

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT**

Case no: **CCD52/2021**

In the matter between:

THE STATE

and

SMANGA PHAKATHI

FIRST ACCUSED

SIPHO RICHARD MTHEMBU

SECOND ACCUSED

SIBONELO MABOSI SIHLONGONYENE

THIRD ACCUSED

JUDGMENT

MOSSOP J:

Introduction

[1] This is an ex tempore judgment.

[2] Mr Smanga Phakathi, Mr Sipho Mthembu and Mr Sibonelo Sihlongonyeni are the first, second and third accused respectively in this matter. I shall refer to them as accused one, two and three respectively. They each face the same three counts, namely a single count of attempted robbery with aggravating circumstances and two counts of murder. These counts have as their origin certain events that occurred at the Pongola Rugby Club (the rugby club) situated in the town of Pongola in Northern KwaZulu-Natal on the evening of 6 March 2020. At approximately 22h00 on that evening, a group of six men with their faces concealed by balaclavas entered a pub situated within the rugby club that rejoices under the name of 'Porra's Pub' and attempted to rob the patrons there present and the pub. Shots were fired and an

alleged robber, Mr Xolani Goodenough Mtshali (the deceased) and a member of the public, Mr Shaun Mathews (Mr Mathews) were fatally wounded.

The application

[3] Before dealing with the pleas tendered by the accused to those counts and the evidence that was then led, it is appropriate for me to deal at this stage with applications that were made by accused one and accused three respectively before they were called upon to plead. Having heard argument from both sides, I dismissed the applications and said that I would provide reasons later. These are those reasons.

[4] But first, some background information relevant to those applications. This court is part of the north east circuit of the KwaZulu-Natal High Court, sitting in Mtubatuba. Before the court decamped from Pietermaritzburg to Mtubatuba for the session commencing on Monday, 26 February 2024, I called a pre-trial conference in Pietermaritzburg with the legal representatives of the parties in this matter and in other matters on the court's calendar for the session. This occurred on Wednesday, 21 February 2024. In attendance at the pre-trial conference in respect of this matter was Mr C Ngubane (Mr Ngubane), who appears for the State, and Mr M Luthuli (Mr Luthuli) who appears for all three of the accused in this matter.

[5] At the pre-trial conference, Mr Luthuli indicated that he intended taking 'a point' before the trial commenced. He indicated that he would accordingly be preparing application papers and would let Mr Ngubane have an unsigned copy of those application papers over the weekend preceding the commencement of the session. He was true to his word and Mr Ngubane received an unsigned copy of the application papers from Mr Luthuli at approximately 11h00 on the morning of Saturday, 25 February 2024.

[6] When the matter was called in Mtubatuba on Monday, 26 February 2024, Mr Ngubane indicated that he had not had an opportunity to consult with the investigating officer regarding the applications and stated that he required time to do so. I agreed to stand the matter down until Tuesday, 27 February 2024 to give him that time.

[7] On Tuesday, Mr Ngubane indicated that he now needed time to deliver an answering affidavit. Mr Luthuli, understandably, indicated that he would then have to reply to the answering affidavit. To afford everyone the opportunity to properly present their respective cases, I stood the matter down until Wednesday, 28 February 2024 on the clear understanding that at some stage on Tuesday (I did not fix a specific time), I would be emailed the contemplated answering and replying affidavits at my place of accommodation. This was not done: I received only the answering affidavit on Tuesday and received the replying affidavits on Wednesday morning before proceeding to court. While this was slightly inconvenient, no significant harm was occasioned thereby and I was able to properly consider both sets of affidavits before argument commenced. I point out that neither side prepared any heads of argument.

[8] What was before me was, in fact, two almost identical applications brought by each of accused one and accused three. Each application had a notice of motion, supported by a founding affidavit to which the same two annexures were attached. The two annexures consisted of a witness statement of a Mr Nkosinathi Mtshali (Mr N Mtshali) recorded in manuscript and a copy of an agreement concluded between the government of South Africa and the government of Swaziland.¹ 'The point' that Mr Luthuli indicated that he would take at the pre-trial meeting, is described in the founding affidavits as being 'a point in limine'.

[9] The identical relief is sought in both applications and reads as follows:

- '1. Declaring that the Applicant's apprehension, arrest and abduction in Swaziland on or about 8 March 2020 and subsequent arrest and detention pursuant thereto, be declared wrongful and unlawful.
2. Declaring that the charge before this Honourable Court is a nullity and setting aside the proceedings before the Court.
3. Declaring that the Applicant is entitled to be discharge (sic) from detention in Qalakabusha Correctional Service Centre.

¹ I am quite aware that the name of Swaziland was changed to 'eSwatini' on 19 April 2018 to mark the country's 50th year of independence. Despite this, the indictment makes reference to Swaziland and not to eSwatini, as do the applicants' notices of motion and founding affidavits. In the interests of consistency, I shall also therefore refer to the country as 'Swaziland'.

4. Directing the Head of Qalakabusha correctional service to immediately discharge the Applicant from detention.'

[10] The founding affidavits in both applications reveal allegations that both the first

and third accused assert that they are citizens of Swaziland. They stated that they resided in Swaziland and that whilst at their separate homes on the evening of 8 March 2020, they were forcibly removed from those homes by men whom they later discovered were policemen from this country. Accused one states that one Captain Mncwango (Capt Mncwango), a member of the South African Police Services (SAPS) and a person who featured prominently throughout the trial, was present at his apprehension in Swaziland, but that allegation is not made by accused three. Their respective apprehensions occurred an hour apart on the same day, the first respondent being apprehended at 20h00 on the date aforementioned and the second applicant at 21h00. When they were apprehended, each applicant was gagged and made to walk from their respective home to the border fence between South Africa and Swaziland and made to 'jump' the fence. Waiting for them on the South African side of the border were numerous SAPS officers as well as members of the Pongola Community Forum. They were placed in a motor vehicle and were taken to the Pongola police station where they were detained and from whence they have ultimately ended up before this court facing trial.

[11] The allegations about the place of residence of the first and third accused are not in dispute. The indictment records that:

- (a) The first accused is a South African male aged 26 years who resides at the Lavumisa area, Swaziland; and
- (b) The third accused is a South African male aged 20 years who also resides at the Lavumisa area, Swaziland.

[12] In the summary of substantial facts put up by the state, the following is stated in paragraph 3 thereof:

'Accused 1 and 3 resided in the Lavumisa area, Swaziland. Accused two resided in the Madanyini area, Pongola.'

There can thus be no dispute about where the first and third accused reside. The only dispute is whether that was where they were when they were arrested and whether this court can make such a determination based only on the papers, for it appeared from the outset that there was a factual dispute between the parties.

[13] The state delivered two affidavits in opposition to the applications. Mr Thabiso Dlakude (Mr Dlakude) indicated in his affidavit that he is a director of a security company and a member of the Julukatsotsi Community Policing Forum (JCPF). Mr Dlakude stated that on 8 March 2020, he received information that the suspects who had perpetrated the robbery at the rugby club were hitchhiking along the N2 highway towards Pongola in the vicinity of Sitilo, which is within the boundaries of South Africa. He and other members of the JCPF, but no members of the SAPS, proceeded to the place where it was believed that the suspects would be found. They were, indeed, found there and he and the people that he was with apprehended them. They were then taken by him and his companions to the SAPS at Pongola where they were handed over to Capt Mncwango, who formally arrested them. Capt Mncwango deposed to the second affidavit delivered by the state and confirmed that he had arrested the suspects at the Pongola police station. He had not, as alleged by accused one, ventured into Swaziland to effect his arrest: on Capt Mncwango's version, he had not even left the town of Pongola.

[14] In reply to the answering affidavits, the first and third accused submitted that Mr Dlakude had no authority to represent the state, or the SAPS for that matter, and, so it was submitted that he:

‘... is acting *ultra vires* and I submit that his affidavit is *null and void*.’

[15] It was further argued that, given the fact that Mr Dlakude's affidavit had to be ignored, the content of Capt Mncwango's affidavit was consequently revealed to be constructed on hearsay allegations and is likewise to be ignored. The version of accused one and accused three should therefore be accepted and the application granted.

[16] Dealing with the first point taken in the replying affidavit, namely that Mr Dlakude lacks authority, the point is a singularly weak one. No authority is required by a witness to depose to an affidavit.² This is an elementary concept and cannot excite any controversy, despite the force with which this point was argued by Mr Luthuli. Likewise, the allegations that Capt Mncwango's affidavit is hearsay is bereft of merit. Hearsay evidence is:

'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.'³

Capt Mncwango's affidavit is brief and simply states that the first and third accused were brought to his office by Mr Dlakude who had apprehended them and he then arrested them. That is not hearsay, but is the recordal of his own conduct. Nothing of any merit is therefore to be found in the replying affidavits.

[17] The indictment specifically alleges that the first and third accused are South African citizens. They, however, allege that they are citizens of Swaziland. Immediately a dispute of fact may be discerned. When I inquired why no objective evidence had been adduced by accused one and accused three establishing their Swazi citizenship, Mr Luthuli indicated that they had insufficient time to acquire the documents that would establish this fact. That argument lacked any appeal because the accused have been in custody awaiting trial for nearly four years and have had ample time to formulate their applications and to acquire the necessary documentation to be used in support thereof.

[18] As previously mentioned, accused one and accused three attached to their respective applications an affidavit of Mr N Mtshali. He is the brother of the deceased. The surname 'Mtshali' appears frequently in this matter and several persons have it as their last name. To avoid confusion, I shall continue to refer to the deceased as 'the deceased' and I shall refer to the other Mtshali's mentioned in the evidence by their initial and surname. No disrespect is intended to the deceased by referring to him in this fashion.

² *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 19.

³ S 3(4) of the Law of Evidence Amendment Act, Act 45 of 1988; *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para 30.

[19] Mr N Mtshali's affidavit was made before Capt Mncwango. It appears to be a damning narration of the participation of the accused in the events at the rugby club. When I inquired why this particular affidavit had been put up for it did not appear to show accused one and accused three in a favourable light nor did it appear to support the allegations of their abduction from Swaziland, I was informed by Mr Luthuli that it had been attached to the two founding affidavits to establish the presence of accused one and accused three in Swaziland on the date of their arrest, being the evening of 8 March 2020. I invited Mr Luthuli to point out where in the affidavit of Mr N Mtshali that was stated to be the case. After several minutes, he indicated that he could not do so. That is not surprising, because the affidavit deals primarily with events that occurred on 6 and 7 March 2020. Why it was attached to the founding affidavits of the first and third accused is accordingly not clear.

[20] Mr Luthuli relied heavily in his argument on the matter of *S v Ebrahim*.⁴ That matter involved a kidnapping from Swaziland of a Mr Ebrahim and his subsequent delivery to the SAPS in South Africa. His abduction from Swaziland was later ruled to be unlawful. Its attraction to the defence was manifest. However, there is one distinguishing feature between the facts of that matter and the facts of this matter. Mr Ebrahim fled to Swaziland from South Africa and it was common cause, or at least not disputed by the state, that he was in that country when he was forcefully removed therefrom to South Africa against his will, as the following extract from the reported judgment reveals:

'Die volgende feite soos vervat in albei voormelde aansoeke, is óf gemene saak óf onbetwis.

...

In Swaziland het appellant bekend gestaan as Ahmed Zaheer en ook as Roy Zaheer en hy was aldaar woonagtig op gedeelte 212 van plaas no 188, Dalriach, Pine Valley, in die Umgugu reservaat aan die buitewyke van Mbabane. 'n Manlike Swazi by name van Dumisane Zwane was daar in diens van appellant as tuinier.

Om ongeveer 22h00 op 15 Desember 1986 was appellant in die sitkamer van sy woning voornoemd. Hy en Zwane het gesit en kyk na die beeldradio. Daar was 'n klop aan die voordeur. Zwane het op appellant se versoek gaan kyk wie dit was en het die deur oopgemaak. Twee swartmans het buite gestaan.'

⁴ *S v Ebrahim* 1991 (2) SA 553 (A).

[21] The fact that it was not disputed that Mr Ebrahim was taken from his home in Swaziland and brought to South Africa distinguishes *Ebrahim* from the facts of this matter. In this matter, it is disputed by the state that accused one and three were in Swaziland at the time of their apprehension.

[22] The dispute about where accused one and accused three were when arrested permeates their applications. Instead of delivering a plea in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 (the Act),⁵ the applications were delivered. It must have been apparent to accused one and accused three that there were disputes of fact: the very essence of the two applications depends on the existence of that dispute. Yet no concern was had for how the disputes of fact were to be resolved on paper and there was no application for oral evidence to be heard before determining the applications.

[23] Mr Luthuli urged me to apply the approach formulated in *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*,⁶ and submitted that if I did so, the inevitable outcome would be that the applications must be granted. That submission seems to me to be based on an incorrect understanding of *Plascon-Evans*, which provides that an application must be decided on the respondent's version unless that version is so farfetched or uncreditworthy that it can be rejected out of hand.

[24] In *National Director of Public Prosecutions v Zuma*,⁷ the Supreme Court of Appeal explained the *Plascon-Evans* principle as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the

⁵ S 106(1)(f) of the Act reads as follows:

'When an accused pleads to a charge he may plead -

(a) ...

(f) that the court has no jurisdiction to try the offence;'

⁶ *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A).

⁷ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[25] As to what a genuine dispute of fact is, in the earlier matter of *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*,⁸ the Supreme Court of Appeal explained that:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him.'

[26] After perusing the application papers and after hearing argument, I was satisfied that the state's version seriously and unambiguously addressed the allegations in the two applications and raised material and bona fide factual disputes. If *Plascon-Evans* was to be applied, as Mr Luthuli urged me it should be, then the application must be resolved on the state's version. The fact that the state admitted that accused one and three reside in Swaziland does not amount to an admission that they were in that country when apprehended.

[27] In the circumstances, I could not find that the versions advanced by the two witnesses for the state who have put up affidavits are so improbable, uncreditworthy or farfetched that they can simply be dismissed on the papers. The denial is not merely a bald denial but is a version populated with facts and details from which a clear picture of how, and more particularly, where, the state alleges that accused one and accused three were arrested.

[28] It is for these reasons that I dismissed the applications.

The plea

⁸ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

[29] Reverting now to the trial, when the three counts were put to the accused, each pleaded not guilty to each count. They specifically did not tender a plea in terms of s 106(1)(f) of the Act. No plea explanation was offered by Mr Luthuli on their behalf but certain admissions were made by the defence in terms of the provisions of s 220 of the Act. Those admissions related primarily to the identity of the two men who perished at the rugby club, the preservation of their bodies after their deaths and their respective post-mortem examinations, all of which were admitted by the accused. It was not disputed that the forensic pathologist recorded the cause of death of Mr Mathews was from a gunshot wound to the left iliac crest of his pelvic bone, which caused him to haemorrhage into the pelvic cavity and cause his death. It was also undisputed that the same forensic pathologist recorded that the deceased died from multiple gunshot wounds to an area just above his umbilicus, the lateral side of his right nipple and the posterior chest wall, causing a right haemothorax and a puncture wound to his right lung and his ultimate demise.

[30] All three accused were apprised by the court of the concepts of competent verdicts and common purpose, which all three indicated that they understood. They were also advised to listen carefully to the evidence and to raise their hand when they wished to attract the attention of Mr Luthuli to give him an instruction on evidence that had been led. Upon a hand being raised, the court indicated that it would alert Mr Luthuli to the need to take an instruction from his client.⁹

The first state witness: Jose Gil Jardim (Mr Jardim)

[31] Mr Jardim is the proprietor of 'Porra's Bar' at the rugby club. He was on duty behind the bar counter on 6 March 2020 at approximately 22h15. He stated that he was seated on a chair facing the door when he saw six men enter the pub, each wearing a balaclava. At that time, he estimated that there were approximately 15 customers in the bar. One of the robbers jumped onto a chair and from there onto the bar counter and pointed a firearm at Mr Jardim. The other five robbers went into the body of the bar near certain pool tables where customers were sitting and drinking. The robbers shouted 'down, down' to the customers and began hitting them

⁹ *S v Mdyogolo* [2005] ZAECHC 3; 2006 (1) SACR 257 (E) page 6.

with the flat side of pangas that some of them wielded. Mr Jardim estimated that two of the robbers had firearms and most of the others had pangas.

[32] Mr Jardim said to the robber standing on the bar counter that he should not shoot and that he was free to take whatever he wanted. He then heard shots emanating from his right-hand side. He testified that he did not turn to see what had occurred because he was facing the barrel of the gun held by the man standing on the bar counter and was afraid that he was to be shot. After the shots were fired, the robbers suddenly fled from the premises and Mr Jardim moved from behind the bar counter into the area of the pub where patrons sit. He observed a white man lying on the ground who had been injured, but who was still alive, and he also observed a black man lying on the ground who appeared to be dead, with a firearm next to his hand. This was the deceased. He was not the man who had been standing on the bar counter pointing a firearm at Mr Jardim.

[33] The injured white man lying on the floor was known to Mr Jardim as Mr Mathews. An ambulance was summoned and a doctor arrived at the pub and Mr Mathews was transported to hospital. He, however, did not survive his injuries and died later that night in hospital. Mr Jardim stated that some of his patrons suffered bruising injuries from being hit with the flat side of the pangas wielded by some of the robbers.

[34] Mr. Jardim said that he was unable to identify any of the robbers because their faces were obscured by the balaclavas that they wore. He indicated that there were closed circuit cameras within the pub and that the hard drive to which those cameras were attached ought to have recorded the images of what had occurred. That hard drive had been uplifted from the pub by a Mr Kurt Stock (Mr Stock), who is apparently a member of the local farmers' forum.

[35] Mr Luthuli cross examined Mr Jardim, albeit briefly. Mr Jardim confirmed that Mr Stock had taken possession of the hard drive and that it had apparently been handed to the SAPS. Mr Jardim confirmed that he did not have the hard drive nor had he himself observed what was recorded on the hard drive. He confirmed that he did not know any of the accused and when the balaclava was removed from the

head of the deceased so that his face could be observed, he did not recognise him as a man that he had previously seen before.

The second state witness: Warrant Officer Themba Knowledge Jele (WO Jele)

[36] WO Jele is stationed at the Local Criminal Records Centre in Vryheid, northern KwaZulu-Natal. He describes himself as being a forensic field worker, photographer, finger printer and draftsman with 13 years' experience. He holds a BSc in biochemistry and he attended the rugby club on the evening of 6 March 2020, arriving there at around 01h00 (which technically meant he arrived in the very early hours of 7 March 2020).

[37] He testified that upon his arrival at the scene, he received an explanation of the events that had occurred and he then commenced looking for exhibits. Once he found them, he marked them and gave them a number and photographed them. The principal exhibits that he discovered were a firearm, spent cartridge cases and some live ammunition. The body of the deceased was still in situ when he arrived and WO Jele accordingly performed a gunshot residue test on his hands (he did not know what the outcome of the test that he performed was).

[38] To the great astonishment of the court, WO Jele testified that he did not dust for fingerprints in the pub because, according to him, there was no surface upon which to check for such fingerprints. Remarkably, he also did not attempt to lift fingerprints from the firearm found next to the body of the deceased because he was told that the deceased had possessed it, which he simply accepted as being true. He did take photographs of the spent cartridge cases where he found them and put them into evidence bags with their own unique serial numbers endorsed upon them.

[39] WO Jele confirmed that he was the author of a photographic album, received by the court. He had taken the photographs that appear therein. He stated that the exhibits that he had found were taken by him to his unit in Vryheid and were locked in a strong room before being sent to the Forensic Sciences Laboratory in eManzintoti, KwaZulu-Natal. He testified that he went to the hospital where Mr. Matthews had passed away and took photographs of his body and his clothing.

[40] In answer to a question from the court, WO Jele confirmed that there was evidence that a firearm other than the firearm apparently possessed by the deceased had been used inside the pub. He was advised later that the owner of that firearm had surrendered it to the SAPS and it was also sent off by him for ballistic testing.

[41] WO Jele's incredible evidence that he had not bothered to dust for fingerprints was correctly explored by Mr Luthuli in cross-examination. WO Jele confirmed that he had been shown the door through which the robbers had entered the pub but had chosen not to check for fingerprints on it because when he saw the door it was already open. Anyone entering the bar, on his understanding, would have had no need to touch the door. He further reasoned that as the door had not been forced open no purpose would be served by checking for fingerprints. He failed to appreciate that he could not have known the state of the door several hours earlier when the robbers entered the pub.

[42] WO Jele confirmed that, as far as he knew, there was no scientific evidence whatsoever that linked any of the accused on trial to the crime scene.

The third state witness: Scott Arden Julyan (Mr Julyan)

[43] Mr Julyan was a patron at the rugby club on 6 March 2020. He was in the company of friends and was seated at a wooden table in 'Porra's Pub.' At about 21h45 he and his friends were finishing their drinks, when he heard a commotion and saw a group of men enter the pub. He observed a man coming towards the table where he was seated and who then moved behind him and began to hit him, the lady that he was seated with and another man seated at his table with a panga. He raised his arms to protect the lady that he was with and was struck by the flat side of the panga. The person hitting him suddenly ran off, which allowed Mr Julyan to stand up. He was armed with his own firearm and he drew it. He observed one of the robbers pointing a firearm at the barman. He then heard a shot and, in turn, fired his weapon at the man pointing the firearm at the barman. He hit him and he estimates that he fired approximately eight to nine shots at the man.

[44] The man that he shot fell to the ground and Mr Julyan then ran up to him. It transpires that the person that he shot was the deceased. Mr Julyan then went outside and followed the robbers as they fled from the pub to make sure that all who remained at the pub were safe. When he returned to the pub, he now observed three men lying on the floor of the pub, namely Mr. Mathews, the deceased and an older, unnamed gentleman. He helped the older gentleman, who was not actually injured, to get to his feet. Mr Mathews, who Mr Julyan knew personally, was injured but was alive and told him that he had been hit in the stomach. Mr Julyan then telephoned his father who had connections with the emergency health services, and requested that an ambulance be dispatched to the rugby club as a matter of urgency. The deceased was not moving at that stage but Mr Julyan indicated that he was loath to come to the conclusion that he was dead. He testified that the deceased's firearm was lying on the floor on his right hand side. He could not see where the deceased had been shot but said that he had a general idea of where he had aimed when he had fired at him. An ambulance then arrived and took Mr Mathews to hospital.

[45] Mr Julyan was still present when the SAPS arrived and he informed them that he had fired his weapon. The SAPS wanted to see his firearm and he surrendered it to them. Approximately one year later he received the firearm back. He was never charged with any offense. Whilst he knew Mr Mathews, he had not been in his company that evening and he was not able to indicate where Mr Mathews had been seated when the robbers burst into the pub.

[46] Under cross-examination from Mr Luthuli, Mr Julyan indicated that he had been drinking and he would therefore not have described himself as being entirely sober, having arrived at the pub at either 18h00 or 19h00. He indicated that he had personally only seen two of the robbers and stated that he had never seen a robber standing on the bar counter as Mr Jardim had described. He indicated that he was not able to identify any of the robbers because their faces were obscured by balaclavas and he agreed with Mr Luthuli that the lighting in the pub was dim.

[47] As regards the shots that he fired at the deceased, Mr Julyan indicated to Mr Luthuli that he had aimed for his 'centre mass'. He denied that there was any prospect of a stray shot from his firearm hitting anyone other than the deceased

because as far as he was aware all the shots that he had fired had hit him.¹⁰ The deceased was standing about 10 metres from him when he fired at him. He confirmed to the court that he had possessed a Gerson MC 28 9mm pistol and that it had been loaded with 15 rounds of ammunition. After the shooting, he had approximately six or seven rounds left in the magazine.

The fourth state witness: Vusi Mathebula (Mr Mathebula)

[48] Mr Mathebula is a resident of Madanyini, Pongola. He testified that he does not know either accused one or accused three, but does know accused two. He knew him because accused two had worked with him as a van assistant prior to his arrest. Mr Mathebula stated that he was the van driver and that the van was owned by a member of his family. He stated that he had known accused two for approximately two or three years.

[49] He testified that on 5 March 2020 at approximately 12h30, he was at home when he received a telephone call from accused two. Accused two indicated that he was calling him from Swaziland and then informed him that he was planning to commit some sort of crime. Mr Mathebula urged him not to do so but did not ask him what crime was being contemplated. Accused two then changed the conversation and said that Mr Mathebula should relax and ended the call.

[50] Mr Mathebula said that accused two did not reside in Swaziland but went there from time to time in order to purchase dagga to sell.

[51] Mr Mathebula testified that the next time that he spoke to accused two was on 7 March 2020, when accused two arrived at his home at approximately 19h30. After exchanging greetings, accused two asked Mr Mathebula if he had heard about something that had happened at the rugby club. Mr Mathebula said that he had heard something about a white man being killed there. Accused two then indicated that it was time for him to go to sleep and he went to sleep in another building at Mr Mathebula's family's homestead.

¹⁰ The post mortem performed on the deceased revealed fewer than eight or nine bullet wounds.

[52] On 8 March 2020, Mr Mathebula further testified that accused two had knocked on his door and asked him for a cigarette. While smoking together, accused two said that there was a problem: he confessed that he was one of the people who had been at the rugby club. Mr Mathebula asked him who he was there with and certain names were mentioned, including 'Bhungu' and 'Mhlobongi Mtshali'. The latter is a reference to the deceased. The witness said that he did not know these people and he never ascertained what role accused two actually played in the events at the rugby club. Mr Mathebula asked accused two what was going to happen and received the response that he was thinking of simply running away. Mr Mathebula mentioned to accused two that he could not do that because he was still 'signing'. This was a reference to the fact that accused two was still on parole after having been released from prison. They then carried on watching television.

[53] Mr Mathebula testified that as far as he knew, accused two was arrested on 9 March 2020. He received a telephone call from someone who informed him of his arrest. He indicated that his relationship with accused two was a good one. He, however, could not recall accused two's telephone number but was sure that it was a Vodacom number.

[54] Mr Luthuli cross-examined this witness. He asked Mr Mathebula why he had not reported to the SAPS that accused two was intending to commit a crime. The unsurprising answer was that the witness stated that he did not know for certain that he was actually going to commit a crime. Mr Luthuli then asked how the SAPS had known about the confession that accused two had made to him. Mr Mathebula's answer was initially not clear. He ultimately agreed that he had deposed to a statement to the SAPS. Under some considerable pressure from Mr Luthuli, Mr Mathebula indicated that accused two must have informed the SAPS after he was arrested that he had spoken to him. It was then put to Mr Mathebula that the telephone number belonging to accused two had been given to him by Capt Mncwango. Mr Mathebula initially could not remember this to be the case. Later, when the question was repeated, Mr Mathebula denied this to be the case and stated that, in fact, he had given Capt Mncwango accused two's telephone number.

[55] Mr Mathebula was also put under pressure when asked about who had told him about the arrest of accused two. His answer had initially been that he could not remember. Ultimately, his statement to the SAPS was proved by Mr Luthuli and it revealed that it made mention of the fact that his mother had telephoned to inform him of accused two's arrest. Mr Mathebula explained that this was not actually a reference to his true mother but was a reference to a female person. He then agreed that the paragraph in his statement dealing with the telephone call that he received was incorrect. Dealing with the telephone call that accused two allegedly made to him from Swaziland, the witness confirmed that the telephone number that appeared on his cellular telephone did not have a Swazi dialling code.

[56] The court asked Mr Mathebula why accused two would have shared with him the information concerning his upcoming criminal activity. He could not explain this. Mr Luthuli put it to the witness that he had been put up to giving false evidence implicating accused two by the SAPS. This was denied by Mr Mathebula. It was further put to him that he had visited accused two whilst he was in the SAPS cells and had admitted to accused two that he had been given his telephone number by the SAPS. Mr Mathebula admitted visiting accused two but denied the allegation that he had been given his number by the SAPS.

The fifth state witness: Nkosinathi Mtshali (Mr N Mtshali)

[57] Mr N Mtshali was the brother of the deceased. He testified that his brother's nickname was 'Mhlobongi'. He confirmed that all three of the accused were known to him. He had grown up with accused one in Swaziland and has known him for 10 to 15 years. Accused two was a friend of the deceased and the witness indicated that he had known him for about a year. Accused three is also a person that the witness had grown up with in Swaziland.

[58] He testified that on 6 March 2020 at about 20h00 he went from South Africa to his parents' home in Swaziland. When he arrived there, he inquired from his parents where his brother, the deceased, was but was advised that he was not at home and that his parents did not know his whereabouts. The witness went to his brother's room, but he was not there. He then decided to go to sleep.

[59] The next morning, between 06h30 and 07h00, he returned to his brother's room to look for him but again did not find there. Instead, he found accused one asleep in his brother's room. He woke up accused one and asked where his brother was. Accused one told him that he did not know where he was, indicating that he had not seen him the day before. Mr N Mtshali left the bedroom and then noticed that accused three had also arrived at the homestead, as had accused two and a person named Sondo Mamba (Mr S Mamba). They conversed and he again asked where his brother was. Mr S Mamba said that they had last seen him near the border fence. All of them then left and went to the neighbouring Sithole homestead to drink the brew called 'amaganu'. They purchased a 5-litre container of this concoction for R50 and sat around drinking it.

[60] Whilst so drinking, accused three approached Mr N Mtshali and took him aside. Mr N Mtshali said that he believed that accused three was drunk, but not drunk to the extent that he was not able to talk. Accused three commenced by apologizing to him, saying that he 'was sorry'. The witness asked him what he was sorry about. Accused three then told him what had occurred on the evening of 6 March 2020 at the rugby club. He explained that they had gone there with a view to committing a crime. The person described as 'Bhungu' and the deceased had been armed with firearms. When they arrived at the rugby club, some white people had come out and Bhungu went in and ran on top of the tables. Those with accused three who did not have guns had pangas. Inside the club, Bhungu fired a shot and the white people had fired gunshots at them in response, causing them to flee in different directions. They, however, met up at a certain point. When they all gathered at the meeting point it was realized that one of their number was missing, namely the deceased. They then left South Africa and returned to Swaziland where they intended to wait for the deceased.

[61] Whilst waiting in Swaziland, so Mr N Mtshali testified further, it dawned on them that perhaps the deceased had been shot. Mr N Mtshali indicated that he telephoned his sister who resides in Pongola and asked her to make inquiries. After a while, everyone left, with accused two saying that he was going to his homestead in South Africa. The group split up between 13h00 to 14h00 on 7 March 2020. Mr N Mtshali stated that he never saw them again.

[62] Mr N Mtshali was not able to explain why accused three chose to make the disclosure to him that he did. He did, however, remark that accused three looked more shocked than the others. He explained that accused three spoke in a normal tone of voice when narrating the events to him and nothing prevented the others present from hearing him make his disclosure to him. He explained that his relationship with accused three was a normal friendship and that he had no problems with him prior to these events. The same applied to his relationship with accused one, who the witness said he viewed as being his brother. As regards accused two, the witness said that he had not spent much time with him but that he had no issues with him.

[63] The witness went on to testify further that on 8 March 2020 he returned to South Africa and he did not know where the accused were at that time. Accused two had said he was going to his house in Pongola. The court asked him whether he had informed his parents of what he had been told by accused three and he said that he had done so. They had instructed him to proceed to Pongola to verify the fate of his brother. He explained that on his way to do so he had met up with Capt Mncwango of the SAPS. He knew him and he told him what accused three had told him. He mentioned the names of all the accused to Capt Mncwango.

[64] Under cross-examination from Mr Luthuli, Mr N Mtshali claimed that despite his residence in Swaziland he was, nonetheless, a South African citizen. He explained that his mother was a Swazi woman, and his father was from South Africa, and they lived in separate households, his mother in Swaziland and his father in South Africa. He also confirmed that he has four brothers, of which only one lived in Swaziland, with the rest living in the environs of Pongola in South Africa. He indicated that he did not regard accused three as being a friend of his but saw him rather as an acquaintance. He indicated that he didn't often speak to accused three but did converse with him when accused three came to his homestead. The witness indicated that he had schooled in South Africa and accused one and accused three had schooled in Swaziland but that they would meet up during the school holidays when he went to Swaziland. Mr N Mtshali indicated that accused one and accused three were, to the best of his knowledge, Swazi citizens.

[65] Mr Luthuli wanted to know when the deceased had been buried. The witness could not remember the precise date but confirmed that it was in March 2020, which answer attracted some criticism from Mr Luthuli, who indicated that the witness could remember dates and times but could not remember the significant date of his own brother's funeral.

[66] Mr N Mtshali was asked where he had met Capt Mncwango and said that it was at a petrol station in Pongola. He confirmed that on 10 March 2020 he had deposed to a statement that had been recorded by Capt Mncwango. Mr N Mtshali indicated that he knew that accused two was actively involved in crime in the area.

[67] Mr Luthuli then put the version of the accused to Mr N Mtshali. He indicated that the accused would deny that accused three had informed him of the events at the rugby club. It would be said that he had been told of those events by one Sanele Mtshali (Mr S Mtshali) and Maphisholo Thabethe (Mr Thabethe). Accused two would also deny having been in Swaziland and accused three would deny that he drank alcohol and therefore did not sit drinking with the group on 7 March 2020. Accused three did not deny that the witness might have seen him on that day, and that if he did, it was when accused three was passing by where Mr N Mtshali was. To this, Mr N Mtshali responded that he knew accused three very well and on 7 March 2020 he sat face to face with him whilst accused three told him of the events at the rugby club.

[68] Mr Luthuli continued that the accused would say that Mr N Mtshali's story was a fabricated story and that the witness had been told what to say. Mr S Mtshali and Mr Thabethe had told him what had happened to his brother. Confusingly, it was also put that the accused would say that the statement that Mr N Mtshali had deposed to did not arise from his own knowledge but from knowledge that had been given to him by the SAPS. This was vehemently denied by the witness. Finally, Mr Luthuli indicated that accused one would deny sleeping at Mr N Mtshali's parents' homestead and did not see him at all on 7 March 2020. Mr N Mtshali denounced this as a lie and said that on 7 March 2020 he found accused one asleep in his brother's room and that he even remembered the clothing that he was wearing at the time.

The sixth state witness: Thabiso Thembumusa Dlakude (Mr Dlakude)

[69] Mr Dlakude is a self-employed businessman. He testified that he is actively involved in the provision of security services to his community. He has incorporated a business known as 'Laws Anti-Crime Force Technical Response Unit' and he provides security to the businesses and townspeople of Pongola. He is also a member of the JCPF.

[70] Mr Dlakude stated that on 8 March 2020 at approximately 20h30 he was in Pongola when he became involved in the arrest of accused one and accused three. He explained that he was doing patrol duties on the properties where he had security guards stationed when he received a telephone call from a member of the JCPF. He was told that three males who may have been involved in the events at the rugby club were on the N2 near Sitilo, within South Africa, and were proceeding towards Pongola. Mr Dlakude telephoned other JCPF members and about 30 minutes later two other vehicles containing six members of the JCPF arrived where he was. He then extracted three security guards from the premises that he was guarding and took them with him. There were thus three motor vehicles containing 10 people. They rushed to the Sitilo area, which Mr Dlakude estimated was about 4 to 5 km distant from Pongola. Mr Dlakude indicated that before a bus stop on the N2, they observed three males. The vehicles that they were traveling in were fitted out with flashing lights and as they approached, the three men ran up a gravel road on the left-hand side of the N2. The vehicles proceeded up the gravel road which ended in a cul-de-sac and Mr Dlakude and his security guards then leapt from their vehicle and pursued the three men on foot.

[71] One of the men they were pursuing ran to Mr Dlakude's right and so he set his sights on him. He chased after him and, during the chase, the pursued man tripped and fell to the ground and Mr Dlakude captured him. The man that he captured was accused one. He estimated the chase had covered some 50 metres. Accused three was captured by one of Mr Dlakude's security guards. Using handcuffs, Mr Dlakude handcuffed accused one and he later handcuffed accused three to accused one

using the same handcuffs. A search was conducted for the third man, but he was not located.

[72] Accused one and accused three were transported to the Pongola police station and there Mr Dlakude met a Capt V K Buthelezi (Capt Buthelezi). Accused one and accused three were handed over to Capt Mncwango. Mr Dlakude said that both the men who had been apprehended were strangers to him. He further confirmed that at no stage had he gone into Swaziland to apprehend them.

[73] Under cross examination, Mr Luthuli wanted to know from Mr Dlakude how he knew who he had to look for after receiving the telephonic tip off. Mr Dlakude said he was told that he had to look for three male persons. Mr Dlakude indicated that he had started working in the security field in 2015 and that in 2018 had set up his security services company. He explained that Pongola is not a big place and that he was a well-known activist in the crime prevention field. He indicated that he also had an application on his cellular telephone that provided him with the true identity of a person calling him. When he had received the tip off about the three men on the N2, he accordingly knew who had made the call to him. It was put to him by Mr Luthuli that none of his evidence was true because it had never happened, which was denied by Mr. Dlakude.

[74] Asked about when he had found out about the events at the rugby club, Mr Dlakude said that he knew about those events on the very night that they had occurred because he happened to be guarding a property that bordered on the rugby club. He also advised that he had only ascertained that Capt Mncwango was the investigating officer when he arrived at the Pongola police station and was so informed by Capt Buthelezi.

[75] It then transpired that Mr Dlakude also had knowledge of the arrest of accused two but had not mentioned this at all during his evidence in chief. He explained that he had never been asked to speak about accused two, only being asked questions about accused one and accused three. Factually, that is entirely correct, but one would have expected that Mr Dlakude would also have mentioned the arrest of accused two. The court asked him to explain how this had occurred. He

indicated that he had received a telephone call from a Mr Andries Nkosi (Mr Nkosi), now deceased, who was a member of the JCPF. Mr Nkosi said that he had received information that accused two was in a nearby area in Pongola and that they should rush there to apprehend him. Mr Dlakude went to the area described and as he parked his motor vehicle, he saw security guards chasing a fleeing person. The fleeing person was apprehended, and it turned out to be accused two.

[76] Mr Luthuli then proved a written statement made by Mr Dlakude. I confess that I am not entirely certain why this was done. Perhaps it was done to establish that no reference was made to the arrest of accused two in Mr Dlakude's statement. This, however, was feely admitted by Mr Dlakude.

[77] Mr Luthuli put it to Mr Dlakude that everything that he described in his evidence had never happened. The court asked whether by this it was meant that he was not involved in the arrest of accused two, which elicited a spontaneous exclamation from Mr Dlakude that 'but they are all here'. Mr Luthuli then said that Mr Dlakude was not involved in the arrest of accused two. Mr Dlakude acknowledged that he was not the arresting person, but that he was in attendance when accused two was arrested.

[78] Mr Luthuli indicated to Mr Dlakude that accused one and accused three would assert that they were in Swaziland when they were apprehended, which Mr Dlakude soundly refuted. He also refuted the notion that they had been abducted from Swaziland and forced to enter South Africa against their will. Mr Dlakude stated, politely, that the accused were mistaken if that was what they were going to say. He, finally, agreed that the accused did not know him.

The seventh state witness: Sergeant Nhlanzeko Sifiso Masondo (Sgt Masondo)

[79] Sgt Masondo ordinarily performs charge office duties. I have no idea why he was called to testify. He attended the rugby club on the night in question but did nothing of significance and made no unique observations that would have warranted his evidence being led. He was not cross examined at all by Mr Luthuli, so unremarkable was his evidence.

The eighth state witness: Gcinile June Mbongwa (Col Mbongwa)

[80] Mr Ngubane, for the state, then informed the court that the next state witness, a commissioned SAPS officer, was to testify about an extra curial statement made to her by accused two. The statement amounted to a confession by accused two but, so it was submitted, no trial within a trial was necessary. The reason for this was that he had discussed the proposed witnesses evidence with Mr Luthuli, who had advised him that the defence's objection to the written statement did not pivot around its admissibility: accused two simply denied that he had ever appeared before the witness to be called and that he had ever made the statement sought to be introduced. Whether the statement was freely and voluntarily made was therefore not the issue. Mr Luthuli agreed that no trial within a trial was needed.

[81] A trial within a trial is resorted to in criminal proceedings to permit an accused person to give evidence on the admissibility of an extra curial statement that he has allegedly made, but now disputes, without being concerned that what he may say in disputing the admissibility of that statement may be used against him when his guilt is later determined in the main trial. It is utilised to deal with the limited issue of whether or not the statement in dispute has been voluntarily made. In my view, justice requires that where a confessor disputes a statement that he has made, he should have the greatest freedom to challenge the admissibility of that document. Practically, this usually means that the confessor must give evidence himself. To an extent, he is therefore forced to relinquish his right to silence to ensure that a statement that he believes was wrongly extracted from him is not admitted into evidence and later used against him. Such considerations do not appear to arise when the confessor simply asserts, as accused two does in this instance, that he never, in fact, made the statement that the state seeks to introduce. The issue in such instance is not one of admissibility, but one of credibility. No trial within a trial was accordingly conducted for the extra curial statement introduced by the eighth state witness.

[82] Col Mbongwa is the station commander of the Pongola SAPS station. She testified that on 12 March 2020 she was in her office at the police station when she received a telephone call from Capt Mncwango. She was informed that he had a person who wished to make an extra curial statement and she was asked if she had

the capacity to record that statement. She said that she had capacity, and it was arranged that the statement would be taken by her the next day, 13 March 2020.

[83] At about noon on 13 March 2020, Capt Buthelezi brought accused two to Col Mbongwa's office. She noted that he was in leg irons, and she indicated that she communicated with him in isiZulu. She testified that she was dressed in full uniform, and she exhibited her appointment card to accused two. She described him as being in a relaxed state of mind. She asked him why he had been brought to her and he indicated that he wished to make a confession because he was involved in the commission of a crime.

[84] Col Mbongwa testified further that she had explained to accused two that she was not involved with the investigation of that crime and that he was not obliged to say anything to her, but that if he did say anything it would be recorded by her and could be used against him at a subsequent trial. He stated that he understood. She stressed to him that he had the right to remain silent and further explained that he was entitled to take legal advice. If he could not afford the services of a legal representative, one would be appointed to assist him by the state. He indicated that he also understood this but nonetheless elected to proceed without legal representation.

[85] Col Mbongwa explained that she ascertained from accused two that he had not been assaulted or threatened and asked if he had any scars that might evidence such an assault. He indicated that he only had an old scar on his forehead. Accused two confirmed to her that no promises had been made to him and that he was acting voluntarily because he felt guilty. He explained that he had not expected anyone to get killed and that he had taken the decision to tell the truth. He then narrated his statement to Col Mbongwa, who recorded it in the English language.

[86] After the statement had been recorded, accused two indicated to Col Mbongwa that he was satisfied with what she had written down. He indicated that he had no complaints. Col Mbongwa mentioned that it was only herself and accused two in the room whilst the statement was recorded. Recording the statement had taken a considerable amount of time, from 12h00 until approximately 15h30.

[87] A document was handed in by the state which was confirmed by Col Mbongwa as being the document that she had completed when recording accused two's extra curial statement. It is comprised of several pre-typed pages with spaces for responses to be inserted. The statement provided by accused two was written down by Col Mbongwa in manuscript on lined A4 paper. The manuscript recordal runs to some 9 pages and the entire document, including the pre-typed pages, comes to some 19 pages.

[88] I do not intend to quote the statement of accused two in the same granular detail that Col Mbongwa recorded it. In summary, it records that accused two went to Swaziland on 4 March 2020. The next day he went to his neighbour's home where he met the deceased, Mr S Mamba, one Malibongwe and accused three. They sat and drank amaganu and were later joined by Bhungu Mnisi (Mr Mnisi) who said that they were going to South Africa with accused two as they needed to get some money. Accused two asked where they would get money from and Mr Mnisi said they would wait and see how they could get it. On 6 March 2020 at about 07h00, Mr Mnisi called accused two on his cellular telephone and said that he would meet him at the deceased's homestead. They all met at about 08h00. Later, Mr Mnisi said they needed to return to South Africa and after accused two had gathered his belongings, they left Swaziland on foot bound for South Africa. There were six of them in all and they crossed the border illegally. Once inside South Africa, they walked towards Pongola, ultimately reaching a caravan park. They then stopped and planned what they were going to do. Mr Mnisi said that their target was the rugby club. On learning of this, accused two apparently protested saying that there was no money at the rugby club because the white people that frequented it paid by swiping their bank cards. Mr Mnisi and the deceased insisted that they were proceeding to the rugby club. Accused two warned them that they would not be able to come back as the whites were always armed with firearms. Mr Mnisi said that that was not correct as they were not allowed to enter a bar with a firearm. Accused two continued to protest that they would all be killed. Mr Mnisi took a firearm and threatened him with it and ordered all of them to go to the rugby club. At the rugby club, Mr Mnisi went in to check the place out and then came back and took out four bush knives from his backpack, giving one to accused two, one to Mr S Mamba, one to accused one and

one to accused three. He also took out a pair of pliers and cut the fence separating the caravan park from the rugby fields. Mr Mnisi had a pistol in his hand and the deceased also had a pistol. They checked that both pistols were loaded with live rounds of ammunition. They entered the rugby club and, in accordance with their instructions, those with bush knives began to assault the patrons on their backs. Mr Mnisi and the deceased pointed with their pistols and ordered the patrons to lie down. Accused two saw Mr Mnisi on the bar counter pointing at everyone and telling them to lie down. Accused two stated that he was scared and then heard a gunshot but could not say who was shooting. He and the others fled from the rugby club and ran in the direction of Swaziland. After a few minutes, he received a cellular telephone call from Mr Mnisi, who asked how many were with him. He explained that they were four in number. Mr Mnisi asked where the deceased was. Accused two stated that they had left him and Mr Mnisi inside the club when they heard the gunshot. Mr Mnisi said they should wait, expecting the deceased to catch up with them. When this did not happen, they resolved to go back to Swaziland using the same route that they had used to get into South Africa, and went to the deceased's homestead and slept. The next day, they still did not know what had happened to the deceased. Mr Mnisi left them but telephoned almost immediately to say that he had heard on Pongola FM that the deceased was dead but that accused two should not tell the others. This news greatly upset accused two. He resolved to leave the group and go back to South Africa. He never heard anything further from the group until he was arrested at his home. He confirmed that he had been advised by the SAPS of his constitutional rights and had been told why he was being arrested. When the name of the deceased white man was mentioned, he realized that he knew him. He confirmed that they had taken nothing from the rugby club.

[89] In cross examination, Mr Luthuli asked Col Mbongwa whether she had an officer by the name of 'Nkosi' at her station. She said that there had been one by that name but that he had since retired. It was put to her that accused two had been taken by Officer Nkosi to see Magistrate Ntshangase at KwaNongoma. Accused two had apparently been taken there for him to make a confession but after being asked questions by the magistrate as to how the deceased man had died, he said that he did not know. The magistrate then wrote something down on a piece of paper and

gave it to Officer Nkosi. The magistrate consequently did not continue with the confession exercise.

[90] The court inquired from Mr Luthuli as to when the visit to the magistrate at KwaNongoma had occurred: before or after the visit of accused two to Col Mbongwa. After taking an instruction, Mr Luthuli advised that this had occurred before the visit to Col Mbongwa. Col Mbongwa said she knew nothing of this.

[91] Under further cross-examination, Col Mbongwa acknowledged some errors that she had made on the recordal document. She acknowledged that she had recorded on the document she was using that accused two wanted legal representation, but said that she had erred and ought to have recorded that he did not want legal representation. The verbatim answer to the next question asked by Col Mbongwa was the following:

‘He wishes to talk to the police officer without legal representation.’

That tends to confirm that Col Mbongwa had, indeed, erred in her recordal about legal representation.

[92] At the bottom of each page of that document a person’s initials and surname appears, written in manuscript. Mr Luthuli stated to Col Mbongwa that what appears was not accused two’s signature and that he consequently denied signing the document. This was refuted by the witness. It was put to the witness that the only time that accused two saw Col Mbongwa was when she had come to see him in the police station holding cells. This, too, was denied. Mr Luthuli went on and said that Col Mbongwa had been carrying a diary when she had come to the holding cells. This was denied. It was put to her that the narration of events at the rugby club had not been dictated to her by accused two, which was again denied by Col Mbongwa. Finally, it was denied by Mr Luthuli that accused two had a girlfriend whose name appears in the narration recorded by Col Mbongwa. Col Mbongwa said that she did not know whether that was correct or not but that was what accused two had told her.

The trial within a trial:

The first state witness: Tjaart Nicolaas Kruger (Mr Kruger)

[93] A trial within a trial was next conducted when the state indicated that it wished to prove an extra curial statement made by accused one.¹¹ The admissibility of this extra curial statement was specifically and pointedly contested by Mr Luthuli on behalf of accused one.

[94] The first witness in this compartmentalised portion of the trial was Mr Kruger. He testified that he was a retired magistrate who had held a position on the bench since 1986. He was stationed at the Pongola Magistrate's Court. He was handed a document which he identified as being a document that he had completed when accused one had been brought before him. The document was handed in, but not before Mr Ngubane had made certain that accused one's statement had been detached from it.

[95] The portion of the document before the court was nine pages long and those nine pages, essentially, dealt with questions that were put by Mr Kruger to accused one before his statement was even recorded. Each page of the document contains printed questions and spaces within which the responses to those questions may be recorded. The first series of questions records that the witness and accused one were alone in Mr Kruger's office, save for the presence of a language practitioner, who assisted Mr Kruger.

[96] Of particular significance in that document is a caution that if accused one was worried that the SAPS might take action against him after appearing before the magistrate or if he had been unduly influenced to make the statement, he was invited to disclose this fact to Mr Kruger in the knowledge that Mr Kruger was empowered to take steps necessary for accused one's subsequent protection. Accused one indicated that he understood this. In response to a question whether he would like to say anything in this regard, his response was as follows:

'No the police have done nothing and I fear nothing'.

[97] When Mr Kruger asked him why he had been brought to him, accused one explained that it was:

¹¹ *S v De Vries* 1989 (1) SA 228 (A) at 233H-I.

'To explain regards to the incident that taken place from time it started until we got arrested.'

[98] Accused one was then informed of his right to legal representation and his right to remain silent, both of which he understood, but he elected to continue without such representation and to make his statement to Mr Kruger. He was then advised that a series of questions would be put to him but that he was at liberty not to answer any of those questions. He indicated that he had not used any drugs or alcohol, which seemed to conform with Mr Kruger's own observations of accused one's condition. Accused one indicated that he understood that the allegations against him were that he and others had committed robbery at the rugby club and that a white man had been killed during the course thereof. Explaining why he came before Mr Kruger, the following was recorded by the latter:

'I explained to Capt Mncwango what had happened and he asked if I could tell what I told him to another person and I said yes it is my decision to make a statement.'

[99] Accused one indicated further that the statement that he made to Capt Mncwango was the same statement that he intended to make to Mr Kruger. He confirmed that he had not been intimidated, threatened, forced or induced by the SAPS to make the statement that he intended making. As to whether he had any injuries, he made reference to a painful nose, occasioned when he had been slapped when he was arrested. He apparently bled from his nose onto his T-shirt and was later given another T-shirt. Mr Kruger noted a stain of approximately 10 cm on the right leg of accused one's jeans. Mr Kruger stated that in his opinion there was no need for further medical attention. He then recorded accused one's extra curial statement.

[100] Under cross examination from Mr Luthuli, Mr Kruger indicated that he made no assumptions or deductions from what he had heard from accused one and simply recorded what he had told him. He was placed under some pressure concerning the injury to accused one's nose but he did not deviate from his opinion that the injury was minor in nature and that it no longer worried accused one. He indicated, further, that in his experience, before an accused person is taken before a magistrate for the recording of a confession, the accused person is taken to a doctor to be examined. He assumed that had happened in this instance. He did, however, state that if he

had formed the view that the injury was a serious one that required medical treatment, he would immediately have stopped the interview.

[101] Mr Luthuli suggested to Mr Kruger that accused one's version was that Capt Mncwango had gone to the holding cells and had given him a piece of paper and made him read it. Written on the paper were words in isiZulu. Capt Mncwango told him that if he did not adhere to what was stated on the piece of paper when he appeared before the magistrate, the SAPS would surrender him to 'the white people' and that they would 'fix' him. Mr. Kruger said he had no knowledge of this.

[102] Mr. Luthuli proceeded and said that Capt Mncwango had indicated to accused one that word would get back to him about what accused one had said to the magistrate. All of this had apparently inspired fear in accused one. Mr Kruger indicated that he could detect no fear in accused one, and had noted at various places in the statement that accused one appeared calm. It was suggested to Mr Kruger by Mr Luthuli that a person could appear calm but could actually be operating under duress. Mr Kruger acknowledged that some people could act better than others, but he indicated that the questions in the confession document were designed to expose where that was occurring.

The trial within a trial:

The second state witness: Nkosinathi Mandla Ntshangase (Mr Ntshangase)

[103] Mr Ntshangase was the language practitioner who assisted Mr Kruger with interpretation services when recording the extra curial statement of accused one. His version adhered closely to that of Mr Kruger. His evidence was largely uncontroversial and nothing of any great value arose from his cross-examination by Mr Luthuli.

The trial within a trial:

The third state witness: Loveness Phakeme Zulu (Sgt Zulu)

[104] Sgt Zulu is a sergeant in the SAPS and, more particularly, is a court orderly stationed at the Pongola Magistrate's Court. She testified that she took accused one from the court holding cells to Mr Kruger's office. In the office was Mr Kruger and the

language practitioner, Mr Ntshangase. She remained outside the office on guard until she was required to take accused one back to the cells.

[105] That evidence ought to have been brief and uncontroversial. It was neither. This is because accused one contended that he had never before seen Sgt Zulu. Much time was devoted to this dispute. Perhaps Sgt Zulu put her finger on it when she stated that her appearance in court would probably be the first time that accused one had seen her when she was not wearing her full SAPS uniform (Sgt Zulu was dressed in civilian clothing and had her head covered).

[106] Another issue that was raised was that at some stage earlier in the trial accused one had complained that a woman, whom he now believed to be Sgt Zulu, had pointed at him from outside the courtroom, through the open court door. I am not sure what the complaint in this regard was and it was never disclosed, expanded upon or persisted in. Sgt Zulu said she had been at court on a number of occasions for this matter and she would normally be found outside sitting on a bench.

The trial within a trial:

The fourth state witness: Muzi Moses Mncwango (Capt Mncwango)

[107] Capt Mncwango previously was the investigating officer in this matter but retired from the SAPS in October 2022 after 39 years' service. He explained that he had informed accused one of his right to remain silent, but that if he chose to say anything it would be recorded and could be used against him at a later trial. He also explained his right to legal representation to him. When advising him of these rights, he communicated with accused one in the isiZulu language.

[108] Accused one apparently admitted to Capt Mncwango that he had knowledge of the events at the rugby club. Capt Mncwango asked him if he would tell the magistrate what he knew about those events and accused one indicated that he was willing to do so.

[109] Before accused one was taken to the magistrate, Capt Mncwango stated that he was taken to a doctor for a medical examination. A J88 document was completed by the doctor and was returned to Capt Mncwango. Accused one was then taken to

the magistrate. Capt Mncwango denied at any stage threatening or assaulting accused one and stated that accused one voluntarily made his statement to Mr Kruger. He did not know accused one prior to him being arrested and he denied that he ever visited him in the holding cells whilst he was in custody. When Mr Ngubane, for the state, put it to him that accused one's version was that he, Capt Mncwango, had given him a statement to read and had then admonished him to tell that story to the magistrate, Capt Mncwango denied that this occurred.

[110] Mr Luthuli commenced his cross-examination of Capt Mncwango by asking him how many times accused one had been taken to the doctor. The answer he received was that this had occurred twice, and that both visits had occurred on the same day. From the evidence given by Mr Kruger, it was known that he had seen accused one on 10 March 2020. Mr Luthuli then produced two J88 documents pertaining to accused one which revealed that he went to the doctor twice on 9 March 2020, being the day before he saw Mr Kruger. Capt Mncwango said that it was normal for detainees to be taken to a doctor twice in one day, firstly before being seen by a magistrate and then after being seen by a magistrate. He later recanted and said that it would not be that regular unless there were circumstances that required two visits to the doctor.

[111] Capt Mncwango was again asked about accused one's allegation of being given a document compiled by him detailing what to tell the magistrate. Capt Mncwango denied that that had occurred. He also denied that he had threatened to hand accused one over to 'the white people' if he did not adhere to the contents of that document.

[112] It was further put to Capt Mncwango that accused one and accused three were always together in the cells, which appears to have been admitted by Capt Mncwango, although he said that when he removed one from the cells to come to his office they would obviously not have been together. It was also put to Capt Mncwango that he had informed accused one that two other co-accused had been arrested and detained at Magudu police station and that they had told Capt Mncwango everything. The alleged co-accused named by Capt Mncwango were Mr

S Mtshali and Mr Thabethe. Capt Mncwango said that he had no knowledge of their involvement in this matter but that he did know of the two men mentioned.

[113] Capt Mncwango was the last witness for the state in the trial within a trial.

The trial within a trial:

The defence witness: Smanga Phakathi (accused one)

[114] Accused one testified that he had been detained in the early hours of 9 March 2020. Later that morning, he and accused three had been called for by Capt Mncwango. When they arrived at a place described by accused one as being a place where people wait to be charged, Capt Mncwango had first called accused three to his office. Accused three later returned and accused one then went to Capt Mncwango's office. Capt Mncwango asked him whether he 'knew this case' and he replied in the negative. He was then taken back to the place where people wait to be charged. Capt Mncwango only asked him the one question. Thereafter, both accused one and accused three were taken back to Capt Mncwango's office.

[115] Capt Mncwango, according to accused one, had a document in his hand. The two accused were told to sit down and to read that document. They shared that document as they read it. Capt Mncwango then read the document to them. He instructed them to repeat what was in that document when they went to see the magistrate. Capt Mncwango said that there was no point in them denying their guilt because their co-accused, now held at the Magudu police station, had told him everything that was contained in the document that they had read. Capt Mncwango had said that if they did not comply with this instruction he would give them to the white people who would shoot and kill them. They were instructed also not to reveal to the magistrate that Capt Mncwango had threatened them and were warned that if they disobeyed this instruction, Capt Mncwango would ultimately know what they had told the magistrate. All of this happened in Capt Mncwango's office.

[116] Accused one continued and said that his T-shirt had been stained with blood from his nose bleeding after being slapped when he was apprehended. He repeated that this had happened at his home in Swaziland and that Capt Mncwango had been present at his arrest in Swaziland. After finishing with the accused in his office, Capt

Mncwango said that they would be taken to the doctor before going to the magistrate. However, before going to the doctor, Capt Mncwango came to the cells carrying another T-shirt and instructed accused one to swap his bloodstained T-shirt for the clean T-shirt. The T-shirt removed was left in the cell and was later found by accused one when he returned from the doctor.

[117] When they arrived at the doctor, accused one said that the SAPS had already told the doctor the reason for them being there. The doctor first saw accused three and then saw accused one. Accused one said that the doctor placed 'ear phones' in his ears and that was all that happened. They were then taken back to the SAPS holding cells. After lunch, they went back to the doctor again and, again, 'ear phones' were put in his ears. This time it was a different doctor that examined them.¹² When they returned to the police cells, Capt Mncwango came to them there and warned them that they must not forget what was in the document that he showed them in his office when they went to see the magistrate.

[118] The next day, they were transferred to the magistrate's court and ultimately accused one went to see Mr Kruger. Whatever he told Mr Kruger was, according to accused one, straight from the document prepared by Capt Mncwango. He did not, however, mention the existence of the document to Mr. Kruger. He confirmed that neither Mr Kruger nor Mr Ntshangase had threatened him and, in fact, described them as being 'good people'. He finally confirmed that his signature appeared on each page of the document prepared by Mr Kruger.

[119] Mr Ngubane cross-examined accused one. Accused one confirmed that on the day that he appeared before Mr Kruger he had not seen Capt Mncwango at all. He was asked then how he could have felt threatened by Capt Mncwango. The answer that he received was that Capt Mncwango had all the time in the world to deal with them whereas he only saw Mr Kruger on one occasion. Asked why he had not told Mr Kruger what the true state of affairs was yet he was happy to tell this court, accused one indicated that he was no longer being kept at the Pongola police station

¹² The J88 documents produced by Mr Luthuli made it clear that accused one was seen by the same doctor on each occasion.

but was now being held at a local prison. Asked what happened to the document prepared by Capt Mncwango, accused one said that it was given back to Capt Mncwango. Accused one refused to indicate what the contents of the document contained because he was not prepared to go into the merits of the matter. He was asked why it had never been put to Capt Mncwango that he had given him a fresh T-shirt. The answer to this was that accused one had forgotten about this.

[120] Accused one was the only witness called by the defence in the trial within a trial.

[121] Mr Ngubane addressed the court and argued that the court should rule that the extra curial statement be admitted whereas Mr Luthuli argued that the statement should be excluded. I indicated that given the lateness of the hour, I would consider the matter overnight and give my ruling in the morning. This I then did, ruling that the extra curial statement of accused one was admissible and that I would give my reasons later. What follows are my reasons.

Trial within a trial

Reasons

[122] Section 217(1) of the Act provides as follows:

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

(a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or a justice; and

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question –

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate;'

[123] Section 35(1) of the Constitution, inter alia, provides that:

- '(1) Everyone who is arrested for allegedly committing an offence has the right –
- (a) to remain silent;
 - (b) to be informed promptly –
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;'

[124] And s 35(5) of the Constitution provides that:

'[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

[125] Strictly speaking, the evidence of Mr Kruger need not have been called by the state as the document that he compiled contained the name of a person identical to the name of accused one, and the language practitioner utilised in the recordal of the statement, Mr Ntshangase, had signed a certificate concerning his involvement in the proceedings before Mr Kruger. The content of the statement recorded by Mr Kruger is not in issue either. It appears to me that accused one admits that what is contained therein is what he told Mr Kruger. What he disputes now is that the version that he gave is his version, for he contends that it is the version that Capt Mncwango gave to him and compelled him to recite to Mr Kruger. This he did under the threat levelled at him by Capt Mncwango and he thus acted under duress.

[126] There was nothing regarding the witnesses called by the state in the trial within a trial that indicated that there was anything irregular about their conduct. All told their

versions in an entirely satisfactory manner. Mr Luthuli tried to make something of the fact that accused one appears to have been seen twice by a doctor on the day before he made his statement to Mr Kruger. It certainly is unusual that this should occur, especially since the visits were but a few hours apart. Capt Mncwango appears to have suggested that a person making an extra curial statement would be taken to a doctor before and after making the statement. This does not appear to have been done in this instance, for reasons that have not been explained but it is likely that this was an administrative error.

[127] There is, however, no requirement that a person making an extra curial statement must be seen by a doctor either before, or after, making that statement. This is made even less relevant in this matter when it is acknowledged that no physical assault by the SAPS is alleged by accused one to have occurred. The assault that accused one complained of to Mr Kruger occurred at the time of his apprehension by the JCPF and not subsequent to his detention. After the slap to the nose, there is no further reference to any physical violence being visited upon him. His complaint before this court was the threat allegedly made by Capt Mncwango. No amount of examination by a doctor would reveal whether that threat had been made.

[128] The duress alleged by accused one is thus not a physical assault upon himself but the threat of what Capt Mncwango alleged would happen in the future if accused one deviated from the terms of the document that he had been instructed by Capt Mncwango to memorise and then narrate to the magistrate. In civil law, it is trite that a contract entered into under duress may be voided by the innocent party. In alleging duress, the party relying on it must prove:¹³

- (i) a threat of considerable evil to the person concerned;
- (ii) that the fear inspired was reasonable;
- (iii) that the threat was of an imminent or inevitable evil and induced fear;

¹³ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A-C; *Van Vuuren v Van der Walt* [2022] ZAGPPHC 705 para 6.

- (iv) that the threat or intimidation was unlawful or *contra bonos mores*; and
- (v) that the contract was concluded as a result of the duress.

[129] Obviously, the last requirement falls away in this matter for we are not dealing with a contract in any form. But there is no reason why the preceding requirements for duress should not be established in criminal proceedings where duress is alleged to play a part. It is not sufficient simply for the duress to be alleged to be accepted: it must truly be duress in the form recognised and accepted by the law.

[130] I have two difficulties with the duress identified by accused one. The first is that the alleged threat is by no means certain in its terms. It started as a threat that accused one would be handed to 'the white people' who would 'fix' them. This was put to Mr Kruger by Mr Luthuli. It then evolved to a threat that the white people would 'shoot and kill them' when accused one testified in the trial within a trial. He then changed it to an allegation that the white people would simply 'kill them'. There is thus no certainty as to precisely what the threat was. The second difficulty is where this threat, whatever its form and content, was made by Capt Mncwango. The evidence adduced of this by the defence is equivocal. The initial version put by Mr Luthuli to Mr Kruger was that it occurred in the SAPS holding cells. Capt Mncwango, when he testified, stated that he never went to see accused one in the SAPS holding cells and only met with him in his office. After this evidence was led, accused one testified that the threat had been made in Capt Mncwango's office. Later it was mentioned by accused one that Capt Mncwango had indeed gone to the SAPS holding cells after the events in his office and reminded accused one that he should adhere to the prescribed version. This version was not put to Capt Mncwango. Thus an attempt at blending the two disparate versions was attempted by accused one. The accused has accordingly given two different versions of where the threat was made.

[131] The substance of the alleged threat must also be considered, for it must inspire a reasonable belief of imminent harm occurring. It is difficult to understand how anyone could reasonably believe that the SAPS would surrender persons in their custody to 'the white people', whoever that general group of people might be, so that the 'white people' could 'fix' them, whatever that may mean. It is so vague in

its meaning and unlikely in its application that in my view it cannot reasonably have inspired fear in accused one if such words were indeed said to him. Indeed, accused three also allegedly received the same threat and it did not drive him to make a statement to a magistrate. It clearly did not inspire any fear in him.

[132] The difficulty of accused one in adhering to a simple allegation can only indicate that the version is not factual in its foundational elements. It is a contrived version to avoid the consequences of what accused one voluntarily elected to disclose to Mr Kruger. I can find no evidence of duress. There is compelling evidence recorded by Mr Kruger that he spoke with him freely and voluntarily. For these reasons, I ruled that accused one's extra curial statement was admissible.

The ninth state witness: Tjaart Nicolaas Kruger (Mr Kruger)

[133] Mr. Kruger, the magistrate who recorded the extra curial statement of accused one, was recalled to the witness box to read out that statement. The statement, which was recorded by him in manuscript, almost completely fills four lined A4 pages. It is not necessary for me to quote the statement verbatim and I shall deal with it only in summary form.

[134] The statement commences with a recordal that accused one was drinking amarula sorghum beer at the Mashazi homestead. Present with him were the deceased, Bhungu, Sondo, accused two and accused three. The deceased and Bhungu stated that they had a plan to get money but did not mention initially where the money was to be obtained from. The group then met the next day to plan their operation. After a diversion involving them attempting to find a missing pig, Bhungu said they needed to get moving in order to implement the plan. The plan was to go to the rugby club where there was a tavern that white people frequented and to take their money. They departed for South Africa and three of them had backpacks. One backpack was loaded with bush knives. They arrived at the rugby club and accused one noticed that there were many 'Boers' present. Accused one indicated that they should not go ahead with the plan but Bhungu did not agree with this, saying that they had not gone there to play. Just then a white man driving a motor vehicle arrived at the rugby club and accused one again insisted that they not proceed with the plan because there was now more 'Boers' present. The deceased then took out

a firearm from a backpack and said they were going on with the plan. Accused one and the others then retreated as if they were going home when the deceased pointed a firearm at them and said that no one was going home. He forced them into the rugby club and all of them entered. Once inside, they heard a gunshot and saw Bhungu coming out of the tavern, running, and they followed him. They split up and went in different directions but accused one and three others ran into the sugarcane and then ran in the direction of Swaziland. Accused two then telephoned Bhungu to inquire where they were and was given directions to find them. He was asked where the deceased was, and he said that they had run in different directions. They then returned to Swaziland and slept and went their separate ways the next day. Accused one went to his homestead and took a bath and then went to drink at the Sithole homestead. Whilst there, the deceased's younger brother arrived and accused two received a telephone call from Bhungu who told him that the deceased had been killed. Bhungu said that he had heard this on Pongola FM radio. The sister of the deceased also telephoned Sondo and also told him of the death of the deceased. They cried when they heard this news and then parted ways.

[135] Mr. Kruger was not cross-examined by Mr Luthuli.

The tenth state witness: Musi Moses Mncwango (Capt Mncwango)

[136] Having testified in the trial within a trial, Capt Mncwango was recalled to the witness box by the state.

[137] Capt Mncwango confirmed that he had arrested all three of the accused with the assistance of Mr Dlakude and the JCPF members. He confirmed that Mr Nkosi was associated with the JCPF but that he had since passed on. He also informed the court that he took possession of the hard drive taken from the bar at the rugby club but that when the experts analysed it they were unable to recover anything from it. He did not explain why this was the case.

[138] As regards the firearms that had been recovered at the rugby club and the gun shot residue test performed by WO Jele on the deceased, he stated that he never received any results from the Forensic Science Laboratory. He had taken the matter up with WO Jele but still did not receive the results that he required. The court expressed its amazement that Capt Mncwango, an experienced SAPS investigating

officer, would let the matter lie and would present the case for prosecution without that evidence.

[139] Capt Mncwango confirmed that accused two had made an extra curial statement. He explained that this had occurred when he had arrested him and after he had read him his rights. In essence, accused two admitted his involvement in the offence to him and Capt Mncwango asked him if he would repeat that statement to Col Mbongwa, which he agreed to do. Before that occurred, however, accused one was taken to a magistrate at KwaNongoma. How this come to occur was never revealed. He believed that had occurred on 10 March 2020. Accused one returned without making a statement to the magistrate because, according to accused two, they did not appear to understand each other. The magistrate did not want to proceed as accused two apparently did not admit the event. He had admitted that he was there but said that he did not kill the person. Asked why he then referred accused two to Col Mbongwa, Capt Mncwango said that accused two had requested the charge office officers to call him to go and see him in the holding cells. He had honoured the request, thereby contradicting his earlier assertion that he did not visit the accused in the holding cells, and accused two indicated to him that he still wanted to make a statement. It is on that basis that accused two was taken to Col Mbongwa. Accused two indicated to him that he knew the deceased person, which presumably was a reference to Mr Mathews.

[140] Capt Mncwango categorically denied that he ever threatened or assaulted any of the accused. He testified that he did try to trace the other persons who were involved in the raid on the rugby club but he was not able to find them. He, finally, confirmed that he did not know any of the accused until he arrested them.

[141] Under cross-examination from Mr Luthuli, Capt Mncwango confirmed that he had explained his rights to accused two and that accused two had signed a notice confirming that to be the case (the rights notice). Mr Luthuli then drew attention to the signatures that appear on the confession recorded by Col Mbongwa and the signature that appears on the rights notice. They were obviously, and demonstrably, different both in their form and in their content. It was put to Capt Mncwango that accused two denied ever making the statement recorded by Col Mbongwa. Capt

Mncwango said that whilst the signatures appeared different on the statement and on the rights notice, on the statement recorded by Col Mbongwa the accused had written out his initials and his surname whereas he had put his signature on the rights notice. Asked why the accused would sign in two different ways, Capt Mncwango said he could not answer that and that the person who could best answer it was accused two.

[142] It was disputed by Mr Luthuli that accused two had ever said that he had knowledge of what occurred at the rugby club, which Capt Mncwango rebuffed. Capt Mncwango was asked whether he searched the accused and he confirmed that he did. Asked whether he found anything upon such search, Capt Mncwango indicated that cellular telephones had been retrieved from accused one and accused three and that those cellular telephones were presently in the SAP 13 register. A statement was then put to Capt Mncwango that he had personally made in which Capt Mncwango reported the use of the cellular telephones that he had recovered from accused one and accused three in relation to cellular transmission towers in South Africa. Capt Mncwango had apparently acquired this information from the cellular network operators. There was no attempt to qualify Capt Mncwango as an expert in this regard and I cautioned Mr Luthuli about the wisdom of introducing this statement. Mr Luthuli indicated that it proved his clients' alibi. I asked him what alibi he was referring to because none had ever been pleaded or disclosed. I pointed out to him that rather than prove an alibi, the statement appeared to prove that those cellular telephones were in the vicinity of the transmission towers in South Africa on the night in question. Nothing further was said regarding this statement. After reflection, I intend to disregard the contents of that statement on the basis that Capt Mncwango did not have that knowledge personally but acquired it from someone else who did and it was therefore hearsay evidence prejudicial to the accused.

[143] It was then put to Capt Mncwango that Mr Dlakude had said that he found nothing when he had searched accused one. Capt Mncwango said that when he searched him he had found the cellular telephone.

[144] The version of the accused was then put to Capt Mncwango. Capt Mncwango disputed that he was present in Swaziland when accused one and accused three

were apprehended, he denied gagging and abducting them from that country and he denied that the JCPF were waiting on the South African side of the border when accused one and accused three were so abducted.

[145] At this juncture, Mr Luthuli advised me that accused one had a headache. I accordingly arranged for my registrar to acquire over the counter headache medication in the form of a popular headache tablet for accused one and he subsequently took the medication.

[146] Mr Luthuli continued his cross-examination of Capt Mncwango by saying that Capt Mncwango had lied when he said that he did not know accused two because accused two had been at school with his son and accused two had been taught by Capt Mncwango's brother. Capt Mncwango said that was a lie because his son was substantially younger than accused two, his son now being 28 years old. According to the indictment, accused two is aged 49. It is accordingly extremely unlikely, given the age differential of 21 years that they ever could have been at school together. It was also put to Capt Mncwango that he had fabricated the statements of Mr Mathebula and Mr N Mtshali, which was denied by Capt Mncwango. Capt Mncwango also denied giving accused one a clean T-shirt and again denied that he had threatened him into making a statement.

[147] Capt Mncwango confirmed that Mr Nkosi had bought accused two to the police station and had said that he was a suspect in the events that happened at the rugby club. At that stage Capt Mncwango had a list of suspects which he had recorded in his diary and he consulted that list and confirmed that accused two's name was on that list. He accordingly denied Mr Luthuli's suggestion that two other persons had been arrested for the offence. In response to an allegation that he had taken a photograph of accused two with his cellular telephone, Capt Mncwango denied this but confirmed that it is standard practice for photographs of arrested persons to be taken by the SAPS, but that such photographs are taken using a camera and not a cellular telephone.

[148] The state closed its case once the cross-examination of Capt Mncwango had been completed.

[149] I was then advised by Mr Luthuli that accused one was not in a condition to continue with the proceedings notwithstanding the medication that he had taken. I accordingly attempted to have accused one examined by a local district surgeon but was ultimately advised by both legal representatives that there is no longer a district surgeon in Mtubatuba. Proceedings accordingly had to be adjourned early to allow accused one to be taken to the prison hospital, some distance from the court, for treatment. Overnight, accused one received medical treatment and was in a position to present his case when the trial resumed the next day.

The first defence witness: Smanga Phakathi (accused one)

[150] Accused one commenced his evidence by indicating that he had been employed as a tailor at an establishment called Mathanjeni Future Garments in Swaziland before he was arrested. He indicated that on 6 March 2020, he was at work during the day and knocked off at 17h00 and from then until 05h00 the next day he had remained at home. He resided at a homestead with his grandparents and his uncle. He stated that he did come into South Africa from time to time in order to purchase items but indicated that he did not know the whereabouts of the rugby club.

[151] Accused one confirmed that he was arrested on 8 March 2020 at around 20h00. On that day, he was sleeping in his room when he heard a knock on the door. While asking who it was, the door was kicked open and persons entered his room and started assaulting him. Whilst doing this, one of his assailants put a piece of cloth on his mouth and tied it. He was taken out of the room to an area with better lighting, where he found two other people who had been handcuffed. Those persons were known to him as Mr S Mtshali and Mr Thabethe. The latter was his cousin, who he said resides in South Africa most of the time. Accused one then corrected himself and said that his cousin stayed in Swaziland but works in South Africa and travels from one country to another every day. Accused one said that he knew Mr S Mtshali was from the deceased's family but that he was not friendly with him.

[152] After had he had seen the two men handcuffed outside his homestead, they had all left together, walking a distance of about 1 km to accused three's homestead. One of the persons in handcuffs was then taken by a police officer who went down to

accused three's house. Accused one remained outside with Mr S Mtshali and a person who was guarding them. Those who had gone inside then came back with accused three, having been away for approximately five minutes. One of the persons who had gone into the homestead walked back with accused three holding his hand over accused three's mouth. A piece of cloth was then taken from one of the guard's pockets and accused three's mouth was 'tied' with it. They then left and proceeded to the road that led to South Africa. Accused one estimated that they walked for 9 or 10 km before reaching the border fence. Walking on the road towards the fence were eight people, including accused one and accused three. Having scaled the border fence, he saw that there were both white and black people waiting for them in South Africa and that there were more than five motor vehicles there. He and accused three were told to lie face down in the bin of a bakkie and the other two men in handcuffs were placed in a different motor vehicle. They were taken to the Pongola police station and made to sit in the charge office. It was now the early hours of 9 March 2020. The two men in handcuffs with them were called by Capt Mncwango who announced that they would be kept at the Magudu police station and would join accused one and accused three later when they appeared in court.

[153] Capt Mncwango then took accused one to his office and told him he was going to be charged with attempted robbery and that people were killed. He was also to be charged with illegal immigration. He was then taken back to accused three. After 20 minutes, Capt Mncwango returned and took accused three with him. Five minutes later he was back and accused one was then taken by Capt Mncwango again. He was taken to his office and Capt Mncwango asked him if he knew of the offences that he had been charged with. To this, accused one replied that he did not. Only then did Capt Mncwango introduce himself to him. Accused one was then taken back to accused three. After approximately three minutes, Capt Mncwango returned and said that they must both go with him to his office.

[154] In his office, so accused one testified, Capt Mncwango had a piece of paper with writing on it. He said that there was no use in them denying the allegations as the two men in handcuffs had told him everything and he had written down what they had told him on that paper. He then read out what was on the paper after which he handed it to accused one and accused three for them to read together. The

document was written in isiZulu and was comprised of two pages. Capt Mncwango then said they were to go and tell the magistrate the story written on the paper otherwise he would hand the accused to the white people who would kill them as they had killed a white person. Accused one said that 'we agreed to that'.

[155] Later, Capt Mncwango gave accused one a new T-shirt. The same day, they visited the doctor on two occasions and after their last visit, Capt Mncwango came to them in the cells and warned them not to forget about what they had read.

[156] The next day, he and accused three were taken to see a magistrate. He confirmed that he appeared before Mr Kruger and agreed that he had informed him that he had come to make a 'confession statement'. He made no mention of what he told Mr Kruger.

[157] Accused one said that he did not know accused two and that he only came to know him after 10 March 2020. He added that after they returned from the magistrate's court, Capt Mncwango came to him with a cellular telephone with a picture on it. The significance of this was not revealed.

[158] Accused one stated that he did not want to say anything about the statement that Mr Kruger took down. He also indicated that Mr N Mtshali was lying when he said that he found him in the deceased's room at the family homestead on 7 March 2020, denied that he drank alcohol and denied that he was ever in the company of accused three and Mr N Mtshali. He denied that Mr Dlakude had arrested him but could not say that he was not present because there were allegedly many people present. Ultimately, he agreed that Mr Dlakude, a very large, conspicuous man, was present.

[159] Mr Ngubane then took accused one under cross-examination. The first point that he took with accused one was that he now mentioned that there were white people involved in his apprehension, a fact that had not previously been mentioned. To this, accused one stated the following:

'I was arrested by black people from Swaziland when I was brought here.'

This was contrary to his evidence in chief, which specifically mentioned the presence of white people. Mr Ngubane insisted that accused one had mentioned the involvement of white people in his apprehension for the first time while being led in chief by Mr Luthuli. That invoked a response from accused one that he could not recall this. He was asked why this version had never been put to Mr Dlakude or to Capt Mncwango. Accused one agreed that it had not been put, but said that he had told his counsel about the persons in Swaziland. He confirmed that he had been at home on 6 March 2020 but ultimately conceded that everyone who could potentially confirm this was not going to be called to testify.

[160] Mr Ngubane asked why Capt Mncwango had not been told of his alibi whilst he was investigating the matter. Accused one stated that he did tell him. It was never put to Capt Mncwango that he had been told of accused one's alibi. Later, accused one agreed that he had not told Capt Mncwango of his alibi because he was in a state of shock. He was at liberty to mention it for the first time because he was now 'free'.

[161] Accused one agreed with Mr Ngubane that he had been spoon fed a version by Capt Mncwango to tell the magistrate. He was asked what was on the piece of paper prepared by Capt Mncwango but refused, initially, to answer the question. The court indicated that he was required to answer the question and every response that was thereafter received to a question relating to the content of the paper was that accused one could not recall.

[162] When accused one's attention was drawn to his confession to Mr Kruger, he was asked whether he had given the names of persons mentioned therein to Mr Kruger. He stated that he could not recall but repeated that what he told Mr Kruger was what Capt Mncwango had told him to say.

[163] Accused one was asked why he did not ask for a copy of the paper from Capt Mncwango so that he could refresh his memory before he went to see the magistrate. Accused one stated that he did not want to interact with Capt Mncwango for a long period of time because he was so afraid. He stated that he thought Capt Mncwango would hand him over to the white people if he 'asked for things'. Asked

how Capt Mncwango could surrender him to the white people when it was obvious that he was in SAPS custody, accused one said that it was possible that he could have been booked out at night.

[164] Mr Ngubane again drew accused one's attention to the extra curial statement recorded by Mr Kruger and, more specifically, to that portion thereof in which it was recorded that the deceased forced accused one into the rugby club against his will at gunpoint. He was asked why Capt Mncwango would have wanted him to say that to the magistrate. Accused one said that he did not know. There is no ready explanation for this. The court asked him whether Capt Mncwango was, in fact, helping him by demonstrating that he was an unwilling participant in the events that were then to occur. He again stated that he did not know. Asked why Capt Mncwango would prepare this false version and force him to narrate it to Mr Kruger, it being agreed that neither Capt Mncwango nor he knew each other, accused one said it was because Capt Mncwango was protecting the two persons that had been taken to the Magudu police station. Why Capt Mncwango would wish to protect these two men was never explained. Mr Ngubane put it to accused one that if the story he was forced to narrate to Mr Kruger was contrived by Capt Mncwango, he could have said that accused one also had a firearm and thereby made it worse for him. Accused one said that he did not know about this.

[165] Asked by Mr Ngubane why Mr N Mtshali would lie about finding him in the deceased's bedroom on 7 March 2020, the only response received was that the witness was lying. Accused one later said that Mr N Mtshali was protecting Mr S Mtshali, one of the persons who was allegedly detained at Magudu police station. That completed Mr Ngubane's cross-examination and Mr Luthuli had no re-examination.

[166] Accused one's case was provisionally closed at that stage pending delivery of a copy of his identity document and the evidence of accused two was then commenced. During accused two's evidence, the further evidence of accused one was interposed to permit the handing in of a certified copy of his identity document to occur. It records that he is a Swazi national. His case was then finally closed.

The second defence witness: Sipho Richard Mthembu (accused two)

[167] Accused two confirmed that he lived in South Africa and that he was unemployed at the time of his arrest. He made a living by doing odd jobs which included, it would appear, some form of block laying. He did not know either accused one or accused three and first met them on 10 March 2020 in the Pongola police station holding cells. Apropos nothing, accused two added that this was a Tuesday.

[168] Accused two stated that on 6 March 2020 he had an argument with a man who owned a security company in Pongola. He was laying blocks for this man. He identified this man as being Mr Mdu Mamba (Mr M Mamba). He explained that he was cleaning a concrete slab and was waiting for Mr M Mamba to bring a pallet of blocks. The concrete slab was apparently near to his home. This response was provided when Mr Luthuli asked him where he was on 6 March 2020. However, it later transpired that accused two was not at the concrete slab but was at home 'from the morning until the afternoon.'

[169] Asked by Mr Luthuli if he knew the witness Mr Mathebula, accused one said he did and that that he was just a boy from the same area where he lived. It is to be remembered that Mr Mathebula stated that he lived at Madanyini, Pongola. He said that Mr Mathebula used to drive a van that belonged to accused two's late brother. He stated that he had no relationship with him and had never trusted him with any of his 'secrets'. He had known him for about five or six years. He denied telephoning him from Swaziland and he denied informing him that he intended to commit a crime. He also denied staying at Mr Mathebula's homestead. He stated that Mr Mathebula's homestead is near a sports field and that Mr Mathebula may have seen him on 6 March 2020 as he proceeded to the sports field to exercise. How this visit fitted in with his alibi, discussed later, was not explained.

[170] Accused two denied informing Mr Mathebula of what happened at the rugby club on 7 March 2020 and did not speak to him on that date. He denied Mr Mathebula's evidence that on 8 March 2020 he had informed him that he had been at the rugby club. All of this was lies, according to accused two. On that date he was at the concrete slab where he was working.

[171] Accused two stated that he knew Mr Mnisi, who he knew because he was, or had been, a player in a local football team called 'Karera'. He knew the deceased as a brother to Mr Mnisi. He stated that he last saw Mr Mnisi approximately 20 to 30 years ago. He stated that he had last seen the deceased when they were arrested together in 2007. The deceased had been released from prison first and he thus estimated that he last saw him in 2013 or 2014.

[172] Mr Luthuli asked accused two why Mr Mathebula would have made up these allegations against him. Accused two indicated that Mr Mathebula had given him an explanation. However, the explanation that he then launched into did not, ultimately, explain why Mr Mathebula had made the allegations about him. What was said by accused two at great length was that at about noon on 8 March 2020, a Mr Nkosi came to him with two men called Mr Sbu Qhakaza and Mr Sifiso Khumalo. Great detail was provided by accused two as to what was said between him and these men. Mr Nkosi asked him where his cellular telephone was. Accused two said that he had it with him. Mr Nkosi then tried to telephone it. When accused two's cellular telephone did not ring, Mr Nkosi then wanted to know about its SIM card.¹⁴ Accused two was then taken to the Pongola police station where Capt Mncwango and three other persons came out to where he was standing near a tree. The three persons with Capt Mncwango each took a photograph of him using their cellular telephones. Members of the JCPF then arrived with two people, one of whom was the deceased's elder brother. They were made to stand in front of accused two. None of this explained why Mr Mathebula would concoct his version about accused two.

[173] Accused two indicated that he remembered Col Mbongwa but disputed that his signature appeared on the statement that she stated that she had recorded from him. His name is on the statement, but he did not know who had written the statement and he was not the person who made it. He confirmed that he had never spoken to Col Mbongwa but that she had come to the holding cells.

¹⁴ <https://www.merriam-webster.com/dictionary/SIM%20card>: A SIM, or Subscriber Identity Module, card is a card that is inserted into a device (such as a cellular telephone) and is used to identify a subscriber on a communications network and to store data (such as telephone numbers or contact information).

[174] Accused two further said that he had never stated to Col Mbongwa that he wanted to clear his conscience. Accused two acknowledged that Capt Mncwango had said that in his evidence, but said that in saying that he was lying. He said that he knew Col Mbongwa and said, rather enigmatically, that he did not think he would have made 'such a thing', meaning the extra curial statement, before her. Certain advice that he had received in prison held that such a statement could only be made before a judge.

[175] Regarding events at the KwaNongoma Magistrate's Court, accused two confirmed that he had been taken there by a police official called Nkosi. There he met a lady who identified herself as Ms Ntshangase (Ms Ntshangase) who said that she was a state prosecutor. A language practitioner was also present. Ms Ntshangase asked why he was there, and he replied that he had been taken there to admit an offence. She spoke English to him which was interpreted into isiZulu by the language practitioner. He informed her that he had no knowledge of the offence but stated that the investigating officer had said to him that if he admitted the offence, the investigating officer would consider letting him go. She did not take a statement from him but signed a form which was given to his police escort. He did not read it and he did not sign it.

[176] Mr. Ngubane commenced his cross-examination of accused two by asking him why it had not been put to Capt Mncwango that he had been working for Mr M Mamba at the time of his arrest. Accused two said that he forgot to dispute that. Accused two was, however, not asked why he had commenced his evidence in chief by stating that he was unemployed before he was arrested. In what was to become a trend with this witness, and with accused three for that matter, he stated that he had told his counsel that was where he was working, but for some reason it was not disputed with the witness.

[177] Accused two was then asked why he had never disputed going to Mr Mathebula's residence. Accused two said that he had disputed that when he said that everything Mr Mathebula said was lies. He was then asked why he had not disputed calling him on 5 March 2020. Initially, accused two said that it had been disputed, but then conceded that it had not and that the error was his but that he had

told counsel that he did not telephone Mr Mathebula. Mr Ngubane pointed out that accused two had not hesitated to attract his counsel's attention when he disagreed with something that a witness had testified about and wanted to know why this had not been done regarding this issue. Accused two said that there were too many questions. He confirmed that he did not see Mr Mathebula on 7 March 2020, but he did see his van parked in his yard. He agreed that they knew each other well but asserted that he had never stayed at his homestead, nor had he ever confided in him that he was considering committing a crime. When Mr Mathebula said that that had occurred, he was lying.

[178] Mr Ngubane wanted to know why it had not been put to Capt Mncwango that he had stated to accused two that if he confessed to the crimes, he would let him go. The response received was that accused two had forgotten about this. He did say, however, that he had a disagreement with Capt Mncwango on that issue, informing him that he did not believe that he could do that because he was 'not a court'. He confirmed that he was not present when Capt Mncwango allegedly gave his cellular telephone number to Mr Mathebula.

[179] The state advocate wanted to know how Col Mbongwa knew his date and month of birth if he never appeared before her, as he alleged. Accused two said that he did not know how this happened, but that he had been arrested before at Pongola and she may have got that information from other documents relating to him. This was, as he acknowledged, merely an assumption that he made. Asked how Col Mbongwa knew where he lived, he stated that what was recorded by her was not where he lived. When it was pointed out to him by the court that the indictment said that he also lived at that address and that had never been disputed, he said that he did not understand that. He appeared also to have forgotten that he had said that Mr Mathebula was 'just a boy from the same area where he lived' and that Mr Mathebula had said that he lived at Madanyini, which is what Col Mbongwa had recorded. He agreed that it had not been put to Col Mbongwa that she had merely copied her statement from an already existing statement. Surprisingly, accused two then stated that he did not know what a 'colonel' was. He said he knew her as the station commander.

[180] Mr Ngubane wanted to know, if the extra curial statement recorded by Col Mbongwa was a fiction, why it included a description of accused two and other people going to look for a missing pig. The answer received was that that may also have been copied from another statement. Why this fictional event should be included in his extra curial statement was not explained. Along a similar line, Mr Ngubane wanted to know why Col Mbongwa would have recorded in her statement that accused two had allegedly been forced by Mr Mnisi to go into the rugby club and that accused two and the others had to be guarded to ensure that they all entered the rugby club. The answer was that accused two did not know why this had been done. He was pressured again with the same question, Mr Ngubane wanting to know why Col Mbongwa would record that accused two was forced to commit the crime. Accused two said that he 'could not comment much' on that.

[181] Accused two stated that Mr N Mtshali was lying when he had said that he had seen accused two on 7 March 2020. When Mr Ngubane later put it to accused two that he had not challenged an issue with Capt Mncwango, accused two, remarkably, now stated that he thought that Capt Mncwango would come to give evidence for a third time and that he was intending to ask him these questions when he returned yet again to give evidence. Asked why he had not sought clarity on this from his legal representative, accused two said that Mr Luthuli had stated that he would ask questions at the tail end of the trial. Asked why he had made an assumption about Capt Mncwango returning, and had not asked to obtain certainty, accused two irrelevantly stated that there were a lot of questions that had been asked.

[182] The court required clarity on certain issues after Mr Ngubane completed his cross-examination of accused two. Firstly, the court required clarity on what had happened at the KwaNongoma Magistrate's Court. It was pointed out to accused two that it had first been put by Mr Luthuli to Col Mbongwa that he had met a magistrate and a language practitioner there. However, when accused two had testified in chief, he said that he had met a state prosecutor and a language practitioner. He had later said that he had seen a magistrate and a public prosecutor. In the latter instance, with him in the room, there were three people. He was asked why there was no language practitioner in the last version. Accused two attempted to suggest that the prosecutor was also an interpreter. He was asked which of these three versions was

correct. He gave a rambling answer and I cannot be entirely sure which of these versions he ultimately plumped for.

[183] The second issue that the court required clarity on was whether he had been employed as a van assistant to Mr Mathebula. Mr Mathebula had said that was how he knew him and that he, Mr Mathebula, drove a van that belonged to a member of his family, the latter fact never being disputed by accused two. Accused two had said in his evidence that the van belonged to his late brother. Accused two said he never worked with Mr Mathebula. Why Mr Mathebula's evidence had been accepted without challenge was not explained.

[184] The final issue that the court required clarity on was accused two's alibi. Mr Ngubane, for the state, appeared to accept that accused two had been at work at the concrete slab on 6 March 2020. However, that was not in conformity with the evidence of accused two, who had stated, as previously noted, that on that day he was at home 'from the morning until the afternoon'. He had never indicated where he was on the evening of 6 March 2020. Accused two then said that on the evening of that day he was at a place known as Sgungwini. That place is apparently next to Ngamazini. This had never been mentioned at any stage. Accused two made no attempt to explain how he could have been at the sports field near Mr Mathebula's house on 6 March 2020 if he was either at home or at Sgungwini.

[185] Before that explanation of his whereabouts on the evening of 6 March 2020 was provided, there was a rather extraordinary exchange between the court and accused two on when a day changed i.e. when, for example, did 1 March become 2 March. Accused two indicated that a day would change to another day at some stage during the afternoon of one day. He later admitted that it changed at midnight, a rather elementary proposition. He was then asked why he had purposefully not mentioned where he was on the evening of 6 March 2020 when asked by his counsel where he was on that day. He said that he had not been asked where he was in the evening. When it was pointed out that he was not asked where he was in the morning or the afternoon either but had provided that information, he could only say that he had forgotten to mention where he was in the evening. Of course, it really made no difference where he was during the day: the crucial part of his alibi was

where he was during the evening while the offences at the rugby club were being committed. The court pointed out to him that had it not asked about his whereabouts on the evening of 6 March 2020, the case would have concluded without accused two ever telling the court where he actually was on the evening of 6 March 2020. Accused two said he forgot about the evening.

[186] That was the case for accused two, who had no witnesses to call.

The third defence witness: Sibonelo Mabobosi Sihlongonyene (accused three)

[187] Accused three elected to testify in his own defence. He stated that he was a Swazi national, had no relatives in South Africa and was unfamiliar with the town of Pongola. On 6 March 2020, between the hours of 19h00 and 23h00, he testified that he was at home, asleep. The next day, he went to work at his sister's place, and he was arrested on Sunday night, 8 March 2020.

[188] On the night of his arrest, accused three testified that he was at home, asleep, with his brother. While he was asleep, he heard the sounds of people coming inside the dwelling and he was then assaulted by those people, as was his brother. He stated that his mouth had been closed and the house searched, and he was then taken outside. When outside, he saw two persons in handcuffs, one of whom was known to him. This was Mr Thabethe. He then left his home and went to the road where he found people standing there. He lost sight of his brother but stated that he knew accused one and he knew Mr S Mtshali, both of whom were present. His mouth had been closed by someone's hand when walking from his dwelling to the road and then the hand was removed and a cloth was placed over his mouth. They walked along the road until they reached the border fence with South Africa. They came through the fence into South Africa and he saw vehicles parked on the side of the road. Many people were present, and he estimated the number to be between 14 and 15 and he stated that they included both black and white people. Accused one and he were taken to a vehicle, made to lie face down in the bin of that vehicle and were conveyed to the Pongola police station. He did not know any of the people who had been involved in his apprehension.

[189] At the Pongola police station, he and accused one were taken to the charge office where a policeman called for the two men in handcuffs that he had seen when he was apprehended. That policeman then came back and took him to his office. They both sat down, and the policeman introduced himself as Capt Mncwango and asked him whether he knew Pongola and whether he was familiar with the town. Accused three said that he did not know Pongola and therefore was not familiar with it. Capt Mncwango then said that an offence had occurred at the rugby club and asked him if he was involved in it. Accused three said he did not know the case. He was then taken back to the charge office. Accused one was then called by Capt Mncwango and taken to his office.

[190] Accused one then returned to the charge office. After some time, Capt Mncwango called accused three to his office. There he was told that he was to be charged with attempted robbery, two murders and an immigration offence. He was required to put his thumb on an ink pad (he did not explain why) and was then taken back to the charge office. Accused one was then taken away and later brought back. About 20 minutes later, both were taken to Capt Mncwango's office. Capt Mncwango had a white paper in his hand. He introduced himself again and said that they could not deny their involvement in the offence at the rugby club because their co-accused, who were being kept at the Magudu police station, had told him everything. He said that he had the names of all the people involved at the rugby club and they were recorded in his diary. He then read to them what was on the paper that he was holding and thereafter gave it to them and instructed them to also read it. After they had read it, Capt Mncwango said that they were to be taken to the hospital. He said when they go to the court, they had to narrate what they had read in the statement that he had given them to read. They were later taken to see a doctor but before they went, Capt Mncwango gave a clean T-shirt to accused one.

[191] Having seen the doctor, they were again taken back to see the doctor in the afternoon of the same day. Accused three confirmed that he had never spoken to Mr Kruger, the magistrate, and that he had not made a confession. When Mr Luthuli asked him to comment on Mr N Mtshali's evidence that he had confessed his involvement in events at the rugby club to him, he stated that Mr N Mtshali was lying. Accused three said he did not know Mr Mnisi and accused two but that he did know

the deceased. He testified that he could not understand why Mr N Mtshali was implicating him in the matter as they had a good relationship. He did know accused one, who had worked with his brother and sister, but he was not a friend of his.

[192] As Mr Luthuli did with each of accused one and two, he invited accused three at the end of his evidence in chief to mention anything that had not yet been mentioned by him in his evidence. Unlike accused one and two, accused three accepted this general invitation and raised two issues that he said had not been dealt with by him in his evidence in chief. He indicated that Capt Mncwango forced him to admit his involvement and took him three times to court to make a confession but that he had declined to do so as he did not know the case. This had not been put to Capt Mncwango. He repeatedly told the court that he could not confess to a crime that he did not commit. He was taken to the Pongola Magistrate's Court on 10 and 11 March 2020, to two different magistrates, but declined to make a statement to either of them. The only thing he stated that he could talk about was how he had been arrested and brought to the court.

[193] The second issue that accused three raised was that he wished to state that Capt Mncwango had said that if he did not confess, he, Capt Mncwango, would do things his own way and would take accused three to a place and that when he returned from that place he would want to listen to him. This occurred on 11 March 2020 at the Pongola Magistrate's Court. Accused three, whilst drawing attention to this alleged threat, never mentioned the threat raised by accused one which, according to accused one, had allegedly also been made to him.

[194] Mr Ngubane commenced his cross-examination with a series of propositions that had never been challenged by accused three when various state witnesses had testified. Thus, accused three had never stated that he did not know of the place called Sitilo where he and accused one had allegedly been arrested by Mr Dlakude; Capt Mncwango had never been told that he had asked accused three if he knew Pongola; Capt Mncwango was never told that accused three had been taken twice to a magistrate; Capt Mncwango had never been told that he had forced accused three to confess; and, finally, it was never put to Capt Mncwango that he had threatened to take accused three to an unknown place and that on his return from that place he

would listen to Capt Mncwango. All these confrontations elicited more or less the same answer from accused three, namely that accused three's counsel had been told to put these propositions to the various witnesses but had neglected to do so.

[195] Accused three agreed that he did not know who had arrested him and could only say that Capt Mncwango had charged him. Mr Ngubane asked accused three whether he had informed Capt Mncwango of his alibi whilst the matter was being investigated. He confirmed that he had, but it was then again pointed out that this fact had never been put to Capt Mncwango. Asked how he had overcome the fear of the threat made by Capt Mncwango, he declined to answer the question.

[196] Accused three was asked what was contained on the paper that he had been required to read in Capt Mncwango's office. He answered generally that it was about what happened during the incident. Asked again, he said that he could not recall the content of the paper but that Mr Kruger read it out in court. When it was pointed out that the confession of accused one was read out by Mr Kruger and not the document that Capt Mncwango allegedly had, he replied that both documents were the same. The court asked him to specifically indicate what was contained in the document presented to him by Capt Mncwango, but he again demonstrated his unwillingness to address that question by saying that he could not recall its contents, but that it contained 'most things', such as names. Asked to mention the names, he eventually stated that those names were those of the deceased, his name, accused one's name, accused two's name and the name of Simanye Mathe.

[197] In another challenge, Mr Ngubane asked accused three why Capt Mncwango had not been asked about carrying a diary. Accused three said that had been his mistake. He also confirmed that Mr N Mtshali was lying in his evidence, although he conceded that he had never had a problem with him and could think of no reason why he would implicate him. Mr Ngubane thus concluded his cross-examination.

[198] The court sought clarity from accused three on two issues. Accused three's attention was drawn to his earlier evidence that he could not recognize anyone who was involved in his arrest in Swaziland and that he could only say that Capt Mncwango had charged him at the Pongola police station. The suggestion was

therefore put to him that Capt Mncwango could not have been amongst those who arrested him in Swaziland, seeing as he could identify him but could not identify anyone in Swaziland. Faced with this question, accused three said that he did not see Capt Mncwango in Swaziland. His evidence on this aspect was at odds with the evidence of accused one.

[199] Finally, the court asked him why he had never at any stage mentioned the threat that accused one had stated that Capt Mncwango made, namely that if they did not do what Capt Mncwango wanted them to do, they would be handed to the white people who would kill them because they had killed a white person. It was pointed out that accused one had stated that accused three was present when that threat was made. Accused three said that he had not mentioned this because Mr Luthuli had said that they were finished with what had happened in Capt Mncwango's office and that everyone knew what happened there. It was pointed out that he had been given carte blanche by Mr Luthuli at the end of his evidence in chief to mention anything that had not yet been mentioned in his evidence that he wished to bring to the court's attention and had not mentioned that threat but had mentioned a different one. Accused three's answer was almost inaudible. He was then asked how serious the threat could have been seeing that he had defied it. Accused three said that different people responded differently to threats.

[200] That concluded accused three's evidence and Mr Luthuli closed his case.

Argument

[201] Mr Ngubane argued on behalf of the state that the three accused, based upon the respective statements that they had made, should be convicted on the three counts that they each face. Mr Luthuli, in a lengthy and passionate address, argued that the state had not established the guilt of the accused beyond reasonable doubt and that they should, therefore, be acquitted on all counts.

Analysis

[202] It is convenient to commence with a consideration of Mr Luthuli's final submission, namely that the state has not proved the guilt of the accused beyond a reasonable doubt. It is trite that the state is required to establish that there is no

reasonable doubt about the guilt of the person or persons that it has put on trial. A 'reasonable doubt' means what it says. It is the reasonable doubt of a fair-minded, impartial judicial officer, honestly seeking to ascertain the truth. It is a doubt based both upon common sense and reason and is not vague or arbitrary in its nature. It is a doubt in respect of which a reason can be given arising from a fair consideration of the evidence adduced, or a lack of such evidence, or from conflicts in the evidence adduced, or a combination of these factors.

[203] Even a cursory appreciation of the evidence adduced would lead to the understanding that in this matter there is no direct evidence implicating the three accused in the events at the rugby club on the evening of 6 March 2020. No eyewitness evidence has been adduced that they were there present nor has any objective forensic evidence been adduced establishing that they left traces of their persons there on that night. That, however, does not necessarily mean that the state has not established their involvement in those events.

[204] Direct evidence is not always necessary to establish the guilt of an accused person, for there are other ways of determining guilt. One such way is by a consideration of circumstantial evidence. In *Tom v The State*,¹⁵ van Zyl J stated: 'The fact is that the law draws no distinction between circumstantial evidence and direct evidence in terms of its weight or its importance. Either type of evidence or a combination of both may be sufficient to meet the required standard of proof in the factual context of a particular case.'

[205] In the English case of *R v Taylor Weaver and Donovan*,¹⁶ Hewart LCJ discussed the value of circumstantial evidence, remarking as follows:

'It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.'

Circumstantial evidence is indirect evidence that does not, on the face of it, prove a fact in issue but gives rise to a logical inference that the fact exists. The state relies

¹⁵ *Tom v The State* [2022] ZAECMKHC 98 (29 November 2022) at para 13.

¹⁶ *R v Taylor Weaver and Donovan* 21 CR App R20 at 21.

on the circumstantial evidence of the extra curial statements made by the accused either to a magistrate, a commissioned SAPS officer or to a long standing friend.

[206] It is perhaps prudent to first consider the undisputed facts in the matter. It is not disputed that the rugby club has within it a pub called 'Porra's Pub' that is owned by the first state witness, Mr Jardim. It is not disputed that he was running the pub on the night of 6 March 2020 and that there were patrons present in the pub when a gang of six robbers struck. It is common cause that no robbery occurred but that an attempt was made to rob the patrons and the pub. It is also common cause that Mr Mathews and the deceased lost their lives in the attempted robbery. The mechanism of the death of Mr Mathews and the deceased is also admitted. The only issue is whether the accused were part of the group of six men who stormed into 'Porra's Pub.'

[207] The correct approach that a court must adopt when assessing evidence is principally set out in two cases. The first is *S v van der Meyden*, where Nugent J observed that:

'A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'¹⁷

[208] Thus, the basic approach to adopt in the evaluation of evidence is that all the evidence must be weighed together in its totality. Navsa JA in *S v Trainor* stated:¹⁸

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'

An approach that fragments and compartmentalises the evidence is accordingly both illogical and incorrect. I bear this in mind as I consider the evidence before the court.

¹⁷ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448h-i.

¹⁸ *S v Trainor* 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) para 9.

[209] The Kingdom of Swaziland and the Pongola region of KwaZulu-Natal are adjacent areas of land seemingly separated by a pervious border. Where one country ends and the other begins is defined on maps, and perhaps even on the ground, but does not appear to prevent the passage of determined persons who want to pass from one country to the other without utilising the formal methods of doing so. In short, a person who does not possess a passport but who wants to enter the other country appears to have no difficulty in doing so, notwithstanding a passing reference in the evidence to the fact that soldiers apparently do patrol the border from time to time. In reality, there appears to be a blurring of the division between the two countries. That this must be so is evidenced by the fact that accused one and accused three are Swazi nationals while accused two is a South African.

[210] Perhaps because the state lacks direct testimony of witnesses who are capable of identifying those who participated in the events at the rugby club, it has had to cast its net wide in order to attempt to find witnesses who may be able to identify who was responsible for those events. In this regard, it has taken statements from a friend of accused two, Mr Mathebula, and the brother of the deceased, Mr N Mtshali. Besides the evidence of those involved in the recordal of the two formal extra curial statements relied upon by the state, those two witnesses are the two most significant witnesses called by the state. The most important witness when it comes to the arrest of the accused is Mr Dlakude.

[211] The first of these witnesses to testify was Mr Mathebula. He clearly was not comfortable in giving his evidence. He stared with a slightly downward trajectory throughout his stay in the witness box, never looking up, a fact of which the court made a note. I gained the distinct impression that he was not happy to be in court giving the evidence that he was giving but, to his credit, he gave it nonetheless. His evidence was multi-faceted: he testified that he was told in advance that a criminal offence was to be committed by accused two; he was told a short while later by him that such offence had actually occurred; and then he was told by accused two that he had participated in the offence.

[212] Mr Mathebula said that he had worked for the last two years with accused two, who was his van assistant, Mr Mathebula being the van driver. Mr Mathebula

said that the van he drove belonged to a family member of his. None of this was disputed by accused two. However, when accused two testified, he stated initially that he was unemployed, and then later that he was employed as a block layer and that he had not worked with Mr Mathebula, who drove a van that belonged not to a member of Mr Mathebula's family, but to accused two's late brother. None of this was put to Mr Mathebula. It is patently untenable for accused two to now suppose that his untested version should be accepted as being the truth.

[213] Accepting therefore the version of Mr Mathebula, it must be so that there was at least some familiarity, perhaps even friendship, between him and accused two based upon their day to day work activities. It is that familiarity that could potentially explain why accused two made the disclosures to Mr Mathebula that the latter says that he made. The disclosure narrated by Mr Mathebula is problematic for the innocence of accused two. From accused two's point of view, that relationship therefore needed to be shown to be fractured and diminished in its importance to make the likelihood of accused two confiding in Mr Mathebula appear to be unlikely and inexplicable. Thus, accused two dismissed him merely as being 'a boy' from the area where he lived. He was more than a boy: he was an adult man with whom accused two worked. But the inference that there was a level of intimacy between them is revealed by the fact that Mr Mathebula knew intimate details about accused two. He knew that accused two was still on parole, and was thus still 'signing', and could not therefore simply run away, as accused two at one stage told him he was contemplating doing. There is further evidence in the admission by Mr Mathebula, given under cross examination, that he had gone to visit accused two while he was in custody awaiting trial. That conduct is consistent with two men who are friendly toward each other and is inconsistent with two men who each regard the other with disdain and suspicion.

[214] Mr Mathebula, even in his discomfort in the witness box, impressed me. He is by no means a sophisticated man, which is stated without intending any disrespect. He simply said what he knew, even though it involved someone that he knew. He did not know the other persons mentioned by accused two as being involved with him in the crime and he candidly stated that he had never ascertained precisely what role accused two actually played in the events at the rugby club. He had no reason to lie

when he stated that accused two was at his homestead on the evening after the incident at the rugby club. An attempt was made to suggest that he had been put up to his evidence by the SAPS, a consistent and common theme throughout the various defence cases, and that the SAPS had given him accused two's cellular telephone number, presumably to strengthen accused two's allegations that his evidence was false.

[215] Given the fact that Mr Mathebula and accused two worked together, I would have been greatly surprised if they did not each have each other's cellular telephone number. I would have considered it a necessity that they be able to contact each other. If, however, this was a plot devised by the SAPS, as was suggested by Mr Luthuli in cross examination, it appeared to fall flat and was entirely unsuccessful because Mr Mathebula could not remember the cellular telephone number that he was allegedly given. He ultimately denied that this occurred and said that he had, in fact, given Capt Mncwango accused two's cellular telephone number.

[216] No evidence was adduced by the defence to show that Mr Mathebula was ever given accused two's cellular telephone number. All the allegations in this regard were simply supposition and conjecture. Accused two in his evidence said that he knew why Mr Mathebula had been put up to give this false evidence but, as already mentioned, his long, rambling explanation did not disclose what the reason was. I am satisfied that the evidence of Mr Mathebula must be accepted where it diverges from that of accused two.

[217] Mr N Mtshali is a brother of the deceased. He, however, appears to be cut from a different cloth when compared with the deceased, for he gives the appearance of being an empathetic human being who is not involved in, or supportive of, a criminal lifestyle. The latter comment finds its basis in the undisputed fact that when Mr N Mtshali came to South Africa on 8 March 2020, dispatched to this country by his parents to ultimately understand the fate of the deceased, he coincidentally met up with Capt Mncwango at a petrol station and told him everything that he knew about what had happened at the rugby club. This involved him making some damning allegations about the conduct of at least two people with whom he had grown up. Those allegations, moreover, would have included damning

allegations about his own brother, the deceased. It could not have been an easy decision to make on his part, or an easy thing to do, and says much for his character that he disclosed all that he did.

[218] Mr N Mtshali's evidence was rubbished by the accused as being false. In argument, Mr Luthuli stated that the common version that was testified to by a number of witnesses, including Mr N Mtshali, had as its base, a 'script' that had been prepared by Capt Mncwango and that had been given to a number of people. These persons included Col Mbongwa, which allowed her to record accused two's extra curial statement without him physically being present in front of her. No evidence of the existence of this 'script' was ever adduced by accused one and three, other than their own say-so. However, it was not initially suggested to Mr N Mtshali that this 'script' was the source of his knowledge. It was first suggested that he had been advised of what had happened at the rugby club by Mr S Mtshali and Mr Thabethe. Why, how or when this occurred was never disclosed nor was how any of the accused knew this to be so. As indicated earlier in this judgment, confusingly, it was also put to Mr N Mtshali that the accused would say that the statement that Mr N Mtshali had deposed to did not arise from his own knowledge but from knowledge that had been given to him by the SAPS. This was vehemently denied by the witness.

[219] It is important to note in this regard that this distancing of accused one and accused three from the statement of Mr N Mtshali is not consistent conduct on their part, for it was them that put up his affidavit as an annexure in their earlier pre-trial applications dealing with their objections to their arrest. They were quite content to use it then. The content of Mr N Mtshali's statement, which was appended to the founding affidavits in each of those applications, is entirely consistent with his later oral evidence.

[220] Mr N Mtshali's evidence, when faced with a denial by accused three that he had confessed to him on 7 March 2020 regarding what had happened at the rugby club, was that he knew accused three very well and that on that date he had sat face to face with him whilst accused three told him of the events at the rugby club. This was a powerful moment in the trial. Mr N Mtshali's response was made with confidence and with an air of disbelief that he could possibly be wrong or mistaken

about what accused three had done. His response appeared to be genuine and it had the ring of truth to it.

[221] The only point of criticism that Mr Luthuli could summon up regarding the evidence of Mr N Mtshali whilst he was physically in the witness box was that he could not remember the precise date of the deceased's funeral, only the month and the year in which it occurred. In truth, this was no material criticism of him at all, but merely showed his human fallibility.

[222] In argument, Mr Luthuli also argued, albeit faintly, that the repeated questions allegedly asked by Mr N Mtshali as to where the deceased was after he saw the other accused and the other gang members at his parents' homestead on 7 March 2020, was contrived and that what he was truly worried about was not the whereabouts of the deceased, but the whereabouts of his other brother, Mr S Mtshali. This proposition was never put to Mr N Mtshali and I have no hesitation in rejecting it. How this could be known by any of the accused was not explained. Mr Luthuli stated that the repeated expression of concern about the whereabouts of the deceased by Mr N Mtshali demonstrated that Mr N Mtshali knew more than he was letting on. I also reject that idea for there is no evidence to establish it. Mr N Mtshali's conduct is entirely in keeping with the concern of a worried younger brother anxious about the well-being of his inexplicably missing older brother.

[223] In short, I found Mr N Mtshali to be a compelling and reliable witness and I accept his evidence.

[224] Mr Dlakude's evidence was led by the state to establish how the accused came to be in SAPS custody. Mr Dlakude is physically a large person, tall and imposing. He is actively involved in the security of his home town and, indeed, makes his living from such security services. But his involvement in the life of his community goes beyond that and also involves him being an active member of a voluntary community policing forum. He was up to speed with what happened at the rugby club from the outset as he was guarding premises right next to it.

[225] The evidence of Mr Dlakude impacts directly on the versions of accused one and accused three. They aver they were arrested in Swaziland. Accused one initially

did not acknowledge his presence at the time of his apprehension, identifying only Capt Mncwango by name. He, however, ultimately conceded that Mr Dlakude was present. Mr Dlakude was adamant that he had never entered Swaziland and if the admission of accused one is accepted, then it can only mean that accused one and three were apprehended in South Africa.

[226] Mr Dlakude was a good witness, and answered questions without hesitation. I found no indication in his demeanour that he was uncomfortable with the version that he gave. He would not be swayed from his evidence as to how his path crossed with the paths of all three accused. For reasons that follow, the accused were not reliable witnesses. I accordingly accept Mr Dlakude's evidence and find that the accused were not apprehended in Swaziland, as accused one and three allege, but in South Africa.

[227] A constant presence in the matter is that of the erstwhile investigating officer, Capt Mncwango. Now retired, it is he who is alleged to have orchestrated the case against the accused. He is alleged to have improperly entered Swaziland to arrest accused one, it is he who prepared a statement, referred to as a 'script' by Mr Luthuli, and compelled accused one and accused three to memorise it, it is he who uttered a threat to accused one and a different threat to accused three and it is he who has acted to protect the two men held at Magudu police station. These are some of the allegations made against him by the accused. He was an excellent witness. He is undoubtedly experienced and has no doubt appeared in court many times over the course of his long career with the SAPS. He accordingly would not be a novice when it comes to the giving of evidence.

[228] The most serious of the allegations against him are that he unlawfully entered Swaziland and was part of a group that unlawfully kidnapped accused one from that country and brought him to this country. If that allegation was true, it would be evidence of grossly unlawful conduct of a person whose duty it is to uphold the law, not break it. I am satisfied that there is no truth in the allegation. Accused three conceded that he did not observe Capt Mncwango in Swaziland. The presence of Capt Mncwango in Swaziland is not a feature of accused three's affidavit delivered in support of his earlier application. While accused one does mention his alleged

presence in Swaziland, no particularity of his conduct is provided. It is simply never mentioned what he allegedly did in that country. Moreover, accused one could, and should, have laid a charge against Capt Mncwango for the alleged act of kidnapping, but never did.

[229] The other principal allegation made against Capt Mncwango was that he had authored the 'script' that he demanded accused one and three commit to memory and narrate to the magistrate. This allegedly occurred in the limited time that accused one and accused three spent in his office together. I do not lose sight of the fact that the initial version put was that it had happened in the holding cells. The very notion of that occurring is so remote that it is tempting to dismiss it out of hand. The likelihood of that having happened is further diluted by the statement of accused one that they were required not to read only two A4 pages of manuscript, but four pages, because the back of the two A4 pages previously mentioned by him had also been written on. It would appear that this addition was introduced by accused one because his statement recorded by Mr Kruger came to occupy four A4 pages, and was alleged to be exactly what Capt Mncwango had forced him to memorise. That there was a threat attached to the memorising of the contents of the 'script' is rendered unlikely by the fact that accused three, who apparently also received the threat, never mentioned it in his evidence, but preferred to advance a different threat, of which accused one made no mention. The entire concept of the 'script' has all the hallmarks of an invented version resorted to by desperate persons attempting to extricate themselves from a predicament of their own making.

[230] Capt Mncwango was comfortable in the witness box and had no difficulty in dealing with the questions put to him. His evidence was by no means perfect: he said that accused one and three had gone to see a doctor before and after being taken to a magistrate, when it, in fact, transpired that for some unexplained reason they had been taken to the doctor twice before seeing the magistrate. He also appeared to contradict himself when he stated that he had gone to see accused two in the cells, apparently at accused two's request, after he said that he never went to the cells. It is possible, however, that his denial was only in respect of visiting accused one and three in the cells. I found him to an acceptable witness and can find no basis for rejecting his evidence.

[231] I turn now to consider the extra curial statements relied upon by the state. Section 209 of the Act provides as follows:

‘An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.’

The purpose behind this section is to rule out the possibility of a person incorrectly admitting his or her guilt in respect of an offence that may or may not have been committed. There must therefore be either confirmation of the offence actually having been committed in a material respect,¹⁹ or, in the absence thereof, that there is other evidence that demonstrates that the crime to which the confession relates was actually committed. In the latter instance, it is not necessary that he accused be linked himself or herself to the crime scene.

[232] In my view, there is evidence that the offences that the accused are charged with were committed. The evidence of Mr Jardim and Mr Julyan establishes the presence of robbers at the rugby club. Regretfully, the bodies of Mr Mathews and the deceased establish the deaths in respect of which the accused are charged. But there is also other corroboration for what happened. Accused two made mention in his extra curial statement that the fences at the caravan park had been cut with pliers. In the photograph album handed in, there is a photograph of the deceased lying with some pliers. Further corroboration may be found in the fact that the deceased resided in Swaziland, hence his brother's inquiries regarding his whereabouts when he arrived at the family homestead. The deceased's body was found in South Africa, in the pub at the rugby club.

[233] I am also mindful when considering the extra curial statements that whatever one accused person states in such an extra curial statement, whether it comprises a confession or an admission or a series of admissions, is not admissible against other accused persons. This is because section 219 of the Act stipulates that no confession made by any person shall be admissible as evidence against another person. The same principle applies to admissions since the judgment of the

¹⁹ *R v Blyth* 1940 AD 355 at 364.

Constitutional Court in *Mhlongo v S; Nkosi v S*,²⁰ where the court held that admitting extra-curial admissions against a co-accused would unjustifiably offend against the right to equality before the law. Thus the position is that an accused person can only confess about, or make admissions regarding, his own involvement in an offence. Any confession or admission by an accused person about the conduct of other accused persons in that offence is inadmissible against those accused persons.

[234] Accused one was taken before Mr Kruger, a magistrate, and made an extra curial statement to him. He made no complaint to him about undue pressure being brought to bear on him to make that statement, nor did he have any complaint about Mr Kruger himself. That statement places him initially in Swaziland but later in South Africa and at the rugby club. The point of contestation is whether the contents of the statement that Mr Kruger recorded was a recordal of accused one's real life experiences or whether what is recorded therein is a story that was made up by Capt Mncwango and which accused one was forced to regurgitate to Mr Kruger under a threat of harm being visited upon him by Capt Mncwango. I have already found that the statement is admissible and I need not repeat my findings in that regard. It appears to me to be entirely fanciful that Capt Mncwango would require accused one and accused three to memorise what accused one later stated was actually four manuscript pages of information within a very short time and then have confidence that the prescribed version would accurately be narrated to the interviewing magistrate. Such a version is entirely naïve in its construction and is rendered all the more unlikely by the refusal of either accused one or accused three to make any reference to what was contained in that document.

[235] The extra curial statement of accused two was made to Col Mbongwa, the station commander of the Pongola SAPS station. This statement was alleged by accused two to be a complete fabrication, with him alleging that he was never taken before Col Mbongwa and that his signature does not appear on the document that she compiled. What is recorded at the bottom of each page of the statement is a manuscript version of accused two's initials and his full surname. Col Mbongwa described it as accused two's signature. It is difficult to say that she is wrong or that

²⁰ *Mhlongo v S; Nkosi v S* [2015] ZACC 19.

she is correct in that conclusion, for a signature is largely dependent on the signor's intent. Accused two, if he wrote at the base of each page as alleged by the colonel, may have intended that to be his signature. But it is equally possible that he merely wrote his name in manuscript. That it differs from his signature on the rights notice that he admits signing, brooks of no doubt. For what appears on that document appears to be a true signature, being accused one's distinctive mark, delivered in a stylized way. It appears to me that what appears on the document compiled by Col Mbongwa is simply his name written in manuscript and not necessarily his signature.

[236] Mr Luthuli posed the question in argument as to why accused two would sign in two different ways. I cannot possibly answer that question as there may be many reasons for it happening. Capt Mncwango, however, answered the same question pithily when he said only accused two would know that. I do not, in any event, have to determine why he did so. I merely have to determine whether he made the statement to Col Mbongwa and whether he recorded his name at the bottom of each page thereof. Resolving that dispute requires me to make a credibility finding between accused two's version that he was never before Col Mbongwa and Col Mbongwa's evidence that he was and that he was the source of everything that she wrote down. I have no hesitation in accepting Col Mbongwa's evidence. She testified well, answered questions put to her without hesitation and candidly admitted errors that she had made. There was nothing to indicate that her evidence was a fabrication. The statement that she recorded contains details that only accused two could have given her, like his personal particulars and the largely irrelevant details involving the pig. The statement, moreover, falls short of him actually admitting his voluntary involvement in the events described. It did not reveal him to have acted in any manner against the patrons but to have performed the role of a reluctant observer, allegedly compelled to be in attendance at gunpoint. If this was a trumped up statement, as accused two alleges, it was a diluted statement that, while admitting his involvement and presence, tended to attempt to shield him from culpability. That it was a fiction cobbled together by Capt Mncwango and the SAPS is simply false and must be rejected. Col Mbongwa's evidence can therefore be accepted in preference to accused two's version. The extra curial statement that she recorded was thus that of accused two, as narrated by him to her.

[237] Accused three did not formally make an extra curial statement before a magistrate or a commissioned SAPS officer, but rather made a statement to his friend, Mr N Mtshali, that revealed his participation in, and knowledge of, events at the rugby club. He spoke freely and voluntarily to him, albeit after having consumed some alcohol although, according to accused three, he does not consume alcohol. Mr N Mtshali had no authority over accused three and offered him no reward nor made any threat that prompted him to reveal to him what he, accused three, knew of the events at the rugby club.

[238] Accused three simply denied that he made the statement to Mr N Mtshali. I have already found Mr N Mtshali to have been a reliable witness. I did not find accused three to fall into the same category of witness.

[239] There is thus evidence that each of the accused at one stage had been in Swaziland but had then proceeded from there to South Africa on the same day and had gone to the rugby club with the purpose of obtaining money from the patrons gathered there. Two of them were armed with pistols and the others had bush knives. Two persons lost their lives in the pub as a consequence. One firearm was subsequently recovered at the rugby club, next to the body of the deceased.

[240] Each accused elected to give evidence. It would not be unfair to commence the analysis of their individual performances in the witness box by noting that each of them avoided mentioning the events at the rugby club. This was no more evident in the behaviour of accused one and accused three who resolutely would not testify about what was contained in the 'script' allegedly prepared by Capt Mncwango and which explained what had happened at the rugby club. The court still does not know what was allegedly recorded in the 'script'. The accused were, however, content to narrate, seemingly endlessly, irrelevant details that had no prospect of assisting them in their respective defences. Who said what triviality, who stood where, what some insignificant person's name might or might not be, where a tree was, who had a diary, what day of the week it was and the like were facts disgorged by each of the accused. They were masters of insignificant minutiae. But when asked to detail what was written on the 'script' allegedly prepared by Capt Mncwango, accused one and three suffered a collective memory failure. It was almost as if they would somehow

infect themselves by even mentioning anything in that alleged statement. The most that accused one would say was that what was in his statement recorded by Mr Kruger was what was in the 'script' prepared by Capt Mncwango. When he was pressurised to deal specifically with what was allegedly in the 'script' he could not remember.

[241] The accused could not adhere to their individual versions and also contradicted each other. This notwithstanding the fact that they have had four years to straighten out their versions. Accused one initially stated that he had visited Capt Mncwango's office on two occasions which visits eventually culminated in the production of the 'script'. Under cross examination, this morphed into three separate visits. In accused one's affidavit in his application, he stated that accused three had been taken from where he was and brought to where accused one was:

'... and he had a cloth around his mouth.'

In his affidavit in his application, accused three said that one of the persons that came into his room:

'... closed my mouth with his hand and forcefully dragged me outside the room.'

Accused one did not mention this detail in his founding affidavit, yet when he gave his evidence in chief in the trial he stated that accused three had been brought to where he was standing by someone who had put his hand over accused three's mouth. He appeared to have read accused three's application in the interim and picked up that detail from his founding affidavit.

[242] In addition, the accused adjusted their versions as evidence was led. In an exchange between myself and Mr Luthuli at one stage, I pointed out to him that no one had said that there were any white people in the group of people allegedly waiting for accused one and three when they were allegedly abducted from Swaziland. The next day, it was added to accused three's version of events.

[243] Accusations of dishonesty by state witnesses were routinely put. They were made without any hesitation or any compunction. It was put on behalf of accused two, without any justification or foundation, that Capt Mncwango was lying when he testified that he did not know accused two because he had gone to school with Capt Mncwango's son. Due to the mathematical fact that there was a 21-year age gap

between them, accused two would have left school before Capt Mncwango's son was even born. The accusation was palpably false but was not retracted or withdrawn. In similar vein, accused two raised no objection initially to the fact that the state alleged that he resided at a place called Madanyini. However, in his evidence under cross examination, he stated that he did not live there, forgetting that he had stated that Mr Mathebula was a boy from the area where he lived and Mr Mathebula had said that he resided at Madanyini. These are but a few of many instances where the accused demonstrated themselves to be entirely unreliable and opportunistic witnesses.

[244] The entire version of the accused as a whole is based upon speculation and allegations of conspiracy in respect of which not a scintilla of actual, tangible evidence was produced in substantiation thereof. It is entirely fanciful in its content, unsupported by any facts.

[245] None of the accused performed well under cross examination. They were evasive. They avoided answering questions specifically asked of them and preferred to answer questions that they had not been asked. This was true, in particular, of accused two. John Henry Wigmore famously said that:

'Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skilful enough not to impale his own cause upon it.'²¹

Those words are undoubtedly true and the power of cross examination revealed the accused to be completely unsatisfactory witnesses.

[246] The essence of each accused's defence is an alibi. They each allege that they were not at the rugby club, but were elsewhere on 6 March 2020: accused one was at home, accused two was at a place called Sgungwini, accused three was also at home. That, however, was not pleaded at the commencement of the trial, for each of the accused elected to remain silent and not disclose the basis of their respective defences, as is their right. The existence of these alibis remained an uncertain

²¹ John Henry Wigmore, John Theodore McNaughton, Peter Tillers, James Harmon Chadbourn (1974): *'Evidence in trials at common law'*.

possibility until the moment that they were finally disclosed by the accused when they came to give evidence for those alibis were not put to any state witnesses.

[247] It is so that there is no onus on an accused person to establish an alibi. It is the task of the State to disprove it. In *R v Mokoena*,²² the court held that:

‘If the onus is upon the Crown to rebut the alibi, as it certainly is, then the evidence as a whole must be considered and the fact that the accused and his witness told stories, which in some respects disagree, does not mean that the Crown case has been proved beyond reasonable doubt ...’.

[248] If an alibi might be reasonably true, the accused must be acquitted. The correct approach is to consider the alibi in the light of the totality of the evidence presented to the court, as stated in *Mokoena*. In evaluating the defence of an alibi, in *R v Hlongwane*,²³ Holmes JA stated as follows:

‘At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.’

For the court to convict an accused who has raised an alibi as a defence, that alibi must be proved to be false beyond a reasonable doubt.²⁴

[249] The Supreme Court of Appeal in *S v Musiker*²⁵ observed that once an alibi has been raised, it has to be accepted unless it is proven that it is false beyond a reasonable doubt. In *S v Burger and others*,²⁶ the same court held that it is worth noting that mere lies for an alibi defence or for alibi evidence does not warrant ‘punishment for untruthful evidence.’ However, where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie or a falsehood, the lie together with the other evidence of the accused as a whole may point towards his or her guilt in certain cases.

²² *R v Mokoena* 1958 (2) SA 212 (T) 217.

²³ *R v Hlongwane* [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D.

²⁴ *Shusha v S* [2011] ZASCA 171 para 10.

²⁵ *S v Musiker* 2013 (1) SACR 517 (SCA) para 15-16.

²⁶ *S v Burger and others* 2010 (2) SACR 1 (SCA) para 30.

[250] It is passing strange that none of the alibi defences were pleaded at the outset of the matter. The accused were not obliged to reveal them, although the late disclosure of the alibis is something that the court must weigh up when deciding the matter. Each alibi raised by the accused is simple in its alleged constituent facts. While it may be so that the state bears the onus of disproving an alibi, for it to do so it must know that an alibi is being proffered and it must know what the facts relating to that alibi are. If an alibi is not revealed, it follows that the state will have no ability to investigate it and either accept or reject its authenticity. It was never put to the investigating officer that any of the accused relied upon an alibi. Moreover, in the case of accused two, it is apparent that he did not even tell his legal representative where he was on the evening of 6 March 2020, for his true whereabouts (according to him) were only revealed when the court asked a final question at the conclusion of his testimony.

[251] The accuseds' alibis must fail for two reasons. Firstly, by virtue of the extra curial statements that they each made. Those statements do not place them at the places that they now claim to have been on the evening of 6 March 2020, but place them squarely at the rugby club at the critical moment on that night. It is unnecessary to remark that it is physically not possible to be at two different places at the same time. On their own admission, each of them was at the rugby club and that shatters the veracity of any alibi that they have subsequently advanced. Secondly, they are not men whose word can be accepted in the absence of corroboration. Not one of them called witnesses to corroborate where they allege that they were on the night of 6 March 2020. Their alibis depend solely on them being credible witnesses. They are not credible witnesses.

[252] The state alleges that the accused were at the rugby club because they developed a common purpose to go there to carry out a robbery and had armed themselves to ensure that they achieved their objective. The Constitutional Court in *S v Thebus*,²⁷ recognized that common purpose (also referred to as 'a joint criminal enterprise') has two forms:

²⁷ *S v Thebus and another* [2003] ZACC 12; 2003 (2) SACR 319 (CC) para 19.

'The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'

Thebus,²⁸ with approval, referred to the following two definitions of the doctrine of common purpose as being:

'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime';²⁹

and

'The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.'³⁰

[253] In *S v Munonjo en 'n ander*,³¹ Nestadt JA dealt with the issue of subjective foreseeability. He found that the liability of persons who are alleged to have a common purpose depends on whether they should have foreseen the consequence of their actions.

[254] While accused one and two in their respective extra curial statements have both submitted that they were forced to enter the rugby club at gunpoint, I cannot accept that evidence, nor can they rely upon that version to dilute their culpability because they dispute the contents of those statements. From the unchallenged and accepted evidence of Mr Jardim and Mr Julyan, there is not a suggestion that the men who entered the rugby club did so in a manner that betrayed that they were acting under duress. The six men that Mr Jardim testified to seeing in the pub were all masked with balaclavas. Those robbers that went to the tables where patrons were sitting shouted instructions to the patrons and commenced striking them with the flat side of the bush knives that they were wielding. Mr Julyan testified that he himself was struck by one of the robbers with the flat side of a bush knife. This is not

²⁸ Ibid para 18.

²⁹ Burchell and Milton *Principles of Criminal Law* 2 ed (1997) at 393.

³⁰ C R Snyman *Criminal Law* 4 ed (2002) at 261.

³¹ *S v Munonjo en 'n ander* 1990 (1) SACR 360 (A).

the conduct of unwilling participants in the attempted robbery. None of this evidence was disputed.

[255] The three accused were thus at the rugby club late in the evening of 6 March 2020. On their own individual version, each of them had gone there to participate in a robbery. Each described the genesis of the plan as having been conceived previously in Swaziland. They left that country to come to South Africa with a single purpose in mind, namely the implementation of their plan, which was to rob the rugby club and its patrons. To achieve this aim they were armed and must have foreseen that those arms, whether in the form of pistols or bush knives, might have to be employed in the event of them encountering any resistance whilst carrying out their plan. Before going into the rugby club, accused two told Col Mbongwa that:

‘Bhungu checked and confirmed whilst we were there that both pistols were loaded with live rounds.’

Accused two was thus fully aware of the presence of loaded firearms. However, both accused one and accused three mentioned in their respective statements that they knew that two of their number, being Mr Mnisi and the deceased, were armed with firearms. If loaded pistols are discharged in a confined space populated with human beings, the likelihood of injury and even death eventuating is high and is entirely foreseeable. The accused all reconciled themselves with these possibilities and proceeded to this country to give effect to their plan. I must therefore find that there was a prior agreement to commit the crime and that the common purpose is the first kind mentioned in the earlier quoted extract from the judgment in *Thebus*.

[256] I am not in a position to conclusively find who shot whom at the rugby club. Disgracefully, no forensic evidence was presented by the state. The evidence, and common sense, however, indicates that Mr Julyan shot and killed the deceased. I cannot make a finding about who shot and killed Mr Mathews, for I have heard no evidence about the circumstances under which he was shot. In my view, legally it makes no difference whether it was a robber or Mr Julyan that shot Mr Mathews. The latter likelihood, however, appears unlikely, because Mr Julyan testified that he was not with Mr Mathews that evening and was not sitting with him.

[257] The reason why I do not believe that it makes a difference as to who shot Mr Mathews arises from the facts of *Nkosi v The State*,³² to which I was referred by Mr Ngubane for the state. In that matter, the appellant was a member of a gang that attempted to rob the owner of a business. During the course of the attempted robbery, the owner of the business drew a firearm and began shooting at the robbers. During that gunfire, a member of the gang was killed. The appellant was convicted of murder despite the fact that he was not the person who fired the shot that killed his fellow gang member. The matter was taken on appeal to the Supreme Court of Appeal, which held that he had been correctly convicted. The appellant had argued that the deceased had embarked on a frolic of his own which caused his own death and that the State had failed to prove that the appellant had the requisite intent to commit murder. The finding of guilty in the court a quo appeared to have been based upon the concept of *dolus eventualis*. The Supreme Court of Appeal found that the robbers reasonably foresaw the likelihood of resistance and the possibility of a shootout and accordingly armed themselves with loaded firearms. The shootout occurred in the same room where the robbery was being perpetrated and during the course of that robbery. The conviction was accordingly in order and the appeal failed.

[258] I can discern no reason why the same principle should not apply to the facts of this matter. It matters not who does the killing when a group have reconciled themselves with the likelihood of that occurring and proceeds, nonetheless, with their unlawful conduct.

[259] Before concluding, finally, I feel I need to address an issue that was raised by all of the accused. This related to their counsel, Mr Luthuli, allegedly being told a version and not putting it to a witness or being told to challenge the evidence of a witness and not doing so. I made it very clear at the commencement of the trial that I had no difficulty with Mr Luthuli taking instructions from the accused whenever necessary and I allowed it to occur without restriction. The accused and Mr Luthuli made liberal use of this offer. Whenever Mr Luthuli took an instruction, he would challenge the witness with what he had been told. In my view, Mr Luthuli has applied

³² *Nkosi v The State* [2015] ZASCA 125.

himself diligently throughout the trial and has invested great effort in properly representing his clients. He has not been correct in every decision that he has taken but I do not accept at all that he neglected to properly put his client's version or that he acted contrary to their express instructions. Indeed, this appears to me to be a manifestation of a traditional tactic adopted by accused persons who, when caught in a difficult moment, blame their counsel for their difficulty.

[260] I accordingly conclude that the state has established that each of the accused was at the Pongola Rugby Club late in the evening of 6 March 2020. They were part of a group of six men that had gone there with the purpose of robbing the patrons and the pub in which they were found. They were each armed and must have foreseen the possibility of applying force to overcome any resistance that they potentially may have encountered. They all reconciled themselves to this possibility and proceeded. The guilt of the accused on all three of the counts that they faced has been established beyond reasonable doubt by the state. They are thus all found guilty on counts one, two and three.

MOSSOP J

APPEARANCES

Counsel for the state	:	Mr C Ngubane
Instructed by:	:	Director of Public Prosecutions Pietermaritzburg
Counsel for the three accused	:	Mr M Luthuli
Instructed by	:	Legal Aid South Africa

Durban

Date of Hearing : 26, 27, 28, 29 February 2024 and
1, 4, 5, 6, 7, 11, 13, 14, 15 March
2024

Date judgment commenced : 13 March 2024

Date judgment completed : 15 March 2024