

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: **CC39/17**

THE STATE

and

ATHENKOSI BANTOM

Accused No 1

SIVUYILE NXELE

Accused No 2

NKOSIYABO MALI

Accused No 3

Neutral citation:

Coram: Swanepoel AJ

Heard: 30 and 31 July 2019, 1, 2, 5, 6, 7, 8, 12 and 13 August 2019

Judgment delivered: 16 August 2019

JUDGMENT

[1] In this matter, the three accused, all from the Uitenhage area, are charged with having committed the crimes of robbery with aggravating circumstances, murder and unlawful possession of a firearm. These charges arise from an attack on an off-duty policeman, one Lulamile Stanley Pase ("*Pase*"), who succumbed to his injuries soon after the attack which occurred during the early hours of the morning on 29 August 2016 at or near Mqolomba Street, Kwanobuhle, Uitenhage.

[2] The indictment originally also included another accused, one Thulani Knockpaal ("*Knockpaal*"), but the said Knockpaal has since died, necessitating an amendment of the indictment at the commencement of the hearing which I granted.

[3] The State, represented by Mr Makasana, alleges that the accused, as well as the said Knockpaal, acted "*in concert and in the execution of a common purpose*" in unlawfully and intentionally robbing the said Pase (hereinafter referred to as "*Pase*") and two females, one Emma Sauls and her sister, Xoliswa Nanto. With respect to the robbery charge, it is alleged by the State that the accused by force robbed Pase, Sauls and Nanto from two cellphones; a wallet; an unknown amount of money and the 9mm pistol of Pase. It is further alleged that aggravating circumstances as described in section 1(1) of the Criminal Procedure Act 51 of 1977 ("*the CPA*") were present, in that the accused wielded dangerous weapons, namely knives, to inflict grievous bodily harm on Pase. With respect to the murder charge, it is alleged that Pase was stabbed by knives. The third charge relates to the alleged possession of the official firearm of the late Pase.

[4] All three accused were legally represented. The first accused was represented by Adv Theron; the second accused by Adv Skepe and the third accused by Dr Erasmus.

[5] With respect to the second accused, it was common cause that at the time when the incident occurred he was a few months short of the age of eighteen. After informing him of his right to be assisted by a parent or a guardian, he intimated that he had no one that could assist him and was satisfied that Adv Skepe, a counsel with substantial experience in criminal law with Xhosa as his first language, would competently represent him. At the time of the trial, accused 2 was already an adult, and was informed in plain language of the allegations against him and of his

constitutional rights. The court was satisfied, in the interests of justice, that the trial could proceed without any prejudice to accused 2 or the administration of justice and accordingly dispensed with the requirement of accused 2 being assisted by a parent, appropriate adult or guardian.

[6] All three the accused pleaded not guilty to all the charges, and all three declined to provide any explanation to the court of their pleas of not guilty. Their legal representatives indicated that their versions would be put to the state witnesses.

[7] The court was informed by Mr Makasana that all three accused were prepared to make formal admissions in terms of section 220 of the CPA. By agreement, I was accordingly provided with three similarly worded written documents containing formal admissions, respectively exhibits "C", "D" and "E" prepared on behalf of the accused. In terms of their admissions, the accused agreed to the introduction of the post-mortem report and its content, marked as exhibit "A" and to the introduction of a photograph album, the contents and the key thereto, which had been prepared by a police official, which was identified as exhibit "B".

[8] In their formal admissions, the three accused all admitted that Pase was a 36 year old male person who had died on 29 August 2016 at the "*crime scene*". During the hearing, evidence was adduced that Pase had made an attempt to drive his vehicle after having been critically injured in the attack to which I shall revert hereafter, and I accordingly sought confirmation from counsel that the concept "*crime scene*" referred to the description of the area known as "*Fan Park*" where the attack had occurred. It was confirmed that Pase was only able to travel a very short distance with his Corsa motor vehicle, before colliding with a tree planted by the municipality at Fan Park where he then passed away shortly after medical personnel arrived.

[9] All three accused further made formal admissions regarding the cause of death of Pase. The post-mortem was performed by Dr Jan Anthonie de Beer, who was called to testify at the hearing. It was undisputed that the fatal wound which caused the death of Pase, was *“a stab wound to the chest, abdomen and spleen, associated with substantial blood loss”*. Dr De Beer testified that the amount of blood found in the peritoneal cavity and also in the left chest cavity comprised approximately 2.5 litres of blood. The post-mortem report recorded that Pase had sustained the following wounds:

- “1. 1 cm wound left side of the neck; penetrating into the neck muscles only
2. 2 cm wound left shoulder; not penetrating
3. 5 cm wound left chest posterior; wound is in posterior axillary line and 16 cm below the armpit; omentum protruding through wound. Tract of wound goes from left to right and towards the front; it enters the left chest cavity between the 9th and 10th ribs left postero-lateral; it misses the left lung; it then goes through the diaphragm into the abdominal cavity and ends in the spleen
4. 3 cm wound left buttock
5. 0,5 cm burst laceration on chin
6. 1 cm wound on back of the head; wound is in a gland in the scalp; looks like a burst laceration; not penetrating the skull
7. 2 cm burst laceration top of head on right; not penetrating through the skull
8. Superficial wound on left thumb
9. Scratch marks on fore-arm”.

[10] Dr De Beer further referred to various contusions that had been found on the scalp of Pase. There was bleeding present in muscles on the left side of the neck.

One of the stab wounds had caused blood in the left chest cavity, but the lung had not been penetrated.

[11] The photographs in the photograph bundle,¹ which was handed in by agreement, showed that the area known as “*Fan Park*” is a relatively flat area situated in Mqolomba Street, Kwanobuhle. It was known as a Fan Park, because, according to the evidence, a large television screen had been erected at the “*Fan Park*” during the soccer World Cup 2010 held in South Africa. The area was thereafter known by this description.

[12] It became clear during the evidential process that Pase lost his life during an opportunistic, vicious attack carried out during the early hours of 29 August 2016. The attack was not pre-planned, but was decided upon shortly before the attack started. The synchronised manner in which the perpetrators carried out their attack, causing Pase to lose his life, unfolded in court, and largely became common cause.

[13] Two different introductory storylines developed, until a fateful overlap of the two sets of roleplayers. The three accused, together with the said Knockpaal, who was slightly older than the other three accused, were accompanied by one Siyatanda Daniëls (“*Daniëls*”) on the evening preceding the attack. Daniëls was called by the State as a section 204 witness. The three accused, Knockpaal and Daniels met at a tavern during the early evening. According to Daniëls, they were all armed with knives because they were going to go to Kwanobuhle, an area which was described by him as “*rough*”. According to him they all had knives on that occasion and showed each other their knives. After drinking alcohol at the tavern, with some of them smoking “*dagga*” or inhaling “*tik*”, they allegedly decided to go home. Such route to

¹ Exhibit “B”.

be followed by the three accused, Daniëls and Knockpaal would take them past the area known as "*Fan Park*".

[14] In the meanwhile, one Emma Sauls ("*Sauls*") previously had an affair with Pase. On the evening in question, Sauls and her sister, one Xoliswa Nanto ("*Nanto*") also went to a tavern. At this tavern, telephonic contact was established with Pase who wanted to meet up with them. It appears that Sauls was interested in re-establishing a relationship with Pase.

[15] After initially partaking of some alcohol at the first tavern, they proceeded to another tavern, where they purchased additional alcohol. It was agreed at the second tavern between Pase, Sauls and Nanto that they would rather proceed to "*Fan Park*" where they intended to listen to music and enjoy their drinks there. When they arrived at "*Fan Park*", Pase and Sauls got out of Pase's vehicle and moved some distance away from Pase's vehicle whilst Nanto, the sister of Sauls, proceeded to play music on her cellphone from the vehicle. The alcohol was either in the vehicle, or on top of the vehicle. Every now and then Pase and Sauls would be "*topped up*" at the vehicle by Nanto, according to Nanto.

[16] And this is where the two storylines met, with tragic consequences for Pase and his two female companions. When the accused, Knockpaal and Daniëls saw Pase's vehicle parked at "*Fan Park*", with Nanto inside the vehicle listening to music on her lit cellphone, and with Pase and Sauls relaxing some distance away from the vehicle, consuming alcohol, they all simultaneously decided to carry out a robbery. Knockpaal and Daniëls, the section 204 witnesses, promptly proceeded to rob Nanto in the vehicle, taking not only cellphones from the vehicle, but Knockpaal also took Pase's official 9mm Beretta firearm from under the front seat of the motor vehicle.

The three accused, led by accused 1, then moved towards Pase and Sauls, where a melee ensued with fatal consequences for Pase.

[17] Although it became apparent from the evidence that even though the particular robbery had not been pre-planned, those taking part in the robbery all reconciled themselves with such an objective to carry out such robbery in circumstances where they were armed with knives,² which could foreseeably cause death or serious bodily injuries. They all played active but different parts.

[18] The first two witnesses called by the State, Sauls and Nanto, were unable to identify any of their assailants. The version of Sauls, who was called first, was to the effect that the attack was sudden and unexpected. Accused 3 was a main protagonist after accused 1 had initiated the attack on Pase. A fight ensued with Pase, in order to overpower him. The assailants attacked strategically. Knockpaal and Daniëls proceeded to the vehicle in which Nanto was sitting in order to rob her, whilst the other three accused proceeded to attack Pase and Sauls. The element of surprise was on their side, over and above the obvious fact that Pase, Sauls and Nanto hardly stood any real chance of meaningful resistance against five assailants, acting together.

[19] Nanto maintained that she was shocked when there was initially a knock on the driver's side of the car. When she tried to flee by getting out on the passenger side, she found that she was confronted on that side by Daniëls. According to Nanto, she then lost consciousness having been hit over the head by someone with a blunt object. She could not say who had hit her. She testified that her bra had been disturbed where her own cellphone was hidden. Her cellphone was missing after the attack. Another cellphone of her sister which had been lying on the dashboard of the

² Although the first and second accused denied that they themselves carried knives.

vehicle had also been taken. She maintained that she was unable to identify any of her attackers, because the one attacker had allegedly, according to her, partly obscured his face.

[20] The witness Daniëls denied that he had hit Nanto, but confirmed that Knockpaal had removed a firearm from under the seat. It cannot be ruled out that it might have been Knockpaal who had hit Nanto over the head, causing her to temporarily lose consciousness.

[21] Some distance away from the car, the other melee was starting to turn vicious. Sauls, a frightened, helpless onlooker ran back to the car, screaming at the same time, whilst Daniëls and Knockpaal rushed to the aid of those that were carrying out the attack on Pase.

[22] The evidence established that accused 3 attempted to incapacitate Pase after Pase had already been kicked to the ground by accused 1. At some stage, according to Daniëls, Pase and accused 3 were grappling with a knife, which was pointing upwards towards the abdomen of the assailant accused 3, who was at that stage on top of Pase. Accused 3 called for help, because Pase was fighting back. The first accused and accused 2 started kicking Pase to assist accused 3 to overpower Pase.

[23] Accused 3's counsel put it to Daniëls that Pase allegedly also had a knife, but this was clearly made up. It is apparent that accused 3, in his attempt to stab Pase, wrestled with Pase who was frantically fighting for his life until he was overpowered, not only as a result of him being kicked or hit by accused 1 and 2, but also as a result of Knockpaal joining the fight. Knockpaal hit Pase violently over his head with Pase's own firearm which Knockpaal had stolen from the stationary Corsa.

[24] The severity and viciousness of the blows which the deceased had to sustain are borne out by the post-mortem report and the description of the wounds described and explained by Dr De Beer. The scalp injuries sustained are consistent with the blows to the head as described by Daniëls, and confirmed by the accused and commented on by Dr De Beer. Photographs of the stab wounds and injuries which the deceased sustained also bear out the nightmarish violence which he had to endure.

[25] The prosecution was confronted by a lack of identification of the assailants by the witnesses Sauls and Nanto. This was exacerbated by an absence of any plea explanations which placed any of the three accused at the scene. This evidential hurdle was surmounted when the State called Daniëls as a section 204 witness. Daniëls was duly warned in terms of section 204 of the Criminal Procedure Act. The court also allowed a legal representative, Mr Saziwa of Legal Aid, to assist the section 204 witness. Once Mr Daniëls started testifying, identifying the three accused as well as Knockpaal as having been participants in the attack, the accused were faced with a dilemma. They now had to extricate themselves from the incriminating evidence of Daniëls. During their own testimonies, they all placed themselves at the scene, but each one of the three accused attempted to diminish their own individual roles in the attack. Their attempts were unconvincing.

[26] Accused 1, through his counsel, admitted that he had "*bumped or pushed*" Pase, causing Pase to fall over, before accused 3 started to attack Pase. He persisted however, in contending that he did not initially kick Pase, as if this form of violence somehow lessened the seriousness of his unlawful conduct in the context of a group attack.

[27] On behalf of accused 2, his legal adviser, Adv Skepe, put it to Daniëls that accused 2 did kick Pase, but attempted to portray such violence less harshly, by suggesting that this occurred after accused 3 had called for assistance, because Pase was in the process of overpowering accused 3.

[28] On behalf of accused 1, it was even suggested to Daniëls that Pase had started to “*assault*” accused 1 and accused 3! Accused 1 admitted that Pase was fighting for his life in the face of a collective attack. He not only joined in, but actively assisted the third assailant, accused 3, who was in the process of fighting for control of a knife which was seen to be “*between*” accused 3 and Pase. He helped accused 3 to overpower Pase. Accused 1 maintained that he only saw that a firearm came into play when he saw Knockpaal starting to hit Pase with the firearm.

[29] The version of accused 2 was put to Daniëls by Adv Skepe. Accused 2 confirmed that he participated in the attack on Pase, in order to assist accused 3. He further asserted unequivocally through his counsel that he did not deny that he had kicked “*the old man, Tata*”. He also confirmed that Knockpaal repeatedly hit Pase violently with the firearm. According to accused 2, during the process of Knockpaal hitting Pase with the firearm over the head, one of these blows injured accused 2’s own leg, impairing his mobility to run away, because he was limping as a result of the injury that he sustained. This invariably placed him right next to Knockpaal, or also on top of Pase, if Knockpaal was violently hitting Pase over the head at the time. Accused 2 also denied that he had seen the stolen wallet of Pase.

[30] With respect to the attack itself, it was put to Daniëls on behalf of accused 3 that Pase had his own knife. Accused 3 confirmed the description of the attack generally, but maintained that he had sustained a stab wound on his left hand. He

confirmed that Pase had fought back, which necessitated him calling for help from Knockpaal and Daniëls in order to overpower Pase.

[31] It was further put to Daniëls by Dr Erasmus that whilst accused 3 admits that he did have a knife with him, that knife was still in his pocket and that he did not use his own knife on the evening in question. Dr Erasmus further put it to Daniëls that his client, the said accused 3, confirmed that during the scuffle he had taken control of the knife allegedly of Pase, implicitly conceding that he had used a knife to subdue Pase.

[32] It was rather evident that Daniëls's evidence had to be treated with a degree of caution when his foot chains had to be removed, at the instance of Mr Sasiwa of Legal Aid, whom the court allowed to assist Daniëls. Daniëls disclosed that he was incarcerated for house breaking. However, the version that he disclosed to the court was substantially corroborated when the versions of the three accused were put to him by their respective counsel.

[33] According to Daniëls, on the night in question, he was in the company of the three accused and Knockpaal, since deceased. They were all armed with knives, an aspect to which I shall return below. In the early hours of the morning, having smoked "*tik*" and dagga, they had to proceed past "*Fan Park*". They noticed the parked vehicle of the late Pase, with one passenger inside, who turned out to be Nanto. They also noticed the late Pase and a female, who turned out to be Sauls, some distance from the vehicle. They spontaneously decided to carry out a robbery.

[34] He and Knockpaal decided to see what they could find in the vehicle and if needs be, to rob the passenger inside the vehicle, whilst the other three proceeded to Pase and Sauls. He testified that Knockpaal opened the driver's door whilst he

proceeded to the passenger door, causing considerable shock to Nanto when she found that she was cornered. He testified that he then took two cellphones from the dashboard. He saw Knockpaal finding a firearm under the driver's seat, which subsequently turned out to be Pase's Pietro Beretta 9mm service pistol with serial number H952247, as identified in the indictment. He also testified that Knockpaal took an additional cellphone from Nanto, but was unable to say whether he had taken it off her person or not. At this stage, he noticed that accused 3 and accused 1 were engaged in a scuffle with Pase. According to him, he saw that accused 3 and Pase were struggling with each other about possession of a knife. His description was that of a large knife. At some stage, he noticed that the blade of the knife was pointing towards the abdomen of deceased 3. It became apparent to him that Pase was fighting back. Accused 3 required assistance. Accused 1 and 2 kicked Pase, to help accused 3. As he had approached the struggle, the female (Sauls) proceeded past him screaming loudly. Knockpaal then repeatedly hit Pase over the head with the firearm, causing him to lose power. According to Daniëls, he saw accused 3 stabbing Pase once. Accused 1 then searched Pase and removed his wallet and took his phone.

[35] From there, the group ran away to a river where they took out the spoils of the robbery and showed it to each other. According to him, accused 1 took out the phone which he had taken as well as the wallet; Knockpaal took out the handgun and a cellphone and he himself took out the two cellphones that he had taken from the car. The money was taken out of the wallet and was used, according to Daniëls, to purchase "*tik*", which they inhaled after purchasing same from a certain outlet that sold drugs. Tik was inhaled until dawn. In the morning, they went home, but the next

day gathered next to a certain church where some of the cellphones were sold to the owner of a “*jikeleza*”, a kind of informal taxi vehicle.

[36] The proceeds from the cellphones were again used by all to buy drugs to smoke. The stolen firearm remained in the possession of Knockpaal. At a certain occasion, near Mabandla, he, Knockpaal and accused 2 were confronted by an individual with the nickname of “*Fashion*”, who approached Knockpaal and enquired about his possession of the handgun. A rumour had ostensibly spread that Knockpaal had such a police firearm in his possession. A confrontation ensued between “*Fashion*”, a friend of the so-called “*Fashion*” and Knockpaal and the handgun was forcibly removed from the possession of Knockpaal by “*Fashion*”. Daniëls also testified that at the time when the late Pase was attacked, they did not know that he was a policeman. By reason of a substantial gathering at Fan Park the next day, they knew that it was a policeman and ascertained that he had died in the robbery.

[37] All the accused were accordingly compromised and were placed at the scene where the robbery had been committed and where Pase died, by Daniëls, the section 204 witness. During his cross-examination by Adv Theron, he repeated that accused 3 had stabbed Pase whilst accused 1 and 2 had kicked Pase in order to help him overcome Pase who was fighting back for his life. The version of accused 1 which was put to Daniëls by Adv Theron substantially confirmed the version conveyed to court by Daniëls. On behalf of accused 1 it was put to Daniëls that accused 1 had not kicked Pase, but had allegedly “*bumped*” or “*pushed him over*”. During his testimony, accused 1 demonstrated to the court what he meant by this. He crossed his arms across his chest and then demonstrated that he forcibly pushed Pase over in order to assist accused 3. Whilst the version of accused 1 was being

put to Daniëls, it was conceded that accused 1, 2 and 3 were all engaged in the attack on Pase. It was even suggested during the cross-examination of Daniëls on behalf of accused 1 that the late Pase had started to “*assault*” accused 1 and 3, an ironic misdescription of Pase’s futile attempt of defending himself.

[38] According to accused 1’s version, accused 1 and 3 had been “*lifted up*” by Pase and thrown on the ground, but this version might well have been contrived *ex post facto*. In any event, their active participation in the unlawful attack and robbery was effectively conceded in the process. Whilst it was admitted on behalf of accused 1 that accused 3 and Pase were struggling with possession of “*something*”, accused 1 dishonestly contended that it was too dark for him to see what the object was. It was evidently a knife.

[39] It was furthermore confirmed on behalf of accused 1 that accused 3 had sought help when Pase fought back and called out to the other accused to come and help him. Daniëls was adamant that accused 1 and 2 both kicked Pase, thereby contributing to Pase being overpowered. He re-affirmed during cross-examination, that Knockpaal had hit Pase violently over the head with the pistol that he had taken from the vehicle. In the process of hitting Pase, Knockpaal accidentally hit accused 2 on one of his legs, causing bleeding and subsequent limping. If anything, this merely demonstrated the violence of the attack.

[40] During the cross-examination of Daniëls he was asked by Adv Theron whether they had knives in their possession. Daniëls stated that they *all* had knives in their possession on the night in question. According to accused 1, he saw accused 3 with the knife in his hand. Daniëls himself denied that he had his own knife in his hand at any stage during the attack. It was put to Daniëls that accused 1 would deny that he had a knife in his possession on the evening in question. In response hereto,

Daniëls denied the assertion. He repeated that they all had knives on the evening in question, because they were going to go to Kayelitsha where it was “*rough*”. At the tavern, they had showed each other the knives which they had in their possession, purportedly for self-protection purposes should they be confronted at Kayelitsha. He demonstrated that these knives varied in length from 6 inches to 12 inches, or up to the length of a ruler. These knives were modified household knives with homemade hand protectors protecting their hands from sliding down on the blades of the knives. This description of the modified nature of the knives in their possession and of the purpose of having modified the knives in this way, was not challenged. What was put to Daniëls was a denial on the part of accused 1 that he had a knife in his possession on the night in question.

[41] During cross-examination Adv Theron sought to introduce a statement that had been taken from Daniëls by one warrant-officer Saaiman. The relevant part relaying the events comprised of a rather cryptic seven paragraphs. This statement was interpreted by an interpreter to warrant-officer Saaiman, from Xhosa to Afrikaans, but was then written down by Saaiman in English. Cross-examination of Daniëls ensued about the language used and the wording thereof. Daniëls disputed the contention that he had not provided all the relevant detail to warrant-officer Saaiman. He insisted that he did convey the description of the events in Xhosa to the interpreter, and asserted that it was not “*his problem*” if it was not correctly interpreted or recorded. Consequently, by reason of this obvious difficulty confronting the accused 1’s counsel, it was recorded that warrant-officer Saaiman would be called as a witness to prove the statement. At the time when Daniëls had made the statement, he did not have the assistance of a legal representative or of a parent or guardian.

[42] However, neither Daniëls, nor Mr Makasana or Mr Sasiwa contended that the statement was not made freely and voluntarily, without undue influence. Adv Theron informed the court that she would prove the statement by calling the interpreter and if possible, warrant-officer Saaiman. One of the identified problems related to the interpretation from Xhosa to Afrikaans, but recorded in English.

[43] The State also called Magistrate John Montgomery, a magistrate employed in the Department of Justice since 1995 to prove a confession made to him by accused 3. Dr Erasmus, who represented accused 3, had no objection to the introduction of this confession. This was unsurprising, given the forthright manner in which Magistrate Montgomery testified regarding the circumstances under which the statement of accused 3 was recorded. An official court interpreter had assisted the magistrate and interpreted the version of accused 3, which was minuted at the time when he had reached the age of nineteen. Mr Montgomery reiterated that accused 3 was calm; made the statement freely and voluntarily, was not under any duress, and was not unduly influenced to depose to the statement. The statement was recorded in Afrikaans, was interpreted in court without any objection and introduced as exhibit "F".

[44] In exhibit "F", accused 3 confirmed the attack which was perpetrated upon Pase, Sauls and Nanto. In particular, he confirmed the robbery of the cellphones and of Pase's firearm which Knockpaal had removed from the vehicle and which was then used to hit Pase over the head. He stated that Pase had fought back and at one stage started to gain the upper hand. He referred to the handgun which was in Knockpaal's hand as a "*shiny thing*" and asserted that he only realised that it was a gun when Pase was hit over his head with the handgun by Knockpaal in his

presence. All the other accused saw the handgun and they subsequently found out that the person which they had assaulted had died.

[45] Dr Erasmus put it to Magistrate Montgomery that accused 3's confession was correctly recorded, save that accused 3 had in fact been stabbed by the person fighting with him. In other words, his instructions were that Pase had stabbed accused 3. However, Dr Erasmus emphasised that accused 3 admits that he did not convey this to Magistrate Montgomery at the time of making his confession.

[46] During the cross-examination of the section 204 witness by Adv Skepe, representing accused 2, there was again substantial corroboration of the description of the robbery as described by Daniëls. Adv Skepe was able to elicit from Daniëls that the robbery had not been pre-planned, but had occurred on the spur of the moment when they noticed the opportunity to rob Pase and the two females. Daniëls reiterated their intention to rob the car, Pase and the females. With respect to the possession of knives, Daniëls persisted that they were all in possession of knives. In response to a pertinent question from Adv Skepe³ to Daniëls that they must then have foreseen the possibility that such knives could be used, Daniëls admitted that this possibility was foreseen.

[47] It was further put to Mr Daniëls on behalf of accused 2 that accused 2 saw no other knife in anyone's hand, save for the knife which accused 3 had in his possession on the night in question. Adv Skepe informed Daniëls that accused 2 was not going to deny that he had kicked Pase in assisting accused 3 to overpower him. This was in response to accused 3 allegedly calling for help, but Daniëls stated that he did not hear such a call. Adv Skepe further put it to Daniëls that accused 2 would confirm that he saw a knife "*between*" the subsequently deceased Pase and

³ Probably welcomed by the prosecutor...

accused 3 at some stage during their struggle. Consequently, it became apparent that accused 2 *knew* that accused 3 was using a knife in the scuffle with Pase.

[48] In response to questions posed by the court, Daniëls stated that Pase did not have a knife. Daniëls's version that Knockpaal had hit Pase over the head with the police handgun that had been removed from the vehicle was confirmed and not seriously challenged by any of the accused.

[49] Daniëls conceded during cross-examination that he had reconciled himself with the intent to rob and overpower Pase. He maintained that he and all of the accused, as well as Knockpaal, had reconciled themselves with the intention to rob and overpower Pase. There was a disavowal conveyed to Daniëls on behalf of accused 2 that he did not share in the proceeds of the sale of the cellphones, but this was disputed by Daniëls.

[50] During the cross-examination of Daniëls by Dr Erasmus, the most important aspect which became apparent during such cross-examination, was the version which Dr Erasmus put to Daniëls to the effect that Pase purportedly had a knife of his own. This was in line with what he had earlier put to Magistrate Montgomery, that accused 3 was purportedly stabbed by a knife of Mr Pase himself, which was not mentioned in his confession. This version was obviously untruthful. Significantly, the version of accused 3 which was put to Daniëls, was not to the effect that accused 3 was *not* on the scene. To the contrary, accused 3 tried to portray himself as a victim in his fight with the late Pase, instead of being a knife-wielding perpetrator.

[51] On behalf of accused 3, accused 1 was incriminated as having been initially responsible for kicking Pase off balance, causing him to fall down, whereafter the fatal struggle ensued. That both accused 1 and accused 2 had violently kicked Pase,

was also confirmed during the version put by Dr Erasmus on behalf of accused 3, to Daniëls.

[52] During the cross-examination of Daniëls by counsel for accused 1, he testified that all the accused, including himself, had knives in their possession. He was criticised for not having asserted in his section 204 statement that he actually saw accused 3 stabbing Pase, as he had testified in court. However, there was corroboration for his *viva voce* evidence in this regard. When the version of accused 1 was put to Daniëls, Adv Theron asserted that accused 1 would testify that he also saw accused 3 "*with a knife in hand*". In response to the lastmentioned assertion, Daniëls merely confirmed that he and the accused all had knives in their possession. In putting the version of accused 1 to Daniëls, Adv Theron further confirmed that accused 1 and 2 had kicked the male person whilst accused 3 was on top and at that stage, accused 3 allegedly needed help, because he and Pase were scuffling with a knife which was protruding upward towards the abdomen of accused 3.

[53] During the cross-examination of Daniëls by Adv Skepe for accused 2, it was put to Daniëls that accused 2 would deny that he was present when the stolen cellphones were sold and that he (accused 2) also dissociated himself from the firearm, having allegedly last seen the firearm when Pase was hit with the firearm during the scuffle with Knockpaal. Daniëls denied this, contending that accused 2 was with him and Knockpaal when the firearm was forcibly taken from Knockpaal by one "*Fashion*", suggesting that accused 2 was at all relevant times aware of the fact that the stolen police firearm was in the possession of Knockpaal.

[54] As already mentioned, during the cross-examination of Daniëls, Dr Erasmus put it to Daniëls that accused 3 would contend that during the scuffle between Pase and accused 3, Pase purportedly produced a knife of his own. Daniëls insisted that

he saw a knife with a blade pointing upwards in the scuffle between Pase and accused 3. It was then put to Daniëls that accused 3 never used his own knife, which was in his pocket. The knife which was used was suggested to have been the knife of Pase. None of this was mentioned in the confession made by accused 3 to Magistrate Montgomery. After taking instructions from accused 3, Dr Erasmus further pertinently put it to Daniëls that by reason of the assistance of accused 1 and 2, accused 3 was able to wrest the knife from Pase. During accused 3's oral testimony, he testified that he allegedly "*won*" possession of the knife and persisted in the version⁴ that Pase had produced his own knife, which was never mentioned to Magistrate Montgomery in accused 3's confession.

[55] Daniëls was cross-examined at length by three different counsel. I disallowed a statement which was minuted from Daniëls by a police official on 24 March 2017, shortly after he had been arrested, as it was evident that Daniëls was unassisted, intimidated and not informed of his constitutional rights to legal assistance or to have a parent or guardian present, even though he was a juvenile confronted with a policeman seeking to minute an incriminating statement.

[56] On the assurance from Adv Theron on behalf of accused 2 that she would call the interpreter and, if possible, warrant-officer Saaiman, I did allow cross-examination on a section 204 statement which was minuted from Daniëls on 24 October 2017 by the said warrant-officer E F Saaiman. The section 204 statement was then introduced, by agreement, as exhibit "H". The eighteen year old Daniëls was interviewed by the Afrikaans speaking Saaiman, who used a Xhosa speaking interpreter Makasi, who allegedly "*translated the above notes, questions asked of the deponent by the W O Saaiman from the Afrikaans language to the Xhosa language*

⁴ Which I find to have been fabricated.

and vice versa". This statement merely consists of seven paragraphs. Daniëls was criticised for not having provided more detail in "H". He was criticised in particular for the fact that he had omitted to expressly state that he saw accused 3 as having stabbed Pase. But accused 3's use of a knife was corroborated, as previously mentioned. Accused 3 himself alluded to a knife, but alleged that this was a knife of Pase and not his own knife. He claimed to have "*won*" possession of the knife, which he threw away later as they approached a river after leaving the scene as a group. Daniëls steadfastly stated that he did disclose the full version to Saaiman and that it was not his problem that Saaiman did not record all the detail.

[57] With respect to proof of previous inconsistent statements, the principles that must be kept in mind include:

- 1) it must be determined what the witness actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard, language and cultural differences must be kept in mind (*vide*: **S v Mafaladiso and Others 2003 (1) SACR 583 (SCA)** at 593 to 594, per Olivier JA);
- 2) secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation, affects the credibility of a witness;
- 3) thirdly, contradictory versions must be considered and evaluated on a holistic basis. This include the need to consider the circumstances under which the versions were made; the proven reasons for the contradictions; the actual effect of the contradictions with regard to the reliability and credibility of the witness; the question whether the witness was given a sufficient opportunity to explain the contradictions

the quality of the explanations, and the connection between the contradictions; and the rest of the witnesses' evidence;

4) fourthly, it is the duty of the court to weigh up the previous statement, allegedly inconsistent, against the *viva voce* evidence of the witness concerned; to consider *all* the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (**Mafaladiso** at 593(e) to 594(h); see also: **Schwikkard and Van der Merwe: Principles of Evidence, Third Edition**, Juta, at page 461).

[58] The evidence of Saaiman was confusing. He was informed by Daniëls, who had just turned 18 years old, that he already had a "*legal aid lawyer*". He failed to enquire who the lawyer was; when the previous statement to such identified "*lawyer*" was made; where it was made and did not record any of such particulars elsewhere in the pre-printed form.

[59] Warrant-officer Saaiman also asserted that he was fully bilingual. When he was asked why the interpreter, who knew him well, did not interpret what Daniëls had told them, directly in English but rather in Afrikaans, he said that she knew him to be Afrikaans. On being asked whether the English language used was then his own interpretation from what the interpreter had interpreted into Afrikaans, he proffered an explanation that he in any event understood 60% of Xhosa, after initially saying he understood a little bit, enough to help himself. An important page, the penultimate page of "H", reflects no signature or initials of Daniëls, although the last page (an English pre-printed page explaining the import of section 204) does. The seven paragraphs are cryptic and overly concise, yet Saaiman maintained that the time recorded on the page unsigned by Daniëls, reflecting that he had purportedly spent nearly two hours to record same, was correct.

[60] Substantial corroboration for the description of the events by Daniëls was in any event provided by the accused themselves during their testimony, by the section 220 admissions and by the photographic and medical evidence, as well as the evidence of the police official Van der Mescht, over and above the description of the robbery and attack on Pase provided by Sauls and Nanto. Overall, the evidence of Daniëls was acceptable and his responses to questions to the point, without undue elaboration, and consistent, despite having been cross-examined at length by three counsel. In his section 220 affidavit, he substantially confirmed the description of the attack which he gave to court, with Pase lying prostrate on the ground after having been overcome by his attackers.

[61] After Daniëls was called, the State led the evidence of Lt.Col Colin Deysel, who recorded a confession of accused 1 on the 27th of March 2017 at the commercial branch Port Elizabeth, which branch was not in any way involved in the investigation of the matter. Lt.Col Deysel had thirty years of experience in the South African Police Service. He emphasised that accused 1 was fully informed of all his constitutional rights before the statement was taken. There was no objection to the introduction of the confession of accused 1 into the evidence by his counsel or any of the other counsel.

[62] In this confession of accused 1, the description of the events as described by Daniëls was substantially confirmed. Accused 1 admitted that he had kicked Pase (the deceased) and thereby actively associated himself with the attack on Pase, in the words "*[W]hen we arrived at that people I kicked the African male and he fell down and then he tried to push me aside. Then it became a fight now. Msawawa (the nickname for accused 3) and I we fought with this man but could not manage*

him. He was beating us. Then Thulani⁵ and Siya⁶ came running towards us. When Thulani arrived, Thulani hit that man with a firearm on his head. He fell. He tried to get up. Then Bongo (the nickname for accused 2) tried to kick this man but while he was doing so that by mistake Thulani (i.e. Knockpaal) hit Bongo with a firearm on his leg. That is when I really noticed that this was a real firearm". He proceeded to state that they ran away from the scene towards a river. They looked down at the scene from some distance and noticed the vehicle driving away slowly, but then coming to a halt. He added as follows: "[A]nd I also want to add that while we were fighting with that man I took his cellphone and it also appears that Siya (a reference to Daniëls) while he was busy in the car he took two cellphones. I gave the cellphone that I took from that man to Siya".

[63] On behalf of accused 1 it was suggested to Lt.Col Deysel by his counsel that the word "kicked" was not correct as recorded by him and that the word should have been "bumped" or "pushed". Lt.Col Deysel insisted that he had correctly written down what was conveyed to him through the interpreter. During the oral testimony of accused 3, accused 3 unequivocally asserted that accused 1 had jumped in the air before violently *kicking* Pase to such an extent that Pase fell over. I find, as a matter of fact, that accused 1's attempt to minimise (in the view of accused 1) his involvement by asserting that he had "*pushed*" Pase over with two arms across his chest, instead of kicking him, was false. It was further confirmed by counsel for accused 1 during the version which his counsel put to Lt.Col Deysel, that accused 1 did indeed become involved in assisting accused 3 in his struggle with Pase, so that accused 3 could overpower him.

⁵ Knockpaal.

⁶ Daniëls.

[64] The prosecutor, Mr Makasane, then sought to introduce a confession of accused 2 by calling Lt.Col Norman Bower. Although there was initially no objection to the introduction of the incriminating statement by Adv Skepe, counsel for accused 2, Adv Skepe changed his position in the light of concerns raised by the court with relation to the following answers given in the pre-printed form completed by Lt.Col Bower, a captain at the time. In paragraph 7, the following question was posed: “[D]o you want to consult with a legal practitioner of your choice or apply for legal assistance to assist and advise you before you make a statement?”. The recorded answer reads: “Yes, I want to apply for legal aid”. Upon being questioned by the court, Lt.Col Bower admitted that he “*wanted to stop at that time*”, but nonetheless proceeded. He seemingly thought he had some form of a discretion to proceed minuting the statement on the basis that the accused would in due course get legal representation at the trial. He evidently did not appreciate that accused 2, a juvenile accused, wanted legal representation there and then before making his statement.

[65] Not only did the juvenile accused 2 not have a parent or guardian present, he had *expressly* sought legal representation. He might well have been advised to decline to make any incriminating statement whatsoever, if he did have the assistance of a legal adviser. The right to legal representation and to remain silent are fundamental rights, aimed at ensuring substantive and procedural fairness, and the import of section 35(5) of the Constitution of the Republic of South Africa Act 108 of 1996 (“*the Constitution*”) is clear.

[66] The fact that accused 2 allegedly stated in answer to the following pre-printed question⁷ that he did not want a legal practitioner, was irreconcilable with his previous answer to paragraph 7. Furthermore, in paragraph 9 it was recorded as

⁷ In paragraph 8.

follows by Captain Bower, in answer to the question why accused 2 was prepared to make a statement, as follows: “[T]he detectives told me that I can get 25 years imprisonment if I do not tell the truth. I therefore just want to tell the truth”. He further intimated that he had made a previous statement to the police with regards to the incident and that he was making the statement because he was “*expecting to be released from police custody*”.

[67] Having regard to the requirements of section 35 of the Constitution and decisions such as **S v M 1993 (2) SACR 487 (AD)** at 490; **S v Kondile en Andere 1995 (1) SACR 394 (SE)** and **S v Soci 1998 (2) SACR 275 (ECD)**, I ruled that the introduction of this confession was inadmissible. Such evidence, especially an incriminating confession of an unrepresented youthful accused in particular, would fall foul of the requirements of section 35(3)(f) and (g), and also undermine the right to remain silent contained in section 35(3)(h), especially taking into consideration the apparent promise of a release which was made, linked to a simultaneous threat of 25 years incarceration. It was accordingly my view that the introduction of such evidence would not only have been unjust to accused 2, but would render the trial unfair or would otherwise be detrimental to the administration of justice, as contemplated by section 35(5) of the Constitution.

[68] As a consequence, the confession which the State sought to introduce in respect of accused 2 was held to be inadmissible, which Mr Makasana accepted. Any possible perception that a purported waiver on the part of accused 2 or form of acquiescence could somehow render inadmissible evidence admissible, was misconceived. The prosecution is prohibited from introducing evidence of an inadmissible confession. In **S v Nkata 1990 (4) SA 250 (A)**, the court held that even the preamble to an inadmissible confession could *not* be used in cross-examination

of the accused and to do so would constitute an irregularity. See further **Schwikkard and Van der Merwe: Principles of Evidence, Third Edition**, Juta, page 349.

[69] Accused 1 was then called as a witness by his counsel, persisting in his rather contrived version that he did not kick Pase but purportedly “*bumped*” him. Nonetheless, he unequivocally admitted that he had led the attack on Pase. From his evidence in cross-examination, it became apparent that he not only led the attack by kicking Pase (and I find that he did not really “*bump*” him as he suggested), causing Pase to lose his footing, but he also came back to assist accused 3 who was engaged in the unlawful attack on Pase, when Pase started overpowering accused 3. Moreover, at some stage accused 1 removed a beer bottle from the hand of Sauls to ensure that she could not use that beer bottle in possibly hitting one of them in order to assist Pase in his desperate struggle. He thereby re-associated himself with the attack, despite the exculpatory suggestions proffered on his behalf through his counsel. He actively led the attack on Pase, joined accused 3 in fighting with Pase⁸ and also removed a beer bottle which concerned him, from Sauls. His active participation and association with the attack was established beyond reasonable doubt.

[70] I further find that accused 1’s assertion that he allegedly could not see that the object was a knife, was untruthful. Even his own demonstration in court would have led any objective observer ineluctably to the conclusion that the object could have been nothing but a knife.⁹ Although there was no direct evidence that he had used his own knife in stabbing Pase, he associated himself with a robbery performed by way of the use of a stolen police firearm, at least one knife and physical violence,

⁸ As is borne out in his confession.

⁹ This was conceded by all counsel during argument.

causing the death of an off-duty policeman. He furthermore admitted that he had stolen a Vodafone cellphone which, according to him, was lying on the ground next to Pase and put such a stolen cellphone onto his “*private parts*”. Only when he found out that the cellphone belonged to a police official who had died, did he attempt to get rid of the cellphone, which then became the proverbial hot potato.

[71] Accused 1, was argumentative, evasive and in my view, deceitful. His assertion that the Magistrate made a mistake in recording his kicking of Pase (instead of “*pushing*”) is rejected and was pertinently denied by *inter alia* accused 3. His description of merely taking the beer bottle to drink same, amidst a frenetic fight, was manifestly untrue. Only during cross-examination did he admit that the beer bottle was removed from the hand of Sauls because he was scared that she could use it against him and his co-perpetrators. During persistent cross-examination by the prosecutor about his own intention in attacking Pase, he eventually admitted that “*I went to the father¹⁰ to take things I don’t have*”. He furthermore conceded that he had run towards Pase before he attacked him, followed by accused 1 and 2. He incriminated accused 2 as having kicked Pase during the scuffle in his presence. He went so far as to expressly concede his involvement in a “*robbery*”. He also conceded that he foresaw that the attack could result in injuries being caused to Pase. His leading role in the attack on Pase had to be conceded by him during cross-examination, although he disingenuously attempted to minimise his own role. He admitted that he became entangled in the violent fight with Pase, when Pase started to overpower accused 3, who then called upon accused 1 by his nickname¹¹ to come and assist him. He also confirmed that he saw accused 3 in possession of a

¹⁰ Or “*Tata*”.

¹¹ “*Radza*”.

knife. After the attack had been completed, he testified that he saw knives in the possession of accused 3, of Knockpaal and also in the possession of Daniëls.

[72] He confirmed that at a gathering after the robbery, all of the accused had met and showed each other what they had robbed from Pase and Nanto. He tried to distance himself from the firearm. He disavowed the use of any knife himself. Nonetheless, he admitted that after the robbery, he had smoked with his cohorts at a certain meeting point. As previously stated, his theft of Pase's cellphone was conceded earlier in his testimony.

[73] Accused 2, who was merely seventeen on 29 August 2016, was a decidedly bad witness with a shifty demeanour. There is very little of his version which one can believe, save for the incriminating admission that he had joined accused 1 in kicking Pase and had seen accused 3 in possession of a knife. He over-elaborated on his assertion that he was accidentally hit on his leg by the seemingly sadistic, firearm-wielding Knockpaal and sought to portray himself as a victim in this regard. He failed to realise that this placed him right at the vicious Knockpaal's side. He furthermore testified that accused 1's version to the effect that he had merely "*pushed*" Pase, was untrue. He testified that accused 1 had violently kicked Pase, causing him to fall over. His testimony was to the effect that when accused 3 was being overpowered by Pase, he did indeed run towards Pase in order to kick him, but attempted to explain this this was somehow necessary, because his help had been sought by a co-assailant. He maintained that he did not share in any proceeds from the sale, save that he admitted that he had smoked with the other assailants after the attack. This exculpatory statement is not believed.

[74] That accused 3 and Pase were engaged in a struggle with a knife was confirmed by accused 2, who was intent on being as vague as possible with respect

to his description of the object, which was clearly a knife. During cross-examination of accused 2, he admitted that he knew about the stolen police handgun that was in the possession of Knockpaal after the incident and also admitted that he was present when this handgun was forcibly taken out of the possession of Knockpaal by the person described as "*Fashion*" some time after the incident. Accused 2's own testimony revealed his active participation in the robbery; that he himself took part in the violent attack and that he associated himself with the violence and theft. He also knew that some of the accused had knives in their possession. He saw Knockpaal steal a firearm and also saw him use the firearm as a blunt object inflicting grievous bodily harm to Pase, right next to him. He further saw accused 3 with a knife in his hand. Still, he continued actively in perpetrating the unlawful attack on Pase.

[75] If accused 1 was dishonest and evasive, and accused 2 decidedly bad,¹² accused 3 was even worse than both accused 1 and 2. He did confirm that accused 1 had kicked Pase so violently by running towards Pase from behind, jumping in the air and literally kicking Pase in the back so violently that Pase fell over. He testified that accused 1 and 2 had engaged in beating and kicking Pase. He then assumed the role of the main aggressor in fighting with Pase. I find that he did use his own knife in the process, described to the court as an Okapi knife. There is ample evidence that the slenderly built accused 3 did use a knife. He was seen with his knife in hand. Pase sustained various stab wounds, including the fatal stab wound which killed him. I find that all the accused were present when Pase was fatally stabbed. Accused 3's denial of Daniëls's categorical assertion that he had seen accused 3 stab Pase was unconvincing and I reject this denial. Accused 3 further testified that there was blood pouring on him from Pase whilst he was fighting with

¹²

Responsibly conceded by Adv Skepe during argument.

Pase. When he was shown the photographs depicting a stab wound to the neck of Pase and a further cut on the deceased's left shoulder, he conceded that such blood which dripped into his face from the "*father*", might well have been from the stab wounds inflicted on Pase.

[76] As I have mentioned already, accused 3 furthermore changed his version repeatedly. In his confession, he made no mention of the spurious assertion that Pase had his own knife. This desperate after-thought arose at the trial. During the trial, it became evident that accused 3's instructions to his legal representative, Dr Erasmus, were changing. Dr Erasmus had previously put it to witnesses that accused 3 had sustained a stab wound to his left *hand*. It turned out that a wound had been sustained to the upper part of his left forearm, and not on his hand. During cross-examination of accused 3 by Ms Theron on behalf of accused 1, he asserted that Pase had lost power, not merely as a result of being hit with a firearm by Knockpaal, but "*he lost power when everyone was on top of him*". He did not challenge the assertion of Daniëls that prior to the events in question, the accused, Knockpaal and Daniëls had shown each other their knives on the night in question. That these knives which Daniëls had described had been specifically modified to protect their own hands from being injured by slipping down on the blade, was never disputed by accused 3.

[77] I find further that the said accused 3 was present after the fateful attack when the assailants showed each other their spoils, smoked and in the process, utilised some of the money which was found in the wallet of Pase. Only during cross-examination by counsel for accused 2 did accused 3 deny that the knives had been shown to one another. That accused 3 had an Okapi knife in his possession was divulged by him himself. This was a folding knife and it was demonstrated to be of

substantial length and size. His assertion that he did not use this knife is rejected. His other exculpatory assertions are also not believed. Most contrived of all was his assertion that Pase had allegedly produced a knife of his own, which he had allegedly wrested from Pase. When he was asked what became of such a knife described by him, he opportunistically advanced a further contrived version that he threw the knife away as they were crossing the river after the attack. This was an obvious untruth, having never been put to any of the witness by his experienced legal representative.

[78] His attempt to portray himself as a victim in the scuffle with Pase was desperate. The extraction of an admission by the prosecutor from him that he was “*angry*” after the incident prior to a postulation being put to him that it was as a result of his anger that he then fatally stabbed Pase, had the ring of truth. He repeatedly admitted that he was angry. Accused 3 also referred to the assailants’ need to take off their jerseys after the incident, because “*our blood was hot*”.

[79] I find that accused 3 furthermore knew that the cellphones had been stolen. His exculpatory assertion that he did not share in the proceeds of the sale of the cellphones, is rejected.

[80] Evaluating the credibility of the three accused, who were all unimpressive witnesses that were either evasive or untruthful in material respects, in contrast to Daniëls who was cross-examined at length, I prefer the evidence of Daniëls, even though I am fully conscious of the need to approach his evidence with caution.¹³

Did the State prove that the accused were guilty of robbery with aggravating circumstances?

¹³

Compare **Monyepao and Another v S (A167/2016) [2017] ZAGPPHC 594** (19 September 2017), and **S v Hlapezula and Others 1965 (4) SA 439 (AD)** at 440 D to H.

[81] The elements of the crime of robbery are:

1. the theft of property;
2. through the use of either violence or threats of violence;
3. a causal link between the violence and the taking of property.

[82] On the evidence, I find that all three the accused were shown to have been guilty of robbery, the late Pase having been dispossessed of his firearm, wallet (with an unknown amount of money in the wallet), of his cellphone, whilst cellphones were also taken from inside the car, and from Nanto. With respect to proof of aggravating circumstances in relation to robbery this entails:

1. the wielding of a firearm or any other dangerous weapon;
2. the infliction of grievous bodily harm; or
3. a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion where the offence is committed, whether before or during or after commission of the offence.¹⁴

[83] Robbery with aggravating circumstances is thus robbery where a firearm or other dangerous weapon is wielded, or where grievous bodily harm is inflicted or threatened. The definition defines “*aggravating circumstances*”, not robbery itself, which is a common-law offence (**Minister of Justice and Constitutional Development v Masingli 2014 (1) SACR 437 (CC)**, paragraph [16]). It is a form of robbery with more serious consequences for sentencing (**Masingli**, at [33]).

[84] The elements of robbery are theft of property, through violence or threats of violence; unlawfulness and intent. Robbery with aggravating circumstances is not a

¹⁴ Section 1(1)(b) of the CPA.

separate offence. Like armed robbery, it is merely a *form* of robbery. (**Masingli**, at paragraphs [33] and [34]. Aggravating circumstances are a manifestation of the degree of violence: at paragraph [48]).

[85] Section 1(1)(b) of the CPA does not expressly require any mental element with respect to the aggravating circumstances. Instead, only objective facts constituting aggravating circumstances are referred to in the section. Nor is intent implicit in section 1(1)(b): **R v Jacobs 1961 (1) SA 475 (A)**. In **Jacobs**, the Appellate Division held that aggravating circumstances are established *objectively* and the intention of the accused is not imported into an enquiry as to whether aggravating circumstances are present. Not requiring proof of specific fault does not offend against the presumption against strict liability, since this principle is “*already established because intent is a requirement for robbery*”. (**Masingli**, at paragraph [48]).

[86] Counsel for all three accused eventually had to concede during argument that the State established robbery and that the objective facts satisfied the definitional elements of “*aggravating circumstances*”, as contained in section 1(1)(b) (see further **S v Hlongwane 2014 (2) SACR 397 (GP)**).

[87] I find that the State has established that all three accused, through the use of violence and with intent to take property from Pase, Sauls and Nanto, inflicted grievous bodily harm on the late Pase and are accordingly all guilty of robbery with aggravating circumstances.

Did the State prove that the three accused were guilty of murder?

[88] Murder is the unlawful and intentional causing of the death of another human being (**Snyman CR: Criminal Law, Sixth Edition**, 2017 reprint, LexisNexis; **S v**

Ntuli 1975 (1) SA 429 (A) at 436 to 437). In this instance an off-duty policeman, the late Lulamile Stanley Pase, was murdered.

[89] It has been formally admitted by all three the accused that the 36 year old deceased died at the scene as a result of a 5cm stab wound which he sustained 16cm below his armpit, posterior, to his left chest, as demonstrated on photographs 13 and 14 of the consensually introduced photo bundle marked "B". The tract of his fatal wound was described by Dr Jan Anthonie de Beer, who performed the post-mortem report dated 31 August 2016 which was admitted in evidence, as going from *"left to right and towards the front; it enters the left chest cavity between the 9th and 10th ribs left-posterior-lateral, missing the left lung, going through the diaphragm into the abdominal cavity and ending in the spleen"*.

[90] That Pase also sustained knife wounds to the left side of his neck, penetrating into the neck muscles only (shown on photos 10 and 18 of "B"), and also a non-penetrating knife wound to his left shoulder (shown on photo 18 of "B"), were common cause.

[91] Daniëls, the section 204 witness, testified that he saw accused 3 stab Pase once. Accused 1 saw accused 3 and Pase struggle with what was clearly a knife. Accused 2 also reticently described such a struggle *"with a knife, something that they had"*. On the version of accused 3, this knife-fight between himself and the late Mr Pase was confirmed, but he dishonestly suggested that the knife had been produced by Pase, which he was then able to *"win"* from Pase. I find that he had used his own knife, described by him as a *"push-button"* Okapi knife, in the attack on Pase, and further find that his belatedly adapted version that the late Pase had produced his own knife, was a fabrication. This is also consistent with the other proved facts and no other reasonable inference was suggested. His own legal

representative moreover received changing instructions as the matter progressed, which has already been referred to above in this judgment.

[92] In the indictment, the State had made it clear that the State alleged that the accused acted in concert and in the execution of a common purpose. The evidence showed that the particular attack on Pase, Sauls and Nanto had not been pre-planned, or that there had been a prior agreement, but when the accused, Knockpaal and Daniëls identified the opportunity to rob them, they, together with Knockpaal and Daniëls, did not hesitate to act as a predatory group intent on achieving their objective of robbing Pase, Sauls and Nanto, irrespective of any foreseen or anticipated resistance from Pase. Knockpaal, since deceased, and Daniëls, focused on the vehicle, stealing cellphones and Pase's official Pietro Beretta 9mm from the parked vehicle, whilst accused 1 led the attack to overpower Pase, with accused 2 and 3 following him.

[93] All three the accused were directly involved in the violent attack. They all knew what they were doing, despite having used tik and dagga. That Knockpaal also participated by violently hitting Pase over his head, does not diminish the individual culpability of the accused. The kicking and hitting was deliberate, aimed at overcoming resistance from the desperate Pase. All the perpetrators must in such circumstances have foreseen that either their own acts, or the acts of their co-perpetrators with whom they associated themselves, may result in the badgered and bloodied Pase's death. They all reconciled themselves with such a possibility. Some of the accused carried knives themselves, or knew that others in the group did carry dangerous, specially modified knives to be effective assault weapons which they would not hesitate to use during a robbery.

[94] Resistance from the burly Pase was not only foreseen, but anticipated, hence the rushed attack from behind on Pase. Each of the accused actively associated themselves with the attack and each of the three were actually involved in the unlawful attack. Accused 3 was specifically identified as having wielded a knife, with Daniëls having seen him stab Pase, whilst Knockpaal used the handgun as a brutal blunt instrument to inflict serious bodily harm to Pase in their very presence.¹⁵

[95] Suggested attempts on the part of accused 1 and 2, to somehow dissociate themselves from the group, after the attack, especially by suggesting an earlier departure (or by running away) from the scene; not sharing in proceeds save for smoking tik or dagga, probably purchased with money from Pase's wallet, and emphasising that Knockpaal jealously kept the stolen firearm to himself, were either irrelevant, belated or clearly untrue.

[96] None of the accused dissociated himself from the joint attack before Pase was fatally injured. This had to be conceded during argument by counsel for all three accused, which concession was prudent and correct.

[97] I find that each of the accused partook in the vicious attack. Whilst the evidence did not clearly establish that accused 1 and 2 had used their own knives, accused 3 did, and Knockpaal's use of the firearm caused extensive burst fractures to the scalp of Pase, in their immediate presence, with the wounds so inflicted having been described by De Beer and demonstrated on photographs 66, 67 and 79 of the photo bundle, exhibit "B". Pase's profuse bleeding, as described by accused 3, who testified that Pase's blood was pouring into his eyes whilst he was struggling with him, did not trouble them at all. They simply carried on with the vicious attack.

¹⁵ See generally: **Snyman**, page 259.

[98] The common purpose doctrine laid down in **S v Safatsa 1988 (1) SA 868 (A)**, imputes the deed(s) which caused the death to all co-perpetrators. In **Safatsa**, Botha JA intimated that in relation to common purpose, the obstacle of proving causation between the conduct of a particular participant and the death of Pase was removed (see page 898 at D).

[99] In **S v Thebus and Another 2003 (6) SA 505 (CC)**, Moseneke J stated in paragraph [34] as follows:

“In our law, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social ‘need to control crime in the course of joint enterprises’. The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual”.

[100] Contentions that the doctrine “de-humanises” people by treating them “in a general manner as nameless, faceless parts of a group”, was rejected and the criminal “norm” in issue, i.e setting a standard of criminal culpability, was held to be constitutional. (at paragraph [36] of **Thebus**) .

[101] In **S v Mgedezi and Others 1989 (1) SA 687 (AD)**, the requirements which must be established in the absence of proof of a prior agreement, were laid down (see page 705 I -706C). These requirements are:

- “1. *Proof that the accused was present at the scene where the violence was being committed.*
2. *He must have been aware of the assault or attack on the victim.*
3. *Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault.*
4. *Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some acts of association with the conduct of the others.*
5. *Fifthly, he must have had the requisite mens rea; so in respect of the killing of the deceased, he must have intended him to be killed, or he must have foreseen that the possibility of him being killed and performed his own act of association with recklessness as to whether or not death was to ensue”.¹⁶*

[102] Applying these principles to the conduct of each individual accused, I am of the view that the conduct of accused 1, accused 2 and accused 3, individually assessed, satisfied these elements. In particular, I find that each of accused 1, 2 and 3 *individually*, participated actively and deliberately, using various degrees and types of violence to overpower Pase. They did so in the achievement of the common purpose that developed at the scene.

¹⁶ See further the words of caution expressed in **Dewnath v S [2014] ZASCA 57 (17 April 2014)** at paragraph [15], which the court has taken into account. See also **Makhubela v The State; Matejka v The State [2017] ZACC 36**, at paragraph [38] and consider further the confirmation of the applicability of **Mgedezi** requirements in factual circumstances as in casu, in **Jacobs and Others vs S 2019 (5) BCLR 562 (CC)**.

[103] I find that each of them must have foreseen, and did foresee, that Pase could be killed by their actions and that each of accused 1, 2 and 3 manifested conduct showing their own individual act(s) of association, with reckless disregard whether or not death was to ensue. Each of them persisted in their participation, even when the severity and viciousness of the attack must have been clear to each one of them. They nonetheless persisted, reckless of the possibility that they, or one of them, could cause the death of Pase.

[104] Having overpowered the bleeding, seriously injured off-duty policeman at the scene, they callously ran away. Whether the critically injured Pase would then die, was none of their concern.

[105] That Pase was somehow able, with the help of Sauls and Nanto, to get into the car, and to start the vehicle, was Pase's last superhuman attempt to get help. The Corsa then collided a short distance from the place of attack, with a tree planted by the municipality and Pase succumbed to his injuries approximately eight minutes after paramedics arrived at 02h29 (as testified to by warrant-officer Van der Mescht). This was undisputed and common cause.

[106] The attackers left the seriously injured Pase to die, viewing his attempt to get up in order to get help unsympathetically from a distance, with the spoils of their crime in their possession, only to go and smoke together thereafter.

[107] For what it is worth, the evidence of accused 1, who allegedly stated to the others that they had to leave and apparently stopped Knockpaal from going back to "*finish off*" the already fatally injured Pase, is as hard to believe as his dishonest refusal to identify the object between accused 3 and Pase for what it was, namely a large knife. In any event, by that time the fatal stab wound had already been inflicted.

[108] There was no proof of any reasonable effort to nullify or frustrate the effect of the individual unlawful acts or “contributions” on the part of any of the three accused. Whatever view one takes of the matter, there was no effective, timeous or relevant dissociation (*vide*: **S v Beahan 1992 (1) SACR 307 (ZS)** at 324; **S v Lungile and Another 1999 (2) SACR 597 (SCA)**). The mere fact that the first accused and his co-perpetrators ran from the scene – with accused 2 allegedly limping – is neither here nor there, as they were probably afraid of being arrested and wanted to make good their escape.

[109] None of accused 1 or 2 intended or attempted to stop accused 3 from fighting with Pase. To the contrary, they actively took part in the attack. Knockpaal was not prevented from repeatedly bludgeoning Pase over the head in their immediate presence. The evidence established the significant roles of each of the accused at the scene of the attack. I have analysed their own roles carefully, as I have to, and find that each of them were active participants in the achievement of a common purpose. I have found that each of them was present at the scene when Pase was fatally stabbed.

[110] I accordingly find that the State has established, above reasonable doubt, all the elements necessary for a conviction of murder in accordance with the doctrine of common purpose, as laid down in **Mgedezi**, applied and explained in **S v Le Roux 2010 (2) SACR 11 (SCA)** at paragraph [17], and confirmed in **Makhubela and Jacobs** (see footnote 16 above).

Has the State proved the third charge, unlawful possession of a firearm, on the part of accused 1, 2 and 3?

[111] On the evidence, Thulani Knockpaal took Pase's 9mm Pietro Beretta firearm from the stationary Corsa vehicle. One "*Fashion*" then forcibly took the firearm from Knockpaal sometime afterwards. Sergeant Ntliziywana of the Kwanobuhle Police Department testified that after receiving a tip-off from a registered informer, the firearm was found at "*Fashion's*" informal dwelling where it was hidden, leading to "*Fashion's*" arrest.

[112] The serial number corresponded with the serial number of the official police firearm that had been issued to the late Pase. The said "*Fashion*" was apparently successfully convicted for being in unlawful possession of the firearm in the Uitenhage Regional Court.

[113] On the evidence before court, none of accused 1, 2 or 3 had physical control over the firearm, but saw Knockpaal using the firearm as a blunt assault weapon, by hitting Pase over his head in their presence. After the attack, they testified that Knockpaal retained the handgun in his possession, which they realised belonged to a policeman because of the serial number and presence of police vehicles in Fan Park the next morning. Only Daniëls, the section 204 witness, was allegedly allowed to touch the firearm.

[114] At common law, the two elements of possession are *corpus* and *animus*, referring to the physical and mental elements respectively. Was the first objective element *and* the second subjective element proved on the evidence, taking into account the legislative provisions relied upon by the State to establish the act or conduct required for a conviction? (See generally **CR Snyman: Criminal Law, Sixth Edition**, LexisNexis, pages 62 to 70). The distinction between *possessio civilis* and *possessio naturalis* is well-known, the latter element being satisfied by proof of the *animus detentionis* and not requiring proof of the *animus domini*. But was either the

corpus element and the *animus detentionis* element proved on the part of each of the accused?

[115] The section 204 witness Daniëls at no stage indicated that any of the accused was in possession of the firearm. To the contrary, Knockpaal jealously retained the stolen firearm in his possession.

[116] The difficulty in proving that a possessor's possession of a firearm should be imputed to others in the group, is apparent from decisions such as **S v Nkosi 1998 (1) SACR 284 (W)** at 286 H to I; **S v Mbuli [2002] ZASCA 78**; **S v Ramoba [2017] ZASCA 74** and also in **Makhubela**,¹⁷ *supra*, at paragraphs [55] to [57].

[117] In his section 204 warning statement, exhibit "H", Daniëls asserted in paragraph 6 thereof that Knockpaal was still in possession of the firearm one week after the attack on Pase. No evidence was adduced establishing that any of the accused either had control over the firearm, or somehow actively approved Knockpaal's appropriation of the firearm. Even assuming that proof of the lesser element of *possessio* suffices, namely *possessio naturalis*, I am unable to find that this offence was evidentially established against accused 1, 2 or 3 above reasonable doubt.

[118] During argument, prosecutor Makasana conceded that there was no factual basis to sustain a conviction of the accused on this charge, which concession was correct. The three accused are not guilty of this charge.

¹⁷

Above, footnote 16.

Conclusion:

[119] Accused 1, 2 and 3 are each found guilty on charges 1 and 2 (robbery with aggravating circumstances, and murder), but not guilty on charge 3 (unlawful possession of a firearm).


 Swaneboel AJ

APPEARANCES

FOR STATE: ADV MAKASANA

FOR ACCUSED NO.: 1- ADV THERON from Legal Aid Board, PORT ELIZABETH

**FOR ACCUSED NO.: 2: ADV SKEPE instructed by Legal Aid Board, PORT
 ELIZABETH**

**FOR ACCUSED NO.:3 MR ERASMUS instructed by Legal Aid Board, PORT
 ELIZABETH**