

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

Case No. CC10/2017

In the matter between:

THE STATE

and

PHIWOKUHLE MSUTHU

Accused No. 1

THANDISIZWE NTUMBUKANA

Accused No. 2

WANELE NDLEBE

Accused No. 3

MCEBISI POYO

Accused No. 4

LUNDI GUMENGE

Accused No. 5

WONKE NDLEBE

Accused No. 6

JUDGMENT

JOLWANA J

Introduction.

[1] The accused appeared in this Court on numerous charges of aggravated robberies, murders, attempted murders, unlawful possession of firearms and ammunition. These offences were all committed in Mthatha, Lusikisiki, Ngqeleni and Tsolo within the O.R. Tambo District Municipality. All the accused who were all legally represented pleaded not guilty to all the charges. All of them did not disclose the basis of their defence. When the accused appeared in this Court, accused no.4 had already reportedly passed on. At the close of the case for the prosecution, all the accused applied to be discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA)¹.

[2] In a judgment delivered on 17 September 2021, accused No.2 was discharged on all the charges save for the alternative count of conspiracy to commit the Lusikisiki robbery on 14 September 2015. However, he passed on before the conclusion of the submissions on the merits of the case. The application to be discharged in terms of section 174 of the CPA by both accused both no.3 and 6 on all the charges preferred against them was granted. Accused no.1 was charged with all the 17 charges listed in the indictment. He applied for a discharge only in respect of counts 3, 4, 5, 6, 8, 9,10, 11, 16 and 17. He did not apply to be discharged in respect of counts 1, 2, 7, 12 and 13. His application in respect of counts 3, 4, 5, 6, 8, 9, 10 and 11 was granted. However, in respect of counts 16 and 17 which are in respect of the Lusikisiki robbery committed on 14 September 2015, his application was refused. Accused no. 5 applied to be discharged from prosecution only in respect of counts 12, 13, 14, 15, 16 and 17. He did not apply to be so discharged in respect of counts 7, 8, 9, 10 and 11. His application to be discharged in respect of counts 12, 13, 14, 15, 16 and 17 was refused.

[3] This judgment is therefore concerned with accused no.1 and 5 who are the only remaining accused persons, the others having died or having been discharged in

¹ Section 174 provides that: If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

terms of section 174 of the CPA. The remaining charges are all in respect of the armed robberies in Lusikisiki on 14 September 2015, at St Barnabas Hospital in Ngqeleni on 2 November 2015 and Tsolo on the N2 on 4 November 2015. The charges that accused no.1 still faces are counts 1, 2, 7, 12, 13, 14, 15, 16 and 17. Accused no.5 is faced with counts 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17. I will henceforth refer to counts 1 and 2 as the Lusikisiki robbery, counts 7, 8, 9, 10 and 11 as the Ngqeleni robbery and counts 12, 13, 14, 15, 16 and 17 as the Tsolo robbery respectively. The principal question before this Court is whether the State has proved beyond reasonable doubt, the two accused's involvement in these aggravated robberies, and whether they are liable to be convicted on one, some or all these charges. The trite legal position in this regard which has remained unshaken for sometime was aptly articulated more than two and a half decades ago by Nugent J in *Van der Meyden*².

The evidence of the State against accused no.1.

[4] The evidence of the State against accused no.1 consists mainly of his confession statement made to brigadier Manyana and the evidence of a section 204 witness, Anele Gqweta (Gqweta). However, the evidence of the State does not start and end with his statement which I ruled admissible and the evidence of Gqweta. There are other witnesses that the State called as well as circumstantial evidence placed before court in an effort to establish the guilt of the accused. The evidence of State witnesses herein is not necessarily presented in the order in which they were called or in any particular sequence.

[5] The evidence of warrant officer Carstens was in connection with the recovery of firearms in Elsies River, Cape Town where some of the accused who are now not before court were arrested on 13 November 2015. He was employed by the South African Police Service and stationed at the Local Criminal Record Centre (LCRC) in Bellville and had attended to the Elsies River crime scene and took photographs and compiled a photo album. In that crime scene he took photographs of an R4 rifle with no serial number which had 27 cartridges, a .45 Norinco pistol also with no serial

² S v Van der Meyden 1999 (1) SACR 447 at 448 h and 450 a-b.

number, one magazine with six cartridges, a Taurus 9mm pistol with no serial number. It had one magazine with 16 cartridges, a Beretta 9mm pistol with no serial number. It had one magazine with 16 cartridges. In that crime scene, accused no.2 and accused no.6 were arrested and a Volkswagen Golf vehicle. I understand that, the charges relating to the unlawful possession of these firearms were dealt with or are being dealt with in Cape Town.

[6] The evidence of Mrs Rwetshe-Jama was in respect of count 15. She testified that on 4 November 2015 in the afternoon at about 17:00 she and her husband left Mthatha going to Kokstad to fetch their son. They drove past the Tsolo junction on the N2. They were driving a Mercedes Benz ML63. As they approached the Tsitsa Bridge about 10 kilometers or so to Qumbu she observed that it was chaotic on the road ahead as if there was a car accident and the vehicles were not moving. A man carrying a torch knocked on the window on the driver's side. This man had covered his face and had a panama hat on his head. The driver's window had been opened by her husband who was driving. This man reached for the ignition and took the key. She realised that on her side there was another man who was carrying a firearm. The man who reached for the ignition and took the keys boarded the vehicle after her husband had alighted with her hands raised. The man on his side waited for her to collect her items like the charger, the cellphone and her hand bag. She then alighted from the vehicle. Another man ordered them to lie down on the road. Their vehicle left with these men leaving them lying down there. Before the vehicle left she saw other men emerging and boarding the vehicle and four men took the back seat while the other two were in the front. The vehicle turned and drove towards the Mthatha direction. They later got a hike back to Mthatha where they reported the incident at Madeira Police Station. They used an iphone to locate the movement of the vehicle and they could locate it stationary somewhere near Mthatha. They ultimately found it with the ignition key having been left in the vehicle.

[7] Sergeant Mark Cornelius testified that in November 2015 he worked for the SAPS. He was attached to the Canine Unit as a dog handler. He was based in Pinelands, Cape Town. He was on duty on 13 November 2015 with constable Clint Africa. They were the ones who chased the Volkswagen Golf vehicle in connection with the Elsie's River crime scene together with their other colleagues. He arrested

accused no.3. Sergeant Bailey testified that he was part of the team that dealt with the Elsie's River incident on 13 November 2015 and he recovered a Taurus pistol 9mm firearm from accused no.3. Constable Clint Africa also testified about that incident. He described the Volkswagen Golf vehicle as a Golf 6 which was white in colour and he arrested accused no.2 during that incident in a garage of a certain house and recovered the Taurus 9mm pistol firearm from him. The state called sergeant Qubilanga, also a member of the SAPS based in Cape Town. He was part of the team that was called to the Elsie's River incident and he recovered a 9mm Norinco firearm.

[8] Sergeant George was also called. He testified that he was a Canine Unit member and also participated in dealing with the Elsie's River incident on 13 November 2015 and recovered an R4 rifle in the VW Golf 6 vehicle. Warrant officer Van Wyk, a member of the National Intervention Unit (NIU) testified that he and his colleagues received information on 31 January 2016 that suspects that were wanted by the Directorate for Priority Crime Investigation (DPCI) in the Eastern Cape would be in Khayelitsha, Cape Town. They went there at about 21:40 to a house at Ilitha Park. They entered the house, and found three black males and one female. They introduced themselves and explained their presence there. He approached accused no.1 who had a sling bag on him. He searched him and took the sling bag which he opened in front of accused no.1. He found a 9mm silver pistol with its serial number filed off. He asked accused no.1 for a licence of this firearm which he, out of his own volition, said it was his firearm. However, he could not produce a licence for it. He arrested him and explained his constitutional rights to him. Members of the DPCI identified accused no.1 as a wanted suspect in connection with a Tsolo robbery. The DPCI members who were there were warrant officer Qokoyi and captain Maqubela. They searched the rest of the premises after which they went to Harare Police Station where he again read the rights of the accused now reading them from the SAP14A notice of rights. Thereafter he handed accused no.1 to the DPCI members. Warrant officer Van Wyk produced the firearm that he recovered from accused no.1 and testified about it. He showed that its serial number was erased in at least 5 areas. He testified that he handed both the firearm and accused no.1 to warrant officer Qokoyi and captain Maqubela.

[9] Under cross-examination warrant officer Van Wyk testified that he read accused no.1 constitutional rights from a pocket book when he arrested him at that house. He read him his rights again in the SAP14A register at Harare Police Station. However, at that stage there was no SAP14A document that he gave to accused no.1. He just read his rights in an SAP14A register that no longer had any other blank pages as the logistics stores were closed at the time. He detained accused no.1 at about 12:00 midnight. He testified that when he arrested and detained accused no.1, it was in connection with the firearm that was recovered in his possession. Thereafter he handed him over, together with the firearm to warrant officer Qokoyi who was investigating the Tsolo robbery. He testified that the sling bag was hanging on the accused who was seated on a couch. He personally removed the sling bag from accused no.1, opened it in front of him and found the firearm as well as a wallet, drivers licence, his identity document, some money and bank cards. He denied that accused no.1 was subjected to physical abuse during his arrest. The firearm had a magazine with 12 rounds of ammunition.

[10] The next State witness was Simon Mathebe. His evidence was that in February 2016 he was a branch manager of Fidelity Security Services (Fidelity) in Mthatha where he managed the daily activities of cash in transit operations. He testified that the company owns several firearms like 9mm pistol, shotguns and rifles. All their firearms have an identification chip embedded in each firearm. The chips assist in their weekly stock-taking. On 29 February 2016 at about 11:00 he received a call from warrant officer Mdepa from the Organised Crime Unit (OCU). He told him that they had arrested a certain suspect in Khayelitsha, Cape Town and recovered a firearm from the said suspect. Warrant officer Mdepa wanted him to come and check if the said firearm was not one of Fidelity's firearms. He took their scanner and went to the OCU offices and scanned it as its serial number had been filed off. The scanner confirmed that the said firearm was one of Fidelity's firearms. Mr Mathebe explained that when a firearm is implanted with a chip, the scanner will pick up the chip number. The chip number in respect of this specific firearm corresponded with the serial number of their firearm which was 3[...]. He also picked up that the firearm had been robbed in a cash in transit robbery in Lusikisiki which took place on 14 September 2015. That firearm was allocated to Fikile Mphumelo and it was a 9mm Arcus pistol. It was silver with a black butt and its serial number

was filed off. The firearm which was previously exhibited in court was shown to Mr Mathebe and he confirmed that it was the firearm that warrant officer Mdepa showed him on 29 February 2016. He further confirmed that Mphumelo was on duty on the R61 to Flagstaff route on 14 September 2015 in which one of their vehicles was robbed in Lisikisiki on that day.

[11] The State called captain Maqubela. He testified that in 2016 he was a warrant officer in the SAPS and was working under the OCU in Mthatha. His sub-unit was the serious and violent crimes unit which investigated crimes such as armed robberies and murders. He was part of the team of detectives that was tasked with investigating all these robberies. His evidence was that on 31 January 2016 he was in Cape Town together with warrant officers Qokoyi and Mancoba. The lead investigator was warrant officer Qokoyi who passed on in 2017 in a shooting incident. They had received information that some of the suspects they were looking for were in Cape Town. They proceeded to Cape Town and linked up with officers from the OCU in Cape town and members attached to the NIU. Based on the information they had, they went to Ilitha Park, Khayalitsha Township in Cape Town together with members of the NIU from Cape Town. They were there to arrest accused no.1. The time was about 21:00 to 22:00 at night when they went there. Constables Van Wyk and Nobanda from the NIU entered the house first and found accused no.1 present with other people. Constable Van Wyk searched him and found a firearm in a sling bag that was hanging on his body and arrested him. The firearm was a 9mm pistol which was silver in colour with a black butt. Its serial number was erased. The following day, they drove with accused no.1 and 5 who had also been arrested to Mthatha and took the said firearm with them.

[12] Mr Keeling testified that in November 2015 he was employed by Fidelity. His job included going to crime scenes where they would go through crime scenes, downloading video footages and circulating firearms, if firearms were stolen. He worked closely with various police stations in the Western Cape. On 19 November 2015 he was called by sergeant September to go to Elsie's River SAPS where four firearms had been recovered. On arrival there he was taken to where firearms recovered from crime scenes were kept. He immediately noticed two firearms that were normally carried by Fidelity personnel. One of those firearms was an LM5 rifle

and the second one was an Arcus 9mm pistol. Every Fidelity firearm nationally has an individual chip embedded in it. The chips are used as a stock count tool. Each chip has a unique number linked to Fidelity's Firearm Management System (FAM). All the details of all the firearms are kept through that system. They have scanners that are used to scan firearms and identify them. Through the FAM, they are able to tell which firearm is missing or not accounted for. When a firearm is scanned, the chip will reveal certain digits which are entered on the FAM. The FAM system will give details of the type of the firearm, its licence, to which branch it belongs and to whom it was booked out.

[13] He had taken a Fidelity scanner with him when he went to Elsie's River Police Station. He scanned the LM5 rifle and the scanner picked up a serial number from the embedded chip. The FAM serial number for the LM5 rifle was 7[...]. He took the said serial number and went back to his office where he entered it into the FAM system. The system indicated that the said serial number belonged to the LM5 rifle he had scanned. The system indicated that that firearm was robbed in 2015 and it reflected the serial number of that particular firearm, the case number under which it was reported robbed and the police area. The system reflected that it was robbed from Fidelity guards on 14 September 2015 at about 15:30 on the R61 road between Lusikisiki and Port St Johns. Its serial number which had been erased was G[...].

[14] In respect of the 9mm Arcus pistol, he found that its serial number had also been erased. He used a scanner which revealed its FAM chip number. Similarly, he took the details of its chip number and went back to his offices where he entered it on the FAM system. The system revealed that it was robbed during an attempted cash in transit robbery from Fidelity guards where one of them died. Its chip serial number was 7[...]. When he entered the chip serial number in the FAM system, it revealed that the serial number of that firearm was 3[...]. It revealed that it was stolen during an attempted cash in transit robbery on 4 November 2015 during the Tsolo robbery where one Fidelity security guard was shot and killed and two others were wounded.

[15] The State called Mpumezi Mlenga. His evidence was that during November 2015 he was working for Fidelity. His duties were to collect money from clients like

banks and to load the auto teller machines (ATM) with cash in Lusikisiki. On 2 November 2015 he was on duty. His duties on that day were to take money in a cash vehicle to Nedbank which he was going to load the into a Nedbank ATM. He was with Mr Vapi who was the driver. They finished their duties in Lusikisiki after six. They were using a bakkie branded as Fidelity Cash Solutions. On their way from Lusikisiki to Mthatha and when they were at Ntlaza they had to take a detour because the road was under construction. The detour took them to a hillock and the road went past Ntlaza Hospital. On top of the hillock he noticed a VW Golf 7 which had no registration plate. It had its hazards on and was being driven slowly in front of their vehicle. He then heard gunshot sounds from behind their vehicle. When he looked in the rear view mirror he saw a Toyota Fortuner vehicle behind their vehicle. He noticed a man in that vehicle shooting the tyres of his vehicle with a rifle. He heard his driver groaning with pains. He saw other people on the right hand side of the hillock also shooting. He saw four men alighting from the Golf 7 vehicle and shooting on the wind screen of their vehicle with rifles. He told the driver to drive on as they were being shot from the front and back.

[16] They drove down the hillock approaching the St Barnabas Hospital entrance. Their vehicle was losing power as they were approaching the hospital. He was calling his control room and the police to report that they were being robbed. His driver drove into the hospital until they reached the last building inside the hospital. The Golf 7 and Fortuner vehicles were chasing them from behind firing shots at their vehicle. The vehicle could not move anymore and there were men who were firing at them. One of the assailants stood next to a tree and shot at their vehicle with a rifle hitting the windscreen and also the passenger door. One bullet penetrated the passenger door hitting him on his body as a result of which his spine and left leg could not move. When he later received treatment at hospital it transpired that a bullet was lodged in his left buttock. The assailants fired bullets targeting the fuel tank and at some stage he noticed the Fortuner reversing and driving away. He was later treated at Bedford Hospital in Mthatha. No money was taken from their vehicle as the assailants were not able to open the vault.

[17] The State then called Bongile Mjungula. His evidence was that in September 2015 he was on duty with Fikile Phumelo (Phumelo) and Gqweta. Phumelo's duties

were to collect the cash from clients and Gqweta was a driver. They were doing the Port St Johns, Lusikisiki to Flagstaff route. They made a collection in Port St Johns, then proceeded to Lusikisiki and the last collection was done in Flagstaff after which they were on their way back to Mthatha. All the money they collected was placed in the vault in the vehicle. They finished in Flagstaff at about 16:20 and left for Mthatha. He was sitting in the passenger seat while Gqweta was driving. Gqweta called Phumelo to come and join them in front as he was sitting at the back. He testified that they drove past Lusikisiki and at the Ntafufu curves Gqweta indicated that he wanted to attend to the call of nature. Gqweta stopped the vehicle saying he was looking for a toilet paper, Mjungula felt a cramp on his leg and alighted. Mjungula closed his passenger door and then saw a Corolla vehicle appearing in front of them and a person pointing a firearm at him came moving very fast. Another person appeared behind him and pushed him as a result of which he fell. He was dragged and taken to the Corolla vehicle. He was ordered to get inside the vehicle and he set at back seat. Phumelo was put inside the boot of that vehicle which then pulled off. When they were near Port St Johns, the man who was seated next to him alighted and instructed him to run into the forest and not to look at him. He ran into the forest and lay on his stomach in the forest. After about five minutes or so he heard some noise and it transpired that it was Phumelo. They both went to the tar road and looked for a hike that would take them to Port St Johns. They got a hike to Port St Johns and alighted at a bridge in Port St Johns after seeing a police vehicle. He told the police that they had been robbed by a white Corolla vehicle. They waited there for about two hours. While they waited there, a taxi arrived from which Gqweta alighted and they were taken back to where the Fidelity vehicle was. Phumelo and Gqweta opened the vault in the vehicle and found that the money they had collected was not there, only a bag with coins was left there. On their arrival at their office they were told that the money they had collected which had been robbed was R2.5 million. Mjungula testified that Phumelo was armed with an Arcus 9mm pistol and he was armed with an LM5 rifle while Gqweta was not armed on that day. The serial number of the LM5 rifle was G[...] and it had two magazines. He had left it between the seats when he alighted where they had stopped before the assailants arrived. He testified that he could not identify any of the assailants.

[18] The next witness was Kwanele Vapi (Vapi). He testified that in November 2015, he was employed by Fidelity as a technical support officer. This job entailed inspecting the cash conveying vehicles before they departed. On the 2 November 2015 he was assigned as a driver of a vehicle that was going to load Nedbank ATMs with cash in Mthatha, Libode, Ntlaza and Lusikisiki. His crewman was Mlenga. The last ATM to be loaded was in Lusikisiki after which they headed back to Mthatha using the R61 route via Port St Johns. When they were in the Ntlaza area they had to take a detour to the gravel road because the road was under construction. As he took the detour there was a Golf vehicle in front of them with its hazard lights on. It was facing the Port St Johns direction with its bonnet opened as if it had a mechanical problem. That vehicle was blocking the road and he flickered his vehicle lights so that it could open the way for him. Five men alighted and he heard the sound of a machine gun. When he looked behind he saw a Toyota Fortuner and other men emerged from the side of the road and fired shots at them. He was struck by one of the bullets. He was bleeding but he drove off and they decided to drive into St Barnabas Hospital which was about 500 metres from the point of the shooting. While inside the hospital he heard further gunfire and drove inside the hospital premises and the Fortuner was chasing them until they reached the end. The assailants alighted and continued shooting at their vehicle while they were inside it. He testified that the vehicle they were driving was the same vehicle that had recently been robbed in Lusikisiki when it was driven by Gqweta. Their vehicle was shot at until Mlenga was struck by a bullet. At some stage after heavy gunfire with rifles, the assailants left. They got out and the assailants were gone with a dummy CPC which was a cash box was missing. They went to look for help at St Barnabas Hospital and ultimately at Nelson Mandela Hospital. Vapi was taken through a crime scene photo album compiled by warrant officer Vutu from LCRC. He confirmed that the vehicle depicted in one of the photos with registration letters and numbers C[...] was the vehicle they were using on the day of the St Barnabas Hospital robbery which took place inside the hospital.

[19] The State called Vuyisile Mandoyi (Mandoyi). He testified that in November 2015 he was employed at Fidelity. On 4 November 2015 he was on duty and his job was to protect the person who was carrying cash which was Mnikelo Nqeto on that day. Nqeto was also a Fidelity employee. They were assigned to fetch cash from

businesses as in Qumbu, Ntabankulu, Mount Ayliff and Mount Frere. It was himself, Nqeto and (Zola Mphako) Mphako. They were using a branded Fidelity vehicle. Their last collection point was Mount Ayliff between 17:00 and 18:00 in the afternoon after which they left coming back to their offices in Mthatha using the N2 route. When they were crossing Tsitsa Bridge near Tsolo, Mphako indicated that they were being shot at. He then noticed a white Toyota Fortuner on the right hand side of the road firing at their vehicle. Mphako was the driver and Nqeto was on the left while he was sitting in the middle. Just in front of their vehicle there was a white Hyundai vehicle which was a pick-up truck with two occupants. When he first noticed it, it was at a bus stop driving very slowly as it entered the main road. Mphako moved their vehicle towards the lane of the oncoming traffic and he realized that their vehicle was losing power. The Hyundai vehicle reversed and stopped in front of their vehicle. Two men alighted from it carrying a five litre petrol container and a rifle. They instructed them to alight. Nqeto opened the door and ran crossing the road. He followed him but leaned against the vehicle. The driver also alighted. Nqeto was shot and he fell across the road. Three young men came to him and told him to open the vehicle. Mphako had been shot and he fell on the road. When he tried to open the second door, he could not do so as it required their office to be contacted to get a code with which to open that door.

[20] The assailants asked him who would normally call the office and ask for the code. He told them that it was Mphako. They fetched Mphako from where he was lying on the road. He realized that he had been shot in the leg. Mphako came and they instructed him to contact their office and ask for the code. The office gave them a wrong code which could not open the vault. At some point he noticed that the assailants were no longer there having apparently given up and left. The Fortuner had stopped behind their vehicle with its lights on. He could only describe one of the assailants who shot him as being light complexion. He was later taken to Dr Malizo Mpehle Hospital in Tsolo for treatment where he was admitted for three months. Mandoyi testified that on that day he was armed with a rifle and Nqeto was armed with an Arcus 9mm pistol with serial number 3[...]. His rifle and Nqeto's pistol were taken by the assailants

[21] The State called Zola Mphako to testify. He testified that in November 2015 he worked at Fidelity in Mthatha. On the 4 November 2015 he was assigned the duties of a driver. His colleagues were Nqeto and Mandoyi. They were collecting cash from Qumbu, Mount Frere, Ntabankulu and Mount Ayliff including ATMs. Their last collection point was Mount Ayliff after which they drove back to Mthatha using the N2 route. As they were approaching Tsita Bridge he heard the sound of gunfire. He checked his rear view mirror and saw a white Fortuner behind their vehicle. The people in the Fortuner were shooting at them. After crossing the Tsitsa Bridge they noticed a mini truck blocking their path. His vehicle was losing power and he had also been struck by a bullet on the waist. The assailants alighted instructing them to get out. They were carrying a five litre petrol container and said if they did not alight they were going to burn their vehicle. They got out of their vehicle and at that time their vehicle was standing across the road blocking traffic. The assailants demanded firearms and even assaulted him with a rifle. After the incident they were taken to hospital in Tsolo and he was later transferred to Mthatha. He was later told that Nqeto had died.

[22] The State called warrant officer Vutu. He testified that he worked at the LCRC in Mthatha in November 2015 as a photographer. On 2 November 2015 he attended a crime scene at St Barnabas Hospital where a Fidelity vehicle was attacked. He picked up some empty cartridges which were later sent for ballistic testing. On 4 November 2015 he was called to attend a crime scene in Tsolo on the N2 near Tsitsa Bridge. He picked up live rounds of ammunition and 27 cartridge cases. Inside the mini truck he found a bag with a small firearm and a magazine of a rifle. He also found a deceased person wearing a Fidelity uniform with a wound on the back of the head.

[23] The next State witness was sergeant September. He testified that in November 2015 he was attached to the Provincial Detective Unit where they investigated firearms. He was based in Cape Town. He investigated the Elsie's River incident and he attended to that crime scene. Four firearms were found and two suspects were arrested being accused no.2 and accused no.3. The firearms that were recovered were an Arcus 9mm pistol with 16 rounds of ammunition which was found in accused no.2's possession. Another pistol was found in accused no.3's

possession. An LM5 rifle was found in a white Golf vehicle. A few days later he received a call from Mr Rooi from Fidelity who told him that Fidelity firearms were embedded with chips so that even if the serial number is erased, they are able to identify it through a scanner. Mr Rooi scanned the firearms that were found at Elsie's River and established that the 9mm Arcus pistol was robbed on 14 September 2015 in Lusikisiki. The LM5 rifle was robbed on 4 November 2015 in Tsolo.

Anele Gqweta's evidence.

[24] One of the witnesses for the State was Anele Gqweta (Gqweta) a witness who was called by the State in terms of section 204 of the CPA. Gqweta's evidence was that in 2013 he was employed by Protea Coin Security Services which was based at Black Heath in Cape Town. He was employed as a driver and he would be conveying cash. In 2015 he was under the employ of Fidelity which took over Protea Coin Security Services. He was employed as a driver and he conveyed cash. In 2015 he was based in Mthatha after asking to be transferred from Cape Town to Mthatha and the transfer took place in March 2014. Gqweta testified that from 2008 to 2010 he worked for SBV Security Services (SBV) and had some friends at SBV one of whom was Ntshongwana. One weekend around May 2013 he visited Ntshongwana in Philippi, Cape Town. Ntshongwana also worked for SBV in 2013. Ntshongwana suggested that they should visit accused no.1 in Philippi and hang out with him because he had a bottle of alcohol and he agreed.

[25] On arrival at accused no.1's place, Ntshongwana was under the impression that he and accused no.1 knew each other so there were no introductions. The reason for that was that accused no.1 also worked for SBV as he did. However, they worked in different branches with accused no.1 being based at the Epping branch while he was based at the Bellville branch. While they were at accused no.1's place in Philippi, Ntshongwana showed Gqweta accused no.1's vehicle which was an Audi vehicle. Gqweta got to know that accused no.1 also worked for SBV and was based at the Epping branch during the conversation in which Ntshongwana mentioned that accused no.1 was a custodian at SBV, Epping. Accused no.1 said that he started working at SBV as a cleaner before he was employed as a protection officer. In the afternoon he and Ntshongwana left for Ntshongwana's place where he

had left his vehicle. He picked up his vehicle and went home to Mfuleni where he stayed at the time. After that occasion he never visited accused no.1 again but he would visit Ntshongwana.

[26] Gqweta met accused no.1 again in April or May 2014 when he was already in Mthatha about a month or two after he got a transfer to Mthatha. They met at an Engen Garage in Nelson Mandela Drive where he had gone to refuel his work vehicle and accused no.1 was coming from inside the shop. Gqweta greeted accused no.1 and had a chat with him while walking towards his vehicle. Accused no.1 told him that he had come back from Cape Town and was now based in Mthatha. Gqweta testified that he noticed that accused no.1 was driving a different vehicle to the one he knew and he asked him what he was doing in Mthatha. Accused no.1 told him that he was involved in some businesses. They exchanged cellphone numbers and parted ways. On that day accused no.1 was driving an Isuzu double cab with stripes. They never called each other until they met by chance at Cweba's place which was about a month after they had met at the Engen Garage. They had a chat but accused no.1 was in a hurry exiting Cweba's place and walking towards a red BMW vehicle. When he noticed the vehicle accused no.1 was driving, he asked him how he did it as he was always driving different vehicles. He asked accused no.1 to introduce him to what he was doing and accused no.1 said that he was in a hurry and that they would talk some other time and they parted ways.

[27] A week or two later, Gqweta was at Vulindlela Heights in Mthatha where he was looking for car parts and he met accused no.1 there. They had a chat and accused no.1 mentioned that he was looking for a bulb and on that occasion accused no.1 was driving a Toyota Hilux single cab vehicle saying he had just bought it from Gauteng. Gqweta became more interested in how accused no.1 was seemingly successful and had money. They again exchanged cellphone numbers with accused no.1 saying he would call him. Within a week or two Gqweta received a call from accused no.1 and he said he wanted them to meet. They arranged to meet at Cicira. When accused no.1 arrived at Cicira at a block of flats which was rented by school children, he went to open the gate for accused no.1 and invited him to come inside one of those flats as it was drizzling. Accused no.1 said that he should get inside his

vehicle as he needed to discuss something with him. This was in September 2015. Gqweta entered the vehicle and found a person who accused no.1 introduced as Notemba and he pointed at accused no.2 as being the person who was in accused no.1's vehicle on that day. Accused no.2 also introduced himself and said that he was from Ndibela Location.

[28] After introductions were done accused no.1 told Gqweta that his job was to do robberies and he wanted money from Fidelity. Gqweta testified that he was shocked but accused no.1 said that if he agreed to do an inside job with him he would protect him, because he knew attorneys and police officers and nothing would happen to him. After their discussions Gqweta said that he would consider what accused no.1 was saying. Accused no.2 also participated in that conversation giving him assurances that nothing would happen to him. A few days to about a week later he got to know that there were vehicles at work that had faulty security systems. A person would know on a Saturday which vehicle he would be using the following Monday. Gqweta became aware that he was going to use a vehicle that had a faulty system. He then decided to contact accused no.1 and they arranged to meet at Brickyard. His colleagues had told him that according to the duty roster he would be working with Mjungula and Phumelo and they were going to use vehicle CH93. When he heard that he would be using that vehicle, he knew that its security system was faulty. He was also told that he would be working on the Lusikisiki route.

[29] When Gqweta arrived at the Brickyard accused no.1 phoned to say that they should meet in Fortgale. They arranged to meet at Sasol Garage in Fortgale as he did not know accused no.1's place in Fortgale. When they met at Sasol Garage he followed accused no.1 to a house in Fortgale. Gqweta found accused no.2 also there together with two ladies and there was a braai and liquor was being consumed. Gqweta, accused no.1 and accused no.2 had occasion to meet aside. He told accused no.1 and 2 about the vehicle he would be using the following Monday and the route that was allocated to him. He also told them that the security system of that vehicle was faulty. Therefore, they would be able to open the crew door and get inside and open the safe door. He also told them that there was a small safe and also a big safe but because of the faulty system the money would be on the floor of the main safe. He also told them that his route would start at Ntlaza via Port St

Johns, and Lusikisiki up to Flagstaff. He further told them that when they got to Flagstaff they would have collected money from all their stops and they would then return to Mthatha. After he gave them that information, accused no.1 said that he would phone some men he was working with who were in Cape Town. They continued drinking and accused no.1 told him that the men from Cape Town would come and would arrive the following Sunday and that they would have to meet on that Sunday. They then parted ways.

[30] On Sunday accused no.1 told him telephonically that the men from Cape Town were still on the way. Accused no.1 again contacted him and told him that the men had not yet arrived and he again contacted him saying that they should meet at a scrapyard in Norwood. Gqweta went to the scrapyard and saw a double cab vehicle and he parked his vehicle next to it. Accused no.1 also arrived driving his single cab Toyota Hilux bakkie. They exchanged pleasantries after which they got into the double cab. Accused no.1 was with accused no.2. They all got into the back seat as the front passenger seat and the driver's seat were occupied. They discussed how the robbery would be committed and accused no.1 told them that the men from Cape Town had not yet arrived but would arrive the following morning. There were discussions about how the Fidelity vehicle would be brought to a standstill and how they would get to where the money would be. Different ideas were exchanged. Gqweta then said that they do stop to pee on the way and that it would be better that he bought stoney drink and accused no.1 suggested a score energy drink which he said caused one to pee frequently after drinking it. It was then agreed that Gqweta would stop the vehicle to pee and that accused no.1 and his men would arrive and bracket it while the vehicle was stopping and put him in another vehicle. They would drive the Fidelity vehicle to a different place and off load the money. He gave a briefing to accused no.1 who was already familiar with the operations of a cash van. It was then agreed that Gqweta should not use his normal phone in communicating with them. He would use another phone to make calls to accused no.1 after the last pick up in Flagstaff. After that phone call, he would destroy that phone and throw it away. It was further agreed that accused no.1 would meet Gqweta to give him the cheap phone he would use for the plan. They later met at the Brickyard where accused no.1 gave him the phone after which they parted ways. Before they parted

ways he also took the number he was going to use in communicating with accused no.1 which was also different from his normal phone.

[31] On Monday he went to work and took the vehicle that had been allocated to him. It was a Toyota Hilux single cab armoured vehicle used for cash conveyance. They were given the firearms that they were going to be armed with as usual. He was given a small revolver which he declined. The company policy was that when there was a shortage of firearms, the driver should not be armed. He took that opportunity to ensure that he would not be armed. They departed and their first stop was Total Garage in Mthatha on the R61 route to Port St Johns where he bought airtime and the energy drink. He was with Phumelo and Mjungula, his colleagues. After buying airtime at that garage he secretly loaded the phone that was given to him by accused no.1 with airtime. Their next stop was Ntlaza after which they went to Port St Johns and from there, they went to Lusikisiki. Incidentally Mjungula indicated at some point that his stomach was upset and he needed to relieve himself. He took that opportunity to secretly make a call to accused no.1. Accused no.1 reported to him that the men from Cape Town had arrived and the group would be available when they finish their last collection of money in Flagstaff. When Gqweta and his colleagues arrived in Flagstaff Phumelo and Mjungula attended to their normal duties and he used that opportunity to make another call to accused no.1 telling him that Flagstaff was their last stop after which they would be on their way back to Mthatha. They would use the R61 route that goes via Port St Johns as they did on their way to Flagstaff. They used to call each other, "Boy" so in that call he said to accused no.1 "Boy we have finished and we are going to depart for Mthatha". Accused no.1 reminded him to destroy the phone they used in their communication as that was their last cellphone call. He destroyed it but he did not get an opportunity to throw it away, so he put it in his pocket and they left for Mthatha.

[32] He was the driver and in the passenger seat there was Mjungula and Phumelo was at the back. On the way Mjungula wanted to relieve himself again so they stopped about 10 km from Flagstaff. It was then that he got an opportunity to throw away the phone which he did. Phumelo said that he was tired of sitting at the back of the vehicle and he was going to squeeze himself in front as that vehicle had a driver's seat and one passenger seat. They drove past Lusikisiki and between

Lusikisiki town and Ntafufu Location curves, at some point he told his colleagues that he wanted to pee. He stopped the vehicle and sat in the vehicle for a moment checking his rear view mirror to see if they were being followed as his arrangement with accused no.1 was that they were going to follow them and block their vehicle and take it after he would have stopped. Mjungula said that he wanted to relieve himself again and he alighted. As Gqweta was alighting a Toyota Corolla bracketed his vehicle and a tall person carrying a rifle alighted. This person pointed him with a firearm and pushed him towards the passenger door. At this time, he did not notice what actually happened to Phumelo and Mjungula. The rifle carrying man had his face covered with a black cloth from the mouthstouche to the back and had a beanie on his head. The only area of his face that was not covered was the area around the eyes and the nose. This person was swearing and telling him to get out of the car and had a stutter but he could not identify this person.

[33] Gqweta fell out on the passenger side of the vehicle and lay on his stomach. He expected them to take him to another vehicle but they took him back to his vehicle and he boarded on the passenger side. Accused no.1 entered on the driver's side and another man he could not identify entered on the passenger side and he was in the middle of accused no.1 and the second man. Before accused no.1 drove off another man entered and he also could not identify him. He was able to identify accused no.1 because he was known to him and he also spoke saying "Boy everything is going to be fine and you should not worry". Accused no.1 drove for a short distance into a gravel road and at this stage he had already been cuffed with cable ties. After a few minutes' drive on the dirt road the vehicle stopped and these men alighted. Accused no.1 also alighted and tried to open the vehicle as he had told him how to open it but was unsuccessful and he, Gqweta had to open it as well as the safe at the back while pointed with a pistol. He was forced into the Fidelity vehicle. He noticed the presence of the white Toyota Fortuner and the white Toyota Corolla vehicles. He cut off the cable ties by rubbing them against the edges inside the vehicle until they broke. He then ran to the tar road and got into a taxi that was off-loading passengers and told the taxi driver that they had been robbed. He asked the taxi driver to take him to the police station. He called his boss Mr Binda and reported to him that they had been robbed. Mr Binda told him that he was already aware and that Phumelo and Mjungula had been found. He asked the taxi driver to

take him to Mzimvubu Bridge where he found them with another colleague, Zibi and some police officers. He took them back to the vehicle where they found that the money had been taken. After the police had taken their statements and processed the crime scene they came back to Mthatha.

[34] On the third day after the incident, they were taken for a polygraph test at work which he was later told he had failed. This incident occurred on the 14 September 2015 and the following day, he phoned accused no.1 but he could not get hold of him until the third day when he called him again. Gqweta told accused no.1 that there was a rumour at work that an investigator was going to take them through the route and stop at all the places they had stopped. He also told him that he had thrown the cheap phone in one of those stops. The following day he and accused no.1 met and went back on that route to retrieve that phone. They found it and accused no.1 took it and damaged it himself and threw its pieces along the way as they were driving back. Accused no.1 told him that he would get R300 000.00. He and accused no.1 met again and he told accused no.1 that his vehicle was in Corana for repairs. In the afternoon of that day accused no.1 phoned Gqweta and they agreed to meet in Ngangelizwe township near a place called Sibaya. They met and accused no.1 gave him a bag saying here are your things. He took that bag and threw it in his vehicle and even before he could ask, accused no.1 said that it had around R300 000.00. He did not count it at that stage and they parted ways. After accused no.1 left, he opened the bag and saw that indeed it had money, took some of it and hid the bag under his seat. He went to his rural home, took a spade and dug a hole at a certain graveyard and hid the money there.

[35] About a week thereafter Gqweta received a call from accused no.1 and they arranged to meet next to Ultra City in Mthatha. They met and accused no.1 asked him to lend him R20 000.00 saying he was running short of funds for building material. Gqweta later went to dig out the money, took it home and counted the R20 000.00 that accused no.1 asked for. The following day they met at Ultra City again and he gave him the money. He told accused no.1 that he was going to Jimmy's workshop in Corana to have his car repaired. Later that afternoon accused no.1 came to Jimmy's workshop and found him there. It transpired that there were many things that needed repairs in his vehicle. Accused no.1 arrived at Jimmy's

workshop and they left together to town where he bought a bottle of brandy for accused no.1 and they came back to Jimmy's workshop. They were consuming that bottle of brandy while Jimmy was busy attending to his car. As they were chatting accused no.1 had a sling bag hanging on him and he opened it and showed him a firearm. Gqweta testified that the said firearm looked similar to the one that Phumelo, had on the day of the robbery. Accused no.1 told him that he got it during the Lusikisiki robbery. The firearm Phumelo carried on that day was still new with a rubberised handle. Gqweta was shown the firearm which was exhibited in court and marked exhibit 1. It was exhibited by constable Van Wyk who had previously testified that he had recovered it in Cape Town from accused no.1 at a house in Ilitha Park, Khayelitsha, Cape Town when accused no.1 was arrested. Gqweta testified that exhibit 1 looked exactly the same as the firearm that accused no.1 showed him. He further testified that it looked the same as the firearm that was in possession of Phumelo on the day of the Lusikisiki robbery and it was not different from the firearms that belonged to Fidelity.

[36] With regard to the R20 000.00 loan, accused no.1 had promised him that he would repay it after another job which he understood to be another robbery. A few days after they had met at Jimmy's workshop around late October or early November in 2015 Gqweta testified that he was coming from Cape Town when he was approached by accused no.1 at a car wash in Fortgale. Accused no.1 asked for another loan saying that he wanted to buy rounds of ammunition which he understood were going to be used in another robbery. Accused no.1 said that he would repay him after he would have received his share from the next job. Gqweta had with him R30 000.00 from which he lent accused no.1 R10 000.00 and they parted ways. He later received a call from accused no.1 about 17:00 on the same day. Accused no.1 said he was following a Fidelity vehicle from the Tsolo direction on the N2 and he wanted information about that vehicle. He told accused no.1 that after the Lusikisiki robbery their vehicles systems at Fidelity were fixed and there was no way of opening it without making a phone call to the office and getting a code. Accused no.1 thought that he was hiding information from him and he then promised him a share but he did not have any information.

[37] The following day he received a call from a friend of his asking him if he had heard that a Toyota Fortuner had robbed another Fidelity vehicle in Tsolo. He later learnt from news on the radio that there was a cash in transit robbery near Tsolo in which one guard was fatally wounded. Gqweta testified that he panicked because accused no.1 had told him that they were following a Fidelity vehicle the previous day. He decided to leave for East London where he stayed at a bed and breakfast establishment until a few days later when he received a call from accused no.1. Accused no.1 said that he had taken his BMW vehicle to East London for service and asked him to pick him up. He picked him up and they went to a place called Ebuhlanti in the Eastern Beach. They enjoyed themselves there and when accused no.1 needed to pick up his vehicle he said he was short of R700.00 to pay for the service and he gave him that money. They parted ways and Gqweta remained in East London. While they were at Ebuhlanti accused no.1 told him about the Tsolo robbery saying that they managed to bracket the vehicle they were following from Tsolo and the guards received the code from Fidelity office but they were unable to open the vehicle and they did not get the money.

[38] While he was still in East London Gqweta received another call from accused no.1 giving him directions to King Williams Town towards Peddie to a place called Bulembu where there was a ceremony and some liquor was being served. On arrival there he found accused no.1 and accused no.2 and another person who was introduced to him as Biza. Swanki and Magaiks were also there and were introduced to him. Gqweta pointed to accused no.3 as the person who was called Magaiks whom he saw for the first time there. He also pointed at accused no.6 as the person who was introduced to him as Swanki and he was also meeting him for the first time on that day. They parted ways later that day. At some stage in late November or early December 2015 he met accused no.1 in Viegsville who told him that some of the men had been arrested in Cape Town in possession of the firearms that were robbed during the Lusikisiki robbery. Accused no.1 suggested that they should run away. He went to sleep at his mother's house. Later that night between 22:00 and 23:00 accused no.1 called him again saying that police had arrived at his home and that they should run away. He then fled to Pretoria. Sometime in 2016 police arrested him at his home having come back from Pretoria.

[39] Under cross-examination Gqweta testified that he was arrested towards the end of 2016. After his arrest by members of the DPCI he told the police what happened and was told to return the following day for the taking of his statement. He went home and returned to the offices of the DPCI the following day. It transpired during his cross-examination that he made what counsel for accused no.1 referred to as a confession statement taken on 24 November 2016 and that in 2017 he was told that he would testify for the State as a section 204 witness. Gqweta maintained that at some stage he and accused no.1 worked for different branches of the same company, SBV in Cape Town between 2008 and 2010. When it was put to him that accused no.1 worked for SBV from 2011 to 2014, Gqweta testified that accused no.1 had said to him that he started working for SBV as a cleaner and was later transferred to trucks. He further confirmed that they first met in 2013 when he arrived at his home with Ntshongwana and it was during that encounter that he realized that accused no.1 was also working for SBV. He also confirmed that he later learned from accused no.1 that during the Tsolo robbery, one of his colleagues (Nqeto) was killed and he felt guilty about the death of his close colleague when accused no.1 told him that he was present during the Tsolo robbery. Gqweta confirmed his evidence in chief in respect of everything that was put to him on behalf of accused no.1. He also confirmed that upon being arrested he told the police the truth about his involvement in these offences. He explained that he was tired of being on the run from the police and that accused no.1 and 2 who had promised to protect him had themselves been arrested and in all of this he was surviving or getting by on sleeping tablets.

[40] The State then indicated its intention to lead evidence of statements obtained from the accused on the basis that such statements complied with the provisions of section 217 of the CPA. The State submitted that those statements, were given by the accused freely and voluntarily who, at the time they made their statements were in their sound and sober senses and therefore the statements amounted to confessions. The legal representatives for the accused objected to the admission of those statements on the basis that the accused were tortured and coerced into making the statements with police saying that they received a statement from one Simphiwe Nomandela, accused no.4 and Anele Gqweta. The accused said they were confronted with statements from these individuals. However, accused no.4 had

since passed on. Anele Gqweta had testified as a section 204 witness. It was submitted on behalf of accused no.1 that he was tortured by being suffocated and lost consciousness a number of times. He therefore made the statements under such circumstances which therefore did not comply with section 217 of the CPA in that his statement was not freely and voluntarily made. He was also told what to say to the commissioned officer based on the information the police received from Nomandela, accused no.4 and Gqweta.

[41] On behalf of accused no.5, the objection was that his statement was made two days after his arrest and on the day of his arrest he was shot on the leg by the police. He was still in pain with his gunshot wound still new. He was not in his sound and sober senses as he was taking pain tablets to ease the pain. When he was taken to the commissioned officer, he told him that he did not want to make a statement as he had indicated in his warning statement that he would make it in court. The commissioned officer threatened to call the investigating officers, warrant officer Qokoyi and captain Maqubela. Because of the fear of further torture, he decided to make the statement to the commissioned officer. The court granted the State's application for a trial-within-a trial to be opened to determine the admissibility of the said statements.

[42] The State called sergeant Nkankula who testified that in February 2016 he was attached to the DPCI in Mthatha. He was not part of the team that investigated the Tsolo robbery. On 3 February 2016 he had only been a member of the DPCI for two days. On that day he was asked by warrant officer Qokoyi to take accused no.5 to PRD building to major Mtirara. He was not part of the police officers that questioned accused no.5 before he went to make a statement to major Mtirara. It was at about 19:30 and he was accompanied by his colleague Sikwatsha. When he met accused no.5, he had no visible injury but he was limping. They arrived at major Mtirara's office at about 19:43 and he told him that he was there to bring accused no.5. Major Mtirara asked for his details, wrote them on a piece of paper including his cellphone number saying he would call him when he was finished with the suspect. He was later called by major Mtirara to fetch accused no.5 at about 21:00. He went to fetch him still accompanied by Sikwatsha. Major Mtirara handed to him accused no.5 and a big envelope telling him to give it to warrant officer Qokoyi. When he found

accused no.5 when he fetched him, he was still in the same condition as he had left him with major Mtirara. He handed accused no.5 to warrant officer Qokoyi. He denied being told by accused no.5 that he was in pain or that he asked for water to take pills. He denied being present with the accused and major Mtirara when the statement was taken. When the statement was finished he took accused no.5 straight back to the DPCI offices to warrant officer Qokoyi. He denied taking the accused no.5 to Madeira Police Station or to any other police station.

[43] The next State witness was colonel Mtirara. His evidence was that in February 2016 he was holding the position of a major in the SAPS and was attached to the Stock Theft Unit. His office was on the 14th floor at PRD building in Mthatha. On 3 February 2016 in the afternoon, he received a call from warrant officer Qokoyi from the DPCI asking him to take a confession from a suspect. He told warrant officer Qokoyi that the person may be brought to him at about 19:30 that evening because he was still busy with his administrative duties. Warrant officer Qokoyi did not tell him the details of the case he was investigating or the names of the suspect. At 19:30 a person who introduced himself as Lundi Gumenge which is accused no.5 was brought to his office by constable Nkankula. After preliminary introductions, he asked constable Nkankula to give him the keys for the leg irons as accused no.5 was in leg irons and to give him his contact details so that he could phone him to fetch him after taking the confession. Thereafter constable Nkankula left him alone with accused no.5 in the office. He had a pro-forma confession form in his office. He took it and completed the questionnaire with all the details that the form required with the information that accused no.5 provided. Before taking the statement that form required him to explain to accused no.5 all the constitutional rights that are detailed in it which he took time explaining them. When he was satisfied that the suspect's rights provided for in section 35 of the Constitution all of which are enumerated in the pro-forma were not violated and was not forced to make the confession, he went ahead and gave accused no.5 the opportunity to tell him what he wanted to tell him.

[44] Accused no.5 told him that he was arrested in Cape Town on 31 January 2016. He told him that he was shot by the police during the arrest. He then asked him to undress so that he could see his wound which was on the right thigh. Accused no.5 answered all the questions that the form required him to answer and signed the form

on each page. Under cross-examination he denied that accused no.5 asked for water in order to take his pills for the pains in the gunshot wound. He testified that he conducted the interview with accused no.5 while he was in leg irons. This was necessary to avoid the risk of the suspect running away or even jumping to his death as PRD building is a tall building. He testified that if accused no.5 had indicated that he did not want to make the statement he would have told constable Nkankula to take him back. He denied that accused no.5 told him that he was not in his sober senses because of the pain tablets he was taking for the gunshot wound or that he was dizzy. He testified that accused no.5 did not have any tablets with him and he did not show him any tablets or ask to take them for pain.

[45] The next witness was brigadier Manyana. He testified that he was a colonel in February 2016. He was based at PRD building in Mthatha and was attached to Crime Intelligence Unit. He was not part of the investigating team. He received a call from colonel Mdingi who was the head of the DPCI in Mthatha. Colonel Mdingi asked him to assist him by taking a statement from a person he said was in his offices. He proceeded to colonel Mdingi's offices which were less than a kilometre away from his offices. He arrived at about 18:00 and colonel Mdingi gave him an office and indicated that the suspect would be brought to him. At about 18:10 sergeant Kutu brought accused no.1 to him. When colonel Mdingi allocated him an office he also provided him with some blank pro-forma confession forms that he would need to use in taking the statement. When he was brought to him, accused no.1 was in handcuffs. Brigadier Manyana asked sergeant Kutu to remove the handcuffs after which accused no.1 sat on a chair in front of his table. Following the pro-forma form which is in the form of a questionnaire, he interviewed accused no.1. He completed the responses that accused no.1 gave to him and after satisfying himself that accused no.1 voluntarily wanted to make the statement, he had not been assaulted or in any way tortured or pressured into making the statement he went ahead and took a statement from accused no.1.

[46] Under cross-examination he testified that accused no.1 never told him that he had been tortured by the police before he was brought to him to force him to make a statement incriminating himself. He denied telling accused no.1 that if he did not make the statement he would send him back to the police that had tortured him in

the first place. He denied that accused no.1 was not in his sound and sober senses when he interviewed him due to the trauma of being assaulted. He denied that when accused no.1 was brought to him he was on leg irons. He further disputed accused no.1's version that when he arrived, he had been handcuffed to the back and he only instructed sergeant Kutu to handcuff him to the front. He explained that he told sergeant Kutu to uncuff accused no.1 because he wanted him to be free and relaxed and not be under any form of pressure.

[47] The next State witness was sergeant Kutu. He testified that in February 2016 he was attached to the OCU and started in that unit on 1 February 2016. He was not part of the team that was investigating the case and was not aware of the facts of this matter at the time. On 3 February 2016 he took accused no.1 for confession at the request of warrant officer Mancoba. It was after 18:00 when he was asked by warrant officer Mancoba to take accused no.1 for a confession. He fetched accused no.1 from the parade room in their offices. He was shown accused no.1 by warrant officer Qokoyi whom he also found with the accused in the parade room. He took accused no.1 to an office where brigadier Manyana was, in the same building. On their arrival brigadier Manyana told him to uncuff accused no.1 and asked him for his rank and his surname. After that brigadier Manyana excused him saying he would call him when he finished with accused no.1. Accused no.1 was not ill-treated in his presence. Brigadier Manyana called him from the passage as the offices are not far apart. It was put to him that it was warrant officers Qokoyi and Mancoba who took accused no.1 to brigadier Manyana which he disputed.

[48] The next State witness was captain Maqubela a member of the OCU. His evidence was that he was part of the team that was investigating this case under the leadership of the late warrant officer Qokoyi. He was present when accused no.1 was arrested in Khayelitsha, Cape Town on 31 January 2016. He was then detained in Mthatha on 01 February 2016 at Central Police Station. When accused no.1 was interviewed, he admitted his involvement in this case. The interview took place in the afternoon on 3 February 2016 at the OCU offices in Mthatha. The interview was conducted by warrant officer Qokoyi and he and warrant officer Mancoba were present. The interview was conducted in a hall in their premises. Accused no.1 was in handcuffs which were tied to the front and he was also on leg irons. Accused no.1

admitted having knowledge of these offences. Warrant officer Qokoyi then organised brigadier Manyana and accused no.1 was later taken to him for a statement. After the statement was taken, accused no.1 was brought back and then taken for detention. At the time of the interview of accused no.1, accused no.5 was also present but in a different office in the same building. The interview of accused no.1 took about 30 minutes or a little bit more than that in which he basically admitted having knowledge of the offences.

[49] The next person to be interviewed was accused no.5. During the interview of accused no.5 it became clear that he was admitting being involved in the commission of these offences as a result of which a commissioned officer was arranged to take his confession. His interview also took about 30 minutes or so. Interviews were being led by warrant officer Qokoyi but he also participated by asking questions as well. Under cross-examination, he testified that on the day of the interviews the accused appeared in court in Tsolo. He denied that accused no.1 was tortured in any way including being suffocated with a duvet cover that was wrapped up in a plastic during his arrest in Cape Town as he alleged. It was further put to captain Maqubela that in the morning accused no.1 had indicated to warrant officer Qokoyi that he would make a statement before a magistrate when he made the warning statement. After the warning statement was taken, the accused were taken to court. After the court appearances the accused were taken to their offices for further questioning. After the interview accused no.1 was taken to a commissioned officer to make a statement in the late afternoon. Captain Maqubela denied that he was not present during the interview that was conducted by warrant officers Qokoyi and Mancoba. It was further put to him that accused no.1 was confronted with a statement said to have been made by accused no.4 and Nomandela. Captain Maqubela testified that he could not dispute that because accused no.4 had already been arrested at the time and they had received information from accused no.4 and Nomandela. He denied that accused no.1 disputed the allegations made by Nomandela and accused no.4 and testified that in fact accused no.1 confirmed what accused no.4 said in his statement.

[50] It was further put to captain Maqubela that accused no.1 agreed to make a statement before a commissioned officer hoping to disclose what the police did to

him. However, the commissioned officer said he would be taken back to his interrogators if he did not make a statement. Captain Maqubela denied this version saying that during the interviews accused no.1 said that he knew about the Tsolo, Lusikisiki and Ngqeleni robberies. Thereafter the late warrant officer Qokoyi arranged for a commissioned officer for accused no.1 to make a statement. Captain Maqubela denied that accused no.1 was taken by warrant officers Qokoyi and Mancoba to the commissioned officer.

[51] Under cross-examination by the attorney of accused no.5 captain Maqubela testified that accused no.5's interview also took place on 3 February 2016 in the afternoon. He took a warning statement from accused no.5 that morning in which accused no.5 said that he had no knowledge of the offences and that he would make a statement in court. The accused were taken to court and the warning statement was in the docket which was with warrant officer Qokoyi. He did not tell warrant officer Qokoyi that accused no.5 had said that he would not make a statement. After the court appearance warrant officer Qokoyi said that they would have to further interview the accused as accused no.5 had told him that he wanted to say something.

[52] When they interviewed accused no.5 he disclosed his involvement in the three robberies and what he said confirmed what accused no.4 had told them. A commissioned officer was then arranged for accused no.5 to make a statement. He denied that accused no.5 had told them that he was not feeling well and had been feeling dizzy the whole day due to the tablets he was taking for pains for the gunshot wound he had sustained during arrest. Captain Maqubela confirmed that accused no.5 did have an injury in the leg but denied that accused no.5 showed any signs of dizziness and in fact appeared to be fresh. He denied that he was tortured by pressing him on his wound. It was further put to captain Maqubela that accused no.5 reported to the Ngqeleni court during his appearance there the following day that he had been tortured and an order was made for him to be taken for medical attention. Captain Maqubela disputed the torture but did not dispute that accused no.5 made a report to court. He denied that accused no.5 was suffocated with a plastic bag, assaulted or pressed on his wound.

[53] The next State witness was warrant officer Mancoba also a member of the OCU based in Mthatha and part of the team that investigated this case. He testified that he became the investigating officer following the killing of warrant officer Qokoyi. He testified that the accused were transported from Cape Town and detained in Mthatha. On 3 February 2016 they appeared in court in Tsolo after which they were brought to their offices. Warrant officer Qokoyi indicated that there were issues about which the accused needed to be questioned. He participated in the interview but the person who was leading the team was warrant officer Qokoyi as the investigating officer. Warrant officer Qokoyi informed accused no.1 of his rights. Accused no.1 said that he did not have a problem, he would narrate what happened during the robberies. Nothing unlawful was done to accused no.1.

[54] They also interviewed accused no.5. He testified that he was not present when accused no.5 was arrested in Cape Town. He met accused no.5 on 31 January 2016 when he came from Harare Mini Hospital. Accused no.5 was in hospital because of a gunshot wound sustained during his arrest. When he saw him, he was with a police officer from the NIU. Accused no.5 was treated and discharged and was not given any medication. They noticed that his injury was regarded as minor. They therefore took him and detained him in Bellville. Accused no.1 and 5 were arrested on the same day so they booked them out so that they could bring them to Mthatha. The accused were detained at Central Police Station on arrival in Mthatha.

[55] When accused no.5 was interviewed, he was first informed of his rights by warrant officer Qokoyi. After his rights were explained, accused no.5 was then asked about his involvement in these cases. He said that he had knowledge about the cases and that he was prepared to give details which he did. Warrant officer Qokoyi then asked if he would be willing to tell another person what he told them. Accused no.5 then said he would be willing to do so to clear his conscience. Thereafter major Mtirara was arranged by warrant officer Qokoyi to take his statement.

[56] Under cross-examination on behalf of accused no.1, warrant officer Mancoba testified that after the interview accused no.1 made a confession. He explained that they interviewed accused no.1 when they did because they wanted to know about

the cases in which he was alleged to be involved in after which a commissioned officer was arranged on the same day for the taking of his confession. He testified that in performing his duties as a member of the team that was investigating this case he wrote some notes in his pocket book. However, he was later involved in a motor vehicle accident in Viedgesville at some stage during which he lost some of his belongings. He recorded all his activities in this case in that pocket book including dates and times. He denied that he and warrant officer Qokoyi took accused no.1 to brigadier Manyana and maintained that he was taken by either sergeant Nkankula or constable Kutu. He denied that accused no.1 was confronted with information they said they obtained from accused no.4. He confirmed that at the time accused no.1 was arrested accused no.4 had already been arrested. He however, confirmed that accused no.4 and Nomandela had given them information about the case but they did not question accused no.1 about what accused no.4 had told them. Warrant officer Mancoba said that he was shocked that accused no.1 was saying he had always denied being involved in these offences as he co-operated with them and told them everything he knew about this case.

[57] Warrant officer Mancoba denied schooling accused no.1 about what he should say to the commissioned officer. He said that the interview with accused no.1 took about 25 to 30 minutes. He denied that accused no.1 was tortured and suffocated when he refused to incriminate himself. It was put to him that accused no.1 succumbed to the torture fearing for his life and promised them that he would make the statement to the commissioned officer. Warrant officer Mancoba denied that any form of pressure was brought to bear on accused no.1. It was further put to him that when accused no.1 was before the commissioned officer, he told him that he had been tortured by the police. Warrant officer Mancoba maintained that they did not torture him and he did not know what accused no.1 said to the commissioned officer as he was not there. It was further put to warrant officer Mancoba that brigadier Manyana returned him to warrant officers Mancoba and Qokoyi who tortured him again at which stage he realized that he might lose his life and then decided to narrate the events as schooled by the investigators. Warrant officer Mancoba denied all this insisting that accused no.1 was not tortured and everything he said to them said it freely. He would not comment on what happened before brigadier Manyana.

[58] Warrant officer Mancoba was then cross-examined on the warning statement of accused no.1 in which he said that he would make a statement before a magistrate. He was then asked if there was any reason for the investigators to ask questions from accused no.1 after he had said that he would make a statement before a magistrate. Warrant officer Mancoba testified that that became necessary after the accused said they wanted to speak after the court appearance with accused no.1 saying he wanted to clear his conscience. It was put to warrant officer Mancoba that on 4 February 2016 accused no.1 was taken to Ngqeleni magistrates' court where accused no.1 reported to the court that he was assaulted and tortured by the police and requested to be taken to hospital as a result of which a court order for him to be taken to hospital was issued and indeed he was taken to hospital. Warrant officer Mancoba testified that he could not dispute that that is what accused no.1 said to the court but denied that he had been assaulted. He denied that when police took him to hospital, they took possession of his medical records which were never returned to him. He explained that when a person has been taken to a doctor his hospital card remains with him. He further explained that in prison there are doctors and nurses who attend to inmates. Before they are admitted in prison the nurses would enquire about their illnesses so that they would know which medication to give to which inmate.

[59] Under cross-examination on behalf of accused no.5 warrant officer Mancoba confirmed that warrant officer Qokoyi had told them that accused no.5 wanted to make a confession. It was put to him that when accused no.5 was interrogated he had already signed a warning statement making it clear that he would make a statement in court. Warrant officer Mancoba responded that warrant officer Qokoyi approached them saying the accused wanted to make a confession. He denied that his constitutional rights were not explained to him. He explained that accused no.5 had already appeared in court and his rights were explained in court and so he knew them. Therefore, they could not have compelled him to make a statement. He denied that accused no.5 had told them that he was not prepared to be interviewed as he was feeling dizzy and was in pain. He denied that accused no.5 was in handcuffs and leg irons during the interview. He testified that accused no.5 was free

and was not handcuffed but was in leg irons but during the interview the leg irons were removed.

[60] Warrant officer Mancoba denied that accused no.5 was assaulted and suffocated with a plastic bag when he denied knowledge of the offences. It was put to warrant officer Mancoba that accused no.5 would testify that he was given a statement which he must make to the commissioned officer which he denied. He denied that accused no.5 was questioned about what accused no.4 had said to the police. He denied being told by accused no.5 that he was dizzy from allergex and panado tablets that he was taking saying that he never saw accused no.5 carrying any tablets. It was further put to warrant officer Mancoba that because he had been assaulted before making the statement, when accused no.5 appeared in court he explained his condition to the court as a result of which the court made an order that he should be referred for medical attention and was taken to Nelson Mandela Hospital. Warrant officer Mancoba said that he had no knowledge of that. Warrant officer Mancoba denied ever taking the accused persons to hospital or doctor other than a doctor in Butterworth which was in 2019. He denied that after he was taken to hospital, accused no.5's medical records were taken by the police who refused to return them.

[61] The State called Dr Mbelekane who testified that he had been practising as a doctor for 28 years. He testified that panado is an over the counter analgesic which means it is a pain killer. He testified that it does not affect a person's ability to do daily activities. The allergex is an antihistamine which is used to fight allergic reactions in a body. It is a prescription medicine. It is a sedative but rarely causes dizziness when taken on the prescribed dosages. It could also result in drowsiness if the prescribed dosages are exceeded and it took five to six hours to be cleared from the body. After his evidence the State closed its case in the trial-within-a-trial.

[62] Accused no.1 testified during the trial-within-a-trial. He said that he did not make his statement freely and voluntarily. He was arrested in Cape Town on 31 January 2016 at Ilitha Park, Khayelitsha after 21:00. On the night in question he was in a certain lady's house there. There were four of them in the house at the time and the door was not closed. They were three males and one female. While they were

sitting there in the house, a person carrying a firearm and not wearing uniform entered telling them to lie down. Five other people also came in. As they were lying down captain Maqubela came and handcuffed him from the back and pulled him towards a bedroom. When they reached the bedroom captain Maqubela pulled a plastic cover of a duvet from above the wardrobe. He used it to suffocate him. He then asked him about his friends. As he was suffocating him he was called by warrant officer Qokoyi. They were ultimately taken to Parrow Police Station at about midnight. They were not allowed to make calls to their family members. They were eventually taken to Mthatha and were detained at Central Police Station on 2 February 2016 at about 23:00. The following day the 3 February 2016 he and accused no.5 were taken by warrant officer Qokoyi and captain Maqubela between seven and eight that morning to the OCU offices in Mthatha.

[63] When they got there, he was asked if he had anything to say about the case for which he had been arrested. He responded that he did not even know why he was arrested. The police officer wrote something down, signed and caused him to sign what later transpired to be his warning statement. In that warning statement it was recorded that he preferred making a statement before a magistrate. He and accused no.5 were then taken to court in Tsolo for their first appearance by warrant officers Qokoyi and Mancoba. In court they were joined by their co-accused. After their court appearance, he and accused no.5 were taken back to the OCU offices in Mthatha. In those offices they were made to wait in an office guarded by captain Maqubela. Accused no.5 was taken to another office. Thereafter warrant officer Mancoba and captain Maqubela took him to a boardroom where he found more than five other police officers including warrant officer Mlumbi from East London. The time was around 1 or 2 pm. In the boardroom he was asked about his personal details like his names and what he did for a living. He was on leg irons and his hands were cuffed to the back. Warrant officer Qokoyi ordered him to stand up. Warrant officer Mancoba went behind him and pulled the leg irons causing him to fall on his face. Thereafter a transparent plastic bag was pulled on his head and face thus suffocating him. He was then asked about the Tsolo robbery. He was told that if he wanted to say something he should move his hand. He did so even though he had nothing to say so that he could get relief from being suffocated. After sometime he was taken out of the boardroom by warrant officers Qokoyi and Mancoba. While

they were outside of the boardroom warrant officer Qokoyi told another police officer that the shirt he was wearing needed to be removed so that it did not get torn or become dirty. He was uncuffed and his shirt was removed.

[64] Warrant officer Mancoba asked him if he was still refusing to co-operate and he said that he did not know what he was being asked about. He was told to familiarise himself with statements made by the other accused. He was handcuffed again and then he was taken back to the boardroom where he was ordered to sit on a chair. He was suffocated again and asked about a certain Magaiks and accused no.4. He told the police that he did not know those people. Accused no.4 was one of his co-accused and he did not know accused no.3 before their arrest. He was again caused to fall on the floor and suffocated. He then lifted his hand and the suffocation was stopped. He was taken out of the boardroom again by warrant officers Qokoyi and Mancoba who said they wanted him to make a statement in which he should include his co-accused. Magaiks was accused no.3, however, while he knew him, the name Magaiks was unknown to him.

[65] The police told him that he had to make a statement and he told them that he could not do that. Warrant officer Qokoyi then said that what would help him was to make a statement. He must also tell them about the whereabouts of his other friends and the friends of the other accused. He was also asked about one Nomandela and he told the police that he did not know him. They then said that he should make a statement because Nomandela and accused no.4 had made a statement implicating him. The police then told him the things they wanted him to say when making the statement. Some of the things they told him were the things contained in the statement in which he implicated all his co-accused. They said that the things they told him about had been said by Nomandela and accused no.4 without individualising who exactly said what.

[66] He testified that the interrogation started at 13:00 on that day. It was not true that it lasted about 25 to 30 minutes. He, however, could not estimate how long it really took. There was no break between the interrogation and him being taken to the commissioned officer but it was already dark when he was taken to the commissioned officer. He testified that the experience he went through on that day

was shocking as what was done to him was done by people he trusted. He was taken to the commissioned officer after being told what he should say to him. He was taken to the office in which brigadier Manyana was by warrant officer Mancoba. He denied that he was taken to brigadier Manyana by sergeant Kutu. In that office it was just him and the commissioned officer as warrant officer Mancoba just brought him and then left.

[67] Brigadier Manyana introduced himself and asked for his names which he told him. He then said they can start. Accused no.1 responded that he had a problem. Brigadier Manyana asked him what the problem was. He then told him that he had been assaulted in the other office. When he told brigadier Manyana that he had been assaulted, his response was to ask if he wanted to be taken back to those officers who had assaulted him to which he said no. Then brigadier Manyana asked him what he wanted him to do to which he said he had been told to come and make a statement about something he had no knowledge of. It was at that stage that brigadier Manyana called out warrant officer Mancoba who came within a short period of time. Warrant officer Mancoba took him out of the office in which brigadier Manyana was.

[68] When he was outside that office warrant officer Mancoba ordered him to lie down on his stomach while he was handcuffed. He had to first kneel down and as he knelt down so that he could lie on his stomach, he was grabbed by the back part of his vest. Warrant officer Mancoba was about to pull a plastic bag on him when warrant officer Qokoyi said that "because you do not want to do what we want you to do, you will eventually die". It was at that stage that he asked to be reminded what they wanted him to say so that he could say it. This was because he could see that he was going to die. He was then taken back to the office in which brigadier Manyana was. Upon his arrival, brigadier Manyana asked "is there something you want to say?" He testified that he was never given his constitutional rights.

[69] Thereafter, brigadier Manyana asked him questions and as he answered he would record those answers. When he was done asking him questions brigadier Manyana caused him to sign and to put his thumb print on the document. Thereafter he was taken back to the office in which he and accused no.5 were kept when they

arrived from court. They were then taken to Central Police Station where they arrived between 23:00 and 24:00 that night. He testified that the statement he made to brigadier Manyana was not made freely and voluntarily. He said that during interrogation he was not in his normal senses because of the suffocation as suffocation leads to dizziness. He was then asked if he ever felt dizzy on that day to which he then said he did feel dizzy and even fainted on that day. When what was done to him was over, he was wet on the upper body but he could not tell whether he was wet because of sweat or water had been poured on him. Accused no.1 testified that when he was tortured by the police on 3 February 2016 he sustained injuries. He explained that he once had an injury from a car accident. On that day as he was being suffocated there would be someone on his back. That caused the pains of his previous car accident to come back. He ended up suffering from back pains and his thumbs were not working well and were numb. When asked if he reported his injuries he said that when he was returned to the office in which they were kept before interrogation he found a Ms Mxokozeli. He asked her to assist him with a phone so that he could phone home and report the matter. Ms Mxokozeli requested him not to report the other things to his family but to only tell his family that he had been arrested. He phoned his family and spoke to his brother after which they were taken to Central Police Station.

[70] The following day they were taken to Ngqeleni magistrate's court where he reported to the magistrate's court that he was feeling some pains and requested to be taken to hospital. The court then made an order that he should be taken to hospital. However, he was only taken to hospital over the weekend on 6 February 2016. He was examined and given medication. However, the report from hospital was not given to him. It was taken by warrant officer Mancoba.

[71] Under cross-examination, accused no.1 testified that on 31 January 2016 he was assaulted by captain Maqubela. On the 3 February 2016 during the morning he made a warning statement which was taken by captain Maqubela in which he told him that he would make a statement in court. He testified that he had made a mistake when he said that he told captain Maqubela that he knew nothing about this case. It was warrant officer Qokoyi who asked him if he knew anything about this case. During that morning before he appeared in court he was questioned by

warrant officer Qokoyi and he told him he knew nothing when he was taking a warning statement from him. He testified that he had told warrant officer Qokoyi that he knew nothing about the case of Tsolo but he did not know why warrant officer Qokoyi changed it to record that he had said he would make a statement in court. He said that the contents of the warning statement that he would make a statement in court did not come from him but came from warrant officer Qokoyi. He did not tell his attorney about that because he did not know what was written in the warning statement. He only got to know it during the trial. He said that what was recorded in his warning statement was not correctly recorded.

[72] During the interview after the court appearance, other than being tortured with being suffocated with a plastic bag, he was also assaulted by his handcuffs being tightened and someone kneeling on his back while he was lying on his stomach. That person would also tighten the plastic bag that had been pulled over his head. He explained that the police would first put a cardboard on both wrists before tightening the handcuffs so that his wrists would not be injured. He confirmed that he was giving this aspect of evidence for the first time under cross-examination. He was then asked as he was handcuffed from the back, and he was on his stomach, how a person could kneel with both knees on his back. He said that he could not see what was happening on his back but he assumed based on what he felt. He then said that he was not handcuffed on his elbows but on the handcuffs and the wrists would be at the very lower end of his back while the person would be kneeling near the shoulder blades. He was then asked if he did not sustain any fracture to which he said he did not get fractured but he was not sure if he did not suffer cracking but he was in pain. Accused no.1 was asked if after being tortured for four hours he had no visible injuries. He testified that his wrists were swollen. He confirmed that he was mentioning for the first time during cross-examination that his wrists were swollen. He then said that although he did not tell his attorney about swollen wrists, he reported it to the doctor in hospital. He confirmed that there were no other visible injuries that he sustained during the interview.

[73] He testified that he was then asked to stand up during which he fell on the floor without knowing what caused him to fall. Warrant officer Mancoba pulled his leg irons while he was standing as a result of which he fell on the floor and could not

balance as he was handcuffed to the back. He fell and landed on his chest. He managed to avoid landing on his head or face. When asked how he achieved not landing on his head or face with his hands on his back, he explained that at the time of his arrest, he was bigger as a result of which his face would be the last part of his body to reach or bump against the floor when he fell. It was because of his weight then that he did not bump his face against the floor.

[74] Accused no.1 testified that brigadier Manyana never assaulted him. He merely threatened him by saying that he would call warrant officers Mancoba and Qokoyi which he fulfilled by calling them. He testified that what he said to brigadier Manyana were things that he was told to say to him. When brigadier Manyana asked him to explain something he would explain in the manner in which he was told to do as he did not want to be taken back to the police officers who had tortured him before. Accused no.1 testified that what is contained in his statement was unknown to him. He would be asked a question and he would respond to it. He was never given the statements allegedly made by Nomandela and accused no.4 to read during the interview. He was only told what was contained in their statements. He did not know Nomandela. Police forced him to implicate himself in offences he did not know about.

[75] Accused no.1 denied that brigadier Manyana told him his constitutional rights before he took a statement from him. When he was asked in relation to his signatures and thumb prints on the pro-forma while his thumbs were numb, he explained that immediately after the injury he did not really feel any pain which is why he was able to sign. He felt the pain later. On being asked questions by the court, accused no.1 testified that when he was taken out of brigadier Manyana's office the first time, he was tortured in the passage. At some stage he screamed while in the passage. The cardboards were put on his wrists so that he could not be injured during questioning in the boardroom.

[76] Accused no.5 testified in the trial-within-a-trial. His evidence was that on 3 February 2016 he was in Mthatha having been arrested on 31 January 2016 in Khayelitsha, Cape Town. On the day of his arrest he was sitting on a street pavement leading to his home. He was with three friends of his. Two unmarked

vehicles came and stopped at a distance. The occupants of those vehicles alighted and started shooting in their direction. Accused no.5 and his friends ran to different directions and as he was running he was shot in the leg. After some time one of the two vehicles, which was a black BMW came and stopped next to him. He was told to stand up and the police officer opened the back door for him. He had one gunshot wound to the upper area of the thigh. As a result, he had cramps and he could not lift his leg. He was assisted in getting into the vehicle. He was not told why he was being put in the vehicle or where he was being taken to. He was attended to by the paramedics after which he was taken to Khayelitsha Hospital for the treatment of the injury. Warrant officers Maqubela and Qokoyi arrived while he was already in hospital. However, they did not introduce themselves to him and never told him why they were there.

[77] Captain Maqubela and warrant officer Qokoyi only introduced themselves when they were at Goodwood Police Station where he was taken for detention. He was ultimately taken to Parow Police Station for detention where he was told that he was being arrested for an armed robbery that occurred in the Mthatha area. He was only told of his rights before he signed the SAP14A form. This was the first time that he was told his rights. The following morning at about 10:00 captain Maqubela and warrant officer Qokoyi arrived and said that were taking him to Mthatha. On the way to Mthatha he was never given any food by the police. When he needed to take his medication during the day he requested the police officers to buy him some food and he gave them R50.00. They only bought him apples and water. He then ate those apples until he arrived in Mthatha. On arrival in Mthatha he and accused no.1 were detained at Central Police Station. The following morning which was on 3 February 2016 warrant officer Qokoyi and captain Maqubela took them to the offices of the OCU where they were told that they were being charged for Tsolo and Ngqeleni robbery cases. He made a warning statement and was asked about those cases. He told the police that he had no knowledge about those cases and that he would explain himself before a magistrate. He was referred to what was recorded in his warning statement that he denied the charges and that he declined to make a statement which he would make in court. It was warrant officer Maqubela who took his warning statement after his rights were explained to him and he signed it. After the warning statement was taken they were taken to court.

[78] In Court they were informed of their rights and he requested that the State provide him with legal representation. He was assigned a legal representative from Legal Aid. After the court appearance, he and accused no.1 were taken to the OCU offices. When they arrived at those offices they were placed in an office. He asked for water and warrant officer Qokoyi went to get water for him. He took his pills after which he was fetched by warrant officer Qokoyi and taken to a boardroom. Warrant officer Mancoba pointed him to a chair and said that if he was going to tell them the truth he should sit down but if he was not going to tell them the truth, he should sit on the floor. He then sat on the chair. He was asked where he was in November 2015 and he told the police that he was in Cape Town where he was working at the time.

[79] As was he sitting on a chair and had been put on leg irons with his hands handcuffed to the back, warrant officer Qokoyi stood up, put the papers that were in his possession down. He then walked as if he was going out. Warrant officer Qokoyi then pulled a forensic plastic bag over his head and tightened it as a result of which he could not breath. He would remove it and put it back on. He was ordered to sit on the floor with his legs stretched. Warrant officer Qokoyi then stomped on his leg on the spot where there was a gunshot wound which was very painful. The torture stopped for a short period of time and warrant officer Mancoba read from the papers he had in his possession in which it was said that he had committed the offences. He denied any knowledge of having been involved in the commission of the offences. Warrant officer Qokoyi took a chair and hooked it to his back. He then pushed his body as if he was trying to break his backbone. He had pain on the leg from the gunshot wound, and he had pains on his back which was being bended over the chair that was hooked on him.

[80] The torture continued from after 11:00 up to between 14:00 and 15:00. Captain Maqubela took him out to another office. In that other office captain Maqubela said that he was going to tell him the information that was in those statements. Captain Maqubela and another young man read to him what was written in those papers and told him to repeat after them. He did that repeatedly and if he made an error a plastic bag would be pulled over his head. The torture only stopped when one officer said that he wanted to charge him and take his finger prints before leaving. He then

requested to take his pills and he was allowed to do so. At that stage his handcuffs had been removed. He had to take pills without having eaten as he last had food in the morning when he had porridge at the police station.

[81] At some stage he was taken from the boardroom to the office of major Mtirara by two police officers to make a statement. What he was required to say to major Mtirara was read to him by a young police officer together with captain Maqubela. He was put on handcuffs and driven to major Mtirara's office by constable Nkankula and another officer at PRD. They found major Mtirara in his office at PRD building. Constable Nkankula removed the handcuffs and placed them on the table and handed some papers to major Mtirara. Those papers had his name on them. Major Mtirara asked if he could help him and he told him that he had been told to come to make a statement and that he had been assaulted. He asked for water and constable Nkankula brought him some water. He took his pills as he was in severe pains. As he was taking his pills major Mtirara was writing something on the papers he received from constable Nkankula. He was writing on his own without being told anything.

[82] Major Mtirara asked him about what captain Maqubela and another young officer had told him at the OCU offices. During all of this constable Nkankula was present in major Mtirara's office leaning against a table that was some distance away but still in the same office. Major Mtirara did not tell him his rights. He just kept on writing. During the interview he was very tired and drowsy and had a headache. When he had a headache he would use a sniff. He took out his sniff and asked major Mtirara if he could take it and major Mtirara agreed. He was also feeling dizzy during all that period. When major Mtirara was done he said he did not have a fingerprint pad and said they should go to the police station. He was taken to a police station and major Mtirara followed them and they went into the police station. At the police station major Mtirara asked for a finger print pad and took his finger prints which he placed on the statement. He would be shown where to sign by major Mtirara and he would sign. Major Mtirara was writing on the form what he told him which was what he was told to say. He then just caused him to sign without reading it back to him. After taking his fingerprints major Mtirara handed the document to constable Nkankula. He was then taken to the OCU offices after which he and

accused no.1 were taken back to Central Police Station. The following day the detectives took them to court in Ngqeleni where he was asked about legal representation. He told the court that he did not have an attorney and asked that one should be appointed for him. He also told the court that the previous day the police had assaulted and tortured him. He also asked the court to make an order for him to be taken to the doctor. The magistrate made the order for him to be taken to the doctor. However, he was only taken to the clinic a day after their court appearance. From the court they were taken to Wellington Prison. Warrant officer Mancoba took the hospital folder and never gave it back to him.

[83] Under cross-examination accused no.5 confirmed that his warning statement was taken by captain Maqubela on 3 February 2016 and he warned him of his constitutional rights which are contained in the warning statement. He was not assaulted at that stage. After appearing in court in Tsolo on 3 February 2016 he was taken back to OCU offices. He denied that his rights were explained to him in those offices. During his second court appearance in Tsolo he advised his attorney that warrant officer Qokoyi and captain Maqubela forced him to make a statement before major Mtirara but his attorney did not convey that to the court. When he appeared in court in Ngqeleni on 4 February 2016 he reported to the court that he had been tortured by the police and was assaulted. However, he had no injuries as a result of the assault except that his hands were swollen because of the handcuffs that were tightened. He reported to the court that his hands were swollen. His hands were swollen and his wrists were numb. He testified that the magistrate did not write down that his hands were swollen. When he was detained at Wellington Prison he was still having injuries in his hands. He told the nurse in prison about his gunshot wound and the swollen hands and that he had been assaulted by the police.

[84] In the boardroom he was questioned from two statements and when he was taken out of the boardroom and tortured in another office he was told what to say by warrant officer Qokoyi and another police officer. The statement was read to him and he had to repeat it. When he made a mistake in repeating it he would be tortured again. The statements related to different incidents and he managed to memorise everything that was being said to him. He confirmed that when he appeared before major Mtirara he asked for water in order to take his pills and he

was given the water. When he was asked about the fact that his attorney had said he was refused water he said he did not remember his attorney saying that but he was sure that he was given water. After taking the pills he was already tired and dizzy and the pills did not have much effect. He had headache and asked to use his sniff. He later changed to say that the pills made his condition worse. However, he was able to tell major Mtirara what he was told by warrant officer Qokoyi and the other policeman. Major Mtirara completed the forms without asking him questions. He never asked him when he was arrested and he never told him that he was arrested in Cape Town on 31 January 2016. He never asked if he was under the influence of alcohol or drugs and he never told him that he was not under the influence. Accused no.5 testified that major Mtirara misled the court when he said that he asked for his names and surname and he did not know how the form had his names written in colonel Mtirara's handwriting.

The admissibility of confessions.

[85] In a trial-within-a-trial the court is concerned with whether the statement or confession which the State intends to tender as part of its evidence ought to be admitted or not. This is because section 217 of the CPA requires proof by the state that the confession was freely and voluntarily made by the accused who must have been in his sound and sober senses and without having been unduly influenced into making the confession. Section 217 is a restatement and a statutory embodiment of an old common law legal position that has prevailed for a very long time. Incidentally, it is now exactly 100 years since the well-known decision in *Camane*³ in which Innes CJ said:

“Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial or during the trial. The principle comes to us through English law and its roots go far back in history. Wigmore, in his book on Evidence (vol iv, section 2250) traces very accurately the genesis, and indicates the limits of the privilege. And he shows that, however important the doctrine may be, it is

³ R v Camane and Others 1925 AD 570 at 575.

necessary to confine it within its proper limits. What the rule forbids is compelling a man to give evidence which incriminates himself.”

[86] Now a 100 years since *Camane* the accused in this matter have invoked this principle after the State indicated its intention to place their confessions before this Court as part of its evidence by objecting to the admissibility of the said confessions. In a nutshell, the accused objected to the admission of the confessions on the basis that they were tortured into implicating themselves in crimes they never committed. These included the accused being assaulted in various ways, suffocation and threats of further violence or torture if they did not implicate themselves. In respect of accused no.5, there was also the objection based on him not being in his sound and sober senses in that he had taken pills to alleviate his pain on his right upper thigh which made him dizzy. Both accused said that they had been told what to say to the commissioned officers who were going to take confessions. The torture went on for several hours in which they were being schooled on what to say when the police confronted them with statements allegedly made by other suspects in particular, accused no.4 and one Nomandela whom they did not even know. In addition to that they alleged that they were not apprised of their constitutional rights before they were questioned and even the commissioned officers did not inform them of their rights. The version of the accused is that they were brutally tortured before making the confessions. Central to the torture was the accused being given a story they were going to repeat to the officers and being drilled on what to say individually. They were being schooled on statements that were said to have been made to the police by accused no.4 and Nomandela who had implicated them and were being forced to also implicate themselves.

[87] It should be remembered that the warning statements of the accused were taken by the same police officers who allegedly tortured them into confessing. However, when they were before the officers who took confessions from them, there is no record of them telling those officers that they had been tortured. Both commissioned officers disputed being told by the accused that they had been tortured. The proforma document that takes an accused person through various stages in which he is told and encouraged to indicate any form of torture or abuse bears no whiff of any abuse or torture. In fact, accused no.1 testified that he was not tortured by

brigadier Manyana. He, however, claims not to have been told of his constitutional rights. Very strangely some of these rights were exercised in the warning statements before their first court appearance and they were further apprised of their rights during court appearance in Tsolo a few hours before they were brutally assaulted and tortured.

[88] It was accused no.1's evidence that brigadier Manyana never assaulted him. It is highly improbable that brigadier Manyana would not have apprised him of his constitutional rights. The proforma that accused no.1 signed details all the constitutional rights and the choices that accused no.1 made having been advised of his constitutional rights. Similarly, with accused no.5, he was not assaulted by major Mtirara on his own evidence and was not assaulted in the presence of major Mtirara. It was also his evidence that when he felt he needed to take his pills he asked for water and he was given water and was allowed to take his pills. When accused no.5 felt he needed to take his sniff he was allowed to take it. As I understand it, sniff is a form of smokeless tobacco product that is inhaled through the nostrils. The very fact that he was so comfortable as to have with him his sniff and was allowed to take it when he wanted to does not sit well with the atmosphere of fear. Similarly, all the answers that are reflected in the proforma were clearly provided by him which would have made him aware of his rights. This is besides the fact that if the accused were so brutally tortured as they alleged, it is very surprising that no injuries were sustained at all and there are no records of their treatment in hospital and even at the detention facilities in which they were detained immediately after their alleged torture. It does need to be pointed out that courts routinely refer accused persons who ask for medical assistance to hospital and issue such an order. The mere issuing of such an order cannot per se and without more be evidence of the accused having been tortured. Similarly, its absence is not necessarily indicative of an accused person not having been tortured.

[89] Having considered all the evidence that was placed before me, I concluded that the confessions were freely and voluntarily made and should therefore not be excluded. I am of the view that some of the evidence of the torture of the accused was choreographed and rehearsed with disturbing similarities on the allegations of the form of torture they were subjected to in some respects. These included both of

them being dizzy at some stage. Accused no.1's reason for dizziness which resulted in him fainting as he said he did was suffocation whereas accused no.5's dizziness was as a result of the treatment he was taking. There is also the evidence of Dr Mbelekane which was to the effect that dizziness could only occur if the tablets were overdosed. Besides, it is unclear how the alleged dizziness manifested itself during their time with the commissioned officers who denied that it even happened. Both accused alleged having been schooled on what to tell the commissioned officers by being forced under brutal torture to memorise statements made by other suspects that they did not even know before. On my assessment of all the evidence I came to the conclusion that the confessions of the accused were freely and voluntarily made.

[90] In *Gumede*⁴ Zondi JA, not no long ago had occasion to articulate the legal position on the admission or exclusion of the evidence of a confession statement from which I quote liberally. He said:

“[20] The Interim Constitution did not expressly deal with the admissibility of improperly obtained evidence. If it was found that there had been a violation of the accused's rights (which were guaranteed by s 25 of the Interim Constitution), that entitled the accused to approach the court for an appropriate relief. In other words, it did not prescribe a remedy for treating unconstitutionally obtained evidence. The remedy now lies in s 35(5) of which provides as follows:

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

[21] In other words, s 35(5) requires the court to exclude evidence obtained in a manner that violates any right in the Bill of Rights if either the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice.

...

⁴ *Gumede v S* (800/2015) [2016] ZASCA 148; [2016] 4 All SA 692 (SCA); 2017(1) SACR 253 (SCA) (30 September 2016).

[23] This court in *S v Tandwa* made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionally obtained evidence. In this regard it had this to say (paras 116 to 117):

‘[116] ...

Evidence must be excluded only if (a) it renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad policy reasons beyond fairness to the individual accused.

[117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court’s discretion must be exercised “by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons”. Relevant factors include the severity of the rights violation and the degree of prejudice, weighted against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.”

[91] The confession statements of the accused were admitted as evidence against the accused, on the basis that I was satisfied that the accused’s rights were not violated. The State called brigadier Manyana to give evidence in the main trial. He testified that in 2016 he was a colonel in the SAPS and is now a brigadier. In 2016

he was attached to the Crime Intelligence Unit of the SAPS with offices at PRD Building in Mthatha. On 3 February 2016 he took a confession statement from accused no.1. He then read into the record the contents of the original statement he took from accused no.1. The said confession as read into the record was in respect of the various crime scenes in which the robberies took place. I do not consider it necessary to reflect *verbatim*, the accused's statements as read into the record by the relevant commissioned officers. The statements are clearly reflected in the record. As indicated hereinbefore, the statement of accused no.5 was taken by colonel Mtirara. He testified that in February 2016 he was employed by the SAPS holding the rank of a major and was attached to the Stock Theft Unit with offices at PRD Building in Mthatha. On 3 February 2016 he took a statement from accused no.5. He also read it into the record.

[92] After the statements of accused no.1 and 5 were read into the record the State handed up by agreement with the defence, the post mortem report in respect of count 13, the murder of Mnikelo Nqeto who was killed during the Tsolo robbery. The post mortem examination of the deceased in count 13 was conducted by Dr Qaba on 6 November 2015. In his report, Dr Qaba records that the cause of death was abdominal injuries – gunshot. After the admission into the record of the post mortem report in respect of the deceased in count 13, the State closed its case. At some stage there were changes in the legal representation of accused no.1 which resulted in him being represented by advocate Potgieter. He applied for and was granted leave to have some of the state witnesses recalled. I have also considered all the evidence tendered in this regard.

The evidence of accused no.1 in the main trial.

[93] Accused no.1 testified in his defence. He testified that he is 36 years old and unmarried with four children. He was arrested on 31 January 2016 and his bail application was refused and has been in custody since then. At the time of his arrest he stayed in Ikwezi Township in Mthatha in a house belonging to his brother. When he was arrested he was self-employed. He stayed in Cape Town between 2010 and 2014 after which he came back to Mthatha. Between 2010 and 2011 he was unemployed and stayed in Cape Town. From 2011 to 2014 he was employed at SBV

Security Services (SBV) where he worked as a protection officer which involved cash conveyance. He later worked at SBV as a custodian which entailed loading cash in ATMs and fixing ATMs.

[94] He testified that at no stage when he worked in Cape Town did he meet Gqweta, and he never worked with him. He only met him in Mthatha at the end of 2014. He had received a call from a former colleague who used to work at SBV who told him that he was working in Mthatha and staying at Ngangelizwe. Accused no.1 proceeded to meet this former colleague named Ntshongwana. That is how he got to meet Gqweta. He disputed Gqweta's evidence that the two of them met in April or May 2014 at a garage in Nelson Mandela Drive in Mthatha saying he never met him in Mthatha at that stage. He also disputed Gqweta's evidence that a week or a month later they again met at Cweba's Tarven and that he was driving a red BMW vehicle at the time. He testified that it was in November 2015 when he was driving a red BMW. He confirmed Gqweta's evidence that at some stage in 2015 he was at Goldwagen which was at Vulindlela Heights in Mthatha where he was looking for car parts but denied that they exchanged phone numbers on that occasion. He said that Gqweta only requested his phone number when they met at Ntshongwana's place in Ngangelizwe. He denied Gqweta's evidence that he called him to meet at Cicira in Mthatha and that he was with accused no.2.

[95] He disputed Gqweta's evidence that during their Cicira meeting, he told Gqweta that his job was to rob and he wanted to rob Fidelity. He denied that he assured Gqweta that he knew attorneys and police officers and that he would protect him if there were to be any problems. He testified that in 2015 he was running a taxi business and his taxis were operating in Nyanga Township, Cape Town. He had another business hiring out tents, chairs, mobile fridges, toilets and tent stages. In 2015 he also registered a construction company and was in the process of registering a security company when he got arrested in this case. He disputed Gqweta's evidence that on a Saturday Gqweta called him and told him that at work he was allocated a vehicle whose security system was not functioning properly. He further disputed that subsequent to that call on that Saturday they arranged and met at a place called Brickyard where they agreed that Gqweta would follow him to Fortgale where he found accused no.2 also present. He disputed everything that

Gqweta said about Fortgate, their telephone calls around the date just before and after the Lusikisiki robbery and the meetings that Gqweta alleged, took place. These included denials of him handing money to Gqweta or even the loans that Gqweta alleged he asked him for. Gqweta's evidence is on record and I do not intend regurgitating it, save to point out that it was all disputed by accused no.1.

[96] On Gqweta's evidence that they held another meeting in Viedgesville later in November or early December in 2015, he testified that at the end of November he was in Durban where he stayed for about three weeks. He disputed telling Gqweta to escape because some people had been arrested by the police and disputed being in constant telephone contact with.

[97] Accused no.1 went on to testify about his arrest in Cape Town on 31 January 2016. His evidence was that he was sitting on a couch in a certain house when baraclava clad men entered. Two people entered first carrying rifles and instructed all of them to lie down on their stomachs. While they were lying down another group entered and one of them asked him if he knew him to which he said he did not know him. That person introduced himself as warrant officer Qokoyi after which he told the others that he, accused no.1 was Msuthu. He was thereafter handcuffed and the belt he was wearing was removed and used to tie his legs. He was then pulled into one of the rooms in that house where captain Maqubela suffocated him. He was not informed of his constitutional rights. He testified that his sling bag was on top of the chair in which he was sitting. The sling bag had a wallet, invoices, business cards, bank cards, his identity document and his driving licence. The police took that sling bag and his cellphones. One of his cellphones, his identity document, wallet, business cards and the drivers licence were returned to him but his second cellphone and the sling bag were not returned to him. He disputed the evidence of the police that there was a firearm in that sling bag. He denied being in possession of a firearm whose serial numbers were filed off when he was arrested.

[98] After his arrest he was then taken to a place called Site B where it was said that another suspect had been shot by the police. They later proceeded to Khayelitsha Hospital where it was reported that the suspect who had been shot had been taken to. On arrival at Khayelitsha Hospital warrant officer Qokoyi and other police officers

alighted and left him with captain Maqubela. They later returned with the suspect that had been shot and wounded, which was accused no.5 in this case. Accused no.1 testified that at that stage he did not know accused no.5 and he was seeing him for the first time. He and accused no.5 were ultimately detained at Parow Police Station in separate cells where they spent the night of the 31 January 2016. On 1 February 2016 he, accused no.5, accused no.3 and accused no.2 were driven to Mthatha by warrant officers Qokoyi and Mancoba and captain Maqubela. He already knew accused no.2 as they were both in the taxi business at Nyanga and they worked together in his business of hiring tents in Mthatha. He and accused no.5 were detained at Mthatha Central Police Station. No food was provided to them on the way to Mthatha. They slept in Mthatha Central Police Station that night of the 1 February 2016 and in the morning of the 3 February 2016 after they had had their porridge, warrant officer Qokoyi and captain Maqubela arrived to collect them and took them to their OCU offices where they were caused to sign warning statements. Thereafter they were charged and taken to court in Tsolo.

[99] The magistrate in Tsolo explained their rights to them including the right to legal representation. He elected to instruct his own attorney. After that court appearance they were taken back to Mthatha OCU offices where they were tortured. Later that evening he made a statement to a commissioned police officer. He did not make that statement voluntarily. He made it after being tortured by the police. Later that evening they were detained at Mthatha Central Police Station. During the course of the day of the 3 February 2016 they were not given food. He testified that warrant officer Mancoba was misleading the court when he said that warrant officer Qokoyi bought them food. Accused no.1 testified that he did not commit any of the crimes for which he was charged.

[100] Under cross-examination, accused no.1 testified that during his arrest he was not advised of the reason for his arrest in relation to the Tsolo robbery. He was only informed that he was arrested in connection with the Tsolo robbery when he was charged. He was never asked where he was on that day. He did not tell the police where he was on that day because he was never asked. After he was charged he told the police officers that he would not be saying anything and that he would tell the court everything. The police insulted him. When he appeared in court the

magistrate informed him of the charges he was facing including the Tsolo robbery of the 4 November 2015. He testified that he never told the magistrate that on 4 November 2015 he was somewhere else. Accused no. 1 confirmed that it was never put to State witnesses that from the first week of December 2015 and for three weeks thereafter he spent that period in Durban. His explanation for that was that he was hearing the 4 December 2015 being mentioned from the prosecutor for the first time under cross-examination. It was never mentioned before and even on the day he testified. He testified that on 4 December 2015 he was in Durban where he had gone to submit company documents for registration in the municipality's data base. Accused no.1 later changed his version and said that he did not remember the exact date but it was during the first week of December 2015. He did not recall exactly what he was doing on the 4 December 2015. He had travelled alone in going to Durban using public transport.

[101] On 14 September 2015, the day of the Lusikisiki robbery he was at Ngangelizwe Location in Mthatha preparing for a church service. Accused no.1 later changed to say that he was not sure exactly where he was and that he was around Mthatha during that month. He confirmed that he knows Gqweta. He testified that he first met him when he came back from Cape Town. His first encounter with Gqweta was in Mthatha, not Cape Town. He met Gqweta at Ngangelizwe in 2014. It was put to accused no.1 that Gqweta was never confronted with this version that their first encounter was in Ngangelizwe during 2014 and he said he did not recall. It was further put to him that he was telling the court for the first time under cross-examination that his first encounter with Gqweta was in 2014 in Mthatha. He, however, disputed Gqweta's evidence that they first met in 2013 in Philippi where Ntshongwana was also present. When he was asked if according to his version his first encounter with Gqweta was in Ngangelizwe in 2014, how would Gqweta know that during 2013 he was in Philippi in Cape Town, accused no.1 said that he had a conversation with Ntshongwana during which Ntshongwana asked where he stayed in Cape Town and Gqweta was present during that conversation. He and Ntshongwana already knew each other and the person who did not know him was Gqweta. During that conversation with Ntshongwana, they also talked about his employment in 2013. He further said he could not have told Ntshongwana that he was working at Epping because Ntshongwana knew him.

[102] Accused no.1 disputed Gqweta's evidence that in 2013 they met at Philippi. However, accused no.1 confirmed that in 2013 he was working for SBV at the Epping branch but he said that he never met Gqweta in 2013. He disputed Gqweta's evidence that on 13 September 2015 he, accused no.1 and accused no.2 and other men met with Gqweta at a scrapyard in Norwood, Mthatha and discussed what was going to happen on Monday 14 September 2015. He denied that he and accused no.2 suggested that two cellphones should be bought for the purpose of communication before the robbery. He said that he never went to a scrapyard in Norwood and he did not even know where it was. When accused no.1 was asked where he was on 13 September 2015 he said that he was not sure where he was on that day. It was then put to him that Gqweta's version was that on 12 September 2015 they met at Sasol Garage in Fortgale and they then travelled together to accused no.1's house in Fortgale where they discussed about the robbery that was going to be done on Monday 14 September 2015, accused no.1 merely said that Gqweta was misleading the court. He said that he did not recall meeting Gqweta in Fortgale and that he never stayed in Fortgale and did not have a house in Fortgale. When accused no.1 was asked where he was on 12 September 2015, he said that he was not sure exactly where he was and what he was doing on 12 September 2015 saying he could not, in 2022 remember something that happened in 2015. He disputed Gqweta's evidence that on the 14 September 2015 during the Lusikisiki robbery he drove the Fidelity cash van during the robbery and that Gqweta was sitting next to him.

[103] Accused no.1 was then confronted with what he told brigadier Manyana in his statement in which he said that he drove the cash van to a nearby place during the robbery. He responded by saying that when he made that statement he was under duress as he was assaulted and suffocated. Furthermore, before he went to make the statement he was told what to say and he was led on what was contained in or read from the statements that police had in their possession. Accused no.1 disputed Gqweta's evidence that after the Lusikisiki robbery they met near Sibaya's place where he gave him R300 000.00. He, however, accepted that Gqweta's evidence in that regard coincided with the contents of his statement that Gqweta was given a share in the sum of R340 000.00 and that at Jimmy's place he showed Gqweta a

pistol saying he got it during the Lusikisiki robbery. Accused no.1 however denied that during his arrest a firearm was found in his possession inside a sling bag that was hanging on his body. It was put to accused no.1 that his version that was put to State witnesses, constable Van Wyk and captain Maqubela was that the firearm was not found in his sling bag but in another bag in that house, accused no.1 said that he could not dispute that. He also could not dispute that that firearm was robbed from one of the security guards at Lusikisiki during the robbery. He maintained however, that the said firearm was not found in his possession.

[104] With regard to the Tsolo robbery committed on 4 November 2015 accused no.1 testified that he was in Mthatha on that day and that at about 16:00 or thereafter he was at Ngangelizwe where he was going to attend a church service. He was part of that church service which started at about 18:00 and he took the last people home at about 22:00. It was then put to accused no.1 that his version that he attended a church service on 4 November 2015 was never put to State witnesses. Accused no.1 then said that he could not recall.

[105] With regard to the St Barnabas Hospital robbery on 2 November 2015 and his statement that he was present when that robbery was committed, accused no.1 maintained that he knew nothing about that robbery. He testified that he was not sure where he was after 17:00 on 2 November 2015 but in November 2015 there was a time when he was in Cape Town. He said that it was between the first and the second week of November because he came back from Cape Town towards the end of the second week of November 2015. When he was asked if it was his evidence that he was in Cape Town on that day, accused no.1 said that he was not sure exactly whether he had already left for Cape Town on the 2 November 2015, in other words, he was not sure where he was on 2 November 2015. Accused no.1 testified that whatever Gqweta said about him which implicated him in connection with the Tsolo robbery was a fabrication. After his cross-examination the case for accused no.1 was closed.

The evidence of accused no.5 in the main trial.

[106] Accused no.5 opened his case by testifying in his defence. He testified that he was arrested on 31 January 2016 at Site B, Khayelitsha, Cape Town. During his arrest he was shot by the police and one bullet struck him. An ambulance arrived and he was put in the ambulance which conveyed him to hospital for treatment. He was ultimately taken to Parow Police Station where he was detained together with accused no.1. From the time of his arrest until he was detained, no police officer told him why he was arrested and his constitutional rights were not explained to him and he was not given food. On 2 February 2016 he and accused no.1 were transported to Mthatha and they were not told why they were being taken to Mthatha. On 3 February 2016 in the morning they were taken from Central Police Station to the offices of the OCU in Mthatha where they were charged. It is only then that his rights were explained to him. He was made to sign a warning statement in which he said that he would explain everything in court. They were thereafter taken to court in Tsolo by warrant officer Qokoyi and captain Maqubela. In Court their rights were explained to them including the right to legal representation. He was then allocated Mr Nogumbe an attorney from the Legal Aid Board who was already in court.

[107] After their court appearance he and accused no.1 were taken back to the offices of the OCU where he remained in the parade room there while accused no.1 was taken to another office. In the parade room he was told to sit on a chair if he was going to tell the truth but if he was not going to tell the truth he should stand. He was then questioned by police officers including warrant officers Mancoba and Qokoyi and captain Maqubela and his rights were not explained to him. With regard to the St Barnabas Hospital robbery on 2 November 2015 accused no.5 testified that on that day he was in Cape Town. He was working there collecting furniture which was transported to the Eastern Cape. His employer was a Mr Bido. His duties were to load furniture and put prices on it and to off-load it. He started working for Mr Bido in 2013 on a part time basis and in 2014 he was employed on a permanent basis. Accused no.5 denied being involved in the St Barnabas Hospital robbery in which a smart box was taken from a Fidelity vehicle. He denied being involved in any of the crimes that were committed during that incident. With regards to the Tsolo robbery on 4 November 2015, accused no.5 also denied being involved in any of the crimes that were committed during that incident. He testified that on both the 2 November 2015 during which the St Barnabas Hospital robbery was committed and on 4

November 2015 during which the Tsolo robbery was committed, he was in Cape Town working for Mr Bido.

[108] He testified under cross-examination and he said that his job with Mr Bido was to load furniture in Cape Town and transport it to the Eastern Cape where he would off-load it. He was also responsible for pricing its transportation to various places in the Eastern Cape. On 2 November 2015 they first made a delivery in Komani after which they made another delivery in Cala. After that they made another delivery in Cofimvaba and Ngqamakwe on that day. After that they spent the night in Komani and returned to Cape Town the following day. On Mondays, Tuesdays, Wednesdays and Thursdays he would be in Cape Town because they normally left Cape Town on a Thursday afternoon to make deliveries in the Eastern Cape from Friday. They would arrive in the Eastern Cape on Fridays. On Mondays, Tuesdays, Wednesdays and Thursdays they collected the furniture and put it in their storeroom and on Thursdays they would load it in the truck and thereafter depart for the Eastern Cape. On the 4 November 2015 he was in Cape Town. The truck they were using belonged to Mr Bido and he did not know its registration number.

[109] Accused no.5 was asked if he maintained a list of the deliveries that he needed to make. His answer was that the book he was using was taken by the investigating officer after he told that officer that on 2 and 4 November 2015 he was busy with his duties at work. He gave it to the investigating officer in Cape Town when he appeared there for another case. He gave it to that officer because on 1 February 2016 he was supposed to have appeared in court. He told that police officer that on 1 February 2016 he was supposed to appear in the Blue Downs magistrates' court. As a result, he did not come to the Eastern Cape, he was left behind. The name of that officer was Mkhi who has since been transferred to Butterworth.

[110] Accused no.5 later changed to say that he was appearing in court but was told by warrant officers Qokoyi and Mancoba that he would be taken to Cape Town for a court appearance there. He was indeed taken to Cape Town and that is when he gave the book to the officer who was investigating that case. As a result, his warrant of arrest was cancelled because he was in custody in the Eastern Cape in this matter. He said that he gave the book to warrant officer Qokoyi who was the

investigating officer of this case. Warrant officer Mancoba and captain Maqubela were present in court when he handed the book to warrant officer Qokoyi. When he went to Cape Town to appear for another case there he came back with the book. When he appeared in Tsolo in this matter warrant officers Qokoyi and Mancoba told him that he had a pending warrant of arrest in Cape Town and that the investigating officer of the Cape Town case, Mr Mkhi would fetch him so that he could appear in Cape Town. It was at that stage that he came back with that book which he then gave to warrant officer Qokoyi. He further testified that when he went to Cape Town for his court appearance he “got hold of that book”. The investigating officer of the Cape Town case took him to his home in Cape Town. Accused no.5 later again changed his story to say that he did not go to his home to fetch the book. He had asked the investigating officer to be allowed to see his family. He was taken home and it was then that he requested his family to bring the book.

[111] He was paid his wages on a weekly basis by Mr Bido and it would be cash given to him by hand. On 2 November 2015 and 4 November 2015 his wife was in Pietermaritzburg but his mother was at home. His mother passed away on 30 September 2019 or 2020. It was only his sister Nomalady who was present at his home. His sister was present when the police went home with him to fetch the book. When he went home to fetch the book he was not accompanied by the team that investigated this case.

[112] Accused no.5 confirmed that on 3 February 2016 he appeared before major Mtirara at PRD at 19:30. The contents of the statement he made to major Mtirara were what he was told to tell him after he was assaulted. Therefore, whatever is contained in that statement was what he had been told to say by the police. He was tortured by warrant officer Qokoyi and captain Maqubela and he was told to narrate what they were reading to him from certain statements. It was warrant officer Qokoyi and captain Maqubela who read the statements they had with them, and assaulted him and told him that they wanted him to memorise it. Both of them were reading different statements and at the same time he was being tortured. This started when he was in the parade room and it took about an hour and some minutes or two hours of being assaulted, tortured and schooled on what to say. Accused no.5 maintained that what is contained in his statement is what he was schooled on by the police.

When he arrived before major Mtirara, sergeant Nkankula handed some papers to major Mtirara. Major Mtirara then asked him what he wanted to say. He did not want to say anything and major Mtirara was busy populating those papers with information. When major Mtirara said that he had been told that he wanted to make a statement, he asked for water. There was a water dispenser in that office and he wanted to take his pills as he was in pains. Major Mtirara told sergeant Nkankula to bring him some water.

[113] As he was taking his tablets major Mtirara was busy populating information into the forms. Thereafter major Mtirara asked him questions. He noticed that his name and surname were already written in the form when he arrived before major Mtirara but he did not notice the rest of page 1 of the form. When accused no.5 was asked if he noticed that the form was completed in similar handwriting, he said that he was not a handwriting expert. When it was put to him that it was never put to major Mtirara that his names were already filled in when he was brought before him, he insisted that it was put to him. He then changed and said that his legal representative put it to sergeant Nkankula that he handed the papers to major Mtirara with the form already populated. When he was asked if what was contained in the proforma did not come from him, he said that major Mtirara completed the proforma and caused him to sign after which he took his statement. Accused no.5 again changed to say that in respect of page one or two he was asked questions from those two pages. He again changed to say that it was pages three, four and five and then again changed to say it was pages three and four and that they started writing on page five. At this stage of his evidence under cross-examination it was difficult to make sense of what accused no.5 was saying.

[114] Accused no.5 testified that after he had finished with the proforma, major Mtirara said that he must tell him what he had been told to by the detectives. When paragraph 1 of his statement was read to him which was about his personal details like his level of education and which school he went to, accused no.5 changed to say that that came from him. He further testified that major Mtirara would ask him questions and he would respond. He then confirmed that a State witness, Vapi had testified that during the St Barnabas Hospital robbery no money was taken. He was then referred to his statement, in which he said that they did not get the money

during that robbery. Accused no.5 was referred to other similarities between the evidence of State witnesses and what was contained in his statement. No coherent response came from him but he maintained his innocence insisting that he was not involved in any of the robberies.

[115] Accused no.5 called Mr Bido to confirm his alibi on 2 and 4 November 2015. Mr Bido's evidence was that he knows accused no.5. Accused no.5 grew up in front of him and he used to work for him since 2014. Accused no.5 was in charge of the books and also dealt with the goods, assisting in loading furniture. Accused no.5 would also travel with him in bringing the goods to the Eastern Cape. They travelled to the Eastern Cape on Thursdays and on Fridays they would start doing deliveries starting with nearby places around Queenstown. Mr Bido testified that he started working with accused no.5 in 2014 and he thought that in November 2015 he still worked for him. Mr Bido was asked if he could still remember if accused no.5 was at work on 2 November 2015. His response was that if it was a Monday he would be in Cape Town and that there was no day in which he would not be at work. Accused no.5 was in charge of the books, keeping records of the type of furniture and the number of items. However, he no longer had the book of that period because he went to get the books from accused no.5's mother who told him that accused no.5 had taken the books with a detective after his arrest. He was using a UD35 Nissan truck. He did not know its registration number because he sold it in 2018.

[116] He testified that he knows accused no.5's house in Cape Town as it was where his truck was parked. He was shocked to hear that accused no.5 had been arrested in connection with a robbery that occurred on 2 November 2015 in Ngqeleni. He would not say anything about accused no.5 allegedly being in the crime scene on 2 November 2015 when he heard that from his mother. However, he maintained that accused no.5 was in Cape Town on that day because it was during the days he would be at work. With regard to the Tsolo robbery on 4 November 2015 Mr Bido said that accused no.5 would be in Cape Town on Wednesdays and Thursdays. This, he said was based on the fact that during those days they would be in Cape Town and they would normally be busy around November.

[117] Under cross-examination Mr Bido testified that he was familiar with all the accused but he did not know their names. He saw them in Cape Town. He saw one of the accused with accused no.1. When it was put to him that a document put accused no.5 at the crime scene on 2 November 2015 and was asked if he knew where accused no.5 was after 16:00 on 2 November 2015 he said that he would not know as his evidence related to days when accused no.5 would be at work. He did not know the dates and times because this incident happened a long time ago. He testified that they were in Cape Town on Mondays busy collecting the goods. With regard to the 4 November 2015 Mr Bido said that if it was a Wednesday they would be in Cape Town but he did not know where in Cape Town. The dates were recorded in the book which accused no.5 took with him. The case for accused no.1 was also closed after the section 213 affidavit confirming that national instructions and standing orders applied to the members of the DPCI and that the DPCI only has operational independence but is subject to the South African Police Services Act 68 of 1995.

Further submissions on confessions.

[118] All the evidence having been led and the accused having testified in the main trial, the court was asked to reconsider its admission of the confessions of accused no.1 and 5. As I understood it, the argument was that on at least two occasions before the confessions were made, both accused exercised their constitutional rights. The right to remain silent and the second was the right to legal representation. It is common cause that the members of the investigating team, warrant officer, Qokoyi and captain Maqubela caused both accused to sign warning statements in the morning of the 3 February 2016 before they were taken to court in Tsolo for their first appearance. In their warning statements, they indicated an intention to say everything in court. Put differently, they chose not to tell the police anything. It was submitted that this choice was in marked contrast to making the confession which they did later that day. The second vital choice made by the accused was when they appeared in court. During their court appearance, they both chose to have legal representation with accused no.1 electing to have a privately funded attorney while accused no.5 elected to be assisted by a legal aid attorney who happened to be present in court during his first appearance.

[119] As I understood the submission, it made no sense for the accused having elected legal representation to suddenly change their minds and implicate themselves in confessions without insisting on legal representation. Two points being made being that the accused were not informed of the right to legal representation during the interview with the police. Secondly, the accused must have been tortured into making the confessions. What these submissions however, miss in the first instance is the fact that the rights are open to an accused person to exercise and an accused person is also entitled not to exercise them. The fact that the accused elected to say everything in court and to be legally represented during court proceedings does not necessarily mean that during questioning with the police, they would have insisted on those rights. I therefore do not find it strange that they would, after court appearance, choose on their own and without being forced to do so, elect to co-operate with the police after their rights were explained to them in court.

[120] If the version of the accused is to be accepted as true, it would be concerning that all the police officers including the arresting officers who were not members of the investigating team who interacted with the accused would fail to observe this basic requirement and fundamental duty of informing an accused person of their constitutional rights when the validity of everything they do entirely depends on it. The accused were arrested by different police officers at two different places on 31 January 2016. Both accused claimed not to have been informed of their rights even as they were being arrested by all the officers who dealt with them. In fact, all the accused in this matter including accused no.2 who died and the ones who were discharged claimed not to have been apprised of their rights. I find that not only improbable but also false beyond reasonable doubt. This is in marked contrast to accused making a choice when their warning statements were taken which was essentially, a choice to remain silent. Surely, they must have been given an opportunity to exercise a choice after their rights were explained for them to make the choices that they did. At that stage the accused had only interacted with the police and the court had not yet come into the picture as they had not yet appeared in court. The accused did not explain how they made this choice in the manner they did if the police were intent on not advising them of their rights. If that was the case,

they would therefore not know which right to exercise and when because the rights were not explained to them.

[121] This brings me to the accused deciding to make confessions when they were interviewed by the police after their court appearance. It was the evidence of the accused themselves that they were confronted with statements allegedly made by one Mcebisi Poyo, who was said to have already been shot and killed during the trial but who was listed as accused no.4 in the indictment. The other statement was also said to have been made by one Nomandela. The point the accused were making, as I understood their evidence, was that what they said in their confessions was a mere regurgitation under compulsion as a result of torture, of not what they knew or intended to say, but that which they were schooled on whilst being tortured all of which was said to have been said by or contained in the statements of Poyo and Nomandela. In the first instance I must say that I struggled, even at the conceptual level, with the idea of memorising a very long story while being assaulted and suffocated even by the brightest of the minds in society. But even putting my difficulties aside, even a cursory look at the extra-ordinarily long confession of accused no.1 which has got names of co-assailants, places, times, types of firearms and vehicles, makes it very difficult to understand as something that one would have memorised under duress or direct assault and suffocation. That is equally so improbable as to be false.

[122] It should be remembered that accused no.5 was not charged in connection with the Lusikisiki robbery and was not implicated in it. However, in respect of the crimes in which he was implicated, his confession is markedly similar to that of accused no.1 in how it accounts for what took place in those crime scenes. This again begs the question, if one accepts their evidence as they said I should, it is very strange that they were able to memorise what they were schooled on and accounted for in almost the same way in how the incidents occurred, how they were planned, when they were committed and some of the vehicles that they used, who was with them and which vehicles were attacked and how they got away from the crime scenes. This brings into serious question, the assault and torture that they alleged were inflicted on them while they were being schooled on what to say. This is besides the fact that subsequent to the brutal assaults in which at some stage they

fell to the ground, the commissioned officers so no evidence of the accused having been actually injured when they actually appeared before them.

[123] When they were before the commissioned officers, the two accused did not allege direct assault by the commissioned officers or even assaults in their presence. Accused no.1's evidence was that before he was assaulted by the police he saw police officers as people that he could trust and rely on. How then did he not tell brigadier Manyana about the assaults when the proforma encourages an accused person in direct terms to do so is difficult to understand. As earlier indicated, accused no.5, on his version, was able to ask for water and was allowed to take his pills by major Mtirara. He was even allowed to take his sniff when he felt the craving to do so. This is in stark contrast to someone who was in a fearful environment. The issue of the contradiction between the pocket book of sergeant Kutu and his evidence was also relied on by Mr Potgieter, counsel for the accused. Sergeant Kutu's evidence was that he had taken accused no.1 to and fetched him from brigadier Manyana before and after the confession. However, the pocket book which he produced in court showed that at 18:20 he took accused no.1 to brigadier Manyana. He had already knocked off duty at 20:20 and yet the rather very long confession was completed at 22:15 the argument being that he had already knocked off at 20:20 when he supposedly fetched accused no.1 after 22:15.

[124] Even if it may be correct that the pocketbook was accurately recorded, it does not take the issue very far in my view. This is so because all it means is that it could very well be that accused no.1 was correct in saying that he was fetched by somebody else from brigadier Manyana's office. Brigadier Manyana's evidence was that after he finished taking the confession he stood at the door way and called out for accused no.1 to be fetched from his office. He was not sure whether it was colonel Mdingi or somebody else who fetched accused no.1. Whoever, fetched accused no.1, even if it was not sergeant Kutu, that does not mean that accused no.1 was assaulted. It just means that the evidence of who fetched him on 3 February 2016 may not be correct or that the evidence of the accused is correct. None of that takes the matter of torture and confession very far. As I conclude on this issue, all the evidence led subsequent to the admission of the confessions as evidence before this Court and having re-considered the submissions relevant, I am

of the strong view that there is no reason to revisit the decision to admit the confessions. I am more than satisfied that the decision to admit the confessions based on the evidence that was placed before me during the trial-within-a-trial including that of the accused themselves all of which I have taken time to consider was correct. The allegations of torture were, at best, unsubstantiated and the allegations of the accused not being informed of their constitutional rights, fanciful. In any event, it is not part of our legal framework that a mere allegation of torture should result in the evidence so obtained being excluded. In as much as an accused person has a right to remain silent he or she also has a right to freely confess his involvement in a crime for reasons that may not always be known for who knows what goes on in the mind of a suspect at any particular time.

[125] In *Ngcobo*⁵ the court expressed the following sentiments which are, in my view, very apt in this matter. It said:

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

[126] In *Tandwa*⁶ the Supreme Court of Appeal had occasion to clarify the exclusionary principle as it relates to the evidence of the commission of a criminal offence. It said:

⁵ S v Ngcobo 1998(10) BCLR (N) at 125E E-G.

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

The constitutional issue.

[127] This brings me to the constitutionality of section 217(1)(a) of the CPA⁷. The second leg of accused no.1 and 5’s attack on the confessions is their contention that section 217(1)(a) of the CPA is itself unconstitutional. At the core of the accused persons’ constitutional challenge, as I read their counsel’s written submissions, on this issue, is that during the nascent years of our constitutional democracy in 1996, section 217(1)(a) of the CPA was amended by the passing of the Criminal Procedure Amendment Act 86 of 1996 in which as regards section 217(1)(a) it reads:

“Amendment of section 217 of Act 51 of 1977, as amended by section 13 of Act 56 of 1979

⁶ S v Tandwa 2008 (1) SACR 613 (SCA) at para 116.

⁷ Section 217(1)(a) Evidence any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided – (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.

11. Section 217 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“ (a) that a confession made to a peace officer, other than a magistrate or a justice who is not a member of the South African Police Service, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer is authorised to exercise any power conferred upon him or her under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presences of a magistrate or such justice.” (My underlining).

[128] What becomes apparent in the amending legislation is that it now provides for the exclusion of the members of the SAPS. Had the provisions of section 11 of the Criminal Procedure Amendment Act come into effect, both brigadier Manyana and colonel Mtirara would have, as a matter of law, been excluded from taking confessions by virtue of their membership of the SAPS. However, Section 14 of amending legislation provides that:

“This Act shall be called the Criminal Procedure Amendment Act 1996, and shall come into operation on a date determined by the President by proclamation in the Gazette.”

[129] As I understood counsel's written argument and submissions in court on behalf of the two accused, it is the failure of the President to gazette the proclamation of the date of commencement of section 217(1)(a) as amended by the Criminal Procedure Amendment Act which permits the taking of confessions by commissioned officers who are members of the South African Police Service when the Legislature, through a legislative process, has determined that they shall not do so. It was submitted that section 217(1)(a) of the CPA in its current form allows a situation in which confessions are taken by the commissioned police officers without an independent judicial process.

[130] It is evident that the Legislature has done everything that accused no.1 and 5 would have wanted it to do to achieve the desired objective of excluding all the members of the SAPS including the commissioned police officers from taking

confessions. Counsel for the accused called upon this Court to do a reading in of the words that are in section 217(1)(a) of the Criminal Procedure Amendment Act, 1996 in circumstances in which, without the court's intervention, the Legislature has, on the argument made before me by counsel for the accused, done all that was required of it. It is now up to the President to proclaim the date on which the amendment shall come into operation. I do not think that it would be correct for this Court in these circumstances to read into the existing legislation a provision that exists in the amending legislation. Doing so would amount to a usurpation of the constitutional prerogative of the President to determine the date on which legislation comes into operation and therefore an interference in the law making process. I similarly do not think that this Court can declare unconstitutional a legislation that has already been amended as is the case in respect of section 217(1)(a) of the CPA. It may very well be that the accused have another remedy, not in criminal proceedings in my view, perhaps in civil courts to force the hand of the President. For this reason, it is not necessary for me to decide whether or not section 217(1)(a) in its current form is constitutional as doing so would be futile. If what is now required is for the President to proclaim the implementation date of the amended section 217(1)(a). It is not for a criminal court nor in criminal proceedings to try and force the hand of the President by making a declaration of constitutional invalidity of an already amended legislation. Similarly, even the reading in would, in my view, have the effect of amending section 217(1)(a) of the CPA when the Legislature has already done so which would, again amount to this Court venturing into the exclusive area of the Legislature and the President in their constitutional power to effect and finalise legislative amendments. For all these reasons and many others, I must decline the application to declare section 217(1)(a) constitutionally invalid or to do a reading in.

The analysis of the merits.

[131] This trial is concerned with basically three armed robbery cases committed in Lusikisiki on 14 September 2015, St Barnabas Hospital, Ngqeleni on 2 November 2015 and on 4 November 2015 in Tsolo on the N2 national road. In all three cash in transit robberies, there was one target, which was the vehicles of Fidelity Security Services whose business is cash conveyance from its own premises to ATMs and

banks and from banks and businesses to its premises. That is why the crimes committed in such incidents are commonly referred to as cash in transit robberies. The employees of Fidelity whose job is to operate the said vehicles, to collect the cash and to protect the cash are faced with the ever present danger of being killed by gangs of marauding robbers who plan, make proper preparations for an attack and arm themselves to the teeth with heavy weaponry including riffles and pistols and in some cases, even explosives. The guards are often injured and sometimes killed using the weapons and their service firearms are often taken away for the obvious purpose of the criminals always having sufficient weapons for further future attacks. In the Lusikisiki robbery which occurred on the R61 route between Flagstaff and Mthatha in Lusikisiki on 14 September 2015, an amount of R2,5 million and firearms were stolen and no one was killed or injured. In the St Barbanas Hospital robbery on 2 November 2015, less than two months later, the armed gang did not succeed in that no money was taken but the two employees of Fidelity sustained serious injuries inflicted by the use of the heavy weaponry which was able to penetrate the armoured vehicle. In respect of the Tsolo robbery on 4 November 2015 while the assailants could not force open the vault, they shot and killed Mnikelo Nqeto and his two colleagues were seriously injured and were lucky to escape with their lives. Mr and Mrs Jama's vehicle was high jacked and used as a getaway vehicle.

[132] The only evidence linking accused no.5 to the St Barnabas Hospital robbery is his own confession in which he also implicated himself in the Tsolo robbery. Accused no.1, also through his own confession, implicated himself in all the three robberies. In respect of accused no.1, there is also other evidence that not only in some respects confirms what he says in his confession but also some of it confirms his involvement in some of these offences as I will further elaborate hereunder. As far as the accused's confessions are concerned, it is important to bear in mind that the Legislature has decreed that a confession on its own even with no other evidence proving the involvement of the accused, is sufficient for a conviction provided that other evidence exists outside of the confession which proves that the offence was in fact actually committed.

[133] Section 209 of the CPA provides that:

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

In respect of all the three robbery incidents, there is abundant evidence of the guards who manned those vehicles that the robberies were actually committed. Such evidence includes the shooting in the case of the St Barnabas Hospital robbery and the Tsolo robbery. That evidence has not been disputed that the robberies actually occurred even though in both incidents, the assailants did not get the money in the Tsolo robbery and the St Barnabas Hospital robbery. The firearms and a smart box were however stolen in the two incidents.

[134] The nature of the evidence *aliunde* which proves the commission of the offence is unrestricted. In *Skosana*⁸, Van der Heever JA expressed himself as follows:

“The danger of innocent persons freely and voluntarily confessing their guilt in connection with crimes which either they did not commit or which were in fact not committed by anyone, is no doubt slight. As a result of accumulated experience, however, different safeguards have been devised in different countries to provide for what must be exceptional occurrences, namely confessions by unbalanced individuals to being guilty of crimes which they never committed. Our practice in this regard has been codified in section 286(2). I find there no limitation placed upon the kind of evidence which may adequately confirm the confession or provide *aliunde* the commission of the offence charged.”

[135] In his confession, accused no.5 explains that between October and November 2015 he was with accused no.1, accused no.2, accused no.3, accused no.6 and one Masakhe Bokovane, one Taima, one Sitshovu-tshovu, one Svig and Boy-boy

⁸ R v Skosana 1960 (4) SA 723 (A) at 729 C-D.

Mntuyedwa. They were armed with two rifles which were brought by Sitshovu-tshovu. He describes the vehicles they were using and the different roles they played when they committed the St Barnabas Hospital robbery in Ngqeleni. He said, he personally, was armed with an R5 rifle. Most importantly, he says that they did not get the money. Accused no.5 further says in his confession that two days later the same group armed themselves with all sorts of heavy weaponry almost as during the St Barnabas Hospital robbery, committed the Tsolo robbery on the N2. He explains how they executed the robbery including the high jacking of the getaway car which was a Mercedes Benz SUV which took them to Mthatha having high-jacked it from the driver and his wife. They thereafter left that vehicle on the way and Taima took them for hiding in his Mercedes Benz vehicle to accused no.2's rural home in Ndibela Location. The following day some of them left for Cape Town. The contents of accused no.5's confession are aligned with some of the evidence given by some of the State witnesses including Mrs Rwetshe-Jama.

[136] On the other hand accused no.1's confession explains how he got to know Gqweta and how they met in Mthatha and how they ultimately planned and executed the Lusikisiki robbery including with some of the people mentioned by accused no.5 and other people who may not have been present when the subsequent two robberies of St Barnabas Hospital and Tsolo were committed, the vehicles used during which he was armed with a pistol. He describes the different roles they played and unveils Nomandela about whom he testified in the trial-within-a-trial as Taima. He got R340 000.00 and was also given R340 000.00 which was Gqweta's share. He later also ultimately went to Cape Town where he was arrested. He explains that they dispossessed the Fidelity guards of a rifle and a pistol. He then kept the pistol for himself. He also explains in some impressive detail how the St Barnabas Hospital robbery was committed with some of the people who were present in the Lusikisiki robbery and the assortment of firearms they were armed with and how the Fidelity vehicle was chased into St Barnabas Hospital where it was further pummelled with gunfire during which they did not get the money. They then decided to try again by planning and executing the Tsolo robbery. Most importantly, he further adds a crucial piece of evidence, that of contacting Gqweta to check through the registration number of the Fidelity vehicle and to find out how it could be opened which Gqweta said he did not know. In any event and without any

information, they decided to take their chances and rob it. He even explains who amongst their number, shot Nqeto. He also confirms the high-jacking of the Mercedes Benz that accused no.5 talked about which he also says they abandoned somewhere.

[137] I have summarised a few aspects of accused no.1 and 5's confessions so that they are easily comparable to the evidence of some of the State witnesses and the similarities between the two confessions. This, I did also to dispel as so improbable as to be false, the notion that the detail contained therein was from people who were tortured and schooled into capturing such amount of detail in a matter of a few hours. If one compares the evidence of Gqweta and the contents of accused no.1's confession, it becomes very clear that Gqweta's evidence was both clear, reliable with very little to no inconsistency. Accused no.1's confession also confirms his conversation with Gqweta on the day of the Tsolo robbery during which he asked for and was given no information about the targeted vehicle. This piece of information was a communication between accused no.1 himself and Gqweta. It could not have come from anybody else be it Nomandela or even accused no.4 as he falsely said in his evidence.

The accused's alibis.

[138] This brings me to the issue of the alibis the two accused raised which for some reason, they elected not to raise them when the trial began. In any event the alibis themselves were clearly false and misguided after-thoughts. On 2 and 4 November 2015, accused no.1 was not sure whether he was in church or not or whether he was in Cape Town or even in Durban during that period. Bido's evidence, properly considered, was that of a witness of convenience brought to corroborate the false story of accused no.5 who on his evidence, was taken to his home to see or visit his family but ends up being given Bido's crucial book which was somehow taken by Qokoyi, for Qokoyi, to do what with it is unfathomable. I am not unmindful of the fact that an accused person does not have to prove his alibi. This has been the legal

position since time immemorial as eloquently stated in *Hlongwana*⁹ in which the court re-affirmed this legal position as follows:

“The legal position with regard to an alibi is that there is no onus on an accused to establish it and if it might reasonably be true he must be acquitted. But it is important to point out in applying this test the alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in case and the court’s impressions of the witnesses.”

[139] Other than the ill-conceived and misguided alibis, both accused’s evidence was not only largely improbable as to be false but also it tended to be very little, if anything more than incoherent bare denials which were told with boldness, told with the sole purpose of misleading the court to avoid being held accountable for their criminal conduct. This is besides a number of crucial aspects of their evidence which was somehow not put to State witnesses and would be heard for the first time either when the accused themselves testified and at times an afterthought and a desperate attempt at explaining the inexplicable by such evidence being heard for the first time under cross-examination. This is an issue that a court, no less than the Constitutional Court dealt with authoritatively in *SARFU*¹⁰ in which the court said:

“The institution of cross-examination not only constitutes a right, but also poses certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to the fact by questions put in cross-examination showing that the imputation is intended to be denied and to afford the witness opportunity, while still in the witness box of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged witness’ testimony is accepted as correct.”

⁹ R v Hlongwana 1959(3) SA 337 (A).

¹⁰ President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC para.

[140] The improbability of accused no.1's evidence and therefore its falsity is so made clear even by his suggestion that the firearm he showed Gqweta at Jimmy's place which was found in Cape Town was either somewhere in the house having possibly been put there by another person in the house in which he happened to be present. It gets worse as it was submitted on his behalf that because no chain evidence was led on that firearm, it could very well be that the firearm found by constable Van Wyk in that house at Ilitha Park, Khayelitsha, Cape Town when accused no.1 was arrested, may not even be the firearm that was exhibited in court. This is despite the fact that there is unchallenged evidence that it was taken from the employees of Fidelity, in particular Phumelo in Lusikisiki on 14 September 2015 during the Lusikisiki robbery in which there is abundant evidence indicating accused no.1's involvement.

[141] The alibi of accused no.5 and the evidence of Mr Bido amounted to no more than that, if the date of the commission of the offence was during any of the seven days of the week, he could not have committed it. This was because he said on Mondays to Thursdays he would be collecting furniture in Cape town and preparing it for delivery in any of the towns in the Eastern Cape. On Thursdays accused no.5 would be departing from Cape Town arriving in the Eastern Cape on Fridays. The deliveries would commence on Fridays to Saturdays and on Sundays they would be driving back to Cape Town which accounts for the whole 7 days of the week. This is patently false in light of the evidence of his own confession which places him in the crime scenes in Ngqeleni and Tsolo. The evidence of Mr Bido was not that accused no.5 was with him on 2 and 4 November 2015. It was that if those offences were committed between Mondays and Thursdays then he was with him. All of this ignores the fact that there is no evidence of the existence of this transport business beyond their mere *ipse dixit*, no delivery book, no receipt, no tax return, no company registration documents, no salary advice and in fact his salary was given to him by hand, not even deposited in a bank account as he testified. Juxtaposed with the evidence of his confession which places him in those crime scenes, the whole alibi is palpably false and stands to be rejected as an ill-conceived idea to mislead this Court. This is not to impose a burden on an accused person to prove his innocence by proving his alibi. It is simply to weigh the evidence of the alibi together with the other evidence and not to assess it in isolation. There is therefore no reasonable

possibility that accused no.5 was in Cape Town on 2 and 4 November 2015 when the St Barnabas Hospital and Tsolo robberies were committed. His evidence and that of Mr Bido is not only improbable but it is clearly false beyond reasonable doubt.

[142] I consider it necessary to refer and quote generously the case of *Musiker*¹¹ in which Tshiqi JA restated the law on alibi defence as follows:

“15. The fundamental problem with the decision of the magistrate is the approach he adopted in regard to the evidence of the appellant, his alibi defence and that of the two State witnesses. He, with respect, failed to take into account the fact that it was the State that bore the onus to prove the guilt of the appellant. Once the appellant raised the alibi defence, that alibi had to be accepted unless it was proved to be false beyond reasonable doubt. That did not happen. The evidence of the appellant’s wife that he was at home at the time of the incident was not challenged. The magistrate was faced with the evidence of two State witnesses who placed the appellant at the scene of the incident and the appellant’s own evidence, together that of his wife which placed him at home. In effect the magistrate was faced with two mutually destructive versions. This being the case:

‘The magistrate had no sound reason to prefer the evidence of the complainant [and Mabena] to that of the appellant (*Peterson v S* [2006] JOL 16082 (SCA) para 8).

16. This court in *S v Liebenberg* 2005 (2) SACR 355 (SCA) paras 15 and 15 stated: ‘(O)nce the trial court accepted that the alibi defence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution’s evidence could not, by itself alone, be a sufficient basis for rejecting the alibi defence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi defence to be false. In *S v*

¹¹ *S v Musiker* 2013 (1) SACR 517 (SCA) paras 15-16.

Sithole and Others 1999 (1) SACR 585 (W) the test applicable to criminal trials was restated in the following terms at 590 g-i:

“There is only one test in criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken’.

...

Where a defence of alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution’s evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biza* 1952 (4) SA 514 (A). At 521 C-D Greenberg JA said:

“If there is evidence of accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that his alibi defence is true, it means that there is the same possibility that he has not committed the crime,”

The firearm charges.

[143] The last issue to be dealt with is that of the accused's possession of firearms. The evidence before this Court is that during the St Barnabas Hospital robbery, accused no.5 was armed with an R5 rifle. This, he says so himself after explaining how they shot at the Fidelity vehicle's wheels and they chased it all the way to a certain hospital which it is not in dispute that the said hospital was St Barnabas Hospital in Ngqeleni. He was obviously using that firearm which he had no licence to possess it and therefore he was in unlawful possession of that firearm and ammunition. However, on 4 November 2015 when the Tsolo robbery was committed, accused no.5 was not in possession of the R5 rifle he used during the St Barnabas Hospital robbery on 2 November 2015. He was in unlawful possession of Banele Ndlebe's 9mm Z88 pistol while Banele Ndlebe, the former accused no.3, was a driver and was unarmed. On the other hand, accused no.1 says he was in possession of a pistol during the Lusikiskiki robbery. However, before the St Barnabas Hospital robbery was committed, there was a day in which he was in possession of an R5 rifle. This, he describes as the first day of their attempt during which they did not go ahead with the robbery as planned. However, on the following day when they actually carried the robbery and in fact fired shots at the Fidelity vehicle, they were all armed with an assortment of firearms. On that second day, it is unclear if he was in possession of any firearm. What is clear is that the vehicle was shot at by some of them hence the damage to the vehicle itself and the injuries Fidelity employees Mlenga and Vapi sustained. There is no clear evidence of himself being in possession of any firearm. He must therefore be given the benefit of doubt.

[144] When they did not get the money they decided to commit the Tsolo robbery. They did not get assistance from Gqweta whom he calls Booie who told them that he did not have information on the vehicle in that route as it was not his route. On this occasion, amongst other vehicles, his own bakkie, a Toyota Hilux was driven by one Bhiza whose duty was to clear the road when he saw police vehicles and to inform others. Accused no.1 says that during that incident, other than the shots that were fired at the Fidelity employees, Mphako and his colleagues as well as the fatal shot that killed Nqeto, the police were also shot at. At some point accused no.1's own firearm jammed, or as he put it, had a stoppage. He also fired four shots in the air so

that the Fidelity guards would not take note of their getaway vehicle and Magaiks high jacked a Mercedes Benz whose model he was not sure about.

[145] The point is that during the Tsolo and Lusikisiki robberies accused no1 was on his own confession, in possession of firearms and ammunition while his co-assailants were also armed with different assortment of firearms. That being the case, the issue of joint possession of firearms does not even arise because both accused no.5 and 1 were personally armed during the Lusikisiki and Tsolo robberies in respect of accused no.1 while accused no.5 does not appear to have been present in the Lusikisiki robbery but was present and armed during both the Ngqeleni and the Tsolo robberies.

The doctrine of common purpose.

[146] The last issue is that in preferring charges against the accused, the State also relied on the doctrine of common purpose. It is not in dispute that the accused possibly with the leadership and guidance of accused no.1 who seems to have been the main man, organised themselves into a group that pre-planned and organised themselves into a mini army with an assortment of weaponry including rifles, hand guns and pistols. They organised and ensured that they had the necessary ammunition for those weapons which they used very effectively and shot and injured Fidelity employees who were in the cash vehicles during the St Barnabas Hospital and Tsolo robberies. They organised several vehicles for each robbery and constituted themselves into a mini army in which accused no.1 would always be amongst their number on each robbery. Their *modus operandi* was that the Fidelity vehicles were followed and there would be communication amongst them about how the robbery would be effected and at what point they would pounce in the journey of the unsuspecting Fidelity employees who unexpectedly found themselves under a hail of bullets from heavy gun fire.

[147] Not so long ago the Constitutional Court had occasion to restate and clarify the law on the doctrine of common purpose. Because of the nature of this matter and the fact that the shooting that occurred during the St Barnabas and Tsolo robberies were done by several assailants with different targets as most, if not all of the

members of the group were shooting whenever they deemed it necessary for them to do so with the result that at least five Fidelity employees were shot at and suffered serious injuries and one of them was fatally injured. The common feature in all the incidents was that the assailants worked together as a group playing different roles to achieve a common design and objective of robbing the Fidelity vehicles and stealing the firearms.

[148] I therefore consider it very useful to quote generously once more from the recent judgment of the Constitutional Court judgment in *Tshabalala and Ntuli*¹² in which the court said:

“Burchell defines the doctrine of common purpose in the following terms:

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

Synman elaborates that –

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

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

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

It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the

¹² *Tshabalala v S; Ntuli v S* 2020 (2) SACR 38 (CC), 2020 (5) SA 1 (CC) paras 46-49.

surrounding circumstances from which the inference are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in the circumstances be established.”

[149] In all these circumstances, the State has proved the guilt of the accused beyond reasonable doubt in respect of all the robberies for which they were charged. While accused no.1 was present in the St Barnabas Hospital robbery, there is no evidence of him being armed on that day, whatever other role he may have played for which he stands to be convicted but must be acquitted in respect of the unlawful possession of firearms and ammunition in respect of that specific robbery. The evidence of Anele Gqweta, the section 204 witness, was impressively clear, credible and reliable in all material respects even taking into account any imperfections including him being a single witness. In fact, his evidence has established the guilt of accused no.1 not only in respect of the Lusikiskiki robbery but also in respect of the Tsolo robbery above and beyond accused no.1’s confession in respect of those robberies. He is therefore granted immunity from further prosecution as provided for in section 204 of the CPA.

[150] In the result, the State has proved the guilt of accused no.1 and accused no.5 beyond reasonable doubt. They are therefore found guilty as follows:

1. Accused no.1 is found guilty of count 1, the aggravated robbery in respect of the Lusikisiki robbery.
2. Accused no.1 is found guilty, in respect of count 2, the unlawful possession of a firearm during the Lusikisiki robbery.
3. Accused no.1 and 5 are found guilty in respect of count 7, aggravated robbery in respect of St Barnabas Hospital robbery, in Ngqeleni.
4. Accused no.1 and 5 are found guilty of the attempted murders of Kwanele Vapi and Mphumezi Mlenga in respect of counts 8 and 9, during the St Barnabas Hospital robbery.

5. Accused no.1 is found not guilty in respect of counts 10 and 11, the unlawful possession of firearms and ammunition during the St Barnabas Hospital robbery.
6. Accused no.5 is found guilty of counts 10 and 11, the unlawful possession of firearms and ammunition during the St Barnabas Hospital robbery.
7. Accused no.1 and 5 are found guilty of count 12, the aggravated robbery in respect of the Tsolo robbery.
8. Accused no.1 and 5 are found guilty in respect of count 13, the murder of Mnikelo Nqeto during the Tsolo robbery.
9. Accused no.1 and 5 are found not guilty in respect of count 14, the attempted murder of Yolisa Mlungwana.
10. Accused no. 1 and 5 are found guilty in respect of counts 15, 16 and 17, the aggravated robbery of the Mercedes Benz ML63 of Mr and Mrs Jama, the unlawful possession of firearms and ammunition during the Tsolo robbery and the high jacking of Mr and Mrs Jama's vehicle.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearance

Counsel for the State : M.L Makubalo
Instructed by : NPA
MTHATHA

Counsel for the accused No.'s 1 and 5: H.J Potgieter
Instructed by : Groenewald Attorneys
GAUTENG

Date delivered : 2 and 3 June 2025