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

CASE NO: CC D13/2024

In the matter between:

THE STATE

and

MZAMELENI TSHEPHO MAJOLA

ACCUSED 1

NKAZIMULO NDLOVU

ACCUSED 2

MONDLI FIHLELA

ACCUSED 4

ORDER

According, I make the following order:

1. Accused 1 is found not guilty of counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 23, 24, 25 and 26.
2. Accused 1 is found guilty on counts 17, 18 and 21 regarding robbery with aggravating circumstances

3. Accused 2 is found not guilty of counts 1, 14, 15, 16, 17, 18, 19, 20, 21, 25 and 26.
4. Accused 2 is found guilty of count 2 regarding the murder of Velani Shezi, count 3 the murder of Bhekani Mntungwa; count 4 attempted murder of Kheswa; count 5 robbery with aggravating circumstances at Vuka Enterprise, count 6 the murder of Sandile Mthembu; count 7 the murder of Mxolisi Gogo; count 8 robbery with aggravating circumstances, count 9 the unlawful possession of a prohibited fire arm; count 10 Unlawful possession of ammunition; count 11 murder of Sphelele Ndiyaza; count 12 attempted murder of Busizwe Goodwill Ngcobo; count 13 attempted murder of Nonkululeko Mthimkhulu; count 22 robbery with aggravating circumstances at KwaSomkhele; count 23 murder of Sbonelo Gumede and count 24 attempted murder of Vusi Mthiyane.
5. Accused 4 is not found guilty of counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20 and 21. Accused 4 is found guilty of count 14 the kidnapping Nkomonde, count 15 the robbery with aggravating circumstances. Count 16 murder of Patricia Nkomonde, count 22 robbery with aggravating circumstances, count 23 murder of Sbonelo Gumede and Count 24 attempted murder of Vusi Mthiyane.

JUDGMENT

Mathenjwa J

Introduction

[1] The first, second, and fourth accused (collectively referred to as the “the accused”) are each charged with one count of contravening of s 9(1)(a) and/or 9(1)(b) and/or 9(2)(a) and/or 9(2)(b) and/or 9(2)(c), read with ss 10 and 11 of the Prevention of Organised Crime Act 21 of 1998 (“POCA”) . It is alleged that the accused unlawfully and intentionally participated in or were members of a criminal gang, and wilfully aided criminal activities undertaken for the benefit of, or in

association with, any criminal gang. Additionally, the accused face the following charges: seven counts of murder, four counts of attempted murder, nine counts of robbery, one count of unlawful possession of automatic rifle, one count of unlawful possession of prohibited firearm, and two counts of unlawful possession of ammunition. Thus, in total, the accused are facing 26 charges. The charges were withdrawn against accused 3 prior to commencement of the trial.

[2] Prior to the accused entering their pleas, the Court, acting *mero motu*, raised concerns about the discrepancies in the averments relating to the locality where the offences were allegedly committed. Specifically, counts 9, 10, 25 and 26 stated that the offences were committed at Ntshwaweni area, in the district of Empangeni. However, count 22 stated that the offence was committed at Masango bus stop at Mkhanyakude, whereas count 23 states that Masango stop is in the district of Ethekwini, and count 24 states that Masango stop is in the district of Kwamsane. While it is correct that someone who is not familiar with the localities to confuse that Ntshawini is located in Stanger rather than Empangeni, however, it is illogical for the same Masango bus stop to be situated at three different districts: Mkhanyakude, Msane, and Ethekwini.

[3] The accused have a right to a fair trial, which include the right to be informed of the charges against them with sufficient detail to enable them to properly respond.¹ For these reasons, I adjourned the matter and afforded the State an opportunity to amend its indictment before the accused pleaded. On resumption, the State applied for amendment of the indictment. The application was not opposed, and the amendment was granted accordingly.

[4] The amended charges were put to the accused as follows:

- (a) Count 1: unlawful and intentional participation in the activities of a criminal gang and/or being a member of a criminal gang, and commission of, or aiding criminal activities for the benefit of, or in association with such a criminal gang.

¹ S 35 (3)(a) of the Constitution,

- (b) Counts 2 and 3: the murders of Velani Shezi and Bhekani Mtungwa, committed at Vuka Enterprise, Springfield, Durban, on 3 November 2021.
- (c) Count 4: attempted murder where Cyril Kheswa was shot at Vuka Enterprise Springfield, Durban, on 3 November 2021.
- (d) Count 5: robbery with aggravating circumstances, where a 38 calibre Taurus firearm was taken from the deceased, Bhekani Mtungwa, at Vuka Enterprise, Springfield, Durban, on 3 November 2021.
- (e) Counts 6 and 7: the murders of Sandile Mthembu and Mxolisi Goqo who were killed at Myingazi, area, Nseleni, Empangeni, on 28 January 2022.
- (f) Count 8: robbery with aggravating circumstances where a motor vehicle was taken from the deceased, Mxolisi Goqo, in the Myingazi area, Nseleni, Empangeni, on 28 January 2022.
- (g) Counts 9 and 10: unlawful possession of a prohibited firearm, namely a 9mm pistol, and unlawful possession of ammunition, both found in possession of the accused at Ntshawini area, Stanger, on 1 February 2022.
- (h) Count 11: murder of Sphalele Ndiyaza at Nseleni Township, Empangeni on 29 January 2022.
- (i) Counts 12 and 13: attempted murder of Busizwe Ngcobo and Nonkululeko Mthimkhulu at Nseleni Township Empangeni on 29 January 2022.
- (j) Count 14: kidnapping of Emmanuel Nkomonde at Punters Hill, Durban, on 3 January 2022.
- (k) Count 15: robbery with aggravating circumstances where an Audi A3 motor vehicle was taken from Emmanuel Nkomonde at Punters Hill, Durban, on 3 January 2022.
- (l) Count 16: murder of Patricia Nkomonde at Punters Hill, Durban, on 3 January 2022.
- (m) Count 17: robbery with aggravating circumstances, where a motor vehicle was unlawfully and intentionally taken at gunpoint from Nkosingiphile Boozi at Cato Crest, Durban, on 14 November 2020.
- (n) Count 18: robbery with aggravating circumstances, where goods belonging to Silindile Khumalo were unlawfully and intentionally taken at gunpoint from her at her home at Indus Lane, Durban, on 26 July 2021.

- (o) Count 19: robbery with aggravating circumstances, where a motor vehicle was unlawfully and intentionally taken at gunpoint from Dhanasagaren Naidoo at Silver Willow Road, Durban, on 13 June 2021.
- (p) Count 20: robbery with aggravating circumstances, where goods were unlawfully and intentionally taken at gunpoint from Appalsamy Ramadu from his bottle store at Peter Mokaba Road, Durban, on 13 June 2021.
- (q) Count 21: robbery with aggravating circumstances, where a motor vehicle was taken at gun point from Jerry Mirimi at Silver Willow Road, Durban, on 13 January 2022.
- (r) Count 22: robbery with aggravating circumstances, where a motor vehicle was taken at gun point from Vusi Mthiyane at Masango bus stop Kwasomkhele Mtubatuba on 15 January 2022
- (s) Count 23: murder of Sbonelo Gumede at Masango bus stop Kwasomkhele, Mtubatuba on 15 January 2022.
Count 24: attempted murder of Vusi Mthiyane at Kwamasango bus stop, KwaSomkhele, Mtubatuba, on 15 January 2022.
- (t) Counts 25 and 26: unlawful possession of prohibited firearm, an AK-47 and ammunition that was in possession of the accused at Ntshawini, Stanger on 1 February 2022.

[5] The State alleged that the accused committed the offences in furtherance of a common purpose. The accused were informed of the prescribed minimum sentences in respect of the counts of murder, attempted murder, robbery with aggravating circumstances, kidnapping, unlawful possession of automatic rifle and unlawful possession of prohibited firearm. All three accused were legally represented by counsel appointed by Judicare. They all pleaded not guilty and elected not to disclose the basis of their defence.

[6] The State called numerous witnesses. However, for the purpose of this judgement, I will only concentrate on the evidence of some of the witnesses, for reasons that will appear later in this judgement. One such witness is Sihle Mhlongo ("Mlongo"), who was an accomplice. He was convicted and is currently serving a sentence of 20 years imprisonment for robbery with aggravating circumstances and kidnapping in respect of counts 14 and 15 in this matter. He was accordingly warned

in terms of s 204 of the Criminal Procedure Act 51 of 1977 ("the CPA"). He knew accused 2 and 4, and he only knew accused 1 by sight. He once resided with accused 2 in Block F at Wema Hostel. He knew accused 4 from when he was still residing at KwaMashu Hostel and he had frequently visited him at his dwelling place at Punters Hill.

[7] Mhlongo testified that he together with accused 2 and 4, and other people who are known to him by the names of Nathi, Ngidi, Shimza, Nqubeko, and Dlamini, formed a group of about nine people who were friends, who would drink, and also committed criminal offences together. They would commit any crime whenever an opportunity avails itself. They would commit crimes collectively or individually. Most of the crimes they committed included housebreaking and theft to hijacking. They resorted to committing crimes to make money out of crime because of unemployment. There was no particular leader for the group, although a person referred to as Shimza often assumed a leadership role within the group.

[8] On 3 January 2022, Mhlongo was at Punters Hill with accused 4 and other people who are not before court. While there, they saw a white motor vehicle trying to turn at a small passage. Mhlongo walked past the vehicle and accused 4 whom he referred to as "Ntshebe" and Shimza were following him behind. When accused 4 and Shimza were alongside the car he heard Shimza state, 'let us take the car'. He looked back and saw Shimza pulling the driver of the car out of the car, and made him to hold on to the roof of the car. Shimza told him to open the back door of the car and told the driver of the car to get inside the car at the back seat. At that point, he then saw a woman who had been seated in the front passenger seat exited the car and picked up an object resembling a wheel jack. Mhlongo then heard a gunshot. Although he did not see who had fired the shot, he saw that accused 4 was standing in close proximity to the woman. The woman then collapsed onto her back, bleeding from the forehead. Accused 4 and Shimza got into the car and accused 4 gave Mhlongo a gun to guard the driver of the motor vehicle at the back seat. He heard Shimza asking accused 4 why he had shot the woman, accused 4 responded that he shot the woman because he observed that she was trying to hand a blow on Shimza.

[9] Accused 4 drove the vehicle to KwaMashu. They dropped off the male victim at KwaMashu, and thereafter, the accused proceeded to KwaMashu hostel where accused 4 used to stay. Accused 4 parked the vehicle at Ezitolo zakwa Shenge within the premises of KwaMashu hostel. Then, someone arrived at KwaMashu hostel and took them with a car to Punters Hill. The following morning, accused 4 returned with the car at Punters Hill. It was at that stage that he realised that the car was an Audi S3.

[10] On or about 9 January 2022, Mhlongo, together with Shimza, accused 2 and 4, went to his home at Nongoma to attend a funeral for his uncle. Accused 4 was driving the white Audi vehicle that was taken during robbery at Punters Hill. Accused 2 was wearing a Sangoma gear with a sorong. Upon arrival, accused 2, 4 and Shimza went into Mhlongo's house, stayed for a while and they left back for Durban. On their return to Durban, they used the road that goes through Mfolozi game reserve towards Mtubatuba. On the following morning, Mhlongo phoned Shimza, who was with accused 2 and 4, to find out whether they have travelling safely to Durban. He heard voices from other group members in the background stating that on their way to Durban they had taken another motor vehicle at Mtubatuba, it was a white Polo motor vehicle.

[11] On his arrival to Durban, he found the white Polo car parked at accused 2's residence at Punters Hill. It had bullet holes on the seat and dashboard. Accused 2 told him that, during the hijacking, the driver shot at them and they shot him dead. The incident occurred at Mtubatuba area and accused 2 showed him a gun they had taken from the deceased.

[12] On or about 27 or 28 January 2022, Mhlongo slept at Dlamini's home, one of the gang members at Melmoth. Dlamini gave him an AK-47 and a white Polo car to take it to accused 2 in Durban. He did not have drivers licence but, Dlamini informed him that he will meet accused 2 on the way to Durban. On his way to Durban, at Eshowe garage he picked up accused 1, who was hiking on the road. He did not know accused 1 and he only knew him by sight. He used to see him at Punters Hill. He gave accused 1 a lift because accused 1 indicated that he was going to Durban. He was informed by Dlamini that he would meet accused 2 at Gingindlovu, who will

be driving a black Polo. As he was approaching the T-junction at Gingindlovu he saw a black Polo flickering lights. He approached accused 2 who was driving the vehicle.

[13] Mhlongo drove on the old road that goes through Stanger towards Durban, following accused 2 who was driving in front. Accused 2 stopped at a traffic light in Stanger and informed him that they had to pass by his maternal uncle's place. They arrived at accused 2's maternal uncle where they stayed about 1-hour drinking beer. Accused 1 was still with them and he also drank beer. They then proceeded to Durban and on the road to Durban they encountered about three or four vehicles that blocked them off the road. The occupants of those vehicles instructed him to raise his hands. They subdued him, he fell down and he was arrested. They searched the vehicle and found a rifle. All three of them, that is accused 1, 2 and himself were arrested.

[14] Mhlongo was cross-examined by counsel for accused 2 and 4. He confirmed that there was no promise made to him by the State when he pleaded guilty to the charges against him. He averred that he was remorseful about what he had done. It was put to Mhlongo that both accused 2 and 4 dispute that they knew him. Mhlongo insisted that both accused 2 and 4 are members of the gang, he had often met with them for purposes of committing crimes. Mhlongo stated that accused 1 had no knowledge about the presence of AK47 rifle in the boot of the vehicle but accused 2 had knowledge of the AK-47 rifle that was found in the motor vehicle driven by Mhlongo at Stanger.

[15] Colonel Hendrik Herbst ("Herbst") testified that on 1 February 2022, he was alerted about a VW Polo motor vehicle with registration number N[...], which was reportedly stolen that was seen on R102 road near Groutville, KwaDukuza. He spotted the vehicle and stopped it. The vehicle was followed by another white polo vehicle. When the black VW polo vehicle stopped, the white polo vehicle that was following it also stopped behind it. The driver of the black polo vehicle identified himself as Nkazimulo Ndlovu ("Ndlovu"). On the foot pedal of the vehicle, Herbst found a 9mm pistol with rounds of ammunition. He explained to Ndlovu (accused 2) his constitutional rights and arrested him. He then approached the occupants of the white polo vehicle. The driver of that vehicle identified himself as Sihle Mhlongo and

the passenger identified himself as Mzameleni Majola (accused 1). He searched the vehicle and in the boot of the vehicle he found an AK-47 rifle with nine rounds of ammunition. He informed Mhlongo and accused 1 of their constitutional rights and arrested them. The white polo vehicle was an imported vehicle with registration number B[...]. He booked all the items found in possession of the accused as exhibit at Stanger Police Station.

[16] Under cross-examination by accused 2's counsel, it was put to Herbst that accused 2 informed him that he received the vehicle from one Peter Hlabisa. Herbst disputed that and contended that the accused did not give him any explanation about his possession of the vehicle, firearm and ammunition. Francois Snyman was with Herbst when the motor vehicles in which the accused were travelling was stopped on the road at Groutville. Snyman corroborated Herbst's testimony. He confirmed that a 9mm pistol was found in the black polo vehicle and an AK-47 was found in the boot of the white polo vehicle.

[17] Themoshin Mike Singh ("Singh") is a detective constable stationed at Sydenham Police Station. On 15 February 2022, while on duty he received complaint over the radio about a motor vehicle that was hijacked at Reservoir Hills. He, together with Warrant Officer Ragendi Bessessar ("Bessessar") proceeded to the aforesaid address and found a white Audi S3 at the driveway. There was a person sitting in the car who identified himself as Mondli Fihlela ("Fihlela" who is accused 4). Fihlela confirmed that the vehicle belonged to him. Singh confirmed the VIN number of the vehicle that it was the vehicle that was hijacked and reported at Mayville Police Station. The driver was detained at Mayville police station. Under cross-examination, counsel for accused 4 put to Singh that the accused informed Singh and other police officer that he received the vehicle from one Phumlani Mthembu. Singh disputed that the accused gave explanation about his possession of the vehicle.

[18] Bessessar confirmed that on 15 February 2022 he was in the company of Singh when they found accused 4 seating at the driver's seat of a white Audi motor vehicle with registration number C[...]. He circulated the motor vehicle on the radio control and discovered that the registration number on the vehicle was not its

registration number, its actual registration number was N[...] which was reported stolen during hijacking at Mayville Police Station. Under cross-examination he denied that the accused gave him explanation about his possession of the vehicle. He stated that the accused informed him that the vehicle belonged to him.

[19] Sabelo Hendrick Zwane (“Zwane”) is employed as a security guard employed by BPSS Company at Morningside Village. During January 2022, while on duty, he observed Nomusa, the owner of a tuckshop at Morningside Village, arrived in a white Audi motor vehicle that was driven by accused 4. Zwane knew accused 4 by sight having occasionally met with him in a tuckshop owned by Nomusa. Nomusa had made arrangement with Nobuhle, the owner of one of the flats at Morningside Village, for accused 4 to park the motor vehicle at parking bay V1, belonging to Nobuhle. Accused 4 would regularly park the vehicle in the evenings or late afternoons and drive away with it every morning. Accused 4 parked the vehicle in the parking bay for almost a month and then disappeared.

[20] Xolani Emmanuel Nkomonde (“Nkomonde”) testified that on 3 January 2022, at about 20h00, he was driving his white Audi with registration number N[...] with his wife, Patricia Nkomonde, at Punters Hill. When he reversed his vehicle and turned around, he saw a male person in front of the vehicle who was exhibiting aggressive behaviour. Simultaneously, another male person approached the right side of the vehicle swearing at him. When Nkomonde’s wife intervened, the second male person swore at her. His wife then exited the vehicle with a car-jack. At that stage, a verbal altercation ensued between her and the man. Nkomonde got out of the car and pleaded with the man who was arguing with his wife to forgive her. Suddenly another man came behind Nkomonde and grabbed him on his neck, and he heard a gunshot.

[21] The person who grabbed him had a gun on his hand. Another man came carrying a gun, searched him and asked him for keys of his motor vehicle. Nkomonde told that man that the keys were in the car. He was then forcibly placed into the back seat of the car at gunpoint. As this occurred, he saw his wife lying down on the ground. There were three assailants in the car. Before they left, the driver of the car handed a firearm to the person who was sitting with Nkomonde at

the back seat and gave him instruction to shoot Nkomonde if he makes any movement. On arrival at KwaMashu, the driver of the vehicle told him that they would drop him off at a certain spot and kill him, he was told to begin praying. The car stopped at the shacks in KwaMashu, where another male person approached and dismantled some parts of the motor vehicle. The car drove back to the road and dropped him off along the side of the road. He ran in to a house alongside the road where he was assisted by the occupants of the house to make a phone call to his mother.

[22] Subsequently, he was fetched by his sister from KwaMashu with a car. He then learnt that his wife was admitted to Addington Hospital, where she died three days later. From the ordeal with the assailants, he heard them mentioning the names of “Shimza” and “Tshebe”. The driver of the vehicle was referred to as “Ntshebe”.

[23] Nkomonde attended an identification parade at Durban Central Police Station, where he positively identified Mhlongo as one of the assailants. Although he did not identify any other person, he identified accused 4 in Court as one of the assailants. He explained that he could not identify accused 4 at the identification parade because he was not among those people that were lined up at the parade. If he was there, he would have identified him. He is able to identify him, because he is the person who came from the side where his wife was shot and that when they drove with him around KwaMashu the streetlights illuminated accused 4's face, allowing him to identify him with certainty . Under cross-examination by counsel for accused 4, Nkomonde testified that accused 4 was the most violent and aggressive person of the group, and he could not forget his face. He had stated in his police statement that he was able to identify accused 4 and emphasised that he remembered him vividly due to the threatening and intense manner in which accused 4 told him that he would be killed.

[24] On 3 January 2022, David Nkosingabantu Nzama (“Nzama”), a warrant officer, in the South African Police Services (“SAPS”) at the Mayville Police Station interviewed accused 4. During the interview, accused 4 stated that the car was borrowed to him by his friend from Newlands. He charged accused 4 for the murder

of Patricia Nkomonde, Nkomonde's wife, robbery with aggravating circumstances, and the kidnapping of Xolani Nkomonde.

[25] On 3 November 2021, Nzama attended a scene of crime involving a double murder at Vuka Enterprise Springfield. On 7 February 2022, he fetched accused 2 from Empangeni Prison and detained him at Mayville Police Station. The following day, accused 2 participated in an identification parade where he was identified by a witness as one of the assailants who committed the double murder at Vuka Enterprise. Prior to the identification parade, Nzama informed accused 2 of his right to legal representation at the identification parade. The accused gave him a phone number for his attorney, Mr Ntenga, whom he wanted to attend the identification parade. Nzama phoned Mr Ntenga, but was informed that he would only come to the parade if the accused family were able to raise necessary fee that he required.

[26] Nzama was also the investigating officer of the robbery where Slindile Khumalo was robbed of her goods at her home at Indus Lane, Springfield. On 4 February 2022, he fetched accused 1 from Empangeni Prison and inform him that he was the suspect in that matter. After accused 1 was identified at the identification parade Nzama charged him, after explaining to him his constitutional rights.

[27] Bafana Khuse ("Khuse") is the witness in counts 2, 3, 4 and 5. On 3 November 2021, while at his place of employment at Vuka Enterprises, Springfield, he observed six black males arriving at the premises. It is pertinent to note that, one week before 3 November 2021 two black males had previously visited Vuka Enterprise and asked to purchase silicon. Khuse informed them that they silicon was not available for purchase at their place and the men left. On 3 November 2021, while at work he saw six males entering through the gate. One of them remained at the gate and five came inside to the warehouse where Velani Shezi, Khumalo and himself were in.

[28] One of them uttered the words " how, so this is a warehouse", before drawing a firearm, aiming it at Khumalo and shot him. Khumalo was a security guard employed at Vuka Enterprise. The person who shot Khumalo was wearing a hat which was written "K- Way". Then one of the assailants shot at Shezi identified as

accused 2. When Khumalo and Shezi were shot at, Mr Cyril Kheswa ("Kheswa"), the owner of Vuka enterprise, ran away and Khuse also ran away. As Kheswa and himself were running away, the assailants fired shots at them. After the shooting had stopped and the assailants had left the premises, Khuse returned to the scene of the incident and found that Shezi was no longer moving but Khumalo was still alive. At the time when Khumalo who is also referred as Mntungwa was shot, Khumalo had a gun which was placed in the holster on his hip. When Khuse returned from hiding, he observed that Khumalo's firearm was taken away from him.

[29] At a later stage, Khuse was invited to an identification parade at the Durban Central Police Station, where he managed to point out accused 2 as one of the assailants. It was not the first time for him to see accused 2 on the date of the incident; in fact, accused 2 was one of the two persons who had previously visited Vuka Enterprises and asked about purchasing silicon, a week prior to the date of incident. Under cross examination, it was put to Khuse that in his statement to the police, he stated that he can only identify the person who waited at the gate. Khuse disputed that and contended that he informed the police who took his statement that he could identify two people, that is, accused 2 and the person who was standing at the gate, because they were the two people who had previously come at the warehouse.

[30] Kheswa is the owner of Vuka Enterprise. He ran away from the scene when the assailants fired shots at them and did not see the suspects. However, in court he identified accused 1 in the dock as the person who shot Khumalo. His recollection of accused 1 is based on a CCTV footage that he viewed after the incident. The CCTV footage was not retrieved, and it is not available as evidence in this Court.

[31] Nkosivumile Booi ("Booi") testified that on 14 November 2020, at about 20h30, he was driving his motor vehicle at Punters Hill. After he had stopped the vehicle and dropped off some of his work colleagues who were passengers in the vehicle, he saw a black male sitting by the wall of a tavern and fiddling with his cell phone. Suddenly, that man stood up and approached him, banged on the door of the motor vehicle and when Booi looked at him, the man cocked a firearm and instructed him to come out of the motor vehicle. Booi exited the vehicle, stretched out his hand

and attempted to grab the firearm from the man but the assailant won possession of the firearm. Booi was shot on the leg and arm. He was severely injured. He sat down because he was unable to run away. The suspect drove away with his motor vehicle. He was admitted to hospital for more than a week. He later identified accused 1 at the identification parade, stating that he had seen accused 1 prior to the incident, particularly near the tavern. He had on various occasions seen accused 1 at that place when Booi picked up and drop off his colleagues. There were lights at the tavern and streetlights on the road that enabled him to see accused 1 clearly.

[32] During cross-examination by counsel for accused 1 it was put to Booi that the accused version would be that there was a tavern in the area belonging to a certain Mkhize; the streetlights had not been working in that area for some time, therefore there was no lights luminating from the streetlights, on the date of the incident. Booi disputed that the streetlights were not working on the date of the incident and maintained that the area was well-lit on the night in question.

[33] On 13 January 2023, Mr Jerry Mirimi was driving his VW Golf 5 motor vehicle at Silver Willow Road, Durban. He stopped at a container that sells chips and at the stand, a black male approached him, cocked a firearm and instructed him to drop the keys down and raise up his hands. The man grabbed the keys, got into his car and drove away, but before the man drove away with the car he saw another black male who was light in completion getting into the passenger seat of the vehicle and they both left with his car. There was a light at the chip stand. He was able to identify accused 1 at the identification parade as the person who jumped into the passenger seat of the vehicle before the assailants left.

[34] Slindile Precious Khumalo ("Slindile") testified that on 26 July 2021, at about 20h30, she was watching an episode on the TV when people knocked on the door at her home. They identified themselves as police officers. Her husband Jimmy opened the door and two black males entered. One pointed a gun at Jimmy and demanded money from him while the other man kicked Slindile and demanded money from her. One of the assailants shot Jimmy on the leg. The assailants robbed them of their two cell phones and left. Jimmy was treated and released at King George Hospital.

Jimmy testified that there were lights in the house, he was able to identify accused 1 and 2 because he had often seen them in the area. Accused 1 is well known to him, he used to play soccer with him at Morningside Village ground. His name is Tsepo. Accused 2 is not well known to him but he knew him only by sight. At an identification parade, Jimmy correctly identified accused 1 but mistakenly pointed to another individual instead of accused 2. In Court, however, he identified both accused 1 and 2 in the dock.

[35] Colonel Bongani Cyprian Mathenjwa (“Mathenjwa”) testified that on 28 January 2022, he attended a scene at Myingazi area, Nseleni, Empangeni, where two people, Sandile Mthembu and Mxolisi Goqo, had been shot and killed. He learnt that a black polo vehicle with registration number N[...] belonging to one of the deceased, Goqo, was taken from him during the shooting incidence. Mathenjwa then circulated the vehicle as stolen vehicle. On the following day, 29 January 2022, he attended another murder scene and attempted murder at Tholokuhle High School, Nseleni, where Sphelele Ndiyaza was shot dead and two other people shot and wounded by bullets.

[36] Xolani Mthimkhulu testified that on 29 January 2022, he was with the deceased Sphelele Ndiyaza, at his mother’s home, Nseleni, when two black males came in chasing a girl child. The deceased and himself intervened and told the two males to leave their mother’s house. The men resisted, but they managed to drive them out. When Mthimkhulu and the deceased left his mother’s house to their motor vehicle that was parked on the road, the two males approached again. At that stage, they pointed firearms at them. The two males fired shots at them. Mthimkhulu drove away with his car to report the incident at Nseleni Police station. When he returned to the scene he found Ndiyaza lying dead with gunshot wounds. He also noted that his sister, Nonkululeko, was shot with a firearm at her fingers. Although it was at the evening, there was still sufficient sunlight to enable visibility . He informed the police that he was able to identify the assailant who was walking in front when the assailants shot at them. He pointed at accused 2 in the dock as one of the assailants. Under cross examination by accused 2’s counsel he stated that he could not attend the identification parade to point out the accused because he was not invited by the police officer to attend.

[37] On 28 January 2022, Sergeant Sinenhlanhla Mthembu working at the Local Criminal Record Centre, Richards Bay attended the scene of crime at Nseleni where the deceased Mxolisi Gogo and Sandile Mthembu were murdered. She found and collected 8 x 9mm empty cartridges on the scene and sent them for ballistic examination. On 29 January 2022, she also attended the scene of crime at Nseleni where Ndiyaza was murdered. She found and collected 2 x 9mm empty cartridges on the scene which she sent to Amanzimtoti for ballistic examination.

[38] On 1 February 2022, Warrant Officer Bhekumuzi Nhleko, was informed by members of Stanger SAPS that the vehicle that was stolen from the deceased Gogo when he was murdered at Nseleni had been recovered and the suspects were arrested. He went to Stanger, collected accused 2 and charged him for the double murder and robbery committed at Nseleni. Accused 2 did not give him any explanation about his possession of the vehicle. He disputed that the accused told him that he received the vehicle from a person named Peter Hlabisa. If accused 2 had given him that information, he would have investigated accordingly.

[39] Vusi Mthiyane ("Mthiyane") testified in respect of counts 22, 23 and 24. On 15 January 2022, at about 22h00, Mthiyane was with the deceased, Sibonelo Gumede, at Kwamasango bus stop Kwasomkhele, Mtubatuba. They were sitting and conversing inside a motor vehicle when a white Audi with hash back and registration number that ends with the letter "G" drove past them and then reversed towards them. A black male who was wearing a Sangoma head gear which had tussle and a sarong exited the vehicle and came to them. That man knocked at the driver's window side. He then pulled out a gun, then Mthiyane and the deceased came out of the vehicle. Mthiyane grabbed the assailant with the Sangoma head gear that he was wearing. They both fell down to the ground. Other men came out from the white Audi vehicle and fired gunshots at them. Mthiyane then ran away and hid at a nearby house. The deceased could not run away because he was crippled on his leg.

[40] Mthiyane used a cell phone and called the police. On arrival of the police at the scene Mthiyane went back and found that Sbonele Gumede was already lying

dead on the ground. The vehicle, a white polo with Eswatini registration, had been stolen during the incident.

[41] On 16 January 2022, Velenkosini Sibiya, a police officer at KwaMsane attended a crime scene at Masango bus stop where the deceased Gumede was murdered. He found a Sangoma head gear on the floor, 14 empty cartridges of a rifle and 25 x 9mm empty cartridges. On same date, Captain Minenhle Ngwane, from the South African Police Services Local Criminal Record Centre attended the scene. She collected 14 empty cartridges of a rifle, 25 x 9mm empty cartridges of 9mm pistol and sent them to Amanzimtoti for ballistic examination.

[42] Sergeant Sabelo Derrick Mantengu was informed by members of Empangeni South African Police Services that the suspects who were found in possession of the white Polo vehicle, that was stolen when Gumede was murdered at Masango bus stop, were in custody for another matter at Empangeni. He went to Empangeni Police Station and informed accused 1 and 2 of their constitutional rights and charged them accordingly. The accused did not make any statement regarding their involvement to the offences. They mentioned that they will make statement in court.

[43] At the end of the State's case, accused 1 did not testify, accused 2 and 4 testified in their defence. Accused 2 denied that he was involved in the commission of any of the offences. He denied that he was present or that he killed the deceased or that he attempted to murder Kheswa at Vuka Enterprise. He further denied that he travelled with Mr Mhlongo to KwaNongoma on or about 15 January 2022 or that he participated in the murder of Sbonelo Gumede, the shooting of Mr Mthiyane, and the robbery of the latter's motor vehicle at KwaMasango bus stop, Somkhele, Mtubatuba. Accused 2 similarly denied involvement in the murder of the deceased at Myingazi, Nseleni, and the murder and attempted murder of Busizwe Ngcobo and Nonkululeko Mthimkhulu, respectively, at Nseleni Township, Empangeni. He denied possession of any unlicensed firearms or ammunition. In respect of his possession of the motor vehicle belonging to the deceased, Gogo, accused 2 stated that he had informed the police he had received the vehicle from a certain Peter Hlabisa. He claimed that at the time of his arrest, he had been drinking with a friend at his uncle's

residence in Ntshawini and was on his way to a bottle store to purchase more alcohol.

[44] Accused 4 likewise denied that he was involved in any of the alleged offences. He denied that on or about 15 January 2022 he went with Mhlongo to his homesteads at KwaNongoma and that he was present, killed, the deceased Gumede, shot Mthiyane and took the motor vehicle from Mthiyane at Masango bus stop. He denied that he was present, kidnapped Nkomonde, killed the deceased Patricia Nkomonde and took away the vehicle from Nkomonde at Punters Hill. He admitted that he was found in possession of Nkomonde's vehicle; that he kept the vehicle at another person's parking in a flat at Morningside. He contended that he received that vehicle from Phumlani Mthembu whom he knew from the taxi industry. He did not enquire from him about ownership of the vehicle because he thought Mthembu had received the vehicle from his employer who is a taxi owner.

[45] This then brings the court to the State's evidence concerning the chain of custody and ballistic examination of firearms and cartridges. The defence did not make any admissions. Therefore, the State had to lead evidence relating to the chain on the counts of murder, that is, counts 2, 3, 6, 7, 11, 16, and 23. The defence counsels did not dispute that the bodies of the deceased did not sustain any further injuries from the scene of crime up to when the post-mortem examinations were conducted on them. The post-mortem reports showing the injuries and causes of death to the deceased were handed in with no objection from the defence counsels.

[46] The State further led evidence relating to collection of empty cartridges from the scenes of crime in respect of all the counts of murder and counts 12 and 13 of attempted murder at Nseleni, Empangeni; the safe keeping of the cartridges and the delivery thereof at Amanzimtoti for ballistic examination. Also, the State led evidence on the safe keeping of the firearm and ammunition found in possession of the accused at Ntshawini and the delivery thereof at Amanzimtoti for ballistic examination. It is not in dispute that some of the cartridges found at the scene where Sbonelo Gumede was killed at Kwasomkhele was ballistically linked to the 9mm pistol found in possession of the accused 2. Some of the cartridges found on the scene where Mthembu and Goqo were killed at Myingazi, Nseleni and some of the

cartridges found on the scene where Ndiyaza was killed at Nselen township were ballistically linked to the 9 mm pistol found in possession of the accused 2.

Legal principles

[47] I now turn to analysis of evidence and applicable legal principles. Apart from the principle of common purpose, the matter mainly involves evidence of an accomplice, single witness, identification, circumstantial evidence, doctrine of recent possession and dock identification. Generally, the principle of common purpose entails the existence of an agreement among the accused persons to commit a crime. It is trite, in the absence of prior agreement the doctrine of common purpose attributed the criminal act of a person to another in the following instances: ² In the first place, the person must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

[48] The State relied solely on the evidence of Mr Mhlongo in proving that the accused are members of a notorious gang. In proving membership of the accused to a gang it would be essential, for the state to prove a pattern of criminal gang activity; that all the activities of such a gang was in furtherance of the gang's activities and for the benefit of that gang which results in criminal offences. Even if each member of a gang were involved in different criminal activities, the state must show that the charge(s) against each of the applicants and the other accused constitutes a pattern of criminal gang activity.³

² *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I-706B.

³ *Williams and Others v Director of Public Prosecutions: Western Cape* 2022 (2) SACR 481 (WCC) para 76.

[49] Mr Mhlongo did not state how the gang aided each other in criminal activities and how members benefitted from the criminal activity of other members. He did not explain what was the criminal pattern of the gang and the crimes they were committing. Mr. Mhlongo stated that he earned a living through criminal activities and met accused 2, 4, and other individuals not before the Court, whom he identified as Nathi, Ngidi, Shimza, Nqubeko, and Dlamini. According to Mhlongo, these individuals were friends who socialized, drank together, and committed crimes whenever the opportunity arose. The crimes they committed include housebreaking and theft, robbery and hijacking. However, Mhlongo only referred to a single incidence involving him, accused 4 and Shimza in kidnapping, murder, and robbery with aggravating circumstances at Punters Hill. Mhlongo stated that accused 1 was not a member of the gang, accused 2 was a member of the gang, but he could not refer to a single incidence where he committed offences together with accused 2.

[50] Mhlongo was an honest witness. He did not hide his own involvement in the offences, however, his evidence on accused membership of does not satisfy the requirement for membership of gang. If the court find that the accused were members of a gang each of the accused could be convicted on any offence committed by a member of the gang if that offence relate to the activities of the gang. By associating himself or herself or being a member of a gang that person “established an active interest in the affairs and activities of such a gang, even though he or she was not present at or participated in a specific activity of the gang which resulted in a criminal offence committed in the name of that gang”.⁴ Apart from Mhlongo’s evidence that they would meet as friends, drink together and commit crimes when opportunity prevail there is no evidence linking them as a gang such as communication through cell phones and other means for purposes of committing crime. Therefore, the accused membership of the gang was not investigated and established by the state. For that reason, the state has not proved beyond reasonable doubt that the accused were members of a notorious gang.

⁴ Ibid para 75.

[51] With regard to counts 2 and 3, pertaining to the murders of Velani Shezi and Bhekani Mntungwa respectively, count 4, attempted murder of Mr Kheswa and count 5 robbery with aggravating circumstances at Vuka Enterprise, it is common cause that Bafana Khuse is a single witness. It is trite that evidence of a single witness must be treated with caution and the court may only convict on evidence of a single witness if such evidence is clear and satisfactory in all material aspects.⁵ Furthermore, the court is mindful of the dangers inherent to the evidence of identity. The principle relating to the evidence of identity was re-stated in *Abdullah v S*⁶ as follows:

‘...It is not enough for the identifying witness to be honest. The reliability of his identification must be tested against other factors such as lighting, visibility, proximity of the witness and opportunity for observation.’ (Footnote omitted.)

[52] Bafana Khuse explained that he was familiar with accused 2 prior to the shooting of the deceased, Shezi, at Vuka Enterprise. He had seen the accused and communicated with him a week prior to the incident when accused 2 came to ask whether they were selling silicon at Vuka Enterprise. When the counsel for accused 2 questioned Khuse about a statement he made to the police, in which he mentioned that accused 2 remained at the gate while the other suspects entered the warehouse, Khuse denied this assertion. He clarified that, in his police statement, he had stated that one of the individuals who had previously inquired about the silicon had remained at the gate, but that accused 2 had entered the warehouse and shot Shezi. It is trite that a court confronted with alleged contradiction must carefully determine whether there is an actual contradiction and the contradictory versions must be considered on a holistic basis; the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given sufficient opportunity to explain contradictions, and the quality of the explanations, and the connection between the contradictions.⁷

⁵ *S v Artman and Another* 1968 (3) SA 399 (A).

⁶ *Abdullah v S* [2022] ZASCA 33 para 20.

⁷ *S v Mafaladiso en andere* [2002] ZASCA 92; [2002] 4 All SA 74 (SCA); 2003 (1) SACR 583 (SCA) 593F-594G.

[53] Khuse was a reliable witness. He answered all questions frankly and without any hesitation. There was no self-contradiction in his evidence before Court. He explained the contradictions between his police statement and version before Court about the location where accused 2 was waiting. In both the police statement and evidence before Court he stated that accused 2 was present and participated in committing the offences. He had mentioned in his statement to the police that he was able to identify the accused. Given Khuse's explanation, the contradiction is not material and does not affect his credibility on the identification of the accused as one of the persons who was present and who committed the offences. His identification of accused 2 at the identification parade support his version that he was able to identify the accused.

[54] The identification of accused 1 on the dock by Mr Kheswa was not credible and reliable. Kheswa did not see any of the accused at the scene of crime. His recollection of accused 1 is based on a CCTV video footage that he viewed at the scene of crime which was not retrieved and placed as evidence before court. There is no evidence of the video footage before Court. Regarding accused 4 no evidence was led implicating him to these charges.

[55] With regard to count 6, the murder of Sandile Mthembu, count 7 the murder of Mxolisi Goqo and count 8 pertaining to robbery with aggravating circumstances at Myingazi, Nseleni, Empangeni, it is not in dispute that accused 2 was found driving the vehicle that was stolen from the deceased Goqo shortly after he was murdered on 28 January 2022 merely two days after the incident. The State proved that the cartridges found at the scene of murder was ballistically linked to have been fired from the gun found in the possession of the accused 2. Accused 2 did not give explanation of how he was in possession of the deceased vehicle, firearm and ammunition to Colonel Herbst who arrested him and to warrant officer Nhleko who charged him.

[56] The doctrine of recent possession and circumstantial evidence link accused 2 to the commission of the offences beyond reasonable doubt. The deceased vehicle that was found in possession of the accused had been robbed from the deceased recently for a period of one day prior to the arrest of the accused and the accused

did not give explanation of his possession of the stolen vehicle.⁸ Both Colonel Herbst and warrant officer Nhleko were credible witnesses. Nhleko informed the Court that if the accused had given him an explanation about his possession of the vehicle he would have followed that information.

[57] The cardinal rule regarding admission of circumstantial evidence was established in *R v Blom*⁹ where it was held that the inference sought to be drawn from the evidence must be consistent with all the proved facts and they should exclude every reasonable inference from them save the one sought to be drawn. In addition to being found in possession of the vehicle stolen from the deceased, accused 2 was found in possession of a gun which fired cartridges that were found in the scene where the deceased was killed. The only reasonable inference to be drawn that excludes all other inferences is that the accused participated in the murder of the deceased.

[58] Regarding counts 11 the murder of Sphelele Ndiyaza, count 13 the attempted murder of Xolani Mthimkhulu, the State proved that the cartridges found on the scene of crime were ballistically linked to have been fired from the gun found in the possession of accused 2. Also, Busizwe Ngcobo and Nonkululeko Mthimkhulu were shot by the assailants during that incident. Xolani Mthimkhulu identified accused 2 in the dock in Court. He explained that he was not invited to identify accused 2 at the identification parade and, if invited he would have identified the accused at the parade. It is trite that a Court must exercise more caution when relying on the identification of an accused by witnesses on the dock.¹⁰ However, being in possession of the firearm which fired ammunition that killed the deceased the previous day and unable to explain the possession thereof leaves the court with only one reasonable inference, that is the accused participated in the murder of the deceased.

[59] In count 14 the kidnapping of Emmanuel Nkomonde, count 15 the robbery with aggravating circumstances and count 16 the murder of Patricia Sibongile

⁸ *S v Screech* 1967 (2) SA 407 (E) at 409.

⁹ *R v Blom* 1939 AD 188 at 202-203.

¹⁰ *Naki v S* (A257/2017) [2018] ZAGPJHC 509 para 8.

Nkomonde, the State based its case mainly on the evidence of an accomplice, Mr. Mhlongo, the complainant Nkomonde and circumstantial evidence relating to possession of the vehicle by the accused 4. It is trite that evidence of an accomplice is treated with caution as was explained in *S v Hlaphezulu*¹¹ as follows:¹²

“It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly. . . there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him...”

Therefore, this Court is required to warn itself of the danger inherent in the evidence of an accomplice and convict only in clearer cases bearing in mind that the burden of proof is on the state to prove the guilty of the accused beyond reasonable doubt.¹³

[60] Mhlongo’s evidence that accused 4 is one of the assailants is corroborated by Emmanuel Nkomonde on material respects. Both Mhlongo and Nkomonde testified that accused 4 drove the vehicle from the scene of crime, they both testified that after Nkomonde was kidnapped he was driven to KwaMashu and dropped there. The names of the other suspects including Shimza and Ntshebe which is the nickname for accused 4 that was mentioned by Mhlongo was overheard by Nkomonde in the vehicle when the assailants were talking to each other. Accused 4 was referred to as Ntshebe. Mhlongo testified that he knew accused 4 from KwaMashu hostel.

¹¹ *S v Hlaphezulu and Others* 1965 (4) SA 439 (A)

¹² *Ibid* at 440.

¹³ *R v Ngamtweni and Another* 1959 (1) SA 849 (A) at 897G-898D,

Accused 4 denied that he knew Mhlongo, however, the information he gave to the police is that he was residing at KwaMashu hostel. In Court, accused 4 stated that he was staying nearer KwaMashu hostel. Therefore, if Mhlongo had not known accused 4 he would not have known that he lived at the KwaMashu hostel.

[61] After the Audi A3 vehicle was stolen from Nkomonde, accused 4 kept it at another flat at Morningside for about a month. It is not in dispute that he was found in possession of the Nkomonde's vehicle. Although Nkomonde was not invited to identify accused 4 at the identification parade, he was able to identify him in the dock in Court. He explained that accused 4 was the most aggressive person. He is the person who angrily looked at him and told him to pray before they would kill him. There were streetlights at KwaMashu and there was light at the garage where the vehicle had stopped at KwaMashu. Therefore, he was able to identify the accused. Although dock identification of the accused by Nkomonde does not carry much weight, the fact that he is able to identify him among other accused in the dock, taken together with the eloquent and credible manner in which Nkomonde narrated his version in court strengthen the reliability of his identification of the accused. If accused 4's version that he received Nkomonde's vehicle from Mthembu who he thought had received it from his employer was correct, he would not have kept the vehicle with him for more than a month. He would have kept the vehicle at his residence instead of hiding it somewhere else for about a month. Therefore, the accused version is not reasonably possibly true. The only reasonable inference to be drawn is that the accused killed Patricia Nkomonde, kidnapped Nkomonde and robbed him of his vehicle.

[62] In count 17 which is robbery with aggravating circumstances of Nkosingiphile Boo, the witness identified accused 1 at the identification parade. It is common cause that the witness is a single witness, therefore his evidence should be treated with caution. However, his version that he had seen the accused nearer to the scene of crime prior to the incident is corroborated by the accused own version put by his counsel to Boo that the accused said that there is a tavern in that area where the robbery took place and according to the accused knowledge the light had not been working in that area therefore, Boo could not have identified the accused. That version corroborates the complainant that there was a tavern nearer the scene

where he was robbed and the accused used to sit outside that tavern. Booi was a credible witness. There was no self-contradiction in his evidence.

[63] In count 18 regarding robbery with aggravating circumstances of Silindile Khumalo and Jimmy, Khumalo's husband identified accused 1 and another person instead of accused 2 at the identification parade. However, in the dock in court, he identified both accused 1 and 2 as the assailants who robbed him. He knew accused 1 very well, he used to play soccer with him at MorningSide Village ground. He knew him by his name as Tsepo. However, he did not know accused 2 that well, he only knew him by sight. It is clear to me that the complainant was not certain about the identity of accused 2, therefore, his identification of accused 2 in the dock after having identified a wrong person instead of accused 2 shows that he was not able to identify accused 2 as one of the assailants. The accused had balaclavas, but they had pulled them below their chin. His identify of accused 1 is based on his prior knowledge of the accused with whom he had played soccer. Unlike accused 2, he even knew accused 1 by his name. Booi was a credible witness, with no self-contradictions in his evidence.

[64] In count 21 of robbery with aggravating circumstances of the vehicle of Jerry Mirrimi, accused 1 was identified by the complainant as one of the assailants who got into the front seat of the vehicle after the other assailant had taken the vehicle from him at gun point. There was light in the tuck shop that enabled the complainant to identify the accused. The complainant was a credible witness, he did not make any contradictions on his evidence.

[65] At the end of the State's case, accused 1 did not testify in respects of counts 17, 18 and 21 against him. It is trite that the accused person has the right to remain silence. However, the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to

prove the guilt of the accused.¹⁴ In the light of the uncontradicted evidence of the complainants against accused 1 in counts 17, 18 and 21 and their ability to identify the accused at the identification parade, I am convinced that there is sufficient evidence before court that accused 1 committed the offences in counts 17, 18 and 21.

[66] Regarding counts 19 of robbery with aggravating circumstances of the motor vehicle of Dhanasagaren Naidoo and count 20 Robbery with aggravating circumstances at the bottle store of Appalsamy Ramadu the complainants in both counts did not attend court, therefore no evidence was placed in court about the commission of these offences.

[67] Regarding count 22 of robbery with aggravating circumstances of the VW white Polo from Vusi Mthiyane, count 23 of murder of Sbonelo Gumede and count 24 the attempted murder of Vusi Mthiyane at KwaSomkhele, Mtubatuba. the presence of accused 4 and 2 at the scene of crime is corroborated by the evidence of Mhlongo that accused 4 was driving the white hash back Audi A3 with number GP when he left his homestead at Nongoma with accused 2; that on their way back they drove through Mfolozi game reserve towards Mtubatuba; that accused 2 was wearing a Sangoma head gear. Mhlongo's evidence is corroborated by Mthiyane who stated that the assailants were driving a white hash back Audi vehicle, that one of the assailants was wearing a sangoma gear which Mthiyane grabbed when he fought with that assailant. The Sangoma head gear was found and picked up by the police at the scene. The undisputed evidence in court is that the white hash back Audi vehicle was in the possession of accused 4 since the commission of the offences at Punters Hill. He is the only person who was driving that vehicle and it was found in his possession during his arrest.

[68] Furthermore, the vehicle that was stolen from Mthiyane at KwaSomkhele was found in the possession of Mhlongo who was in company of accused 2 who was driving another vehicle which was stolen at Nseleni. Finally, some of the cartridges found on the scene where the deceased was shot at KwaSomkhele was ballistically

¹⁴ *S v Boesak* 2001 (1) SA 912 (CC) para 24.

linked to the gun found in possession of accused 2. Therefore, the only reasonable conclusion that can be drawn is that accused 2 and 4 committed the offences at KwaSomkhele Mtubatuba.

[69] With regard to count 25 of the possession of prohibited firearm, AK-47 and count 26 the unlawful possession of ammunition, although accused 1 was found in the vehicle with Mhlongo where the firearms were found, Mhlongo testified that accused 1 was not aware of the presence of the fire arm in the vehicle because. He picked up accused 1 at Eshowe garage where he was hiking. Therefore, based on the evidence of Mhlongo who is one of the reliable state witnesses, accused 1 could not be found guilty of these offences. Apart from the suspicion that accused 2 was aware of the presence of the AK-47 in the boot of the vehicle driven by Mhlongo, there is no evidence linking accused 2 to the possession of the firearm and ammunition. No submission was made in court as to how accused 2 could be linked to the possession of the AK-47 rifle and ammunition that was found in a vehicle driven by Mhlongo separate to the vehicle driven by accused 2.

[70] This then brings me to the interlocutory applications brought by the State during trial. The State applied to recall Warrant Officer Nzama and counsel for accused 1 opposed the application. The application to recall Nzama arose from the evidence of Kheswa's who revealed for the first time that there was a CCTV video footage that he viewed at Vuka Enterprise where the offences of double murder was committed. Nzama as the investigating officer did not say anything about the existence of the video when he gave evidence in Court. It was clear to this Court that if Nzama was not recalled to clarify the issue of the video footage, that would leave a gap in the state case. The recalling of Nzama would not prejudice accused 1, because he would be given an opportunity to cross examine Nzama. For that reason, the Court granted the state leave to recall Nzama.

[71] The State applied for the warning statements made by accused 1 and 2 to be admitted as evidence in Court. The nature of the evidence sought to be introduced by the State is extra-curial statements purportedly made by the accused to the investigating officer. Generally, these statements are excluded unless it is proved that they were made freely and voluntarily. The law regarding admissibility of these

statements was set out by Innes CJ in *Rex v Barlin*,¹⁵ where it was stated as follows:¹⁶“The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made --- in the sense that it has not been induced by any promise or threat proceeding from a person in authority.”

The police officers who took the statements from both accused were not investigating officers in these cases. They testified that they read the constitutional rights of the accused to them before the accused made the statements. Both accused signed the proforma documents containing their constitutional rights that were read to them, and they also signed the statements. The statements by the accused were intended to be completely exculpatory. They do not amount to admission or confession, they merely show that the accused knew other people who were implicated in the commission of the offences. I ruled that the statements were admissible because they were made by the accused freely and voluntarily.

[72] The State made an application for admission of evidence of pointing out by accused 4. The main purpose of adducing the evidence of pointing was to prove that the pointing out amounted to a confession by the accused. There was no evidence of anything discovered as a result of the pointing out. Section 217 of the CPA which governs confessions provides that:

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

¹⁵ *R v Barlin* 1926 AD 459.

¹⁶ *Ibid* at 462.

unless confirmed and reduced to writing in the presence of a magistrate or justice.

(b) that where the confession is made to a magistrate and reduced to writing by him, or is conferred and reduced to writing in the presence of a magistrate, the confession shall upon the mere production thereof at the proceedings in question-

(i) ...

(ii) be presumed, unless the contrary 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, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.”

[73] Warrant Officer Nzama who detained accused 4 in a police cells on 15 January 2022 testified that the accused had no injuries when he was detained by him. On 16 January 2022, Constable Olivier who received accused 4 from Mayville police cells and took him to Colonel Vezi who then conducted the pointing out, observed that the accused had injuries. Warrant Officer Nqobile Mzimela who is attached to the provincial task team received accused 4 from Sergeant Jila who had booked him out for investigation. She took accused 4 to a medical doctor prior to him being taken to the pointing out. After the accused had made the pointing out he was taken by Sergeant Jila to a medical doctor for examination. Sergeant Jila was one of the investigating officers in this matter. He is also attached at provincial task team where Mzimela who took the accused to the doctor prior to the pointing out is also working. Clearly the participation by one of the investigating officers to the pointing out indicates that the process of the pointing out was irregular.

[74] The medical doctor who examined the accused prior to the pointing out noted some injuries on the accused wrists and ankles which he opined might have been caused by handcuffs and legs irons. The doctor further noted tenders on the chest and on the back of the accused. The doctor who examined the accused after the pointing out recorded that the accused reported to him that he was assaulted by the police who were investigating this matter. At the hearing of this application, I invited

the state counsel to look at the doctors reports and decide whether this application would advance his case in any way. Nevertheless, the state called the medical doctor who confirmed that the tender on the chest and back of the accused might have been caused by assault upon the accused. In the light of the overwhelming evidence that the accused was detained the previous day with no injuries and when he was taken to the pointing out the following day he had sustained injuries.

The State has not proved that the pointing out was made freely and voluntarily by the accused. The version of the accused that he was assaulted by the investigating officer is further corroborated by the medical reports compiled by the doctors who examined the accused. For these reasons, I ruled that the evidence of pointing out by accused 4 was inadmissible.

[75] The state made an application for admission of statements by some of the complainants and witnesses in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ("the LEAA"). The application is based on the ground that the witnesses fear for their lives to come and testify in Court. It is appropriate to refer to s 3 of the LEAA which reads:

"(3)(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be considered, is of the opinion that such evidence should be admitted in the interests of justice."

[76] Some of the witnesses, Appalsamy Ramadu and Dhanasagren Naidoo closed their businesses, left Durban and relocated to Gauteng after they were robbed at gun point by the assailants. After Mkhimkhulu and Ngcobo were shot at Nseleni they left the area for hiding to other areas. Mthimkhulu's fear is further based on the facts that accused 2's friends who are also involved in criminal activity at Nseleni know her. Accused 2 frequently visits them at Nseleni and if she were to testify she fears for her life. It is instructive, in a criminal proceeding the accused has a right to a fair trial which includes the right to adduce evidence and challenge evidence against them.¹⁷

[77] In instances such as the present where the witnesses are unable to testify for fear of their lives the law make provision in terms of s 158 read with s 153 of the CPA for the witnesses to give evidence by means of closed-circuit television or similar electronic media. The State did not make an application for the witness to give evidence in that manner. The right afforded to the accused person to confront the witnesses and challenge their evidence should not be dispensed with easily where the witnesses are available and the law make provision for them to give evidence in other manner other than in an open court. In my view s 3 of the LEAA does not permit a short cut for the State to dispense with oral evidence of witnesses in instances where the law provides for other means in which the witnesses can give evidence orally. For these reasons, I dismissed the application.

[78] After hearing the evidence of the investigating officer about the fear of the witnesses to come to Court and give evidence orally, the Court was satisfied that the fear of the witnesses was real. For that reason, the court *mero motu* gave an order that these witnesses may testify by means of a closed circuit or similar electronic media. However, the State counsel informed the court from the bar that the State is unable to trace these witnesses.

[79] It is worth mentioning that after hearing evidence during the trial, the Court raised some concerns about the fact that the evidence before Court revealed that some of the complainants and witnesses were shot except for charges of robbery, no charges of attempted murder were put against the accused. In this regard, the

¹⁷ See fn 1 above.

evidence reveals that when the offences were committed at Vuka Enterprises, shots were also fired at Khuse, but no charge of attempted murder of Khuse was put to the accused; when Nkosingiphile Booï was robbed of his vehicle, he was shot and sustained serious injuries, but no charge of attempted murder of Booï was put to the accused; when Slindile Khumalo was robbed at her house her husband Jimmy was shot on the leg and the bullet went through his leg, but no charge of attempted murder of Jimmy was put to the accused.

[80] The Court enquired from the investigating officer Sergeant Mnguni while he was on the witness stand about these charges. Mnguni informed the Court that these charges were contained in the docket. During address for judgment, the State's counsel informed the Court that the State had some difficulties in putting some of the charges against the accused where people were shot because the State was not able to locate the complainants' medical records relating to these charges. Without under-estimating the great work done by all parties involved in the criminal justice system to eradicate crime, given the rate of intimidation to witnesses and fear instilled to them not to come forward to report crime and testify in Court, failure to pay adequate attention to the complainant's matters is likely to discourage complainants to participate positively in the criminal justice system. The community, including the complainants, places significant trust in the criminal justice system, expecting that their cases will be thoroughly investigated, appropriately presented in court, and impartially adjudicated by the presiding judicial officers. I have already stated above that the State has not proved beyond reasonable doubt that the accused are guilty of count 1. Furthermore, there is no evidence that link accused 1 to counts 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 20, 22, 23, 24, 25 and 26. Therefore he ought to be acquitted of these charges. The State has proved beyond a reasonable doubt that accused 1 committed the offences in counts 17, 18 and 21. The State has not proved beyond a reasonable doubt that accused 2 committed the offences in counts 14, 15, 16, 17, 18, 19, 25 and 26. Accused ought to be acquitted of these offences. However, the State has proved beyond a reasonable doubt that accused 2 committed the offences in counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 22, 23 and 24 and that he ought to be found guilty of these charges. The State has not proved beyond a reasonable doubt that accused 4 committed the offences in counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 25 and 26. However, the

State has proved beyond a reasonable doubt that accused 4 committed the offences in counts ,14,15,16, 22, 23 and 24.

Order

[81] In the premises, the following order is made;

1. Accused 1 is found not guilty of counts1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 23, 24, 25 and 26.
2. Accused 1 is found guilty on counts 17, 18 and 21 regarding robbery with aggravating circumstances
3. Accused 2 is found not guilty of counts 1, 14, 15, 16, 17, 18, 19, 20, 21, 25 and 26.
4. Accused 2 is found guilty of count 2 regarding the murder of Velani Shezi, count 3 the murder of Bhekani Mntungwa; count 4 attempted murder of Kheswa; count 5 robbery with aggravating circumstances at Vuka Enterprise, count 6 the murder of Sandile Mthembu; count 7 the murder of Mxolisi Gogo; count 8 robbery with aggravating circumstances, count 9 the unlawful possession of a prohibited fire arm; count 10 Unlawful possession of ammunition; count 11 the murder of Sphelele Ndiyaza; count 12 attempted murder of Busizwe Goodwill Ngcobo; count 13 attempted murder of Nonkululeko Mthimkhulu; count 22 robbery with aggravating circumstances at KwaSomkhele; count 23 the murder of Sbonelo Gumede and count 24 attempted murder of Vusi Mthiyane.
5. Accused 4 is found not guilty of counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20 and 21,25 and 26. Accused 4 is found guilty of count 14 the kidnapping Nkomonde, count 15 the robbery with aggravating circumstances; count 16 murder of Patricia Nkomonde; count 22 robbery with aggravating circumstances, count 23 murder of Sbonelo Gumede and count 24 attempted murder of Vusi Mthiyane.

Sentencing

[82] Accused 1 is convicted of three counts of robbery with aggravating circumstances. Accused 2 is convicted of six counts of murder, four counts of attempted murder, three counts of robbery with aggravating circumstances, one count of unlawful possession of a prohibited firearm, and one count of unlawful possession of ammunition. Accused 4 is convicted of two counts of murder, one count of attempted murder, one count of kidnapping, and one count of robbery with aggravating circumstances.

[83] The offences for which the accused have been convicted of fall within the ambit of offences in respect of which the Criminal Law Amendment Act 105 of 1997 has prescribed minimum sentences. Accordingly, the court is required to impose the prescribed minimum sentence unless substantial and compelling circumstances exist that would warrant deviation. In determining whether such substantial and compelling circumstances exist, the court must consider all relevant factors, including the nature and seriousness of the offence, the personal circumstances of the accused, the presence of aggravating and mitigating factors, and the broader needs of the society.¹⁸ The court is only entitled to deviate from the prescribed minimum sentence and impose a lesser sentence if it is satisfied that, in a particular case, the factors render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done.¹⁹

[84] The personal circumstances of the accused, as placed on record by their counsel, are as follows:

- (a) Accused 1 is 33 years of age. He has attained an educational level of Grade 11. At the time of his arrest, he was employed part-time at Sunshine Bakery in Springfield, earning a salary of R7 500 per month. He is unmarried and has one child, aged nine years old, whom he was supporting at the time of his arrest. He has no previous convictions.
- (b) Accused 2 is 26 years of age. He also attained an educational level Grade 11. He is unmarried and has one child, aged five years old. At the time of

¹⁸ *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15.

¹⁹ *S v Malgas* 2001 (1) SACR 469 (SCA) at 482.

arrest, he was self-employed as a street vendor, earning an income of approximately R900 per day. He has no previous convictions.

- (c) Accused 4 is 35 years of age and has an educational level of Grade 9. He is unmarried and has four minor children; whom he was financially supporting. At the time of his arrest, he was employed part-time as a taxi driver, earning a salary of R1200 per week. He too has no previous convictions.

[85] The nature and circumstances of the crimes committed by the accused demonstrate a profound disregard for human life and complete insensitivity to the suffering of others. The brutality displayed in the commission of these crimes suggests that the accused have become desensitised to inflicting harm on other human beings. In all the three counts of robbery involving accused 1, a firearm was used. In two of these counts, he shot and wounded the complainants before dispossessing them of their goods. One of the complainants was assaulted and robbed in the sanctity of her house, while she was unwinding by watching an episode on TV. The accused introduced themselves as police officers in order to deceive the complainant to give them entry into her house. In all the counts of robbery committed by accused 2 and 4, they used firearms and killed occupants of the motor vehicles before taking the vehicles away. At Punters Hill, the wife of the complainant, Mr Nkomonde, was shot and killed in his presence. He was then kidnapped by the accused and was rendered unable to give attention to his wife, who was left lying helplessly on the ground. At Vuka Enterprises, the victims were shot and killed even though they did not give any form of resistance to the accused. At KwaSomkhele Mtubatuba, the accused shot and killed Gumede, who was disabled and was unable to outrun the accused. At Nseleni Myingazi, the two friends were killed while they were conversing at the butchery. Another person was killed at Nseleni while protecting a girl child who was being chased by the accused. This incident further demonstrates the accused's utter lack of compassion or humanity. This conduct reflects a callous disregard for human life, treating the merciless murders of a human being with the same indifference as other people might show in the slaughter of animals.

[86] It is evident from the victim impact statements submitted by the next of kin of the deceased, as well as from the deceased family members, who broke down in

tears when testifying in court about the demise of their loved ones and that the accused conduct left them devastated. The victims' families still struggle to comprehend a world without their loved one's physical presence. Furthermore, the evidence before court shows that some of the complainants who were shot by the accused and survived were so severely affected that they left their homes after the incident and went into hiding. Two business persons, Naidoo and Ramadu, immediately after they were attacked and robbed of their goods at gunpoint have since permanently relocated to another province and declined to testify in court. This shows that the conduct of the accused in committing these offences constitutes the greatest constraint in doing business in the province. The crimes committed do not only negate economic growth; they contribute to the high rate of unemployment and instil fear to the citizens of the Republic. The spree crimes was not isolated or localised spanned across the province ranging from Durban to the far North at Mkhanyakude District, indicating an intentional and sustained operation of lawlessness. It is therefore clear that the accused are a danger to the society and pose a significant threat to public safety. The community looks up to the courts to impose appropriate sentences that will not only protect them from the accused, but deter other people to commit crimes.

[87] The defence counsel correctly conceded that there are no substantial and compelling circumstances that would entitle the court to deviate from the prescribed minimum sentences. All three accused were majors when they committed the offences. Currently, they are from 26 to 35 years of age. While they have been in custody for approximately three years pending conviction, it is well-established that time spent in detention before sentencing, while relevant, does not in and of itself constitute a substantial and compelling circumstance warranting deviation from the statutory minimum sentences.²⁰ The accused did not show any remorse for their actions. The accused personal circumstances cumulatively taken are not substantial and compelling circumstances. The gravity of the offences committed far outweigh the accused personal circumstances. Therefore, I find that there is no justification for the court to deviate from the mandatory minimum sentences.

²⁰ *S v Radebe and Another* 2013 (2) SACR 165 (SCA).

Order

[88] In the premises, I make the following order:

1. Accused 1 is sentenced as follows:

- 1.1. 15 years' imprisonment in respect of count 17;
- 1.2. 15 years' imprisonment in respect of count 18; and
- 1.3. 15 years' imprisonment in respect of count 21.

The sentences are to run cumulatively, resulting in a total effective sentence of 45 years' imprisonment.

2. Accused 2 is sentenced as follows:

- 2.1. Life imprisonment in respect of count 2;
- 2.2. Life imprisonment in respect of count 3;
- 2.3. Five years' imprisonment in respect of count 4;
- 2.4. 15 years' imprisonment in respect of count 5;
- 2.5. Life imprisonment in respect of count 6;
- 2.6. Life imprisonment in respect of count 7;
- 2.7. 15 years' imprisonment in respect of count 8;
- 2.8. 15 years' imprisonment in respect of count 9;
- 2.9. Two years' imprisonment in respect of count 10;
- 2.10. Life imprisonment in respect of count 11;
- 2.11. Five years' imprisonment in respect of count 12;
- 2.12. Five years' imprisonment in respect of count 13;
- 2.13. 15 years' imprisonment in respect of count 22;
- 2.14. Life imprisonment in respect of count 23; and
- 2.15. 15 years' imprisonment in respect of count 24.

The sentences imposed in respect of counts 4, 5, 8, 9, 10, 12, 13, 22, 23, and 24 shall run concurrently with the sentence imposed in count 2.

3. Accused 4 is sentenced as follows:

- 3.1. Five years' imprisonment in respect of count 14;
- 3.2. 15 years' imprisonment in respect of count 15;
- 3.3. Life imprisonment in respect of count 16;
- 3.4. 15 years' imprisonment in respect of count 22;
- 3.5. Life imprisonment in respect of count 23; and

3.6. 15 years' imprisonment in respect of count 24.

The sentences imposed in respect of counts 14, 15, 22, and 24 shall run concurrently with the sentence imposed in count 16.

Mathenjwa J

Date of hearing: 14 April 2025 to 6 June 2025
Date of Judgment: 17 June 2025
Date of sentence: 20 June 2025

Appearances:

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Counsel for Accused 2: Adv. J Malinga

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Counsel for Accused 4: Adv. T R Mthembu

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Counsel for the State: Adv. B Vika

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