss17, 19 or 20(1)9b) of the Act

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 9 — Unlawful possession of a 9mm parrabellum Calibre CZ model 75 semi-automatic pistol with an obliterated serial number without a license, permit or authorisation in terms of Act 60 of 2000

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 10 — Possession of ammunition being 5.56mm x 39mm calibre ammunition (live rounds) and 9mm parabellum (live rounds) without a license. (b) permits to possess ammunition; (c) a dealer's licence manufacturer's licence, gunsmith's licence, import, export or in transit permit or transporter's permit issued in terms of this Act; (d) or is otherwise authorized to do so

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 11— Theft of a motor vehicle during the period 29 May 2015 to 21 September 2015 in terms of 51(2) of the Criminal Law Amendment Act 105 of 1997 BMW 320i registration number [...] belonging to Tshepiso Lerato Mosikatsana together with contents therein;

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 12 — In that, on 21 September 2015, near Hillbrow the accused were in unlawful possession of 5.56 x45mm calibre Vector R4 Assault Rifle with an obliterated serial number.

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 13 — Unlawful possession of ammunition being approximately 70 x 5.56 x 39mm calibre cartridges without a license they were charged with

Accused 1 guilty as charged

Accused 2 guilty as charged

Count 14 — Possession of explosives It is alleged that the accused unlawfully and intentionally endangered lives and property. An explosive charge was placed in the drop safe at the business premises which exploded and caused damage.

Accused 1 guilty as charged

Accused 2 guilty as charged.

JUDGE OF THE HIGH
COURT

GAUTENG DIVISION, JOHANNESBURG

Date of Judgment: 5 June 2023

Appearances:

The State: Adv Ranchod

For Accused1 and 2: Mr Vorster,

Ms Greonewald,

Mr Welgemoed,

Adv Makhubela, instructed by S Zulu Attorneys