

**In the High Court of South Africa
KwaZulu-Natal Division
(sitting both in Durban and Pietermaritzburg).**

Case No: CCD46/2019

In the matter between:

The State

v

Felokwakhe Fanuel Mhle Ndlovu

First Accused

Nkosiyaanda Ndlovu

Second Accused

Nkosinathi Mbambo

Third Accused

Judgment

Lopes J

[1] The three accused in this matter were charged with the following counts:

- (a) conspiracy to murder, in that prior to the 3rd of September 2018, they conspired to bring about the death of Thulani Lawrence Nxumalo;
- (b) the murder of Thulani Lawrence Nxumalo on the 3rd of September 2018;

- (c) that at the time of the murder, they were in the unlawful possession of a firearm, alternatively a prohibited firearm, in contravention of the Firearms Control Act, 2000;
- (d) that at the time of the murder, they were in the unlawful possession of ammunition, in contravention of the Firearms Control Act, 2000.

The State relied upon the doctrine of common purpose for counts 3 and 4.

[2] All three accused pleaded not guilty to all four counts. Because of the similarity of names and without intending any offence whatsoever, the accused shall be referred to as 'Mhle', 'Nkosiyaanda' and 'Nkosinathi' respectively. Mr Thulani Nxumalo shall be referred to as 'the deceased'.

[3] The three accused all chose to remain silent in the face of the charges proffered against them. However, three documents were handed in by consent at the outset of the trial:

- (a) exhibit 'A', a list of admissions made in terms of s 220 of the Criminal Procedure Act, 1977 ('the Act'), in which they admitted that the post-mortem examination report conducted on the body of the deceased was true and correct, that it correctly reflected the cause of death of the deceased as being the result of three gunshot wounds, and that the body of the deceased sustained no further injuries, from the time he was shot, until the post-mortem examination report was conducted;
- (b) exhibit 'B', which was the post-mortem examination report itself; and
- (c) exhibit 'C', a photo album of the scene of the crime.

Those admissions were confirmed by all three accused and their counsel.

[4] The background and history to the murder was set out in the evidence of the wife of the deceased, Makhosi Thokozani Nxumalo. We summarise her evidence as follows:

- (a) in 2013, she began to live in the area of Rockdale in KwaNdengezi together with the deceased who had lived there all his life;
- (b) at the time of his death, the deceased was the chairperson of the Local Community Policing Forum ('the LPCF') and the chairperson of the local branch of the African National Congress ('the ANC');
- (c) the area itself is partly under the control of a local municipality, and partly under the control of a local Chief. The Chief's Induna is Mhle. The history of the area starkly revealed the conflict in this province between the life-styles of those falling under the democratic control of municipalities, and those areas falling under the control of local Chiefs and their Indunas;
- (d) the deceased's family, and the family of Mhle, knew each other, and the Nxumalos would on occasion attend traditional functions at the home of Mhle, because he and the deceased were related through their grandmothers;
- (e) one Sunday morning, in late December of 2017 or early during 2018, Mrs Nxumalo was returning home from church when a man known to her as Celani Dlamini stopped his motor vehicle and approached her to speak to her. *Inter alia*, he told her that he had seen her from time-to-time, cooking at functions at the home of Mhle. He referred to a particular traditional ceremony ('umbondo'), where he had expected her to be present. It was fortuitous that she was not there because there had been a conspiracy to kill her husband. This was to have been achieved by having persons lie in-waiting for them when they returned home from the umbondo. The assailants would have shot her

husband. Celani warned Mrs Nxumalo that her husband should be very careful because people were going to be sent by Mhle to kill him;

- (f) he also told Mrs Nxumalo that whenever Mhle wanted someone killed, he used Celani's motor vehicle to facilitate the commission of the crime. Celani was unhappy about this, and to avoid Mhle doing so, he had in fact removed the wheels from his vehicle so that he was able to say that the vehicle could not be used;
- (g) as they were talking, the deceased approached and Celani then recounted to him that which he had told Mrs Nxumalo. It emerged from that conversation that the deceased had not intended to be at the 'umbondo' function in December 2017;
- (h) some three to four months prior to the murder, the deceased requested Mrs Nxumalo not to attend church on Sunday, but to remain seated in their bedroom, and to listen to a conversation he anticipated having with Mhle;

(This concerned a dispute between Mhle and a certain Mrs Makhathini, regarding the allocation of a vacant plot of land allegedly belonging to her. Part of her land was subsequently allegedly wrongfully allocated to another person by Mhle.);

- (i) Mhle arrived and told the deceased that one Khule had reported to him that Mrs Makhathini had complained about Mhle's conduct to the deceased, instead of approaching him, or the Chief. (Tragically, Mrs Makhathini had subsequently been murdered, and it was clear that Mhle was a suspect);
- (j) Mhle then requested that the deceased should deny, if ever asked by members of the South African Police Force, that he had ever received such a complaint from Mrs Makhathini;

- (k) the deceased told Mhle that as he was a member of the LPCF, working for the community, he was on the side of the law protecting the community, and would not lie. He told Mhle that Mrs Makhathini had been given his cell phone number, and had phoned him and reported to him about the matter. He had instructed Mrs Makhathini to approach the Chief because he, the deceased, did not deal with matters involving tribal land;
- (l) Mhle then asked the deceased why he would not support him, because they were related. The deceased responded that he would not lie. This conversation was overheard by Mrs Nxumalo;
- (m) two or three weeks after this first meeting, Mhle again visited the Nxumalo's home. The deceased had again requested that Mrs Nxumalo listen to the conversation from their bedroom. Mhle pestered the deceased to refuse to give a statement, or to say to the police that Mrs Makhathini had not made a report to him about the land. He said that if the deceased did this then he, Mhle, would be 'set free by (the deceased's) action' - this referred to a trial, in which Mhle stood accused of the murder of Mrs Makhathini. (He was subsequently acquitted). The deceased told Mhle that should the investigating officer approach him, he would not lie to him;
- (n) on the 3rd September 2018, Mrs Nxumalo had begun cooking while she was waiting for the deceased to arrive home. Present with her was one Bonakele Ngcobo, who was staying overnight with the Nxumalos. At approximately 7:00pm they heard several gunshots and a blasting noise on the roof of their home. The gunshots came from the direction of the gate on the front of the side of their house. Mrs Nxumalo immediately ran into a small room with her grandchildren who were present at the time, together with Ms Ngcobo, and switched off the lights and huddled there and prayed. They were all terrified and crying. Mrs Nxumalo then asked an eleven-year-old child to crawl on her

stomach, and switch off the main electrical switch, presumably to plunge the house into darkness; and

- (o) Mrs Nxumalo then attempted to phone two friends, Mr Celani Zungu and Sizwe Mabizela, but initially was unable to contact them. It soon thereafter emerged that in fact Mr Zungu and Mr Mabizela were outside the house, and they called on Mrs Nxumalo to come outside. There she found her late husband lying on the ground in front of the house. The police were then called.

[5] In cross-examination of Mrs Nxumalo, the following issues were put to her:

- (a) Mhle denied ever having coming to her house for the two meetings;
- (b) the only Sunday when Mhle came to their home was when he was in the company of Sandile Mdadane, Gewu Ndlovu and Eric Ndlovu to discuss a dispute over a fence which existed between the Nxumalo's home and their neighbours, the Vilakazi Family. On that occasion they never even entered the Nxumalos' home;
- (c) the reason that the deceased and Mrs Nxumalo never revealed the plots to kill the deceased was because they distrusted the members of the South African Police, and that information given to them would inevitably go straight back to Mhle;
- (d) it was suspicious that the conversations between her and her husband concerning his deep concerns about the behaviour of Mhle, were only communicated between the two of them, and that there were no other witnesses, and that the matter was not in any way recorded or reported to the police; and
- (e) Ms Mshololo, appearing for Mhle, put to her a statement which she had made to the police. Mrs Nxumalo confirmed two incorrect, but unimportant details. Importantly, she reiterated her evidence regarding

the visits of Mhle to their home, and that Mhle continually requested that the deceased meet him at night. The deceased said that he was prepared to meet Mhle during the daytime at the police station, but those times never suited Mhle.

[6] There is nothing in the evidence of Mrs Nxumalo which would lead us to the conclusion that she was telling anything other than the absolute truth. She was honest, forthright and certain in her answering of questions, and the ordeal which she had experienced was clearly present to her mind, and was expressed by her in a logical and persuasive manner.

[7] The next witness for the State was Celani Ndlovu, who was warned by me in terms of s 204 of the Act. His name is variously referred to in the record as 'Celani' and 'Xolani. All, however, agreed that the correct spelling was 'Celani'. I summarise his evidence as follows:

- (a) in 1997, he first met Mhle, when they both worked as volunteers in the offices of the Inkatha Freedom Party ('the IFP) in Pinetown, where Celani worked closely with the coordinator of the local committee, arranging meetings for the chairperson and secretaries;
- (b) during 1999, Celani moved to KwaNdengezi, and then eventually became the secretary of the committee, run by Mhle, as the Induna of the area. Most of the work which they did was on the weekends, because Celani was in full-time employment;
- (c) Celani came to know the members of the Ndlovu family including Nkosiyanda;
- (d) from photographs, Celani identified a second-hand white Toyota Corolla motor vehicle bearing registration mark N[...] 5[...], which belonged to the brother of Nkosiyanda. It was in those circumstances that Celani met Nkosiyanda, who, so he was told by Mhle, was the person who would drive him around;

- (e) other relevant members of Mhle's committee were Piti Langa, Mzikayise Makhubalo ('Mzi'), Sandile Mdadane and another person named Mtshali. The deceased was also well known to Celani;
- (f) when Celani arrived in the KwaNdengezi area, the deceased was the chairperson of both the LCPF and the local ANC Regional Committee;
- (g) he described how it came about that Mhle and the deceased were not on good terms. There were numerous reasons for this:
 - (i) Mrs Makhathini had approached the deceased, and complained to him about Mhle, because the deceased was the chairperson of the LCPF;
 - (ii) Her complaint was that Mhle had sold her land and allocated it to someone else. The impression we gained from Celani was that, because Mrs Makhathini's husband had passed-away, it was culturally inappropriate for Mrs Makhathini to approach the Chief directly;
 - (iii) accordingly, she approached the deceased, who spoke to Mhle about his allegedly wrongful sale of Mrs Makhathini's land;
 - (iv) sometime thereafter Mrs Makhathini was shot and killed;
 - (v) the development of Mrs Makhathini's land was then discontinued. When Mhle was arrested, he suspected that he had been reported to the police by the deceased, which had resulted in his arrest;
 - (vi) other problems relating to the allocation of properties by Mhle, were:

- (aa) he demanded a payment of R10 000 for sites (which sum had previously been less when the allocation of sites had been done by the Chief);
 - (bb) the community had been promised RPD homes (low-cost, government-subsidised houses, which the claimants came to own), which had been partially built, and Mhle sold them without recourse to the waiting lists of prospective owners;
 - (cc) Mhle changed the formalities for land ownership by not indicating the square metres of the property being allocated, resulting in continual neighbourhood disputes;
 - (dd) a document entitled 'Permission to Occupy' had previously been given to land purchasers. Mhle stopped providing original documents to purchasers, and he would simply use a copy of another original document which included the Chief's stamp on it. The document provided then, was a copy, and not an original, and he would simply fill in the particulars of the land allocated. This meant that there was no permanent record of what land was being allocated to whom;
 - (ee) Mhle allocated land located near transformers, and this was forbidden by the municipality. Some of the dwellings on allocated land would be illegally constructed over underground sewerage pipes;
 - (ff) Mhle sold community land, earmarked for use as playing grounds, churches, pre-schools, and crèches;
- (h) the problems regarding the allocation of land were discussed between Mhle and the deceased. Celani was present during many of these

discussions, and knew and understood the position. When the deceased was present, Mhle would agree with his complaints, but as soon as the deceased left, he would express unhappiness. His unhappiness was that he viewed the deceased as 'talking nonsense to him' (in not understanding that he, Mhle Ndlovu, was in charge, and not the deceased). He said he did not take instructions from the deceased, as the deceased was not the Induna, and he was. In addition, he also complained that the deceased had caused him to be arrested;

- (i) during August of 2018, an urgent meeting was held at the South African Police Station in KwaNdengezi ('the meeting'). The meeting originated because community protesters blocked the local freeway, in protest at the allocation of land by Mhle. The meeting was chaired by Colonel Zulu of the South African Police, and it was conducted in English. Matters became so heated that the meeting was adjourned, and it was agreed that the matter would be referred to Chief Shozi;
- (j) after the meeting, Mhle expressed his dissatisfaction to Celani about the behaviour of the deceased. Mhle had questioned the authority of the deceased, who replied by saying that the protesters were members of the ANC, and it was his duty to deal with matters that affected them. Mhle persisted that, as he was the Induna, the deceased had no right to represent the complainants; and
- (k) whilst Mhle was complaining to Celani after the meeting, he said that the deceased had been following him, had caused him to be arrested, and had alleged that the deceased had assembled meetings with people, so that it would reflect poorly upon Mhle; using language indicating that he wanted to have the deceased killed.

When Mhle had spoken about this, he was upset and aggressive.

[8] Celani also spoke to the circumstances of the murder of the deceased, and the alleged involvement of the various parties:

- (a) approximately a week after the meeting, Celani was phoned by Mhle, who asked him to bring to him five or six live rounds of ammunition. Celani was the licensed holder of a 9mm firearm, and accordingly had the available ammunition, which he brought and gave to Mhle. That ammunition has nothing to do with the killing of the deceased;
- (b) Mhle had formerly been in possession of a .303 rifle and a .38 revolver but they were no longer in his possession, having been confiscated by the police, pursuant to the murder trial of Mrs Makhathini;
- (c) when Celani arrived at Mhle's home, he found him standing next to the Toyota Corolla alongside Nkosiyanda, who witnessed the handing-over of the ammunition;
- (d) on the 3rd September 2018, Celani did not go to work as he normally would have done, because his wife and child were ill. Whilst waiting for them to be treated at the clinic, he fetched his friend Piti Langa, to keep him company. After the child had been treated, they then proceeded to Pinetown where Celani saw his own doctor, because he too, felt unwell. He was booked off-sick for two days by the doctor and returned to KwaNdengezi;
- (e) on the way home, he received a phone call from Mhle asking him to fetch him later that afternoon, after work. He and Piti then proceeded to the house of Mhle, arriving between 5:20 pm and 5:30 pm;
- (f) Mhle wanted Celani to drive him to Coffee Farm, to enable him to preside over a boundary dispute between the Ngcobo and Mchunu families. They drove there, and were joined by Eric Ndlovu (also a member of Mhle's committee), who was traveling alone in his own car. The meeting between the families could not go ahead, and it was adjourned;

- (g) they left Coffee Farm, Eric taking the route to his home, and Mhle, Piti and Celani returning towards Mhle's home. At the main road, where Celani would normally have turned to the right, he was told by Mhle to turn left towards Pinetown, and the Emangabantu Butchery, a 'shisanyama' (a place where meat can be purchased and grilled);
- (h) Mhle then gave Celani and Piti between R200 to R250 to buy meat, bread, and soft drinks. They started to grill the meat at about 5:30 pm to 6 pm. According to Celani, it was already dark by then (sunset at 5:57pm!), but there were big lights providing sufficient lighting to enable people to grill, and Celani described it as being 'bright, very bright' with big lights, providing light, like 'flood lights';
- (i) from time-to-time, Mhle went off to make cell phone calls, separating himself from the others when he did so;
- (j) while they were eating, Nkosiyaanda arrived driving the Toyota Corolla, and accompanied by Nkosinathi;
- (k) Mhle then went to the car, which was parked outside the premises, and held a lengthy discussion with Nkosiyaanda and Nkosinathi, out of the earshot of Celani and Piti. They all ate together, and that was the first time that Celani met Nkosinathi. When Mhle received a cell phone call, he instructed Celani and Piti then to leave with him in Celani's vehicle. Nkosiyaanda and Nkosinathi drove off in the Toyota Corolla;
- (l) during the journey towards KwaNdengezi, Mhle complained that he had sent Nkosiyaanda and Nkosinathi to kill the deceased. They had done so, but they had left the firearm carelessly in a plastic bag, and buried it under a chicken-run at his mother's home;
- (m) unknown to them, certain children had witnessed them doing so, and had told Mhle's mother, who had then unearthed the plastic bag, unwrapped it, found the firearm, and then phoned the police;

- (n) Mhle said that they should rush to his home, in order to arrive there before the police, and to retrieve the firearm;
- (o) Mhle's mother's home was just across the street from his home;
- (p) when they arrived, Mhle's mother related what had happened, and Mhle said that if the police arrived, they would arrest him;
- (q) Mhle took his mother's cell-phone from her, and instructed Celani to take out her SIM card, so that the police would not be able to communicate with her, in order to give them directions to her home. Celani did so, and gave the SIM card to Mhle. who then instructed them that no one should talk about the matter and that 'it should end here';
- (r) Celani then drove Piti to his home. After Piti alighted, and on his way back to his own home, Celani drove past the home of the deceased, and saw many cars parked outside;
- (s) the next morning, he received a phone call from Mhle asking him to attend at his home at 11:00 am for a meeting with Municipality security personnel. Celani arrived early at about 10:00 am, and enquired from Mhle as to how he had managed to send Nkosiyaanda and Nkosinathi to kill the deceased on the previous day;
- (t) Mhle then said that he knew, that on the previous evening, there would be an ANC meeting at the Council offices, and that the deceased would be present. He told Celani that Nkosinathi resided at KwaNgcolosi, and that Nkosiyaanda had driven Nkosinathi to where the deceased was shot, and Nkosinathi did the shooting;
- (u) Mhle also told Celani that Nkosiyaanda and Nkosinathi had recognised the deceased by his voice, because it appeared as if he was speaking to someone, as he was approaching where they were hiding in a rondavel;

- (v) Mhle also indicated to Celani that he was going to fetch Nkosinathi again, for him to kill one Mbongeni Ngwenya, because he was someone who also talking too much, as had been the case with the deceased;
- (w) Mhle also instructed that they should all attend upon the home of the deceased, in order to offer their condolences to the family, to make it appear that they had had nothing to do with the killing of the deceased; and
- (x) Mhle, Celani, and Gewu Ndlovu attended the funeral.

[9] I now deal with the evidence of Celani, setting out the circumstances following the funeral:

- (a) he had met Nkosinathi on three more occasions:
 - (i) the second time, in front of Build-it (a construction supply company) in Pinetown, where he was loading material for his house;
 - (ii) the third time when he was parked near Sanlam Centre in Pinetown, filling fuel at a petrol station. He received a phone call from Mhle, asking his whereabouts, and then instructing him that he should bring Nkosinathi back with him. Nkosinathi said that he would not be able to meet with Mhle on that day, because he had made alternative arrangements;
 - (iii) the fourth time, at Pinetown, on a Friday. Celani was in front of a place where tyres were changed, and Mhle arrived. He phoned Nkosinathi, and asked him to come to where they were. After five minutes Nkosinathi joined them. Whilst waiting for Nkosinathi to arrive, Mhle had attempted to phone Nkosiyaanda but his calls were not answered. He then said to Celani that he realised that

Nkosiyanda was angry with him, because Mhle had not paid him for killing the deceased. Mhle stated that Nkosiyanda had seen him paying Nkosinathi a sum of R2 000 for the killing, but he had not paid Nkosiyanda anything;

(iv) after Nkosinathi and Mhle's brother arrived, Mhle and Nkosinathi moved away from the others to hold a discussion. When this was done, Mhle climbed into the motor vehicle with his brother and wife, and drove away. Nkosinathi left on foot;

(b) Celani told the court the conversation which he had had with Mrs Nxumalo regarding the plot during 2017 to murder her husband. The facts of the intention to murder the deceased were related to him by 'Mzi', who was also a committee member. He told Celani that he and Ndoda Ndlovu, the brother of Mhle and one Mtha Ndlovu (apparently unrelated to Mhle) were to be sent to kill the deceased, but they could not find him; and

(c) the circumstances related by Celani of the conversation with Mrs Nxumalo, were the same as those to which she testified before us.

[10] In our view Celani was a very good witness. His evidence was unshaken by the cross-examination of the legal representatives for the defence. The following issues emerged during cross-examination:

(a) he conceded that issues regarding problems between community members and the Induna, should have been resolved by the Chief of the area;

(b) Mhle would deny there were any disputes between him and the deceased over the land issues;

(c) had Mrs Makhathini had any complaints regarding the allocation of her land, she should have reported the matter to the Chief and not to the

deceased. This assertion was adequately explained by Celani both in his evidence-in-chief and in cross-examination;

- (d) it was suggested to Celani there were no such documents referred to as a 'Permission to Occupy', and that Mhle had never issued copies thereof, as suggested by Celani;
- (e) in response to the denial that Mhle ever complained about the deceased's behaviour, Celani reminded his legal representative that it had happened both pursuant to the meeting, and thereafter;
- (f) Celani admitted that he was not legally entitled to have given live ammunition to Mhle. It turned out that his reason for so doing was that Mhle had been requested to provide the live ammunition by his nyanga (or traditional healer) to serve as a form of resistance against his enemies;
- (g) Celani had taken Mhle to his nyanga, and had witnessed the cuts which had been made on the body of Mhle. Celani insisted that he had handed the ammunition to Mhle in the presence of Nkosiyaanda;
- (h) curious aspects of the cross-examination by Ms *Mshololo*, on behalf of Mhle, were:
 - (i) she put to Celani that it was dark at the time they allegedly visited the shisanyama, and there was no way that he could have seen Mhle speaking to Nkosiyaanda and Nkosinathi. I requested clarification from Ms *Mshololo* on exactly what her instructions were in that regard. She said it was dark, and that she confirmed that there were no lights on at the shisanyama;
 - (ii) this was denied by Celani, and then Ms *Mshololo* put to him that Mhle would deny that he ever met with Nkosiyaanda and Nkosinathi at the shisanyama;

- (iii) Celani recorded that Mhle, and his wife, bribed the investigating officer in this case with an amount of R120 000 in order to ensure that Celani would not testify;
 - (iv) Mhle phoned Celani whilst he was in prison, instructing him to go to the State Prosecutor, and withdraw himself from being a witness in the matter;
 - (v) the investigating officer then visited Celani, and informed him that Mhle and his wife had hired a hitman to kill him, so that he would not testify in the matter;
 - (vi) thereafter Ms *Mshololo*, on behalf of Mhle, telephoned Celani to establish what he had told the South African Police when he made his s 204 statement to the police.
- (i) the curious aspect of this evidence is that none of it was denied in cross-examination. I did not make further enquiries about the communication between Ms *Mshololo* and Celani, and the record shows that I considered that the defence would have been entitled to see the document at the end of the day. My approach was incorrect. Ms *Mshololo* was previously employed as a State advocate and prosecuted in the High Court for many years. She knew full-well that it was most improper for her to have contacted a State witness, and ask them about a statement which they had given to the police;
- (j) there was also no denial of the fact that there was an attempt to bribe Celani not to testify. It turned out from his evidence that in fact Mhle, his wife and the investigating officer were arrested in connection with this attempt. That matter is on-going; and
- (k) on behalf of Mhle, the hiding of the firearm behind or under the chicken-run at the home of his mother was denied. It was also denied

that he gave Celani his mother's cell-phone to remove the SIM card, and it was denied that she ever reported the matter to the police.

[11] With regard to the cross-examination of Celani on behalf of Nkosiyaanda and Nkosinathi, little impact, if any, was made to the reliability of his evidence. Some emphasis was placed on the fact that it was highly improbable that committee members would have attended the funeral at the Nxumalo's home after the murder to express their sympathies. We see nothing improbable in that evidence. Indeed, there was every reason to have done so if the other evidence was true, as testified to by Celani.

[12] Ms *Marais*, on behalf of Nkosiyaanda, also highlighted the improbability that, having been secretive at the shishanyama about making the arrangements for the murder, Mhle would not have revealed all to Celani and Piti in the motor vehicle on their return to KwaNdengezi. Once again, given the plot as testified to, there is nothing improbable in this evidence. On Celani's evidence, Mhle was angered by what had happened with the negligent hiding of the firearm, and the incompetence of Nkosiyaanda and Nkosinathi, the discovery of the firearm by his mother, and the possibility that the police could be waiting for him when he returned to his mother's home. That he would inevitably have been anxious and concerned about this, makes it more probable that he disclosed why they were rushing away from the shishanyama.

[13] The cross-examination by Mr *Khumalo* on behalf of Nkosinathi made no impact on the evidence of Celani, and rather served to confuse matters regarding the number and sequence of attempts which had been made on the life of the deceased.

[14] The next State witness, Mzi, also had to be warned in terms of s 204 of the Act. Unfortunately, Mr *Gcaba* and I both recognized at the same moment in time, after Mzi had testified for, perhaps, ten minutes, that I had failed to warn him. I then explained to Mzi the basis upon which the indemnity would apply, and he confirmed that he understood. Given the stage at which I warned him, and his subsequent evidence and cross-examination, there can be no suggestion that the necessary s

204 warning was rendered in any way inapplicable, or that any prejudice would have been occasioned to any of the accused persons.

[15] The evidence of Mzi was, in summary:

- (a) he had owned a house, and resided in KwaNdengezi since 2005;
- (b) he had been a member of the IFP, and Mhle's committee since 2010, and his functions were to deliver letters of invitation (or summonses) to persons required to appear before Mhle;
- (c) he knew the deceased as the chairperson of both the LCPF and the local branch of the ANC;
- (d) he knew that the deceased and Mhle did not see eye-to-eye. He viewed their differences as being that the deceased believed that the development of the community should emerge through the functions of the Municipality, whereas Mhle (and he) believed that the development of the community should emerge via the authority of the Chief of the area;
- (e) during the period between the years 2015-2016, it 'had become apparent' that the deceased should be killed, and Mhle instructed Mzi with the function of knowing the whereabouts of the deceased, so that this could happen;
- (f) three persons were involved in this, Mzi, Mtha Ndlovu and Kuhle Magic Ngcobo. The latter two carried firearms in order to enable them to carry out the task – one was a revolver, and the other a '16 loader' pistol. Mzi himself was given the care of the revolver which he received from Mhle, with instructions that if it was needed, he would hand it over to Kuhle;

- (g) Mzi believed that Mhle and Mtha were related, but he was not certain how. Both Mtha and Kuhle are no longer alive;
- (h) the plan, and the instructions given to Mzi, never came to pass, because 'I ended up not being able to spot the deceased';
- (i) the only person whom Mzi told of the plot was Celani;
- (j) he arrived at the meeting late (a fact confirmed by Celani), but witnessed the heated exchanges between Mhle and the deceased, and the subsequent decision to adjourn the meeting, to be dealt with by the Chief;
- (k) after the meeting, Mzi was in the parking lot when Mhle emerged and said that the deceased 'should be removed'. He had no doubt that that expression meant that the deceased should be killed, and that Mhle was angry when he said that;
- (l) Mzi stated that the dispute at the meeting was about who had authorised the sale of a piece of land next to some speed humps –this went back to the issue of development by the Municipality or under the power of the Chief;
- (m) on the day that the deceased was killed, Mzi was phoned by Mhle at 11:20 am, who asked him to come to where he was. There was some delay before he was able to find Mhle, who had said that the deceased was at a meeting at the Municipal offices. Mhle instructed Mzi that he was to phone him after the deceased left the meeting, and was returning home. He knew that the deceased would be shot after he phoned Mhle;
- (n) after the meeting whilst Mzi was searching for the deceased, he saw him walking in the direction of his home, followed him, and saw him joining the footpath leading to his home. He immediately phoned Mhle

who told him to leave the area, lest he be injured. Mzi did so, and within 15 minutes', he heard gunshots. A nearby boy told him that the deceased had been shot, and an hour later there were a lot of police officers in the area; and

- (o) Mzi stated that he had phoned Mhle between 6:00 pm and 6:30 pm. He knew that after he had phoned Mhle, the deceased would be killed, but was unaware of the identity of the others to the plot who had replaced Mtha and Khule.

[16] In cross-examination, it was put to Mzi that there were no arguments between the deceased and Mhle concerning land, and that Mhle never asked Mzi to observe the deceased and report on his whereabouts. It was then put to Mzi that Mhle had asked him to keep possession of a firearm for him, which Mzi did because he was afraid of Mhle, and regarded the request as an instruction – he said he did not regard doing so as unlawful, because Mhle had a license to possess firearms. He had kept the firearm for 'approximately six months', but Mhle later retrieved the firearm when he felt that Mzi was drinking in excess.

[17] It was put to Mzi that both Colonel Zulu and Mr Mbanjwa would testify on behalf of Mhle that the meeting did not end in dispute, but all agreed that the matter should be referred to the Chief. It was also suggested that Mzi was fired from Mhle's committee because, at the end of September 2018 he was 'causing chaos in the committee'. Mzi denied this, saying that the suggestion was a complete surprise to him.

[18] An issue which arises from the evidence of Mzi is the apparent time delay from when he saw the deceased and phoned Mhle, and when the deceased was killed. When he saw the deceased turn down the footpath to his home, the deceased was, according to Mzi, three minutes' walk from his home. The deceased was alone at the time. Yet, according to Mzi, he heard the gunshots only some 15 minutes' later. Various explanations could account for that lapse of time. One may easily imagine that the deceased fell into conversation with someone on the way,

unknownst to Mzi, and there was evidence to support this contention (in the redacted statement by Nkosinathi).

[19] This issue, however, is insufficient on its own to cast doubt upon the evidence given by Mzi, who did not minimise or deflect his participation in the conspiracy, and the pointing out of the deceased to Mhle. That he did so, and that his function was to alert the killers to where the deceased could be found and killed, was freely conceded by him. There is no rational basis to disbelieve his evidence, and we accept it, both in respect of the background of the dispute between Mhle and the deceased, and the plot to kill the deceased.

[20] Siphephelo Goodboy Ndlovu ('Siphephelo') testified, after being warned in terms of s 204 of the Act. He explained how it had come about that the murder weapon was recovered by members of the South African Police from a cupboard in his room. Briefly:

- (a) he had been living in KwaNgengezi since 2007, but he did not know Mhle, nor was he aware of the identity of the Induna of the area;
- (b) as from 2011, he had been friends with Lindokuhle Ndlovu ('Doleza'), who often visited his home, and seemed to regard Siphephelo as a father-figure;
- (c) he had met, and knew Mhle, but not as the father of Doleza;
- (d) Siphephelo had, over time, noticed that Doleza had a problem, and spent a disproportionate amount of time sleeping whenever he visited Siphephelo;
- (e) to assist him, he invited him to a local church service, during which the Preacher invited Doleza to pray with him. Doleza collapsed into a trance of sorts, and was revived by Siphephelo at the end of the service;

- (f) Siphephelo encouraged Doleza to unburden himself of the problem he was experiencing. This resulted in Doleza fetching the firearm used to kill the deceased, (which was contained in a white plastic bag), from his home, and then placing it into a cupboard in Siphephelo's room. This occurred on the 14th December 2018;
- (g) at some stage thereafter, Doleza removed the firearm from the plastic bag, and left the firearm in the cupboard;
- (h) he steadfastly maintained that he did not realize that, allowing Doleza to store the firearm in his room, was an offence;
- (i) on the 27th February 2019, police officers, clearly aware of the whereabouts of the firearm, recovered it from Siphephelo;
- (j) Siphephelo was arrested, and detained in the same cell as Mhle; and
- (k) he told Mhle that he had informed the police officers that the firearm belonged to him (Siphephelo), and Mhle told him that he should maintain that stance with the police.

[21] Siphephelo was, in our view, a good witness, whose evidence attracted little or no criticism. The significance of the evidence of Siphephelo is that he received the firearm from Doleza, the son of Mhle; that he stored the firearm until it was recovered by the police officers; and that Mhle told him to maintain his stance with the police that the firearm belonged to him (Siphephelo). On those issues the only aspect gainsaid in cross-examination was that he and Mhle were ever together in the same prison cell, and their alleged conversation.

[22] The next stage of the trial was the holding of two trials-within-a-trial. The documents which were challenged were:

- (a) an alleged confession by Nkosiyaanda;

- (b) an alleged confession by Nkosingathi; and
- (c) a pointing-out (and the accompanying document allegedly prepared preparatory thereto), by Nkosingathi.

[23] When it came to dealing with the above documents, Mr *Gcaba*, for the State, recorded that the 'understanding' he had reached with Ms *Marais*, was that Nkosinganda had been given a document to sign, and he had done so. He was not the author of the document and the dispute would only be an issue of credibility.

[24] Ms *Marais* subsequently received instructions that Nkosinganda had signed the document under the threat of harm from two members of the police, Warrant Officer Mzimela and Sergeant Sokhela (then a constable), who were not necessarily in the room where Nkosinganda was forced to sign, but were within earshot, or close nearby, at the open door of the room where the door stood ajar. It accordingly became necessary to hold a trial-within-a-trial in respect of all three documents.

[25] The fact that the two officers allegedly primarily responsible for the intimidation of Nkosinganda were the same officers who were alleged to have assaulted Nkosingathi to force him to confess, led to the parties agreeing that both the trials-within-a-trial would be merged to avoid multiple cross-examinations.

[26] Major-General Mboiki Obed Ngwenya, the Provincial Head of the Directorate for Priority Crimes and Investigations ('the Hawks'), and at the time of the investigation a Brigadier in the Hawks in Mpumalanga, testified to the completion of the document by Nkosinganda. He had not in any way been involved in the investigation of the case against the accused.

[27] The Major-General's evidence was not entirely satisfactory because:

- (a) he had been requested by General Khumalo, stationed in KwaZulu-Natal, to travel down from Silverton in Gauteng (although he was based in Nelspruit) to record the confession, but, initially, he said that

when he agreed to do so, he wasn't certain whether it was to take a warning statement or a confession;

- (b) under cross-examination, he eventually realized that it must have been to take a confession, because any other competent officer would have been able to record a warning statement;
- (c) he was unable to provide a suitable explanation why it was necessary for such a senior officer to travel so far, to take a confession when it could have been done by a local magistrate – save for some banter between himself and General Khumalo regarding the unwillingness of those qualified to hear confessions, to assist in the taking of the confession, no effort whatsoever appears to have been made to obtain someone local to do it. He was, he said, aware of the many decisions in the High Court which criticized the use of police officers for the function of taking confessions, and expressed the view that until the courts prohibit police officers from taking confessions, he would continue to do so;
- (d) he was phoned by General Khumalo on the Friday, yet seemed to welcome the suggestion that no magistrate was available to take the confession on the Sunday, notwithstanding the possibility of relief personnel perhaps being available. The inconvenient truth was simply that no enquiries were made, nor was it ever intended that they would be made;
- (e) upon his arrival at Pinetown Police Station, there were, inexplicably, no confession forms available, and so the Major-General simply used a pro-forma warning statement;
- (f) the inappropriateness of doing so seems to have escaped the Major-General, because he recorded on the form that he was investigating the offences; the document only referred to the crime of murder; and he was unable to record the necessary details on the pro-forma

warning statement because he had not, in fact, investigated the matter himself;

- (g) despite considerable delay in seeking a confession form, once again, incredibly, the Major-General was unable to obtain one, allegedly because the person who was in possession of a pro-forma confession form, could not be traced;
- (h) the Major-General denied that any photographs had been taken of him and Nkosiyaanda in the room where the interview was conducted. With regards to photographs taken after Nkosiyaanda had signed the document, the Major-General stated:

‘No, it is not correct, there’s no photo that was taken while I was there.’; and

‘No, during the conversation between me and the accused 2 there were no photographs that I’m aware of that were taken’;

- (i) when faced with the evidence of the photographic album (exhibit ‘F’), the Major-General was forced to concede that he remembered one photograph being taken ‘during the introduction’.

[28] Despite a most unimpressive performance as a witness, and his reasons for going to such lengths to take the statement, the Major-General was emphatic about the following:

- (a) he knew Constable Mzimela;
- (b) Constable Mzimela did not bring Nkosiyaanda to the office where the interview was conducted. He was brought to the office by a uniformed officer attached to the Pinetown Police Station, who was neither Constable Mzimela, nor Warrant Officer Sokhela;

- (c) when Nkosiyanda arrived, the Major-General introduced himself, Nkosiyanda sat down, and the Major-General himself shut the door to the interview room. No other persons were present during the interview, and no officers were standing at or near the door, who could have, or did have, any influence whatsoever on the statement made by Nkosiyanda;
- (d) Nkosiyanda made the statement freely and voluntarily, without any influence or pressure being exerted upon him by any person, and although the questions asked of Nkosiyanda may have differed slightly in wording from those contained in a pro-forma confession document, his essential constitutional rights were protected, and that no pressure of any kind was used to influence his responses;
- (e) had Nkosiyanda indicated that he was under any form of pressure or fear of later consequences should he not comply with instructions, the Major-General would have made a note of such protests, or terminated the interview;
- (f) Nkosiyanda was not told to sign an already completed, or partly-completed, document – the Major-General would simply never have compromised his position and authority by taking instructions from two-such lower ranking officers as Mzimela and Sokhela, and would never have allowed them to be near Nkosiyanda or to threaten him in his presence; and
- (g) all the questions he asked of Nkosiyanda were communicated firstly in English, then in the Zulu language, and then recorded in English.

[29] In assessing the evidence of the Major-General, the probabilities overwhelmingly favour the proposition that he would never have allowed two junior officers to threaten and intimidate a witness in the manner suggested by Nkosiyanda. To have done so, would have so compromised his authority, that it would have rendered his authority as a very senior officer, nugatory. This would have

been compounded by the presence of the photographer, because it was suggested that the threats were made from the outset (when we know the photographer was present).

[30] The next witness was Sergeant (formerly constable) Cyril Sizwe Sokhela, a member of 16 years' standing, deployed in the Organized Crime Unit in the Western Cape, and seconded to the task team dealing with political killings in KwaZulu-Natal. He had worked on the team headed-up by General Khumalo, together with the then Sergeant Mzimela since the 18th July 2018.

[31] His involvement in the arrest of Nkosiyaanda may be summarized as follows:

- (a) acting on information received, Sergeant Sokhela and members of the team, including Warrant Officer Mzimela, established the whereabouts of the Toyota Corolla – it turned out that the vehicle belonged to the older brother of Nkosiyaanda, one Induna Ndlovu (not to be confused with Mhle);
- (b) they were informed by him that Nkosiyaanda would have used the Toyota on the days concerned. He then accompanied members of the combat unit to the home of Nkosiyaanda in Greytown, where the combat team members arrested Nkosiyaanda. At Greytown, Nkosiyaanda was transferred to a Hyundai H1 vehicle, and transported back to the Pinetown Police Station, whilst Sergeant Sokhela and Warrant Officer Mzimela returned Induna Ndlovu to his home in their vehicle. Sergeant Sokhela and Warrant Officer Mzimela then returned to the Pinetown Police Station. What happened to Nkosiyaanda after he was transferred to the Hyundai H1 to be taken to Pinetown, was not within the knowledge of Sergeant Sokhela;
- (c) neither he, nor Warrant Officer Mzimela were present when Nkosiyaanda was interviewed by Major-General Ngwenya, and the version of them threatening Nkosiyaanda from the door-way of the

interview room in the presence of the Major-General was denied in its entirety; and

- (d) at the time, he, Warrant Officer Mzimela and Sergeant Dlamini were seated in a motor vehicle in the parking area at the back of the Pinetown Police Station. They also deny having been in any way involved in the alleged assault of Nkosiyaanda near some offices on the outskirts of Greytown.

[32] Warrant Officer Mzimela then testified that he was part of the same unit, and worked together with, Sergeant Dlamini and Sergeant Sokhela. He confirmed the evidence of Sergeant Sokhela about the arrest of Nkosiyaanda, and denied the making of any threats to induce Nkosiyaanda to sign any document before Major-General Ngwenya. He also denied the suggestion that he had taken Nkosiyaanda out of his cell, and escorted him to the interview room at the Pinetown Police Station. He confirmed having been with others in a vehicle in the parking lot at the time that Nkosiyaanda was being interviewed.

[33] Although the evidence of both Sergeant Sokhela and Warrant Officer Mzimela were not models of clarity, they were both good witnesses, and their versions fall to be accepted, both because the probabilities strongly favour their version, and the improbabilities in the versions of Nkosiyaanda and Nkosinathi, which we deal with later herein.

[34] Nkosiyaanda then gave evidence, and stated *inter alia*, that it had been evident to the magistrate at his first appearance that he, Mhle and Nkosinathi had all been assaulted. He was then reminded that Nkosinathi had only been arrested sometime after him, and had not been present at his first appearance in court. He told the court that after his arrest he was taken to an area outside Greytown, where he was tortured by police officers for approximately two hours'. The purpose of the assault was that the police wished to ascertain the whereabouts of the murder weapon. Upon arrival at the Pinetown Police Station, he was made to sign an SAP 14A document. On the facts, if this assault happened, it could have had nothing to do

with Sergeant Sokhela and/or Warrant Office Mzimela, as they were returning Inkosi Ndlovu, the brother of Nkosiyanda, to his home.

[35] Nkosiyanda recounted that he was removed from his cell by Sergeant Mzimela, and taken to the office where Major-General Ngwenya was. As they emerged from his cell, Warrant Officer Mzimela was waiting for them, and both officers threatened him that should he not sign the documents to be put before him, there would be repetition of what happened in Greytown when he was tortured. Both Sokhela and Mzimela repeated the threat in front of Major-General Ngwenya when he placed the documents before Nkosiyanda, who signed the documents without knowing what they were, and only did so because of the threats made to him. This was never put to the State witnesses by Ms *Maraïs*, in cross-examination of them.

[36] Despite admitting that he was related to Mhle, and knowing his mother, his wife, and the names and nicknames of his children, Nkosiyanda claimed not to know the deceased. In the context that Nkosiyanda is the nephew of Mhle, and given the local make-up of the politics in the area, and his involvement with Mhle, this seems most improbable. When it came to dealing with the identity of Lindokuhle (Doleza), Nkosiyanda was extremely evasive and tried to avoid dealing with his identity. Doleza Ndlovu's name is, however, mentioned in the (then) redacted document – questions asked of Nkosiinathi regarding the identity of Doleza were only permitted by me because Nkosiyanda was the source of the name, and this was several months prior to the recovery of the firearm, when the police officers investigating had no knowledge of the whereabouts of the firearm, or, apparently, its origins. In addition, the matter of the white plastic bag/wrapper, inside which the gun was contained – could only have been known to Mhle, Doleza, Nkosiinathi and Nkosiyanda. The State accordingly submitted that the information regarding Doleza could only have come from Nkosiyanda. This was even after Nkosiyanda had denied ever knowing the name 'Doleza' and being extremely evasive when asked about Lindokuhle being a son of Mhle.

[37] Nkosiyanda conceded that he had told his legal representative that he was threatened to sign the document. His error in suggesting that the learned magistrate at his first appearance could see that all three of them had been assaulted was

telling in revealing his credibility. Nkosiyanda insisted that the magistrate could see that he had been assaulted – after being asked five times how he did so, Nkosiyanda changed his version to say that the magistrate had been told so by his counsel.

[38] I have perused the document entitled ‘Statement Regarding Interview with Suspect’ which was completed by Major-General Ngwenya, and signed (with thumb-print) by Nkosiyanda and the Commissioner of Oaths. Despite its inappropriate nature, and the unimpressive evidence of Major-General Ngwenya, all the warnings necessary for the taking of a confession appear to have been covered by the document. Nkosiyanda was a poor witness, and clearly unable to deal with his knowledge of Lindokuhle/Doleza, despite his desperate attempts to do so.

[39] I accept the statements of Sergeant Sokhela and Warrant Officer Mzimela and reject the contrary evidence of Nkosiyanda, that they were not present at the interview room when Nkosiyanda was interviewed. In all the circumstances, we find that the State has proved, beyond a reasonable doubt, that the statement of Nkosiyanda was freely and voluntarily made when he was in his sound and sober senses, and without being unduly influenced thereto, and is accordingly admissible against him in these proceedings.

[40] The State then sought to prove the two statements against Nkosinathi – the alleged confession made at 12:50 pm on the 19th November 2018, and the pointing-out conducted later the next day from 2:45 pm. Mr *Khumalo*, then appearing for Nkosinathi, made the following statements regarding the objections to the admissibility of the two documents;

- (a) the confession and the pointing-out were made under duress after Nkosinathi was assaulted by police members;
- (b) the names of the officers responsible for the assaults were unknown;
- (c) the assaults took place at various places – including, at his girlfriend’s home when he was initially arrested;

- (d) what is in issue is the admissibility of the statements, and not the accuracy thereof;
- (e) the second assault took place at KTT Mariannridge (accepted by all to intend to mean KTT Mariannhill) ('KTT') – it is common cause that it was the former base of the Public Policing Order Unit, although it was partly abandoned or used only for storage;
- (f) Mr *Khumalo* then changed his instructions to state that the names of the officials who assaulted Nkosiyanda, as being Constable Sokhela and Sergeant Mzimela;
- (g) after being assaulted at KTT, he was taken back to the home of his girlfriend to recover his cell-phones, and then to the home of his parents to obtain a fresh change of clothing, because the clothes he was wearing 'had blood all over it as a result of the assault'. He was taken to a doctor who asked about the visible injuries on his body, and he reported the assaults to police officials;
- (h) he intended to call his father, Fisokuhle Nojiyeza, his girlfriend, Sindisiwe Mnyandu and his aunt, Khanyile Sibisi, all of whom witnessed his blood-stained condition;
- (i) he was taken to the Cato Manor Police Station, where an arrangement was made for him to make a statement, whereafter he was taken to KwaNdengezi, where he was instructed to stand and point at certain areas; and
- (j) whenever he refused to point at something he was told to point at, he was assaulted and threatened and reminded that he could be taken back to KTT – these assaults/threats were made by seven or eight police officers who were present at the pointing-out, and he could not take note of exactly who did what.

[41] At the request of the State, Mr *Khumalo* confirmed my understanding of what he had placed on record concerning the confession – that the contents were not disputed, only the fact that the statement was made freely and voluntarily was disputed! Despite the initial omission by Mr *Khumalo* of suggestions of assault, I will not regard this aspect as prejudicial to Nkosingathi. This was because of complaints made by Nkosingathi of the conduct of Mr *Khumalo* as his legal representative.

[42] Briefly, the evidence of the State witnesses was:

- (a) Constable Thamsanqa Siphamandla Msimango was a member of the South African Police stationed with the Durban Public Order Policing Unit. The unit's function was not to investigate crimes, but to assist the detectives and other police personnel in carrying out their functions, *inter alia*, by arresting persons regarded as dangerous. Their unit was requested to arrest Nkosingathi;
- (b) to that end they proceeded to Nkosingathi's home address in KwaNgqolosi at approximately 11:00 pm on the 18th November 2018. The officers spoke to Nkosingathi's father, who told them that his son was not there. They were then redirected to the home of Nkosingathi's fiancé, Sindisiwe Mnyandu, who confirmed that Nkosingathi was present;
- (c) they entered the house and found Nkosingathi sitting on a bed. Constable Msimango introduced himself, explained the purpose of their visit, and their need to handcuff him. Although there were eight officers present, only Constable Msimango and one other attempted to handcuff Nkosingathi. He resisted; a struggle ensued; he was eventually subdued; his identity was confirmed by the Crime Intelligence members accompanying the Durban Public Order members; he was placed under arrest; and handed over to the members of the National Political Task Team dealing with the matter;

- (d) at that stage there was no blood on the clothing of Nkosinathi, and he had, despite the struggle to handcuff him, suffered no visible injuries;
- (e) in cross-examination, Mr *Khumalo* suggested that Sindisiwe Mnyandu had been slapped by one of the two officers who first entered the room. Nkosinathi had been asleep when the officers entered, and Nkosinathi had not put-up resistance to being handcuffed. Mr *Khumalo* then suggested that Nkosinathi had not put-up any resistance, and there was no further assault upon him, save for a single slap. He never suffered any injuries whilst arrested and in the custody of Constable Msimango. Mr *Khumalo* then asked Constable Msimango to confirm that when he handed Nkosinathi over to the National Political Task Team, he did not exhibit any injuries;
- (f) Richard Ramukosi testified that in 2018/2019 he was a Lieutenant-Colonel in the Hawks, based in Gauteng. He played no role in the investigation of the offences with which the accused are charged in this matter. He first met Nkosinathi at approximately 12:15 pm in office J9 at the Cato Manor Police Station. Nkosinathi was brought to the office by Sergeant Khumalo of the Durban Central Technical Response Team. Mr Ramukosi explained that his purpose was to take a statement from Nkosinathi, that Nkosinathi had no reason to fear any harm, and was able to speak freely to him, and that he was afforded every protection from harm. A J88 document was given to Mr Ramukosi, recording that Nkosinathi was 'swollen on both arms or wrists.' Nkosinathi volunteered that he had sustained the visible injuries during his arrest. He stated that the officers who had kicked him during his arrest were unknown to him, and were not the officers who interviewed him, or brought him to Mr Ramukosi to make a statement. Mr Ramukosi went through the pro-forma questions recorded on the document with Nkosinathi, and recorded his responses. Although the questions and answers are recorded in English, the communications between Mr Ramukosi and Nkosinathi were conducted in the Zulu language, with which they were both conversant.;

- (g) Constable SI Mjadu, from the Local Criminal Record Centre in Richard's Bay, testified that he had taken photographs before the statement was taken;
- (h) when asked by Mr Ramukosi whether he had been assaulted in order to influence him to come and make a statement before Mr Ramukosi, Nkosinathi replied 'not now' and 'not during arrest and when the police was trying to put handcuffs'. The J88 document recorded by the doctor who examined Nkosinathi prior to the interview had no recording of bleeding by Nkosinathi – but noted a swollen right hand, and handcuff indentations on the right and left wrists;
- (i) the interview was completed at 2:48 pm, and Nkosinathi was handed over to the person who had brought him to Mr Ramukosi, at 2:50 pm. No questions were posed to Mr Ramukosi in cross-examination;
- (j) Captain Nkosinathi Fortune Ncube testified that on the 19th November 2018, he was a member of the South African Police Force stationed at Mpumalanga, Hammarsdale, KwaZulu-Natal, and was requested by Captain Kortman to assist in conducting a pointing-out by Nkosinathi. The process began at the KwaNdengezi Police Station at 11:45 am the next day, when he completed a pro forma pointing-out document for Nkosinathi. The questions and answers, though recorded in English, were communicated to, and replied to the Zulu language;
- (k) responses in the pro forma document included numerous responses by Nkosinathi denying that he was assaulted to induce him to conduct a pointing-out; and
- (l) the cross-examination of Captain Ncube by Mr *Khumalo* for Nkosinathi was very brief, and related almost solely to the procession of motor vehicles going to the pointing-out. Captain Ncube had insisted that there were only two vehicles, whereas it was suggested that there were

three vehicles. In addition to the double-cab containing a driver, Captain Ncube and Nkosinathi, the photographer travelled alone in his VW Polo. Captain Ncube denied the presence of a second double-cab containing many armed officers. Mr *Khumalo* also put to the witness that Nkosinathi was threatened that what happened to him at KTT would be repeated if he did not co-operate.

[43] It was alleged that Sergeant Sokhela, Warrant Officer Mzimela and Sergeant Dlamini received Nkosinathi from the Public Order Policing Unit, and they were involved in the allegations of intimidation and assault in respect of both Nkosiyanda and Nkosinathi. Their evidence is that they sat down to interview Nkosinathi, who was angry because he said that the officers who arrested him had assaulted him when doing so. What was evident to Sergeant Sokhela was that Nkosinathi's wrists were swollen. The interview lasted approximately an hour.

[44] According to Sergeant Sokhela, the interview led to the detectives returning to the home of Nkosinathi, and then back to the Pinetown Police Station, and a further interview, after which Colonel Khumalo was requested to make efforts to secure the services of an officer for the purpose of taking a confession. Sergeant Sokhela then pointed out that the SAP14A document incorrectly recorded that the document was signed at KwaNgcolosi, when, in fact, it should have read Pinetown SAP.

[45] An extract from an Occurrence Book was adduced in evidence, recording that at 7:50 am, Nkosinathi was 'kept for safekeeping'. Sergeant Sokhela stated that he had done this at Pinetown. It was put to him that Nkosinathi had never been incarcerated at Pinetown, which the sergeant denied. Despite his emphatic statement that Nkosinathi had been detained 'for safekeeping' at Pinetown, that response was downgraded under cross-examination to 'If I remember to the best of my ability, yes, it's Pinetown'. It eventually turned out that the extract was from the Occurrence Book at Cato Manor Police Station.

[46] Sergeant Sokhela insisted under cross-examination that he had only received custody of Nkosinathi at 3:00 am, and not earlier, at approximately 1:00 am, as suggested. He refuted the suggestion, gleaned from the evidence of Sergeant

Msimango, who estimated that he had handed Nkosinathi over to the National Political Task Team somewhere between 12 midnight and 1:00 am, and not as late as between 2:00 am and 4:00 am. It was submitted that this suggestion reinforced the version of Nkosinathi having been taken to KTT and assaulted there. Sergeant Sokhela distanced himself and the whole team from the alleged assaults at KTT.

[47] It was also put to Sergeant Sokhela in cross-examination that, after being questioned at KTT about his cell-phones, Nkosinathi was taken back to the home of Sindisiwe Mnyandu, in order to recover them. Thereafter Nkosinathi was taken to his home to change his clothes. Sergeant Sokhela insisted that they had only returned to Nkosinathi's home after he was handed over to them by the Public Order Policing Unit, in order to attempt to find the murder weapon. Sergeant Sokhela was also adamant that when Nkosinathi was handed over to them, there were no blood-stains on his clothing. He had inspected Nkosinathi for injuries because he had complained of being assaulted at the time he was arrested.

[48] Sergeant Sokhela denied that he had been to the home of Sindisiwe Mnyandu (or Nkosinathi's home), a second time, allegedly to look for Nkosinathi's cell-phones. Mr *Khumalo* again recorded that Nkosinathi's aunt, Khanye Sibisi would speak to this evidence. The suggestion was he was then taken to Cato Manor Police Station, something about which Sergeant Sokhela claimed he knew nothing.

[49] Mr *Khumalo* put to Sergeant Sokhela that Nkosinathi had told Dr S Govender that he had been assaulted between 1:00 am and 8:00 am that day. He also recorded that Dr Govender had called the officers accompanying Nkosinathi to the hospital into the consultation room, and reprimanded them for assaulting Nkosinathi. As Sergeant Sokhela had not accompanied Nkosinathi to the hospital, he was unable to comment. It was also put to him that on subsequent visits to the hospital, officers had been present during his examination, intimidating him into not revealing previous assaults.

[50] Sergeant Mzimela testified that he was present together with Sergeants Sokhela and Dlamini when Nkosinathi was handed over to the Provincial Organized Crime Unit (subsequently the Political Task Team Section) at Pinetown Police

Station. At that stage, Nkosinathi was read his rights at the Pinetown Police Station (from the SAP14A document) by Sergeant Sokhela. Thereafter the three officers interviewed Nkosinathi who was angry because he had been assaulted during his arrest. Thereafter they proceeded to his parental home in KwaNgcolosi, in order to search for a firearm. The search was unsuccessful, but Nkosinathi's cell-phones were recovered from the home of Sindisiwe Mnyandu. Sergeant Mzimela was familiar with the KTT facility, which he said contained (or had previously contained) the offices of the Public Order Policing Unit.

[51] The problem which arises in any analysis of Sergeant's Mzimela's evidence is:

- (a) Constable Msimango testified that he was present at the arrest of Nkosinathi at approximately 11:00 pm on the 18th November 2019;
- (b) at 1:30 am on the 19th November 2019, Sergeant Mzimela received a phone call informing him that Nkosinathi had been arrested, and was present at Pinetown Police Station;
- (c) he then fetched Sergeant Sokhela who lived nearby, and they drove to a hostel in Klaarwater to fetch their witness, to facilitate the identification of Nkosinathi;
- (d) once identified, Nkosinathi was handed over to Sergeants Dlamini, Sokhela and Mzimela, as the team investigating this case;
- (e) an SAP14A document records that Nkosinathi was notified of his constitutional rights at 3:00 am – there is some doubt whether this meant he was 'detained' at this time, or merely warned then;
- (f) the three sergeants then interviewed Nkosinathi at the Pinetown Police Station;

- (g) they all then proceeded to the home of Nkosinathi's parents, to search for a firearm – that was unsuccessful, and they then proceeded to the home of Sindisiwe Mnyandu to recover cell-phones belonging to Nkosinathi;
- (h) Sergeant Mzimela maintained that three interviews were conducted with Nkosinathi in the early hours of the 19th November – two in Pinetown and one in Cato Manor. His evidence was criticized in cross-examination because, in a statement he made, the sergeant did not mention the second interview in Pinetown. The sergeant clearly saw the first interview as being when reference was made to the cell-phones, and his evidence refers to returning to Pinetown and to Cato Manor for detention, at which stage further discussions were held with Nkosinathi; and
- (i) Sergeant Mzimela estimated that the first interview lasted approximately an hour, taking the time they left for KwaNgcolosi to approximately 3:30 am - 4:30 am. He estimated the journey to recover the cell-phones and the search for a firearm as taking more than three hours', then another hour for the visit to the KwaNdengezi Police Station and the return to Pinetown. Thereafter, 25 minutes would have sufficed to reach Cato Manor Police Station.

This meant that they would not have arrived at Cato Manor Police Station to conduct the final interview much before 9:00 am, which results in a discrepancy, with the Occurrence Book entry at Cato Manor recording that Sergeant Sokhela delivered Nkosinathi 'for safekeeping' at 7:50 am. The time discrepancy created by the Cato Manor log-book does not assist the defence allegations of assault. The time-line of events that morning is open to mistakes of timing, which do not indicate the probability of Nkosinathi having been assaulted.

[52] On the 4th October 2021, both the attorney and counsel for Mhle were granted leave to withdraw as representatives of Mhle. Mr Louwrens de Klerk placed himself on record as the attorney of Mhle, and represented him throughout the trial

thereafter. Nkosinathi then sought to replace his attorney with Mr M Hardeo from the 11th April 2022.

[53] At the request of Mr Hardeo, Warrant Officer Derick Bongani Myeni was called to speak to the photographs he had taken in the room where Nkosinathi was interviewed by Captain Ncube, both before and after the interview. He also testified that he had taken the photographs of the pointing-out by Nkosinathi. His memory of events was not a model of clarity, but he was adamant that Nkosinathi had not been assaulted or threatened in his presence, either in the interview room, or at the scene of the pointing-out. His evidence emerged unscathed by cross-examination. He confirmed the suggestion by Nkosinathi that three vehicles went to the pointing-out (and not two, as testified to by Captain Ncube). The third vehicle, contained approximately eight police officers, who, curiously, although there to ensure that Nkosinathi did not escape, sat in their vehicle throughout the pointing-out.

[54] Warrant Officer Myeni recalled that the only person who came into the interviewing room beside himself and Captain Ncube, was Warrant Officer Khoza, who delivered Nkosinathi to Captain Ncube. He also recalled that after returning from the pointing-out, that Captain Ncube told Nkosinathi that further photographs would be taken. Warrant Officer Myeni did so, and then left.

[55] Nkosinathi then testified in the trial-within-a-trial, and his evidence may be summarized as follows:

- (a) he related the circumstances of the phone call from his aunt to warn him that police officers were on their way to Sindisiwe's house;
- (b) the police officers arrived whilst he was awake, and they assaulted both he and Sindisiwe. He sustained minor scratches during the scuffle to handcuff him and to get him and/or Sindiswe to disclose the whereabouts of the firearm. They then took him to Pinetown Police Station and handed him over to the National Political Task Team;

- (c) his failure to satisfy the questions put to him, led him to be taken to KTT and further assaulted there;
- (d) at 4:25 am, he was taken back to Sindisiwe's home, where she gave the police officers two cell-phones. He was then taken to his father's home at 5:25 am. The police officers asked his father for a change of clothes, which he was given;
- (e) both Sindisiwe and Nkosinathi's father could see his scuffed and bloody t-shirt, and the fact he was injured. He heard his father asking the police officers at which station Nkosinathi would be detained, and they said he would be detained at Hillcrest Police Station;
- (f) he was then taken to Cato Manor Police Station, and instructions were given to the officers at that station that no persons should be given access to him;
- (g) in his cell, Nkosinathi felt unwell, and Warrant Officer Sokhela and Sergeant Mzimela arrived, and he was taken to the RK Khan Hospital. The doctor who examined him asked him who assaulted him, and he told the doctor that it was the police officers who arrested him. Somewhat ambiguously he stated;

'I further told the doctor that the police who had caused severe pain on me were the ones who tubed me.'

- (h) he was then returned to the Cato Manor Police Station. Upon his arrival, he was placed into another motor vehicle where he was questioned by Warrant-Officer Sokhela and Sergeant Mzimela regarding their assault upon him. He was returned to his cell and they asked him to sign a document, which he refused to do. They then assaulted him in the cell. They threatened to take him back to KTT, and eventually he became submissive, and was taken to an office where

there were Constable SI Mjadu, a photographer, and Lieutenant-Colonel Richard Ramukosi;

- (i) Lieutenant-Colonel Ramukosi suggested that they work together in order to convict Mhle, and said that he would be paid R150 000 if he signed the documents before him. When he refused to do so, Warrant-Officer Sokhela and Sergeant Mzimela were called. Nkosinathi was then assaulted and threatened with his life. Eventually he signed and the photographer took photographs of him, and he was returned to his cell;
- (j) in the afternoon he was handcuffed and taken to RK Khan Hospital. The officers spoke to the doctor there, but Nkosinathi was wholly uncertain whether he had in fact been examined by the doctor;
- (k) the next day he was taken to another police station and placed in a cell. Eventually he was taken to a room where he found Captain Ncube and a photographer. He was threatened in the presence of Captain Ncube, and his request to see a lawyer was denied. He was assaulted, and eventually signed the document which was put before him. He was thereafter placed into one of three motor vehicles which proceeded to the area where the pointing-out was conducted. He was again assaulted when he refused to point-out places indicated to him, and he was forced to pose for the photographs; and
- (l) thereafter, he was taken to Addington Hospital where the police officers accompanying him went into the room where he was examined by the doctor. He could not tell the doctor about the assaults because he feared the officers present.

[56] Under cross-examination:

- (a) Nkosinathi gave vague and evasive responses to questions regarding his instructions to his legal practitioners. Initially the court was told that

he did not know the names of the officers who assaulted him. He claimed to have forgotten their names when giving instructions;

- (b) his evidence that he was crying and shaking at the consultation with the doctor is contradicted in the doctor's report which records that he was 'co-operative and calm';
- (c) he said he had no opportunity to tell his father of the assault upon him, because his father just walked past him to speak to the police officers;
- (d) he did not suffer any bleeding as the result of the assaults upon him when he was arrested;
- (e) as the result of the assaults upon him at KTT, blood oozed from his nose, and his t-shirt was stained with blood.
- (f) he claimed to have told the doctor that he was assaulted from 1:00 am to 8:00 am – that is not borne out by what the doctor recorded. In addition, the doctor does not mention his allegedly swollen right eye, or the assault upon him at KTT;
- (g) there was no suggestion of an assault at KTT when Lieutenant-Colonel Ramukosi was cross-examined – Nkosinathi said that this was because he forgot to tell his legal practitioner that he had been assaulted there; and
- (h) in his evidence-in-Chief, Nkosinathi said that at KTT, a motor vehicle arrived, driven by a captain, and Sergeant Mzimela said to Warrant-Officer Sokhela that they had nearly been caught. It was put to him that this was never put to either of the officers when they were cross-examined. Nkosinathi said that that was because he had forgotten to tell his legal practitioner.

[57] Nkosinathi was an unimpressive witness. His vagueness, avoidance of questions, the discrepancies between his evidence and the written recordings of things, and the general improbabilities inherent in his version, render his evidence improbable unless corroborated by other facts.

[58] Fisoqule Alex Nojiyeza testified that he is not the father of Nkosinathi, but rather his uncle, and he had raised and cared for him after his parents died. He confirmed the evidence of Nkosinathi that the police officers came to his home with Nkosinathi to arrange for clean clothes for Nkosinathi – these were a different group of police officials who had arrived the night before and who had been impolite to him (by not acknowledging him as the head of the household, and by unnecessarily damaging property) in making enquiries about Nkosinathi.

[59] Mr Nojiyeza stated that when the police officials arrived to obtain a change of clothes for Nkosinathi, he had seen that he had a reddish and swollen eye, dry blood around his nose, blood stains on his greyish t-shirt (spots), his jeans were dirty and his clothes were full of hair (as if he had been in a cattle or goat kraal), and he had scratches on his wrists.

[60] When Nkosinathi was brought into the house he was not handcuffed. The police officers did not enter the house, and he spoke to them whilst Nkosinathi was changing. He complained to them about his treatment by the police officials who had visited during the night. He never had a chance to speak to Nkosinathi.

[61] In cross-examination it emerged that:

- (a) in all the time since Nkosinathi's arrest, he had never visited or spoken to him until he saw him at the trial;
- (b) Mr Nojiyeza was adamant that Nkosinathi was in leg-irons when they arrived – a fact not mentioned by Nkosinathi;
- (c) leg-irons would have to have been removed if he was there to change clothes – a factor not mentioned by Mr Nojiyeza; and

- (d) Mr Nojiyeza was unable to give a satisfactory explanation for his failure to raise the matter of Nkosinathi's injuries with the police officials.

[62] Mr Nojiyeza was not a good witness, and had to be reminded to answer the questions asked of him, and not to prevaricate. One gained the distinct impression that his evidence was told to him by others, and he was merely seeking to protect his nephew.

[63] Ms Tracy Sindisiwe Mnyandu told the court that she was the fiancé of Nkosinathi and the mother of his children. When the police officials arrived to arrest Nkosinathi, they had pushed and slapped him. She left the house with the children and took them to her mother. Upon her return she witnessed the police pouring water over Nkosinathi. They demanded the firearm and slapped him. When she tried to intervene, they slapped her as well (on more than one occasion). She saw the police place plastic bags over the head of Nkosinathi, and pull them tight.

[64] In cross-examination:

- (a) Ms Mnyandu initially stated that when the police officers entered her home, they pushed her aside and then went to Nkosinathi. In cross-examination the issue of her being slapped by a police officer was raised, and she then said that she had forgotten about that slap in her evidence-in-chief;
- (b) in cross-examination she was unable to explain why she did not see that the police officials placed leg-irons on Nkosinathi immediately after they handcuffed him. She also did not see the leg-irons when he was leaving her house;
- (c) during the arrest of Nkosinathi, the police officers only referred to the presence of a firearm, and she was not insulted by the police officers as stated by Nkosinathi;

- (d) when she saw Nkosingathi in the morning when he arrived with police officers, he did not have a red right eye. She stated that Nkosingathi's face was swollen, but forgot to mention that his hands/wrists were swollen; and
- (e) Ms Mnyandu initially stated that in the morning, Nkosingathi's t-shirt was wet and muddy, and that his nose was oozing blood. She did not mention blood on his t-shirt until it was raised in cross-examination. In addition, Nkosingathi made no mention of mud on his t-shirt.

[65] It is true that there were discrepancies in the State case, but they were not sufficient to disturb the probabilities. We appreciate that each of the trials-within-a-trial are to be assessed separately, but there is a probability which arises from the respective versions: the fact that a Major-General and a Lieutenant-Colonel, unconnected to each other, would have risked allowing the assaults in their presence contended to have been committed by more junior ranks, with the associated risks to their careers. We regard that as being highly improbable. We accept the over-zealous treatment of Nkosingathi by the police officers who arrested him, but they belonged to another unit, which was tasked with the dangerous function of effecting the arrest of persons who are, themselves, regarded as dangerous. Their conduct seemed excessive and unlawful, if the allegations of torture were to have been true. The alleged torture took place after Nkosingathi was under control and handcuffed. However, Nkosingathi himself said repeatedly that that incident had no bearing on his attitude to making a statement.

[66] Given the contradictions, vagueness, and uncertainty of Nkosingathi's evidence; the differences between his evidence and that of his father and his fiancé which were not adequately explained; the improbabilities in the evidence of his father and his fiancé; and the fact that they were both poor witnesses, I find that the State has proved that the confession and pointing-out by Nkosingathi were freely and voluntarily made.

[67] Messrs Mhle, Nkosiya and Nkosingathi then testified, and their evidence is set out in the record. They were all very poor witnesses who were vague and

evasive on all important issues. Their evidence was uniform in that they all deny the material evidence of the State, and rely on alibis. The correct approach to assessing these alibis is to consider them in the light of the totality of the evidence, and the court's impression of the witnesses. The alibis were not, as I understand the position, given to the State in advance of the trial, and were raised in evidence for the first time, all three accused having reserved their right to silence. I shall not draw any inference against the accused in that regard, and shall treat it as a neutral factor. Although the State bears the onus of establishing the guilt of an accused, if the court is of the view that the alibi might reasonably be true, then the State will not have discharged its onus.

See: *S v Khumalo en Andere* 1991 (4) SA 310 (A) at 327H.

The correct approach in determining guilt in a criminal trial, is set out in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15:

'The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.'

[68] Mhle's alibi was vague and uncertain, lacking in any detail whatsoever. However, matters fell apart for him when he was informed of the fact that children

had seen persons, who could only have been Nkosiyanda and Nkosinathi attempting to conceal the firearm in the chicken run. The further evidence against Mhle is:

- (a) Celani's evidence of what happened at the shishanyama, and the extra-curial admissions of Mhle when he said he had sent Nkosiyanda and Nkosinathi to kill the deceased, and that they had caused a problem in negligently concealing the firearm;
- (b) the direct evidence that the firearm and the white plastic bag were handed over to Mhle at his mother's residence;
- (c) the attempts to frustrate the police by the removal of his mother's SIM card;
- (d) Celani then passed the deceased's home and he saw the police, confirming the other evidence that the deceased had just been killed. This ties-up with what Mhle said;
- (e) the next day, at the request of Mhle, Celani went to meet Mhle at his house, and he asked Mhle about the murder. Mhle related that he knew about the ANC meeting and that the deceased would be there. He said he had instructed Mzi to phone him when the deceased was going to his home; and
- (f) Mzi testified that Mhle instructed him to watch for the deceased and to phone him as soon as left the meeting. Mzi saw the deceased and phoned Mhle and told him. Mhle told him to leave the area in case he was injured. Mhle heard shots and later saw the police and the crowds outside the home of the deceased.

[69] The evidence ultimately leads to the drawing of an inference, which is consistent with the facts, and on the probabilities, the only reasonable inference to draw – that, *inter alia*, the three accused planned to murder the deceased, and did so. The animosity between the deceased and Mhle provides the background for

what followed, and the case for Mhle is not helped by the fact that the witnesses which his legal representatives said would be called to nullify this animosity, in so far as it relates to the meeting, were not called. That they were listed as State witnesses is irrelevant where the defence specifically records that they will be called. The history of the ill-will between the deceased and Mhle is clearly demonstrated by the evidence of Mrs Nxumalo, who gave direct evidence of his attempt to corrupt the deceased, who steadfastly resisted those attempts.

[70] The evidence of Celani and Mzi corroborate each other regarding the animosity at the meeting, and the statements by Mhle after the meeting which were interpreted by both to mean that Mhle would kill the deceased, or have him killed. In the context of the evidence, and the previous plots by Mhle, those statements could only have meant that he would, or would have, the deceased killed. Mr De Klerk submitted that the evidence of one s 204 witness could not be used to corroborate the evidence of another s 204 witness. No authorities were relied on for this submission, and I do not accept it as being part of our law.

[71] In assessing the evidence of all the s 204 witnesses, we have considered the caution to be applied thereto, both because they may be single witnesses to parts of their evidence, and because they were accomplices to one or more of the charges. The evidence of Mzi is compelling because he fully admits his participation in the plot and its execution. He does not implicate Nkosiyaanda or Nkosinathi in any way, when he could easily have done so.

[72] We have no doubt that Celani and Mzi gave their evidence frankly and honestly, and accordingly are entitled to the indemnity in terms of s 204 of the Act. The evidence of Sphephelo does not establish a link between Mhle and the firearm, even if I accept that Mhle wanted Sphephelo to persist in maintaining to the police that that the firearm was his. Other inferences may be drawn here. I am of the view that Sphephelo is also entitled to an indemnity in respect of counts 3 and 4 in terms of s 204 of the Act.

[73] The evidence against Mhle clearly implicated him in all four counts. His evidence was a bare denial of the direct evidence of the State witnesses. The only

concession he made was that at the third meeting in Pinetown he had phoned Celani and told him to fetch Nkosinathi. He was extremely evasive in recounting his alibi. In the almost five years since the murder, he has had every opportunity to recall where he was, who was with him, and what he/they were doing. The murder was a dramatic event in the community, and he must have known from the outset that he was a probable suspect, especially from his arrest two months' later. The establishment of his alibi was crucial to his defence. In not doing so, his failure to call his mother as a witness is not held against him, because she has since passed away. The same thing cannot be said for Mhle's wife. Given that he was such a poor witness, we have no hesitation in dismissing his evidence as false beyond a reasonable doubt, and in convicting him on all four counts.

[74] Nkosiya's evidence was a denial that he was in any way involved in the plotting or killing of the deceased. His evidence, however, stands in stark contrast to the admissions made in his statement to the police. That statement is not a confession to the four charges, but the extra-curial admissions made in the statement were ruled to be admissible. They implicate Nkosiya in the commission of the killing, where he admits that he and Nkosinathi received the firearm, he dropped Nkosinathi off at the spot designated by Mhle, and after the shooting went to fetch him. Thereafter they dropped off the firearm at Mhle's mother's home, and then returned to the shishanyama, where Nkosinathi admitted to all present that he had shot the deceased,

[75] The only part of his involvement not admitted in his statement is his knowledge of the identity of the deceased as the person who would be shot by Nkosinathi, and any involvement in the planning. However, he must have known that he was dropping Nkosinathi off to go and shoot somebody. If he wished to rely on that defence, then he was bound to have confirmed the extra-curial admissions in his *viva voce* evidence, and then explained his innocence. He failed to do so, and elected to lie about his involvement. The inference that he was involved in the planning of the deceased's killing is then the only reasonable inference, is entirely consistent with the facts, and he is guilty on all four counts.

[76] Given the extra-curial admissions of Nkosinathi which have been ruled to be admissible, and the direct evidence of Celani, Nkosinathi clearly had a case to answer. His evidence, however, was so poor that it cannot be accepted as reasonably possibly true. Those admissions include:

- (a) that he knew Mhle, who asked him to meet him in Pinetown, and when they met, he was in the company of Nkosiyaanda;
- (b) he was asked by Mhle to kill the deceased because he was quarrelling with the deceased over land issues;
- (c) Mhle then drove Nkosinathi to KwaNdengezi, and pointed out to him the home of the deceased;
- (d) he and 'another tall person' were dropped off near the home of the deceased at approximately 7:00 pm;
- (e) they waited in a rondavel near the home of the deceased;
- (f) Mhle phoned him to say that the deceased was arriving;
- (g) he heard the deceased greet other persons on the street;
- (h) after the shooting, he went to the home of Mhle, and Nkosiyaanda came to fetch them and took them to the shishanyama; and
- (i) whilst there Mhle received a phone call that someone found the firearm and gave it to his wife.

[77] Those extra-curial admissions and the direct evidence of Celani (confirming much of what was told to the court) created a case for Nkosinathi to answer. His denials amounted to an admission that he knew Mhle because he wished to purchase land from him. He claimed to have desperately tried to contact Mhle, but when he did so, he never asked for details of the land he wanted to purchase, nor

the sizes available, nor the prices for those plots, nor anything else relating to them. Indeed, his evidence was woefully lacking in any substance. It falls to be dismissed as false beyond a reasonable doubt.

[78] Mr Seedat, who appeared for Nkosiyaanda, submitted that his statement to the police was exculpatory, and it was not a confession. He made no concession, however, that the statement contained extra-curial admissions, which would be admissible against Nkosiyaanda.

[79] With regard to the alternative to count 3, it was accepted by all that the murder weapon had had its serial number filed off. The firearm accordingly falls within those listed in s(4)(1)(f)(iv) ('a prohibited firearm') of the Firearms Control Act, 2000.

[80] All three accused knew of the intention of Mhle to have the deceased murdered. All three knew that, to achieve that end, he would be shot. Whilst they individually may not have all known all the particulars of the plot, they knew that their conduct on the 3rd of September 2018 would lead to the murder of a person – the exact knowledge of the identity of the deceased was not necessary to establish guilt, and the functions of one person in such a conspiracy are the functions of all, as established by the evidence before us. Their conduct falls within the ambit of s 18(2)(b) of the Riotous Assemblies Act, 1956. They were all aware which firearm that would be – Mhle provided it, Nkosiyaanda saw it delivered by Doleza, and Nkosinathi saw the firearm being handed over – all knew the purpose for which it would be used.

[81] There is an issue which I wish to raise, concerning the conduct of the South African Police and/or any forensic experts who attended the scene of the murder. Collectively they did not perform their functions. They recklessly left parts of the late Mr Nxumalo left lying on the road when they left the scene. It then became the most unfortunate task of Mrs Nxumalo to collect them, and store them until the funeral, and then to re-unite them with the body of the deceased. This was extremely important to Mrs Nxumalo, in line with her religious and cultural beliefs. In this regard the grossly incompetent, careless, and insensitive conduct of the members present

at the scene of the murder gave Mrs Nxumalo a great deal of anxiety and distress. This was something which should never have happened.

[82] In all the circumstances, I make the following order:

- (a) Celani Dlamini and Mzikayise Makhubalo are hereby indemnified in terms of s 204 of the Criminal Procedure Act, 1997 ('the Act'), from prosecution on counts 1-4 as listed in the amended indictment.
- (b) Sphephelo Goodboy Ndlovu is hereby indemnified in terms of s 204 of the Act from prosecution on counts 3 and 4 (including the alternative to count 3), as listed in the indictment.
- (c) The Clerk of this court is directed to deliver a copy of this judgment to the Commissioner of Police for KwaZulu-Natal, and to refer to the Commissioner in particular, the contents of paragraph 81.
- (d) Messrs Felokwakhe Fanuel Mhle Ndlovu, Nkosiyanda Ndlovu and Nkosinathi Mbambo are convicted on count 1 (conspiracy to commit murder), count 2 (the murder of Thulani Lawrence Nxumalo), the alternative to count 3 (unlawful possession of a prohibited firearm), and count 4 (unlawful possession of ammunition) as set out in the amended indictment.

Lopes J

K. Mehta (Assessor)

Dates of hearing: 12th, 13th, 14th, 15th, 19th, 20th, 21st, 22nd, 26th, 28th, and 29th April 2021, the 10th, 11th, 12th, 13th and 14th May 2021, the 4th and 7th May 2021, the 20th October 2021, the 11th, 12th, 13th, 14th, 19th, 20th, 21st, 26th April 2022, the

12th, 14th, 24th, and 26th October 2022, the 11th, 12th, 13th,
14th, 17th, 18th, 19th, and 20th April 2023.

Date of judgment: 26th April 2023.

For the State: Mr L Gcaba/Mr Gcweka assisted by Mr Shange.

For the first accused: Mr L de Klerk.

For the second accused: Mr AS Seedat

For the third accused: Mr H Hardeo.