

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

**CASE NO. CC18/2019**

In the matter between:

**THE STATE**

**AND**

**NKOSIKHONA MPHETSHWA**

**ACCUSED NO.1**

**SEBENZILE SIDOYI**

**ACCUSED NO.2**

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**JUDGMENT**

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**JOLWANA J**

[1] The accused were charged with two counts of murder in contravention of section 84 of Act 9 of 1983, robbery in contravention of section 155 of Act 9 of 1983, attempted murder in contravention of section 84 read with section 31 of Act 9 of

1983, possession of firearms in contravention of section 3 read with sections 1, 103, 120 (1) (a) and 121 further read with schedule 4 of Act 60 of 2000 and section 250 of Act 51 of 1977, possession of ammunition in contravention of section 90 read with sections 1, 103, 117, 120 (1) (a) and section 121 of Act 60 of 2000 and further read with section 250 of Act 51 of 1977.

[2] The state provided the accused with the following summary of substantial facts in terms of section 144(3) (a) of Act 51 of 1977<sup>1</sup>:

- “1. Prior the commission of the offences in the indictment, the accused conspired, planned and decided to kill the deceased counts 1 and 2 and to further rob the firearm of the deceased in count 1, cellphones and money.
2. They then armed themselves with a firearm loaded with ammunition, and other dangerous objects.
3. On 05 July 2018, the accused, armed as aforesaid, went to the homestead of the deceased in counts 1 and 2, where they found the latter seated inside the rondavel with their children.
4. The accused entered, fired shots at the deceased in count 1 and further fatally assaulted him with the dangerous objects they were also carrying.
5. They thereafter demanded the firearm of the deceased in count 1 from his wife and child, drove the latter to another house in the same homestead where they robbed the said firearm, money, and cellphones. They shot at the deceased’s

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<sup>1</sup> Section 144(3) (a) reads: “Where an attorney-general under section 75, 121 (3) (b) or 122 (2) (i) arraigns an accused for a summary trial in a superior court, the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of the witnesses the attorney-general intends calling at the summary trial on behalf of the State: Provided that –

- (i) this provision shall not be so construed that the State shall be bound by the contents of the summary;
- (ii) the attorney-general may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld;
- (iii) the omission of the name or address of a witness from such list shall in no way affect the validity of the trial.”

child (A[...] N[...]), and thereafter killed the deceased in count 2 by also shooting at her.

6. The deceased in count 1 died as a result of “Extensive brain bleeding caused by head injury caused by stab head”.
7. The deceased in count 2 died as a result of “cerebral bleeding caused by head injury caused by gunshot head”.
8. The provisions of section 51(1) of Act 105 of 1997 are applicable in respect of the counts of murder, in that:-
  - 8.1 The killing of both the deceased was planned or premeditated;
  - 8.2 The accused were acting in execution or furtherance of a common purpose or conspiracy.
  - 8.3 The death of the deceased in count 2 was caused by the accused after having committed robbery with aggravating circumstances, to wit, wielding of a firearm(s).
  - 8.4 Alternatively, the accused killed the deceased in count 2 because she was likely to give material evidence with reference to an offence, to wit, murder, referred to schedule 1 to the Criminal Procedure Act 51 of 1977, at the criminal proceedings.
9. The provisions of section 51(2) of Act 105 of 1997 are applicable in respect to the counts of robbery.”

[3] Both accused were legally represented throughout the trial. They pleaded not guilty to all the charges and accused no.1 elected not to disclose the basis of his defence to the charges. They were warned that the state had invoked the provisions of section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1977 in respect of the murder and robbery charges, should they be convicted.

[4] Accused no.2's legal representative orally gave a plea explanation for accused no.2's plea of not guilty, which was that on 5 July 2018, the date on which the offences were committed, he was at a certain shop in his locality. Accused no.1 who

is known to him arrived in that shop after having been in Durban for two years. Accused no.1 asked him to accompany him to fetch his belongings from certain boys in the same locality. They found those boys who handed to accused no.2 the said belongings of accused no.1. It transpired that, it was accused no.1's firearm whose calibre he did not know. He gave the said firearm to accused no.1. Accused no.1 asked for a cigarette which accused no.2 was already smoking. He indeed gave his cigarette to accused no.1 which was already half smoked after which they parted ways and he did not know where accused no.1 went.

[5] On a certain day accused no.2 was with a certain policeman in his room at his home. The said policeman suddenly and surprisingly showed him a firearm as he was preparing his clothes which he was going to take with him and go with the said policeman. The said policeman asked him about the firearm and he told him that he knew nothing about that firearm. He was told that the said firearm had been used in committing murder and robbery. He was not involved in any murder or robbery and he did not possess any firearm.

[6] Accused no.2 confirmed that the above plea explanation was according to his instructions and it was the version he had given to his legal presentative.

[7] The state addressed court in terms of section 150 (1) of the Criminal Procedure Act 51 of 1977 (the Act)<sup>2</sup>. In its address the state indicated that it would rely on the evidence of two eye-witnesses who are the children of the deceased in counts 1 and 2 as direct evidence. The state would also rely on DNA evidence linking both accused to the commission of the offences as well as the ballistic evidence of the

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<sup>2</sup> Section 150 (1) reads: "The prosecutions may at the trial before any evidence is adduced, address the court for the purposes of explaining the charge and indicating, without comment, to the court what evidence he intends adducing in support of the charges."

analysis of the firearms that were recovered after the arrest of the accused by the police and statements made by the accused to the police after they were arrested.

[8] The state called A[....] N[...] (A[...]), the 20 year old son of the deceased in counts 1 and 2, Mr Maqhayi Nyolukana and Mrs Nofika Nokwakha Nyolukana. In the interest of brevity I shall henceforth refer to the deceased in count 1 as Maqhayi and the deceased in count 2 as Nofika, to avoid any possible confusion about the respective deceased's persons.

[9] A[....] testified that he is the eldest of five children followed by M[...], A[...], S[....] and the last born is O[....] who was born in 2013. On Thursday 5 July 2018 in the evening he was at home with his parents and his siblings at Makhabaludaka locality in Bizana. They were in rondavel which serves as a kitchen where he was straining traditional beer called Mqomboti at about 18:00.

[10] His homestead is electrified and the rondavel they were in as family has a light bulb which provided light. The light was bright but not very bright as the electric bulb had soot. The bulb is located at the centre of the rondavel.

[11] He heard dogs barking outside the rondavel inside the yard. Mawanda went out to check on the barking dogs and came back reporting that there was someone who was asking for a firewood to light a cigarette. Mawanda took a small burning firewood from the fireplace and went outside to give the firewood to that person just outside the door. This person was visible to him though it was at dusk. This person fired a gunshot towards Maqhayi who was sitting at the fireplace which was at the centre of the rondavel about two metres from the door frame. The gunshot was fired from a small firearm. Mawanda rushed in and closed the door and his mother rushed to assist Mawanda in closing the door. He (A[...]) also rushed towards the

door to assist in closing it and he heard another gunshot after which two men entered one of them pointing a firearm. One of the two men was the one who had earlier asked for a firewood to light a cigarette. The second man was armed with a bushknife and a spear, although he was not certain about the exact types of those dangerous weapons. The one who was carrying a firearm pointed him with it and ordered him to lie down.

[12] The one who was carrying dangerous weapons whom he identified as accused no.1 proceeded to attack Maqhayi with those weapons. When Maqhayi must have died the gun welding man ordered him and Nofika to go to another house in his homestead pointing them with a firearm. They indeed proceeded to the other house where he demanded money and Maqhayi's firearm. A[...] identified the person carrying a firearm and who demanded money and firearm as accused no.2. Maqhayi had a small firearm which had a flywheel. The other man had followed them to the house but did not say anything at that stage.

[13] He (A[...]) pushed a sofa and thus revealing Maqhayi's firearm which was hidden under the sofa and the person who was carrying dangerous weapons took it. He did not know if Maqhayi's firearm had ammunition. Accused no.2 looked for money and opened the pedestals next to the bed although he was not sure if he got it.

[14] Accused no.1 fired a shot at him as he was turning hitting him with a bullet on the right shoulder and he fell down. He lay on his stomach putting his hands over the back of his head and another shot was fired at his head but the bullet hit both his hands and scratched his head. He thought accused no.1 assumed that he was dead because he said to Nofika "here is your son we have killed him" as he lay there

unconscious. They took Nofika out of that room leaving him there. In the meantime he woke up and jumped out of that room and ran away.

[15] As he ran away he heard gunshots and he ran to the neighbours to ask for help. When he returned he found that both Maqhayi and Nofika were dead. His silver sumsang cellphone and Nofika's mobicel cellphone were missing. He had injuries from gunshots on the back of the right upper arm and his hands and the skin of his head had been injured by the bullets. He was taken to St Patrick's Hospital in Bizana where he was admitted and was discharged after a week and a half. Nofika's cellphone and his own cellphone and Maqhayi's firearm and another firearm were later brought to him in hospital by the police on a Saturday or Sunday after the attack at his homestead on Thursday the 05 July 2018.

[16] His and Nofika's cellphones were exhibited in court and he identified them as the cellphones that went missing on the day of the attack at his homestead. The firearm that A[...] said was Maqhayi's firearm which was taken on the day of the attack at his homestead was also exhibited which was a .32 revolver with serial number C168068. Another firearm a .38 revolver with serial number 665143 which was also brought with Maqhayi's firearm was also exhibited.

[17] When the attack took place he could identify the attackers and he later heard their names from the locality. He knew the names of one of them and he knew the second attacker by sight. He knew accused no.1. He had seen him in the locality before the incident and they are from the same locality although he had never spoken to him. He did not tell the police that he identified one of the attackers as accused no.1 because he was not sure that it was really him as he knew him to be in Durban.

[18] He testified that at the time of the attack he was doing grade 11 but had to leave school to look after his homestead following the death of his parents.

[19] Under cross-examination A[...] testified that his family and that of accused no.1 had a good relationship but at some stage the relations deteriorated even before the incident. It was put to him that in 2016 accused no.1 was arrested for some charges that were later withdrawn. On 02 August 2016 Maqhayi paid bail for him and also gave him R50.00 advising him to buy a traditional medicine called *intelezi* and to go to a certain river to wash away the darkness of prison before he went home. He did so and while he was washing with the *intelezi* at the river three people emerged and kidnapped him. They kept him there next to the river from about 15:00 until about 23:00. Those people were communicating over the phone with another person. They said they had been hired by that person to remove his private parts and his tongue. It transpired that it was Maqhayi, the deceased in count 1 who hired them. The kidnappers were Mawande (different from the one who was a state witness), Zola and Mayoyo. They told him that they had been hired by Maqhayi. Accused no.1 intended to call at least one of them as a witness. A[...] testified that he had no knowledge of any of these allegations.

[20] After he was released by the kidnappers he went to the police and reported the incident. That culminated in lieutenant colonel Freemantle initiating peace talks between the two families and a truce was reached. Further allegations of further attacks resurfaced about which A[...] said he did not know.

[21] Under cross-examination by counsel for accused no.2 A[...] testified that he knew accused no.2 by sight, he did not know his name. He confirmed that even before the incident he knew him, however, did not tell the police that he could identify

him. His reason for this was that there was a lot on his mind and he was still in shock. However, he insisted that accused no.2 was there and disputed accused no.2's version that he was not there.

[22] The state called M[...] M[...] N[...] (M[...]) the brother of A[...] and the second born son of Maqhayi and Nofika. He testified that he is a 15 year old grade 8 learner. He was at home with his family in the rondavel during the incident on 5 July 2018 in which his parents died. It was between 19:00 and 20:00 and the visibility outside was good in front of the houses but it was dark behind the houses as you went towards the gate. The light came from an electrified house nearby. The electric bulb inside the rondavel was switched on.

[23] A[...] was straining traditional beer generally known as Mqomboti and also known as *ijiki* in the Pondoland areas. He heard dogs barking and some sound from the gate. Maqhayi asked him to go and have look. He went to check and saw a person coming. That person asked for a firewood to light a cigarette. Nofika handed him a burning firewood and he took it and proceeded to that person who was standing about half a metre from the door way outside the rondavel. The visibility where that person was standing was good, provided by the electric light from inside the rondavel.

[24] He saw that person's face and it was someone he knew by sight. He had seen that person at his home on one occasion when there was an *ilima* after bean harvesting. That person was also assisting in the activities of *ilima*. He was from Nombengeza locality. During that *ilima* he saw him for the first time. The *ilima* started in the morning at about 8:00 and ended at about 16:00. On that day he

(M[...]) served the people traditional beer. That person remained at his home until about 15:00.

[25] On the day of the incident he gave that person a burning firewood and he used it to light his cigarette but he realized that that person was coming closer to him and it seemed that he wanted to see inside. He saw him smoking the cigarette. He then took the firewood to put it back to the fireplace. As he was about to sit down he heard a gunshot from the direction of the door. They all scattered in the hut. He saw someone standing at the door carrying a firearm and trying to enter the hut but he and Nofika tried to push the door to close it.

[26] It was the same person he had given a firewood to light a cigarette. He was carrying a small firearm which had a wheel. Another gunshot was fired and they stopped pushing the door and two men entered. One of them was carrying a firearm and that person asked where Maqhayi was. Nofika was screaming. The second person did not say anything but proceeded to Maqhayi and attacked him with an iron rod and a spear that he was carrying. He was not sure if that person also carried a bushknife. That person was wearing a hooded jersey which did not fully cover his face. However, he did not see that person's face.

[27] The person who was carrying a firearm ordered them to shut up while the one with dangerous weapon was attacking Maqhayi. The one carrying a firearm demanded Maqhayi's firearm and ordered A[...] and Nofika to go to the other house. They left and he remained in the rondavel and went to call neighbours. He came back with some neighbours and they stood on the other side of the road. They heard three gunshots and he realized that the neighbours were afraid to go into his homestead. He then went to call other people. He later learnt that both his parents

had been killed in the incident. In court he pointed at accused no.2 as the person who had attended *ilima* at his homestead before the incident and was present when his family was attacked.

[28] Under cross-examination by counsel for accused no.2 he testified that about nine people were at his homestead during the *ilima* and he (M[...]) was working with them. However, he did not talk to accused no.2. It was put to M[...] that accused no.2 never attended the *ilima* and that he never went to his homestead at any stage. He insisted that he saw him during the *ilima*. He testified that accused no.2 was carrying a firearm which had a wheel which he used to see on television and it is called a flywheel. He said he also knows a 9mm pistol. He was never taken to an identification parade and on the day of his testimony in court he was seeing accused no.2 for the third time. He estimated the time it took taking the firewood from Nofika and giving the firewood to that person and the person lighting his cigarette and him taking back the firewood and putting it back to the fireplace to about two minutes. He also saw him before he handed him the firewood. He denied that he was falsely implicating accused no.2 insisting that he saw him at his home during the attack.

[29] The state indicated that it was in possession of statements made by the two accused persons to captain Wophula and captain Macala respectively which the state believed complied with section 217 of the Act. There were also exhibits which had been recovered by constable Sonkosi, warrant officer Maqhethuka and captain Junqwana after the arrest of the accused which the state also sought to have admitted as evidence in this trial. Mr Nohiya who represented accused no.1 indicated that his instructions were to challenge the admissibility of the statement allegedly made by accused no.1 to captain Wophula as the said statement did not comply with section 217 of the Act.

[30] The reasons cited for the alleged non-compliance with the Act were that accused no.1 was assaulted by the police who arrested him being constable Sonkosi, warrant Maqethuka and two others. During his arrest there were between five and six police officers but he was assaulted by four of them and he did not know the names of the other two. He was arrested at Mawoti in Durban and that was where the first assault took place. On the following day he was assaulted at Bizana police station by constable Sonkosi, warrant officer Maqethuka and two other police officers who were not present in Durban when he was arrested and assaulted. The commissioned officer before whom he made the statement did not explain his constitutional rights. However, he did not assault him.

[31] Accused no.1 also intended to challenge the evidence relating to the recoveries allegedly made by the police. However, the basis on which accused no.1 intended to challenge the evidence of the state about such recoveries was not disclosed, with accused no.1's legal representative merely indicating that such evidence would be challenged.

[32] Mr Ntikinca who appeared for accused no.2 also indicated his intention to challenge the evidence of the state regarding the statement allegedly made by accused no.2. His instructions were that accused no.2 was approached by the police who suffocated him telling him that they wanted him to testify against accused no.1. He was later made to sign a document purporting to be a confession which was not read back to him. The commissioned officer he was taken to gave him a statement to sign without telling him his constitutional rights. Therefore, the statement was not made freely and voluntarily as his rights were not explained to him, he had been suffocated before he was taken to the commissioned officer who caused him to sign the statement without even reading the document back to him.

On recoveries, constable Sonkosi and another police officer arrived at his home and searched his room. Suddenly constable Sonkosi showed him a firearm which he said had been used in the commission of the offence. The police also took an iron rod from his homestead.

[33] The state thereupon applied for the opening of a trial within a trial on the issues raised by the accused to determine the admissibility of the confessions and recoveries made by the police. The state called constable Sinethemba Sonkosi to testify in the trial within a trial. He testified that he was attached to the detective unit at Bizana police station and is the investigating officer in this case. He started investigating the case on 6 July 2018 and visited the crime scene on the same day. He interviewed some people at the Nyolukana homestead.

[34] He also found a cigarette butt in front of the door about two metres from the entrance to the rondavel. About three quarters of it had not been smoked. He collected it and sent it for forensic testing at the laboratory.

[35] On Sunday the 08 July 2018 he arrested accused no.2. His arrest came about after he was told by M[...] who had seen accused no.2 at the crime scene at his home although he did not know his name, only informing them that one of the assailants was from Nombengeza locality. Eventually they arrested accused no.2 at correctional services offices for parolees. He went to arrest accused no.2 with warrant officer Maqethuka. They arrived there, introduced themselves and asked if he was Sebenzile Sidoyi and he confirmed that indeed he was. At some stage they were joined by captain Junqwana. They told him that they were there investigating the Nyolukana case, explained his rights which he read from his pocket book in

isiXhosa. Accused no.2 immediately indicated that he knew about what happened at the Nyolukana homestead.

[36] They handcuffed him and took him to the police station for further interrogation to see if he was really involved in the offences. He told them that he would like to first fetch his items at Highlands which is a township in Bizana. They went straight to Highlands where there was a four roomed house and there was no one there. He told them that the house belonged to a relative of his. In one of the rooms accused no.2 reached out for a bag which was between a bed and a wall. They ordered him not to take the bag as they wanted to search it first before he took it which is police procedure.

[37] Accused no.2 then told them that there was a firearm in the bag. They opened the bag and found a firearm with serial number 665143 which had no ammunition and a mobicel cellphone. They asked for a firearm licence and he said did not have one. He told them that it was the firearm that he used at the Nyolukana homestead and that he took the cellphone from the Nyolukana homestead as well. On the way to the police station he asked him about his visit to correctional services offices. Accused no.2 explained that he went there to change his residential address as he was going to stay in Port Shepstone.

[38] They were already looking for accused no.1 for the Nyolukana case as well. They booked him in at the police station and detained him. They thereafter booked him out for further investigations. They wanted him to assist them in getting to accused no.1. They asked him to call accused no.1 who said he should come and they would meet at the market in Durban.

[39] They proceeded to Durban in two vehicles being himself, warrant officer Maqethuka and accused no.2 in their vehicle and in the second vehicle captain Junqwana was with warrant officer Memela. They arrived in Durban at the market and asked accused no.2 to call accused no.1 and tell him that he was already at the market. Accused no.1 told accused no.2 that he was at Mawoti outside Durban but would send another person to take accused no.2 to the taxis. Shortly thereafter that person arrived. Accused no.2 assisted them in hiding their presence around him as he had said it was accused no.1 who got him involved in that whole incident.

[40] He and warrant officer Maqethuka boarded a taxi with accused no.2 to Mawoti. Captain Junqwana followed them in a vehicle so that there would be a vehicle close by when they arrested accused no.1. When they arrived at Mawoti bus stop they alighted from the taxi. Accused no.1 who was unaware that accused no.2 was coming with the police was excited to see him and they arrested him. They handcuffed him and told him why they were there and also introduced themselves. He read him his constitutional rights from his pocket book in isiXhosa. Accused no.1 giggled saying as long as Nyolukana was dead he did not mind even if he got a life sentence.

[41] They waited there at the bus stop for captain Junqwana to arrive with a vehicle and pick them up. Before the vehicle arrived accused no.1 asked to go and fetch his belongings from his place of residence in Mawoti. He asked him about the items they took at the Nyolukana homestead. Accused no.1 said he would see when they got to his place. They all proceeded to his place of residence and when they got there captain Junqwana remained in the vehicle with accused no.2 and the other person while he, warrant officer Memela and warrant officer Maqethuka and accused no.1 went into his room.

[42] Accused no.1 took out some clothes that were in a washing basket and at the bottom there was a firearm which he pointed out to them. He also showed them a gold samsung cellphone that was on table. The firearm had no ammunition and its serial number was C168068. Eventually they returned to Bizana with both accused on the same day and detained them. The following morning both accused were charged for the crimes committed at the Nyolukana homestead. It became clear from the interviews with the accused that they were implicating themselves. He asked captain Junqwana to arrange for statements to be taken by commissioned officers. They never assaulted, threatened or coerced the accused in any way.

[43] Under cross-examination on behalf of accused no.1 he confirmed that he explained the constitutional rights of the accused who did not indicate what his election was regarding the right to legal representation but merely giggled. He made the accused sign in his pocket book that he explained his constitutional rights to him. However, that particular pocket book got lost. He insisted that the constitutional rights were explained to the accused at all material times. It was put to him that accused no.1 denied that any firearm was found in his room which he disputed. It was further put to him that accused no.1 would say that indeed a cellphone was found in his possession at the bus stop when he was arrested. However, he had bought that cellphone from accused no.2.

[44] When he was arrested at the bus stop he was assaulted by the police with open hands. When the police met him they first grabbed him and then hit him with open hands, then put him on the ground after which he was handcuffed. Constable Sonkosi testified that indeed they got the cellphone from the accused at his place of residence in Mawoti but he had no knowledge that he bought it from accused no.2 as he said he did. He also confirmed that they did put accused no.1 down and

handcuffed him but did not assault him in any way. He denied putting plastic bag over the accused or suffocating him. He denied that he personally took accused no.1 to captain Wophula to make a confession.

[45] He disputed that there is a container at Bizana police station where the accused alleges that he was taken to and assaulted therein by him and warrant officer Maqethuka. He testified that in 2018 and now there was and there is no container at all.

[46] Under cross-examination from accused no.2's legal representative constable Sonkosi testified that accused no.1 never told them that he bought the cellphone from accused no.2. He testified that accused no.2 was told his constitutional rights which he read from his pocket book. He denied that it is the police who showed him a gun whose existence accused no.2 did not know and confirmed that it was accused no.2 who told them that there was a firearm in his bag. He confirmed that he became aware of the involvement of accused no.2 on the 6 July 2018 when he visited the crime scene. When accused no.2 was arrested there was already evidence implicating accused no.1. Accused no.2 merely assisted in locating accused no.1. He denied that they ever asked accused no.2 to become a state witness. He denied that they manhandled, assaulted, suffocated or in anyway tortured accused no.2.

[47] The next witness for the state was captain Sibusiso Wophula who confirmed that the statement of accused no.1 was taken by him after explaining the rights to the accused as contained in the pro-forma document. He was asked by captain Junqwana, the commander of the detectives in Bizana police station to come and take a confession.

[48] When he arrived at Bizana police station from Mzamba police station where he worked, captain Junqwana showed him the office and the stationery that he was going to use. He then completed the pro-forma document himself with the details and the answers that accused no.1 gave to him. Accused no.1 was brought to him by constable Badama. After the pro-forma document was completed the accused signed all the pages after all the explanation was given and the accused had confirmed to him that he had not been assaulted. He denied that accused no.1 was brought to him by constable Sonkosi. He confirmed that he knows both constables Sonkosi and Badama and could not mistake them.

[49] The state called Nosipho Macala who testified that she is attached to the visible policing unit at Maluti police station where she is now a lieutenant colonel. She testified that when she took the statement from accused no.2 she was stationed at KwaNdengane police station as a station commander and held the rank of a captain at the time. She testified that she did not recall who asked her to come and take a statement from the accused. She had to come to Bizana police station because they did not have enough offices at KwaNdengane police station which is a small police station.

[50] She was given an office by the station commander at Bizana police station. Constable Msuthu who was already known to her brought the accused to her. She then went through the whole process and explained the rights of the accused reading them from the pro-forma document. She completed the form from the answers that the accused gave to her. The accused signed all the pages and she also signed and thereafter she took the statement from the accused. She denied that she did not read the contents of the document to the accused before he signed

it. Only when she was satisfied that all the requirements for a confession had been complied with did she proceed to take the statement from the accused.

[51] Constable Msuthu testified and confirmed that he is a constable stationed at KwaNdengane police station. He knows lieutenant colonel Macala. He was at Bizana police station on 09 July 2018 and was asked by captain Junqwana to take a suspect from the cells to captain Macala for a confession. He went to the cells and asked accused no.2 if he had any injuries or felt any pain as he was going to take him out of the cells for a confession and he said no. He then took accused no.2 to captain Macala and left him there with captain Macala who was alone. At some stage captain Macala appeared at the door and asked him to come and take the suspect back to the cells. He again asked accused no.2 if he had any injuries as he was taking him back to the cells and he said there was nothing wrong with him.

[52] The state called captain Maqethuka who confirmed that he was stationed at Bizana police station and was a warrant officer as at the 05 July 2018 but has since been promoted. He visited the Nyolukana homestead on 5 July 2018. He was involved in the arrest of both accused. Accused no.2 was arrested by constable Sonkosi in his presence. Constable Sonkosi introduced them to accused no.2 and then explained the constitutional rights to the accused before arresting him.

[53] From the correctional services offices where the accused was arrested they were going to go straight to the police station. However accused no.2 asked to be taken to Highlands View where he wanted to fetch some items. They therefore started at Highlands View where they went into a room with accused no.2. They noticed a bag next to a wall there which accused no.2 said was his. Accused no.2 took the bag and opened it saying it had a firearm. Constable Sonkosi immediately

stopped him and took the bag and searched it. He found a firearm which was a .38 revolver. They also found a mobicell cellphone which was silver in colour.

[54] Accused no.2 told them that the firearm belonged to accused no.1 and that it was the same firearm that he used in the shooting at the Nyolukana homestead. Accused no.2 also said he took the cellphone from that homestead during the attack at that homestead. They took the firearm and the cellphone with them to the police station. Accused no.2 assisted them with information which resulted in the arrest of accused no.1 in Durban at Mawoti bus stop where he had gone to meet accused no.2. Accused no.1 was informed of his constitutional rights by constable Sonkosi. Accused no.1 asked to be taken to his place of residence where he wanted to fetch some items that he would need in the cells.

[55] They proceeded to his room and on arrival there he took a gold samsung cellphone and gave it to constable Sonkosi. Accused no.1 also went to a washing basket and took out some clothes from it. They noticed a firearm in the washing basket. Accused no.1 told them that he took that firearm from the Nyolukana homestead. Eventually they returned to Bizana with both accused where they were detained. Throughout the process of the arrest of both accused until they were detained they were never assaulted or threatened in anyway or promised anything.

[56] Accused no.1 was charged by him whereas accused no.2 was charged by constable Guqaza. In the process of charging accused no.1 he explained his rights to him in the normal way. The accused made a statement to him in which he was incriminating himself. He then informed the investigating officer about that. The investigating officer told captain Junqwana who organised a commissioned officer to take the confession.

[57] Under cross-examination he confirmed that the constitutional rights were explained to the accused and he was not assaulted at all. On the way from Durban accused no.1 was talking freely and even said as long as Maqhayi was dead he was okay. He denied that in Bizana the accused was assaulted with open hands or suffocated with a plastic bag. Further cross examination did not alter his evidence in chief in any material way.

[58] Constable Guqaza confirmed that on 09 July 2018 she charged accused no.2. Her role was merely to charge the accused after having been asked to do so by the investigating officer. She was not herself involved in investigating the case. She charged the accused in the normal way and informed the accused of all his rights. Accused no.2 elected to speak without legal representation. She thereupon completed the warning form and took a warning statement from him. She realised that accused no.2 was in fact confessing. She then informed the investigating officer about that. Thereafter she had no further dealings with the accused. She confirmed that there is no container at Bizana police station.

[59] It was put to constable Guqaza on behalf of accused no.2 that accused no.2 was not charged by a female police officer. She disputed that insisting that she is the officer who charged accused no.2. When she was re-examined she confirmed that she completed the warning form and she and the accused signed it and the statement was also signed by the commissioner of oaths.

[60] The evidence of captain Junqwana did not take the evidence of the other officers who participated in arresting the accused any further save to confirm his involvement in the investigation of the case and the role he played as already testified to by other police officers. Constable Badama also testified and confirmed

that he was stationed at the charge office on 9 July 2018. He knows captain Wophula. On 9 July 2018 he was doing his normal charge office duties when constable Sonkosi asked him to fetch accused no.1 from the cells and take him to captain Wophula.

[61] He then went to the cells and made the necessary entries in the cell register. Accused no.1 was not injured and appeared to be sober. He took him to captain Wophula whom he found alone in an office. He then left the accused there with captain Wophula. At some stage captain Wophula called him to come and fetch the accused. He checked and again observed that the accused did not have any injuries and he took him back to the cells. Nothing of significance came out of his cross examination.

[62] The state closed its case in the trial within a trial after which the defence called accused no.1 to testify. He confirmed that he was arrested at Mawoti bus stop by constable Sonkosi and warrant officer Maqethuka. He disputed the evidence of those police officers that his constitutional rights were explained to him. He said they introduced themselves to him and informed him of the charges they were investigating and the reasons for his arrest. However, his constitutional rights were not explained.

[63] His version of events was that he was at the bus stop waiting for accused no.2 when the police arrived and caused him to lie down, handcuffed him and told him that he had murdered Maqhayi and his wife. When he denied being involved in those offences they assaulted him by slapping him on the face with open hands. He was searched and a cellphone was taken from his pocket by warrant officer

Maqethuka. He then requested them to take him to his place of residence to fetch his clothes.

[64] When they arrived at his place of residence he told his cousin with whom he stayed there what was happening. He entered his room with three police officer and he took his clothes and cosmetics. Thereafter he went to the police vehicle with the police. He confirmed that he did take clothes out of the washing basket but denied that there was a firearm there. He denied that he handed a cellphone to the police in that room. He had bought the cellphone from accused no.2 at a liquor outlet next to a bus stop in Bizana either on a Friday or Saturday as he was on his way to Durban. Thereafter he returned to Bizana with the police. He spent the night in the holding cells. The following morning constable Sonkosi and warrant officer Maqethuka and another officer in uniform arrived and took him out of the cell. He was taken to a white container where the police told him that he had murdered Maqhayi and his wife. He denied that and the police assaulted him with open hands and covered his head with a plastic bag suffocating him.

[65] He was returned to the holding cells and was later taken out again by constable Sonkosi who told him that he was going to take him to another person where he would make a statement. He was also warned that if he did not tell that person everything he would be returned to them. Constable Sonkosi took him to captain Wophula. He denied that it was constable Badama who took him to captain Wophula. Captain Wophula did introduce himself and asked him to explain to him where and how he was arrested. However, he did not explain his constitutional rights to him.

[66] He also lied to captain Wophula admitting to having murdered the deceased because he was tired of being assaulted by the police. Constable Sonkosi thereafter arrived and took him to the charge office and handed him to warrant officer Maqethuka who caused him to sign some papers which he did. He denied that warrant officer Maqethuka explained his constitutional rights to him.

[67] It was put to him on behalf of accused no.2 that he would deny that he ever sold him a cellphone. He maintained that he did. Under cross-examination by the state he maintained that the police assaulted him in Durban because he had denied being involved in the Nyolukana murders. He was assaulted by constable Sonkosi and warrant officer Maqethuka later joined in assaulting him with open hands on his face more than 5 times but was he not sure if it was more than 10 times. Warrant officer Maqethuka also assaulted him more than 5 times. They stopped assaulting him because a police vehicle arrived and he was put inside the vehicle.

[68] When the vehicle arrived he was taken to his room at his request to fetch his clothes. The phone that warrant officer Maqethuka searched him and found in his pocket is the samsung that was exhibited in court. He confirmed that when he was arrested accused no.2 was present and he saw him being assaulted.

[69] In his room the police never assaulted or coerced him to do anything and all the way from Durban to Bizana they did not assault him. In the morning he was taken to a white container at Bizana police station which is the office in which he was assaulted by constable Sonkosi and warrant officer Maqethuka saying he should admit to the murders. They also suffocated him with a plastic bag. Both constable Sonkosi and warrant officer Maqethuka assaulted him on his face more than 5 times

each with open hands. The assaults were so severe that his face was swollen and when he cleaned his left ear pus would come out.

[70] The assaults only stopped after he told them that he would admit to the crimes. He was then returned to the cells. He was booked out of the cells again on the same day and he was taken to captain Wophula. However, captain Wophula did not assault him or threaten him. Captain Wophula did not tell him about his right to legal representation, had he done so he would have asked for a legal representative. He never informed him of his right to remain silent and he did not read him the rights contained in the pro-forma part of his statement. He created a story which was a lie and captain Wophula wrote it and read it back to him to confirm its correctness and thereafter caused him to sign it.

[71] He appeared in court on 10 July 2018 where he was represented by Ms Tetyana. He told Ms Tetyana that the police assaulted him but she did not do anything about it. He appeared before magistrate Msengana who told him his constitutional rights including the fact that the evidence he gave during bail proceedings could be used against him in a subsequent trial. He denied deposing to an affidavit for bail proceedings in which he told the magistrate that he intended to plead guilty to murder, possession of firearms and ammunition and robbery. He denied ever saying that he wanted to plead guilty. Accused no.1 further testified that he might have misunderstood the fact that the affidavit said he intended to plead guilty as he did not intend to do so. What he confirmed to the magistrate was that he intended to apply for bail.

[72] It was put to him that his intention to plead guilty which he expressed to the magistrate was consistent with the evidence of the police that he co-operated with

them after his arrest and that the police could not have had any reason to assault him. However, he maintained that the police assaulted him. It was further put to him that it was improbable that the police would have repeatedly assaulted him in his face knowing fully well that he was going to appear in court the following day. However, he maintained that he was assaulted by the police. He also confirmed that his statement made to captain Wophula consisting of three full pages came from him and not the police.

[73] Accused no.2 also testified during the trial within a trial. He testified that at the time of his arrest he had gone to the correctional services offices to change his address as he intended to go to his brother in Port Shepstone. Two men who introduced themselves as police officers arrived. They asked if he was Sebenzile Sidoyi from Qhabangeni and he responded affirmatively. They then addressed the correctional services officials requesting to talk to him. They took him outside where they asked him what he had done at Nyolukana. He told them that he knew nothing about Nyolukana. They asked him about the whereabouts of accused no.1 and he told them that he might be in Durban. He confirmed to the police that he had seen accused no.1 on a Thursday about 17:00 or 18:00.

[74] Eventually they left the correctional services offices and went to the police station. At the police station he was asked about his meeting with accused no.1. He told them that accused no.1 arrived at a shop called TM Bottle Store asking about some boys called Luthando and Bavu. Accused no.1 told him that some of his belongings were robbed from him by those boys and that he should assist him to find them. Eventually they found those boys and recovered a firearm belonging to accused no.1 which he took and gave it to accused no.1.

[75] They then went to Qhabangeni bus stop where accused no.1 gave him a cigarette which he smoked and gave it back to him and they went to their separate homes. The police said he was lying and warrant officer Maqethuka took out a plastic bag. He was ordered to sit down. He was suffocated with the plastic bag by warrant officer Maqethuka and told that when he wanted to tell the truth he should tap his foot. When he bit the plastic so that he could breathe constable Sonkosi slapped him with an open hand about five times. He was again tortured by being pressed down with the chair he was sitting on and two plastic bags were also used to suffocate him. The police said they would only stop torturing him if he defecated on himself if he did not tell them the truth. They stopped when he wet himself. They were stopped by captain Junqwana from further torturing him.

[76] The police asked him to co-operate with them so that they could get to accused no.1 as they had information that it was accused no.1 who murdered Maqhayi. He was told by constable Sonkosi that they had all the information about what happened at the Nyolukana homestead and that they knew that he was not present at the crime scene when the crimes were committed. Constable Sonkosi told him to create a convincing story that he was present at the crime scene so that they could get accused no.1 whom they knew had a bad relationship for some time with Maqhayi.

[77] Constable Sonkosi showed him a cell phone that was silver in colour and told him that they wanted another cellphone. He told him that he did not see that cellphone when he met accused no.1. Constable Sonkosi wanted the cellphone number of accused no.1 which was in a different sim card that was in his clothes at Highlands View at his paternal uncle's place. He went to Highlands View, with constable Sonkosi, warrant officer Maqethuka and captain Junqwana.

[78] On the way to Highlands View they were giving him some ideas. He asked them about his own cellphone which they had taken as they had only showed him the silver cellphone. He heard constable Sonkosi and captain Junqwana saying they should say that the silver cellphone belonged to him. They arrived at Highlands and entered his room. The police asked him to point out his bag which he did. Warrant officer Maqethuka searched the other room. Constable Sonkosi opened the bag and took out some clothes and then put them back into the bag.

[79] He and constable Sonkosi waited for warrant officer Maqethuka who was searching the other room, but he came back saying he did not get anything. They left Highlands going to his home at Qhabangeni. They arrived at his home and went to his flat which is a two roomed structure and his room was searched. Constable Sonkosi took out an ash tray and put it in a plastic bag.

[80] They also searched the second room which was used by his older brother. They found a sharpened iron rod. Constable Sonkosi took out a stick under his father's bed, ordered him to lie down and hit him on his buttocks. They eventually returned to the police station.

[81] He denied that a firearm was found when any of his places was searched both at Highlands and at his home. He explained that the police produced the firearm in the vehicle on the way back to the police station. He was told by constable Sonkosi that the firearm belonged to accused no.1 and asked him if it was not the same firearm that they got back from those boys. He told him that it looked like it. He was told by constable Sonkosi that when they got to accused no.1 he should not deny that he was present at the Nyolukana homestead and that accused no.1 left the firearm with him.

[82] On arrival at the police station warrant officer Maqethuka said that he should not say that on that day they parted ways with accused no.1 but should say that he was there at the crime scene. They said that a plan should be hatched to incriminate himself so that accused no.1 would not be able to deny his involvement. They told him that a firearm and a cigarette butt were recovered at the crime scene. That firearm had been left at the crime scene by the perpetrators and they were looking for the second firearm.

[83] He was eventually charged eventually by constable Sonkosi who caused him to sign a document and his fingerprints were taken. The papers he was made to sign were already completed and they were not read back to him. He confirmed that he did sign the warning statement but its contents were not read back to him and his constitutional rights were not explained to him. He could not remember the policeman who attended to him and caused him to sign the document. There was no stage at which he was attended to or appeared before a female police officer.

[84] Under cross-examination by the state he confirmed that he was present when accused no.1 was arrested in Durban. However, he was about 10 metres behind the police who arrested accused no.1. There were many people moving up and down but accused no.1 was visible to him. He led the police to accused no.1. When he alighted from the taxi accused no.1 approached him and the police who were with him arrested him. Accused no.1 was not aware that he was with the police. The reason he was 10 metres behind was that constable Sonkosi grabbed him and another officer pushed him back. The reason he ended up being so far behind was also that there were many people there.

[85] He saw the police causing accused no.1 to lie down but did not see them assaulting him. He then said that he would have seen them if they had assaulted him and therefore it was not true that the police assaulted accused no.1 at the bus stop at Mawoti. He testified that on the way back from his home at Qhabangeni, police said that they had recovered a firearm from his bag. The reason he had said in his evidence in chief that the police had recovered a firearm in his bag was because he had a deal with the police.

[86] His deal with the police was to say that he got the firearm from accused no.1. As the firearm was with the police he should say that it was recovered from his bag. He was promised that if he kept to this deal he would be released from the case when accused no.1 was arrested. He was taken by constable Sonkosi together with another police officer who had opened the cell for him to a male commissioned police officer. That police officer wrote down his statement as he was narrating the story. He read it back to him and he confirmed that it was exactly as he had narrated it. In that statement he incriminated himself and he signed it. That police officer to whom he made the statement never assaulted him and that on the 9 July 2018 he was never assaulted by anyone at any stage.

[87] He denied being attended to by a female police officer. He did not know how it came about that his signature appeared on a document which was completed and signed by constable Guqaza, a female police officer. He also changed his version to say that during the interview with the police on the 08 July 2018 when he was arrested they never said he should falsely implicate accused no.1. The only thing that the police said he must say was that he got the firearm recovered from him from accused no.1. He insisted that on the 9 July 2018 he made a statement to a male

police officer in writing and not to constable Guqaza and captain Macala both of whom are females.

[88] He confirmed that the mobicel cellphone which was exhibited in court is the same cellphone that constable Sonkosi had shown him. It was not recovered from him but constable Sonkosi came with it. His evidence was both disjointed and contradictory when his evidence in chief is compared with his evidence under cross-examination and the version put on his behalf to state witnesses.

[89] The defence closed its case in the trial within a trial and the state and the defence addressed the court on the merits.

[90] Section 217(1)(a) of the Act makes the following provisions regarding the admissibility of confessions:

“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.”

[91] The main objection by both accused to the admissibility of the statements made to captains Wophula and Macala was that the accused were assaulted by the police and secondly they were not apprised of their constitutional rights thus rendering the statements so made inadmissible. Accused no.1 testified that he was first assaulted by four policemen at the bus stop when he was arrested at Mawoti in Durban. There are a number of difficulties with this version and I will just mention a few of them. Firstly, the police officers who were there when he was arrested were not four, they two being constable Sonkosi and warrant officer Maqethuka. Secondly, he did not say why they assaulted him. Thirdly, accused no.2 was present when accused no.1

was arrested as he was the one who helped them to get to him. Very strangely, accused no.2 did not see him being assaulted and yet he was present.

[92] It was accused no.1's evidence that at Bizana police station he was taken to a white container in which he was assaulted. The evidence of the police is that there was no container in July 2018 to date at Bizana police station. If he could not be assaulted in a container because it was not there, it becomes doubtful if he was assaulted at all. His evidence was that he was assaulted with open hands by both constable Sonkosi and warrant officer Maqethuka more than five times by each of them.

[93] Despite what must have been a heavy assault on his face as he testified that his left ear would ooze sum pus when he cleaned it, he appeared before captain Wophula but he did not tell him that he had been assaulted. Captain Wophula also made his own observation that he had not been assaulted in addition to accused no.1's direct answer to him that he had not been assaulted. The following day on the 10 July 2018 he appeared in court where he was represented by an attorney Ms Tetyana. He claimed to have told Ms Tetyana that he had been assaulted but she did nothing about it. All of his evidence was highly questionable at best as it contained a significant amount of inconsistency.

[94] Accused no.2 testified during his evidence in chief that he was ill-treated because constable Sonkosi said he was lying when he said he met accused no.1 on 5 July 2018 at that shop and parted ways after sharing a cigarette. Constable Sonkosi took a plastic bag that had been prepared by warrant officer Maqethuka and told him that he was going to suffocate him with. Indeed they put that plastic bag over him and also slapped him with open hands five times when he bit the plastic

bag so that he could breath. The plastic bag was doubled and he was told that they would only stop torturing him in that manner if he deficated on himself or wet himself. He did wet himself and they removed the plastic bag.

[95] One of the strange things about this evidence is that those police officers did not know where exactly accused no.1 was at the time. He did not deny his knowledge of accused no.1 and in fact he told them that he was in Durban and in fact assisted them in arresting him in Durban. They assaulted him saying that he was lying just because he himself was on the way to Port Shepstone when he was arrested. They had to go to Highlands where the sim card that had accused no.1's cellphone number was. The firearm was not found at Highlands or at his home at Qhabangeni. It was produced by the police in the vehicle on the way to the police station from Qhabangeni. They told him that the said firearm was found at the crime scene and the cigarette butt was also found at the crime scene. Only his personal belongings were found with him, not a firearm or cellphone. All of this does not make sense at all.

[96] Even on the issue of constitutional rights, which both accused claimed were not explained to them, it is puzzling that all the police officers including both commissioned officers to whom the confessions were made did not tell them their rights. The evidence of accused no.2 was that he did not even appear before a female officer at any stage, yet the evidence of the state was that it was constable Guqaza, a female police officer who charged him and completed the warning statement which the accused signed and he admits his signature on that document. Similarly the commissioned police officer, captain Macala is also a female officer. The evidence of accused no.2 was not only that she did not explain the constitutional

rights to him but that captain Macala did not even attend to him. He was attended to by male officers throughout.

[97] The evidence of both accused is both contradictory and in many ways, so improbable as to be false both as regards the assaults, the issue of constitutional rights and the recoveries made. Their evidence simply did not make sense. Even if I were to be wrong in my conclusion that their evidence is full of falsehoods, that would not necessarily lead to the confessions being inadmissible without more.

[98] The legal position with regards to the admissibility of the evidence in a criminal trial has been explained by our courts. However, our justice system is, like everything else, governed by our Constitution. Section 35(5) of the Constitution provides:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

[99] From this provision it is not hard to see that it is the exclusion of the unconstitutionally obtained evidence that is made subject to the condition that for it to be excluded such evidence must be such as to render the trial itself unfair or detrimental to the administration of justice. If the drafters of the Constitution wanted unconstitutionally obtained evidence excluded at all times and under all circumstances with no regard to whether it would render the trial unfair or not, section 35(5) would have ended with the word “excluded” without the condition that follows thereafter or been worded differently.

[100] That this is so was aptly explain in *S v Tandwa*<sup>3</sup> as follows:

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<sup>3</sup> *S v Tandwa and Others* 2008 (1) SACR 613 (SCA) at para 116.

“The notable feature of the Constitution’s specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair, or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.”

[101] More directly on confessions and pointing out the following sentiments were expressed in *S v Ngcobo*<sup>4</sup>

“It is essential that society should have confidence in the judicial system. Such confidence is eroded where Courts on the first intimations that one of an accused’s constitutional rights has been infringed exclude evidence which is otherwise admissible. Such evidence is very often conclusive of the guilt of the accused. It is either admissions or a confession made voluntarily and without undue influence wherein the accused implicates himself in the commission of the offence or it is the discovery either by way of a search or a pointing out of objects such as the murder weapon or property of the victim which conclusively links the accused to the crime. At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence.”

[102] Recently the above legal position was cemented in *Gumede v S*<sup>5</sup> where the Supreme Court of Appeal said:

“The illegality of the search is therefore beyond question and that much was conceded by the state. The firearm was obtained by means of the search

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<sup>4</sup> *S v Ngcobo* 1998 (10) BCLR 1248 (N) at 1254 E-G

<sup>5</sup> *Gumede v S* 2017 (1) SACR 253 (SCA) para 32

which because of its illegality violated the appellant's right to privacy. But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in the unfairness in the actual trial. I am satisfied therefore that the admission of the evidence of the discovery of the firearm under the pillow did not render the appellant's trial unfair."

[103] In this case both accused testified that they requested the police to go to their rooms to fetch their belongings where the firearms were recovered. The police had not yet established the whereabouts of the firearms and the cellphones when the accused requested to be taken to their rooms where they knew there was incriminating evidence. Clearly it cannot be that on the mere allegation by the accused that there was impropriety in the conduct of the police, no matter how flimsy the basis of the allegation is, such evidence should be excluded.

[104] It was for these reasons and the legal position as articulated above that I came to the conclusion that on the facts of this case the accused's statements made to captain Wophula and captain Macala were made freely and voluntarily as provided for in section 217 of the Act. The evidence of the recovery of the firearms which was given by the state witnesses proves beyond reasonable doubt that the firearms and cellphones were in fact recovered from the accused in a lawful manner with their co-operation. The evidence to the contrary is clearly contrived and must be rejected, so should the evidence of the accused about the unlawfulness of the confessions.

[105] Captain Wophula was again called to give evidence of the statement made to him by the accused no.1 following the ruling that such statement was admissible

against the accused. He read the said statement into the record and was not cross-examined on any aspect of it.

[106] The statement by accused no.2 was also read into the record by lieutenant colonel Macala. She, like captain Wophula, was not really cross-examined on any aspect of the statement.

[107] The post-mortem report of Dr Zonke Mrenqwa–Mazwi in respect of Nofika Nyolukana was handed up in terms of section 212 of the Act. She made the following chief post mortem findings.

1. A compound fracture/stab wound in the posterior aspect of the head.
2. Gunshot entry wound medial to the left ear and caused bruising covering the left side of the face with the ear, fractured skull and left hemisphere (brain) bleeding.
3. Gunshot entry wound in the left breast.

She concluded that the cause of death was cerebral bleeding caused by head injury caused by gunshot head.

[108] The post mortem report compiled by Dr Zonke Mrenqwa-Mazwi in respect of Maqhayi Nyolukana was handed in terms of section 212 of the Act. She made the following chief medical findings:

1. Multiple stab wound (compound fractures) on both sides of the head and the skull with extensive brain injuries.
2. Multiple stab wounds in the anterior chest wall.

She concluded that the cause of death was extensive brain bleeding caused by head injury caused by stab head.

[109] The last medical report handed up by the state in terms of section 212 of the Act was the J88 which was compiled by Dr Majeke who examined Athenkosi and it reflects that he sustained the following injuries:

1. Laceration  $\pm$  6cm (L) parietal regions (not penetrating)
2. Entry wound (L) dorsum of hand (below 3<sup>rd</sup> finger) (no exit wound)
3. Entry wound (R) dorsum of hand below 2<sup>nd</sup> finger and exit (R) palm
4. Entry wound (R) shoulder posteriorly (no exit wound)

[110] The following admissions were made in terms of section 220 of the Act:

- “1. That deceased in count 1 is the person named in the indictment, to wit, Maqhayi Nyolukana.
2. That the deceased in Count 1 died on 05 July 2018 as a result of “Extensive brain bleeding caused by head injury caused by stab head”, which he sustained on 05 July 2018 at Makhabaludaka Locality, Amantshangase Administrative Area, in the district of Bizana.
3. That the body of the deceased in Count 1 sustained no further injuries from the time at which the wounds as aforesaid were inflicted on 05 July 2018 until a post mortem examination was conducted on 10 July 2018.
4. That Dr Zonke Mrenqwa-Mazwai conducted a post mortem examination on the body of the deceased in Count 1 on 10 July 2018 and recorded her findings on Exhibit “E”.
5. That the facts and findings of the post mortem examination as recorded by Dr Zonke Mrenqwa-Mazwai on Exhibit “E” are correct.
6. That the deceased in Count 2 is the person named in the indictment, to wit, Nofika Nyolukana.
7. That the deceased in count 2 died on 05 July 2018 as a result of “cerebral bleeding caused by head injury caused by gunshot head”, which she sustained on 05 July 2018 at Makhabaludaka Locality, Amantshangase Administrative Area, in the district of Bizana.

8. That the body of the deceased in count 2 sustained no further injuries from the time at which the wounds as aforesaid were inflicted on 05 July 2018 until a post mortem examination was conducted on 10 July 2018.
9. That Dr Zonke Mrenqwa-Mazwai conducted a post mortem examination on the body of the deceased in Count 2 on 10 July 2018 and recorded her findings on Exhibit "F".
10. That the facts and findings of the post mortem examination as recorded by Dr Zonke Mrenqwa-Mazwai on exhibit "F" are correct.
11. That on 05 July 2018 at about 22:20 Constable Ntuthukho Brian Mbuthuma stationed at Local Criminal Record Centre in Port Shepstone visited the scene at Nyolukana Homestead, Makhabaludaka Locality, Amantshangase Administrative Area, in the district of Bizana.
12. That at the scene Constable Ntuthukho Brian Mbuthuma took photographs of the scene, including photographs depicting the bodies of the deceased in counts 1 and 2 respectively.
13. That Constable Brian Mbuthuma compiled a photo album, Exhibit "G" with the photographs he took at the scene.
14. That the photographs on Exhibit "G" are a true depiction of the scene and bodies of the deceased in Counts 1 and 2.
15. That on 06 July 2018 at about 10:00 Captain Ndumiso Junqwana stationed at Bizana Detective Unit of the South African Police Service visited the scene at Nyolukana Homestead, Makhabaludaka Locality, Amantshangase Administrative Area, in the district of Bizana.
16. That inside the Rondavel, depicted on photos 2 to 24 of Exhibit "G", Captain Ndumiso Junqwana picked up one 7,65mm Calibre fired bullet (projectile).
17. That the 7,65mm Calibre fired bullet (projectile) in paragraph 16 above, together with Exhibits 3 and 4 were dispatched by Constable Sonkosi on 15 August 2018 to the Ballistics Section of the Forensic Science Laboratory, Eastern Cape situated at Eben Donges Building, Handcock Street, north End, Port Elizabeth for analysis.

18. That on 04 September 2018, Warrant Officer Karen Chamel Africa attached to the Ballistics Section of the Forensic Science Laboratory, Eastern Cape situated at Eben Donges Buildings, Handcock Street, North End, Port Elizabeth analysed the Exhibits in paragraph 17 above and recorded his findings on Exhibit "H".

[111] The court was informed by counsel for the state that he together with the legal representatives of both accused consulted with lieutenant colonel Arnold Freemantle and was therefore a witness for both the state and the defence. He testified that he is the station commander of Mbizana police station. He testified that he knows Maqhayi and accused no.1. About 10 months or so before the Nyolukana incident he became involved trying to mediate peace between Maqhayi and accused no.1. At the request of a fellow colleague warrant officer Mfundo. He held a meeting between Maqhayi and accused no.1 in his office.

[112] In that meeting Maqhayi said that accused no.1 wanted to kill him but could not say why. It transpired that the deceased speculated in the buying and selling of livestock in which accused no.1 developed an interest. For a reason that is not very clear they ended up quarrelling. At some stage Maqhayi was attacked in his home and robbed of money. He suspected that accused no.1 was involved but there was no evidence of accused no.1's involvement.

[113] The version given by accused no.1 during that meeting was that at some stage he had a domestic violence case with his wife which led to his arrest. He was granted bail of R500.00 or so. The family of accused no.1 could not pay the amount of bail. Maqhayi paid the money and accused no.1 was released. Maqhayi advised accused no.1 that as he had been imprisoned he could not go straight home from prison. He should buy *intelezi*, a traditional medicine for cleansing himself. Maqhayi

organised the *intelezi* and told accused no.1 to go and cleanse himself at a certain river.

[114] Accused no.1 went to the river and at that river he was kidnapped by three men accusing him of having stolen a greyhound hunting dog. He was assaulted and suffocated with a plastic bag. During this kidnapping those men were talking to another person over the phone. Those men told accused no.1 that they had been instructed by Maqhayi to kill him. However, they said they did not want to kill him, they just wanted their dog. He escaped at about midnight and went into hiding because he feared that Maqhayi wanted him dead. During that session accused no.1 cried and said he had given up and had organised himself a firearm.

[115] Accused no.1 said to Maqhayi that he loved him but Maqhayi wanted to kill him and he did not know what happened. When he (lieutenant colonel) Freemantle enquired about the whereabouts of the said firearm accused no.1 voluntarily surrendered it together with a dagger knife. Accused no.1 had said if Maqhayi could not be shot due to some traditional medicine he might have used he (accused no.1) would use the dagger knife. He thought he had succeeded in restoring peaceful relations between the two as they left shaking hands.

[116] However, sometime later he received a call from accused no.1 saying that Maqhayi still wanted to kill him. On further questions from counsel for accused no.1 lieutenant colonel Freemantle confirmed that a M[...] who was a complainant in respect of the missing dogs was present during the meeting. He confirmed the presence of M[...] and the fact that M[...] had said that Maqhayi wanted them to kill accused no.1 whereas they just wanted their dogs back.

[117] Warrant officers Jo-Anri Jacobs and Fundiswa Yvonne Ngcuphe filed section 212 affidavits and also testified about the evidence recovered from certain exhibits that were collected by the police as well as samples received from the police. Their evidence was not questioned in any way nor was the integrity of the chain evidence put into question. Warrant officer Nombongo Mabentsela also testified about the samples she received and analysed. Her qualifications, experience and the manner in which she exercised her duties in conducting the DNA analysis as well as the conclusions she reached are common cause.

[118] In essence the conclusions made in the DNA analysis report are that the DNA of accused no.2 was found in the cigarette butt collected by the police from the crime scene. Furthermore the tracksuit pants and the jacket had blood stains of both deceased which contained the DNA of both deceased. It is not in dispute that the said tracksuit pants and jacket belonged to accused no.2 and were taken from him by the police.

[119] The court was advised by counsel for accused no.1 that he had decided to plead guilty to all the charges save for counts 2 and 4. In this regard a statement in terms of section 112 of the Act signed by the accused was handed up as exhibit "M".

[120] The said section 112 statement of accused no.1 reads as follows:

**"STATEMENT MADE IN TERMS OF SECTION 112(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

I, the undersigned

**NKOSIKHONA MPETSHWA**

Do hereby state and confirm that:

1.

I am the accused person in this matter.

2.

I made this statement freely, voluntarily and without being unduly influenced.

3.

I plead guilty to the four following counts:

3.1 Count 1. Murder (Maqhayi Nyolukana)

3.2 Count 3. Robbery with aggravating circumstances.

3.3 Possession of firearm

3.4 Possession of ammunition.

4.

In amplification of my pleas of guilty, I wish to state the following:-

5.

## **BACKGROUND FACTS**

5.1

During the year 2010, the deceased accused myself and my family of allowing our live stock to eat mealies from his mealie field. He also said I called him a thief. He said one day the chief of the area will come to collect dead bodies from my homestead. In the same year (2010) deceased came to my homestead at night and he peeped through the window. We called for help and he left. The incident was reported to the chief and the chief summoned both families (mine and his). He didn't deny that he was at my home. He said he was looking for me. The incident was discussed and he was reprimanded.

5.2

In 2016 I was arrested for a domestic violence which [case] was later withdrawn. In this 2016 case I was granted bail but I didn't have money to pay it. On the 02<sup>nd</sup> August 2016 the deceased (Maqhayi Nyolukana) paid bail for me and he further instructed me to go and bath at the river, in the forest, to rid myself of the bad luck I got from the prison (to cleanse myself). He gave me R50.00 to buy *Intelezi (muthi)* to bath with it. While bathing, three African

males emerged and they posed as police officers. They pointed firearms at me and said they were there to arrest me. They handcuffed me and said I stole dogs. They kept me there until 23h00 hours. They were communicating with someone over the phone. They were telling me that somebody from Durban was coming to cut off some of my body parts. That person didn't come. We left the river with them and came to Bizana Town. While in town they told me that they were hired by the deceased to catch and keep me there at the river he would come and kill me on his own. The deceased told them that I was responsible for the attack at his home. They released me and warned me not to go to my homestead. I later became aware of their names to be Mayoyo, Zola Dlezi and Mawande. I went with Zola with the intention of sleeping over at his place. His phone was ringing time and again and he would tell me that it was the deceased who was phoning. I escaped during the night from Zola's homestead and I slept near the river in Nikwe Locality.

### 5.3

In the morning I went to the Police to report the incident. I told the police that I was not opening a case but if anything happens to me they must know that it is the deceased who did it. Police officers took my cellphone number and transported me to the taxi rank. I didn't go to my home I went to my grandfather and narrated the story to him. A meeting of male community members was called at Gegebula Nyolukana's homestead to talk about this but the deceased didn't attend. One day a police officer known as Freeze (Freemantle) contacted me and I told him what happened. He gave me his contact details to report any [thing] happening to him.

### 5.4

I decided to buy myself an illegal firearm. One day towards the end of August 2016, I was going to Ntamonde Locality when I came across Thanduxolo Nyolukana, Yamkela Mpetshwa and the deceased, Maqhayi Nyolukana. The deceased was driving his motor vehicle while Yamkela and Thanduxolo were riding horses. They chased me wanted to catch me and they were also swearing at me. I took out the firearm and fired one shot in the air they then stopped and went back. After that they went to my home to kidnap my mother she was helped by one Nkosiphendule Nyolukana who came to her rescue. I phoned Captain Freemantle and we were summoned to the Police Station. It was myself, M[...], the deceased Maqhayi Nyolukana and other

police officers. Each of us was given an opportunity to say his side of the story. I narrated my side of the story. The deceased didn't deny that he hired people to kill me. He said I hired people from Durban to kill him. I also told the police that I have an illegal firearm and I was prepared to give it to them. We went with the police to fetch the firearm from my homestead. We shook hands with the deceased and I genuinely believed that we have forgiven each other. Few months down the line, three unknown males driving a white Toyota Fortuner came to my home looking for me. They said they were police officers and they came to arrest Nkosikhona. Fortunately for me they didn't know the identity of this Nkosikhona (myself). I told them, that Nkosikhona was not at home and they left.

#### 5.5

I decided to leave my home for Durban. I came back in December 2017 for Christmas. On the 29 December 2017, the same Toyota Fortuner came looking for me again but this time around I was not at home. On the same day I returned back to Durban. While in Durban I was informed by Bongiswa Matiwane that the deceased was looking for me and he promised her R500.00 if she can tell him when I am around i.e. when I was at home.

#### 5.6

I never returned home since then and I missed home so much. Things were not going well at home and as a first born I couldn't fully assist because I was scared of coming home. I took a decision to kill the deceased. I bought an illegal firearm from Verulam. I had already made up my mind that in order for me to find peace I have to kill the deceased. On Wednesday the 04 of July 2018 I left Durban for Bizana. When I reached Bizana it was already late and I could not get transport to my locality I spent the night at the initiation school and went home in the morning the following day. During the day I went to Qhabangeni locality where I met Sebenzile Sidoyi. I bought liquor from TM Bottle Store and I consumed it. After consuming it I fell asleep outside the bottle store. When I woke up my firearm was missing. While looking for it I came across Sebenzile Sidoyi who assisted me in finding the boys who took my firearm and we found it.

#### 5.7

I told him that I came to kill the deceased. At that stage I had not yet figured how will I get to the deceased homestead without being noticed because I am well known in that homestead. Sebenzile told me that he also had a problem with the deceased. His father was murdered and mutilated. He suspected that it is the deceased who killed his father and cut off his body parts.

#### 5.8

We proceeded to the deceased homestead and the arrangement was that Sebenzile will get inside and ask for firewood to lit a cigarette while I remained outside the yard. He will come and report to me if the deceased was home. I was carrying a spear and a stick having an iron nut at the other end (ibhawuti) Sebenzile was carrying a firearm.

#### 5.9

Sebenzile went in but he didn't come back to report. I heard gunshot sounds and immediately went straight to the rondavel. I proceeded to the deceased and I hit him with the stick and stabbed him several times. I went out of the rondavel after he felt down and Sebenzile remained inside. Sebenzile came out driving the deceased wife and a boy demanding money and a firearm. I followed them to the house. The boy took the firearm from underneath the sofa and gave it to me. I put it inside the backpack I was carrying. I took the deceased firearm because I knew that his family will use it to attack me.

#### 5.10

Sebenzile told the boy to lie down and not to look at him and the boy complied. Sebenzile fired two gunshots at the boy. We moved from that room to the sitting room. I told Sebenzile that we must leave. He wanted to shoot the wife of the deceased, I stopped him. We exited the house together. As we were leaving the homestead while inside the yard Sebenzile went back to the house I heard gunshot sound. Sebenzile cameback and he found me outside the gate. He told me that he killed the wife (deceased in count 2). We proceeded to Bavini tarven in the locality where Sebenzile bought beers and we drank. He later told me that he also got an amount of R500.00 from the deceased homestead.

#### 5.11

We spent the night at initiation school and I went home the following day to prepare for my trip back to Durban. On the way as I was going to take a taxi to Bizana town I met Sebenzile at the bus stop. He sold me a cell phone saying he wanted money for travel to Port Shepstone where his brother Mvuyisi was staying. I didn't know that the cell phone was from the deceased homestead. I left for Durban with the cell phone and the deceased firearm. The deceased firearm had no ammunition. At the time I gave my firearm to Sebenzile it had five live ammunition and I didn't see it after that, and I left it with him when I returned to Durban.

#### 5.12

On Sunday Sebenzile phoned me saying he was coming to me in Durban. I gave him direction and contact details of a person who was at the Market in town, Durban. Sebenzile arrived in the company of the police officers and I was arrested. I gave the cell phone and the firearm to the police. I co-operated with the police and I told them everything and I was intending to plead guilty immediately after my arrest but I was taken to the prison I was advised by other prisoners not to plead guilty. as the trial progressed I realised that the advice I got from the prisoners was not a good one. I have since then changed my mind and decided to plead guilty as I'm doing now.

#### 6.

#### **I FORMALLY ADMIT THE FOLLOWING:**

##### **Count one**

6.1 That on the 05<sup>th</sup> day of July 2018 at Makhabaludaka Locality Amantshangase Administrative Area, in the district of Bizana I did wrongfully, unlawfully and intentionally kill Maqhayi Nyolukana, an adult male person.

6.2.1 knew that at all material times my actions were unlawful.

##### **Count three**

6.3 that upon the same date and at the same place mentioned in count one above 1 did unlawfully and intentionally wield a firearm and did then with force take a .32 revolver with serial number C168068, the property of Maqhayi Nyolukana. Even though I am not the one who wielded the

firearm but my conduct of taking the deceased firearm after a firearm was wielded by Sebenzile to force them to give us the firearm makes me liable.

6.4 I knew that at all material times my actions were unlawful.

**Count five**

6.5 that upon the same date and at the same place mentioned in count one above I did unlawful and intentionally possess a firearm to wit a .32 special revolver with serial number C168068 and a .38 revolver without holding a licence to possess the said firearms

**Count 6**

6.6 that upon the same date at the same place mentioned in count one I unlawfully and intentionally possessed ammunition to wit five live rounds

6.7 I knew that at all material times my actions were unlawful

7.

In conclusion of the recording of my plea of guilty I wish to emphasize that I have been informed by my legal representative, and I understand that I have the right:-

7.1 Not to plead guilty and to be presumed innocent until proven guilty beyond reasonable doubt by the state

7.2 To remain silent and not to testify during the proceedings, and

7.3 Not to be compelled to make any self-incriminating statement.

8.

**FURTHERMORE, I EMPHASIZE**

8.1 That I am in sound and sober senses and that I am pleading guilty freely, voluntarily and without having been assaulted, forced or influenced in any manner by the police, the state's representative or anyone else to do plead in these counts;

8.2 That I have not been rushed into pleading guilty and that I have elected to do so after due consideration and out of my own free will;

8.3 That I have been informed by my legal representative of, and I understand the nature and extent of the sentence(s) which may be imposed upon me in the circumstances of this matter.”

[121] When the state closed its case accused no.1 testified in his defence. He confirmed that he has changed his plea of not guilty in respect of counts 1,3,5 & 6 to that of guilty but persisted with his plea of not guilty in respect of counts 2 and 4, the murder of the deceased in count 2 Mrs Nofika Nyolukana and the attempted murder of Athenkosi.

[122] He testified that indeed he was present at the Nyolukana homestead on 5 July 2018. He knew about the killing of Nofika but he did not see the killing. He killed Maqhayi in the rondavel. Accused no.2 then pointed a firearm to Nofika and Athenkosi and demanded a firearm. He drove them from the rondavel to the house and he followed them. In that house Athenkosi lifted up a couch, took a firearm from under the couch and gave it to him. He (accused no.1) checked it and saw that it did not have ammunition. He then put it in the back pack that he was carrying.

[123] Accused no.2 drove them into another room and instructed Athenkosi to lie down on his stomach and to not look him in the eyes. After Athenkosi lay down accused no.2 shot him in his back. He told accused no.2 not to shoot Athenkosi as he was co-operating. Accused no.2 then said that he must keep quiet as a dog bites its owner which he understood to be threatening to shoot him (accused no.1). He returned to the sitting room followed by Nofika. Accused no.2 left Athenkosi lying there in that room in which he had shot him. At the sitting room accused no.2 pushed Nofika into a sofa and pointed her with a firearm. He told her not to do what

he was thinking of doing as Nofika had nothing to do with his business. He only had a quarrel with Maqhayi. He then stopped pointing her with a firearm. He told him that they must go and they left but when they were about to reach the gate accused no.2 said that there was another firearm that Nofika was aware of and he then went back inside.

[124] After about 8-10 minutes after accused no.2 had returned to the house he heard gunshots. Accused no.2 came back from the house and told him that he had shot Nofika. He asked him why he shot her and he did not answer. They left going to the initiation school but they went past a liquor outlet where he bought liquor. Accused no.2 said he should not pay with his money as there was a sum of R500.00 that he got at the Nyolukana homestead. They drank the liquor and left for the initiation school thereafter.

[125] They slept at the initiation and in the morning he went back to his homestead to prepare to return to Durban. He waited for a taxi at Qhabangeni bus stop near TM Bottle Store. Accused no.2 arrived and told him that he thought of going to Port Shepstone but had no money. He then sold him a cellphone for R200.00. They exchanged cellphone numbers. On Sunday he received a call from accused no.2 saying that he thought of coming to him in Durban instead of Port Shepstone. He gave him directions to his place at Mawoti. He again received a call from accused no.2 in which he said he was at the Durban market. Eventually accused no.2 arrived in a taxi with the police who arrested him. The police found the cellphone in him and found the firearm at his place of residence in his room.

[126] He had planned to kill Maqhayi only. After he met accused no.2 who assisted him in getting back his firearm from Luthando they went to accused No.2's

homestead. He told accused no.2 that he had returned because he wanted to kill Maqhayi but did not know how he would gain entry at his homestead as he was known there. Accused no.2 told him that he suspected Maqhayi of killing his own father whose body parts were harvested.

[127] Accused no.2 offered to go with him and said it would be possible to go into that homestead. They proceeded to the homestead of the deceased. When they were near the gate he gave accused no.1 a cigarette and told him to go and ask for a lighter to light the cigarette. If Maqhayi was there he should return and tell him. The dogs barked and a young man came out and stopped the dogs from barking. Accused no.2 and the young man went towards the rondavel. He heard him pretending to be asking for a firewood to light the cigarette. The young man came out of the rondavel to where accused no.2 was standing in front of the door outside the rondavel and gave him a burning firewood and he lit the cigarette and gave the firewood back to the young man.

[128] While he was still waiting for accused no. 2 to come and tell him whether or not Maqhayi was there, he heard a gunshot. He went inside and found accused no.2 inside the rondavel. He (accused no.1) went straight for Maqhayi and hit him with an iron rod and also stabbed him with a spear and he fell down. He then told accused no.2 that they should leave. When they went to the Nyolukana homestead the plan was to kill Maqhayi only.

[129] Under cross-examination by counsel for accused no.2 he confirmed that he did not see accused no.2 shooting Nofika. Accused no.2 returned into that homestead while he waited near the gate after which he heard a gunshot and accused no.2 returned telling him that he had killed her. He added that accused no.2 was lying to

say that he was not there. Accused no.2 was lying to say that accused no.2 never told him about killing a person before they parted ways near TM Bottle Store. Accused no.2 was also lying to say that he never told him that Maqhayi killed his father.

[130] Under cross-examination by counsel for the state Mr Nolutshungu, accused no.1 further testified that he already knew Athenkosi before the incident and Athenkosi knew him. Athenkosi was correct to identify him and accused no.2 as the persons who killed his father Maqhayi in the rondavel. While he was attacking Maqhayi accused no.2 was pointing Athenkosi and Nofika with a firearm with which he was armed. He himself was armed with dangerous weapons only which was a spear and a stick with a bolt in its head. He was not carrying a bushknife. Accused no.2 drove Athenkosi and Nofika to the house demanding a firearm and money.

[131] He followed accused no.2, who was driving Athenkosi and Nofika because if they discovered that it was him who killed Maqhayi they could use his firearm to attack him. He thought Athenkosi and Nofika did not see him because when he got there they were shocked and were also concentrating on accused no.2 who was pointing them with a firearm. Furthermore he was wearing a hooded jacket with its strings pulled tight. They went out after he stopped accused no.2 from killing Nofika. Accused no. 2 returned into the homestead and he heard a gunshot while he was standing near the gate. Accused no.2 returned telling him that he had killed Nofika and they left. He also confirmed that throughout the attack he was armed with a spear and an iron rod while accused no.2 was armed with a firearm.

[132] He testified that he could not dispute the fact that according to the post mortem report Nofika had a gunshot wound and a stab wound as he did not see her being

killed. Athenkosi was mistaken to say that he was the one who shot him. Athenkosi was also lying to say that they were facing each other as he was lying down when he was shot. Athenkosi was mistaken when he testified that he had said to Nofika that they had already killed his son as he never uttered a word in that homestead.

[133] He confirmed that he had intended to plead guilty but other prisoners advised him not to do so and that what is recorded in the bail proceedings was correct. He also confirmed the evidence of the police that a firearm was recovered at his place in Durban. He testified that his plan was to kill Maqhayi only. The killing of Nofika and the shooting of Athenkosi were not part of his plan. The case for accused no.1 was closed without further witnesses being called.

[134] Accused no.2 testified in his defence. He testified that on 5 July 2018 he met accused no.1 at TM Bottle Store at about 16:00. Accused no.1 told him that he had just arrived but some of his items went missing when he fell asleep next to the road after his arrival. He had established that he was robbed of those items by Luthando and Bavu. Eventually it transpired that accused no.1 had been robbed of his firearm which they recovered. He took the firearm from Luthando and gave it to accused no.1. They then went to TM Bottle Store where they initially met. They stood there having a conversation. He asked accused no.1 for a cigarette and accused no.1 gave it to him. He smoked it and gave it back to accused no.1 and went home alone to sleep. Accused no.1 was lying to say that they went to his (accused no.2's) home together.

[135] At some point on another day he went to the correctional services offices in Bizana to change his address as he wanted to go to Port Shepstone. Two men arrived there and asked him if he was Sebenzile Sidoyi. He confirmed his name and

they asked for him from the correctional services officials. It was constable Sonkosi and another man both of whom turned out to be policemen. When they got out of that office they came across a third man who was also a police officer. He was handcuffed and taken to a vehicle where they asked him about the whereabouts of accused no.1. Eventually he was taken to the police station where he was questioned about what happened at the Nyolukana homestead.

[136] He told the police that he did not know anything about the attack and killing at and he never went to the Nyolukana homestead. He was asked about a firearm that they used to kill there. He told the police that he did not kill at the Nyolukana homestead and did not know anything about a firearm that was used to kill at the Nyolukana homestead. He told the police that he only saw a firearm that accused no.1 was carrying. Police told him he was not telling the truth. Constable Sonkosi took out a plastic bag and used it to suffocate him. He told the police that he had accused no.1's cellphone number but it was in another sim card which was in his clothes at Highlands.

[137] He together with the three policemen went to Highlands at his paternal uncle's place. He, constable Sonkosi and warrant officer Maqethuka went into the house while captain Junqwana remained outside. The police asked for his bag and he showed them his bag. Constable Sonkosi took it and opened it and also searched it while warrant officer Maqethuka was searching another room. Constable Sonkosi showed him a firearm saying he found it in his bag. He did not see where the firearm came from. The police also showed him a mobicel cellphone.

[138] They left Highlands and went to his home at Qhabangeni. His room at his home is in a two roomed flat structure. The other room is used by his older brother.

They searched his room. The police took his jacket, track pants and an ashtray. In his brother's room they found a sharpened iron rod. He told the police that the iron rod belonged to his brother. They returned to the police station. Constable Sonkosi told him to stop lying and that he must tell them what happened. He told them that he was not there at the crime scene.

[139] Eventually they went to Durban where accused no.1 was arrested. He denied going to the deceased's home on 5 July 2018. He did ask accused no.1 for a cigarette, he smoked it, and gave it back to him and they parted ways. He never gave a cellphone to accused no.1 and never sold one to him. Under cross-examination by counsel for accused no.1 he testified that police showed him a firearm and a mobicel cellphone at Highlands. It was the same mobicel cellphone that was exhibited in court. He would not dispute that Athenkosi identified it as having been taken at his home.

[140] Accused no.1 was lying to say that the firearm which the police showed him at Highlands which was exhibited in court was the firearm that they were carrying at the Nyolukana homestead during the attack. Accused no.1 was also lying to say that he (accused no.2) was present when the deceased were killed. He also denied the evidence of accused no.1 that he left his firearm with him when he went to Durban. Police showed him a firearm in his room at Highlands but he did not see it when they took it out. In essence he disputed the evidence of accused no.1 which was that he was involved in the Nyolukana attack.

[141] He denied that drove Athenkosi and Nofika from the rondavel to the house. He denied being stopped by accused no.1 from shooting Nofika or saying that a dog does bite its owner. He disputed all the evidence of his involvement in the attack.

He would not dispute accused no.1's evidence that the firearm recovered from him in Durban belonged to Maqhayi. He denied that the following day he met accused no.1 and told him that he wanted to go to Port Shepstone but had no money and denied selling a cellphone to him at all. Accused no.2 confirmed that indeed he has a brother who stays in Port Shepstone. He confirmed that his father was killed but he had no knowledge that his body parts were harvested.

[142] Under cross-examination by the state he confirmed that the police took his jacket and track pants from his homestead. He denied being involved in the Nyolukana murders. He said he would not deny that his jacket and track pants had the blood stains of Maqhayi and Nofika but he was never shown the blood stains in his clothes. He did not know how the blood of Maqhayi and Nofika got to be in his clothes as he never went to the Nyolukana homestead.

[143] He confirmed that he is from Nombengeza locality. It was put to him that Mawanda told the police in the morning after the attack at his home that one of the attackers was from Nombengeza locality and that he had attended the *ilima* at his homestead. He testified that he played soccer so the boys would know that he is from Nombengeza. He denied being involved in the killings and said he was being falsely implicated. He denied that the police got the cellphone that went missing from the Nyolukana homestead from him four days after the incident and said that it was the police who said they got it in his bag. Accused no.2 denied being involved in the Nyolukana attack and the crimes that were committed there. He closed his case without calling further witnesses.

[144] The evidence has been very long and I have thought it necessary to traverse most if not all of it even to the point of being repetitive at times. This was

necessitated in the main by five reasons. Firstly, both accused initially pleaded not guilty and put their versions to the state witnesses. Secondly, after the state had led basically all of its evidence accused no.1 changed his plea of not guilty on all counts to one of guilty in respect of counts 1, 3, 5 and 6, maintaining his plea of not guilty in respect of counts 2 and 4. Thirdly, the state conditionally accepted the section 112 statement of accused no.1 to the extent that it was consistent with the state's evidence. Finally, accused no.2 maintained his innocence and in particular the fact that he was never involved in any of the offences for which he was charged. Most importantly, the state had invoked the doctrine of common purpose and this necessitated that all of the evidence of the state and of the defence should be traversed to see if the doctrine of common purpose was applicable against both accused in respect of all the offences.

[145] I must at the outset, point out that the versions of both accused that were put to the state witnesses before accused no.1 changed his plea, amounted to nothing more than bare denials and lies for the most part. This should not be understood to suggest that the evidence of the state witnesses was perfect. In fact it was not and it should never have been expected to be. However, even a cursory look at the evidence of the state reflected in the main a lot of consistency, more than sufficient to give it irrefutable credibility even if it is considered alone without any corroboration from the section 112 statement of accused n.o.1.

[146] If one were to give an example of some of the imperfections in the state's case the clearest example is the identification of the perpetrators of these offences by Athenkosi. In court he had testified that accused no.1 was one of the persons that attacked his family. He further testified that he remembered whilst in hospital that

one of the assailants was accused no.1. However he never told the police that he had since remembered one of the perpetrators.

[147] It was put to him during cross-examination by counsel for accused no.1, Mr Nohiya, that he (Athenkosi) should know accused no.1 very well and they know each other. His explanation for the fact that he did not tell the police that he had since remembered one of the assailants was that he was busy with the funeral arrangements. He also testified to having been confused by the fact that to his knowledge accused no.1 was in Durban. He did not know about his return from Durban. I readily accept that the criticism of Athenkosi might be unfair to Athenkosi who had just witnessed the brutal attack on his parents and he himself survived by a whisker.

[148] His reasoning was at worse, naïve, but it certainly did not mean that he lied about not telling the police his recollection that accused no.1 was there. Mr Nolutshungu, counsel for the state, made a concession that had the evidence of Athenkosi been alone, it would not have been sufficient for the purposes of identifying the perpetrators. In fact he submitted, correctly in my view, that it would have been dangerous for the court to rely on Athenkosi's evidence on the important issue of the identity of the perpetrators.

[149] Having made this example about the imperfections at times in the evidence of the state as may be found to exist, as already stated above no witness whether it be for the state or the defence including the accused themselves should be expected to give perfect evidence. It remains the duty of the court to make a proper assessment and conclude, whether despite the imperfections as may exist a witness did tell the

truth which is what in my view, the state witnesses did in this case. Their evidence was in all material respects, credible and consistent.

[150] The evidence of both accused was characterized by bare denials, improbabilities and often times a concerted effort to hide the truth by lying. This was both before and after accused no.1 turned against his own earlier versions put to state witnesses before he decided to plead guilty to counts 1, 3, 5 and 6. His evidence in this regard speaks for itself. He also continued to lie even after the plea of guilty as is clear in his evidence in respect of counts 2 and 4. I am convinced that even after he changed his plea he continued to sprinkle his truth with generous amounts of falsehoods as I will point out below.

[151] As indicated earlier the state placed on record that it accepted the section 112 statement of accused no.1 only to the extent that it was consistent with the evidence of the state. This, therefore, means that to the extent that accused no.1's section 112 statement is inconsistent with the evidence of the state I will rely on the evidence of the state to establish the guilt or otherwise of accused no.1 in respect of counts 2 and 4 considered together with all the evidence led by the accused themselves during the trial.

[152] Just to digress a little bit, I do not think that courts should generally and simplistically rely on an accused's plea of guilty and/or the section 112 statement of an accused. This is more so where an accused pleads guilty to some of the offences and not guilty to others and the evidence of the state already presented points to the accused being guilty even to those offences to which the accused is pleading not guilty. Even in respect of the offences in which he pleads guilty, the

court must still satisfy itself that the plea of guilty does not hide some of the truth in respect of all the offences where the state has led evidence.

[153] It might very well be that the plea of guilty is designed to shield the true criminal or to implicate an innocent person for reasons that may never be known. It would not be in the interests of justice for a court to ignore the evidence placed before it and accept a plea of guilty by an accused blindly and in so doing acquit an accused person on those charges on which he pleaded not guilty. It remains at all times the duty of the court to consider all the evidence before it makes a pronouncement.

[154] This is, in my view a logical corollary of our criminal justice system founded on our constitutional value system. Section 165 of the Constitution<sup>6</sup> provides:

“Judicial authority

165 (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

[155] When courts make judicial pronouncements on the guilt or otherwise of an accused person, they are not only talking to the accused and the victims of crime and the witnesses, they are also talking to all the members of the public who have a right to judicial pronouncements that make sense in light of the evidence presented before courts. If this were to be unheeded the confidence of the public in the criminal justice system could be compromised.

[156] There were two eye witnesses to the crimes committed against the Nyolukana family. The first one was Athenkosi. It is common cause that Athenkosi did not see

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<sup>6</sup> Constitutional of the Republic of South Africa, 1996.

his mother, Nofika being shot and stabbed. This, he made clear, even in his evidence in chief. He did not pretend to have witnessed it or try to embellish his evidence by supplementing it with things that happened when he had already run away just to ensure that the accused paid for killing his parents and for attempting to kill him.

[157] The second eye witness was M[...], a 14 year old boy at the time of the incident and who was 15 years old when he testified. He, like his brother A[...], did not witness the murder of his mother as he had also run away from the rondavel after A[...] and Nofika had been driven to the house by the assailants.

[158] A[...] testified about the shots that were fired at him when they were in the house. His evidence was that he was shot at by accused no.1 pointing towards the chest but he turned to his right and the bullet hit him on his right shoulder towards the back. He fell down and put his hands on the back of his head whilst lying down. Accused no.1 fired another shot. This is the evidence of A[...] in this regard:

**MR NOLUTSHUNGU**: On what part of the body was he aiming or shooting?

**MR N[...]**: He was pointing on my chest, M'Lord, I turned towards my right and it hit me (as the witness is indicating) on the right shoulder, M'Lord, and I fell on the floor.

**COURT**: Is that front or back?

**INTERPRETER**: The witness is pointing towards the back, on the upper arm.

**COURT**: Okay.

**MR NOLUTSHUNGU**: and you fell. Please proceed. After you fell what happened?

**MR N[...]**: I fell, M'Lord, and then I put my hands on the back of my head as I was lying down. He continued to fire another shot.

**MR NOLUTSHUNGU**: how did you lie down, were you lying on your stomach, on your sides or on your back?

**MR N[...]**: I was lying on my stomach.

**MR NOLUTSHUNGU**: Yes I can see that you held the back of your head with both your inside of your hands. All right, okay. And then you say he repeated again. What did he repeat?

**MR N[...]**: He fired again, M'Lord, on the head and the bullet hit my hands or entered my hands.

**MR NOLUTSHUNGU**: Yes and you are pointing somewhere on your head also.

**MR N[...]**: And the other one scratched and passed on my head.

**INTERPRETER**: The witness is indicating on the left side of the head.

**MR NOLUTSHUNGU**: yes. How many times did he fire shots towards you – at you?

**MR N[...]**: I think three.

**COURT**: You speak very good English I must say.

**MR NOLUTSHUNGU**: Do you know what stopped him from firing further shots?

**MR N[...]**: I don't know what stopped him from further shooting at me, M'Lord, but I heard him saying to my mother "here is your son we have killed him."

**MR NOLUTSHUNGU**: You, yourself, as at that time as he said that to your mother were you moving or what was the situation, were you still awake, what was the situation?

**MR N[...]**: I think I was still in shock, M'Lord, or a bit unconscious but I heard them or him as he was saying that and they took my mother out of that room.

**MR NOLUTSHUNGU**: Okay. They took your mother out of that room, yes, what happened, what did you then do yourself?

**MR N[...]**: I tried to stand up, M'Lord, and opened another door of the room where we had been put in and jumped outside.

**MR NOLUTSHUNGU**: And you ran away?

**MR N[...]**: And I ran away, M'Lord.

**MR NOLUTSHUNGU**: Yes. What happened as you were running away?

**MR N[...]**: After a short while after I've got out of the room, M'Lord, I heard the gunshot again.

**MR NOLUTSHUNGU**: Yes. From where was the gunshot, could you determine where it came from?

**MR N[...]**: I could hear that, M'Lord, the sound of the gunshot was in the room where they had entered with my mother."

[159] This evidence is consistent with the J88 medico legal examination report compiled by Dr Majeke at St Patrick's Hospital on 05 July 2018 at 23h10. All of A[...]'s injuries were, in my view, caused by the two bullets that he said were fired at him. This brings me to the injuries sustained by Nofika. As indicated before, no one witnessed it when she was shot and stabbed. Her post mortem report compiled by Dr Zonke Mrenqwa-Mazwi reflects the following injuries:

**"Chief post mortem findings:**

1. A compound fracture, stab wound in the posterior aspect of the head.
2. Gunshot entry wound medial to the left ear and caused?? bruising covering the left side of the face with the ear, fractured skull and left hemisphere (brain) bleeding.
3. Gunshot entry wound in the left breast."

She concluded that the cause of death was cerebral bleeding cause by head injury caused by gunshot head.

[161] This independent evidence shows at least two very important findings by the doctor. The first one is that Nofika was shot twice. She had two bullet wounds. She also had one fracture/stab wound in the posterior aspect of the head.

[162] The evidence by A[...] and M[...] was that the only person who had weapons that could cause a compound fracture/stab wound was accused no.1. It was also the evidence of accused no.1 that throughout the attack at the Nyolukana homestead it was only him who had a stick with an iron head as he described it in his section 112 statement and a spear. As I understood his evidence, he never suggested, even indirectly, that he ever gave those weapons to accused no.2. He kept his dangerous weapons with him throughout until he returned them to their various owners as he had borrowed all of them.

[163] Even his evidence of having at some stage been left near the gate by accused no.2 who returned inside after which he heard gunshots, he did not say that accused no.2 took with him his dangerous weapons. This leads me to the conclusion that it is highly improbable that after they left together exiting that homestead accused no.2 returned. There are two reasons for this. Accused no.2 would have had to shoot the deceased in count 2 twice in the manner described in the post mortem report. In addition to that he would have had to look for and find weapons that could cause the type of injury that was a compound fracture/stab wound in the posterior aspect of the head. There is yet another reason for the conclusion that Nofika must have been attacked by the same person and with the same weapons accused no.1 was carrying in respect of the stab wound. Dr Mrenqwa-Mazwi's post mortem report in respect of the injuries Maqhayi sustained is very similar to the first injury mentioned in her post mortem report in respect of the Nofika.

[164] On the totality of all the evidence in this case the deceased in count 2, was in all probability, killed by both accused by being stabbed by accused no.1 and shot by accused no.2. I am unable to agree with Mr Nohiya's submission that to conclude that it was accused no.1 who caused the stab injuries on Nofika is speculation and that accused no.1's version must be accepted. It would be wrong to rely on the discreditable evidence of any of the accused unless such evidence is otherwise supported by other circumstantial evidence. Accused no.1 lied so many times that relying on his evidence alone would be dangerous in the extreme.

[165] This brings me to the question of the person who shot A[...]. A[...] said that when accused no.1 shot him they were about 1,5 metres apart which was very close. However, that room in which he was shot was dark. In my view, he most probably relied on the utterances of accused no.1 whom he said he heard saying to his mother "we have killed your son" for his conclusion that it was accused no.1 who shot him. I do not think that in that dark room he could have clearly seen who shot him between the two.

[166] Furthermore, accused no.1 testified that the firearm of Maqhayi which he took to Durban with him did not have ammunition when he got it. If this is true it is improbable that accused no.1 took the firearm that was with accused no.2 to shoot A[...]. On who shot him A[...] must be mistaken. He must have been shot by accused no.2. The probabilities of him being shot by accused no.1 are non-existent in my view.

[167] This brings me to accused no.2. His evidence was just a bare denial and his version was so improbable as to be false. I will not analyse it in any greater details.

Suffice it to mention the following facts which on the evidence are not contradicted save for his bare denials:

1. M[...] gave a description of the assailant who was carrying a firearm to whom he gave a burning firewood to light a cigarette as being from Nombengeza
2. A cigarette butt with accused no.2's DNA was found by the police in front of the rondavel.
3. His clothes had the blood of both deceased according to the DNA evidence.
4. The firearm which he got from accused no.1 was found at his paternal uncle's place in his bag at Highlands according to the evidence of the police.
5. Accused no.1 testified that he left his firearm with accused no.2 as he never took it back after the incident when he returned to Durban.
6. Accused no.1 places accused no.2 at the scene of crime throughout the attack at the Nyolukana homestead on 5 July 2018.

[168] The state needs to do no more than give credible evidence. Some of the shortcomings in the evidence of the state has been supplemented more than sufficiently by the evidence of accused no.1 and by other independent evidence such as the post-mortem reports in respect of Maqhayi and Nofika and the J88 in respect of A[...] and a lot of other credible circumstantial evidence.

[169] The state has invoked the doctrine of common purpose whose principles are well known. It was the evidence of accused no. 1 that they had agreed about the murder of Maqhayi. As for the other crimes both accused actively participated in the crimes that were committed especially because they were together at both crime scenes being the rondavel and the house. This is a classic case of what the Constitutional Court was in my view, talking about when it expressed itself as follows in *Thebus v S*<sup>7</sup>:

“[34] In our law, ordinarily, in a consequent crime, a casual nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrator in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social “need to control crime committed in the course of joint enterprises.”

The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed casually to the criminal result. Such a casual prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.”

[170] To the extent that the evidence of A[...] was that of a single witness, the well-known cautionary rules are applicable to the extent that his evidence was not corroborated by that of accused no.1 or other circumstantial evidence. Even with the application of cautionary rules his evidence does prove the guilt of the accused. Therefore in all respects and for all the offences, the trite legal position that the state

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<sup>7</sup> *Thebus v S* 2003 (6) SA 506 (CC)

must prove its case beyond reasonable doubt which needs no elaboration or authority is satisfied. Therefore the state has proved its case against both accused no.1 and 2 in respect of all the counts.

[171] In the result both accused no.1 and 2 are found guilty as charged.

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**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

Appearances

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Heard on: 06 December 2019

Delivered on: 12 & 13 December 2019

