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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: CCD33/16

In the matter between:

THE STATE

versus

K SHANGASE AND 2 OTHERS

JUDGMENT

NTLAMA AJ

[1] The three Accused appeared before this Court on charges, first: robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (CPA) read with relevant provisions of section 51 and Schedule 2 of Criminal Law Amendment Act 105 of 1997 (Amendment Act) (Count 1). Secondly, murder read with section 51 and Part 1 of Schedule 2 of the Amendment Act (Count 2).

[2] The State alleged in respect of Count 1 that on or about the 27 April 2015 and at or near LB5 Sibisi Road KwaMashu in the district of Ntuzuma, the accused had unlawfully and intentionally assaulted Ntombifikile Dube, Celiwe Mkhonza, Nokuthula Mkhonza and Xolani Mnguni and by intentionally using force and violence to induce submission by the aforesaid person, took and stole from them certain property, to wit cellular phones, a laptop and electronic equipment, their property or in their lawful possession, and thus robbed them of the same.

[3] The State further alleged that in respect of Count 2 in that on or about 27 April 2015 and at or near LB5 Sibisi Road KwaMashu in the district of Ntuzuma, the accused unlawfully and intentionally killed Xolani Mnguni, an adult male.

[4] All the three accused pleaded not guilty to the charges in line with the provisions of section 115 of the CPA and chose to exercise their right to remain silent in accordance with section 35(1)(a) of the Constitution of the Republic of South Africa 1996 (Constitution). Different legal representatives represented them: Mr Zulu for Accused 1, Mr Dlamini for Accused 2 and Mr Marimuthu for Accused 3. The representatives also confirmed that the plea was in accordance with the instructions

they received. I am also satisfied that they understand the impact of the application of the Minimum Sentences Act regarding the charges they are faced with.

[5] The State, represented by Ms Mshololo submitted admissions in terms of section 220 of the CPA marked as Exhibit A, which were amended without prejudice to the Accused in terms of section 86 of the CPA which were supported by the medical legal report marked as Exhibit B, Photo Album of the Scene marked as Exhibit C. There are a further exhibits forming part of this record that will be referred to in this judgment.

The State's case

[6] The State called its first witness Sergeant Mbongiseni Nene who testified that he is employed at the SAPS, for 16 years stationed at Ntuzuma detective's branch. He was assigned as the Investigating Officer in this matter. On the 27 April 2015, he was on duty at the Ntuzuma police station when he received a report from the Community Services Unit that someone had been murdered at section LB5 SIBISI ROAD, KWA MASHU. He immediately headed to the scene and upon his arrival, he found a number of bystanders and upon introducing himself, he sought witnesses. He met Ms Ntombifikile Dube (Dube) who was visiting the deceased at LB section. Dube resides at [...] Road. She confirmed that the deceased had been shot and she pointed him out to Sgt Nene. He was dead in his room which was his permanent residence. Sgt Nene confirmed that upon entering the room he found a dead male, face down in a pool of blood. He realised the deceased had a gun shot wound to the neck. He also found that things were upside down in the room. Upon investigation,

closer to the body he found a cartridge and bullet head in close proximity to the body. He also met the two ladies, who he described as the sisters of the deceased: one Ms Celiwe Mkhonza (Celiwe) and one Ms Nokuthula Mkhonza (Nokuthula). They reside on the same premises but in an adjacent building. They also told him their rooms were ransacked and their cellphones and other items were taken. Sgt Nene noticed that their rooms had been ransacked like the deceased room. He then organised for the Durban Local Crime Record Centre (LCRC) to take photos of the crime scene and for the collection of the bullet head. One Constable Mpanza and Constable Mtolo arrived from LCRC. Constable Mpanza took the spent cartridge and bullet head. He further confirmed that one Ms Nokuphila Mvelase removed the deceased body to the medico – legal lab.

[7] Sgt Nene also testified that upon his arrival at the scene, although it was at night, there was sufficient lighting with electric lights inside and outside the scene. As far as he was concerned, the lighting was sufficient at the scene to the extent that he did not have to use a torch. Sgt Nene then identified various aspects of the crime scene from the photo album that was admitted into evidence marked C and which was admitted by the Accused in terms of the section 220 admissions of the CPA.

[8] Thereafter, he then went on to testify that upon the case being allocated to him he was the person who arrested the Accused. On the 31/07/2015 he was at work conducting a suspect raid when he received a tip off from an informer that certain suspects were arrested on another matter at Inanda Police Station. The informer told him that these suspects were involved in the murder of Xolani Mnguni. He took his team and proceeded to Inanda police station where he worked with

Crime intelligence Unit. Upon arriving at INANDA South African Police Service Station (SAPS) he found five or more suspects and various investigating officers dealing with various dockets. He introduced himself to the suspects and indicated that he was investigating the murder and robbery at LB section. He testified that he told all the suspects he would be interviewing them and asked them to participate in an Identification Parade (ID) to be arranged for the 2/8/15 and that they could have their legal representatives present. He further testified that the suspects were detained and in the process of being interviewed by other investigating officers. The suspects were not detained in respect of the matter he was dealing with.

[9] He confirmed that an ID Parade was conducted on the 2/8/15 and those identified at the ID Parade were the indicted on this charge. The ID Parade was held at the Inanda SAPS and one Sgt Ndlovu from Kwa Mashu SAPS conducted it in his absence. He formally charged the accused in the late afternoon of 2/8/15 at the Inanda SAPS Cells after they were identified. He introduced himself and told them of the charges they were facing and advised them of their section 35 rights as envisaged in the Constitution of the Republic of South Africa 1996 (Constitution). Whilst he had also the section 35 rights in his pocket book he chose to read same from the SAP14A Form when he was putting the charges to the Accused. He read the rights individually to each Accused in the holding place at the police station. He confirmed he dealt with Accused 1 first and after the preliminary introductions of each other he told him of the charges he was facing and read him his rights including that of his right to bail. Accused 1 was then asked to sign the SAP14A Form, which he did. The Accused rights were explained to him in English and translated into IsiZulu. The Accused understood his rights hence he signed the SAP14A form,

which was also signed by Sgt Nene. The accused was also given a copy of the form. The form was admitted into evidence as exhibit D. He went on to testify that he followed the same procedure with Accused two and three and their SAP14A Forms were admitted into evidence as exhibits D1 and D2.

[10] He then went on to testify that he had taken the warning statements of all three Accused on 2/8/15 and did so by following the proforma forms. The responses of the Accused were recorded on the forms as they were being provided. This was done in the late afternoon on the 2/8/15. The Accused were appraised of their rights and understood what was being asked of them. All three warning statements were admitted into evidence as exhibits E, F& G respectively. He confirmed that whilst the accused were charged in this matter on the 2/8 /15, he had no idea how it is that they came to be at the said Inanda police station on that day, nor was he present when they were brought to the police station. Others were investigating the accused on other docket numbers and he had no knowledge of the dockets or the outcome of those cases. He concluded his evidence in chief by confirming that he had no knowledge if any of the stolen goods were recovered or reclaimed.

[11] Under cross examination by Accused 1 representative this witness held firm to his version of the events as they transpired. He was questioned repeatedly on the scene of the incident and to the signing of the SAP14A form and the warning statement. It was put to him that he did not explain the accused his rights, which was denied and that it was suspicious that all SAP14A forms were signed at 15h30. He stood firmly by his version as detailed in the evidence in chief. He denied being part

of or knowing about the alleged assault of the Accused at any stage and confirmed that he only arrested ACCUSED AFTER the ID parade which he was not part of.

[12] Under cross-examination by the representatives of Accused two and three little emanated that differed from his evidence in chief. He stood firmly by his version as to how matters transpired once the accused were charged. He continued to confirm that rights were read to the accused and that the responses on the warning statements were recorded as they were conveyed to him. He was adamant that he was not at the ID parade nor did he speak to Sgt Ndlovu. The ID parade was conducted in a fair manner and apart from dropping the witnesses off at said ID parade, he was not involved at all.

[13] Overall Sgt Nene was a reliable and credible witness. He was forthright about what he found at the scene and the manner in which he conducted his investigation. Although the defence tried hard to find flaws in the manner in which he did things, no impropriety can be levelled against this witness. He came across as honest and to the point. He told the court what he knew, despite the time lapse, in a coherent and clear manner. His evidence as a whole was reliable and free from bias or conjecture. He stated the facts surrounding his involvement in the matter and no contradictions were elicited between his evidence in chief and cross-examination. He was overall a good witness for the state.

[14] The State called its second witness Ntombifikile Dube who testified that she resides at [...] – KwaMashu and the incident pertaining to this matter took place at LB5 – Sibisi Road. On the night of 27/4/15 when the incident took place she was at

Section LB5 – Sibisi Road with Xolani Mnguni, the deceased in this matter. They were in bed, in the room when at approximately 00:30 – after midnight she heard a noise from outside. She raised her head to investigate but the deceased continued to lie down. The room door was open but the gate leading to the room was locked. There were approximately seven people outside and they shone a cellphone light on her when they noticed she was awake. They shot at the lock of the gate at which stage she jumped up out of bed, stood upright and the deceased continued sleeping. She testified that they all entered the room and demanded money and items they had for sale. She told them she could not assist as she was a visitor and this resulted in them waking the deceased up and doing a body search of him. They demanded money and items for sale from him. Upon searching the deceased they took his Nokia cellphone and his wallet, which they emptied and threw it on the floor. There was money in the wallet which they took, and one of them shot at the wall but she could not identify this person, who was standing at the door. The shot was aimed at scaring the deceased who after being searched got back into the bed.

[15] She was also confronted and her cellphone (a navy blue Samsung) was demanded of her, she pointed to where the phone was, which was on top of the fridge in the room. One of them who took her cell phone then assaulted her and another person (a third individual) returned and took the laptop that was on the side of her. The laptop was next to the TV near where she was standing. One person took her cellphone and the other one slapped her across her face. They were in close proximity of her when this happened. They then exited the room save for the person who took the laptop (he did not have a firearm). He instructed the one who

slapped me to shoot Xolani. He did not oblige. The one who carried the firearm remained in the room and the rest went outside. This was another person.

[16] In the room at this stage was the Deceased, Dube and the person with the firearm. He instructed Dube to lie next to the deceased on the bed, she did not oblige and remained standing nearby. Dube told deceased to stand up and the person carrying the firearm demanded she and the deceased kneel down. As soon as he knelt down he was shot once and the gunman exited the room. The gunman was wearing a cap to hide his face and he wore a jacket with an orange trim and blue shorts. Due to him disguising himself she could not identify him. The gunman was the same person who slapped her and who shot the deceased and she could not identify him. She could identify the person who took her cellphone as he was in close proximity to her and was not wearing anything to disguise himself. She could not identify the person who took the deceased cellphone.

[17] She testified that the source of lighting emanated from two sources, one directly outside the room and one above the snooker table and there was a light inside the room which was also on. She further confirmed that there was a blind across the window in the room but the light from outside still entered the room, making visibility easy. She testified that she remained standing close to the window from which the light source entered and was standing at the same spot when she was slapped. She went on to testify that after the deceased was shot and the gunman exited the room, she exited the room and walked behind the building where she saw two cars driving off in the vicinity of the house where the incident took place. Prior to the assailants driving off she noticed them getting into the house next door.

She went to the main building which has the kitchen door and related what happened to the deceased. Dube, Nokuthula and Celiwe went to the deceased room where he was lying. She did not know who called the police.

[18] She went to testify that she went to an ID Parade at the Inanda SAPS towards the end of July 2015. Sgt Nene phoned and informed them he would fetch them for same. He collected them and dropped them off outside the Inanda SAPS where they met other police. Inside the police station they were explained what an ID parade was and what would happen. She entered the room and the suspects appeared. She was alone in the ID room with a police officer when the pointing out was done. She was asked to point out persons she recognised and she pointed them out by numbers appearing above their heads. She pointed out Accused 1 and 2 as they appeared in the dock at court.

[19] She confirmed that Accused 1 on the day of the incident – demanded her cell phone and was standing right next to her. Accused 2 – took the laptop from her next to her and said the deceased must be shot on the leg or foot. She confirmed that there were many people at the line up but she was able to identify Accused 1 by his roundish face and healthy built and his German or English haircut where the sides of his head were shaved and which was the same as per the night of the incident. Accused 2 was slender and had a narrow face. She went on to identify the Accused from exhibit H, where Accused 1 appeared as number 9 and Accused two appeared as number 15. She could identify these two individuals as they came close to her. After the ID parade she left the room and did not discuss the point out with anyone.

[20] Under cross examination she confirmed that seven people entered the room and she was looking at different faces and was not fixated on one person. She testified that Accused 1 was facing her, standing right next to her, when he spoke to her and demanded her phone. It took about two minutes. Whilst this was happening the others were ransacking the room. She confirmed it was dark in the room but nonetheless was able to identify Accused 1 from where he was standing as the light from outside was illuminating the room and he was closer to the window and he came closer to her so she could see him. She confirmed that she gave the police a statement, entered into the record as exhibit J, in which she described Accused 1. She did not mention the taking of the laptop in her statement as she was confused. She further confirmed that she identified Accused 1 by his face and not his clothes as he was wearing different clothes on the day of the incident. It was put to her that Accused 1 said he was taken to various houses on 31/7/15 and introduced as the person who robbed them. She denied that this happened and was adamant that she saw him exiting the room and heading for the neighbours house after exiting the room she and the deceased were in. She was adamant that Accused 2 was also present at the premises when the incident took place. Upon cross examination by Accused two representative she was clear that she was not reminded of aspects relating to the Accused numbers at the ID parade and reiterated her version of events relating to having taken at the ID parade.

[21] This witness was a reliable, credible and precise witness. She had the powers of observation on her side, which were heightened, as she was able to see the accused in close proximity to her on the day of the incident under stressful circumstances in order to later identify them without hesitation. She was precise as

to what she saw and how events unfolded. Her evidence as regards the pointing out was truthful and honest and there was clearly no collusion between her and Sgt Nene as regards the identification of the Accused which was done almost instantaneously at the identification parade. She was overall a good witness whose testimony can be relied upon and was clearly not motivated by anything other than pointing out the perpetrators of the incident whom she did not know prior to the incident.

[22] The third witness: Nokuthula Daphney Mkhonza confirmed that she resides at [...] KwaMashu and that is the same address where the deceased was shot. On 27 April 2015 she testified that whilst Ms Celiwe Mkhonza (her cousin) and her were each occupying their own room in a three bedroomed house asleep. Celiwe woke her up after having heard sounds. She switched on the lights and opened the door that had burglar gates. She saw boys approaching them and when the burglar gate had been opened they started pushing the door, which was the kitchen door, which she and Celiwe were pushing closed. Upon entering the house, they demanded money and cellphones and took the Television, DVD Player, which was on the regular stand in the dining room, and R100 that was on the table whilst they were in a state of shock. They were then pushed into the bedroom where they were assaulted by being kicked, pointing a firearm demanding money. Whilst three people had entered the house, two were taking turns to assault them. Both, she and Celiwe were being assaulted in the same room she sustained no visible injuries but was gun whipped on her upper right arm. Whilst being assaulted by the two, one person entered the dining room and she could not see what she was doing. She identified Accused 1 as he appeared in the court dock to have taken the TV but she could not

identify who took the DVD player or the R100. Thereafter, they exited the house and walked into the yard and came across Dube crying, and told them that the deceased, Xolanin had been shot. She attempted to get a motor vehicle to take the deceased to hospital but he was already dead. The police arrived at the scene and enquired from each of them about what had happened. She also confirmed that she was able to see the Accused when they were forcing their way into the house and that Accused 1 was in the front pushing the door. She confirmed that she could identify the suspects because there was sufficient lighting shining from outside the kitchen door and inside the kitchen.

[23] From Exhibit C, the photo album of the scene, she identified the houses and the source of light which coincided with her version as regards the lighting. She went to testify that she attended the ID parade on 2 August 2015. Sgt Nene picked them up and left them outside the police station. They were then taken to waiting room from which they were called individually to the ID Parade room. Dube was called first and she was eventually called by a policeman inside the ID Parade room. There was a line-up of suspects with numbers above their heads and she identified two of the suspects that were present at her house on the night of the incident. Although she could not recall the numbers that appeared above the suspects heads at the ID Parade due to a lapse of time she pointed Accused 3 and Accused 1 as they appeared in the court dock. She went on to testify that Accused 3 was pointed first by her as the one who kicked her whilst she was inside the bedroom and he also demanded money and a cellphone. His identifying features were his complexion and dreadlocked hairstyle as he appeared to have them in court as she was testifying. She went on to highlight she considered his face to be unique because the upper

half of his face was roundish but pointed by the cheeks. She did not hand him the cellphone but told him it was on top of the bed. She testified that her cellphone was not taken but Celiwe's cellphone was taken. Whilst being assaulted by Accused 3 who was on her left hand side Accused 3 was facing her and she looked at him and ducked her face at times as she was warned not to look at him. According to her, the assault lasted about 30 minutes and at all times during the assault the light in the bedroom was switched on.

[24] She identified Accused 1 as the ringleader when the door was pushed in as he was in the front. Apart from pushing the door, all he did was to take the TV and no one assisted him in doing that. His identifying features were his complexion, side beards and was quite hefty. She went on to identify him from the photo album in respect of the ID Parade marked Exhibit H. After pointing out the two identified suspects she went back to the waiting room where she found Dube waiting. She was in another room not the one they initially waited in but could not remember how far was it from the ID Parade room, it was possibly, the third room from the waiting room. After ID they were collected from outside the station by Sergeant Nene. Before the ID they did not discuss the case as they were advised by the police against doing so. They did not discuss the description of the attackers because Ms Dube is not a permanent resident at her homestead. They did discuss the incident and have not recovered the robbed items.

[25] On cross-examination in respect of Accused 1 by Mr Zulu she held firm by her version as detailed by her evidence in chief. Whilst the Defense attempted to identify

loopholes in the evidence of Ms Mkhonza and Ms Dube there were no material contradictions elicited as regards aspects relating to the ID Parade. She reiterated that she was not mistaken when identifying Accused 1 and was adamant he was the one that pushed open the kitchen door. She held firm to her version regarding the description of Accused 1 to the police which description was also detailed in a statement she made to the police. She conceded without hesitation she did not mention Accused 1 beard in her statement. The version that she saw Accused 1 on 31/7/2015 when the police brought him with others to various houses in KwaMashu and identified them as the people who robbed their homes, was vehemently denied by her. She emphasised that it was Accused 1 who was at the scene of the incident and whilst she had a sight of him for a short while in the house it was the first time she had ever seen him, taking into account this was a moving scene her powers of observation were good and went on to advise the court that on the evening of the incident that Accused 1 wore a navy/black jacket and black Bermuda shorts.

[26] On cross-examination by Mr Dlamini on behalf of Accused 2 she reiterated that she met Sergeant Ndlovu for the first time at the Inanda Police Station. They were dropped by Sergeant Nene who fetched them at their homestead and left them outside the gate. Upon being made aware of the ID she called Dube to come. On the fatal night she saw three people that were at her homestead attempting to open the door. One of them was carrying a firearm but could not identify him and he was not in court as well.

[27] On cross-examination by Accused 3's representative she held firm to her version that one person was carrying a firearm although in a written statement to the police marked as Exhibit K that two people that carried a firearm but said she could not recall saying this to the police. She testified that she could not identify the assailant with a firearm or describe Accused 3's clothing but was adamant as to the identification of Accused 3 by his light complexion and dreadlocked hairstyle. The Defense went on to suggest it was only Accused 3 that has the unique hairstyle she went on to confirm. Although it was put to her that Accused 3 had this unique hairstyle, she conceded that there was another individual appearing in the same ID Parade with a similar hairstyle and it was Accused 3's complexion with the hairstyle that assisted her in identifying him as the individual that assaulted her that night. Despite the ID Parade having been held some three months after the incident and it was difficult for her to estimate certain timeframes relating thereto. She was adamant that she had not been coached to identify the Accused as they appear before Court and that she picked out Accused 3 first at the ID Parade as he was the one who kicked her and associated him with that assault on her. Hence her immediate identification of Accused 3 at the ID thereby dismissing Accused 3's Defense that she was mistaken as to his identification as being present at the scene of the incident. No material contradictions were elicited.

[28] As a witness she articulated clearly the events as they unfolded without hesitation. She was clear, precise and not shaken under cross examination in so far as her opportunity to observe the events as they unfolded and her independent recollection of the event, thus placing reliability on her version in relation to the other

state witness: namely Dube. She had no motive to implicate either of the Accused identified by her as they were not known to her prior to the incident. Further, she was able to identify them albeit several months after the incident by complexion, stature and hairstyle which she considered significant from the incident. She was overall a good witness for the State.

[29] The state continued with its case and called upon Constable Sibusiso Mpanza who testified that he is in the employ of the SAPS for 11 years working in the Unit of the Durban Local Criminal Record Centre. He attended the ID Parade on 2/08/2015 and was tasked to take photographs and compiled the album which is referred to as Exhibit H.

[30] On cross-examination by the Defense no material contradictions were elicited. It was evident that he simple attended the ID Parade to take photographs and nothing else. He had no prior connection to the case prior to the arrest of the Accused or thereafter. His, was a simple recollection of taking photographs and nothing else.

[31] The State furthered its case and brought in Sergeant Leornard Bhekizenzo Ndlovu who testified that he has been in the employ of the SAPS for the 13 years under the Detective Unit of KwaMashu Police Station. He testified that he was called by Sgt Nene on 31/7/2015 to conduct an ID Parade on 2/8/2015 at Inanda Police Station. He was informed and given the names of witnesses that would located in the vicinity of the benches at the Community Services Centre at Inanda. He called

out the names, two ladies approached him and he escorted them inside to where the ID Parade will be conducted. He further oriented them as what to expect. He advised them they would be doing the identifications individually and left them at the room under guard by Constable SS Ndlela and or Constable Dladla. He was not certain at the time of testifying which one had assisted him. He then approached the personnel who arrested those that were in the cells and asked them to hand over four suspects pertaining to the case Sgt Nene was investigating and requested eleven additional people to participate in the line-up. Once all the suspects were brought up to the ID room he oriented them what to expect at the ID Parade. He testified that he focused on the four suspects in respect of this matter and enquired if they had any legal representatives to which they responded they had none. He then went on to explain the provisions of legal representation in so far as the Legal Aid Board is concerned to which he was told they did not see the need for attorneys at this stage and would wait to see if the formal charges were to be laid against them at which stage they will opt for legal aid at court. He then proceeded in recording the individual details who formed part of the line-up and recorded it on the Pro-forma ID Parade Form (SAP329). He then instructed Constable Mpanza to take photos of the entire line-up whereafter he called upon the first witness: Dube. The first witness pointed out number 9 and number 15 as they appear in the SAP329. He then asked number 9 and number 15 to step forward and requested Constable Mpanza to take individual photographs of them both. Once the photographs were taken, they were asked to return to the line-up. He then went on to inform those in the line-up that a second witness will be called and enquired if any of those appearing in the line-up had any complaints. None were recorded.

[32] He then indicated that prior to second witness being called he pointed out to those appearing in the line-up that they were at liberty to switch positions and change their clothes. They all indicated that the clothing was okay, thus the clothes remained the same. However, the suspect appearing as number 9 asked to move to position number 12 and was accordingly moved and this is noted in the SAP329. The first witness took approximately a minute to identify the suspects. The second witness took approximately 50 seconds to identify the suspects appearing as number 6 and number 12 in the line-up. He testified that he followed the same procedure with the second witness as he did with the first witness. Once the suspects were identified, taking individual photographs and enquiring of any complaints. After the identification had been completed, he handed those appearing in the line-up to the personnel at the police station to return them to their cells. He then focused his attention on the witnesses and obtained statements relating to the pointing out which they signed. He then informed Sgt Nene that the ID Parade was completed. He indicated that the ID Parade started at 12h00 and completed in its entirety by 15h00 on 2/8/2015.

[33] On cross-examination by the Defense this witness was scrutinised in detail as regards the time it took for the ID Parade to commence and be completed whether he had observed the 18 Rules of Procedure as detailed in section 37(1)(b) of the CPA, the number of participants and the appearances of persons in the line-up. He was adamant that he followed the correct procedures and the ID Parade was conducted in a fair manner, no constitutional rights were violated and at all times, the Accused rights were explained and what he was told is what was recorded in the forms. His version remained consistent as detailed in his evidence in chief and there

were no material contradictions between his evidence and that of Constable Mpanza who were both present at the ID Parade. He further confirmed he was impartial in this matter and simply worked on information provided to him in that Sgt Nene asked him to conduct the ID Parade and Sgt Gumede gave him the case number. He simply took the suspects and put them in the line-up with others and conducted an ID Parade.

[34] As a witness, despite the lapse of time, he came across as simply regurgitating the events as they unfolded at the ID Parade and that he had no motive to do anything except his job and followed procedure within the Guidelines of the Police Directives in conducting the said ID Parade.

[35] The state called upon its fifth witness Ms Celiwe Lungile Mkhonza who testified that she resides at [...] at KwaMashu with her cousin: Nokuthula where the incident took place. She testified that she knew the deceased and was residing at the adjacent building at the same place of residence. She also knows Dube by virtue of her being the mother of Xolani's child. On the fatal night, 27 April 2015 she was at home when she saw four boys after she relieved herself. She woke Nokuthula and told her that she heard the voice of a screaming woman like that of Dube, and they went to check why she was crying. Whilst in the kitchen which was lit up, she saw the boys pushing the door. A struggle ensued between the boys, herself and Nokuthula over the kitchen door as the boys were pushing to enter and they were pushing to close the door. The boys forcibly entered, demanded money, assaulted them, and she was hit on the face. Whilst the one male was assaulting her the others were busy searching for money. She was pushed into the room where money

was demanded from her and she was forced up against the wall and told to sit down. All this, while there was movement in the house with different boys leaving and entering the house, cellphones were also demanded. Nokuthula told them where the cellphones were. The individual who hit her returned and swore at them demanding money.

[36] She further testified that she saw them taking some items including the Television (TV) that was in the dining room and a cellphone to the value of R1000, that she never recovered, which was on top of her bed. She identified the individual who took the TV by his clothing and confirmed that he was wearing black/ navy shorts and a black jacket. The other one was wearing a grey jacket with a hood and he had mohawk haircut, other had his face wrapped with a jacket and he had a gun, the other one was small built and had a silver/gold teeth. She went on to testify that the one who took the TV was well-built and the person who assaulted her wore the grey jacket and he was dark in complexion and had a medium size face and was before court identified as Accused 2. She indicated that once they had taken items and assaulted them they left the house and she was standing close to the door where she noticed that there were a number of others outside. When she returned to her bedroom to check on her child she found an individual by the name of 'Dray' in the bedroom sitting next to the child. He was drunk and bleeding from his forehead. There was also sufficient light that enabled her to have clear visibility, which was derived from the light in the kitchen as well two outside lights, one being outside the kitchen door and the other from Xolani's side. She did not attend the ID Parade because on the 2/8/2015, she was at work. All the stolen items were never recovered.

[37] On cross-examination by the representative of Accused 2 and Accused 3, she testified that she did not know Accused 2 in specific before the night of the incident and confirmed that she saw him for the first time on that night. She also confirmed that she made a statement to the police and was not mistaken as regards the identification of Accused 2 who assaulted her and took her cellphone. She further confirmed that there was no specific ringleader and on the night of the incident there were a number of individuals who entered the home and behaved in an aggressive and violent manner. She testified that the entire incident took approximately ten minutes and that it was a moving scene that she was describing the events unfolded in respect of her recollection. She went on to testify that whilst Accused 3 was of a light complexion and had a unique hairstyle as he currently appears in court, she would have described him if she had seen him on that day. However, since the events unfolded very quickly, she focused on the person who was assaulting her and the demands that were made of her. Nokuthula was approximately 6m away from her but she could see her being assaulted, she was more focused on what was happening to her.

[38] As a witness, her powers of observation were heightened by the stressful situation she found herself in. She was precise and to the point, without hesitation, emphatically clear as regards her independent recollection of the same incident testified to by Dube and Nokuthula. Whilst certain elements of her evidence before court did not appear in her statement to the police there were no material contradictions in her evidence. Under cross-examination there were no material contradictions raised in so far as evidence tendered by her in relation to the other

state witnesses. Having testified approximately two years after the incident took place, her recollection of the events was precise and unbiased. This Court did not gain the impression that it was in any way manufactured to coincide with the previous state witnesses.

[39] The State then called Sergeant Ndlela who testified that he has been in the employ of the SAPS for 13 years and stationed at KwaMashu Police Station under the Case Investigation Unit. He attended the ID Parade and was tasked to guard the witnesses who attended the ID Parade. He testified that the witnesses were in a room prior to the ID Parade being held and he warned them not to speak to each other. He confirmed that he opened the door to the room they were in and showed them where Constable Dladla was who then escorted them to the room where the ID Parade was held. When the name of the witness was called he simply directed the witness to Constable Dladla and once the ID Parade was completed by that witness, the witness did not return to him. He testified that Constable TE Dladla has since passed on and could not recall whether he called the witness or not on that day. He testified that he had met the witnesses at the Inanda Police Station where the ID Parade was held and did not see the Investigating Officer at the Police Station. He took instructions from Sgt Ndlovu and did not know the police officers who allegedly assaulted Accused 1 by the names provided to him. He further testified that he could not comment on the witnesses crossing paths as they proceeded to the ID Parade room.

[40] As a witness he provided this court with a clear but simple recollection of his involvement in so far as ID Parade was concerned. No contradictions were raised between the evidence in chief and the cross-examination.

[41] The State then called Sergeant Philangenkosi Mkhize who testified that he is also employed at the SAPS and based at KwaMashu at E-Section. He testified that he attended the ID Parade on 2/8/2015 and was tasked to escort the witnesses out of the ID Parade room when they were finished. He testified that the rooms were not far apart and he escorted two witnesses on 2/8/2015. His evidence was simply, precise and to the point, simply detailing procedure that was followed on the day in question.

[42] The State called its final witness Sergeant Sandile Ngcobo who testified that he is employed at the South African Police Service and stationed at KwaMashu Police Station. On 2/8/2015 he was asked to attend and guard the witnesses at the ID Parade. His main duty was to separate the witnesses who had attended the ID Parade from those who had not attended the ID Parade at that stage. He was at all times placed in a separate room from the ID Parade room and the witnesses were brought to him by Sergeant Mkhize. Under cross examination, he testified that he did not know of the police officers who are alleged to have assaulted Accused 1 and could not recall seeing Sgt Nene at the police station on 2/8/2015 nor was he the alleged 'Sticks' as referred to by Accused 1.

[43] As a witness he was despite, the time lapse, precise as regards his recollection of his role at the ID Parade.

At this stage, the State called no further witnesses and closed its case.

[44] At this juncture, all three Accused applied for a discharge as envisaged in section 174 of the CPA. The following was placed before this Court in respect of Accused 1 with reference to case law that the evidence by the State was of such a poor quality to the extent no reasonable person could convict due to the following factors:

- (a) There was no evidence why the Accused was arrested.
- (b) No exhibits were found in the Accused possession regarding the commission of the offence.
- (c) The witnesses: Celiwe and Nokuthula contradicted themselves in that Celiwe said the incident took ten minutes whilst Nokuthula said it took 30 minutes. He went on to mention other discrepancies which are on record.
- (d) Apart from the aspects of visibility being poor, hence casting doubt on the identification of Accused 1, he also emphasised that there was a total lack of compliance with the provisions of section 37(1)(b) of the CPA regarding the conducting of the ID Parade.

Based on these grounds, the State's evidence was so poor that no court could convict under the circumstances.

[45] Mr Dlamini on behalf of Accused 2 also applied for the discharge of Accused 2 in terms of section 174 of the CPA sharing the same sentiments as expressed by Mr Zulu for Accused 1. Further advancing the argument that the State failed to prove a *prima facie* case against Accused 2.

[46] This Court was presented with the Head of Arguments detailing various arguments in support of the application by Accused 3. It therefore, sees no need to regurgitate all points raised therein save to state the Court considered each argument carefully with reference to the case law presented.

[47] The State then advanced its argument in asking this Court to dismiss the applications for a discharge in terms of section 174. Some of the points highlighted with reference to case law are as follows: (i) Whether in this specific case, without the Accused giving evidence the State had proved its case to result in a conviction, as stated in *S v Shuping*¹ whether the Defense case would supplement the State case. (ii) the Court had to consider the evidence in totality and to take into account the evidence presented by Dube and the Mkhonzas who were present at the scene in its entirety. (iii) the Court had to consider further whether the role of each Accused was sufficiently put forth to have the Accused answer to a case at this juncture. (iv) last but not least, the police have a set of Guidelines relating to police procedures as enumerated in section 37 and whether those were sufficiently complied with to have the Accused answer to the charges preferred against them.

¹ (CC 161/05) [2006] ZANWHC 5 (1 January 2006).

[48] For the reasons enumerated above, the Accused in my view had a case to answer to. Our courts have repeatedly held that credibility in an application for a discharge under section 174 is one of the key features that should be taken into account by the court... thus it plays 'only a very limited role'.² Its limited role was contextualised in *S v Lubaxa*³ when the court pointed out that **'its consideration does not necessarily rely on the burden of proof or the exercise of the right to silence but on the minimum weight of the evidence that warranted a prosecution in the first place that a possibility of a conviction exist'**. In this matter, I was of the view, that the State had adduced sufficient evidence on which a reasonable man may convict. Hence the Accused were called upon to provide answers in this case.⁴

The Defense Case

[49] Accused 1 is an adult male of 23 years of age. His highest standard of education is Standard 8 and having left School in the middle of Standard 9. He denied all the charges preferred against him by the State against him and testified that on the fatal night he was never at LB5 Sibisi Road and did not commit the alleged crimes. He was thus arrested by two police officers who alighted from a white motor vehicle at the bus stop near his home at Bester: KwaMashu. He testified that the police namely: Mtshali and Dubazane pointed firearms at him, ordered him to lie down, searched his bag and where after he was taken to the police station despite them having found nothing in his bag except his jacket. He was further interrogated to reveal the names of the boys that committed robberies in

² *S v Swartz* 2001 (1) SACR 334 (WLD) 335e-f quoted in Wessels J & Pillay L 'Useful Cases' ARMSA Education and Project Committee.

³ 2001 (2) SACR 703 (SCA) 707-708.

⁴ *S v Mafokate* 1998 (1) SACR 603 (T) 6122-j-613a-f; headnote on 605b-i.

the neighbourhood. He got to know that they were the police at the police station and there was no Warrant of Arrest shown to him or the Identity Cards which were indicative that they were police. He was then taken to KwaMashu E-Section and assaulted by Mtshali and Dubazane and other unknown officers. Officer Mtshali slapped him with open hands whilst his hands were cuffed at the back and officer Buthelezi fastened his hands to a car rim and hit him with his takkie on his back whilst his legs were tied to the table until a Captain, whom he could not remember rescued him from the beating. Officers Mtolo and Sticks arrived and said that they would show him if he did not want to talk. Officer Mtolo placed a glove over his head and sprayed him with a spray gun asking him to produce guns. He was unable to breathe to the extent that he urinated on himself. Officer Buthelezi hit him with a hockey stick on his stomach until another officer arrived and said that if he knew something, he would have long spoken in light of the beatings. He suffered injuries and Officer Sticks also stabbed him with an okapi knife on his left forearm before he was taken to the cells.

[50] Eventually, he with others were taken in police vehicles to look for one Sandile who he knew by sight and were brought back to the cells around 3am. He testified that they were taken to different places in KwaMashu, Inanda, Newlands and Phoenix by the police where they were paraded before the victims of robberies and these victims were told that they were the persons who robbed them. He then testified that he appeared at the ID Parade on 2/8/2015 and appeared in court on 4/8/2015 as the 3/8/2015 was a holiday. He further confirmed that at his court appearance he told the magistrate of the assault perpetrated on him by the police but was asked by the magistrate to return to the police station. As there were other

cases to be preferred against him, he returned to the police station where he also appeared in other ID Parades. He denied that he robbed the State Witnesses in this case and alleged that it was possible that Dube and Nokuthula worked with the police in identifying him because there was no one who resembled him at the ID Parade. He further testified that there were no rights explained to him. They were also fetched from the cell and found the other group already lined up for the ID Parade. He never reported the assault because the police did not allow him access to the phones and even his family knew of his arrest only when he was at Westville prison and no property was shown to link him to the crime and therefore denies his involvement in the commission of the offence.

[51] Under cross examination by Accused 2 representative he confirmed that Accused 2 was his neighbour. However, he never saw Accused often as he had left the area in 2014 and went to live in Malukazi. He only saw Accused 2 after his arrest at the police station on the 30/7/2015. In so far as Accused 3 was concerned, he met him for the first time at the police station when he arrived, approximately 18h00 on 29/7/2015. Under cross examination by the state, a number of contradictions were raised: he claimed to have been arrested at a bus stop in a public area where others were present. He testified that police picked him up as they were looking for his friend Sandile. He testified that the police had charged him in this case to teach him a lesson as he did not want to release information about Sandile. He went on to concede that in April 2015 he was living at Moweni whilst he lived at Bester, where he was guarding his cousin: Wonderboy Ngcobo's house in Moweni. In April 2015, he was sleeping at home with his girlfriend and child and this was conveyed to Officer Mtolo but not to Sgt Nene who was the Investigating Officer.

He conceded that it was his mistake that the Court was not told as well in evidence in chief where he was in April 2015. He conceded that it was his mistake that this version was not put to the state's witnesses that testified including the Investigating Officer. He further testified that he did not give the police the name of the mother of his child when the incident happened because she phoned when he was arrested and police swore at her and asked her to stop calling. He never told the Investigating Officer and it was his mistake that he did not tell the Court of his alibi in his evidence in chief. He conceded that whilst on parade at the homesteads he did not see any of the witnesses that testified for the state, in specific, Dube and Nokuthula. He suggested that Dube was lying when she said he robbed her. He also suggested that the witnesses were mistaken in identifying him and whilst he signed his warning statement that his rights had not been explained and he did so even though he had no knowledge of the document he was signing. Whilst he was not assaulted or threatened by Sgt Nene in any way, he signed out of fear of other police officers. Last but not least, he conceded that the Investigating Officer and himself had spoken nothing about this case.

[52] As a witness , he was evasive and unreliable. He tailored his evidence to suite the answers he thought this Court would accept. He raised an alibi under cross-examination which was never mentioned in his evidence in chief nor was it put to the State witnesses which raises a question in this Court's mind as to the veracity of such alibi. Whilst he could clearly recollect events pertaining to the alleged assault perpetrated on him by officers not known to State witnesses within the employ of SAPS leaves many questions in this Court's mind as to the alleged assault

including the seriousness of having been stabbed and not receiving any medical attention for such injury. Accused 1 called no further witnesses and closed his case.

[53] Accused 2 testified that he was an adult male of 24 years of age. In April 2015 he was residing at Malukazi which is close to Isipingo and is at Umlazi. He knows Accused 1 as he was his neighbour and they grew up together. He did not know Accused 3. In so far as the charges preferred against him were concerned, he knew nothing about the murder and robbery. He was aware of LB Section in KwaMashu. More specifically he testified with reference to the 27th April 2015 that he had in fact not gone to KwaMashu for the whole year of 2015 and could not remember where he was on the 27th April 2015.

[54] As far as his arrest was concerned, he could not remember the date of his arrest but it was towards the end of July. He was at his house sleeping and around 2:00am when the police kicked open the door asking for Ayo. He identified himself as Ayo and they then demanded property and guns from him. They arrested him in respect of a number of cases and not only the case he is appearing in now before this Court, but also others in other courts where he is still appearing. He told the police he knew nothing about property and they told him not to be stubborn. He was then assaulted with the police covering his face with a glove. It was one Ngcobo, known as "Sticks", that perpetrated the assault. The police then left with him and he was placed in a vehicle where many other vehicles were present. He confirmed that at this stage the police already had Accused 1 and another person, not known to him, in custody. After they left Malukazi they proceeded towards Bester. Prior to arriving at Bester, they went to KwaMashu. They proceeded from place to place and

went to different homesteads, which belonged to victims of the housebreakings. Eventually he was taken to the police station where he met Accused 3. At the police station all charges were preferred against him and he was told where and when he committed the crimes, by Detectives at the Police station.

[55] As far as the ID parade was concerned, he testified that he attended many ID Parades so he could not recall specifically which ID parades he stood in. He met the Investigating Officer after the ID Parade was held. The Investigating Officer never assaulted him.

[56] Paragraph 8 of Exhibit F was raised and he testified that it shocked him to hear the contents thereof. He would not admit to anything he knew nothing about or explain what he knew nothing about. At the time the warning statement was taken he had no attorney nor did the police give him an opportunity to get an attorney.

[57] Exhibit L (the Notice of Rights) as signed by Accused 2 was traversed. He denied that his rights were explained or that he was involved in the crime. He testified that both Dube and Celiwe were mistaken in identifying him. He further testified that he did not know Dube or Celiwe and saw them both for the first time at these court proceedings.

[58] On cross-examination by Accused 3 representative, he testified that after having been picked up in the early hours of the morning he was taken to the police cells between 4am & 6am. He was the last person to be arrested and the two others that were arrested before him were in separate vehicles. The individual arrested

before him apart from Accused 3 was one Sifiso Mhlongo who formed part of the ID Parade. He did not know him prior to this but is aware that he was appearing in other cases that are before court.

[59] Accused 3 was not known to him and he met him at the police station for the first time. Accused 3 was not appearing in any of those cases. The police searched the house they had found him in for guns, TVs and cell phones. They found none. At the ID Parade he appeared with others who were in the cells with him. He referenced to others who were already in cells prior to Accused 1, himself and Mhlongo arriving at the Police Station. Investigating Officer Nene had asked for all of them to attend the ID Parade and he was told he was arrested in the same case as Accused 1, 3 and Sifiso Mhlongo.

[60] On cross-examination by the State he testified that his home was at Bester and Malukazi was his girlfriend's place that she rented between 2014 & 2015. He was in matric in 2012 but failed. He was of the opinion that his arrest in Malukazi had been led by Accused 1 showing the Police his house as he knew the house as he visited there; they were friends and grew up together. He re-iterated that he was familiar with Accused 1 and not Sifiso and that he did not see the state witnesses before the court hearing nor had he seen them at Inanda or elsewhere prior to the court hearing. He went on to suggest that despite not knowing Dube he had no knowledge why she pointed him out as he had not seen her before the court appearance. Clearly she was speaking "great lies" in identifying him as one of the perpetrators.

[61] He admitted that he signed the warning statement taken by Sgt Nene but signed out of fear as those who had assaulted him were present when the warning statement was taken. He confirmed he never told Sgt Nene of the assaults and despite a glove being placed over his head, he suffered no injuries. He could not recall where he was on the 27th April 2015.

[62] In totality, Accused 2 was a witness with a selective memory. He could easily recall where he was when arrested but could not independently say where he was on the day of the incident. Whilst he admitted to knowing Accused 1 his stance on their friendship was contrary to what Accused 1 testified to. In fact he suggested that it was Accused 1 who led the police to him as he had visited his home in Malukazi whilst Accused 1 indicated that they had not seen each other in 2015 as Accused 2 had relocated. It is improbable that the state witnesses, Dube and Mkhonza, would be motivated to implicate Accused 2 when, on his own version, he had not known or seen them prior to these court appearances. His assertion that Dube would speak great lies against someone she had not known seems improbable to say the least.

[63] As a Witness, the impression of Accused 2 was poor in relation to the state witness that testified. His version was a simple one. He blatantly stated he could not remember where he was on the 27th April 2015 but was clear he was not at the scene of the incident. On his version, he was assaulted by the Police yet he, for no apparent reason, did not inform Sgt Nene of such assault nor did he suffer any injuries. Based on fear albeit not forced to, he signed a warning statement when his rights were not explained. It seems improbable that his rights were not explained but he signed the warning statement when not forced to.

Accused 2 called no witnesses and closed his case.

[65] Accused 3 elected to testify in his defense. He was born on the 16th December 1994 and is currently unemployed. He resides at Inanda, Newtown with his parents and siblings and is a semi-professional soccer player to earn an income. He has been playing soccer since the age of 11 and belongs to the Menziwa Tigers Club which is based in Ntuzuma. In the year 2015 he was studying Grade 12 at Nhlakanipho High School which is far from Newtown. He took transport to school and apart from living in Newtown he also resided at Ntshungwana at Inanda. Since a close friend of his had passed on he resided at Ntshungwana over the weekends and during holidays to ensure a male figure was seen at the premises of his deceased friend as the household consisted only of females. At these premises he resided in the outside building and his appearance at the premises warded off thugs from entering the premises. His fame from playing soccer also contributed to people knowing him when he stayed there. In the outside building he resided alone or with his then girlfriend.

[66] He testified that he was at Wandile's place in Ntshungwana–Area 2 when he was arrested on the 29th July 2015, which was a Wednesday at approximately 1:30pm. Dagga and tobacco were sold from Wandile's place and upon his arrest, he was there smoking dagga. He was arrested together with Sifiso Mhlongo and others he could not remember. He knew Mhlongo who also frequented Wandiles Place where he also smoked dagga. He was given no reason for his arrest and was taken to Mshebeni Inanda Police Station where he was kept for approximately two weeks.

Whilst at the Police Station and after the ID Parade was held, he saw Investigating Officer Nene but did not recall speaking to him.

[67] He testified that the police found no exhibits on him and that prior to his arrest he did not know Accused 1 or Accused 2. He could not say if Accused 1 was in one of the vehicles that came to Wandile's place where he was arrested and that he saw accused 2 for the first time at the police station.

[68] In so far as the charges preferred against him are concerned, he denied that he was at LB5 Sibisi Road on the 27th April 2015, he did not know where Sibisi Road is and in the early hours of the 27th April 2015 he had no knowledge of where he was but he was likely to have been guarding at Ntshungwana. He was not sure if the 27th April 2015 was a holiday or fell within the holidays.

[69] He testified that he saw state witness Nokuthula for the first time at court and on her version if she had been kicked by him she would have been seriously injured as he was a soccer player. He is, however not violent towards women. She was clearly mistaken when she identified him. No one at the ID parade looked like him nor were his rights explained to him. As far as he knew, Sifiso Mhlongo was still at Westville Prison.

[70] Under cross examination by the State, he testified that he was smoking dagga at Wandile's place and he was in the company of Sifiso Mhlongo, Wandile and Wandile. He was given no reason for his arrest but he suspects it was because he was smoking dagga. He was not aware why the others were arrested. His father

supervised his assistance rendered to his late friend's family but conceded that no one supervised him during the middle of the night.

[71] On the 27th April 2015 he was in the company of his ex-girlfriend who could confirm where he was but he did not tell the police of this. He was of the opinion that Nokuthula lied about him being at the premises and it was simply bad luck that she had picked him out but conceded that she positively identified him at the ID parade. According to him, it was a co-incidence that she identified him as he had not seen her before nor did he know her. She was clearly mistaken in identifying him and has no idea why she would lie. Albeit that the visibility was good she clearly saw someone else.

[72] He earned R 300.00 per week playing soccer and all he told Investigating Officer Nene was that he did not commit the crime as Sgt Nene did not tell him where the crime had happened. He was never charged for smoking dagga.

[73] As a witness, Accused 3 was soft in demeanor. Evaluating his evidence in the light of the other witnesses who testified before this court, what is clear is that he was tailoring a version to suit his needs. He contradicted himself in the following respects:-

- (a) In his evidence in chief he was clear that he had no knowledge of where he was on the 27th April 2015 yet under cross examination by the State he puts forth an alibi that he was with his ex-girlfriend that could confirm where he was;

- (b) In his evidence in chief he testified that he was arrested with Sifiso Mhlongo and others he did not know yet under cross examination he was with Mhlongo, Wandile and Wandile;
- (c) Further, in raising an alibi he did not tell the police and it appears he did not even tell his Defense Counsel as it was not raised prior to his testimony nor was this ever posed to state witnesses to exclude the possibility that he was not at the scene of the incident;

[74] In contrast to the State Witness Nokuthula based on the quality and independent recollection of his identification by the said Nokuthula, it was she who identified him in less than 50 seconds at the ID Parade some three months after the incident. It seems improbable that Accused 3, who was on his own version not known to her, would arbitrarily pick him out at an ID Parade because no one else in the ID Parade had the same hairstyle or complexion. She had a clear opportunity to observe the events and identified Accused 3 as the person who assaulted her. He was facing her at the time of the assault so she had ample opportunity to look at his face. She had no motive to implicate him as she did not know him, on his own version, and the only objective inference based on the facts support the version that Accused 3 was in fact at the scene of the incident on the 27th April 2015 amongst other perpetrators.

[75] Whilst it is accepted that Accused 3 has no duty to put forth an alibi, under these serious circumstances it is questionable why he would not put forth his alibi to

his own Defense Counsel who could have put his version/defense to state witnesses to rebut the probability that he was at the scene of the incident. Accused 3 did not call further witnesses and closed his case.

Analysis

[76] The incident is ascribed to a spree of illegal activities, which resulted in not only the unauthorized entry, unlawful access into people's homes and robbery with aggravating circumstances but also the death of Mr Xolani Mnguni. The incident came in the wake of the spate of violent crimes that have reached alarming proportions in South Africa.⁵ Thus, it is not the intention of this judgment to whine about the levels of crime in South Africa but to focus on the credibility of the evidence presented before this Court in the determination of the guilt of the Accused. The core content, which is the subject matter of this enquiry, is the question that arises whether the evidence placed before it is acceptable as 'truth' beyond reasonable doubt as required by the standards of adjudication in criminal trials. This is the high standard of proof which had long developed even before the 1996 Constitution which envisages a transformed system of criminal justice.⁶ Considering South Africa's history, particularly the criminal justice which was characterized by a hallmark of a tyrannical system of law,⁷ it becomes imperative that it transforms itself within the framework of the principles of the new dispensation. This transformation

⁵ OSAC 'South Africa 2015 Crime and Safety Report' 2 February 2015 Product of the Research & Information Support Center (RISC). Available from <file:///C:/Users/Ntlama/Downloads/South%20Africa%202015%20Crime%20and%20Safety%20Report.pdf> (accessed on 10 July 2017).

⁶ See section 35 of the Constitution.

⁷ See Mhlantla J and Plasket J in *Tanatu v The State* ECJ NO: 036/2004 at para 37.

is essential with regard to the way it conduct itself, the jurisprudence it produces and the effect of such restructuring for social change.

[77] The centrality of this matter borders on the credibility of the evidence, mainly, of the three witnesses: Ms Ntombifikile Dube (Dube), Ms Nokuthula Mkhonza (Nokuthula) and Ms Celiwe Mkhonza (Celiwe) who were the subject of this violent behavior on the night in question. Nokuthula's evidence became a more contentious, thorny and sensitive issue as she was the single witness that identified Accused 3 at the ID parade. In turn, Accused 1 other than barely denying his involvement in the commission of the crimes placed before this Court that he was brutally assaulted by the afore-mentioned police officers to the extent of not getting assistance from the magistrate when he raised the matter with him/her. In addition, the other two Accused (2&3) equally denied their link to the case citing a number of reasons as also mentioned above. The evidence of the police officers starting from the Investigating Officer (Sergeant Nene), ID Conductor (Sergeant Ndlovu), Assistants at the ID (Sergeant Ndlela, Sergeant Mkhize and Sergeant Ngcobo) and the Photographer (Constable Mpanza) were also the subject of heavy cross-examination regarding the way in which this matter was handled.

[78] Accordingly, the significance of the credibility of the evidence placed before this Court cannot be overemphasized. The court is required to consider the evidence presented before it holistically and not adopt a 'slaughter-house' approach in the determination of the guilt of the accused.⁸ Van Zyl J affirmed this principle in

⁸ See Bosielo JJA in A S v S (349/10) [2011] ZASCA 52 (30 March 2011).

*Ganda v The State*⁹ when he held that **'a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt [and] this does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof'**.¹⁰

[79] It is clear that the court is required to tread carefully in assessing the evidence in order to sift the case from what is reliable from what is untrustworthy in ensuring that it reaches a just outcome that will fit the crime that has been committed. The contention was similarly expressed by Theron AJA (as she then was) when she held in *Sithole v The State*¹¹ that **'it is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies and other defects in the evidence and, in the end, to decide whether on the totality of the evidence the state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility'**.¹² The same principle applies equally to the evidence tendered by the Accused which requires the consideration of the evidence in its entirety because the conviction stands only if there are no reasonable doubts about the evidence that implicates him in the commission of the crime. This means as pointed out by Heher AJA in *S v Chabalala*¹³ that the Court has to be aware of the **'inherent probabilities that point towards the guilt of the accused as opposed to those that are indicative of his innocence, taking into account the strengths and weaknesses in order to decide**

⁹ Appeal No: A182/2011.

¹⁰ *Ganda* at para 4.

¹¹ [2006] SCA 126 (RSA) citing with approval *S v Sauls* 1981 (3) SA 172 (A) at 180E-F.

¹² *Sithole* at para 7.

¹³ 2003 (1) SACR 134 (SCA).

whether the balance weighs heavily in favour of the State so as to exclude any reasonable doubt about the accused guilt'.¹⁴

[80] Bearing this approach in mind, this case presents an opportunity to exercise caution in the evaluation of the evidence before this Court. This is borne by the fact that this Court is alive to the possibility of the vulnerability of the witnesses that find themselves in circumstances of this nature that could lead to an honest mistake being made in the presentation of the evidence before the Court. The situation is more intense when a single witness, particularly when the evidence relied upon is drawn from an ID Parade, as is the case in this matter with regard to Accused 3. This is prompted by what had long been laid in *S v Mthethwa*¹⁵ as Holmes JA approached the caution principle as follows:

because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: The reliability of his observation must also be tested. This depends on various factors, such as the lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not

¹⁴ *Chabalala* at para 15.

¹⁵ 1972 (3) 766 (A) at 768(A).

individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities...¹⁶

[81] In the present matter, in view of the totality of the argument of the Defense in respect of all the Accused, taking into account that they were represented by different legal representatives, the Counsels argued very strongly and attempted to persuade this Court that the State's evidence was of such a poor quality and no reasonable court could convict on such evidence. They cited a numbers of reasons which include (i) the lack of corroboration between the witnesses, (ii) the poor investigation and of the way in which the ID was conducted, (iii) lack of compliance with the 18 Rules of Procedure as envisaged section 37 of the CPA (iv) the court should be cautious in evaluating the truthfulness of a single witness as prescribed by section 208 of the CPA, particularly in respect of Accused 3 who was identified only by Nokuthula (v) there is therefore little evidence against Accused 3 because there is no onus on him to prove his innocence and the case against him was one of mistaken identity (vi) no evidence of ballistic testing was presented (vii) none of the arresting officers were called to testify because there was a coordinated effort to effect arrest (viii) the police adopted a 'flip-flop' approach in the conducting of the ID in order to get the Accused to court before the prescribed limit of 48 hours (ix) there was also another suspect Mr Sifiso Mhlongo who was arrested with Accused 3 at the dagga place who did not appear before this Court and last not least (x) Sergeant Nene did not know the suspects.

[82] Accordingly, I am of the view that there are indications in the evidence that give credence to the witnesses' version of the events on the night in question, the

¹⁶ *Mthethwa* at 768(A).

legitimacy of the ID Parade and the spell of a doubt on the Accused bare denial of the commission of the offence. First, it was not in dispute that the Accused were already detained in respect of other crimes that are not linked to this matter. It was therefore only after Sergeant Nene received a tip-off that there are suspects at Inanda Police Station that might be linked to the LB5 section crime. Hence the quest for the holding of the ID Parade which was held on 2/8/2015 when the Accused were already arrested on 29 July 2015. Secondly, the Accused were officially identified for the first time at the ID Parade by the witnesses: Dube and Nokuthula except for Celiwe who could not attend it because of work commitments. They were formally charged on 2/8/2015 following the outcome of being pointed out at the ID Parade. Since the Accused were identified at the ID Parade and charged only after they were pointed out, it is important that I briefly look at the ID as the investigative method in the development of the adjudicative principles of criminal law.

[83] It is not the purpose of this judgment to go at length about the purpose of the ID Parade. Thus, it is befitting to note that there are 18 Rules of Procedure that have been developed in accordance with section 37(1)(b) of the CPA that provides guidance on how the ID Parade should be conducted. It is also not my intention to provide an analysis of each of the Rule other than highlighting that they are meant to ensure that they are observed properly to the effect that the identification of an accused acquires a reliability it may not otherwise have received.¹⁷ They are meant to advance the evidential cogency of the ID Parade. The importance of its evidence relies on the establishment on whether it was conducted fairly in accordance with the

¹⁷ See Mhlantla J and Plasket J in *Tanatu v The State* ECJ NO: 036/2004.

rules of practice.¹⁸ In this way, the Rules gives effect to the ID Parade as an investigative procedure that enhances the quality of the evidence to be presented before the Court. It is deduced from the Rules that the ID Parade should be characterized by elements of fairness, accuracy, objectiveness in the witness identification of the accused and adherence by police officers in upholding the principle of fairness. These factors provides a foresight to the Court to assess the quality of the investigation as it provides a far more persuasive evidence than dock-identification. In general, 'fairness' without engaging in its deep-rooted analysis, entails the enhancement of compliance with the rules and a further advancement to the prescripts of the new constitutional dispensation.

[84] In this case, the Defense argued very strongly against the lack of compliance with the Rules of the ID Parade. I am persuaded by my learned colleagues Du Toit *et al* (2006: 7) as quoted with approval by Cloete J (as he then was) in *S v Mphala & Another*¹⁹ who held that an accused does not have the right, whether or not he has received legal representation not to participate in an ID Parade held in accordance with the prescribed rules of section 37(1)(b) of the CPA and to require an Accused to participate in an ID Parade is not a violation of the Accused's constitutional rights. As substantiated, the Rules are not the creators of rights but a framework that is designed to ensure that fairness is upheld in the pointing out process. Lack of compliance with any of them is not fatal and would not render the evidence inadmissible. As simply put by Borchers J in *S v Monyane and Others*:²⁰

¹⁸ *Tanatu* at para 16.

¹⁹ 1998 (1) SACR 654 (W).

²⁰ 2001 (1) SA 115 (T).

‘Police Rules’ are, however, merely guidelines to the police on the procedures to be followed in the holding of the identification parades. The rules do not creates rights and as in the case of non-observance of so-called ‘Judges Rules’ relating to confessions, non-compliance with one or another of them will not necessarily result in a ruling that the parade is inadmissible’.²¹

[87] Accordingly, I am satisfied that the ID Parade was not riddled with material factors that fell foul of the prescripts of the regulatory framework as sanctioned by section 37(1)(b) of the CPA. This means that I could find no flagrant disregard of the constitutional rights of the Accused. Sergeant Nene (Investigating Officer: IO) in collaboration with Sergeant Ndlovu (ID Conductor) and the other Officers that were in charge of the ID Parade dealt properly with the pointing out procedure within the framework of ‘fairness’ which is the underlying principle in this regard. The contention is prompted by the fact that as presented before this Court, its purpose was communicated to all the 3 Accused in the language that they understood as envisaged in section 35(3)(k) of the 1996 Constitution. I also found no reason that they did not understand the implications of the pointing out. I could also not find the set-up prejudicial to either of them because from the fifteen participants that partook in the ID Parade I do not have a reason to believe that the witnesses could falsely implicate the three Accused in the commission of the crimes. They were further given an opportunity to change the position numbers with Accused 1 changing from his initial number 9 position to number 12 where the witness: Nokuthula again identified him without a measure of doubt presented before this Court that she could have colluded with Dube who was the first witness to do the pointing out. The pointing out itself, which lasted less than two minutes, with the first witness: Dube

²¹ *Monyane* at 132F.

taking one minute and Nokuthula taking 50 seconds is indicative of the reliable observation that they made when they were subject to this ordeal. Of special significance is the fact that there was evidence relating to the Accused clothing, which was supplemented by their special features relating to physical and facial attributes that they were identified with. All the evidential documents relating to the way in which the ID Parade was conducted were produced in this Court and marked as Exhibits.

[88] Accordingly, the evidence of the three witnesses, notwithstanding that Celiwe did not partake at the ID Parade proved that it was not tainted by material irregularities as the Defense seemed to suggest and reliance can safely be placed on the credibility of the identifications, which were supplemented by the dock-identification of the Accused in this Court. In essence, I am satisfied by the way in which the ID Parade was conducted and consequently of the opinion that it was done within the parameters of 'fairness' as a basic principle that underlie the Rules of Procedure.

[89] My view regarding the credibility of the ID Parade is advanced by the pointing out itself. The witnesses: Dube and Nokuthula were forthright in their individual turns in pointing out the Accused which took less than two minutes in total. There were subtle contradictions leading to the improbability of the Accused versions that they were not at the scene of the incident. There was certainty about their presence at the scene of the incident as the witnesses provided independent recollection of the events and their ability to recall was clear, precise and free from bias. They had

never met each other before the day of the incident, which supports the probability of the witness's version that the Accused were present at the scene of the incident.

[90] I am therefore dissuaded by the Defense argument that there was no corroboration between the witnesses that tainted the credibility of the ID process. I wish to emphasise that people in the position of the witnesses observe things differently in their recount of what happened on the day in question. It is also important to acknowledge the circumstances under which the incident emanated. As presented before this court, there was a commotion, which made it difficult for each of the witnesses to focus on what was happening to the other at the time of the incident. In my view, I say without hesitation that the identified contradictions regarding the times and whether they were escorted or not at the ID Parade were not material factors that could blur their version as they testified before this Court regarding the events of the night in question. A moving scenario confronted these witnesses but they still managed to recollect the way in which the events unfolded almost ninety days of the incident having happened. The recollection was endorsed as noted above, by the pointing out in less than two minutes. In this context, I found no reason that the witnesses harboured any hatred against the Accused they met for the first time on that evening.

[91] The question of a mistaken identity in respect of Accused 3 because he was identified by a single witness: Nokuthula as the Defense argued warrants an analysis. I am well aware that a sloppy reliance on the evidence of a single witness would render the trial of the Accused unfair. Thus, the evidence of a single witness

as prescribed by section 208 of the CPA²² has to be treated with utmost caution. In this instance, as simply put by the Court in *S v Sauls and Others*²³ that **‘there is no rule of ‘thumb test’ or ‘formula’ to apply when it comes to the consideration of the credibility of a single witness. The question is what weight, if any, must be given to the evidence of a single witness’.**²⁴ Notwithstanding this limitation, the courts have repeatedly produced jurisprudence which give effect to the reliability of the evidence of a single witness where he or she had ample opportunity to make a proper observation of the perpetrator which has to be taken into consideration by the court. In this case, the Accused was identified by his light complexion and hairstyle and Nokuthula remained unshaken regarding the identification of Accused 3. She did not only identify him but he was the first one she identified as the person that kicked her in less than 50 seconds. I therefore, do not have a reason to believe that Nokuthula was not honest and inconsistent in her evidence despite the length of her cross-examination by the Defense Counsels. There was no reason of her to falsely implicate an Accused whom she saw for the first time on the night of the incident and again at the ID Parade. This Court places great reliance on her evidence as a credible witness in the sense that she had an ample opportunity in the circumstances she was confronted with to carry out such observation as would be reasonably required in affirming an accurate identification. The Court is therefore satisfied that the identification was not merely a *bona fide* and honest process but was coupled with the consideration of various factors that were observed during the night of the

²² The section provides that ‘an accused may be convicted of any offence on the single evidence of any competent witness’.

²³ 1981 (3) SA 172 (A) 180H quoted in *Sithole* at para 9.

²⁴ *Sauls* at 180H. See also *S v Shilakwe* 2012 (1) SACR 16 (SCA) at 20 para 11 in *Ganda* (note 3) above.

incident with particular reference to Accused 3 and all other events that emanated on the night in question as corroborated by Celiwe.²⁵

[92] Another contentious issue that did not come up during the Defense's evidence in chief was the Accused alibi's on the night in question. This issue came out in a piecemeal fashion during cross-examination about their whereabouts. It bears repetition that the courts had long enunciated the principle regarding the consideration of an alibi as a defense. The courts had long said that the evidence must be considered in its totality and the Court's impression of the witnesses without limiting to the evidence as a sufficient basis to reject alibi as a defense.²⁶ It is worth to re-emphasise herein that the totality of the evidence captures the content of the proof beyond reasonable doubt as to the guilt of the accused. It is therefore the State that has to prove the untruthfulness of the defense of alibi because the Accused does not have to prove his alibi.

[93] The application of this principle was well captured by Moseneke J as he then was, in *Thebus & Another v The State*²⁷ that in '**considering the totality of the evidence an alibi is one of the factors to be taken into account and its stand alone as a defense does not justify an inference of guilt**'.²⁸ Of particular importance which is of direct relevance to this case is the late disclosure of the alibi as presented before this Court wherein the learned Judge held that the non-timeous disclosure of an alibi is

²⁵ See the dissenting judgement by Bosielo JA and Seriti JA in *Magadla v The State* (80/2011) [2011] ZASCA 195 at para 52. The Judges identified various factors that concretize the evidence of a single witness which include but not limited to period of observation, proximity of the persons, visibility or state of the light, angle of observation prior opportunity of observation, absence of presence of noticeable physical or facial features, marks or peculiarities or clothing or other articles such as glasses and all other related factors connected to the person observed.

²⁶ *R v Hlongwane* 1959 (3) SA 337 (A) at 341A.

²⁷ 2003 (2) SACR 319 (CC).

²⁸ *Thebus* at para 68.

not a neutral factor and can be taken into account in the evaluation of the evidence as whole.²⁹ Considering the evidence in totality, it is clear that the Accused manufactured their alibi to suite their circumstances as and when question were posed to them by the State under cross-examination.

[94] I turn now to address another aspect which was not substantially argued in this Court other than its framing in the indictment and an indicative argument by the Defense for Accused 3 which was rebutted by the State: the question of the common purpose in relation to robbery with aggravating circumstances with the resultant murder of the deceased (Mr Xolani Mnguni). I do not wish to regurgitate the principles as already developed by the courts regarding its application other than acknowledging that it is trite law that the presence of the person at the crime scene does not necessarily mean that he/she acted in concert with the other accused.³⁰ In this case, the entering of the deceased and the witness's residence at the unholy hours of or at about 00h30 on the 27 April 2015 creates a reasonable suspicion that the Accused acted in concert with each other and others. It is common cause that the death of the deceased was caused by one of the perpetrators whom the Accused associated with. Notwithstanding the fact that the witnesses could not identify the one who shot the fatal shot that killed the deceased, evidence was placed before this Court that the witnesses were robbed of items by the three identified Accused who also assaulted them. The three Accused, by the mere fact that they engaged in this house robbery would have reconciled themselves with the resultant consequence that one of their group in brandishing a firearm would have used that firearm either to

²⁹ *Thebus* at para 68.

³⁰ See the detailed analysis in *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706B which cited with approval *S v Safatsa and Others* 1988 (1) SA 868 (A).

overcome any resistance from the victims alternatively make good their getaway, which could have resulted in the death of someone at the scene of the crime.

(95) It is therefore accepted by this Court that they were all part of the same group that desired to achieve their common purpose. The reasons for this conclusion is borne out by the fact that Accused 1 was identified by both Dube and Nokuthula. Accused 1 demanded the cellphone from Dube and she could clearly see him because he was standing next to her. Dube further alluded to the fact that there was sufficient light on that night which made her see him clearly as she was standing next to the window. She also identified Accused 2 who took the laptop and said the deceased must be shot on the foot or leg. Nokuthula also identified Accused 1 as the one who was in front when they forced their entry into the house, took the TV and carried it away. She also identified Accused 3 as the one that assaulted her. It would be a travesty of justice if the conviction was to be solely based on the identification of the particular Accused who fired the fatal shot. The Courts have repeatedly held the determination of liability cannot be solely based on principles of causation because of the absence of the link between each member's act and the resultant death. If the *condictio sine qua non test* could be applied in isolation of the doctrine of common purpose it would be an insurmountable barrier in finding anyone guilty of the offence in question.³¹

[96] It is clear that in the context of this case in line with the principle that had long been laid down by Botha JA in *Mgedezi* that the linkage of all the 3 Accused to the actions of each other is not based on a prior conspiracy to commit the crimes but is inferred

³¹ *S v Bengu* 1965 (1) SA 298 (N).

from the conduct of each by associating themselves in such an action or behaviour.³² This finding was not taken in isolation of other factors as presented before this Court that put the all the Accused at the crime scene. In essence, at the risk of repeating myself, the facts in this case the Accused associated when the gun was used with Accused 2 calling for the deceased to be shot on the foot or leg and Accused 3 found himself associating with an individual who produced a gun at Nokuthula and Celiwe place.

[97] Accordingly, I am of the view that the State has satisfied the requirements in proving the guilt of all the three Accused beyond a reasonable doubt. I therefore, find as follows:

- Accused 1 is found guilty of robbery with aggravating circumstances and on the murder.
- Accused 2 is found guilty of robbery with aggravating circumstances and on the murder.
- Accused 3 is found guilty of robbery with aggravating circumstances and on the murder.

N NTLAMA

ACTING JUDGE OF THE HIGH COURT

Appearances:

³² See *Mgedezi* (note 30) above at 705l.

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Judgment delivered on: 19 July 2017