

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS147/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
31/07/2018	
DATE	SIGNATURE

In the matter between:

THE STATE

and

MOPEDINYANE, FRANCIS MOKOAELA

Accused 1

SETENE, LEI

Accused 2

SETLABA, LEFA EMMANUEL

Accused 3

MOROBI, THABISO

Accused 4

SUMMARY

Criminal law and procedure – numerous and various counts, including murder – direct evidence and circumstantial evidence – approach to – *alibi* defences raised by all accused – evidence of Gunshot Residue (GSR) – collection, storage, analysis and probative evidential assessment thereof as circumstantial evidence.

ORDER:

1. The order I made yesterday in convicting accused 2, in regard to Count 4 is hereby recalled and rescinded, and replaced with the following:
2. *"Accused 2 is found not guilty and discharged in respect of Count 4."* Accused 2 is hereby found guilty in respect of Counts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15 and 16.

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The four (4) accused persons specified below, are charged with some sixteen (16) various Counts allegedly committed at separate locations in the area of Johannesburg.

THE ACCUSED PERSONS AND VARIOUS COUNTS

[2] The accused are, Mr Mopedinyane Francis Mokoaela (*"accused 1"*); Mr Setene Lei (*"accused 2"*); Mr Lefa Emmanuel Setlaba (*"accused 3"*); and Mr Thabiso Morobi (*"accused 4"*). The indictment in essence covers four (4) locations and incidents during which the various alleged crimes were committed. The first is an incident at Johannesburg Central which occurred on Saturday 20 May 2017 (*"the first crime scene"*). The second is the occasion which occurred on Tuesday 23 May 2017 at the Booyens Railway Station, Johannesburg (*"the second crime scene"*); the third is an incident which occurred on Tuesday 30 May 2017 in Johannesburg (*"the third crime scene"*); and the fourth and final incident occurred on Thursday 1 June 2017, at the Genesis Mine Dumping Site, South of Johannesburg (*"the fourth crime scene"*)

[3] Counts 1 to 3 relate to the first crime scene. It is alleged that the accused killed Mr Bartholomew Seabata Sehloho the deceased in Count 1 (*"Count 1"*). Counts 2 and 3 are those of unlawful possession of a firearm, and unlawful possession of related ammunition, respectively, at the first crime scene. Counts 4 to 6 relate to the first crime scene. It is alleged that the accused killed Mr Lehlohonolo K Mphonyane the deceased in Count 4,

(*Count 4*). Counts 5 and 6 relate to the unlawful possession of a firearm and related unlawful of ammunition, respectively (*Counts 5 and 6*). Counts 7 to 16, in respect of which rather excessive evidence was led, relate to the fourth crime scene. In all, some twenty-five (25) witnesses testified, including the accused. In particular, Count 7 alleges the unlawful possession of a Norinco 9 mm calibre semi-automatic firearm (*Count 7*). Count 8 alleges the related unlawful possession of ammunition, to wit, seven (7) 9 mm calibre rounds (*Count 8*). Count 9, plainly mistakenly, locates the commission of the offence at the fourth crime scene, instead of at the second crime scene. In my view, nothing should really turn on this error when proper regard is had to the evidence led in that regard. I deal with this aspect later below in the judgment. Be that as it may, Count 9 alleges that the accused persons committed the crime of theft of 12 Gauge calibre Model Musler Pump Action Shotgun with serial number AM 34077 firearm (*the firearm in Count 9*), the property or in the lawful possession of Mr Philisande Ngcombolo (*Philisande Ngcombolo*), and/or Mr Doctor Joseph Dladla (*Doctor Joseph Dladla*), (*Count 9*).

[4] Counts 10 and 11, relate to the unlawful possession of the firearm in Count 9, as well as the related unlawful possession of ammunition, to wit four (4) 9 mm calibre live rounds, respectively, *Counts 10 and 11, respectively*. Count 12, alleges the unlawful possession of a Norinco Pistol semi-automatic firearm with serial number 666669 at the fourth crime scene (*Count 12*). Count 13, the related unlawful possession of ammunition, to wit six (6) 9 mm calibre live rounds (*Count 13*). Counts 14 and 15, relate to the attempted

murders of Warrant Officers Lesibana Johannes Moja (*“Warrant Officer Moja”*), and the investigating officer, Warrant Officer Elliot Msibi (*“Warrant Officer Msibi”*), respectively, by shooting at them at the fourth crime scene (*“Counts 14 and 15”*), respectively. The final count, Count 16, relate the robbery of Mr Thembelihle Mvelase and/or Mr Christopher Tsingoane, at the fourth crime scene (*“Count 16”*). Again, the location of the commission of the crime scene is misplaced.

AMENDMENTS TO THE INDICTMENT

[5] It is so that at the commencement of the trial, and later, amendments were sought, and granted by the State, to the indictment regarding certain specifics. All of the amendments were granted with the concurrence of the accused.

THE PLEAS OF THE ACCUSED

[6] At the commencement of the trial, all the accused, and pursuant to confirmation of understanding the allegations, pleaded not guilty, to all the charges. All the accused persons enjoyed legal representation through the trial. In addition, the accused confirmed, through their respective legal representatives, the implications of the minimum sentencing regime in the event of conviction.

ADMISSIONS IN TERMS OF SECTION 220

[7] In their pleas of not guilty to all the charges, the accused persons, generally, made no statements in terms of the provisions of section 115(1) of the Criminal Procedure Act 51 of 1977 (*“the Criminal Code”*). However, in terms of section 220 of the Criminal Code, all the accused persons made certain admissions, both at the commencement of, and during the trial. These are specified immediately below.

THE ESSENCE OF THE NOT GUILTY PLEAS

[8] In essence, the pleas of not guilty raised the following legal issues: the defences of alibis; the veracity of the allegations of common purpose, and the joint possession of firearms as envisaged in case law such as *S v Mbuli* 2003 (1) SACR 97 (SCA); the reliability of the body of circumstantial evidence led by the State; the reliability of the outcome of the evidence of the identification parade; the reliability of the evidence to sustain attempted murder charges (Counts 14 and 15); and finally, the reliability of the evidence relating to Gunshot Residue (*“GSR”*).

FORMAL ADMISSIONS

[9] At the commencement of the trial, certain customary and formal admissions were made by all the accused. These are on record, and include: that the deceased in Count 1 is the person therein named, that he died on 2

June 2017 as a result of perforating wounds of the head and neck sustained at the first crime scene; that Doctor H Nel conducted a post-mortem examination on the body of the deceased on 5 June 2017, as well as the correctness of her findings; that from the time of the infliction of the wounds on 2 June 2017, until the post-mortem examination, the deceased sustained no further injuries which contributed to his death. Similar admissions were made in regard to the deceased in Count 4. This was that, he died on 30 May 2017 as a result of multiple gunshot wounds which he sustained on 30 May 2017 at the third crime scene; that Doctor Jacob J Moar conducted a post-mortem examination on the body of the deceased on 1 June 2017, as well as the correctness and truth of his findings. That, from the infliction of the injuries on 30 May 2017 up to the post-mortem examination, the deceased sustained no further injuries. It was equally admitted that the photographs and key to the photo plan compiled by Constable Sibuso Shongwe at Rosettenville Road, Selby, Johannesburg, (the third crime scene), on 30 May 2017, are correct. It was further admitted that the procedures, content, and analysis followed in regard to Exhibits "E" to "J", were correct. These relate to the various firearms and cartridges seized and retrieved at various crime scenes, were correct, as well as the ballistic tests carried out and the correctness thereof. In particular, the ballistic analysis report by Warrant Officer S D Tema regarding the various firearms and spent cartridges, and submitted in terms of section 212 of the Criminal Code, was admitted. In other words, his findings and correctness thereof, were admitted. The same applied to the ballistic report of Warrant Officer J P Botha. Equally admitted were Exhibit "G", the ballistic reports of Warrant Officers M S Sebola, Exhibit

“H”, and M J Matjila, Exhibit “J”, respectively. Exhibit “K”, being the photographs and album of the Identification Parade conducted by Warrant Officer R S Khiba at the Johannesburg Central Police Station on 10 June 2017, were also formally admitted. The contents of Exhibit “N”, were also admitted, relating to the photos and identification parade of 10 June 2017. In the course of the trial, additional exhibits were handed up and admitted by consent. These include, Exhibit “P”, being a copy of a licence to possess a firearm issued to Imvula Quality Protection (Africa) (Pty) Ltd Security Company, and in respect of a 12 BR Shotgun-gun, with serial number AM 34077, (Count 9); Exhibit “Q” relates to the SAPS 13 of 1 June 2017 in which the various firearms, spent cartridges etc were booked, including the Norinco Pistol with serial number 666669 (Counts 12 and 13). Exhibit “R” relates to a sworn statement of Constable E Tshwana, who took samples of Gunshot Residue (GSR) from both the hands of accused persons, no 1 (Mopedinyane Francis Mokoaela); accused no 2 (Setene Lei); accused no 3 (Setlaba Lefa Emmanuel); and accused no 4 (Thabiso Morobi). In the sworn statement, Constable Tshwana confirmed that he packed and sealed the various samples in an exhibit bag specified; that the exhibit was kept under lock and key for safekeeping; and that on 8 June 2017, the said exhibits in a forensic bag, were handed over by him personally to Constable M E Mthembu at the Forensic Science Laboratory, Pretoria, for analysis. In the trial, the State led the evidence of the result of the analysis of the Gunshot Residue (GSR), which linked certain of the accused persons to the firearms involved, as dealt with later below. At the outset, I must mention that, the only challenge directed to these results on behalf of accused persons 1 and 4 in particular,

was that, since the hands of the accused were admittedly still blood-stained at the time, the process of the analysis and results, could have been inaccurate and tainted somehow. I shall deal with this contention later below.

[10] I must continue with the exhibits handed up by consent. Exhibit "S", relates to the SAPS 329, the Identification Parade Form, and in respect of the identification parade conducted by Warrant Officer R S Khiba on 10 June 2017 at the Johannesburg Central Police Station. In terms of this exhibit, the state witness, Mr Sakhe Mcimeli, pointed out accused 1 and accused 4. At the same time, state witness, Mr Bulelani Vena, pointed out accused 1 and accused 4. On his turn, state witness, Mr Ntsikelelo Mdyongolo, pointed out accused 1 and accused 4. Warrant Officer R S Khiba an Identification Parade on 15 June 2017 at Johannesburg Central Police Station, as reflected on Exhibit "T"; the Identification Parade Form. In terms of this Exhibit, state witness, Mr Sthembele Innocent Mkhize, pointed out accused 4. However, this witness proceeded to point out a person not involved in the present crimes. State witness, Mr Ephraim Dladla, pointed out accused 2 and accused 4, whilst pointing out also a third innocent person. State witness, Mr Christopher Tsingoane, also pointed out an innocent person. Exhibit "U" is a copy of the Notice of Rights in terms of the Constitution issued and given to accused 1 by Warrant Officer Masilela on 1 June 2017. There may be other exhibits handed up by consent during the trial.

[11] In an endeavour to prove its case, the State called numerous witnesses, approximately twenty-two (22). On the other hand all four (4) accused testified without calling witnesses.

THE REASONS FOR RULING – TRIAL-WITHIN-A-TRIAL

[12] In the course of the trial, the evidence of a pointing out made by accused 1 to Captain Nicodemus Sebogodi on 2 June 2017, was challenged. This necessitated a trial-within-a-trial. At the conclusion of such trial, I ruled that the evidence was admissible. At the same time, I undertook to furnish the reasons for the ruling as part of the main judgment. What follow hereunder are such reasons. Included in the judgment, are the reasons for the ruling made on the application for the discharge of the accused at the conclusion of the state case, in respect of certain of the counts only.

[13] From the evidence, it appeared that there were competing groups of self-employed persons doing recycling of items or articles dumped as waste at the fourth crime scene. The groups include what is called the Mai-Mai Group (mostly foreign and Lesotho nationals), and the Booyens Group (mostly local nationals). The self-employed recyclers were each required to pay a fee of about R400,00 per week for the privilege of conducting business there, and being guarded. In this regard, a list of defaulters was kept. Defaulters were not allowed to conduct their businesses. Trading hours varied. The contestation was fierce.

[14] Indeed, the first few state witnesses testified about the workings and arrangements described above. These included, Mr Sakhe Mcimeli (*"Mcimeli"*); Mr Bulelani Vena (*"Vena"*); and Mr Ntsikelelo Mdyongolo (*"Mdyongolo"*) and in regard to counts 1, 2 and 3. They were doing recycling business together with other recyclers, including the deceased in Count 1 who was unarmed. It was during the day when he observed the suspects. The incident occurred towards dusk. Mcimeli approached the deceased and suggested that they should stop working as he was feeling unwell. The deceased asked to delay departure slightly as he wished to collect all his belongings, and complete his tasks. Whilst busy working, Mcimeli heard gunshots being fired near the deceased, about twenty (20) metres away. It was still light. The deceased fell to the ground. Mcimeli saw about six assailants around the deceased, wearing balaclavas except two assailants. He knew them by sight prior to the shooting, and from the same scene. The assailants had firearms, including shotguns, and pistols, black in colour. The assailants were part of the recyclers guarding the witnesses. Mcimeli, on observing the shooting, ran away. Prior to the shooting, he had observed the faces of the assailants, who would on occasion walk past him, in front of him, and called themselves *"Bo-Ntate"*, meaning males. As a consequence, he could observe accused 1 and 4 as part of the assailants. It is so that Mcimeli, and at the Identification Parade held on 10 June 2017, pointed out accused 1 and 4, as part of the assailants, as contained in Exhibit "S".

[15] As in the case of witnesses implicating the accused, Mcimeli was cross-examined incisively on behalf of accused 1 and 4. In essence, he stuck to his co-version that, he knew the two accused he pointed out; they were part of the assailants who carried firearms on the day in question; the two accused stayed at Booyens, as reflected on the indictment; which fact was denied by the accused; on the day in question, the witnesses were guarded by the Mai-Mai Group; and he had seen their faces well, during daylight, and before the shooting. Mcimeli denied the versions of accused 1 that: on the day of the incident, accused 1 was at home and slept with his wife at Mpumalanga Province; and that the accused returned to Johannesburg only on 26 January 2017 to work at the crime scene; in the process, a rather confusing version was put to Mcimeli. This was that accused 1 returned to Mpumalanga Province on 30 May 2017. Mcimeli also denied the versions of accused 1 and 4, that they were not part of the guards who demanded from the witnesses the R400,00 per week fees. He assumed that accused 1 and 4 originated from Lesotho since they spoke the Sesotho language. Mcimeli further denied the version of accused 4 that on the day in question he was at home at Doornfontein with his wife, Mercy, and added that he saw the accused on the day in question during the day at about 15h00, before the shooting. He denied that when he pointed out both accused 1 and 4 at the Identification Parade subsequently, he was just guessing and therefore mistaken. He denied that he saw accused 1 and 4 at the police station after their arrest, and prior to the Identification Parade.

[16] The evidence of state witness, Vena, regarding the same incident, relating to counts 1, 2 and 3, required some cautionary approach for some palpable reasons. He testified. It was not in dispute that he was with Mcimeli, the deceased in count 1, as well as with state witness, Mdyongolo, during the incident. He too was a self-employed recycler at the crime scene. They were forced to pay the R400,00 per week fee for doing their business, more so that they came from outside the area. In good times, they made a profit of about R1 000,00 per week from recycling business. Accused 1, 2 and 4 were part of the people guarding them. The defaulters on the list were instructed to stand aside and not depart. These included the deceased, Mcimeli and Mdyongolo. Accused 1, 2 and 4 carried firearms. He knew them prior to the incident as co-recyclers. He saw them earlier in the day when it was daylight. However, whilst working, and when it became dusk, he heard gunshots emanating from the deceased in Count 1, some twenty (20) metres away. He observed some six male assailants around the deceased, including accused 1, 2 and 4. He saw the deceased fall to the ground. On hearing the gunshots, he fled the scene. At some stage before the shooting, and when the list of defaulters was mentioned, accused 1, 2 and 4 were some five or four metres away from the witness. He observed the sides of their bodies, including the front parts when his view was not obstructed. In his flight from the scene, he observed accused 1, 2 and 4 still next to the deceased. He did not see any specific suspect firing the actual shots. In court, Vena claimed that he subsequently identified accused 1, 2 and 4 at the Identification Parade. However, this assertion was not borne out by the Identification Parade Form, Exhibit "S", as well as the evidence of Warrant Officer Khiba, who conducted

the parade. Exhibit "S" however confirmed that Vena in fact pointed out accused 1 and 4 only at the parade. For this, and for his evidence that he did not observe any assailant wearing a balaclava, as testified by Mcimeli, Vena was heavily criticised in cross-examination, in particular by counsel for accused 2, and despite Vena's protestations to the contrary. Indeed, this is the reason why Vena's evidence required some cautionary and closer scrutiny. However, I must hasten to mention that I observed the witness closely during his entire evidence. Although he commenced by testifying in a soft voice, he became louder and more confident in cross-examination. He belonged to the Booyens Group, which claimed exclusive working environment. The same applied to the Mai-Mai Group, which was not working on the day in question. Vena denied the version of accused 1 that he was away to Enkomeni, Mpumalanga, on the day in question and only returned to working at the crime scene on 26 May 2017; and the accused's version that he never carried a firearm. He used to see accused 1 carry a firearm at the scene. Similarly, Vena denied the version of accused 4 to the effect that accused 4 was at his residence at Davis Street, Doornfontein, during the crimes on 20 May 2017. Vena also denied the version of accused 2, that accused 2 never worked at the crime scene concerned, either as a recycler or guard.

[17] On his turn, state witness, Mdyongolo, gave evidence materially corroborating the evidence of Mcimeli and Vena. He worked with them as a recycler at the crime scene. He was part of the Booyens Group. He was with the deceased in Count 1. They arrived during midday. They reported to

the Lesotho nationals who were guarding them. The deceased was behind him, some twenty metres away. Gunshots were fired late afternoon. The assailants carried firearms. He did not know the names of the assailants, but knew them by sight. He observed the gunshots for about five minutes. He saw the deceased tumble to the ground after gunshots. He observed accused 1 and 4 among the assailants. He knew them for about a week before the incident. As testified by Vena, he did not observe any balaclavas. He pointed out accused 1 and 4 at the subsequent Identification Parade as evinced in Exhibit "S". He recognised accused 3 also, although he could not see his face on the photo-album, Exhibit "K".

[18] In cross-examination, Mdyongolo, testified that he knew the deceased in Count 1 who stayed in the same area and worked with him. He pointed out accused 1 at the Identification Parade because he had seen him next to the deceased during the shooting. This included accused 1, 3 and 4. Accused 1 and 4 carried firearms. He was emphatic that he had observed accused 1, 3 and 4 clearly during day time, and during the shooting next to the deceased. The witness denied, credibly the version of accused 1 that on 25 May 2017, he was at his residence at Enkomeni, Mpumalanga, and only returned to the crime scene to work on 26 May 2017. The witness was not at the scene on the latter date. He denied that his identification of accused 1 at the Identification Parade was mistaken. The witness also denied emphatically the version of accused 4, that on the day of the crimes he was at his residence, at Davis Street, Doornfontein, with his wife called either Mercy or Meisie.

[19] In further cross-examination on behalf accused 2 and 3, Mdyongolo testified that: accused 1, 3 and 4, who he mentioned and implicated in court, he had seen before, and that he was certain of their identities as part of the perpetrators; he denied changing his version or that Vena made a mistake; he did not point out accused 3 at the Identification Parade because the photographs were not clear enough; on the day in question, he only observed four suspects, as opposed to Mcimeli who saw about six perpetrators next to the deceased; he also did not see any suspects wearing balaclavas; he was certain that he had seen accused 3 at the dumping site, on four separate days prior to the incident he observed accused 3 for about five minutes next to the deceased; and he denied the versions of the accused, in particular the version of accused 3 that on the day of the incident, he was away at Embalenhle, Secunda. In re-examination, Mdyongolo testified that he identified accused 3 not only by his face, but also by the cap he was wearing, and which cap he had seen before.

COUNTS 4, 5 AND 6

[20] State witnesses, Mr Rethabile Johannes Mpeka ("*Mpeka*"), and Mr Mabuti Ditsietsi ("*Ditsietsi*"); testified in regard to Counts 4, 5 and 6. Indeed, these are the counts in respect of which I acquitted accused 2 and 3 at the conclusion of the state case on 27 August 2018. For these reasons, an extensive recital of all the evidence was unnecessary, save to the extent of the implication of accused 1 and 4.

[21] In short, Mpeka testified that he also conducted the business of recycling at various waste-disposal places in particular in the South of Johannesburg. On the day in question, he was in the company of Ditsietsi and the deceased in Count 4. They were pulling their trolleys containing respective wares. It was about midday. Visibility was clear. As they crossed the railway line from the side of Rosettenville, they came across accused 1, as close as some 4/5 metres, and apparently in the company of two other assailants who were some distance away namely about 100 metres from the witness. Accused 1 greeted them and asked to speak to the deceased. At that stage accused 1 stood face to face to the witness. The deceased ran away. Accused 1 and the other suspects pursued the deceased. Accused 1 had a small firearm, whilst the other two suspects were also armed with firearms. The deceased was regrettably cornered near a mine dump wall, shot at and killed. Several shots were fired at the deceased by accused 1 and the other suspects who Mpeka could not identify. After the shooting, accused 1 and his cohorts swiftly vanished from the scene and never to be seen by the witness. What was significant in the evidence of Mpeka, both in evidence-in-chief and cross-examination, was the following: he told the police that it was accused 1 who killed the deceased; he mentioned accused 1 by name; he knew accused 1 before the incident; he had met accused 1 in Gauteng and knew him for about two months before the incident on 30 May 2017; accused 1 frequently visited an unknown person at the site where Mpeka resided; the site was situated at the Mai-Mai hostel; on occasions during the visit, accused 1 would do so over weekends; the deceased and accused 1 knew each other, but no words, were spoken prior to and during the shooting; he denied the alibi

defence of accused 1 to the effect that on 30 May 2017 accused 1 was not in Gauteng, but sleeping at his residence at Enkomeni, Mpumalanga Province; and I must observe that this version put to the witness was somewhat confusing whether accused 1 returned to Gauteng on 30 May 2017 or 1 June 2017.

[22] Ditsietsi testified. His evidence corroborated in full, and materially, the evidence of Mpeka. He too alleged that he observed accused 1 and others first, approaching them during daylight, pursuing the deceased, and shooting the deceased. He identified accused 1 in court as one of the perpetrators. He and Mpeka both originated from Lesotho. However, I must point out that the evidence of Ditsietsi, although tending to corroborate that of Mpeka, was not wholly a model of perfection. In his witness statement made to the police on 30 May 2017, Exhibit "L", he mentioned that he would not be able to identify the assailants. This was clearly contrary to his oral evidence in court. He was heavily criticised in cross-examination on behalf of accused 1 only, for making what is called dock-identification, which he denied vehemently. This aspect is better left for proper evaluation of the entire evidence later below.

[23] The evidence of state witnesses, Mr Christopher Tsingoane ("*Tsingoane*"), Mr Ephraim Mphiliowa Dladla ("*Dladla*"), Mr Philisande Ngcombolo ("*Ngcombolo*"), Mr David Chauke ("*Chauke*"), and Mr Sithembile Isaac Mkhize ("*Mkhize*"), as supplemented by the evidence of the police, all dealt with Counts 9, 10, 11, 12, 13 and 16. That is at the second crime scene and the third crime scene. The evidence was extensive and prolix. However,

some of the evidence has been dealt with in part when reference was made to the various exhibits handed up by consent. It is also so that some of the crime scenes have been incorrectly interposed with the major crime scene, the fourth crime scene, relating to Counts 7, 8, 11, 12, 13, 14, 15 and 16.

[24] Be that as it may, Tsingoane, a security guard employed by Royal Security Company, testified. On 23 May 2017, he was on duty at the Booyens Railway Station from about 18h00 in the guardroom which was locked. He was with a colleague, Ms Thembelihle Mvelase ("Mvelase"). The other colleagues were outside the guardroom.

[25] Later that evening, and whilst the guardroom was unlocked but closed, they were accosted by about five armed suspects. They were assaulted, harassed and insulted, with demands for firearms. Other colleagues from outside, were driven into the guardroom, which was well-lit, with visibility clear, but not spacious. In the end, the victims were relieved of their personal belongings, including cellphones, and a company firearm, and ammunition thereof, mentioned in Counts 9 to 13. Tsingoane, who was seriously injured during the ordeal, could not identify any of the suspects, even at a subsequent Identification Parade.

[26] State witness, Dladhla testified. He was in the guardroom with colleagues, and Tsingoane including Mkhize, when they were accosted by about five suspects. The incident occurred at about 19h00. His evidence as to what transpired during the ordeal which lasted for about 5 minutes, was

substantially the same as that of Tsingoane, except for the following variations: he could observe the assailants well, including their faces as the guardroom was well-lit by electrical bulbs; three of the suspects carried firearms, three suspects entered the guardroom whilst the other two stood guard at the door. In court, Dladhla pointed at accused 1, 2 and 4 as part of the assailants. Accused 1 and 2 carried firearms. However, at the subsequent Identification Parade, as alluded to before, he identified accused 2 and 4 only. He recalled in oral evidence that accused 1 was also part of the assailants. This witness clearly had difficulties with the photos in court, which he described as not very clear. The court had to adjourn briefly to enable him to view the photo-album.

[27] Dladhla was cross-examined incisively. He conceded readily that he made a mistake in referring to photo 12 of the photo-album at the parade, instead of photo 27. The reason advanced for the mistake was that the photos were not clear. Dladhla also readily conceded that he in fact did not point out accused 1 at the Identification Parade but did so in court. He recognised the suspects by their faces at the crime scene. He did not know accused 1 and 4 before the incident. The same applied to accused 2. Dladhla denied the versions of accused 1, 2 and 4 that they were not at the crime scene. He emphasised that he could not easily forget someone who assaulted and robbed him. In cross-examination by accused 2, he testified that it was in fact 2 who searched him and demanding a firearm during the robbery. Accused 2 carried a firearm. He pointed out accused 2 at the Identification Parade since accused 2 did bad things to him.

[28] – State witness, Mkhize, also employed by Royal Security Company, testified. He was on duty as a security guard with Mvelase, Dladhla, Tsingoane and others during the robbery on 23 May 2017. At some stage, when he was in the guardroom, his phone rang. He went outside. However, at the door appeared three suspects. One of the suspects pointed a firearm at him, and ordered him to keep quiet. The security guards were ordered to lie down, not look at the suspects, assaulted, searched, and robbed of belongings, as testified by his colleagues. Tsingoane was robbed of a company 9 mm Norinco pistol. The guardroom was well-lit by electricity, and small in size. He could see clearly, and the suspects came close to him, less than one metre. In court, he claimed to see two of the suspects, one of which was accused 4. During the robbery, accused 4 carried a .38 Special firearm which he pointed at the witnesses' head. He looked at accused 4 at least three times during the robbery as accused 4 was the suspect who searched him and relieved him of his cellphone. At the subsequent Identification Parade, and as depicted on Exhibit "T", Mkhize identified accused 4 as one of the perpetrators. It is so that Mkhize saw accused 4 at the nearby shacks, near Booyens Railway Station, on several occasions prior to the identification parade. Accused 4 was probably unaware of this. His company, Royal Security, had a cable in the squatter camp, near Booyens Railway Station, which the witness checked regularly on foot patrols.

[29] Mkhize was cross-examined extensively on behalf of accused 1, 2 and 4. In essence, he stuck to his co-version. He conceded readily that at the identification parade, he also pointed out an innocent person. He could not

point out accused 1 as some of the suspects on the line-up wore hats. Mkhize denied the alibi defences versions of the accused. It is perhaps appropriate to record at this stage, some of the demeanour of Mkhize. At the commencement of his evidence, he could not testify as he appeared visibly to be unwell. The unwellness was ascribed to him having been mugged recently, which incident aggravated the injuries he sustained during the robbery in question. Initially, he appeared argumentative in the witness stand, answering questions by questions in cross-examination. He appeared to be angry and hostile towards the accused persons, and their counsel. However, towards the end of his testimony, Mkhize became more assured and confident. It will truly be difficult to discard his evidence in the final analysis.

[30] State witness, Mr Monnapule William Nyanga ("*Nyanga*") testified in regard to Count 7. He was a supervisor at Royal Security Company, and worked with Mvelase, Mkhize Tsingoane and others. On 1 September 2017, he was called by Warrant Officer Msibi to the Johannesburg Central Police Station. There he identified his company's firearm, namely a 9 mm calibre semi-automatic model 201C-Norinco, with serial number 49101498, and which firearm was found by Sergeant V Naidoo of the K9 Unit in the possession of accused 1 at the veld near Wemmerpan and the N17 roads on 1 June 2017. The firearm, depicted in Exhibit "M", contained seven live rounds of ammunition. In addition, the firearm was subsequently linked ballistically to the cartridges found at the third crime scene. More about this firearm later. Nyanga was not cross-examined at all, and there should be no reason all not to accept his evidence.

[32] State witness, Philisande Ngcombolo ("*Ngcombolo*"), a security guard at Invula Security Company, testified. This was in regard to Count 9, as depicted in Exhibit "P". The evidence of this witness, as well as that of colleague, Mr Doctor Joseph Dladla ("*Doctor Dladla*"), and their supervisor, Mr David Chauke ("*Chauke*"), was not challenged. None of these witnesses directly implicated the accused persons. In short, Ngcombolo and Doctor Dladla, employees of Invula Security Company, were on duty on the night of 2 March 2017. They were posted at what was called the DSM Centre, Eloff Street Extension, Selby. They were accosted by armed suspects, tied up, and robbed of two firearms, the property of their employer, Invula. One of the firearms robbed was a shotgun with serial number AM 34077, a pump-gun shotgun, which contained ammunition, referred to in Counts 9, 10 and 11. This firearm was found in the possession of accused 2 on 1 June 2017 around the Wemmerpan and N17 roads, South of Johannesburg. State witness, Chauke, later at the Johannesburg Central Police Station, identified the firearm as the property of Invula Security Company.

THE INCIDENT OF 1 JUNE 2017

[32] I now turn to the fourth crime scene, and in respect of which the bulk of the evidence was led. The police received a complaint about a shooting at the crime scene in the morning, about 09h00. As will appear from the evidence of Warrant Officers Msibi and Moja, they were amongst the first group of police to arrive at the scene. Warrant Officer Msibi, observed a group of about 100 suspects fleeing the scene on sight of the police. In the

process, he observed about four suspects who were shooting at the police, breaking away from the fleeing group, and climbing up the hill at the crime scene. He gave chase, and kept the four suspects under observation. He called for backup in the form of the other police, including the K9 Dog Unit, which arrived shortly thereafter.

THE EVIDENCE OF THE K9 DOG UNIT POLICE

[33] I must transgress for now, and deal with the evidence of Sgt V Naidoo ("Naidoo"), and Constable Jacob Rapoo ("Rapoo"), and Constable E M Motswana ("Motswana"), all from the K9 Dog Unit. They arrived at the crime scene shortly after receiving a backup call from Warrant Officer Msibi. Their evidence was almost similar and complementary, save to the extent of which suspects were apprehended, and what was found in their respective possessions.

[34] Naidoo unleashed his dog in the direction of the four suspects pointed out by Warrant Officer Msibi or Warrant Officer Moja, following and holding the dog on a puppy leash. So did Rapoo. Naidoo's dog caught and bit a suspect with a red T-shirt. A firearm fell from the body of the suspect. Naidoo apprehended the suspect and took possession of the firearm with its serial number untempered. There was one live round in the chamber of the firearm and six rounds in the magazine – ready to fire. The suspect was bleeding from the dog bites. The suspect was accused 1. His constitutional rights were explained to him. Accused was treated medically at the scene.

Accused 1 was taken to the Johannesburg Central Police Station and detained.

[35] In a similar fashion, Rapoo, on his turn, released his dog in the direction of the fleeing suspects who were reportedly shooting at the police. The dog caught the second suspect. As the dog was grabbing and struggling with the second suspect, a firearm fell from the body of the suspect. The suspect, as confirmed by Naidoo, was accused 2. He kneeled on his knees and the dog grabbed his arm. The firearm contained one live round of ammunition in the chamber, and four in the magazine. When caught by the dog, accused 2 was lying on his tummy flat, and not far from accused 1. There were no other people on the hill where accused 1 and 2 were apprehended. Accused 2 was injured on his leg and thigh, but given medical assistance on the scene by the paramedics. The firearms, and ammunition were handed in at the Johannesburg Central Police Station under SAPS13, as reflected in Exhibit "Q". The later exhibit, described the items as:

"Containing five (5) live rounds shotgun rounds; one (1) silver/black shotgun with serial number AM 34077; one (1) magazine, seven (7) live rounds 9 mm rounds, and a black Norinco pistol serial number 49101498; one (1) magazine, sixteen (16) live rounds, one (1) black Norinco pistol with serial number 666669."

There could be no doubt that the firearms and ammunition were those referred to in Counts 7, 8, 9, 10, 11, 12 and 13 of the indictment.

[36] Constables N J Kgatlempo ("Kgatlempo") and E M Motswana ("Motswana"), also from the K9 Dog Unit, testified. On arrival at the scene,

and after being shown the direction in which the four suspects fled, released their dog in similar fashion. The dog caught a suspect. The suspect held a firearm in his right hand. The firearm fell to the ground. The dog was controlled by the puppy line. The suspect was searched, and live rounds of ammunition were found in his pockets. The suspect was accused 3. Accused 3 had dog bites on his leg and on his arm. From about 16 metres away, another suspect emerged, holding his hands up and announced that he was Thabiso Morobi, accused 4. He was bleeding from his head. When questioned, accused 3 responded that he was injured by unknown illegal miners.

[37] The above police witnesses from the K9 Dog Unit were all cross-examined. For the sake of brevity, and without derogating from the veracity and incisive nature of the cross-examination, it was well-founded to observe that they all did not deviate from their co-versions in implicating the accused persons identified. The respective versions of the accused put to the witnesses, were emphatically, and credibly denied by the witnesses. The firearms were linked to the accused as mentioned below.

THE EVIDENCE OF WARRANT OFFICER MOJA

[38] I deal with the evidence of W/Officer Moja, and in regard to Count 14, the attempted murder on him. He too, arrived at the scene after backup was called for. He and his team, were all in full police uniform, and marked police motor vehicles. I must the brief with the evidence of this witness, since I was

not convinced at all that the alleged crime of attempted murder perpetrated in him had been proved beyond reasonable doubt by the State. This for a number of reasons.

[39] First, and in order to pave the way as well for Count 15, which is also one of attempted murder, I was not entirely persuaded that the evidence presented here made out a case for attempted murder in respect of Count 14. The elements of murder itself are given as, the (1) unlawful, (2) killing, (3) of a person, with (4) intention. See Burchell, *Principles of Criminal Law* 5 ed, p 578. It means therefore that in attempted murder most of the above elements must be present specially "a person", since attempted murder is a separate from murder. W/Officer Moja and his team were part of police backup who arrived at the scene. In fact, he also called for more backup.

[40] Although he testified persistently in a soft voice, his evidence was clear. He followed the K9 Dog Unit police in chasing the suspects up the hill. Shots were fired from the group of fleeing suspects, and from a distance of about 100/200 metres. The shots were fired generally at the police. From the entirety of the evidence, none of the police were struck by the shots. The evidence of Warrant Officer Msibi confirmed this. At some stage the shooters move down the hill. Moja could not see well and he could therefore not identify any of the shooters. In this regard, his specific evidence was, "*I do not want to lie.*" On his arrival near the shooting suspects, Warrant Officer Moja testified that it looked like the shooting was over. At that stage accused 2 was already apprehended by the K9 Dog Unit. Later, Warrant Officer Moja

heard from Constable Rapoo that the suspects were firing shots at them. Warrant Officer Moja in fact confirmed in cross-examination that of the four suspects, later accused, who were retrieved from the hill, he did not see them shoot. In particular during cross-examination by accused 2, Moja confirmed that he ran towards the suspects, but following the KG Dog Unit. He was unable to tell the Court who shot at the police. Significantly, Moja did not testify that shots were fired specifically at him, although he attempted to suggest this in re-examination. In any event, even if this was so, he could not identify the shooters. It could have been any other fleeing suspect apart from the four people arrested by the K9 Dog Unit. Based on the above, I am compelled to conclude that the State has not succeeded in proving beyond reasonable doubt the charge of attempted murder in Count 17, and in respect of Warrant Officer Moja. Consequently, all the accused must be found not guilty, and discharged on this count.

[41] However, the above finding does not signify that the evidence of Warrant Officer Moja called for complete rejection. I never gained the impression that he made any attempt to deliberately mislead the court. Indeed, the bulk of his evidence rendered corroboration to the evidence of not only Warrant Officer Msibi, and the K9 Dog Unit Police at the crime scene on 1 June 2017, but the other police officers also at the scene. I deal with this aspect later.

[42] Captain N Sebogodi ("*Sebogodi*"), whose evidence was challenged in advance, testified in the trial-within-a-trial. On 2 June 2017, and at the request of W/O Msibi, he accompanied accused 1, who allegedly wanted to make a pointing out. It was alleged that accused 1 volunteered to point out his boss in the crimes, namely one Sello ("*Sello*"). On the other hand, the defence for accused 1, at the commencement of the trial-within-a-trial, contended that the alleged pointing out was contrary to the accused's wishes.

[43] In the police motor vehicle, and accompanying Sebogodi, and the accused, was Sgt Malatjie. However, on the way to the destination, accused 1 had a change of mind, according to Sebogodi. In this regard, accused 1 conveyed that since he was scared of Sello, he could not point him out. It was common cause that Sello was also a Lesotho national. Accused 1 explained that should the scheduled pointing out of Sello occur, the latter would kill the accused. Instead, accused 1 freely offered to show the police something else. Sebogodi retorted: "*do not play games with us*", we are on duty. Accused 1 had his constitutional rights explained to him, but he nevertheless assured the police that his change of heart was on his own volition. Sebogodi spoke to accused 1 in the Sesotho and Setswana languages, which accused 1 understood. Sebogodi contacted W/O Msibi, the investigating officer, and conveyed the developments. Arrangements were made for photographers to be present, and photographs taken. However there was insufficient time to secure the customary pro-forma forms used for pointings-out, and since the change of mind by the accused was unexpected. In any event, Sebogodi testified that he no longer trusted the accused. The

pointing-out was delayed again, and the constitutional rights of the accused again explained to him. In the end, accused 1 proceeded to point out to the police a dead body, at the Genesis Mine Dump, South of Johannesburg, at Fennel Road, Village Main, and as depicted in photographs 9, 10, 11, 12, 13, 14, 15, 17 and 18, depicted on Exhibit "V". The body was charred, and full of wounds. More about the dead body later.

[44] Warrant Officer Msibi also testified in the trial-within-a-trial. He confirmed in large measure the evidence of Sebogodi. On questioning by the Court, he testified that the pointing out by accused 1 of his alleged boss, Sello, had to occur swiftly since the latter was a Lesotho national and was likely to flee the Republic of South Africa. On his arrest, accused 1 had his constitutional rights explained to him by Warrant Officer Masilela. Accused agreed freely and voluntarily to point out the residence of his boss, Sello. At the time, accused 1 still had injuries caused by the dog bites on his arrest. However, the accused, like his co-accused, had been treated by the paramedics who recommended detention, and not hospitalisation. At the time, the investigations showed that there was another person killed by accused 1, as well as one other whose body could not be located.

[45] Both Sebogodi and Msibi were cross-examined. The version of accused 1 that he was booked out of the cells in order to show his residence was denied. So was the version that at the pointing out scene, accused was coerced to point out the dead body. The family of the dead body pointed out, later came to identify the body which was transported to Lesotho.

[46] At the conclusion of the evidence of Msibi, and pursuant to a brief adjournment, the notice of rights in terms of the Constitution, Exhibit "U", issued by Warrant Officer Masilela to accused 1 on his arrest and detention on 11 June 2017, was handed up by consent. It therefore became unnecessary for Warrant Officer Masilela to testify.

[47] Accused 1 testified as the only witness in the trial-within-a-trial. In essence, his version came to this: he was booked out the cells by Warrant Officer Msibi in order to show his residence; he was handed over to Sebogodi at the Johannesburg Central Police Station, and placed in a police motor vehicle; he was driven to the Genesis Mining Dump site; he was forced by the police, and pushed towards an unknown and dead body and made to point at it, whilst photographs were taken; and he denied the existence of an alleged boss, Sello, who allegedly instructed him to kill people. Interestingly, accused 1 alleged that Warrant Officer Msibi was present at the pointing out of the dead body, and actually took part in forcing the accused to touch the dead body. Msibi had denied this version, although admitting to be present in the background, and in a separate unmarked police vehicle. If this was indeed true, it remained a worrying factor to the Court.

[48] Accused 1 was cross-examined. In the evaluating of the evidence, I concluded, for present purposes, that the version of accused 1 in the trial-within-a-trial was completely false; riddled with inconsistencies; a perfect innovation and afterthought, and rendered by an unimpressive witness. It was highly improbable for the police to book out the accused from the cells merely

for him to go and point out his address when they already had it, or could verify it without him. On the way to the pointing-out, accused 1 clearly had a change of mind. It boggled the mind why he would be made to point out a dead body. Indeed, this accounted for the absence of the customary pro-forma pointing-out forms at the scene. For the above reasons, and having regard to the merits of the allegations against the accused, I ruled that the evidence was admissible. In hindsight, on the version of the accused, there was plainly no need to enter into a trial-within-a-trial.

THE EVIDENCE OF THE GUNSHOT POWDER RESIDUE

[49] Constable M E Tshwana (*"Tshwana"*), based at the Local Criminal Record Centre, Johannesburg, testified based on Exhibit "R", and related exhibits. On 1 June 2017 (the day of the shooting in Count 7), he collected samples of gunshot powder residue from both hands of all the accused persons, which he sealed in forensic bags, under lock and key for safekeeping. On 8 June 2017 the exhibits were handed over to Constable M E Mthembu to take to the Forensic Science Laboratory, for analysis. This witness was not cross-examined.

[50] The Report of the Gunshot Powder Residue, Exhibit "X", compiled in terms of section 212 of the Criminal Procedure Act, was admitted by consent. In terms of the report, the analysis in respect of accused 1 and 4, the samples tested positive for Gunshot Powder Residue (GSR).

[51] Warrant Officer Salome Sebola ("*Sebola*"), of the Forensic Science Laboratory testified. This was in regard to the Ballistic Report, Exhibit "H". She examined the fired cartridges, including of, the 12 Gauge calibre Model Musler, Pump Action Shotgun, mentioned in Count 9; the 1 x 9 mm Parabellum calibre Norinco Model 213 semi-automatic pistol with serial number 666669 with a magazine; 16 x 9 mm Parabellum calibre cartridges; 1 x 9 mm Parabellum calibre model 213 semi-automatic pistol with serial number 49101498; 7 x 9 mm Parabellum calibre cartridges; 3 x 9 mm Parabellum calibre fired cases; and 1 x 9 mm calibre fired bullet, all as contained in the admissions, Exhibits "D", "E", "F" and "G".

[52] Warrant Officer Sebola, and in regard to what she tested, testified that: the three (3) 1 x 9 mm Parabellum calibre fired cartridge case marked 311958/17 – B1 to B3, respectively, and the one 1 x 9 mm calibre fired bullet, marked and the one (1) – 9 mm calibre fired bullet marked IT 311958/17 C1, were fired in the same firearm as the test fired cartridge case, namely as the 9 mm Parabellum test fired case marked 498T62, and that the bullet, namely, 9 mm calibre fired, marked IT, 311958/17 – C1, was fired from the same firearm. Warrant Officer Sebola, confirmed the contents and correctness of her report, Exhibit "H". She was not cross-examined.

[53] As stated above, the process of taking from the accused the gunshot powder residue, and the results thereof, were admitted. The same applied to the process and procedure followed at the identification parade on 10 June 2017, Exhibit "T".

THE EVIDENCE OF WARRANT OFFICER MSIBI

[54] The evidence of Warrant Officer Msibi was the last of state witnesses, to be considered. He testified in both the trial-within-a-trial and the main trial, as the Investigating Officer. The evidence was extensive and as such, resulted in extended cross-examination.

[55] The evidence must be compressed. On arrival at the crime scene with his crew: suspects were shooting at the police; they were in police uniform; the police chased at a group of about 100 suspects up the hill; from the group of 100 suspects, four separated in the process of the chase; Msibi kept the four suspects under constant observation, according to him; the police never retaliated; he called for back-up, including the K9 Dog Unit, which arrived shortly thereafter, at about 10h00; the K9 Dog Unit, with the assistance of their dogs, and as testified by the unit's members involved, arrested the four accused who were brought to Msibi and his team; they were injured as a result of dog-bites; these accused were treated medically, by the paramedics on the scene, and later at the Johannesburg Central Police Station; three of the accused were found in possession of firearms specified and related ammunition; prior to their capture, the accused shot at the pursuing police again; the four accused had run, and jumped over the N17 freeway towards a second bushy hill; at the spot where the accused were arrested, there were no other suspects/community people present; and that, the spot was circled with no other people leaving it. Indeed, it was clearly apparent that certain crucial parts of Msibi's evidence, required careful assessment and evaluation.

Such evidence was his contentions that: he kept the four accused under constant observation from when they broke away from the group until they were captured and brought to them; he only lost sight of the accused during the chase after they reached the top of the hill, and saw them again after apprehension; that the accused were the same four persons who climbed the hill during the chase as the four suspects subsequently arrested by the K9 Dog Unit; and that he was certain about the identity of the accused since they fled being four from the crowd of about a 100 suspects originally and were apprehended being four thereafter; the latter was the only identifying feature relied upon by Msibi, which shows the circumstantial evidence at play here.

[56] As alluded to previously, Warrant Officer Msibi was cross-examined extensively. The overall impression gained by the court, and despite the above remarkable features, including that his evidence somewhat bordered on exaggeration, he nevertheless kept to his co-reversion. For example, he denied that the accused were exposed to potential witness after their arrest at the police, and prior to the identification parade as alleged by all the accused. He also denied convincingly that he threatened one of the accused that he would arrange an *“illegal identification parade”* later. In any event, these allegations were generally spurious.

THE EVIDENCE OF THE ACCUSED

[57] I must deal with the versions of the accused. In doing so, I must, at the outset bear in mind certain trite legal principles. These include that, the State bears the *onus* throughout to prove the guilt of the accused beyond reasonable doubt; if there is any reasonable indication that the version of the accused might be reasonably possibly true, they are entitled to their acquittal; the correct and proper approach to both circumstantial evidence, need identifying evidence; and in regard to an *alibi* defence, that an accused not convince a court of law of the truth of his *alibi*, and that such *alibi* defence must be considered not in isolation, but in proper context of the totality of the evidence. As to the former, see cases such as *S v Sithole and Others* 1999 (4) SACR 575 (W). As to the latter principles, see case law, such as *S v Malefo* 1998 (4) SACR 127 (W); *S v Mhlongo* 1991 (2) SACR 207 (A); *S v Khumalo* 1991 (4) SA 310 (A); *S v Ntsele* 1998 (2) SACR 178 (SCA); *S v Jochems* 1991 (1) SACR 208 (A); and *S v Nkombani* 1967 (4) SA 877 (A). Indeed, there are other obvious applicable legal principles in this case to be reverted to later below.

[58] All the accused testified, with accused 4 also testifying during the trial-within-a-trial, as mentioned above. I preface the various defences, generally and variously, ranged from *alibi* defences (Counts 4 to 6), and Counts 9 to 13; in regard to Counts 7, 8, 14 and 15, the defences were that the accused were lawfully at the scene, innocent and working when they were suddenly attacked. In regard to Count 16, the defence proffered was once more, an *alibi*.

[59] Accused 1 testified that during May 2017 he resided at Enkomeni, Mpumalanga Province. He did not know the deceased in Count 1, and never killed him. He similarly, denied the allegations contained in Counts 2 and 3. He advanced the same defence in regard to Counts 4 to 6. Accused 1 testified that he was in Mpumalanga. In regard to Count 7, and related counts, accused 1 testified that on 1 June 2017 he was at work as a recycler at the dumping site and denied all the allegations. On his arrest, he was bleeding from injuries, and his hands had blood even when he agreed to have gunshot power residue samples taken from him. He never handled any firearms or ammunition. In regard to Count 9, the theft of the 12 Gauge Calibre Model Musler Pump Gun Shotgun, and related counts, accused 1 merely denied the allegations. In regard to the robbery count, Count 16, he testified that he was at home at Enkomeni, Mpumalanga.

[60] In cross-examination by his co-accused, accused 1 alleged that he did not know accused 2, and saw him for the first time on 1 June 2017. However, he knew accused 3 from home in Lesotho, and they did the same work at the dumping site. He was with accused 3 on 1 June 2017 at the dumping site, and had met him on 29 May 2017. Accused 1 met accused 4 for the first time on the date of arrest. He rented a house at Enkomeni, Mpumalanga, where he stayed alone, whilst his wife stayed in Lesotho. He conceded that he stayed also at Booyens Squatter Camp from 26 May 2017. It soon became apparent that accused 1 was untruthful in regard to his actual residence, when and how many times he visited Mpumalanga after he arrived in Johannesburg. He avoided questions in cross-examination by the State, he

introduced new evidence for which he blamed his counsel. He also blamed his counsel for not communicating properly with him. He also could not explain why the witnesses in Count 1 identified him if he was not at the crime scene. Accused 1 repeated his incredulous version on how the police made him point out a dead body during the pointing-out. Accused 1 spectacularly denied that he was doing recycling at what was commonly called the mining dumping site, when all the credible evidence indicated that to be the case. It was plain that accused 1 made every endeavour to remove himself from the mine dump site where the crime was committed. Regarding his arrest on 1 June 2017, the accused version was simply this: he worked at the crime scene from morning to late afternoon; he was with accused 3, not accused 2 or 4. Late that afternoon, many people arrived there shooting at them; he and accused 3, either tried to run away or in fact ran away – his evidence was confusing in this regard. In the process, they came across the police; they were assaulted by the police viciously; they were searched, and nothing was found on them. This version was clearly false in several respects. It was contrary to the credible evidence of the police that the shooting at the scene commenced in the morning, about 09h00, the time at which accused 1 reportedly started working. Second, all the four accused ran up the hill together, and apart from the bigger group of about 1 x 100. The accused and/or suspects were shooting at the police as they fled. Thirdly, the accused were arrested together at the same spot, not separately as contended by accused 1. When searched, accused 1 and 4, possessed firearms. The version of accused 1 was also in conflict with the more credible version of the K9 Dog Unit police officers. Furthermore, the version that accused 1 was

viciously, and variously assaulted on capture, constituted entirely fresh evidence in cross-examination. The police openly admitted to injuries sustained by the accused as a result of dog bites. A careful scrutiny of the version of accused 1 showed that it was replete with inconsistencies, improbabilities, and adaptations. His contentions that the various witnesses who implicated him in the various crimes engaged in fabrication against him, were without merit at all. If true, the fabrication was simply too extensive and complicated. Accused 1 admitted that he was pointed out at the identification parade, particularly, in regard to Count 1. However, he denied the presence of gunshot powder residue on his hands on the basis of the unfounded assertion that at the time of the taking of the samples from him, his hands were full of blood. Indeed, all the inconsistencies, improbabilities, and unmeritorious aspects of accused 1's version, have been extensively captured in the State's heads of argument. He closed his case without calling any witnesses.

[61] Accused 2 also testified as the only witness in his defence, to which he was entitled. He was a Lesotho national, and came to South Africa in 2011. He was arrested on 1 June 2017. Prior to that, he was unemployed and residing at the Booyens Squatter Camp. He did not know his co-accused, but first met them on the day of arrest.

[62] He was walking alone, and innocently on foot, from Johannesburg CBD towards the South, Rosettenville. He heard gunshots. He saw members of the South African Police, as well as other civilians firing shots. He and other

civilians walking nearby, ran away. He reached a hill with grass and trees. On top of the hill, which was porous, he hid himself. When the shooting subsided, he heard dog barks. He saw police, and Metro cops, some in uniform, and others not. He approached the police for help. He was about 15 metres away from the uniformed police. He was instructed to stop dead in his tracks, and face away, which he did. Gunshots ensued. He was circled by the police. He was searched, but nothing was found in his possession, except a fifty rand (R50,00) note. He was assaulted. He was suffocated with a glove placed over his head. He was assaulted variously. The suffocation lasted for over 1 x 25 minutes. He was instructed to pick up a firearm and handle it – by, *inter alia*, inserting his finger into the trigger. He was removed to another soily area where he was shown a firearm. He saw members of the SAPS holding dogs on leashes or puppy-lines. He observed accused 1 and 3 among many people. Rather significantly, accused 2, in his prolix evidence-in-chief testified that, suddenly a police dog bit him on the left thigh. This must have been in the presence of accused 1 and 3. A second dog came and bit him, this time on the right thigh. Thereafter the accused were removed again where they encountered accused 4 who was in the company of a lot of people. Accused 2 denied the version of Constable Rapoo who arrested him.

[63] I have thus far refrained from curtailing the extremely prolix evidence of accused 2 in-chief. The version was extremely revealing, and exceedingly eventful. He proceeded to mention some further dramatic event. Once they were all captured, they were taken to another spot in the crime area. They

were instructed to lie down. The SAPS then placed three (1 x 3) firearms on the side, next to their heads. Accused 2 was almost naked. Photographs, several were taken whilst the firearms were next to their heads. The accused were eventually driven to the Johannesburg Control Police Station. However, the drama in his evidence was not over. At the police station, they were first placed in a steel-cage. The police were in-and-out of the cage, with several events occurring. In short accused 4 was assaulted in the cage for pointing out accused 1 when the police produced a big firearm. In addition, accused 2 was pulled by his private parts, by a female officer which resulted in laughter. In the end, and for what was relevant ultimately, accused 2 commenced to deny the various allegations levelled against him in the indictment. This was so, even though there was other credible evidence implicating him, such as the identification parade evidence.

[64] Accused 2 was duly cross-examined. Fast-forward, accused 3 and 4 testified in their own respective defences. Accused 3 testified that he is also from Lesotho, and came to South Africa during 2012. He knew his co-accused. Prior to 1 June 2017, he stayed at Jeppestown, and at the Booyens Squatter Camp, as alleged by the police. He was also self-employed as recycler, collecting scrap metals and steel, at the dumpsite. In regard to Count 1, he testified that on 20 May 2017 he was at Embalehle, Secunda, and returned to Johannesburg towards end of June 2017. On 23 May 2017 he was also away at Secunda. He was arrested on 1 June 2017 at the dumping site.

[65] The accused testified that whilst he was coming back from the top of the hill, he saw many people arriving, firing shots. Some people were in uniform, and others not. He saw accused 1 and 4 earlier working at the hill. He denied the version of Warrant Officer Msibi. He and accused 1 run away but were stopped, arrested, and assaulted by the police. He was made to lie down. Whilst so positioned, a police dog was unleashed onto him and bit him. He was made to handle a firearm, and live ammunition. The dogs continued to bite him. Accused 2 and 4 arrived; and were also bitten up. Thereafter, the accused were taken to another spot on the tarred road, and once more ordered to lie down. Firearms were placed next to them, and photos taken. Later, the accused were taken to the police station, and to hospital for medical treatment. Accused 3, like the accused denied the various allegations levelled against him. He was cross-examined.

[66] Accused 4, an extremely arrogant and hostile witness, testified. At the outset, it was not out of place to observe that accused 4 instantly displayed combativeness and uncooperativeness. He was not at the crime scene referred to in Count 1. He alleged that he was just sitting at his residence, at Rocky and Davis Streets, Johannesburg. The same applied to the incidents on 23 May 2017, and 30 May 2017.

[67] However, on the day of his arrest, on 1 June 2017, he was at work as a recycler at the dumping site hill. He started work at about 08h00, with a group of people, including accused 1 and 3. They were unarmed. Accused 1 and 3 at some stage went to the top of the hill. Immediately thereafter, accused 4

heard gunshots emanating from the direction in which accused 1 and 3 had gone. Whilst walking towards the direction of the gunshots, he came across the police who pointed him with firearms. He was insulted and assaulted by a police officer who testified in court. He was searched but nothing found in his possession. He was handed to Warrant Officer Msibi. He observed two police officers with dogs. At about 18h00, accused 4 saw accused 1, 2 and 3. For the rest, including the extended version of other events, most of which were not put to the relevant state witnesses. The evidence of accused 4 was the same as his co-accused. He denied the various allegations in the indictment levelled against him.

[68] Accused 4 was cross-examined. He refused point-blank to reveal the address of his residence, even with the intervention of the Court. He was also from Lesotho, but he knew accused 1 and 3 only from Johannesburg from May 2017, working with him at the mining hill, not the dumping site. So did accused 1. He did not know accused 2. All he remembered was that on 20 May 2017, and 23 May 2017, was that he was home, nothing else, or the day before or after. Accused 4 conceded that he was pointed out by three witnesses at the identification parade, but does not know why they did so. It was common-cause that the wife of accused 4 was present in court throughout the entire evidence. Accused 4, like his co-accused, could proffer no explanation for the presence of gunshot powder residue found on his hands.

[69] I must revert to the cross-examination of accused 2. There was much which emerged and militated against his version on the various charges, save for Count 4. Most of the extensive version rendered in evidence-in-chief was not put to the state witnesses. For example, it was never put to the state witnesses, that accused 2 was forced to handle/touch a firearm and by putting his finger on its trigger. In any event, the demonstration given by accused 2 in the witness stand as to how this handling occurred, was unimpressive and improbable. In addition, it was never put to the state witnesses that, upon his capture, accused 2 was tied up with cable ties. There were other similar omissions.

[70] Indeed, from the entirety of the evidence, the Court gained the distinct impression that, accused 2, like his co-accused; rather overplayed the number of civilians who were present where he was arrested; the police witnesses disputed the presence of many innocent people at the arrest scene; all the accused minimized the roles played by their co-accused; accused 2, and the other accused, tried to steer away from the actual crime scene on 1 June 2017, namely the mine dumping site commonly referred to in evidence. In fact, accused 4 referred to it as the mining hill. In addition, all the accused denied that they gave the police as their addresses, the Booyens Squatter Camp, except one accused.

[71] The cross-examination of accused 3, save for Count 4, rendered his version improbable, like accused 2. Accused 3, like his co-accused arrested on 1 June 2017, denied or played down the role played by the police dogs.

They all denied the obvious. Surprisingly, accused 3 suggested that he was chased, shot and arrested for no conceivable reason. It was put to the state witnesses that accused 3 was in Mpumalanga from January 2017, however he testified that he was there since 2012. It was also put to the state witnesses that accused 3 was at the dumping site, yet he testified that he was at hill. As mentioned above, it was unclear whether accused 3, on hearing the shots for the first time, and immediately prior to his capture, he ran or attempted to do so. Both accused 1 and Warrant Officer Msibi said accused 3 was at the dumping site, but he denies it for no apparent reason. In all the circumstances, it was highly improbable that his counsel would put incorrect versions to state witnesses in the presence of the accused, without a murmur from the accused.

[72] I have previously sketched certain legal principles applicable to this matter. There are indeed others, but too numerous to restate, but also contained in the heads of argument. Additionally, in an endeavour to prove the guilt of an accused beyond reasonable doubt (not proof beyond the slightest doubt). (See *S v Slegg* 1973 (4) SA 34 (A), and that fanciful possibilities should not be allowed to defeat the course of justice. See *Miller v Minister of Pensions* 1947 (2) All ER 372, 373, and *R v Difford* 1937 (A) 270, 272). It is equally trite that in the process of proving its case beyond reasonable doubt, it does not mean that in any case, the State is called upon to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which, on the face thereof, is

incriminating. See *S v Reddy and Others* 1996 (2) SACR 1 (A). Indeed, in the latter case, it was also stated that circumstantial evidence is not necessarily weaker than direct evidence.

[73] Based on all the above legal principles, and not considering the evidence implicating the accused, and the evidence exculpating them separately, but holistically, I must conclude. In regard to Counts 4 to 6, there was plainly no evidence that proved the involvement of accused 2, 3 and 4. They qualified to be given the benefit of the doubt, and to be acquitted on this count, and all related charges. That was done at the end of the State case in respect of accused 2 and 3.

[74] However, in regard to accused 1, the picture was completely different. The evidence against him was overwhelming. State witnesses, Mpeka and Ditsietsi testified that they saw accused 1 and other unidentified assailants shooting the deceased in that count, (Mphonyana) with firearms. They could see accused 1 clearly, it was daylight. They had adequate and unobstructive opportunity and view to observe the accused. In fact, the witnesses first saw accused 1 whilst he was sitting down right in front of them. Accused 1 proceeded to greet them. Accused 1 said he wanted to speak to the deceased. Accused 1 was close to the witnesses then, about 4/5 metres away. The deceased fled away, and was pursued by accused 1 and the other assailants. In addition, witness, Mpeka, knew accused 1 prior to the incident, for about two months, as revealed in the evidence. In those circumstances, the conclusion that the identification of accused 1 as part of the assailants

was reliable and satisfactory, became irresistible. Furthermore, the identifying evidence was corroborated objectively by the admitted ballistic analysis evidence, which proved that the firearm, with serial number 49101498, found in the possession of accused 1, discharged the cartridges retrieved at the crime scene referred to Count 4. See, in this regard, *S v Charzen* 2006 (2) SACR 143 (SCA).

[75] In regard to Counts 1, 2 and 3, it appeared that accused 3 (Lefa Emmanuel Setlaba), ought to be acquitted, as well. The concession made by State counsel in this regard, was correctly made. However, in regard to accused 1, 2 and 4, I have sketched the evidence of the state witnesses in this regard. These were, Mcimeli, Vena and Mdyongolo. In sum, these witnesses testified that, at the first crime scene, they saw the deceased being shot at. They heard and saw the gunshots emanating from where the deceased was. The deceased fell and laid down. The deceased was surrounded by assailants. These included, accused 1, 2 and 4. The assailants wielded firearms, including pistols and pump guns. The visibility was clear. At the stage when the names of defaulting recyclers were called out, the witnesses were about $\frac{3}{4}$ metres from the accused, and during the shooting, the witnesses observed the accused from about twenty metres. Immediately prior to the shooting, the accused and witnesses were mingling, and moving around on all sides including the faces. They all worked there. The faces of the accused were not covered. The view of the witnesses was not obstructed in any way, and they observed the accused on at least two occasions. Importantly, the witnesses had prior knowledge of the accused as they were

used to seeing them at the dumpsite, their common workplace. It was not in dispute that the accused used to guard the witnesses at the dumpsite whilst in possession of firearms. This was an almost daily occurrence. More importantly, some of the witnesses pointed out the accused at the subsequent identification parade. Accused 1, 2 and 4 were so identified. Accused 1 also pointed out to Captain Sebogodi a dead body, and as showed by the photographs, Exhibit "V", and as a result of the trial-within-a-trial. The state witnesses corroborated each other on material aspects. In these circumstances, the identification was not only reliable, but also corroborated, see *S v Charzen, supra*. The witnesses displayed extreme honesty in that they testified that they only heard the sounds of gunshot, not that they saw who shot at the deceased. The only reasonable inference to be made was that it was the identified accused who shot and killed the deceased, see *R Blom* 1939 (A) 188 at 272, and related cases. The admitted post-mortem examination report, Exhibit "B", gave the cause of death as, "*perforating gunshot wound of the head and neck ...*" The implicated accused, placed themselves on the scene. However, their respective versions in denying involvement in the murder and related crimes, were not reasonably possibly true. In fact, these versions were false. As stated above, there was plainly no evidence implicating accused 3 in crimes under discussion.

[76] The evidence led in respect of Counts 7 to 11, was extensive. I have, after several days of agonising, come to the conclusion that, the evidence of Warrant Officer Msibi, in spite of the limited questionable aspects defined above, as well as the evidence of Warrant Officer Moja, and in respect of

exactly what transpired at the fourth crime scene on 1 June 2017, must be accepted as reliable. There was no convincing reason to suggest that these senior officers attempted to mislead the court – in any way. Their evidence, on at least three aspects, was not only corroboratory, but also corroborated by other evidence sufficiently: that is that, the shooting of assailants of the police commenced much earlier that morning than what the accused collectively wanted the Court to believe; the accused ran up the hill with other suspects whilst shooting at the police; the police quite uncharacteristically, never returned fire; the K9 Dog Unit arrived as backup; the four suspects captured on the hill turned out to be the four accused before court; and that the accused were injured by dog bites, which was confirmed by all the accused, although for additional reasons of alleged assault. Warrant Officer Moja in particular, made no attempt to implicate any of the accused by testifying that the fleeing suspects were shooting at the police generally. For this reason, the count of attempted in respect of Warrant Officer Moja, as stated, could not be sustained.

[77] Sgt Naidoo and Captain Rapoo, captured accused 1 in possession of a 1 x 9 mm pistol firearm with serial number 49101498, containing 1 x 7 live rounds of ammunition. The latter firearm was seen falling from the front part of the accused's body. Visibility was once more clear. In respect of accused 2, Captain Rapoo, testified convincingly, and credibly, that, he found in the possession of the accused, a shotgun with serial number AM 34077, with five (5) live rounds. Accused 2 was lying over the firearm on discovery. This is one of the firearms referred to in Counts 9, 10 and 11, in spite of the

accused's protestations to the contrary. The firearm together with the third firearm and ammunition, were booked into the SAP 13, with entry number 1545/17 by Constable Kgatlampe and Constable Motswana, and contained in Exhibit "Q". The firearms were linked ballistically to the relevant crimes, as mentioned elsewhere in this judgment.

[78] Prior to reverting to the evidence of Warrant Officer Msibi and Warrant Officer Moja and others at the crime scene, I must complete the evidence led in regard to the firearm mentioned in the preceding paragraph. It should be recalled that the state witnesses, Ngcombolo and Dladla testified that they were robbed of, *inter alia*, a shotgun firearm with serial number AM 34077 on 2 March 2017. However, they were unable to identify the robbers. However, this firearm was eventually found in the possession of accused 2 on 1 June 2017. It was later identified as the property of Imvula Security Company by Chauke, at the instance of Warrant Officer Msibi. Based on the principle that theft is a continuing crime, the implicated accused persons, ought to be convicted of the crime. (See CR Snyman, *Criminal Law*, 6ed, pp 500-201, as well as the cases therein cited.

[79] In regard to Counts 12 and 13, the unlawful possession of a Norinco pistol semi-automatic firearm with serial number 666669, as well as the accompanying ammunition, Constable Kgatlampe and Constable Motswana found in the possession of accused 3 1 x 9 mm pistol with the same serial number, namely number 666669, containing 1 x 16 live rounds of ammunition. The firearm was in the accused's hand, and was later handed into the SAPS

13/1545/2017 at the Johannesburg Control Police Station. Accused 4 was later arrested but had no firearm in his possession. Both accused 3 and 4 had dog bite injuries. This was common cause. On the credible evidence, accused 1, 2 and 3 had no licenses to possess firearms and/or ammunition. They were therefore plainly in unlawful possession. The firearms were stolen factually.

[80] I have already dealt with the evidence of Warrant Officers Moja and Msibi. Indeed, the evidence of the accused, and to a lesser extent that of accused 3, was that they were pursued by the police, they therefore corroborated the evidence of Warrant Officer Msibi. The accused had dog bite injuries, which could only emanate from dogs under control of the K9 Dog Unit police. The bare denials of the accused that they were in possession of firearms, and shooting at the police, were untruthful and false. All the accused were arrested in the same vicinity. Accused 1, 2 and 3 were found in possession of firearms and ammunition. In addition, as more dealt with below, accused 1 and 4 were found to have gunpowder residue on their hands. The accused should all be found guilty in respect of Count 15, as well.

[81] I have already dealt with the final count, Count 16. It will be recalled that state witnesses, Ephraim Dladla and Mkhize, identified accused 2, 3 and 4 as part of the robbers. In addition, accused 2 and 4 were pointed out at the identification parade by their faces. In all the circumstances of the case, the identification was not only reliable and trustworthy, but also corroborated by other credible evidence. Accused 1 was not pointed out at the identification

parade, but the identifying witness recalled him in court. (See, *inter alia*, *S v Matwa* 2002 (2) SACR 350 (E).) However, the evidence of Ephraim Dladla was particularly corroborated by other objective evidence in the form of the 1 x 9 mm pistol, with serial number 49101498, which was found in the possession of accused 1, some eight (1 x 8) days after the robbery, and in respect of which firearm accused 1 was linked to other offences committed with his co-accused. The firearm was robbed and retrieved in the area of Johannesburg. It follows therefore that the doctrine of recent possession was applicable to accused 1. See in this regard *R v Sikosana* 1960 (4) SA 723 (A); *S v Shabalala* 1999 (4) All SA 583 (W); and *S v Matola* 1997 (1) SACR 321 (B). All in all, from the above, it follows that all the accused ought to be convicted in respect of Count 16, as well.

FURTHER PROPER ANALYSES OF ACCUSED EVIDENCE

[82] As gleaned from the evidence, the versions of the accused, based on bare denials, particularly in respect of Count 7 onwards, and *alibi* defences on the other counts; were not convincing or satisfactory at all, and therefore not reasonably possibly true. This in the light of the entirety of the evidence, considered holistically and in accordance with the applicable legal principles enunciated above. The accused, collectively and individually, were by far incredible and unconvincing. I must elaborate, accused 1, and in particular during the trial-within-a-trial, started lying from the onset; he had several versions followed by the introduction of new ones, whenever it suited him, his versions about his movements from Enkomeni, Mpumalanga, and to Gauteng

and *vice versa*, were startling and inconsistent; he was not truthful about where exactly he worked at the Genesis mine dumping site; he even denied the obvious, like denying that he was captured by K9 Dog Unit police dogs; and the list was not exhaustive.

[83] Accused 2 on his turn, like the rest of the accused, was also not impressive and truthful with the Court. I have already dealt with his prolix version in evidence-in-chief. He testified from about 12 o'clock on 27 August 2018 to about 15h00. He was lying. He denied the obvious, namely what he was carrying and selling at the mine dumping site. He was extremely evasive. He, like his co-accused, blamed his counsel for the various new versions introduced in cross-examination, he lied about how, and for how long he was hiding on the hill before captured; and spectacularly, not only about the police after arrest making him handle a firearm by forcing him to insert his finger into the trigger, but also about the police making them lie on the ground, placing firearms next to their heads, and taking photographs; the list was not exhaustive. Accused 3 was no better as a witness. He too lied to the Court on numerous occasions. He only collected dumped steal metals, but not at the mine dump site called Genesiss named by the credible evidence. He denied his address, namely, the Booyens Squatter Camp, as recorded by the police on the indictment. He attempted like some of his co-accused, to minimize his knowledge and involvement of his co-accused in these crimes. He lied about his *alibi* defence of being in Embalenhle, Secunda, where it suited him. It was not clear whether he came to Johannesburg already in 2012 or later. He changed his versions several times, and introduced new ones when the

proverbial shoe started to pinch. I have alluded to the demeanour and evidence of accused 4. He was excessively talkative. He also commenced lying from inception. He was, in the view of the Court, probably the most aggressive and uncontrollable witness ever seen. He was truly hostile to all. He refused to reveal his full address. He in fact, attempted to minimize, not only his involvement in the crimes, but that of his co-accused. He could never be believed by any reasonable court. In the end, the Court was more than satisfied that all the accused were untruthful, and misleading whenever they were implicated. I rejected confidently, their respective versions as false beyond reasonable doubt. They all literally chose to deny the obvious – the incriminating evidence. The circumstantial evidence against the accused, where applicable, was simply too overwhelming against the accused, and from which the only reasonable inference to be made, was their involvement in the crimes, beyond reasonable doubt, where proved. In regard to the firearms, and where they were all implicated, they possessed these jointly. See *S v Mbuli* 2003 (1) SACR 97 (SCA).

THE EVIDENCE OF GUNSHOT POWDER RESIDUE

[84] Prior to concluding, I was compelled to deal briefly with one other aspect in proper perspective. That was the question of the reliability of the evidence of the gunshot powder residue (GSR) in this case. To this end, I had requested counsel to properly research the matter and assist the Court in arriving at a correct and just decision on the evidence presented in this

matter. Regrettably, the heads of argument were not entirely helpful in this regard.

[85] Indeed, thus far in our law of evidence, the principled and traditional approach to the evidence of GSR was simply that: once it was proved, after a shooting incident, that the suspect had gunshot powder residue on his/her hands or body, the suspect was, inexorably and inextricably linked to the shooting, depending on the nature of the inquiry. However, this approach is not that simple and free of problems as shown below.

[86] In an article titled, "*Guide to Gunshot Residue Sampling and Analysis*", by Allison Martha, Forensic Department Manager (amartha@rjleegroup.com) (RJ Lee Group), and from which I must quote extensively, the following is said:

"Gunshot Residue is the particulate that is expelled from a firearm when it is discharged. This particulate is going to be made up of lead, barium and antimony, the three elements found in the primer mixture of a bullet cartridge. The particulate will escape from the gun from any available opening in the form of a vaporous plume. The plume will then solidify into fine particles and seal on surrounding surfaces. The particles that deposit on the surfaces surrounding the discharge of a firearm can be classified into three categories. When lead, antimony and barium combine or fuse into a single particle, it is defined as being GSR. Any particle with two of the three elements lead, barium and antimony is classified as a two component particle. Any particle with only one single element, lead, barium or antimony is classified as a one component particle. As time passes from the moment an incident occurs, the subject containing potential GSR particles can have particle loss due to activity and movement. Officers collecting from subjects need to be especially cautious as they and their surroundings can GSR. Therefore wear gloves and be aware of potential contamination sources around collection area. It is not uncommon to find only one or a few GSR particles, and you don't want to be a possible source of these particles when sampling hands use Scanning Electron

Microscope (SEM) gunshot residue collection kits. These kits contain clear plastic vials with SEM sample stubs. The stubs will have an adhesive collection surface used to collect particulate from a subject's hands."

The Article also deals with what is termed Frequently Asked Questions (FAQ's). The answers given come to the following: once a kit is collected and stored as evidence the collected particulate will not disappear, disintegrate, or go bad. The analysis on a 10 year old kit will show the same results as if the kit were analysed immediately after collection; particles can be lost through environmental conditions including wind and rain-movement of the subject such as running, washing of hands, putting hands in pockets, laundering of items of clothing, shaking of items of clothing; the presence of GSR on a person can be explained by three possibilities; namely, that the person discharged or firearm, that the person was in close proximity to a discharging firearm, and that the person came into contact with something that contained GSR. The article also instructs that the fact that there was lack of GSR, does not mean that a suspect did not discharge a firearm, due to the fact that particles can be lost. And finally, that Prime residue is what is referred to when speaking of GSR, it is the mixture of lead, barium and antimony that originates in the primer cap of a cartridge, whilst powder residue refers to the particulate produced by the gunpowder in a cartridge. This particulate will be nitrogen based as gunpowder is typically made up of nitro-glycerine and nitrocellulose.

[86] In *S v Botha* 2017 JDR 1769 (SCA), the appellant was convicted of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The State's case (as in certain respects in the present case), was based on circumstantial evidence. The Court had to apply the all enduring logic as stated in *R v Blom, supra*. There the appellant went to bed with her husband, the deceased, and the following morning he was dead. The appellant tested positive for the primer residue and the deceased did not, even though he had allegedly fired two shots to his own head, in the process of killing himself. In the light thereof, the Court *a quo* (the High Court), concluded that she had a case to answer. The Appeal Court found that the version of the appellant was improbable and false in several respects, and as to how exactly the shooting occurred. The Appeal Court came to the conclusion that, having considered the totality of the evidence, the probabilities and improbabilities, that the version of the appellant was false, and that the Court *a quo* could not be faulted for rejecting her version. The appeal was dismissed. In *S v Barnard* 2018 JDR 0159 (Nm), the accused was charged with murder. At the time of the incident, the accused was married to the deceased. It was alleged that the couple was alone at home. Whilst they were watching television an argument ensued between them over a South African political leader, and the accused shot the deceased in the head with a firearm. One of the state witnesses conducted a prime residue test at the scene. The prime residue test was conducted to detect any gunpowder after a shooting incident. It was conducted on the deceased and the accused. The residue kits and the forms that accompanied the kits were also filled in. There were two prime residue kits for the deceased and one for

the accused. The residue kits were taken to the laboratory for forensic analysis. The findings of the analysis were that both the accused and the deceased had primer residue on their hands. The deceased had it on both hands whilst the accused had it on his left hand. According to the expert witness, for prime residue to be found on the accused and the deceased's hands means that both the accused and the deceased were adjacent to the firearm at the time of the firing. The expert could not identify the shooter, but expressed the view that it was possible that the accused held the firearm with both hands and one hand, for example the left hand shielded the right hand, one will not expect to find gunpowder residue on the right hand. The deceased had more gunpowder on both hands comparing to the gunpowder found on the accused's one hand. In cross-examination, the defence sought to draw inferences that because the deceased had gunpowder on both of her hands, and that the accused had lesser prime residue, an inference could be drawn that it was more probable that the deceased shot herself. The State's expert witness conceded that, other hypotheses were also possible. It was further suggested that because there was more prime residue on the left hand of the deceased and the entry wound was on the left side of the deceased's head, an inference could also be drawn that the deceased shot herself. The Court, came to the conclusion that, the fact that the possibility of suicide on the part of the deceased was ruled out since the state witnesses testified that nothing was found disturbed at the scene, and that the suggestion that the deceased had committed suicide because of the gunpowder residue that was found on both her hands, was not the only reasonable inference to be drawn from the proven facts. The accused was duly convicted of the murder.

DISCUSSION ON GUNSHOT RESIDUE (GSR)

[87] I have deliberately extended the judgment in dealing at length with the issue of Gunshot Residue (GSR), and on which much has not been researched and written, purely in order to ensure that the correct verdict was pronounced in the present matter. Indeed, there are other foreign and international research articles, some of which are critical, and sceptic about evidence of GSR, and recommend a cautious approach thereto, which are all rather instructive. For example, in *Forensic Sciences, Critical Review Criminalities* (available on line at: onlinelibrary@wiley.com), at page 13, the learned authors opined that, "*the presence of GSR on an individual is not exclusively indicative of firearm discharge ... Investigations have high-lighted the possibility for GSR to undergo secondary, and even tertiary, transfer (62) and also the potential for GSR particles to deposit onto an individual walking through a recently contaminated area*".

[88] Back to the present matter. The facts in the above case law are obviously distinguishable from the facts in the present matter. The taking of the samples from the accused, the storage, the transportation and analysis thereof were not seriously challenged. The only lame challenge emanating from accused 1 and 4, was that at the time of the taking of the samples, the accused still had blood on their hands as a result of the dog bites, and that this could have led to the compromise and possible contamination of the samples. No authority was proffered to the Court for the proposition, neither could I find any in my extended research. Other than the above, the accused

implicated merely denied the results of the GSR analysis, and failed dismally to explain why it was found present on their hands. I must accept the results of the GSR analysis in these circumstances. There was no counter expert testimony presented. I must also at this stage, make the specific finding that, the murder allegations, where the accused were proved to be involved, showed that the murders were not only pre-planned, and pre-meditated, but also carried out with precision and in pursuit of a common purpose, all seemingly based on the rivalry and competing interests and rivalry at the Genesis mine dumping site.

ORDER

[89] In the result the following order is made:

1. Accused 1 (Mopedinyane Francis Mokoaela) is hereby found guilty in respect of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15 and 16. He is found not guilty and discharged in respect of Count 14.
2. Accused 2 (Setene Lei), is hereby found guilty in respect of Counts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15 and 16. He is found not guilty and discharged in respect of Count 14.
3. Accused 3 (Setlaba Lefa Emmanuel) is hereby convicted in respect of Counts 7, 8, 9, 10, 11, 12, 13, 15 and 16. He is found not guilty and discharged in respect of Counts 1, 2, 3 and 14.

4. Accused 4 (Morobi Thabiso) is hereby convicted in respect of Counts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15 and 16. He is found not guilty and discharged in respect of Counts 4, 5, 6 and 14.

[90] Today is 5 October 2018. Subsequent to handing down judgment on the conviction yesterday, before I adjourned, it was brought to my attention that the order I made may have been incorrect in convicting accused 2 (Mr Setene Lei) in regard to Count 4 as well, pursuant to acquitting himself previously in respect of the same count. If so, it was plainly a patent error, which is inconsistent with the evidence and I am entitled to correct the order in terms of the Uniform Rules of Court, which I do hereunder. The correction will cause no prejudice to any party, but benefit the accused concerned.



D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for accused 1 and 4	Adv V D T Nolutshungu
Instructed by	Johannesburg Justice Centre
Counsel for accused 2	M Buthelezi
Instructed by	Johannesburg Justice Centre
Counsel for accused 3	P Milubi
Instructed by	Johannesburg Justice Centre
Date of hearing	31 July 2018
Date of judgment	3 September 2018
Counsel for the State	J M Serepo
Instructed by	DPP, Johannesburg