

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. CC21/2020

In the matter between:

THE STATE

VS

LUZUKO TAI-TAI

Accused No.1

MALETSATSI MAKETENG

Accused No.2

SAMKELO NONTWANA

Accused No.3

JUDGMENT

JOLWANA J:

Introduction.

[1] The three accused persons were arraigned in this Court on charges of conspiracy to commit murder, (count 1); arson, (count 2) and counts 3, 4 and 5 which are murder charges. The State invoked the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 in respect of the murder charges on the basis that the murders were premeditated and that the accused acted in execution of a common purpose.

[2] The summary of substantial facts in terms of section 144 (3) of the Criminal Procedure Act 51 of 1977 which was attached to the indictment does throw light into what the gravamen of the State's case against the accused is. It reads as follows:

- “1. Before the killing of the deceased persons, accused no.2 approached accused no.1 looking for a person who she could hire to kill her estranged husband (Nyakambi Monoana). And that she was prepared to pay a sum of R10 000.00 for such killing. Accused no.2 then introduced accused no.1 to her boyfriend one Sam.
2. On the 6th of November 2019 during the day, accused no.2 phoned Zimasa Binca to arrange transport to take her to Walaza Location during the night at 22h00. Zimasa then informed her boyfriend who was running a business of taxi cab about the booking of the cab by accused no.2 to Walaza and her cell number 0[...].
3. Around 23h15 Zimasa received a call from the same number that the cab should wait for her near Mokhesi Bridge. Indeed, Mhlali Manzi drove to the mentioned place and that is where he met and identified that it was accused no.2, Sam and an unknown guy. Sam loaded a black plastic at the back and accused gave directions to Walaza Location.
4. Accused no.2 instructed Mhlali to drive to the main road whilst Sam and Accused no.1 had gone away to burn deceased house. On coming back accused no.1 and Sam came back smelling burns.
5. The house of Nyakambi Monoana was burnt and he died of being burnt with his girlfriend and his son.
6. All 3 deceased died as a result of flame burns.”

The pleas.

[3] The accused pleaded not guilty to all the charges preferred against them with their legal representatives indicating that the accused would not be disclosing the basis of their defence which was reserved for trial.

The case for the prosecution.

[4] The first State witness was sergeant Tole. She testified that on 6 November 2019 while on duty at about midnight towards early morning she was at the charge office when they received a telephone call reporting that a homestead at Walaza was on fire. She drove to Walaza and the time was about 2am. As the vehicle approached Walaza she could see from a distance that there was a burning house. She drove to that homestead and went to a two roomed structure that was on fire. She looked through the window and saw a human body inside the first room. She went to the next room and saw two burnt bodies in the kitchen. She looked around in the yard of those premises. She saw a green water tank. Next to the water tank she saw a black bucket which contained something that was green and smelled like petrol. She looked around and next to the gate she saw a black plastic which had a plastic container with a yellow lid. She opened the container and it smelled of petrol. After all those observations she called the emergency services, the detectives and the LCRC to come to the crime scene. The LCRC officers worked on the crime scene and took exhibits.

[5] The State then called Zimasa Bhinca. She testified that she stayed at Kroomspruit in Sterkspruit. She was a student at Nelson Mandela Metropolitan University. On 6 November 2019 she was at home at Kroomspruit. In the course of the day she received a telephone call from a lady enquiring about whether she had a taxi cab. After she confirmed that indeed she was running a taxi cab the lady enquired about prices for a return trip to Walaza. She informed the lady that a return trip to Walaza was R300.00. The lady indicated that she would call again around 18:00 as she would need a cab to take her to Walaza. She phoned her partner, Mhlali Manzi and informed him that they had a trip to Walaza at about 18:00.

[6] Just after 18:00 the lady phoned again requesting to reschedule the time. The lady also mentioned that she would be coming with a sangoma whom she wanted to strengthen her household. The lady indicated that the rescheduled time should be about 10pm to 12 midnight because the sangoma did not want to do the cleansing with local people still moving around. She told the lady that that would not be a problem as their business operated on a 24 hour basis. The lady said they would wait for the cab near the Mokhesi Bridge. After 10 pm the lady phoned again

indicating that they were ready. Zimasa then called her partner Mhlali and informed him that the people that needed a cab were ready.

[7] The State called Mhlali Manzi. He testified that he was involved in various types of business ventures including farming and taxi cab services. He knew the three accused persons. He saw accused no.1 for the first time on the day of the incident and thereafter he got to see him when he attended this case. He knew accused no.2 even before the incident from a place called Dlananomemela where she was employed. He first saw accused no.3 when he met him at an event at Memela. He also got to know that accused no.3 was a producer or presenter at LA-FM radio station in Sterkspruit. Thereafter he would see him in local social circles.

[8] On 6 November 2019 at about 17:00 he received a call from Zimasa who told him that there were people that would need a cab to Walaza at about 22:00. He received another call from Zimasa at around 23:00 indicating that the people who needed a cab were waiting near Mokhesi Bridge. He then drove to Mokhesi Bridge and found three people who were waiting for him. Accused no.3 requested him to open the boot of the vehicle. Indeed, he opened the boot and accused no.3 loaded a container of between 10 to 20 litres in the boot. The said container was in a black plastic bag. Thereafter he drove off. Accused no.1 was introduced to him by accused no.2 as a sangoma and he was told that he was going to strengthen a certain homestead. When they reached the Walaza area accused no.2 gave him directions. During the trip accused no.2 was sitting in the front passenger seat. Accused no.3 was in the rear passenger seat behind him and accused no.1 was seating behind accused no.2. Accused no.2 gave him directions until they reached a certain homestead. When they reached that place accused no.2 made a phone call and informed the person she was calling that they had arrived.

[9] Accused no.1 and 3 alighted from the vehicle. Before they alighted they requested him to open the boot for them. He opened the boot and they took out the object they had loaded. He did not notice who took the object between accused no.1 and 3. Accused no.2 asked him to drive to the main road and stop next to a shop that was no longer operating. He drove to that spot with accused no.2, leaving accused no.1 and 3 behind. While they were waiting there accused no.2 told him

that the sangoma was going there to help her sister whose marriage was going through some difficulties. They were going there at night so that her sister's husband could not see what was being done. At some point accused no.1 and 3 came back running. They got into the vehicle. As they boarded the vehicle he noticed that they smelled smoke. As a result, he enquired from them what they were smelling of. Accused no.3 said they were smelling of the thing they had used. He also enquired why they were running. Accused no.3 responded saying that it was because dogs were chasing them. He asked them why they were not carrying the thing they went with there. They said that after a job they leave whatever they were working with at the place.

[10] He drove with all three accused and it was quiet on the way. He dropped them off at the same spot he had earlier picked them up near Mokhesi Bridge. They paid after which he parted ways with them. The following day he went to Memela and realized that accused no.2 was not at work. He learned there from one Nonelwa that something happened at Walaza and that police had just left. He never had anything to do with the accused again.

[11] An inspection in *loco* which was by agreement between the State and the defence during which the court was not present was done. Both Manzi and the accused and their legal representative as well as the prosecutor were present. Thereafter the State placed on record the following observations which it was indicated, were by agreement:

1. It was agreed between the State and the legal representatives for the accused that from the point at which Manzi said he dropped accused no.1 and 3 to the homestead of the deceased, the distance was 150 metres.
2. The distance from the point at which he dropped accused no.1 and 3 to where he and accused no.2 waited for accused no.1 and 3 was also agreed at 150 metres.
3. It was also noted that the accused disagreed that the drop off point was the one pointed by Manzi.

4. The distance from where Manzi said he dropped accused no.1 and 3 to where they said they were dropped was 100 metres. Therefore, from that spot to the deceased's homestead the distance was 250 metres according to the accused.
5. The distance from the place where Manzi alleged that he dropped accused no.1 and 3 to where the accused said he dropped accused no.1 and 3 is 50 metres and it is obscured from the one pointed by Manzi.
6. When they returned the witness pointed near the Gamazini Carwash near Mokhesi as the spot at which he dropped off all the accused after they had returned from Walaza.
7. According to the accused they were dropped off at a place known as Dukathole next to a cash loans advertising board near Mokhesi.
8. The distance between the two places is 50 metres.

[12] Under cross-examination Manzi testified that he estimated the distance from where he picked up all the accused to Walaza to be between 15 and 20km. He testified that when he opened the boot for accused no.3 to put the plastic bag that had a container of about 10 to 20 litres he was sitting in the driver's seat. He testified that in his statement and in his evidence he did not mention a smelling of petrol because he did not smell petrol. He confirmed that the spot where he dropped accused no. 1 and 3 was about 150 metres from the deceased's homestead. He denied dropping accused 1 and 3 about 100 metres from the spot that he pointed. He denied dropping them next to Mr Monoana's place. He said that while he is not from Walaza, he is from Sterkspruit and he could never miss Mr Monoana's place. He agreed that the distance from Mr Monoana's place to the dropping place that he pointed was 50 metres.

[13] He confirmed that the person who was giving him directions when they were going to Walaza was accused no.2. It was put to him that his evidence that the plastic bag carried by accused no.3 contained a container was a fabricated story which he made up after he learned that a container was found at the crime scene.

He denied fabricating his evidence in this regard. It was further put to him that the plastic bag that accused no.3 carried had clothes in it. His response was that while he would not know what accused no.3 was carrying, he maintained that he saw a container in that plastic bag. He denied that when accused no. 1 and 3 returned to the vehicle accused no.3 was in possession of a plastic bag and denied having to open a boot for accused no.3. It was put to Manzi that the purpose of going to Walaza was to get dagga and those clothes that were in that plastic bag were going to be used to exchange them for dagga. His response was that he would not know that. He denied that when they returned to the vehicle accused no.3 was carrying anything.

[14] The next witness for the State was Keketso Mokgejane. His evidence was that he knew accused no.1 as they resided in the same rental premises but occupying different rooms and were neighbours. At the time which was in 2019 accused no.1 worked as a security guard at a shop called Metro in Sterkspruit. He also knew accused no.2 from her work place. She also stayed in the same premises as himself and accused no.1. He did not know accused no.3 but he would see him when accused no.3 would often visit accused no.2 but he never saw him anywhere else. In November 2019 he, accused no.2 and accused no.1 went together to Walaza where they fetched some goods from a certain homestead. They travelled in a bakkie. He knew that homestead but he did not know the owner thereof. It had a two roomed flat structure. The goods they fetched were a cupboard and some other items he did not remember. He did not know if accused no.2 was related to the people in that homestead but she said it was her homestead. They took the goods to her place of residence in her flat. The goods were off loaded from the vehicle and taken to her flat or room. Some of the goods or items did not have space in her room. They put those other items in his room. The items that were put in his room were five containers. Four of those five containers were 25 litres and one was twenty litres in size.

[15] The following day he, accused no.1 and accused no.2 were in her room and bought liquor which they consumed. At some point he went out and when he came back he was told not to enter as they were still discussing something. He then went to his own room. At about 18:00 or thereabout accused no.2 came to his room and

borrowed a container saying that she was going to fetch water. He gave her one 25 litre container. She said she wanted the one that was black with a yellow lid. He gave it to her, after all it was hers. He later saw the three accused persons getting out of the gate from those premises singing or chanting. That was the last time he saw them on that day.

[16] The following day at about 10:00 am he noticed that accused no.1 was not waking up. He went to his room to wake him up. Accused no.1 opened the door and he noticed that his face was black. He asked him where he was burning fire. Accused no.1 said that he should have followed him when he was told to leave as this would not have happened. Keketso enquired from accused no.1 as to what happened. He did not give him an answer. Keketso then left. Later that day police arrived looking for the accused persons. He added that on the day that he had gone out of accused no.2's room he had left his coat in accused no.2's room. The following day he went to fetch it and noticed that it was burnt. He did not know what happened or how it got burnt on the sleeve and on the edges at the back. When he fetched the coat accused no.2 was on her bed and accused no.3 was also in the room. He took his coat. When he left it there, it had not been burnt. He asked accused no.2 why his coat was burnt. Her response was that she did not know. Thereafter he asked accused no.1 about his burnt coat and he also said he did not know. He further enquired from him how come his coat was burnt as it had not been burnt when he left it. However, he decided to leave the issue like that and washed his coat.

[17] Under cross-examination Keketso testified that when he was interviewed by the police he did not mention that he together with accused no.1 and 2 went to fetch goods from Walaza. He also did not tell them about him going to accused no.1's room and finding him with black face and asking him when he had burnt tyres. He said the reason he did not tell the police about accused no.1's burnt face was because he did not know what burnt his face. He only made the statement to the police when everything had happened when Mr Kutwana, the investigating officer approached him. Their trip with accused no. 1 and 2 to Walaza to fetch goods happened and the statement was taken after the trip to Walaza. Police approached him on the day he heard about the Walaza incident asking about the whereabouts of

accused no. 2. He could not recall when Mr Kutwana approached him but it was still in November 2019. It was put to him that the statement was made on 18 January 2021. His response was that the statement was taken a long time ago, perhaps he forgot as to when it was actually made.

[18] It was put to Keketso that accused no.1 went to Walaza with him not in November 2019 but at the beginning of October 2019. He disputed this saying accused no.1 was lying. It was further put to Keketso that at the beginning of October 2019 he, accused no.1 and another person went to Walaza to fetch accused no.2's brother's goods because he was going to be working in Cape Town. His response was that accused no.1 was lying. He did not know accused no.2's brother's homestead. What he did know was that they went to Walaza to fetch the goods. Accused no.2 said that they were fetching the goods from her homestead and they were fetching her own belongings.

[19] He testified that he did not mention to the police leaving his coat at accused no.2's place and finding it burnt in some places because when he had asked accused no.2 about it, she said she did not know. It was put to Keketso that accused no.2 did not dispute going to Walaza with him in 2019 but she was saying it was early in October. Keketso said he did not remember the date and the month but what he was saying was that they did go to Walaza. It was further put to him that accused no.2 disputed that she had said to him that the homestead from which they went to fetch the goods was hers. Keketso said that accused no.2 was lying. He personally did not know the owner of that homestead but it was accused no.2 who told him that it was her homestead. He said that he went to that homestead for the first time when he went there with accused no.2. He did not know to whom the goods belonged and would therefore not dispute that they belonged to accused no.2's brother Lefu. He confirmed that accused no.2 went to his room to fetch a container the following day after they had returned from Walaza.

[20] He disputed accused no.2's version that she fetched the container from him on 3 November 2019 and said that she fetched the container from his room on the 6 as he was on duty on that day but he could not recall the month. He testified that the 5 was on a Tuesday. He worked on Tuesdays, Thursdays and Sundays and only

when it was busy that he worked everyday Monday to Friday. He disputed accused no.2's version that he was not present when she came to fetch the container from his room saying that accused no.2 was lying. He denied that only three containers, two of them were white and one was yellow were kept in his room insisting that they were five. He said that there were five containers, four of them were 25 litre containers and one of them was a 20 litre container which was black with a yellow lid.

[21] He denied that he had meals at accused no.2's place and said that it was accused no.1 who used to have meals at accused no.2's place. He denied having a quarrel with accused no.2 and being told to stop eating there or even coming to her place. His evidence was that accused no.2 was lying and that they are still close even now and that he never had any quarrel with accused no.2. He denied that his evidence in court was because of the alleged quarrel. It was put to him that accused no.2 denied that he ever left a coat in her room. He said that accused no.2 was lying and that she knew very well that he left his coat there. It was put to him that when he saw the container as accused no.2 was leaving the premises, she was going to fetch water and she was with her sister and accused no.3. Keketso testified that accused no.2 was lying insisting that she came to fetch the container from his room. Then she was joined by accused no.1 and 3 and all three of them left together from the premises. He did not know her sister and that the only female was accused no.2 when they left the premises.

[22] The next State witness was Mr Combi. He testified that he resided at Walaza. He knew the deceased Nyakambi Monoana. He was his brother but he uses their mother's surname because he was raised by his mother's family. He knew accused no.2 as she was his brother's wife but they had been in separation for about four years when his brother died. In November 2019 they were no longer living together as husband and wife. Accused no.2 left their common home. At the time of his death the deceased stayed with Kekeletso Senoamadi and a boy child who was 13 years old at the time. During the night of the 6 November 2019 he received a call in which he was told that the home of the deceased was on fire. He and his wife proceeded to the home of the deceased. On arrival they found that indeed the deceased's homestead was on fire and there were members of the community there.

The deceased persons were inside the burning structure lying there. He saw a 20 litre container next to a water tank. At that stage police had arrived and warned them not to touch anything. He did not report the incident to accused no.2. He continued with the preparations for his brother's funeral and accused no.2 did not attend the funeral.

[23] He confirmed that accused no.2 had a brother who stayed at Walaza in 2019. He could not remember when accused no.2's brother left Walaza. With reference to photo no.2 which is in the photo album which was submitted as an exhibit he testified that photo no.2 depicted the 20 litre container that he referred to including the plastic bag. Photo no.4 depicted a bucket that was smelling petrol which was also at the crime scene.

The trial within a trial.

[24] The State indicated its intention to lead evidence in relation to a statement allegedly made by accused no.1 which it believed was a confession as well as a pointing out allegedly made by accused no.1. The attorney for accused no.1 indicated that his instructions were to object to the evidence of the said statement and the pointing out. The reason for the objection was that the said statement and pointing out were not obtained freely and voluntarily in that accused no.1 was beaten, assaulted, tortured and threatened by the police into making the statement and doing the pointing out. He feared for his life and out of that fear he did what the police told him to do. He was told where to point and what to point before he went to do the pointing out. His constitutional rights were not explained to him during the interview with the police which preceded to confession and pointing out.

[25] The State applied and was granted leave to open a trial within a trial to determine the admissibility of the statement made by accused no.1 as well as the pointing out. The State called sergeant Kutwana, the investigating officer of the case. He testified that he works as a detective at Palmietfontein police station. On 6 November 2019 he received a phone call at night in which he was told that a certain homestead at Walaza had been set on fire with people inside. He proceeded to Walaza and when he got there the date was the 7 November 2019 and from then police investigations continued. On the 8 November 2019 he received a phone call

for his informer. His informer told him to look for accused no.1 accused no.2 and her boyfriend whose name the informer did not know at the time. On that very same day he proceeded to accused no.2's place of residence in Mokhesi. She was present and he told her that she was a person of interest in the Walaza incident. He enquired from accused no.2 about any knowledge that she might want to share with the police about the Walaza incident. Her response was that she knew nothing. He asked her about her boyfriend and she said his name was Samkelo Nontwana who is accused no.3 in this case. He eventually met accused no.3 in town that same afternoon and he also told him that he was also a person of interest in his investigations about the Walaza incident. He requested accused no.3 to give him his cellphone handset and he agreed.

[26] He then proceeded to accused no.2's place of residence but she was not present this time. He eventually found her at Hohobeni in a church service. He took her to her place of residence. He asked for her cellphone and she said even the cellphone of accused no.1 was with her. He took both handsets with him. He requested her for permission to search her place and she agreed. She searched it and found a jacket and a pair of trousers which she said belonged to accused no.3. Those clothing items were smelling of smoke and he took them to the police station. He looked for accused no.1 from the 8 to the 10 November 2019 but he could not find him anywhere. Even at his home at Pelandaba he was not there. At work he was told that he was no longer reporting for duty. Then on 11 November 2019 he received information from his informer that accused no.1 was on his way to his place of residence. The time was about 12 midday. He together with sergeant Moahloli proceeded to accused no.1's place of residence. They found him and introduced themselves to him and also told him why they were there. Accused no.1 co-operated with them and agreed to come to Palmietfontein police station with them. When they arrived at the police station he told him his constitutional rights. He asked him what his choice was and he said that he would speak on his own and that he would co-operate with the police and tell them what happened.

[27] He interviewed accused no.1 about what happened on the day of the incident at Walaza. From what he was saying it seemed to him that accused no.1 was not present when the fire started. As he was taking a statement from him he noticed that

he had some burns on his face. He asked him about the burns and he then said that he got those burns on the day of the incident. He decided to inspect his body and noticed that he had burns also on his waist at the back as well as the back of his leg. It is then that accused no.1 told him what happened on the day of the incident. As he listened to his story he realized that he was also involved in that incident. He therefore stopped him from continuing with his narration of what happened. He asked him if he would be prepared to repeat his narration before a commissioned police officer or a magistrate. Accused no.1 requested that he should arrange a magistrate for him so that he could narrate everything before the magistrate. He asked him since the incident occurred at night if he knew the area where it occurred and he said he knew the area. He asked him if he would be prepared to do a pointing out to another police officer and he said he would have no problem with that.

[28] The time was about 16:00 at that stage and the court had already closed for him to arrange a magistrate. He then decided to let accused no.1 go home. This was because even when he fetched him for his place of residence he co-operated with him. He therefore saw no need to keep him in the holding cells before he met the magistrate. That was how they parted ways on 11 November 2019. On the 12 November 2019 he came to court very early and met Mr Tloti who was a magistrate in Sterkspruit at the time. He made his request for him to take accused no.1's statement. Mr Tloti indicated that he would be able to see accused no.1 on that very day. He also made arrangements for captain Modise to do the pointing out and he agreed. He then went to the police station to fetch sergeant Ndulula whom he wanted to take accused no.1 from his place as he had arranged with accused no.1 that he would fetch him after he would have made all the arrangements. He and sergeant Ndulula travelled in two separate vehicles going to accused no.1's residence. In his vehicle he was with sergeant Moahloli and sergeant Ndulula was alone in his vehicle. As they reached the Mokhesi Bridge which is near accused no.1's place of residence he saw accused no.1.

[29] He then went to sergeant Ndulula and told him that accused no.1 was the person he was going to fetch from his home. They proceeded back to Palmietfontein police station with accused no.1. When they arrived at the police station he asked accused no.1 if he was still prepared to make the statement to the magistrate and

was also still prepared to do the pointing out. He said he was still prepared to carry on with those things. The statement was to be done on the 12 November 2019 and the pointing out was to be done on 13 November 2019 in terms of the arrangements he had made with magistrate Tloti and captain Modise. He parted ways with accused no.1 whom he handed over to sergeant Ndulula. He met sergeant Ndulula at about 18:00 on the 12 November 2019 and he gave him accused no.1's statement which had been recorded by the magistrate. He then arrested accused no.1 and detained him. On 13 November 2019 he again asked sergeant Ndulula to go with captain Modise for the pointing out.

[30] He testified that accused no.1 was never assaulted, forced, induced or tortured at any stage to make a statement. He explained that accused no.1 even had an opportunity to run away if he had been assaulted or even go to Sterkspruit police station to report the assault as the interview with him took place at Palmietfontein police station. On the 11 November 2019 after he had finished interviewing him he drove him back to his place of residence to spend the night at his place and come back the following day. Therefore, he had an opportunity to run away if he had been tortured. As far as the pointing out was concerned sergeant Kutwana testified that he was not present when it took place. Therefore, he would not be able to respond to accused no.1's allegation that he was told places and points to point out. Even the officers who went with him to do the pointing out were not familiar with that area.

[31] At no stage was he dealt with by six police officers. He was with one police officer when he interviewed accused no.1 at the police station, sergeant Moahloli. The other officers who were at the police station were busy with their daily duties. He denied that the statement was not made freely and voluntarily. He testified that accused no.1 was never assaulted throughout his dealings with him. It was a lie that he was confronted with information obtained from an informer upon arrival at the police station. He denied that accused no.1 was schooled on what to say and said that everything contained in his statement came from him. He further testified that he could not have schooled him as he did not know how the events unfolded. He denied that he wanted accused no.1 to be a State witness. He denied suffocating accused no.1 with plastic bags or twisting his private parts. He denied schooling accused no.1 about the points he wanted him to point out. He denied threatening

accused no.1 with drowning him at the Orange River if he told the magistrate about being tortured or forced to make a confession.

[32] Sergeant Kutwana was further cross-examined by the legal representative for accused no.2 and 3. He denied finding accused no.3 at accused no.2's place of residence and confiscating both their cellphones. He explained that he confiscated accused no.3's cellphone when he met him in town whereas he confiscated accused no.2's cellphone in her place of residence. It was further put to him that accused no.2 says that when he took accused no.3's clothing in her place of residence and he said that they smelled of paraffin or petrol, but he never said they smelled of smoke. Sergeant Kutwana testified that he never told accused no.2 that those clothes smelled of smoke. He kept that to himself. He denied breaking at accused no.2's place of residence saying that he found her at Hohobeni and took her to her place of residence which she opened on her own.

[33] The next State witness was Dr Godlwana. She testified that in November 2019 she worked at Empilisweni Hospital in Sterkspruit. On 12 November 2019 she performed her duties as a medical officer at the casualty area. At 14:34 she saw accused no.1 and examined him and completed a J88 form. He was brought by constables Kutwana and Moahloli. She read the information she had recorded in that J88 form into the record. At no.5 of part 2 thereof she had recorded that accused no.1 told her that she had been burnt with petrol and fire by one adult male and one adult female that were known to him at around 12 am on 6 November 2019 at midnight. He said that he was burnt on the face, the lower back, and backside of his left leg. She testified that all that information came from accused no.1 himself. Her clinical findings were that accused no.1 had first degree burns on the face and nose. He had second degree burns on the lower back, the upper thigh and the lower limb of the left leg. She estimated those burns to have been about six days old and were in their healing stages. She further testified that if he had been assaulted on 11 November 2019 such assault would have been evident on his body on 12 November 2019. When she examined a patient she did so with his clothes off so that she could examine him or her from head to toe.

[34] Under cross-examination it was put to Dr Godlwana that the police officers who brought accused no.1 to hospital were the source of the information regarding how the burns were inflicted, it did not come from accused no.1. She testified that the contents of the J88 form were a reflection of the examination she conducted and the information contained therein was that of the patient. She further testified that she examined the private parts of accused no.1. Whether or not there would be evidence of his private parts having been twisted would depend on how long the twisting took place and the amount of force applied as well as the technique used. Accused no.1 never told her that his private parts had been twisted when he gave her the history she recorded.

[35] The second J88 form was read into the record. It was also completed by Dr Godlwana also on 12 November 2019 at 17:12 after he had been brought by police for the second time. She testified that a patient examination is done without the police being present even where they had brought the patient because of the confidentiality as the patient might divulge things that were not intended to be of general knowledge. When she examined accused no.1, it was just the two of them in the room and the police officers were waiting outside. Nothing had changed with the accused from the earlier examination. There was no evidence of new physical trauma. She denied that there was a stage in which she was found by the accused with the police officers who had taken him there. Even during the second examination she had to examine the patient as if she was doing it for the first time.

[36] The State called Mr Sithembele Tloti who testified that he is a magistrate currently based at Edenburg in the Free State. In November 2019 he was based in Sterkspruit. On 12 November 2019 he was asked to assist in taking a confession. He requested the clerk of the court to get a pro forma of the confession and an interpreter for him. After all the preliminary arrangements had been made he asked that the person concerned should be brought in. He took down the details of the police officer who brought the suspect in after which he excused him so that only himself, the suspect and the interpreter were in his office. He did the introductions and attended to the preliminary formalities. He thereafter read the confession pro forma as completed on 12 November 2019 into the record. There is nothing peculiar on the pro forma and the information contained therein save for a part in which the

pro forma requires the suspect to explain to the magistrate how he was treated by the police from the time of arrest until he was brought before the magistrate. His response was:

“Today they did not ill treat me before they brought me here. Yesterday they arrived at home saying they were looking for me. I do not wish to say anything regarding the treatment I got yesterday.”

[37] Mr Tloti was cross-examined on the pro forma document. His cross-examination related to what accused no.1 said allegedly happened before he was brought to him. As would be expected Mr Tloti would not be able to comment on any of the things that allegedly happened in his absence. Those all concerned the same things that were put to sergeant Kutwana during the police’s interaction with accused no.1. Mr Tloti’s evidence was that while he did not know what happened before accused no.1 was brought before him as he was not present, when he was before him he appeared to be making the statement freely and voluntarily. The magistrate’s evidence was that if accused no.1 had told him that he had been schooled on what to say to him he would have recorded that as well.

[38] The next witness was Mr Sipamla, the interpreter who assisted with interpretation when accused no.1 was before the magistrate. There is nothing peculiar about what happened when the accused was before the magistrate in the presence of Mr Sipamla who did the interpretation. In fact he was not even cross-examined as it was the accused’s case that everything went well during that process.

[39] The State called its next witness, sergeant Ndulula. He testified that he was stationed at Palmietfontein police station. On 12 November 2019 he received a call from constable Kutwana in the morning requesting him to assist with a suspect who wanted to make a confession. He was driving a marked police vehicle and was with sergeant Bahlekazi. Constable Kutwana was in his own vehicle with constable Moahloli. As they drove towards Sterkspruit constable Kutwana showed him accused no.1 as the person he wanted to be assisted with. They met accused no.1 at Mokhesi just before the town of Sterkspruit. Kutwana then requested accused no.1 to come to his vehicle. From there they all drove to constable Kutwana’s office

at the police station. After Kutwana did some paper work he handed accused no.1 to him and asked him to take him to the magistrate. But before he took accused no.1 to the magistrate he took him to Empilisweni Hospital where he was attended to by a doctor. He wanted the doctor to complete a J88 form before accused no.1 was taken to the magistrate. The doctor examined accused no.1 and completed the J88 form and signed it after which he brought accused no.1 to the magistrate.

[40] He met the magistrate in his office and told him that he had brought a suspect for the confession. The magistrate took his details after which he excused him. He came back only after the magistrate had finished taking the confession. The magistrate handed the confession to him and he took accused no.1 back to Empilisweni Hospital with a new J88 form. Accused no.1 was examined again and the J88 form was completed after which he drove back to the police station with accused no.1 and gave all the documents to Kutwana and left. On 13 November 2019 he was told that captain Modise would be coming and he was requested to assist him with the pointing out that accused no.1 wanted to do. He took a clean J88 form and took accused no.1 from the cells to Empilisweni Hospital. The doctor examined him and completed the J88 form after which he took accused no.1 and the J88 form back to the police station. At the police station accused no.1 met captain Modise in the office. After that he drove captain Modise and accused no.1 to Walaza. After the pointing out was done he drove back and took accused no.1 and a clean J88 form to Empilisweni Hospital again. After he was examined and the form was completed he took accused no.1 back to the police station.

[41] Under cross-examination it was put to sergeant Ndulula that accused no.1 knew Walaza locality even before the 13 November 2019. What he did not know was the homestead in which people were burnt to death. Sergeant Ndulula testified that it cannot be true that he did not know that homestead as he was the one who gave him directions to that homestead as he was driving. He gave directions all the way to the crime scene. As far as having been schooled on what to point out Ndulula said that he did not know what accused no.1 was schooled to say or point out. All he knew was that as the driver it was accused no.1 who gave him directions to the homestead that was a crime scene. Prior to his interaction with the accused he

knew Walaza and he knew the directions from Palmietfontein police station to Walaza and accused directed him to that homestead.

[42] The State called Dr Ntethe. She testified that on 13 November 2019 she was on duty at Empilisweni Hospital. Police brought accused no.1 for examination. She examined him and filled in the J88 form. She examined him two times that day. She first examined him at 10:05 and then at 15:00. During the first examination she observed that he had two healing abrasions, one on the right hand side of the face and the other one below the left side of the cheek. He also had two second degree burns on the lower side of the back which was becoming septic and also on the left leg at the back. There were no fresh injuries. She again examined accused no.1 at 15:00 when he was brought for the second time by the police. There was no change in his condition from the earlier examination and no fresh injuries were noted. Dr Ntethe was not cross examined on her evidence.

[43] The next witness for the State was captain Modise. He testified that he was a police captain stationed at Maletswai police station detectives' unit. On 12 November 2019 he received a call from sergeant Kutwana requesting him to assist him with a pointing out. They arranged that he would do it on the 13 November 2019. On 13 November 2019 he drove to Palmietfontein police station. On his arrival he was allocated an office and waited for the suspect to be brought in. Constable Ndulula brought accused no.1 in after which he left him with accused no.1. He had with him a pointing out form which he completed. He obtained all the details of the accused from the accused himself and they were both communicating in isiXhosa and there was no interpreter. The photographer who had been arranged to take photographs joined them for the pointing out photographs. After the initial photographs of accused no.1 were taken in the office they proceeded to the vehicle and more photographs of the vehicle and themselves were also taken. They then left for the pointing out in a vehicle driven by Ndulula.

[44] Under cross-examination he testified that accused no.1 did not tell him anything about being schooled, threatened or assaulted by the police. It was confirmed by accused no.1's legal representative that indeed he told accused no.1 his constitutional rights. He testified that while he would not be able to comment on

what was allegedly done by the police to accused no.1, he was certain that during the pointing out he was doing the pointing out freely and was in fact relaxed. It was put to him that while Ndulula was driving in Walaza when accused no.1 saw a burnt down house he pointed it out as he was previously directed by the police. Captain Modise testified that his impression was that accused no.1 was doing the pointing out as someone with a personal knowledge and wanted to point out what he wanted to point out. Nothing arose out of the cross-examination.

[45] The State called sergeant Mooko. He testified that he is a police officer stationed at Aliwal North LCRC. On 13 November 2019 he was requested by Kutwana to assist captain Modise with a pointing out. He drove to Palmietfontein police station and found captain Modise already interviewing accused no.1. Captain Modise introduced him to the accused. Captain Modise asked the accused to have his photos taken in a semi naked position. Indeed, he agreed and the initial photos of accused no.1 were taken in the office with his permission. The purpose of those photos was to have visual aid of any injuries the suspect might have. Thereafter they moved to the vehicle where more photographs were taken including the ones for the vehicle that was going to be used. Thereafter he followed captain Modise's vehicle who was with the accused and the driver. Captain Modise was in constant conversation with the accused person at the crime scene which is where he took photographs of everything pointed out by the accused. After that they drove back to Palmietfontein police station where he took pictures of the vehicle on return. They then went inside to the office and photographs were again taken with the accused being semi naked. Sergeant Mooko was not really cross-examined on his evidence on anything of significance.

[46] The next witness for the State was sergeant Moahloli. He testified that he was at work at Palmietfontein police station on 11 November 2019. He was with Kutwana when the latter received information on the investigation of the Walaza incident. They followed up on that information and went to the place of residence of accused no.1. After the preliminary introductions they requested him to come to the police station with them. He agreed and at the police station Kutwana informed accused no.1 of his constitutional rights after which the accused indicated that he would like to talk on his own and co-operate with the police. At some point Kutwana

noticed that accused no.1 had some injuries on his face which appeared to be burns. Accused no.1 also showed Kutwana other burns on his body. On being questioned further it transpired that accused no.1 had knowledge about the Walaza incident. Kutwana asked accused no.1 if he would be prepared to repeat that information to a commissioned police officer or magistrate. He agreed to that. It was late in the afternoon and because of the co-operation of the accused, Kutwana decided to release him to go back home on the basis that he would arrange for his statement to be taken the following day.

[47] On the 12 November 2019 he and Kutwana drove to the accused's place of residence. However, they came across him along the way. There was also another vehicle from their work place that was following them driven by Ndulula. Kutwana asked accused no.1 if he still wanted to continue with making the statement and he responded in the affirmative. Accused no.1 boarded Ndulula's vehicle and they drove back to the police station. He denied that accused no.1 was ever assaulted and forced to make a statement. He confirmed that accused no.1 was informed of his constitutional rights and denied that he was coached on what to say to the magistrate.

[48] Under cross-examination he denied that on their arrival at his place of residence they told accused no.1 that they had all the information on the Walaza incident and that he should not waste their time. He denied that accused no.1 was assaulted or taken to the police station without being given his constitutional rights or without his permission. He denied that they told accused no.1 that they knew that he was not involved in the Walaza incident and that they wanted him to be a State witness and must make a statement incriminating his co-accused. He denied that accused no.1 was tortured and his private parts twisted or threatened with being drowned at the Orange River. He testified that in fact accused no.1 was so co-operative that they decided to let him go home as the statement was to be taken the following day because it was late. It was put to him that indeed on 12 November 2019 Kutwana enquired from the accused if he was still willing to make a statement and he said indeed he had decided to continue with the statement. Moahloli confirmed that. He however denied that the contents of the statement made before the magistrate did not come from accused no.1 and that he made the statement to the magistrate

based on what Kutwana told him to say. He further testified that accused no.1 was not told how to do a pointing out or even schooled on what to point out at the crime scene. He pointed out however that he, Moahloli was not involved with the pointing out. After this evidence the State closed its case in the trial within a trial.

The evidence of accused no.1 in the trial within a trial.

[49] Accused no.1 testified in the trial within a trial to give evidence about the treatment he allegedly received in the hands of the police on 11 and 12 November 2019, that evidence being the basis upon which he contended that the confession and pointing out which the State sought to introduce should be declared inadmissible. His main contention was that both the confession and pointing out were not freely and voluntarily made. He testified that after supper he received a call from his father informing him that police have been looking for him. His father told him that he had been receiving phone calls from the police who told him they were looking for him.

[50] He testified that after hearing from his father that police were looking for him, he went to the police in Sterkspruit. The Sterkspruit police told him that they were not the ones who were looking for him. He then decided to go to his place of residence in Mokhesi where he was renting a room. When he got there he saw a police vehicle but those detectives could not see him. He noticed that accused no.2's room had been broken into and the police officers were inside. He proceeded to his room and applied his ointments on his injuries. While he was still doing that, Kutwana and Moahloli barged in. Kutwana came in and slapped him with an open hand on the wounds. He testified that he and Kutwana were known to each other but Kutwana asked "if this is Zuko". At that stage Kutwana was carrying a pipe. Moahloli slapped him with an open hand as well. Kutwana used the pipe he was carrying to hit him many times in the shoulder area.

[51] The reason proffered by these police officers for assaulting him were given only after they had finished assaulting him with the pipe. They asked him what he did at Walaza. When he told them that he did not know anything about that, they said that he was playing. They told him that they have an informer who had told them everything. It was at that moment that Moahloli jumped onto him and throttled him.

They told him that he was lying and that he would tell the truth. They took him and put him in the vehicle and drove with him to the police station. When they arrived at Palmietfontein police station they took him to their officers and handcuffed him to a drawer of a steel cupboard and left him like that saying they were going to have a meal. When they came back Kutwana and Moahloli were joined by a third police officer and they asked him questions about this case.

[52] They told him that he was implicated in the burning of a house at Walaza but they were actually after accused no.2 and 3. They told him that he was also present during the incident when the house was burnt and people were killed. Throughout he was never informed of his constitutional rights by the police. He was just kicked and assaulted and told that he would say what they wanted him to say. When he did not speak saying that he did not know anything they started hitting him hard especially on his burn wounds and took turns in doing so until he became weak. They continued hitting him for a long time. They took evidence bags and said if he wanted to say something he should stomp his feet on the floor. They inserted the plastic bag on his head and sealed it so that he could not breath. He then decided to stomp his feet on the floor. The plastic was removed but when he said he did not know anything the police inserted it again and suffocated him for a long time. When he realized that they were not stopping he stomped his feet on the ground again. The third police officer rolled up his sleeves and would squeeze his private parts very hard every time he was suffocated with the plastic. He would also hit him with fists, go up and down and hit him some more with fists.

[53] Eventually he succumbed to the torture and agreed to a statement that the police officers gave him. He was afraid that they would kill him as they said they would drown him in the Orange River. He was told what to say from what appeared to have been written and that he would have to go to a pointing out to point out certain spots. After he agreed to the statement and pointing out he was not assaulted again and was also uncuffed. He was caused to sit there and told what was going to happen. He was told that he would not be arrested again, he would be a State witness and that he would be taken to a magistrate. He was warned not to tell the magistrate that he had been beaten up. He should not tell him that he would become a State witness. The police further said that he should speak nicely about

them. If he did not do so there would be consequences. He was told that he should narrate the statement he had been given to the magistrate. He was given a homework and told that he should go home and come back the following morning so that they could hear that nothing has changed before he went to the magistrate. The other police officers left and he remained with Kutwana who took him home.

[54] On the following day he went to meet Kutwana who happened to arrive near his place of residence at that moment. Kutwana told him to board their vehicle. They proceeded to court and sat outside and drank some juices. During that time he was made to rehearse the statement he was required to make to the magistrate by Kutwana. After Kutwana was satisfied with how he would narrate the statement to the magistrate, Kutwana handed him over to Ndulula. Ndulula took him to the magistrate and stood at the door as he entered the office of the magistrate. An interpreter was called over and the process of taking the statement before the magistrate started. He testified that Mr Tloti, the magistrate explained his constitutional rights to him after which he narrated the things he had been told by Kutwana. He told the magistrate what Kutwana had schooled him on what to say. He did not tell the magistrate that Kutwana and his colleagues had assaulted him.

[55] He could not do so because he had been warned that there would be consequences if he told the magistrate that police had assaulted him. He further testified about the part of the pro forma where he was dealing with his treatment from the time of arrest until he was brought before the magistrate. He said that he told the magistrate that he was not ill-treated before he was brought to him. He explained that when he said that he had realized that there were no police officers in the office where the magistrate was. He therefore decided to "show the magistrate something when I narrated the story that a certain treatment was there on the previous day". However, the magistrate stopped him saying that he should not say anything about that treatment if he was not comfortable in telling him what transpired the previous day and that he would inform the court if he was not comfortable informing him there. He testified that he did not make the statement freely and voluntarily as he was forced to make it.

[56] With regard to the pointing out, the police had told him four places to point out. When he woke up in the morning Kutwana told him that he would go and do a pointing out. He was then taken to captain Modise from the cells. The pointing out was also not done freely and voluntarily. It was as a result of the assault and being schooled on it. He did not inform captain Modise about being assaulted and tortured as he had been warned not to divulge such things. He testified that when he went to Walaza for the pointing out it was not the first time that he went to Walaza. He pointed the places he did, not because he knew them but because he had been schooled on them. He confirmed that the doctors who examined him did find burn wounds on his body. He was with accused no.3 when he sustained those burns. He had gone to a drinking establishment to drink alcohol. There were tyres that were sometimes burnt on the streets. Because he was drunk on that day he fell on that fire. He was with accused no.3 who saved his life. He testified that all the doctors who examined him did not examine his private parts. He further testified that captain Modise did inform him about his constitutional rights. When he told one of the doctors that he was burnt by accused no.2 and 3 he had been schooled by the police to say that.

[57] Under cross-examination he testified that he knows Kutwana a lot. He did not recall the date on which Kutwana and Moahloli visited him at his residence. He testified that in November 2019 he visited Walaza but he could not remember the date. On that occasion he visited Walaza with accused no.2 and 3. He accepted the evidence of Kutwana that he and Moahloli went to his place of residence on 11 November 2019 but he could not remember the date on his own. When it was put to him that he heard Kutwana's evidence in that regard who was also cross-examined on the events of the 11 November 2019 he said that he did not hear him. He said that he might have been lost in his own thoughts about his own problems when that was said. With regard to his evidence that he saw the police at accused no.2's room it was put to him that the evidence of Kutwana was that it was on the 8 November 2019 when he went to accused no.2's place of residence, not the 11 November 2019. He disputed that saying that it might be that Kutwana visited accused no.2 on 8 November 2019 but he did not see him on that date. He saw him on 11 November 2019. On that date it had been a while since Kutwana had taken his cellphone from

accused no.2's place which he had left there for charging. Therefore it could have been on 8 November 2019 when Kutwana took his cellphone.

[58] When it was put to him that in laying the basis for objection to the admissibility of his statement, his legal representative had said that six police officers dealt with him at Palmietfontein police station, he said that his attorney did not ask him how many police officers assaulted him. However, three police officers dealt with him while the others were there in the office. He denied being dealt with by Kutwana and Moahloli only, insisting that there was a third police officer. He was assaulted because the police were asking him what he had done and wanted him to co-operate with them. He was assaulted with hands and kicked. No weapons were used until the evidence bag was used to suffocate him. Kutwana would put the evidence bag over his face and the third police officer would squeeze his private parts. His hand was cuffed to a steel cabinet drawer to the level of his head. The handcuffs were not tight and he had no injuries caused by the handcuffs.

[59] The police were saying that he should co-operate with them and make a statement in the manner in which he was being told. He was drilled by Kutwana and Moahloli on what he must say to the magistrate but it was Kutwana who was telling him what to say with Moahloli just assisting. It was put to him that Kutwana and Moahloli never assaulted him at Palmietfontein police station. It was further put to him that Kutwana was so professional in his dealings with him and he co-operated with Kutwana so much that Kutwana decided to let him go and sleep at home. He denied that. He said Kutwana took him from his place of residence in the morning and brought him back home at night. He co-operated as a result of which Kutwana decided to bring him back to his place of residence. Kutwana beat him so much that he had no option but to co-operate with him.

[60] Accused no.1 was referred to his consultation with Dr Godlwana at 14:34 on 12 November 2019. He testified that police entered to see the doctor first and told the doctor about the history of his injuries. All he did was to confirm what the doctor wanted him to confirm. When he spoke to the doctor she had already been told what happened by the police. With regard to the magistrate who took the statement from him he testified that he treated him well and he had no complaint against him. He

told the magistrate everything he had been schooled to tell him. He told the magistrate that he was burnt by accused no.2 and 3. That came from him but he had been schooled to say that. The history he gave to the doctor of having been burnt with petrol and fire by one adult male and one adult female known to him on 6 November 2019 at around 12 midnight was something the doctor had been told by the police. All he did was to confirm it in line with what he had been taught. He denied that what the doctor and the magistrate recorded came from him voluntarily. He testified that on 13 November 2019 he met captain Modise. When he met him he told him everything that he was taught to tell him but he did not have a problem with captain Modise.

[61] With regard to his injuries he testified that on 9 November 2019 he sustained the burn injuries when he fell on a fire of burning tyres, while he was drunk that night. He clarified that that was two days before he met Kutwana on 11 November 2019. He was basking on that fire when he fell on it and was assisted by accused no.3. When it was put to him that he got burnt on 6 November 2019 at Walaza, he denied that. He confirmed his evidence that only the magistrate and captain Modise explained his rights to him. Accused no.1 was not re-examined on his evidence. After this evidence accused no. 1's case in the trial within a trial was closed.

The confession and pointing out.

[62] The defence having closed its case in the trial within a trial the State and the defence addressed the court on the admissibility of the confession and the pointing out. Section 217 (1) (a) of the Criminal Procedure Act makes the following provision regarding the evidence of a confession:

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

[63] The basis for the objection to the statement made to Mr Tloti on 12 November 2019 was that accused no.1 was beaten up, assaulted, kicked, suffocated, beaten

with a pipe and other forms of torture were used to force him to tell the police what they said he knew about the Walaza incident. This was done despite the fact that he had told the police that he knew nothing about what happened at Walaza. From his evidence it appears that the torture took various forms, was prolonged and was done with heavy handedness designed to force him to agree to a statement in which he would implicate accused no.2 and 3. What is inexplicable though and which he did not explain was that on the 12 November 2019, the following day after the torture he was taken to Empilisweni Hospital. He was seen by Dr Godlwana and she examined him two times that day and there was no evidence of any form of physical assault at all. I have looked at accused no.1's evidence thoroughly. It is clear to me that his evidence about being assaulted was fabricated. I just do not understand how it is possible for him to have been physically assaulted in the manner he described and to have no evidence of the assault the following day after he was assaulted as heavily as he described. It also does not make sense to me that he could be so seriously assaulted for such a prolonged time and being subjected to all forms of torture only to be driven home to sleep at his place of residence peacefully and not detained.

[64] His other main objection was that his constitutional rights were not explained to him by the police. Besides the difficulties with his evidence generally which appeared to be mostly contrived and largely fabricated to fit some narrative, it was also his evidence that both the magistrate, Mr Tloti and captain Modise treated him very well. Most importantly, his evidence was that both of them explained his rights to him when he appeared before them for the confession and the pointing out respectively. The obvious question then is, why did he not exercise those rights when he was in the presence of people in authority both of them very senior and accountable people who on his evidence treated him well. He never used the enabling atmosphere that they created and told them about the ill-treatment that he said the police subjected him to. I do not intend to go into further details on his evidence save to point out that I was satisfied that his evidence on being tortured was patently dishonest besides being largely contradictory.

[65] Both the confession and pointing were recorded in circumstances in which the alleged earlier treatment accused no.1 claimed to have received included physical

torture for a long time in which he was assaulted in various ways. I have found that he lied about that torture and I reject his evidence in that regard. His evidence included the fact that the magistrate and captain Modise both explained his constitutional rights to him. This is besides their evidence that indeed they explained the constitutional rights to accused no.1. The explanation of constitutional rights to him happened before the confession and pointing out were done. The State also led evidence of an official photographer from the Aliwal North Criminal Record Centre. The photos of the upper body of the accused which were taken on 13 November 2019 which were taken within two days of the alleged violent assault on his body was inflicted bear no evidence of the assault. This must be because it did not happen. I reject this idea by accused no.1 that he did not tell both the magistrate and captain Modise about the violence he alleged was visited on him because he feared being drowned at the Orange River as false as is the evidence of the assault itself.

[66] The confession was properly recorded and in my view, complied with the law. The requirements of a proper recordal of a confession were articulated quite clearly in *S v Mpetla & Others* 1982 (2) SA 406 (C) which predates our constitutional dispensation. It was quoted with approval very recently by Mbha JA in *Mudau and Another v S* (1148/2016) [2017] ZASCA 34 (29 March 2017) in which the Supreme Court of Appeal said:

“A confession made to and reduced to writing by a magistrate is, upon its mere production, admissible in evidence provided that the requirements of s 217 are satisfied. This means that a magistrate should ensure that the confession conforms to the prescripts set out in the Constitution. Even before the advent of the Constitution, cases are legion that emphasized the importance of informing the accused of his constitutional rights to legal representation and the right to silence at every important stage during the recording of a confession.

Thus in *S v Mpetla & Others* [1982 (2) SA 406 (C)] the court said at 408 E-H:

‘Before the presumption comes into operation it must appear “from the document in which the confession is contained” that such confession was made freely and voluntarily etc. Normally no confession of itself would refer to questions of voluntariness or undue influence. A person making a confession is most unlikely to volunteer the fact that he is confessing freely and voluntarily, that he is in his sound and sober senses and that he has not been unduly influenced to make such confession. It is manifest therefore that implicit in the whole procedure envisaged by the section is a questioning by the magistrate of the person confessing. These question as well as the answers must be recorded for it to be able to appear from the document that the confession was made under the required conditions of voluntariness, etc. This, of course, is also in accordance with long-standing practice. It is well known that over a period of many years departmental instructions and the decisions of the Courts have built up a series of guidelines to ensure that confessions are in fact freely and voluntarily made without the exercise of undue influence. ...’

These rights have since been entrenched in s 35 [of the Constitution].”

[67] It is evident from the pro forma confession document that the right questions were asked by the magistrate and answered by the accused. All of that including accused’s clear answers appear from the pro forma document itself. This is besides accused no.1’s own evidence that indeed his rights were explained to him by magistrate Tloti.

[68] The same applies to the pointing out. It was preceded by a form captioned “NOTES OF POINTING OUT OF A SCENE/S AND/OR POINT[S]”. It appears there from that the accused was indeed telling the truth when he testified that his rights were explained to him. The form is quite detailed and has been carefully designed to ensure that no accused person would participate in a self-incriminatory process without a clear understanding of his right not to participate in such a process when the process is properly done. In all these circumstances I ruled both the confession made on 12 November 2019 before Mr Tloti, the then Sterkspruit magistrate and the

pointing out done with captain Modise from Aliwal North or Maletswai police station were admissible as evidence in this case.

Can an accused be cross-examined in the confession before it is ruled admissible?

[69] As I conclude on this issue I must point out that prosecutors must understand that while a confession is generally shielded from the ears and eyes of the court and therefore the accused person may not be questioned on it, that veil may be lifted, on application, if the accused's basis for his objection to its admissibility is that the contents thereof did not come from him. They were narrated to him by the police or that he was schooled on what to say. This is because the truthfulness of his allegations in this regard needs to be tested as well. The best way to do that is to cross-examine the accused on the contents of the confession which he alleged, came from the police even though it has not yet been ruled admissible. In *S v Talane* 1986 (3) SA 196 (A) at 198 C-D in which the court said:

“The truth of the content of a confession made by an accused is, generally speaking, irrelevant to the decision of the question whether such a confession has been freely and voluntarily made, and a prosecutor would not be entitled to cross-examine the accused as to the truth of such contents. Where the accused, however, himself alleges that the content of his confession is false and was prescribed to him by the police, the State should have the right to cross-examine the accused on the content of the confession to prove that the accused himself is the source of the contents, in other words to test his credibility. In such a case it would not constitute an irregularity that the content of the statement has been revealed to the Court and the assessors before the decision as to the admissibility thereof has been made.”

[70] With the confession and pointing out having been ruled admissible, the State continued with its evidence against all the accused in the main trial. I start with the evidence of Mr Tloti. He started by reading the confession into the record as follows:

"I am Luzuko Taitai and I am 27 years old. I stay at Mokhesi, just across the bridge from town. I am renting since I work as a security guard here in town. I work at M[...] F[...] M[...]. My home is at Phelandaba

2.

About 3 weeks back Maletsatsi arrived where I rent also to come and stay. We welcomed her with other tenants. After some time, about two days after her arrival, she asked me if I know at a person who sells firearms. I asked her what is she going to do with the firearm. She informed me of her abusive husband. I said I have no knowledge of a person who sells firearms.

3.

The next time I saw her, approximately a day later, she again talked about her abusive husband. She said anybody who can kill her husband can give that person R10 000.00. I told her I am a security. I only do legal work. She was confusing me. She began to call me constantly, even at work, urging me to do this for her, I refused. I told [her] I am busy with my odd jobs and I was doing painting during the day at those flats.

4.

On 05 November 2019 I got off days at my work that were to resume on 06 November 2019. She requested me to paint her room and do some plaster work. We were no longer talking about killing of her husband as I have earlier refused. On my arrival on 06 November 2019. In the morning from work, she was already gone to work.

5.

Earlier, when she arrived to stay at the flats where we rented, she had introduced me to Sam. Sam works at L.A. Radio Station. He was also a tenant at the flats. They had a love affair. He was always sleeping at Maletsatsi's room.

6.

On the 6th November 2019 they were both present at 17h00. I am not certain if they arrived together or separately. Maletsatsi sent us liquor at Boxer, namely 4 quartz stout and 6 pack of blue ice. She sent us there before 18h00. Again sent us to buy liquor at Mjafi Tavern, namely several quartz, I cannot remember well as I was already drunk. It was about 21h00. I was on both occasions in company of Sam.

7.

At about 22h00, we were very drunk. We were still drinking. It was myself, Sam and her. She said to us this is the day she has been talking about. She said we must not concern ourselves with money, she has it. She will pay us. We ignored her as we were busy drinking. She told us what to do, we were just drinking ignoring her.

8.

At 23h00 she called one Oupa telephonically. She said we must go next to the road so that Oupa will not see the room we emerged from. Oupa has a small taxi. She gave us plastic containers containing petrol to take to Oupa's vehicle. I[t] was 1 X 20 litre container and 2 X 5 litres. In the 20 litres there was about 10 litres of petrol. Oupa asked what was contained in the containers and she said it was traditional medicine. He took us to Walaza. The car waited for us in the main road. The three of us proceeded to a house in Walaza. At that stage I was struggling to walk as I was very drunk.

9.

I seek to clarify that the petrol was only in the 20 litre container. The 2 X 5 litre containers were empty. On our arrival at this house in Walaza, Sam jumped over the fence into the yard. The petrol was then poured into the empty 5 litre empties. They were almost full both. Small petrol was left in the 20 litre container. Sam poured the petrol in the 5 litres before he jumped into the yard.

10.

I said I am drunk and I do not want to be involved. Sam told me he will kill me if I do not co-operate. I also entered and Maletsatsi was trying to open the

gate in order to enter. Whilst inside the yard I refused to co-operate. Sam poured me with petrol and Maletsatsi lit me. He used his hands to scoop the petrol he poured at me. I took off my jersey trying to extinguish the fire.

11.

Whilst I was trying to doze off the blaze, Sam had opened the windows at the homestead and sprinkled petrol. He lit using matches. Also Sam caught fire on his hair. He came to me trying to extinguish himself. Maletsatsi was also there but since I was burning I could not quite make out where she was. Also my trouser was burnt and came back naked on my lower body.

We ran back to Oupa in different directions. We came back to Sterkspruit with Oupa. On our arrival I went to my room. They took my phone. They then started to threaten me that they will kill me if I talk. They then ran away. That is all.”

[71] Captain Modise also gave evidence in the main trial relating to the pointing out which had also been ruled admissible. His evidence was based on the photo album compiled by sergeant Mooko in respect of the pointing out and the notes of the pointing that he, captain Modise took as the pointing out was taking place. It is worth mentioning that the pointing out notes which were read into the record were signed by both captain Modise and accused no.1. The notes read as follows:

“11:00 Interviewing started with the witness Luzuko Tai-tai at office C-10 Palmietfontein detective’s offices.

11:50 Photos of the witness taken by constable Mooko of LCRC.

11:55 Photos of the seating in m/v BSZ 055 B Reg No. F[...] 2[...] E[...].

11:57 The witness ordered the vehicle to depart and pointed left direction from the police station.

- 11:58 The witness Luzuko Tai-tai orders the vehicle to turn left on the R393 road main road from Telle-bridge to Sterkspruit direction.
- 12:10 The witness orders the vehicle to turn right joining the road to Walaza on Zastron road.
- 12:20 The witness orders the vehicle to turn right near Walaza Store.
- 12:23 The witness Luzuko Tai-tai pointed the burnt house referred herein as the scene of crime and asked the vehicle to stop km: reading: 102010.
- 12:24 The photo of the gate was taken where the witness Luzuko Tai-tai and Sam and Maletsatsi entered carrying five litres of petrol.
- 12:25 The photo was taken where the petrol containers were left and the window where petrol was thrown in the house.
- 12:28 Photo of the window where petrol was poured by Sam as witness Luzuko Tai-tai alleges.
- 12:30 The witness pointed the spot where one full five litre petrol and half five litre petrol was left by him (Luzuko Tai-tai) and Sam as the petrol also burn them.
- 12:35 The witness Luzuko Tai-tai pointed the place where the white sedan which was hired by Maletsatsi was parked before they proceeded to the scene.
- 12:40 The witness Luzuko Ta-itai finished or was done with the process of pointing the scene and orders the vehicle to drive back to the police station at Palmietfontein.

13:05 The witness Luzuko Tai-tai, captain Modise and the driver constable Ndulula arrived at the police station motor vehicle kilometer reading stands at 102040.”

[72] Captain Modise was not cross-examined on his evidence and his handwritten notes.

[73] Sergeant Mooko's evidence was that at the request of Kutwana to assist captain Modise with taking photos of the pointing out process he arrived at Palmietfontein police station on 13 November 2019. In his evidence he merely confirmed the evidence he had given during the trial within a trial. No real cross-examination on the real issues pertaining to the actual pointing out process took place. After Mr Tloti, captain Modise and sergeant Mooko's evidence all of which related to the confession and the pointing out the State closed its case.

The defence case.

[74] After the State had closed its case there was an attempt on the part of the legal representatives for the accused persons to apply to the court to make a ruling on whether or not, following the admission of the statement made by accused no.1 before Mr Tloti, that statement was in fact a confession. I first deal with this issue as the contents of the confession, to the extent that it was alleged to be exculpatory, loomed large in both the heads of argument filed and during oral submissions in court. I think that the said application was procedurally out of place and in fact a conflation of two separate issues. When the evidence of a confession is sought to be introduced, a trial within a trial is opened for purposes of determining if the said statement complies with the strict requirements of section 217 of the Criminal Procedure Act. I have already dealt with section 217 above. However, I consider it necessary to point out that once a ruling is made that the statement made by the accused person is admissible, all it means is that the State is not barred from leading such evidence. However, the evidence itself must be assessed together with the rest of the evidence as to whether when considered with other evidence, it supports a conviction of the accused person. Its admission does not mean that on its mere admission the fate of the accused is sealed and he must be convicted.

[75] The accused, through their legal representatives, sought to argue that the court should make some form of a ruling on that document. I do not think that there is a second ruling that must be made by a court that is based on the reading of the document that has been admitted as a confession. That document speaks for itself in that it is now available to the court as well to read it. Until the State has led its last witness, it is not known what other State witnesses might say and what might transpire from a cross-examination of such witnesses. After all, rulings on confessions, pointings out and admissions are generally interim in nature and the court is entitled to revisit them. The court is at large to consider the confession in light of what the accused chooses to say in his defence when he testifies. The court may very well conclude that on its reading of the document it does not appear that the accused admitted to having committed any offence. Or he did not admit to all the elements of the offence. Even worse, he can testify and prove to the court that he was compelled to commit the offence. That is a totally separate issue to that of its admissibility.

[76] The accused having said in a confession statement that he was at the crime scene because he was forced to be there by other people must depend on whether it is in fact his defence that he committed the offence because he was forced by other people. If his defence is that in fact he was not there as was the case in this matter, he cannot use the confession that says that he was there as a result of being forced to be there or was compelled to commit the offences when in fact his evidence under oath in court was that he was not even at the crime scene and he never committed any of the offences. If an accused person gives as his defence that he was compelled to commit the offence indeed, the State must cross-examine him on being forced to commit the offence, not on him not even being at the crime scene. The same applies with the accused being too drunk to be criminally liable, he must decide if that is his defence or not and put his version to the State witnesses accordingly. The idea that he must first see which way the wind blows is not part of our law and is not in the interests of justice. He cannot have his bread buttered on both sides. His right to remain silent is beyond debate as it is enshrined in our Constitution. That the State must prove the guilt of the accused beyond reasonable doubt, there can be no debate about that. But the accused is not entitled to plead an alibi and at the same time plead compulsion in committing the offence. The fairness

of a trial is not to be determined only on the basis of what the accused and his legal representative consider to be his way out of the evidence the State presents. That would be antithetical to the whole concept of justice.

[77] In *S v Yende* 1987 (3) SA 367 (A) at 368 E-J the following is stated which, with respect, I consider to be the correct statement of the law:

“In the adjudication of the question whether a statement was a confession for the purposes of s 217 (1) (a) of the Criminal Procedure Act 51 of 1977, an objective approach is preferable to a subject approach. A confession, being an unequivocal admission of all the elements of the offence in question, concerns the facts which an accused states (either orally or in writing) rather than the intention behind such statement. If the facts which he admits amount to a clear admission of guilt, it does not matter that (in making the statement) he acted exculpatory. It would be unrealistic to regard a statement which otherwise amounts to a confession as not amounting to such merely because the person making the statement (possibly for some or other illogical reason) does not intend it as a confession. The application of an objective standard does not mean, however, that all subjective factors have to be left out of account. The state of mind or intention of the person making the statement will sometimes be taken into account as one of the surrounding circumstances from which the objective meaning of his statement can be ascertained. In many cases the precise meaning of a statement can only be ascertained against the background of the prevailing circumstances – particularly in the case of an oral statement consisting only of a few words. Surrounding circumstances can therefore be taken into account, with this proviso, however, that ‘(s)urrounding circumstances which put the statement in its proper setting and which help to ascertain the true meaning of the words used’. Facts of which the person making the statement had no knowledge at the time of the statement must, however, be left out of account.

In order to decide whether a statement amounts to a confession, the statement must be considered as a whole. In this connection regard must be had not only to that which appears in the statement, but also that which is

necessarily implied therefrom. If the content of the statement does not expressly admit all the elements of the offence or exclude all grounds of defence, but does so by necessary implication, the statement amounts to a confession. Whether a statement, either standing alone or in conjunction with such surrounding circumstances as can lawfully be taken into account, is capable of a necessary implication will have to be determined according to the merits of each particular case. If there is doubt in this connection, the statement is not a confession as it does not, in the nature of the case, contain a clear admission of guilt.”

[78] It should be remembered that the trial within a trial is concerned with one issue only. That issue is the admissibility of the confession or pointing out. The issue at that stage is not the guilt or innocence of the accused person who remains entitled to be regarded as innocent until proven guilty beyond reasonable doubt. When the court rules that a confession is admissible, that is the end of the issue as far as admissibility is concerned. The contents of that document and what they amount to do not require a new impromptu enquiry to determine if it is in fact a confession. The issues of whether the accused makes an unequivocal admission of guilt in the statement itself are all part of the trial. He may testify and explain the prevailing circumstances at the time it was made. Those circumstances may very well show that he was forced to be there and compelled to commit the offences. The document, though admitted as a confession, is not immune from scrutiny. In fact, it is always open to scrutiny in terms of what is actually said in the document. The court may very well decide that that statement was not a confession. This is because, the court, during the trial within a trial is not dealing with whether the statement is a confession or not but whether, it was constitutionality obtained. If it was constitutionally obtained, then it is admitted as a confession. If on closer scrutiny after admission it appears not to be, the court is entitled to revisit its earlier decision and conclude that in fact that statement was not a confession in which case it can still disregard it. This legal position was made very clear in *Zuma and Others v The State* 1995 (1) SACR 568 (CC) where the Constitutional Court per Kentridge AJ said at para 7:

“... The reference to the admissions of the two accused that they had committed the offences arose from the evidence which they had given in the course of the trial within a trial. As Hugo J fully appreciated, that evidence was given only in the context of the trial within a trial, where the only issue was admissibility. To that issue the truth of the confession was irrelevant. Thus, in *S v Radebe and Another*, 1968 (4) at 410 (A) Ogilvie Thompson JA said –

“It not infrequently occurs that, although the presiding Judge may think that the contents of a tendered confession are true, the circumstances where-under the confession was made compel its exclusion.”

The evidence of accused no.1.

[79] The accused opened their case with accused no.1 testifying in his defence. He testified that on 6 November 2019 he stayed at Mokhesi in Sterkspruit. He was employed as a security guard at M[...] F[...] M[...]. He testified that he knows nothing about this case. However, he remembered what happened in the early days of November 2019. He and accused no.2 stayed in the same premises whereas accused no.3 would visit the premises from time to time. On 6 November 2019 he was at his place of residence and late in the evening he went to Walaza. When they went to Walaza they were four people. It was himself, accused no.2 and 3 as well as Mhlali Manzi. The purpose for going to Walaza was to fetch a bulk amount of dagga. He and his co-accused were going to sell it. Manzi was not involved in that business, he was just driving them there. They did not tell Manzi that his vehicle was going to be used to transport the dagga as he might have refused. They told him that they were going there to perform a ritual at a certain homestead in Walaza and that he was a traditional healer. The arrangement for Manzi to transport them to Walaza were made by accused no.2. They boarded the vehicle near Mokhesi Bridge.

[80] The person who was going to sell them dagga confirmed to them that he was available on that day. He also said that they needed not to worry about money if they did not have cash as he also took clothing and blankets, branded clothing like Nike. The said person was a male and he spoke Sesotho. The clothing was packed

in a black plastic bag which was closed. When Manzi confirmed that he was present they proceeded to the vehicle. They greeted him and asked him to open the boot. They put the parcel in the boot and the vehicle drove off. After a while he asked them what were they carrying. They decided not to tell him the truth. They said to him that they were carrying traditional medicine for a cleansing ritual. They were only carrying the black plastic bag which was fully loaded with clothing. They stopped near Mr Monoana's homestead who is not the same person as the deceased in this case. They requested Manzi to open the boot so that they could off load the parcel. He did so and they took the plastic bag from the boot and proceeded to the shack where they were going to meet the dagga dealer. He and accused no.3 left leaving accused no. 2 in the vehicle with Manzi. But they requested her to alight from the vehicle to show them directions to the shack. He already knew the shack so when she showed them the road they proceeded to the shack. The dagga dealer was there smoking dagga. He asked them to taste the dagga. He tasted it by smoking it and he confirmed that it was indeed dagga. Thereafter the dagga dealer opened the plastic bag to check the clothing and when he was satisfied, he took the dagga and loaded it in the same black plastic bag. After they were done smoking and had their parcel of dagga they had to rush as the vehicle was a hired vehicle.

[81] They ran back to the vehicle and on reaching it they requested Manzi to open the boot for them. He disputed Manzi's evidence that on their return they were not carrying the parcel. About Manzi's evidence that on their return they were running, he testified that they rushed to the vehicle or were trotting. When he was asked to explain whether when they returned to the vehicle they were running or not, he testified that initially they were rushing and then eventually they ran to the vehicle but not in full speed. He was asked to comment on Manzi's evidence that he asked them why they were running and they said they were being chased by dogs. He said that Manzi never asked him anything unless he was talking to his co-accused. He explained that he did not dispute that the question was asked by Manzi saying that perhaps he did not hear it.

[82] On Manzi's evidence that on their return they were smelling of smoke he testified that Manzi could be telling the truth about them smelling smoke because on arrival at the dagga dealer's place, the room was full of smoke and he also smoked

some dagga. He denied that when they departed for Walaza from Mokhesi they were in possession of a 20 litre container. On their return to the vehicle at their request Manzi opened the boot for them, they loaded their dagga parcel and he drove off until they reached Mokhesi Bridge near the place where he had picked them up earlier. On reaching that place they requested him to open the boot for them and they off loaded their parcel. Manzi drove off and they went to their respective rooms. He opened his room but did not stay but went to their room to say goodbye and to also say that they would see the following day how to go about their dagga. He then went to his room to sleep.

[83] One day he was arriving from his home at Phelandaba and found the police already at the premises. The police officers were Kutwana and Moahloli who assaulted him and eventually took him to Palmietfontein police station where he was cuffed and interrogated about Walaza. During that interrogation he was assaulted and threatened with being drowned at the Orange River. The police wanted him to implicate accused no. 2 and 3 saying that he was burnt by accused no.2. Eventually he agreed to co-operate with the police. That same evening, he was brought back home and fetched the following morning in two vehicles. The police found him with his employer. He was taken to the magistrate's court where they waited outside for some time with the police trying to see if he had rehearsed his statement properly. Eventually he was escorted to the magistrate by Ndulula. The magistrate informed him of his constitutional rights. He made a statement to the magistrate which is the one that the magistrate read into the record. He testified that in that statement he talks about accused no.2 and 3. After that statement he was taken to the hospital. He was examined by the doctor.

[84] He testified that when he went to Walaza on 6 November 2019 with accused no.2 and 3 it was not his first time going there. He first visited Walaza in October when he went to fetch accused no.2's brother Lefu's goods. He went there for the second time during the dagga visit on 6 November 2019. On that first visit in October 2019 it was himself, the person who was going to assist them in loading the goods, the driver and accused no.2. When asked if Keketso went with them to Walaza on that occasion, his response was that Keketso is a sickly person and that he did not notice his presence. He then said he did not dispute his presence but he

was saying that he did not remember his presence there or seeing him there. He disputed Keketso's evidence that they went there in November 2019 to fetch the goods insisting that it was in October 2019. They brought the goods to accused no.2's place of residence. They remained there consuming liquor.

[85] After he made the statement to the magistrate he was then charged and detained. The following morning, he was taken to captain Modise who took him to the pointing out where he pointed the points he had been told about. He pointed the points or spots Kutwana had told him about. He testified that he knew the home of the deceased in count 3 and he knows that it is the homestead of accused no.2 because she said that it was her husband who stayed there on the day they went there to fetch a key. On that day he did not enter. That day was in October when they went to fetch Lefu's goods. On that day accused no.2 went inside while he remained in the vehicle. Since it was her husband, she was taking time coming back. As a result he went in to call her out. He testified that he never conspired with anyone to commit the offences for which he has been charged. He never set the deceased's homestead alight and he never caused the death of the deceased in counts 3, 4 and 5. Accused no.1 was referred to the evidence of Keketso who said that he knocked at accused no.1's room and when he opened he noticed that his face was black. He asked him where he was burning tyres and accused no.1 said that he wished he had listened to him. Accused no.1 testified that he did not open for Keketso because he had a hangover. He denied that his face was black or that Keketso enquired about it.

[86] Accused no.1 was cross-examined by the legal representative for accused no.2 and 3. He testified that his statement which he made to the magistrate led to the arrest of accused no.2 and 3. He testified that he was told by Kutwana that they were after accused no.2 and 3. Kutwana assaulted him to make a statement implicating accused no.2 and in accordance with what they told him to say. What he said in that statement was a lie and it is what he was told to say. He was also promised that he would not be arrested but would be made a State witness. Where he said in that statement that accused no.2 loaded petrol in the hired vehicle, that was a lie and he had been schooled to say that. He confirmed that on 06 November

2019 he was at Walaza and he had been there before some time in October when he went to fetch a key.

[87] He knew the deceased Nyakambi Monoana by sight as he once saw him. On the 6 November 2019 when they went to Walaza, the homestead they visited was very far from Nyakambi's. On 6 November 2019 he and accused no.3 went to a shack to buy dagga. He did not dispute smelling smoke but it was from smoking dagga. Any evidence that related to him and accused no.3 at the crime scene was a lie. Any evidence of him being approached by accused no.2 for a firearm to kill the deceased was also a lie. It was something he had been told to say. He never conspired with accused no. 2 and 3 to kill the deceased. It was also a lie that he was forced to participate in the commission of any offence by accused no.2 and 3.

[88] Under cross-examination by the prosecutor it was put to him that he mentioned for the first time when he gave evidence that he once visited the home of the deceased in count 3 and that he knew him. He responded that he had indicated that he forgot to mention that he did go to the homestead of the deceased in count 3. The deceased in count 3 also used to visit accused no.2's place where she was renting. Accused no.2 used to tell him about her husband and he would see him when he visited her. When he went to Walaza in October to fetch Lefu's goods he was not seeing the deceased in count 3 for the first time. It was put to him that on his evidence he visited Walaza three times, the first time was when he went there in October to fetch Lefu's goods, the second time was when he went to buy dagga and the third time was when he was taken there for the pointing out. He admitted going to Walaza on 3 occasions.

[89] On 6 November 2019 he boarded Manzi's vehicle which was hired by accused no.2. They were carrying clothing that was in a black plastic bag which was a refuse bag. They used two refuse bags for that one parcel of clothing. He agreed that Manzi was correct that they were carrying a black plastic bag which they put in the boot. He said that that plastic bag was sealed, so he could not have seen what was inside. He did not know where Manzi got the idea of a 10 or 20 litre container as he could not see what was in that plastic bag. He also agreed with Manzi that he was introduced to him as a sangoma and that he was going to Walaza for a ritual. With

regard to the in loco inspection they did with Manzi, accused no.1 said that Manzi pointed his own places and they, as the accused pointed their own. He disputed Manzi's evidence that they loaded a plastic bag containing a 20 litre container. Their plastic was sealed with clothing inside. He was referred to the evidence that a black plastic containing a container with a yellow cap was found at the crime scene, he said he knew nothing about Manzi's evidence. He denied that they loaded a plastic bag containing a container inside in the boot of Manzi's vehicle. He insisted that that plastic bag contained clothing in it. He knew nothing about a container with petrol which was used to burn the homestead of the deceased in count 3.

[90] Accused no.1 explained that his burn wounds occurred when he fell on a fire of burning tyres because he was drunk and was rescued by accused no.3. This happened after some time after the 6 November 2019. He however did not remember the date. He thought it was the 8 or the 9 November 2019 when he fell on that fire. When Kutwana visited him he had already fallen on the fire. He disputed Keketso's evidence that on 6 November 2019 he gave accused no.2 a container with a yellow lid and that he then saw him, accused no.2 and 3 getting out of the premises singing. He denied being seen by Keketso the following morning with a black face and saying that he never opened for him. He said that Keketso was lying and is sick and that he must have been fed this kind of information. On 6 November 2019 he had not yet been burnt. On Manzi's evidence that he came back to the vehicle smelling smoke, he testified that he should have smelled smoke because the room they were coming from had smoke and he had smoked dagga. He further said that Manzi was lying that on their return they were not carrying the plastic bag.

[91] They returned carrying the plastic bag containing dagga. He denied telling Dr Godlwana that he was burnt on 6 November 2019 saying that Dr Godlwana had spoken to the police, she just examined him and told him that they did not have medication. It was put to him that his being burnt by burning tyres was never put to Keketso. His response was that he had told his legal representative how he got burnt. On the fact that it was also never put to Dr Godlwana that he was burnt in a burning tyre fire he testified that may be his lawyer was focusing on being burnt on the 6 November 2019 but Dr Godlwana never asked him when he got burnt. He had mentioned to his attorney how he got burnt who was cross-examining witnesses. He

mentioned it when he testified because it was his chance to tell his story. He testified that he saw Kutwana on 11 November 2019 in accused no.2's room but she was not there. Kutwana then came to his room just after he arrived. He denied that on 6 November 2019 he went to Walaza for the purpose of killing the deceased in counts 3, 4 and 5 and not to buy dagga. On being asked some questions by the court accused no.1 testified that he went to Walaza once in October when they went there to fetch Lefu's goods. He explained that Lefu's keys were kept at the deceased's homestead and that was the key they went to fetch in October 2019. In November he only went to the deceased's homestead when he was brought there by the police. Accused no.1 closed his case after his evidence.

Accused no.2's evidence.

[92] Accused no.2 testified that she stays at Majuba in Sterkspruit and she is not married currently. She and her husband simply separated and theirs was not a civil law marriage. Her husband was Nyakambi Monoana, the deceased in count 3. She had three children with her husband but those three children all passed away. Majuba is her home where she stays with her mother, nephews and nieces and her own children. She now has two children, one is 7 years old and the second one is 5 years old. In November 2019 she stayed at Mokhesi and worked at Memela Tarven until the time she was investigated for this case. At that time she had already separated from her husband as she stayed in Mokhesi and he stayed at Walaza. They however, visited each other. He would come to her place of residence in Mokhesi and she would visit him in Walaza. Their relationship was basically the same as at the time they stayed together in Walaza. By being in separation she was referring to the fact that they lived in different places.

[93] On 6 November 2019 she was at her workplace. She knows nothing about the offences in this case. She knocked off from work at 18:00 and went to her place of residence where she found accused no.1 already there but in his own room as he was off duty on that day. When he saw her entering her room he came to her and told her that accused no.3 had just left. He further said that they wanted to discuss something with her. She then phoned accused no.3 who said he was in town. He came back from town and the three of them had a meeting. The time was at about 19:00. Accused no.1 and 3 said they had a dagga that needed to be fetched from

Walaza that same day and they needed transport. She then told them that she had a metre taxi that she normally used which belonged to someone she knew. She phoned the metre taxi as it was only her phone that had airtime. The call was answered and she said to the person who answered the phone that at around 22:30 she would need transport to Walaza. She phoned this person again and changed the pick-up time to 22:45. The vehicle arrived at 23:15. The clothing that was to be taken to Walaza had already been packed. They took a plastic bag and went to the vehicle. The driver saw the plastic bag and opened the boot. The plastic bag was loaded in the boot of the vehicle. She sat in the front passenger seat and accused no.2 and 3 took the back seat. The vehicle drove off until it reached Walaza. At a certain place in Walaza the vehicle turned where accused no.1 and 3 alighted. Before they left Mokhesi for Walaza her co-accused had requested her to come along because they were taking clothing to Walaza but they were worried that the driver might leave them. The arrangement was that she would remain in the vehicle with the driver.

[94] Accused no.1 and 3 alighted from the vehicle and requested that the boot be opened for them. They took their parcel and left her in the vehicle with the driver. They later came back and requested that the boot be opened for them. The boot was opened and they loaded their parcel. She noticed when they alighted at Mokhesi that the parcel was in a black plastic bag. The vehicle drove off returning to Mokhesi where they alighted and all three of them proceeded to her room. In the morning on 7 November 2019 she heard that her husband had passed on in a fire incident from someone. This was on a Thursday when she heard the news. It was on Friday the 8 November 2019 when police arrived at her place while she was preparing to go to Walaza. The police officers were Kutwana and Moahloli and a third policeman. When the police arrived she was with accused no.3 in her room. They asked them about what happened at Walaza and told her that she was a suspect. They asked her for her cellphone handset which she gave to them. They also requested accused no.3's cellphone handset. He also gave it to them. Kutwana also asked her not to go to Walaza because she was a suspect after which Kutwana and his colleagues left.

[95] Later that day on 8 November 2019 police found her at Hohobeni and took her to her room in Mokhesi. Her keys were not with her, accused no.3 had left with them. She was not even able to phone him because police had taken his phone. The police decided to damage the padlock and gained entry into her room. She entered the room with them. They searched her room but did not find anything that linked her to the commission of the offences in this case. With regard to the evidence of Keketso that on 6 November 2019 she took her 20 litre container which was in his possession which the State alleges, was found at the crime scene, she testified that she had three containers that she had asked Keketso to keep for her. They were two 25 litre containers, both white and one 20 litre container which is yellow. When she went to Keketso's room he was not there and the room was not locked. She entered and took one white 25 litre container. She, accused no.3 and her sister left the premises. Her sister was going to the taxi rank while she and accused no.3 went to fetch water with that container. She did not have a black container. However, she did have a 20 litre container that had a yellow lid but it was also yellow. With reference to photo no. 17 she testified that she never had a black or blue container with a yellow cap. She explained that on 6 November 2019 she and her co-accused had in their possession a black plastic bag but it did not have a container. The plastic bag they loaded in Manzi's vehicle boot did not have a container.

[96] She phoned Zimasa and made arrangements for their trip to Walaza. The person she knew who had a metre taxi was Manzi but when she called the phone was answered by Zimasa. She could not recall the time she spoke to her but she arranged the pick-up time with Zimasa to be 22:45. However, the vehicle arrived at 23:15. She had arranged the time initially to be 22:30 but she later changed it to 22:45. Manzi was correct that she was the one giving him directions to Walaza. She knew the place they were going to.

[97] Under cross-examination she testified that she and her husband separated in terms of places of residences in 2010. During the period they were in separation he would visit her at Mokhesi and sleep there and she would also visit him at Walaza and sleep there. She was not aware that in 2019 the deceased in count 3 was dating Keketso, the deceased in count 4. When it was pointed out to her that it

was never put to Mr Combi that the deceased and herself visited each other, she said that her legal representative never asked Mr Combi any questions. He also did not ask her if she had anything she wanted Mr Combi to be asked. She considered herself as deceased's wife even after she left him because he would also refer to her as his wife.

[98] Accused no.2 was asked about the time at which she called Zimasa on 6 November 2019. She said that during the first call to Zimasa she buzzed her number which was a number she saw on a poster whilst she was still at work. It was after 18:00 after she knocked off. It was put to her that Zimasa testified that she received a phone call from a lady during the day and that lady enquired about a cab. Her response was that she did not hear Zimasa saying that. Zimasa went on to say that the caller wanted to know the price for a return fare to Walaza and she told the lady that it would be R300.00. The lady said she would call at about 18:00 as she needed a cab to Walaza. She responded that what Zimasa was talking about was what they discussed after she had knocked off and after her discussions with accused no.1 and 3. It was further put to her that Zimasa testified that indeed the lady phoned just after 18:00 and requested to reschedule the time. She confirmed calling to reschedule the time. Accused no.2 was referred to her conversation with Manzi in which she told him that accused no.1 was a sangoma, she explained that she could not tell Manzi the truth when he asked her what they were going to do at Walaza. This was because they were going to fetch dagga at Walaza and he would not have agreed to load dagga in his vehicle.

[99] Accused no.2 testified that she did not leave her homestead in 2010 in a bad way. Her two children who are seven and five years old are not those of her husband. She did not know that he was staying with Kekeletso. She last visited the deceased in count 3 in 2019. She had gone there to fetch a key, so in 2019 she visited him once, when she went to fetch a key. It was put to her that Manzi said that when accused no.1 and 3 returned to his vehicle at Walaza they did not return with the parcel they had taken with them when they alighted. She testified that she had no knowledge about that. However, they asked him to open the boot for them and when they reached the place where the vehicle had picked them up they took out a black plastic bag which she understood to be the same plastic bag they had placed

in the boot when they returned to the vehicle. Accused no.2 confirmed Keketso's evidence that in November 2019 he together with her and accused no.1 went to fetch goods from a two roomed flat structure. However, that was not the home of the deceased in count 3. It was the place her brother Lefu was renting.

[100] She also disputed Keketso's evidence that on 6 November 2019 she came to his room and took a 20 litre black container with a yellow lid. It was put to her that according to Keketso she, accused no.1 and 3 were carrying that 20 litre container going down, out of the premises and singing. She disputed that evidence and said that Keketso saw her, accused no.3 and her sister. They were carrying a white container which he did not see it when she took it because he was not present in his room when she took it. Furthermore, it was not on 6 November 2019 but it was on a Sunday.

[101] Accused no.2 testified that Manzi lied when he said that accused no.3 asked him to open the boot and the boot was opened and accused no.3 put in a black plastic bag containing a 10 or 20 litre container. She testified that Manzi could not have seen what was in that plastic bag. She however, agreed that the plastic bag was black and that Manzi took them to Walaza on 6 November 2019. It was further put to her that at the crime scene a black plastic bag with a black container that had a yellow lid was found. She responded that she heard that. It was further put to her that her legal representative said Keketso was fabricating his story about her because of a quarrel. However, she herself never gave evidence about that. She testified that that was because her legal representative did not ask her about her quarrel with Keketso. It was put to her that on 6 November 2019 she went to Walaza with the intentions of killing the deceased persons in this case. Her response was that she had not gone to the homestead of the deceased in count 3 when she went to Walaza on that day. She went to Walaza to fetch dagga. She denied acting in concert with accused no.1 and 3 to kill the deceased.

[102] In re-examination accused no.2 testified that she remembered that she did call Zimasa during the day after she met accused no.1 and 3 and had discussions with them on 5 November 2019. During those discussions she said to them that she would make a telephone call the following day during the day. So her discussions

with accused no.1 and 3 were on 5 November 2019. She first called Zimasa on 6 November 2019. With regard to what was put to Keketso that he was falsely implicating her she explained that when she arrived at their premises, Keketso already stayed there and she already knew him. She did not have a stove and used that of Keketso for cooking. She took his stove and used it to cook in her room and they would eat together. She was also buying the groceries. One day he came back drunk carrying 2kg of chicken. Keketso later gossiped about her saying he was feeding her. After she heard that gossip she took the 2kg chicken and his stove and threw them outside and told him never to set foot in her room. That is what they quarreled about. Since then their relations were never the same. The main reason for him to implicate her was that he was no longer coming to her room for meals but would see accused no.1 and 3 coming to have meals with her. He got angry about that. The difficulty with accused no.2's evidence about the reasons Keketso would falsely implicate her is that they were never put to Keketso.

The case for accused no.3.

[103] Accused no.3 testified that he stayed in Lusikisiki but in 2019 he stayed at Tienbank in Sterkspruit. He arrived in Sterkspruit in February 2018. He worked at LA-FM as a programme director and also conducted two radio shows. He stopped working at LA-FM in November 2019. He received another offer in Limpompo where they needed a manager for a restaurant. He testified that he knew nothing about the charges preferred against him. He also did not know any of the deceased persons. He had never seen or heard of them before. He had never visited the homestead of the deceased in count 3, Mr Nyakambi Monoana. He once visited Walaza in November 2019 in connection with their dagga deal. All he knew about the dagga dealer was that he had a Sotho name which he struggles to pronounce. However, that person was known by accused no.1. Accused no.1 knew the name of this person very well. They visited Walaza at night but he was not sure about the time. He was with accused no.1 and 2 as well as the driver of the vehicle. They met with their dealer at Walaza in his shack. When they went to meet him it was himself and accused no.1. The driver and accused no.2 remained in the vehicle near an old shop where the vehicle dropped them off. He estimated the dealer's shack to be about 300 metres from where the vehicle dropped them. The reason the vehicle did

not come closer was because they did not want the driver of the vehicle to be involved in the dagga deal.

[104] They met the dagga dealer. They took their parcel as agreed and returned to the vehicle. When they went to the shack they were in possession of some clothing items that were to be exchanged for the dagga. They gave the dagga dealer the clothes and he gave them dagga. They placed the dagga in the plastic bag which previously had the clothing items. He denied that that plastic which they had put in the boot of the vehicle had a 10 or 20 litre container. He had nothing to do with the offences that were committed on 6 November 2019. He did not conspire with anyone and he did not set the homestead of Nyakambi Monoana on fire. He did not kill anyone of the three deceased persons.

[105] Under cross-examination accused no.3 testified that accused no.1 has been his friend since 2019. He started knowing him in February 2019. Accused no.2 is also his friend. He disputed Keketso's evidence in which he said he saw him and accused no.1 and 2 leaving the premises carrying a 20 litre container which had a yellow cap. He testified that accused no.1 was not there. It was himself, accused no.2 and her sister. However, he could not remember what the date was. He denied Keketso's evidence that he was with him, accused no.1 and 2 in accused no.2's room and he went out and on his return he was not allowed in and that he was told that they were still discussing something. Accused no.3 said all that was a lie because usually when he visited accused no.2's room, he had no relations of any sort with Keketso and he never spent time with him. He confirmed asking Manzi to open the boot for him at Mokhesi and he confirmed carrying a plastic bag. He went on to say that it, however, did not contain a container. Secondly, when Manzi opened the boot, he did not alight from the vehicle to open the boot in which case he could have identified what was in that plastic bag. That plastic bag contained clothing which was to be exchanged for dagga. Those were normal clothing for males like jeans and t-shirts.

[106] He disputed Manzi's evidence that accused no.2 gave directions as he was driving to Walaza saying that Manzi knew the Walaza area. What he did not know was where he was going to drop them. When it was brought to his attention that

accused no.2 admitted that she was the one giving Manzi directions, he said that accused no.2 was admitting for herself, not for him. He could not agree to something that did not happen. Accused no.2 told Manzi on the phone that they were going to Walaza. As a result, Manzi enquired from accused no.2 where exactly in Walaza they were going to so that he could charge the fare properly. He added that he was present when accused no.2 made the phone call. The last time he was present when their transportation to Walaza was finalized was in the afternoon.

[107] When it was pointed out that accused no.2's evidence was that she phoned Zimasa after 18:00 after knocking off from work. His response was that perhaps accused no.2 had her own reasons for saying that and therefore he would not stand in her way. When it was pointed out that accused no.2 was speaking to Zimasa, not Manzi, his response was that he did not have a comment. When he was asked about accused no.2's evidence that it was before 19:00 when they told her that they needed transport to Walaza, his response was that he would not comment as he was not sure about the time. He further testified that the dagga deal was discussed with the dagga dealer by accused no.1. Accused no.1 told him about it five days before the date of the actual deal.

[108] When they got inside the dealer's shack they were supposed to test the dagga to see if it was the correct dagga they had made the deal for. They found the dagga dealer smoking his own dagga and they had to test the one they were going to take with them. After they had tested it and were satisfied with it, the dagga dealer checked the clothing to see if it was what was agreed upon. He testified that when they returned to the vehicle they found the vehicle at the spot where Manzi had dropped them off. He then said he did not know if he had moved after he dropped them off. On returning to the vehicle his observation was that the vehicle was still in the same spot where it had dropped them earlier. He added that when they were dropped at that spot he and accused no.1 alighted from the vehicle. He disputed accused no.1's evidence that accused no.2 also alighted to show them the way. He insisted that only himself and accused no.1 alighted and added that accused no.1 knew the place.

[109] On Manzi's evidence that on their return, they were running saying they were being chased by dogs, he said that that was not true. They were walking when they returned in the same way that they walked on their way there. He disputed accused no.1's evidence that on their return they were running but not in full speed or that they were trotting. Accused no.3 said that he did not know because accused no.1 had been smoking dagga and on that day he himself did not smoke. He merely tested the dagga. Accused no.1 was a dagga smoker. Perhaps he was high as a result of which he thought they were running or rushing when in fact they were just walking. Accused no.3 closed his case.

Analysis.

[110] The defence of all three accused persons was that at about the time at which the crimes were committed they were in the vicinity of the crime scene, at most, about 250 metres from the crime scene. They were there on an unrelated business that had nothing to do with the deceased or the homestead at which the deceased died. They were there to get dagga from a dagga dealer. It is so that there is no direct evidence linking them to the crimes that were committed. Therefore, the evidence against them is of a circumstantial nature.

[111] In *Gcaza v S* (1400/2016) [2017] ZASCA 92 (9 June 2017) the Supreme Court of Appeal restated the approach to the assessment of circumstantial evidence, reaffirming our *locus classicus*, *R v Blom* on inferential reasoning. The court said in *Gcaza*:

“[23] The appellant's challenge to the evidence is in a piece-meal fashion. This court in *S v Reddy & Others* 1996 (2) SACR 1 (A) at 8C-D warned against this, where it stated as follows:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-

203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such “that they exclude every reasonable inference from them save the one sought to be drawn”.

...

[25] The sentiments expressed by this court in *S v Ntsele* 1998 (2) SACR 178 (SCA) are relevant, where it held that the onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt - not beyond all shadow of doubt. The court held further that when [it] was dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment of evidence individually. It was the cumulative impression which all the pieces of evidence made collectively, that had to be considered to determine whether the accused’s guilt had been established beyond a reasonable doubt. Courts are warned to guard against the tendency to focus too intensely on separate and individual components of evidence and viewing each component in isolation.”

[112] There are a number of facts that are common cause and some that cannot be disputed with any degree of cogency in this case. I mention a few of them hereinbelow.

1. Accused no.2 was married to the deceased in count 3. According to accused no.2, they had three children who all predeceased them.
2. Accused no.2 had two children who, on her evidence, in 2022 were seven and five years old respectively. Both of those children were not fathered by her husband.
3. At the time of his death, the deceased in count 3 had an intimate relationship with Kekeletso, the deceased in count 4 and also lived with a 13 year old boy, the deceased in count 5.

4. Accused no.1 and 2 and Keketso went to fetch goods at Walaza, not very long before the deceased's homestead was set alight evidently with the petrol found at the crime scene.
5. Keketso testified that he was part of the people that went to fetch those goods. Some of his evidence indicates that it was in November 2019. So both on accused no.1 and 2's version goods were fetched from Walaza. This corroborates Keketso's evidence. Accused no.1 chose not to know whether Keketso was there or not in the bakkie that accused no.2 had hired to fetch the goods.
6. According to Keketso, he did not know the deceased in count 3. However, he was told by accused no.2 that they were fetching the goods from her homestead in Walaza. Accused no.1 adds a piece to this evidence. He says he and accused no.2 went to the Nyakambi homestead but, they went there to fetch a key for the homestead where Lefu's goods were to be fetched. So on that occasion, he also places himself at the deceased's homestead with accused no.2. They only disagree about the dates.
7. Keketso's evidence was also that he was approached by accused no.2 who took a black 20 litre container with a yellow lid from him. That container was part of the items he keep in his room for accused no.2 as some items which had been fetched from Walaza did not fit in her room. He later saw accused no.1, 2 and 3 leaving the premises with the said container singing. Accused no.2 and 3 agree that they did leave the premises carrying a container which according to accused no.2, was white with a white lid and it was a 25 litre container.
8. Keketso's evidence was also that the following day after accused no. 1,2 and 3 left the premises with the container he described as black with a yellow lid, he noticed that accused no.1 was not waking up. He went to his room and knocked. Accused no.1 opened the door. Keketso noticed that accused no.1's face was black. He asked him about his black face. Accused no.1 responded that if he had listened to Keketso, none of this would have happened. Accused no.1's evidence

was that he did not open for Keketso. Most importantly, he never disputed that Keketso knocked at his door.

9. Manzi's evidence was that he was hired for a trip to Walaza on the night of the 6 November 2019. In the vehicle it was the three accused persons. He picked them up near Mokhesi Bridge. He was asked to open the boot of his vehicle. He opened the boot while sitting in the driver's seat. He saw being loaded, a black plastic bag which had a 10 or 20 litre container. The accused admit his evidence, all of it in this regard save for what was in the black plastic bag. Their version is that it was clothing that was in the plastic bag which was to be exchanged for dagga.
10. The vehicle drove to Walaza with accused no.2, who had hired the vehicle giving directions. Accused no.2 admitted hiring Manzi's taxi cab which picked them up at 23:15 and giving him directions to Walaza. Manzi was told where to stop the vehicle and at that spot accused no.1 and 3, alighted and he was again asked to open the boot and the parcel was off loaded. Accused no. 1 and 3 left with that parcel.
11. According to Manzi, when accused no.1 and 3 returned to his vehicle in which he and accused no.2 were waiting, accused no.1 and 3 were running. Accused no.1 agrees that they were running or were in a rush as he put it. Manzi says when the two accused returned, they were not carrying the parcel they had taken with them when they left and were not carrying anything. In fact they were smelling smoke. When he asked then why they were running they said they were being chased by dogs. Accused no.3 denies that they were running. He thinks it could be that accused no.1 was high from the dagga he had smoked at the dagga dealer's shack. As for smelling smoke, Manzi did not know why they smelled smoke. However, they attribute the smell from the dagga that was smoked at the dagga dealer's shack. Very interestingly, it was put to Manzi that accused no.3 did not smell any smoke. It was further put to him that if anything he smelled cigarettes because he is a smoker. Manzi clearly stated that "well, at least I can be (*sick*) differentiated between that smell of a cigarette or tobacco and that of something which has been burned different from a cigarette."

12. It is common cause that accused no.1 had healing burn wounds on his face, lower back in the waist area and the back of his left leg.

13. It is common cause that the police found a 20 litre container at the crime scene. That container appears in photos 1, 2 and 17 of the crime scene photo album. It is in a black plastic bag. The crime scene photo album's description of points describes that plastic container as black. This aligns with Keketso's evidence that the container that accused no.2 took from his room was black with a yellow lid.

[113] The version of the accused having gone to Walaza that night in pursuit of a dagga deal is farfetched and is so improbable as to be false. It is a product of an attempt at creative manipulation of facts which resulted in their evidence being contrived and appears to have been well rehearsed and appears to have been adjusted as the State's case continued. This explains the contradictions that are just too many to count in the evidence of the accused. However, as they say the truth has a tendency of coming out no matter how hard and careful one is at trying to hide it as the accused before me seem to have done. The exchange of dagga with accused no.3's clothes is farfetched. It does not fit in with probabilities and is in fact false. The whole dagga deal has clearly been made up to explain their presence in that area at about the same time the crimes were committed. It is even worse that the dagga dealer was not called to testify so that the veracity of this dagga deal could be tested.

[114] The same applies with what was alleged to be Lefu's goods, the brother to accused no.2. Accused no.2 testified to have a sister from one of her relatives who lives in Walaza. The key was not left with her and there is no evidence why the key could not be left with her or at the homestead Lefu was renting. Lefu himself was not called to testify about his goods. Accused no.1's evidence was that on the day they fetched the goods, which on his and accused no.2's evidence, was in October 2019, they fetched the key from the homestead of the deceased Nyakambi. Combi's evidence was that at the time of their demise, Nyakambi had a relationship with Kekeletso who also died in that fire. How in those circumstances where there was no longer any relationship between accused no.2 and Nyakambi, and both of them

had moved on with their lives, the key could be left with him is bewildering. After all the homestead from which the goods were fetched not very long before Nyakambi's homestead was burned, was that of Nyakambi according to Keketso. Keketso's evidence was that he was told by accused no.2 that they were fetching the goods from her homestead in Walaza.

[115] The evidence of these State witnesses, Zimasa, Manzi and Keketso was very credible in most material respects. It was not exaggerated and while it was not perfect, especially that of Keketso, it was very credible with all its inconsistencies and imperfections at times. I may add that in respect of the issues he testified about, Keketso was a single witness. Applying the necessary precautions to the evidence of a single witness, it is clear that Keketso told the truth and his evidence was credible. The evidence of all the accused was full of contradictions and was largely fabricated. Not only did each accused contradict themselves, they also contradicted each other. All of it was fabricated when it comes to their reason for hiring Manzi's vehicle and their presence on the night of the deceased's murders at Walaza. That reason was for fetching dagga. That evidence was so improbable that it was false and a trumped up story that was carefully designed to explain their presence at Walaza at about midnight on the date and at about the same time at which the deceased were killed in that fire. On the evidence of the State, even without the confession and pointing out, I would, in any event, have convicted the accused. I have no doubt in my mind that they are the ones who set the Nyakambi homestead on fire. They intentionally killed the deceased at the behest of accused no.2. The confession merely serves to explain what was in the mind of accused no.2 which would have caused her to arrange and procure the murder of the deceased and the burning of their home. Accused no.1's confession and pointing out merely add to the State's evidence which was, in my view, sufficient for a conviction even without the confession and pointing out. At the risk of stating the obvious, I may add that the confession of one accused is not admissible as evidence against another accused. Section 219 of the Criminal Procedure Act makes this very clear.

[116] Two cases come to mind that fit the circumstances of this case. The first case is *Olawale v S* [2010] (1) All SA 451 (SCA) at 455 paras 13-15 in which the court said:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possible true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against inherent probabilities. But it cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

In evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant and further look at the probabilities of the State’s version.”

[117] As the court said in *S v Ipeleng* 1993 (2) SACR 185 (T) at 189 c-d an accused person is under no obligation to explain why the State witnesses would falsely implicate him. This principle is sound. It is difficult for anybody to explain what is in another person’s mind. The attempt by accused no.2 to provide a motive for what she said was the reason Keketso implicated him had all the hallmarks of an after thought. She gave a long winded explanation that had different components that could not possibly have anything to do with each other. It was, like most of her evidence, false. It does not account for Manzi’s evidence who also testified about a 10 or 20 litre container. It also does not account for the one that was found at the crime scene at Walaza on the night they, on their version, were all at Walaza. Those two pieces of evidence, looked at independently of the evidence of Keketso who is accused of having a motive for implicating accused no.2 point to the guilt of the accused persons.

[118] To the extent that some of the evidence of the State might justifiably be criticized for imperfections, the case of *S v Van der Meyden* 1999 (2) SA 79 (W) at 82 C-D comes to mind. In that case Nugent J, as he then was, said:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.”

[119] Having considered with great care, all the evidence of the State witnesses and the evidence of each one of the accused persons, it is clear to me that the three accused persons were not at the wrong place at the wrong time. The evidence considered as a whole point to carefully planned and executed crimes which were designed to procure the outcome that they did, the killing of the deceased and the destruction of their home. On the evidence, it is accused no.1 and 3 who set the Nyakambi homestead on fire at the behest of accused no.2 who masterminded the whole operation in what, if it was not criminal acts, would be said to be commendable skill to evade detection. The meeting at her place was not to discuss a dagga deal. It was evidently to plan and execute the crimes that were committed with the willing assistance and participation of accused no.1 and 3 who ordinarily had no axe to grind against the deceased persons.

[120] The fact that accused no.2 never set her feet at the Nyakambi homestead at the time it was set on fire is neither here nor there. Accused no.1 and 3 acted on her behalf and executed a plan they had all hatched together. They both had no reason of their own to kill the deceased persons. The doctrine of common purpose under which they were charged makes all of them equally liable for all the crimes that were committed that night. The principles of the doctrine of common purpose have

recently be reaffirmed in *Tshabalala v S; Ntuli v S* 2020 (2) SACR 38 CC, 2020 (5) SA 1 (CC) by the Constitutional Court in which the court said:

“[46] Burchell defines the doctrine of common purpose in the following terms.

‘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 crime.’

[47] Synman elaborates that –

“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.”

These requirements are often couched in terms which relate to crimes such as murder.

[48] The liability requirements of a joint criminal enterprise fall into two categories. 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. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.

[49] It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the

other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in these circumstances be established.”

[121] In all these circumstances, the State has proved the guilt of all the accused beyond reasonable doubt. They acted together to commit the premeditated gruesome murder of Nyakambi Monoana, Kekeletso Catherine Senoamadi and the 13 year old boy, S[...] B[...].

[122] In the results all the accused are found guilty in respect of counts 2, 3, 4 and 5, that is arson and the murder of the deceased in counts 3, 4 and 5 as charged.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: L. POMOLO
Instructed by : NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
MTHATHA

Counsel for Accused No. 1: M. SAKWE
Instructed by : LEGAL AID SOUTH AFRICA
MTHATHA

Counsel for Accused No's 2 & 3: Z. NGXISHE

Instructed by: LEGAL AID SOUTH AFRICA
MTHATHA

Date heard : 27 March 2023

Date Delivered : 29 March 2023