



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable / Not reportable

CASE NO: CC08/2020

In the matter between:

THE STATE

and

SINETHEMBA MAKALENI

Accused 1

ANGA ANGANDA MABEJANE

Accused 2

LONWABO COSA

Accused 3

SIYANDA NDZENDZE

Accused 4

Coram: Honourable Madam Justice HM Slingers

Delivered: 14 and 15 August 2025

ORDER

Offences of which the accused has been found guilty of:

Accused 1 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019;

Accused 1 is found guilty of count 2, the attempted murder of Yandisa Sitishi by shooting him with a firearm;

Accused 1 is found guilty of the unlawful possession of a firearm without a licence;

Accused 1 is found guilty of the unlawful possession of ammunition;

Accused 3 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019

Accused 3 is found guilty of count 2, the attempted murder of Yandisa Sitishi by shooting him with a firearm;

Accused 3 is found guilty of the unlawful possession of a firearm without a licence;

Accused 3 is found guilty of the unlawful possession of ammunition;

Accused 4 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019

Accused 4 is found guilty of count 2, the attempted murder of Yandisa Sitishi by shooting him with a firearm;

Accused 4 is found guilty of the unlawful possession of a firearm without a licence;

Accused 4 is found guilty of the unlawful possession of ammunition;

All the accused is found not guilty in respect of count 3, robbery;

Accused 2 is found not guilty on all the charges and is acquitted.

JUDGMENT

1. The accused are charged with :

- (i) the murder of David Mbazwana (**'Mbazwana'**) on 19 May 2019 at or near Mkhaza, Khayelitsha;
- (ii) the attempted murder of Yandisa Sitishi (**'Sitishi'**) by shooting him with a firearm ;
- (iii) robbery (with aggravating circumstances);

- (iv) the unlawful possession of a firearm without a licence; and
 - (v) the unlawful possession of ammunition.
2. Furthermore, the state alleges that the murder of Mbazwana was planned or premeditated or committed by a group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. Thus, the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 are applicable and a prescribed minimum sentence of life imprisonment may be imposed upon conviction.
 3. The state alleges that the accused, with the intent to force them into submission, assaulted Mbazwana and/or Sitishi and/or threatened them and/or caused them to believe that harm would be done to them by threatening them with a firearm and then took by force a 9mm parabellum semi-automatic pistol. Thus, aggravating circumstances as described in section 1 of the Criminal Procedure Act, Act 51 of 1977 (**'the CPA'**) were applicable as the accused or an accomplice wielded a firearm or dangerous weapon during the commission of the offence. Thus, the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 are applicable to the robbery charge with a prescribed minimum sentence of 15 years' imprisonment for a first offender, 20 years' imprisonment for a second offender and imprisonment for a period not less than 25 years for a third or subsequent offender being applicable.
 4. Similarly, the provisions of section 51(2) of Act 105 of 1997 are applicable to the charge pertaining to the unlawful possession of a firearm, which is listed in Part II of Schedule 2, as the firearm in question was a semi-automatic firearm.
 5. The accused pleaded not guilty to all the charges and confirmed that the application of the minimum sentence legislation had been explained to and understood by them.
 6. The accused made various formal admissions in terms of section 220 of the CPA, which included admitting the identity of the deceased and the correctness

of the medico-legal postmortem examination conducted on the body of the deceased.

7. Furthermore, the accused did not dispute that a 9mm parabellum calibre CZ model 78B semi-automatic pistol was found in Mfuleni on 23 May 2019. Nor did they dispute the contents of the ballistic reports marked as exhibits 'O', 'P' and 'Q'. They did not dispute that 2 cartridges were found at the crime scene and that it was fired from the 9mm parabellum calibre CZ model 78B semi-automatic pistol.
8. The state called numerous witnesses. The first witness to testify was Mr. A.
9. He testified that Mbazwana and Sitishi were shot at Whitehouse tavern on 19 May 2019 at approximately 14h30. On this day, Mr. A went to Whitehouse tavern where his cousin, Odwa, was employed as a cashier and also sold alcohol.
10. Mr. A needed to see Odwa because he (Odwa) had sold his house in Harare and the purchaser needed his banking details. The purchaser sent Mr. A a WhatsApp message asking for Odwa's banking details. During cross-examination, Mr. A testified that Odwa did not have a telephone and that is why the purchaser communicated with him telephonically.
11. During examination in chief, Mr. A testified that he had visited Whitehouse tavern before and that is how he got to know Sitishi and Tamantjie. Tamantjie was the owner of the Whitehouse tavern and Sitishi helped to sell alcohol. It is not disputed that Sitishi is also known as Malema and that Mbazwana is also known as Tamantjie.
12. En route to the tavern, Mr. A came across two (2) men and a lady in the passage that is approximately 5 meters long and leads to Whitehouse tavern. Mr. A testified that accused 1 was one of the men he saw in the passage. He went on to testify that accused 3 was not one of the men he saw in the passage

leading to Whitehouse tavern but that he later saw him in the middle of the tavern.

13. During Mr. A's evidence the court was informed that he was provided with alternative accommodation to stay but that someone had gone to his house and asked his sister why he was testifying. Mr. A was worried and advised the court that his sister was working night shift and that her children were alone at home. This caused her quite some anxiety and stress to the extent that she could not sleep. This, in turn, caused him anxiety and resulted in him being unable to sleep. Mr. A was visibly upset and the matter stood down for a few minutes to allow Mr. A to consult with the witness preparation officer. However, the matter had to be postponed as Mr. A could not proceed as a result of his emotional state and anxiety.
14. When the matter resumed, Mr. A was able to continue with his evidence.
15. When Mr. A entered gate 2, the three people he met in the passage also entered the tavern. Mr. A stood at the gate and did not enter the tavern. Mr. A testified that he and the three people were walking in the same direction and that he saw their backs. He went on to state that when he was standing outside speaking with Mbazwana, they passed him and went inside the tavern at which point he saw their faces. It was not busy, and it was not dark.
16. Mr. A continued to the tavern and met Odwa at gate 2 which is the entrance to the tavern. Odwa came out of the tavern and out of gate 2 but he did not reach him as he turned back to go and help the two men and the lady who entered the tavern.
17. After Odwa assisted the three people he went to the storeroom. Mr. A testified that Mbazwana also went to the storeroom. Sitishi was already in the storeroom when Odwa and Mbazwana entered it.
18. Mr. A exited the storeroom with Mbazwana and Sitishi and was walking in the middle of them. Whilst they were walking towards gate 1, accused 3 passed

them walking in the direction of the tavern. He heard shots being fired from behind and turned around to see where the shots were coming from. Mr. A saw accused 1 shooting Sitishi and while they were standing, accused 3 ran pass shooting Mbazwana.

19. When it was put to Mr. A that he was not able to identify accused 1 as one of the shooters, he challenged that the incident occurred during the day. He was adamant that he was able to see and identify accused 1 as one of the shooters.
20. Mr. A testified that accused 1 shot at Sitishi and accused 3, who was running past them, shot at Mbazwana. Mr. A was shocked and he ran away out of the tavern to hide. Mr. A estimated that accused 1 was about 3 metres from Sitishi when he shot at him and that accused 3 was approximately 3.5 to 4 metres when he shot at Mbazwana. During the cross examination conducted on behalf of accused 3, Mr. A conceded that he could not say who exactly shot Mbazwana and who shot Sitishi. However, he remained steadfast in his identification of accused 1 and 3 as the shooters, whom he did not know before the shooting incident.
21. Mr. A saw Mbazwana and Sitishi being put into a vehicle which he followed to Khayelitsha District Hospital where he was informed that Mbazwana had passed away and that Sitishi was alive. Mr. A returned to the location where he started drinking.
22. He attended an identity parade at Harare Police station in August 2019 when he was taken to Harare Police station by the investigating officer. He was taken into a room by two police officers he does not know, where he was asked questions and shown a book with photographs. One police officer was taking a video, and the other was asking him to point out the people who were present at the scene.
23. Mr. A identified accused 1 via the photo-album as the person who shot Sitishi and accused 3 as the person who shot Mbazwana.

24. It was put to Mr. A on behalf of accused 1 that he was not at the scene of the shooting and that he was at home with his family. It was put to Mr. A on behalf of accused 3 that he was not at the tavern and that on the morning of the incident, he went to the shops, but other than that, he was at home and that Mr A was mistaken in identifying him as one of the shooters.
25. Mr. A was confronted with the statement he gave to the police on 20 May 2019. In paragraph 4 thereof he stated that he noticed a guy who passed them and as he passed, he took out a firearm and shot Sitishi. Mr. A was also confronted with the fact that in his statement he only mentioned one shooter but during his evidence in court he mentioned two shooters. In response hereto, Mr. A stated that he told the detective what happened, and he cannot explain why the detective failed to write down what he told him.
26. During cross-examination Mr. A testified that he could not recall if he read his statement or if it was read back to him before he signed it. Furthermore, he could not recall if the oath was administered to him before he was requested to sign his statement. Mr. A also testified that he did not look at his statement before he testified in court.
27. Mr. A was quite vague when he was confronted with differences between his evidence in court and his statement, often saying he cannot remember. He also came across exasperated by the cross-examination. Mr. A was generally very animated when he testified and was not consistent with his evidence. He often testified in a confusing, contradictory manner. Mr. A was not a good witness.
28. The second witness called by the state was Mr. B who testified that he was working at Whitehouse tavern on the date of the incident. He stated that Whitehouse tavern was located in Mkhaza island and was owned by Mbazwana.
29. Mr. B's duties were not fixed and included selling alcohol and the wiping of tables.

30. Mr. B could not recall the time of the incident but testified that he thought it was about 11h00. Mr. B stated that he was standing next to the small gate talking to Malosa, Tavidio and Ayanda who were sitting in the storeroom. He noticed a group of approximately four men and one woman near a Somali shop which was marked on exhibit T.
31. Although Mr B saw the woman pointing in their direction he did not know whether she was pointing at them. He testified that two men of this group walked down the road and entered gate 1 of Whitehouse tavern. One of them said he wanted a Heineken and a Hunters Gold. Mr. B instructed the two men to go inside the tavern where he followed to serve them. One of the men gave Mr. B a R50 but then said that he does not feel safe. After Mr. B took the money, he heard gunshots which caused the man to demand the return of his money, whereafter he ran away.
32. Mr. B went out of the tavern and saw a small phone which he described as a *tililie* phone that do not send WhatsApp messages, laying on the floor. Mr. B picked up the phone, looked at it and saw the image on the screen was of the man to whom he refunded the R50 after the gunshots were heard.
33. Mr. B tried running after the man but then saw Mbazwana and Sitishi laying on the ground. He put his hands on the side of Mbazwana's neck and felt that he still had a pulse. He also saw Sitishi falling down when he tried to stand up.
34. Mr. B called Sipho who was washing Mbazwana's vehicle. Sipho drove Mbazwana's vehicle to gate 1 where they put Mbazwana and Sitishi into the vehicle. Mr. B does not know where they came from, but Ayanda and Tavidio assisted Mr. B to put Mbazwana into the vehicle. Mbazwana and Sitishi were both bleeding.
35. Mr. B testified that he had seen Mbazwana, who was on his telephone before he entered the tavern.

36. After Mbazwana was taken to hospital Mr. B returned to the tavern to lock up. He then rushed to the hospital where he heard that Mbazwana had passed away and that Sitishi was in ICU.
37. Mr. B identified accused 1 as the person who accompanied the customer on the day of the incident and accused 3 as one of the men in the group, who came into the area near the tavern. Mr. B testified that he saw accused 1 and accused 3 for the first time on the day of the incident.
38. Although Mr. B did not take note of the group of men because there was nothing suspicious about them, he was able to identify accused 1 who he saw for a few seconds. He described him as having a beard but not a big beard on the day and that he was wearing a black bomber jacket.
39. Mr. B testified under cross examination that Mr. A, who was his cousin, came to see him because the person who bought Mr. B's house was looking for him. However, he did not have an opportunity to speak with Mr. A on the day but observed him when he was standing with Mbazwana.
40. When it was put to Mr. B that accused 1 was never at Whitehouse tavern and that he was not involved in the shooting incident he responded by stating that accused 1 was lying and that he was there.
41. Mr. B readily admitted that the area was known for shooting incidents.
42. When he was confronted with the statement he made to the police, Mr. B at the outset stated that it contained information which he did not provide and that it was not read back to him before he was told to sign it.
43. Mr. B testified that he heard two gunshots and then he ducked down but that he does not know how many shots were fired afterwards.
44. Mr. B was very precise when he testified. He became animated when his testimony was incorrectly stated during cross-examination, and he would

correct it. Mr. B presented as a thoughtful witness, who made sure to understand the question before he answered.

45. The next witness called by the state was Sergeant Warries (**'Warries'**) who testified that he works at the anti-gang unit at VISPOL (visible police). The anti-gang Detective requested assistance and had a briefing with his unit at the police station when they were informed that they were searching for suspects in a murder case. Warries and the team were informed that the suspects could be dangerous and that there was a possibility of firearms being used. After the briefing they proceeded to a house at approximately two o' clock in the morning where they believed the suspects could be found. They encountered a RDP house which was not cordoned off by any fencing around the structure. Warries testified that they announced themselves at the front door by shouting that it was the police. Warries heard movement inside the structure, but it appeared as if no-one wanted to open the door. Warries could not say who opened the door as he was part of a group of people. When it was put to him that accused 3 would testify that he opened the door to allow the police entry, Warries was adamant that the door was not opened by someone on the inside. It was further put to Warries that accused 3 would testify that he was woken by a friend and that he knew there were people outside and that he did not have an RDP house but that he had a "shack".
46. When he entered the premises, Warries found a person on his left-hand side who was sleeping on a single bed, and he moved to secure the person. His colleagues moved pass him to get to the other people. Warries testified there was a light inside the house.
47. There were two people in the house and there were approximately ten (10) to twelve (12) South African Police Service Members (**SAPS**) and three detectives. Warries testified that the house was not big and that they had torches, so it was easy to see what was happening.
48. Warries could not recall if there were any dogs in front of the house or the yard and denied that there was a verge in front of the house. On the contrary, he

stated that there was nothing, it was open. It was put to Warries on behalf of accused 3 that visitors had to enter through the gate.

49. Warries testified that though there were two people in the house and that the other person was awake and moving around, he did not see the other person.
50. Both men were identified as suspects by the detectives in the murder case. The detectives requested and was granted permission to search the premises by the second man who Warries did not see.
51. Warries who was partnered with Sergeant Abrahams (**'Abrahams'**), concentrated on the bed where the one suspect was sleeping. Warries searched the bed and found a black CZ 75 9 mm pistol. Warries showed the firearm to both Abrahams and the suspect before continuing with his search. It was put to Warries that accused 3 denied that the firearm was shown to him at the premises and it was put to Warries that the first time the firearm was shown to him was at the police station.
52. Warries testified that he asked the suspect at the premises whether he had a licence to possess a firearm which he did not. Warries then informed the suspect that he was arresting him on a charge of unlawful possession of unlicensed firearm and ammunition. Warries identified accused 3 as the person he arrested.
53. The firearm was secured at the police station and handled further. There were 13 live rounds in the firearm. The serial number of the firearm was filed off.
54. Warries did not impress as a witness and came across as brash. As will be shown later herein, other witnesses differed with Warries in respect of his description of the house as well as how and who opened the door to the premises.

55. The next witness called by the state was Mr. C aka Sitishi who was shot on 19 May 2019 at Whitehouse tavern, where he was employed as a bouncer¹. Mr. C's duties included accompanying Mbazwana to the bank.
56. On the day in question, Mr. C, Malosa, Ayanda, Thandazwa and Odwa were present at Whitehouse tavern. Odwa went inside the tavern as he was tasked with selling alcohol on the day. Mr. C testified that Mbazwana told him that they had to go to the bank and that on the way they should go past the street committee.
57. Mbazwana, Mr. C and Thandazwa were in the passage on their way to gate 1 when two men passed them and were on their way towards gate 2 and another two men were standing next to gate 1.
58. Mbazwana instructed the 2 men standing next to gate 1 to go inside the tavern as the gate is not the tavern, that the tavern is inside. Mr. C cannot recall whether these men responded to him. At this stage, Mbazwana was not close to the two men but was approaching them. Whilst Mbazwana was talking to the two men, Mr. C looked back and one of the two men who passed them, turned back, took out a firearm and shot at them. After that Mr. C does not know what happened and he woke up in the hospital.
59. At this stage Mr. C became emotional and was unable to continue and the matter had to stand down.
60. When the trial resumed the state brought an application for Mr. C to present his evidence via close circuit television. The application was not opposed and was duly granted.
61. Mr. C testified that he knew Mbazwana had a firearm on him as he saw him put it in his waist when they were at the storeroom. Mr. C described the firearm as being 7 x 15.7 cm in height and 15 cm in length.

¹ There was no logic to the state withholding the name of this witness when his identity was readily ascertainable from the questions posed to this witness and from his testimony.

62. Mr. C testified that as the two men passed him and Mbazwana he heard the sound of a firearm being bridged or cocked, he turned around and was shot. Mr. C confirmed that he would be able to identify the person who shot him.
63. Mr. C sustained four bullet wounds, and all the entry points were in front of Mr. C's body. One bullet passed his spinal cord; another passed his chest and two injured his stomach. Mr. C was in hospital for three to four months.
64. Mr. C's lifestyle changed as a result of the injuries he sustained. Upon being discharged from hospital, he had to use a faecal bag and he had trouble finding a job as he could not stand for long periods of time. He also developed epilepsy after he was shot.
65. Mr. C identified accused 3 as the person who shot him. Mr. C explained that when he looked back, he saw accused 3 taking the firearm, cocking it and shooting it.
66. Mr. C's focus was on accused 3, who shot at them, and he did not look to see what the second man, who passed them earlier, was doing. Mr. C was able to identify accused 3 as he testified that his face is always on his mind and he cannot forget. He cannot identify the other men.
67. When it was put to him during cross-examination that the best thing would be for him to forget the incident, Mr. C responded that every time he washes, he sees the scars of his operations and then *'it comes back'*.
68. Mr. C did not see a lady with the two men who passed him in the passage. When it was put to Mr. C that Mr. B testified that he saw 5 people, Mr. C responded that he only saw 4.
69. Mr. C testified that he and Mbazwana were walking in front and Thandaswana was walking behind them. When he was asked if there was a time when all

three of them walked in a line, Mr. C responded that he could not remember as it was too long ago.

70. It was put to Mr. C that Mr. A testified that someone other than accused 3 shot him and that accused 3 shot the deceased, Mbazwana. Mr. C responded that he does not know who shot Mbazwana and that he cannot comment on what another witness testified but that he is testifying of what he knows happened that day.
71. Mr. C was confronted with his statement wherein he stated in paragraph 5 that Mbazwana took out his firearm and told the men standing at the gate that they must go inside or *'fok off'*. Mr. C testified that he does not recall stating that to the police. Furthermore, Mr. C was confronted with the fact that in his statement he stated that the two men he saw both had firearms. Mr. C testified that at the time the statement was taken he was in pain and on medication. However, only one of the two men who passed him was running towards them and carried a firearm.
72. When asked if he ever carried a firearm as he was part of security, Mr. C answered that he never carried a firearm.
73. The next witness called by the state was Mr. Okes (**'Okes'**) who was wheelchair bound and suffered from ill-health often struggling to speak. This made it difficult to follow his evidence.
74. During 2019, Okes was a member of the SAPS, affiliated to the gang unit of the SAPS and his duties included the tracing of suspects. On 23 May 2019, Okes was involved in the arrest of Uno, whose real name is Anga Mabejane, in Khayelitsha.
75. During cross- examination Okes testified that there were approximately 15 officers involved, including Warries who arrested the suspect with the firearm. However, Sergeant Hlatshaneni was not present. Okes differed from Warries and testified that they did not have to break-open the door as it was opened by

a person on the inside. Okes also testified that the lights were on at the house when they arrived at 02h25. Although there were dogs barking, he does not know to whom these dogs belonged. Okes agreed when it was put to him that there is a fence around the house and that there was a gate, through which entry had to be gained.

76. Okes stated that they arrested three people with two of them being in one room.
77. Sergeant Abrahams (**'Abrahams'**) was the next state witness. He testified that he was on duty on 23 May 2019 and that he was contacted by the detectives to assist with the tracing of murder suspects. He could not be sure but he thinks they were approximately ten to twelve members who visited the two addresses.
78. At the first address, he and Warries went to the front door which was locked. Warries knocked and shouted that it was the police, but no-one opened. They then decided to use minimum force to open the door.
79. Abrahams testified that there was a mattress on the floor as you enter the property with a person who was laying thereon. Warries approached this person, explained his rights to him and handcuffed him.
80. They were then informed by the detective in charge that a firearm was involved and that they should search for it. While Abrahams was standing by the handcuffed person, Warries lifted the cushion on the mattress where this person had been sleeping and found a firearm. Warries asked the person if it was his firearm and whether he has a licence for it. The handcuffed person did not answer. It was not disputed that this was accused 3. It was put to Abrahams that the first time accused 3 saw the firearm was when he was already in custody. This was denied by Abrahams.
81. During cross-examination it was put to Abrahams that Okes testified that the door was not broken open but that it was opened by someone on the inside. This was also denied by Abrahams.

82. Abrahams impressed favourably as a witness and created the impression that he was simply testifying what he could recall.
83. Faizel Storah (**'Storah'**) was the next state witness to testify. He stated that he is a member of the SAPS and has been a police officer for 20 years and is currently stationed at the anti-gang unit. During 2019, Storah was working with the uniformed shifts and would respond to incidents and assist detectives with the tracing of suspects.
84. On 23 May 2019, he was part of tracing operations with anti-gang unit detectives. They were briefed at Khayelitsha police station about Harare Cas 480/05/2019 and were taken to 6[...] K[...] street, Site B, Block V, Khayelitsha. When they arrived at the premises Storah knocked on the door. Thereafter, he heard glass breaking at the right-hand side of the house. Upon investigation Storah saw a suspect jumping out of the window. The suspect was wearing a jeans and takkies and no t-shirt. The suspect had a white carrier bag with him. Storah shouted at the suspect to lie down, which he did. Upon checking the contents of the white carrier bag, Storah found seventeen (17) different calibre rounds of ammunition, thirty six (36) whole mandrax tablets, two (2) halves and thirteen (13) quarters.
85. Storah denied it when it was put to him that the right side of the house is closed and stated that there is an alley on both sides of the house.
86. The detective confirmed that this was a suspect they were looking for in the murder case. The suspect was informed of his rights and transported to Khayelitsha police station. The suspect arrested was Sinethemba Makaleni, accused 1.
87. It was put to Storah that the police had assaulted and beaten the people in the house who were crying. Storah responded that he heard no crying. Storah also denied it when it was put to him that accused 1 was wearing a navy t shirt,

trunk and socks and no shoes and also testified that they obtained a top for accused 1 to wear when he asked for clothing.

88. When it was put to Storah that upon accused 1's arrest he was told there is no time to get an attorney because he killed attorneys, he responded by testifying that he did not hear this at all.
89. Storah confirmed that the house was a brick structure but could not comment on the number of rooms as he did not enter the house.
90. The next witness called by the state was Thembelani Sawuti (**'Sawuti'**) who testified that he is 40 years old and that that he resides in Covid informal settlement. During 2019 Sawuti worked for Famous Brands and worked with Lundi Mvotyo.
91. On Sunday, 19 May 2019, Sawuti was working with Lundi Mvotyo and after work, they and three others went to a tavern in an informal settlement known as Lindiwe's tavern where they met up with their other colleagues. Sawuti and a colleague known as Bongani left the tavern at approximately 19h00.
92. Sawuti finished work at approximately 12h00 and arrived at the tavern at approximately half past 2. Lundi Mvotyo was with Sawuti all the time they were drinking.
93. Ms. CC was the next state witness to testify. She testified that Lundi Mvotyo was her boyfriend and that she dated him from 2017 to 2019 when he was arrested. She testified that Lundi Mvotyo passed away on 18 July 2022.
94. On 19 May 2019, at approximately something past 17h00 something to 18h00, Ms. CC was on her way home from work when she came across a white quantum taxi which flashed its lights at her. Lundi Mvotyo and the driver were the only occupants in the taxi. Lundi Mvotyo disembarked from the taxi and he and Ms. CC had a brief conversation wherein he told Ms. CC that he had lost his mobile phone. Ms. CC informed him that she was going home and Lundi

Mvotyo said that he would fetch her later. He also told her that he was going to Malicious' place aka Lindiwe's place to have some drinks. They then parted ways.

95. Later that evening at approximately 21h00, Ms. CC heard a noise outside and went to investigate as she had earlier received a message threatening Lundi Mvotyo. Ms. CC testified that she received a message / text which stated that they were looking for Lundi Mvotyo and that he was in trouble. Furthermore, the message / text went on to state that they would plan to get him and they wanted to know his whereabouts. The message was received from an unknown number and was received after Ms. CC had arrived home.
96. When Ms. CC went outside there was no-one there. She then decided to go in search of Lundi Mvotyo and while searching she came across his mother and brother who were also looking for him as they too had received a threatening message from an unknown number. They eventually went to Lindiwe's place where they found Lundi Mvotyo. His mother and brother asked him what he had done because they too had received threatening messages. Lundi Mvotyo said he had done nothing and that he lost his mobile phone.
97. The next witness was Mr. G who testified that he worked as a general worker at Whitehouse tavern. On the day of the incident, Mr. G woke up between 12h00 and 13h00 as he worked late the previous day and he was still hungover. He saw Mbazwana and the other employees of Whitehouse tavern having drinks and he joined them. During cross-examination, Mr. G testified that there were Windhoek beers, Viceroy and a tray of shots on the table. All the staff were present and participated in drinking. Tevido asked Mr. G to go and smoke with him. At the time of going for a smoke two people -a male and female- came in. Mr. G's attention was not on them. Mr. G testified that people are normally searched before they enter the tavern, but as it was a Sunday, no-one was searched.
98. Mr. G testified that the bouncer had a firearm at the back of his waist. Approximately ten seconds after Mbazwana and his bouncer left the storeroom

they heard gunshots. Mr. G testified that he thought that the bouncer had pulled the trigger because usually when there is fighting at the tavern the bouncer would pull the trigger to calm people down. Mr. G testified that he was laughing and when he turned around he saw a person wearing a black jersey top and a blue jeans. He was not able to recognise the face of the person but saw that the person was carrying a silver firearm in his hand and that he was running in the direction that Mbazwana had walked with the bouncer.

99. While Mr. G was still in shock, one of the cashiers came and said that while they are busy working, people are busy falling down outside. They then tried to exit the storeroom but were unable to do so which caused them to return and hide in the storeroom until the shooting stopped.
100. Mr. G went outside when the shooting stopped where he saw the bouncer and Mbazwana laying on the floor. Only the bouncer was still conscious who was injured on his back side. Mbazwana was injured on his stomach and chest.
101. As Mr. G could not drive at that time, he called someone who could and asked that person to use Mbazwana's vehicle to take both Mbazwana and the bouncer to hospital. They were informed that Mbazwana had passed away when they arrived at the hospital.
102. Mr. G was standing facing the inside of the storeroom with his back towards the gate which gave entry into the tavern. After hearing the gunshots, Mr. G turned to look over his left shoulder. It was at this stage that he saw the person exiting the tavern with a gun in his hands. Mr. G testified that there were so many gunshots that he is unable to recall exactly how many went off and it seemed as if there were more than one person firing off shots.
103. During cross examination, Mr. G confirmed that there was a female present but that he did not see her face.

104. When it was put to Mr. G that Mbazwana had a firearm, he remained adamant that it was the bouncer who had the firearm which was held at his back, by his waist.
105. The next witness to testify was Ms. Ntomboxolo Mvotyo, the mother of Lundi Mvotyo (**'Lundi'**). Ms. Mvotyo confirmed that Lundi had passed away in 2022 from injuries sustained from gunshot wounds.
106. During May 2019, Odwa² came to her and said that he was looking for Lundi because he was receiving threatening phone calls from unknown people. Odwa is Lundi's brother as they share the same father. Upon hearing this Ms. Mvotyo told Odwa that they should look for Lundi. While they were looking for Lundi they met his girlfriend who was also looking for him as she had also received threatening calls. They went together to a tavern situated in W Section where they found Lundi. Lundi told Ms. Mvotyo that he had lost his phone. Lundi did not return home with Ms. Mvotyo as he would not be able to sleep there as he did not know what kind of people were looking for him. Instead, he went with home with Odwa.
107. When the police arrived at her house looking for Lundi, Ms Mvotyo took them to Mfuleni where he was arrested at his cousin's home, which is a RDP house. This was the last time she saw Lundi.
108. When she was asked during cross-examination if she knows if Lundi's phone was found, she replied that the police informed her that they had the phone
109. Lucas Mvotyo was the next witness to testify. He testified that he resided in Mfuleni during 2019. During May 2019 Lundi stayed with him for a day after Lundi's mother called him and informed him that Lundi was coming to his place. He was informed by Ms. Mvotyo that the police were looking for Lundi.

² This is a different Odwa to the one who testified during the trial.

110. Lundi told Lucas Mvotyo that he was sitting at W Section with his friends. They then went to a shebeen in Mkhaza to buy 2 beers and while he was busy buying the beers he heard 2 shots. He (Lundi) then asked for the return of his money as he did not want to sit at the tavern after hearing the shots. Lucas Mvotyo then told Lundi that if this is as he says that they should go to the police station and retrieve his phone as he said that he had left it on the counter when he was buying beers. Lundi then responded that they could go the next morning.
111. They went to sleep and later that night, the police came to the house looking for Lundi.
112. Lucas Mvotyo confirmed that his house is a RDP house with a front and back yard and that it has three rooms.
113. At this stage of the proceedings, a trial with a trial commenced pertaining to the warning statements of accused 1, 2 and 3. The state and the defence agreed that the contents of the warning statement constituted admissions and did not amount to confessions. Therefore, section 219A of the CPA was applicable which provides that:

'(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence...

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).'

114. Accused 1 objected to the admission of his warning statement on the basis that his hands were cuffed prior to and at the time his warning statement was taken. He felt intimidated and pressured to comply. Although he requested the services of an attorney, he was not allowed the services of one. Accused 1 was told by the police official that you *kill attorneys so you will not be allowed*

the services of one. It is not disputed that the signature on the warning statement is that of accused 1, however, it was alleged that it was not his complete signature as he was handcuffed at the time of signing which hampered him.

115. Furthermore, when accused 1 signed the warning statement, the section on page 6, which provides for details to be inserted, was blank. The points in the warning statement were not explained to him nor was the entire statement read back to him.
116. Accused 1 contends that his right to legal representation was breached and that he was coerced to sign the warning statement.
117. Sergeant Hlatshaneni (**'Hlatshaneni'**) testified in the trial within a trial. He stated that he has been a member of the South African Police Services for 15 years. During May 2019 he was attached to the anti-gang unit where he was tasked with investigations. Although he was initially the investigating officer in this matter, he no longer.
118. Hlatshaneni confirmed that he took the warning statement of accused 1, Mr. Sinethemba Makaleni on the day he was arrested, 23 May 2019. Hlatshaneni testified that he spoke both English and IsiXhosa with accused 1. Hlatshaneni explained that both he and accused 1 would initial and place the date on the left-hand side of the page wherever he made deletions or corrections. Hlatshaneni, accused 1 and the commissioner of oaths, Sergeant Tshabalala, signed the warning statement. Sergeant Tshabalala signed in the capacity of a commissioner of oaths. Although it was required that the commissioner of oaths also initial wherever a deletion or correction is made, Sergeant Tshabalala did not do so. No satisfactory explanation for this omission was forthcoming.
119. Furthermore, it appears from the evidence that Sergeant Tshabalala was present when accused 1 was arrested and accompanied Hlatshaneni during the arrest operation. Therefore, it cannot be said that he was an independent

officer with no knowledge of the matter who acted as the commissioner of oaths.

120. Hlatshaneni testified that he explained accused 1's rights to him, including the right to remain silent and the right to legal representation. Accused 1 elected not to consult with a legal representative but rather to make a statement.
121. Hlatshaneni testified that he proceeded to take a statement from accused 1 and interpreted sections 'a' to 'd' in Isixhosa. Accused 1 was asked if he was injured to which he responded that he was not. He was also asked if he was threatened or assaulted and he again responded negatively. The statement was not read back to accused 1 as he read it himself.
122. Hlatshaneni testified during cross examination that he interviewed accused 1 at Khayelitsha Police station in an office in which an empty photo machine stood. He admitted that he knew the deceased in the matter. He does not recall any matters he had with the deceased, but he would see him when he went to court and would greet him.
123. Accused 1 was shown Hlatshaneni's appointment certificate. Hlatshaneni explained to accused 1 that the incident occurred on 19 May 2019 at about 14h00 at Mkhaza, Khayelitsha where two people were shot, one fatally. There were also a number of suspects involved. The details of this explanation were not contained in the warning statement. No satisfactory reason for this omission was provided. Hlatshaneni obtained this information from the docket and some of the statements.
124. When it was put to Hlatshaneni that he did not inform accused 1 that he was connected to the murder and attempted murder, he denied it and stated that accused 1 was informed hereof when he was arrested.
125. It was also put to Hlatshaneni that accused 1 requested an attorney but was denied same. Hlatshaneni denied this. Hlatshaneni admitted it when it was put to him that accused 1 was arrested in the presence of Tshabalala. However,

he stated that accused 1 was arrested by uniformed members of the police service and that he and Tshabalala were merely observing the arrest.

126. Hlatshaneni denied that accused 1 was handcuffed throughout the interview process. He stated that accused 1 was handcuffed when the procedure was explained to him but when he was required to sign, his handcuffs were removed.
127. The door to the office where the interview took place could not be locked.
128. Accused 1 was arrested during the early hours of the morning but was only interviewed at 21h15.
129. It was also put to Hlatshaneni that he did not afford accused 1 the opportunity of making a telephone call when he was arrested. In response hereto Hlatshaneni stated that accused 1 did not request to make a telephone call and he was arrested at home in the presence of his brother.
130. It was put to Hlatshaneni that he took accused 1 to Blue Downs police station where they assaulted him. This was denied.
131. Hlatshaneni denied that accused 1 could not sign his full signature because he was handcuffed, on the contrary, he stated that the handcuffs were taken off when accused 1 had to sign the warning statement.
132. It was also put to Hlatshaneni that at the time accused 1 was asked if he had any injuries, he had no visible injuries, but the fact remained that he was beaten up, kept in the cells and denied an attorney. Therefore, when accused 1 was requested to sign his warning statement he did so. In response hereto, Hlatshaneni denied that accused 1 was forced to sign the warning statement and that at no stage did he complain that he was assaulted.
133. The court was informed that although the state wanted to call Sergeant Tshabalala to testify it could not do so as he was no longer employed by the

South African Police Services and all efforts to trace him had been unsuccessful.

134. The state closed its case in the trial within a trial.
135. Accused 1 testified in the trial within a trial. He was arrested at his home in W section that is owned by his father.
136. In explaining what happened when he was arrested, accused 1 testified that he was sleeping on the sofa when he heard a noise and the kicking of the doors. The police entered the house and made everyone lay on the floor. They proceeded to beat everyone and asked where *is the male person by the name of Sinethemba*. Accused 1 lifted his hands while lying on the floor and stated that he is Sinethemba. The police lifted him, beat him and said that he must prove that he is indeed Sinethemba by way of an identity document. Accused 1 was handcuffed and taken outside where he was put in a van. There was a police officer standing next to the van. Accused 1 asked this police officer to fetch his clothing. Accused 1 was then taken out of the police van and allowed to fetch his takkies, a pants and a long sleeve T-shirt. Thereafter, accused 1 was again placed in the police van. He found accused 3 in the police van and asked him to help him dress by pulling up his pants and fastening his shoes. Accused 1 was unable to do this himself because his hands were handcuffed at his back.
137. While he was in the police van accused 1 could hear the people in the house cry out.
138. He was taken to the police station at Khayelitsha Site B. The police van proceeded into the yard where it was turned around and then proceeded to Y Section. Accused 1 does not know why they went to Y Section where the police went to a house and then proceeded back to the police station.
139. When they returned the police station accused 1 asked Hlatshaneni if he could call his father who was not present when he was arrested. He was told to wait

a while because they were very busy and that he would be helped shortly. Thereafter, accused 1 was taken to the police holding cells. Accused 1 was alone in the holding cells.

140. During the night of 23 May 2019, Hlatshaneni and Tshabalala fetched him from the police holding cells and took him in a vehicle to the Blue Downs police station. They proceeded to the area near the containers which was hidden from view. Hlatshaneni and Tshabalala beat him saying that he must talk. Tshabalala was the person who held accused 1 by his handcuffs, tightening and shaking it. This was very painful and caused the handcuffs to cut into his flesh. Tshabalala also stepped on the handcuffs. Hlatshaneni beat accused 1 on his chest. Accused 1 cried out and asked them not to beat him on his chest as he has a heart problem and had an operation where they were beating him. Hlatshaneni and Tshabalala stopped beating him and said that if he does not want to be beaten up, they will stop as they already know the whole story. It was at this juncture that they took him back they showed him the papers and asked him to sign.
141. Accused 1 testified that Hlatshaneni did not consult with him before he was asked to sign the warning statement as there was no time. Hlatshaneni did not tell him that he was a police officer but accused 1 could see this as he was with other police officers. In respect of what was told to him, Hlatshaneni merely informed him at the time of his arrest at his house that they were looking into a murder. However, he was not told how he- accused 1- was purportedly involved in the murder. Accused 1 did not understand what was happening and did not know that he was a suspect.
142. When he was required to sign the warning statement, the handcuffs were taken off as he was handcuffed with his hands at his back. He was then handcuffed with his hands in front of him.
143. Although he did not observe the time, the process of getting him to sign the documents did not take long as all they wanted was for him to sign the warning statement.

144. Accused 1 also testified that when he requested an attorney, he had a specific attorney in mind who had assisted him previously.
145. Although the signature on the warning statement is his, it is not his ordinary signature. He could not sign as he usually does as the handcuffs were too tight around his wrists to allow him to sign properly. He was told that if he signs the warning statement, the handcuffs would be removed.
146. During cross-examination accused 1 was adamant that the document was blank when he was requested to sign it. Although the handcuffs were tightened all the time, accused 1 did not bleed but marks started showing.
147. Accused 1 admitted during cross-examination that the beating he endured would have been to get him to provide information to the police. When he was beaten and told them that he does not know anything of what they want to know, they accepted it, stopped beating him and told him that they know the whole story.
148. Accused 1 and accused 3 both got out of the van at Khayelitsha and accused 1 did not get to see him again. There was no opportunity to speak with him, and he only asked him if he could assist in dressing accused 1. However, accused 3 could not assist accused 1 as he was laying on his side, handcuffed and in pain. At the time of his arrest, accused 1 was dressed in a short sleeve t-shirt, a trunk and socks (it was put to Hlatshaneni that he was topless).
149. When accused 1 made his first appearance in court, he did not inform the magistrate of his injuries as he was concerned with obtaining the services of an attorney.
150. Accused 1 admitted that there were regular inspections of the holding cells and that he did not inform the officers inspecting the holding cells of his injuries. No satisfactory explanation for this was provided.

151. After his testimony, accused 1 closed his case in the trial within a trial.
152. After the trial within a trial pertaining to accused 1, the state brought an application in terms of section 158(2) of the CPA to present the evidence of witness J ('J') via closed circuit television ('CCTV'). The application was unopposed and was subsequently granted.
153. J testified that he knows a place called Whitehouse tavern and that he had a tavern that was situated next to it. On 19 May 2019, the deceased woke him and they proceeded to wake the others who were in the tavern. Thereafter, they all went to sit in the tavern. J, another male person and a female person went to the storeroom where they remained.
154. J testified that a group of 6 people appeared with one being a person who they knew. This group was standing at a distance from them and two members went inside the tavern to buy alcohol. There was a female person with the group who showed them the place but she did not enter the yard.
155. When Mbazwana and Sitishi left the tavern they first went to the storeroom and informed them they were going to buy food. Mbazwana and Sitishi then went to the car. A while after Mbazwana and Sitishi left, J heard gunshots sound. The female person who was with them said that he must go and look what is happening outside. When J peeped outside he saw Sitishi on the ground and Mbazwana was standing. The two persons who went to buy alcohol came running out of the tavern and took out their firearms.
156. J and his companions left the storeroom running and tried to get out of the tavern's area but they could not jump over the fence and they ended up returning to the storeroom. At this stage the other people had left and Mbazwana and Sitishi were both lying on the ground.
157. J testified that Odwa picked up a phone which was dropped by one of the people. The phone was found where Sitishi was laying. Mbazwana and Sitishi were taken to hospital by car while Odwa and J remained behind. They took

the phone which Odwa picked up and went to Mbazwana's family and told them what happened. They also met with Mdoti and showed him the phone. The phone rang and the caller was asking '*where are you*'.

158. On the Sunday at approximately 11, J took the police to Mdoti to fetch the phone.
159. A friend of J's took them to the hospital where they learnt that Sitishi had been discharged but that Mbazwana had passed away.
160. J's evidence was that the shots were fired by persons who did not go into the tavern but who stood at the gate.
161. J saw a group of people approaching when he left the tavern to go to the storeroom. Thandaswa, who is Odwa's brother was walking in front but it looked as if they were walking together. There were approximately 5 to 6 persons with Thandaswa.
162. J testified in a very confusing manner, and he was led on irrelevant aspects, which amplified the difficulty in following his evidence.
163. The second trial within a trial pertaining to the admission of accused 2's warning statement commenced after J's evidence. Accused 2 challenged the admissibility of his statement on the grounds that he was not informed of his rights to remain silent and to consult with an attorney. Thus, he challenged the admissibility of his warning statement on the basis that his constitutional rights were infringed and that its admission would render his trial unfair. Furthermore, while he was handcuffed, he was asked to sign the warning statement.
164. As with the trial within a trial pertaining to the admissibility of accused 1's warning statement, Hlatshaneni set out where he was stationed during 2019 and what his responsibilities were. He also explained the procedure he followed in taking down accused 2's warning statement which was the same procedure he used in taking down accused 1's warning statement. As with

accused 1, Sergeant Tshabalala was the commissioner of oaths for accused 2's warning statement.

165. Hlatshaneni testified that he informed accused 2 of his rights which included the right to have legal representation. The purpose of the interview was also explained to accused 2.
166. During cross-examination, Hlatshaneni confirmed that he did not take Lundi Mvotyo's statement. He was then presented with a statement dated 24 May 2019 which contained his signature and that of Lundi Mvotyo. However, Hlatshaneni testified that the document was not a statement as there was nothing written.
167. It was also confirmed that the interview with accused 2 was not video recorded. When he was asked what he told accused 2, Hlatshaneni testified that he told them that he is a suspect in a murder and attempted murder matter which occurred on 19 May 2019 at about 14h00 in Mkhaza. Hlatshaneni told accused 2 that they were in a quantum taxi.
168. The interview with accused 2 started at 23h20 on 23 May. It was put to Hlatshaneni that accused 2 instructed that he was kept in custody the whole day and just after 23h20 he was taken out of the police cells and taken to where Hlatshaneni interviewed him. Hlatshaneni confirmed that accused 2 was handcuffed during the interview but denied that he did not inform accused 2 that he could apply to the Legal Aid Board for an attorney before the holding of his interview.
169. When asked where accused 2 was residing at the time of his arrest, Hlatshaneni testified that he was residing in Site B but that accused 2 also provided him with an address in Worcester and told him that he was not residing there. Hlatshaneni was present during accused 2's arrest. Accused 2 told him that he was staying at the address he was arrested at for a few days.

170. Accused 2 said that he did not want the services of a lawyer when he was asked about this during his interview. When it was put to Hlatshaneni that accused 2 instructed that he was not given an opportunity of consulting with an attorney, he denied it and reiterated that accused 2 told him that he does not need an attorney.
171. When it was put to Hlatshaneni that accused 2 was not afforded an opportunity of calling a family member, he responded by stating that accused 2 did not have the number of any family member and that he would have afforded him the opportunity to call a family member if he had the cellular telephone number.
172. Hlatshaneni agreed when it was put to him that it was accused 2's instructions that he was arrested and that his rights were read to him at about 04h00.
173. On 13 September 2023, the state brought an application to interpose the trial within a trial to present the evidence of Ms. K. There was a further application to present her evidence via CCTV, which was unopposed and subsequently granted.
174. Ms. K testified that on the day of the incident she was doing a person's hair. It is unknown in what capacity Ms. K was performing this task. It is unknown whether she is an professional hairdresser / stylist or whether she was performing. This was in a street in Site B, W Section. She received a telephone call from her friend and while she was standing in the road speaking with her, Sinethemba (accused 1) came to her, he held her hand and spoke with her. Sinethemba's nickname is Ski and his surname is Makaleni.
175. Ms. K knows Sinethemba as they stay in the same area and he grew up in front of her. He also used to purchase clothes from her. Ms. K testified that Sinethemba still owed her a balance from purchasing clothes and that he said he was going to pay it.

176. Ms. K told Sinethemba of the gunshots she had heard the day before which came from a shebeen, Whitehouse Tavern, which was close to where she stayed.
177. While she was busy doing the hair she received a telephone call from an unknown number, and the caller told her to come outside. When she went outside, Sinethemba told her that they were on their way to Mkhaza and wanted to know how far she was with doing the person's hair. She told him that she is almost done and that she is going to Mkhaza. Sinethemba told her that they would give her a lift. She said that the "they" she was referring to was Sinethemba, Lundi, Mkeki and a lot of people she did not know. These people were in a white quantum vehicle.
178. While driving in the quantum, enroute to Mkhaza, the occupants were drinking and enjoying themselves. They ran out of liquor and were looking to buy more liquor.
179. The quantum vehicle stopped alongside the road and Ms. K got out. Ms. K, Lundi and another unknown male who she saw for the first time that day walked between the shacks to Bluehouse tavern, but it was closed. She then proceeded to take them to Whitehouse tavern which also required them to walk between the shacks. Ms. K did not herself go to Whitehouse tavern but only showed them where it was whereafter she turned back and returned to the quantum.
180. Lundi was the person who had money and who wanted to buy more alcohol.
181. Ms. K testified that she does not know Lundi's surname but that he is one of the persons who purchased clothing from her. On her way back to the quantum, Ms. K met Makeki and Sinethemba who were on their way in the direction from which she came.
182. While she was on her way to the quantum she heard gunshots but she cannot say where the gunshots came from nor who discharged the shots. Ms. K

decided to walk back to the quantum. When she arrived there, she told them that she heard gunshots but that she does not know where it was coming from. Ms. K testified that the reason she went back to the quantum was because the people at Whitehouse like to shoot and that is why she went back to the quantum to tell them.

183. Thereafter, Lundi Mvotyo and the other person arrived back at the quantum. Sometime later, Mkeki and Sinethemba also arrived at the quantum. Ms. K saw Lundi Mvotyo handling a firearm and taking out the magazine. Sinethemba also wanted to see the firearm.
184. Ms. K identified Mkeki, Lundi Mvotyo and accused 1 and accused 5 in a photograph identity parade, Ms. K was seated behind the driver and could not tell how many people were in the quantum.
185. It was put to Ms. K that accused 1 knows who she is and that he admits to owing her R1 200. It was also put to her that she was falsely implicating accused 1 as a result of the money he owed her. It was further put to Ms. K that accused 1 did not meet her the day of the incident and that he did not hold her hand while she was on the phone.
186. Ms. K testified that she only saw 1 firearm.
187. After the evidence of Ms. K the trial within a trial in respect of the admissibility of accused 2's warning statement recommenced and Hlatshaneni returned to the witness stand.
188. Hlatshaneni testified that accused 2 and 3 were arrested as a result of information received as well as the firearm which was found.
189. It was put to Hlatshaneni that accused 2 was taken out of the cells and taken to an office where Hlatshaneni went through the form without affording him an opportunity to call an attorney. It was also put to him that accused 2 did not have a cellular telephone in his possession. Hlatshaneni agreed that accused

2 was taken out of the cells and that he was handcuffed and that he did not have a cellular telephone. However, Hlatshaneni was adamant that accused 2 did not want an attorney. When it was put to him that accused 2 told him that he was not working and could not afford an attorney, Hlatshaneni replied that accused 2 told him that he does not need an attorney, not that he could not afford one.

190. Hlatshaneni testified that Tshabalala administered the oath to him. He did not testify that the oath was administered to accused 2.
191. Hlatshaneni testified that he returned to accused 3's house to search for his cellular telephone. However, he denied that he had agreed with accused 3 that he would give him an opportunity to get clothes as he was dressed in shorts and a t shirt, in return for his co-operation in obtaining his cellular telephone. Hlatshaneni testified that he asked accused 2 to accompany him to his house and that it was not accused 3 who asked to go with him. Hlatshaneni denied that he had made any deal with accused 3.
192. It was put to Hlatshaneni that he- accused 2- was assaulted after he was arrested and that it was made clear to him by more than 1 person that if he failed to co-operate that he would be subjected to more assaults.
193. Hlatshaneni testified that he conducted an interview with accused 2 at 00h05 on the 25th, 2 days after his arrest.
194. Accused 2 testified in the trial within a trial to admit his warning statement.
195. Accused 2 testified that he was 39 years' old and that prior to his arrest he resided in Worcester. He was arrested on 23 May 2019 in Khayelitsha together with accused 3. Accused 2 testified that he had been visiting accused 3 for about a week which did not include sleeping over and that it was the first time he had slept over when he was arrested.

196. After accused 2 was arrested he was taken to W Section to accused 1's place and then to Site B police station.
197. At approximately 23h00 he was visited by Hlatshaneni in his cell. He was handcuffed with his hands behind his back and taken to an office where Hlatshaneni instructed him to sign certain papers. Tshabalala was also present. Accused 2 testified that he was told to sign because they already know everything.
198. When accused 2 refused to sign Hlatshaneni and Tshabalala took him to Mfuleni police station in Blue Downs and to a container at the back where he was assaulted. Upon his return from Mfuleni accused 2 was forced to sign the warning statement whereafter a photograph was taken of him, and he was returned to the cell.
199. Accused 2 was shown his warning statement and identified his signature thereon. He testified that his right to legal representation was not explained to him.
200. During cross examination, accused 2 testified that the document he was requested to sign and initial had no deletions and was blank but confirmed that it was the warning statement he signed. It was put to accused 2 that at no stage did his legal representative submit that he signed a blank document.
201. Accused 2 was confronted with the fact that it was never put to Hlatshaneni that he was forced to sign a blank form and that his version of events mimicked accused 1's version in his trial within a trial.
202. Accused 2 testified that neither he nor Hlatshaneni and Tshabalala said anything during his assault and that he was unable to tell the court what caused the assault on him to end. However, he testified that they wanted him to sign the forms which were at Blue Downs police station.

203. The cell register recorded that accused 2 was booked out of the cells at 23:20 and booked in at 12:15 with no visible injuries.
204. Accused 2 closed his case in the trial within a trial after testifying. Thereafter, the trial within a trial pertaining to the admission of accused 3's warning statement commenced.
205. It was put to Hlatsaneni that accused 3 was not taken through his warning statement properly and that it had writings on it. However, he had no problems with it, and he signed it. Accused 3 maintains that his rights were not explained to him but did not object to the admissibility thereof.
206. This warning statement pertained to his whereabouts on 19 May 2019. In this statement, accused 3 simply states that:
- 'On Sunday 2019-05-19 I was at Brian's Fishery in site B and in T Section, Khayelitsha. I never went to Makazar Khayelitsha that day and I don't have anything to do with the murder at Makhazar. I was at Site B the whole day that Sunday.'*³
207. However, accused 3 objected to the admission of his second statement which pertained to the unlawful possession of an unlicensed firearm. Accused 3 challenged the admissibility of this statement on the basis that his constitutional rights were infringed as he was not afforded an opportunity to consult with an attorney, and his constitutional rights were not read out to him. Furthermore, he alleges that he was beaten both at the place of his arrest and at the police station. He was also asked to sign a blank form.
208. It was put to Hlatshaneni that accused 3 would testify that accused 2 was present in the room when Hlatshaneni started asking about the firearm. This was denied and Hlatshaneni testified that accused 3 was alone in the room

³ This statement was received as exhibit 'DD'.

when he was questioned. It was also not accused 2's version that he was in the room with accused 3 when Hlatshaneni questioned him about the firearm.

209. It was put to Hlatshaneni that when accused 3 denied any knowledge of the charges he was taken to another room where a lady was sitting. He was also told to sign a blank form as Hlatshaneni knew what he was going to put in it.
210. Hlatshaneni denied it when it was put to him that accused 3 was beaten with bare fists and that he was slapped and that he was beaten on places which would not show any injuries.
211. Hlatshaneni also denied it when it was put to him that there was a woman performing secretarial or typist work in the room and that she asked him and Tshabalala to stop beating accused 3. He testified that accused 3 was interviewed in the room used to take official police photographs and that there was nobody else present.
212. Hlatshaneni denied that accused 3 was unlawfully assaulted when it was put to him that accused 3 would testify that his assault began at the time of his arrest and that he simply signed his statement because he was broken down.
213. Hlatshaneni testified that it made no sense to force accused 3 to admit to possession of the firearm but not to force any admissions in respect of the murder charge, which was a more serious charge.
214. After Hlatshaneni's evidence the state closed its case in the trial within a trial and accused 3 took the stand in his defence.
215. Accused 3 testified that people knocked on his door and requested to enter during the early morning hours of 23 May 2019. After they entered, he was instructed to lift his hands and was told that he had killed someone. He was taken to the van wearing only a vest and trunks and was not wearing shoes.

216. Accused 3 alleged that he was beaten by Hlatshaneni and Tshabalala as well as another officer in a mask and that an older officer told them to stop.
217. After his arrest they proceeded to W Section where accused 1 was arrested and placed in the police van. At this stage accused 1 was not dressed. They drove to the police station and the police van drove into the yard but exited it again whereafter they proceeded to drive to Y Section.
218. At Y Section the police members entered a RDP house whereafter they returned to the police station and accused 1 and 3 were placed in a room which had cameras and a cage. There were also officials wearing police uniforms. Accused 1, 2 and 3 were placed in a room with Tshabalala and Hlatshaneni.
219. Accused 3 was not fully dressed so he asked for an opportunity to dress himself. Accused 3 testified that Tshabalala sat next to him. He requested one of the uniform police officers to uncuff accused 3 and asked him what he could tell him about a tavern in Mkhaza. Accused 3 told him that there is nothing he can tell him as he was not there. Accused 3 told him that he was home, went to the fisheries to get something to eat and then returned home. Accused 3 testified that it was at this stage that he noticed that Tshabalala wanted to fight. Tshabalala inquired about the whereabouts of his mobile telephone. Accused 3 told him that he does have a phone but that he was not fully dressed. This led him to propose an agreement in terms whereof accused 3 would be afforded an opportunity to dress himself in exchange for his phone.
220. Hlatshaneni was completing the form and accused 3 could see that he was writing down what accused 3 was saying. On instruction of Tshabalala, accused 3 signed and initialled the form. After accused 3 signed the form, Hlatshaneni came back with a uniform official who was requested to handcuff accused 3. They proceeded to accused 3's house in a private vehicle. Accused 3 went to his room where his clothes were kept and noticed that it was upside down. Accused 3 asked to be uncuffed in order that he could dress. This request was refused, and he was informed that he could dress at the

police station. Accused 3 inquired whether he could also take clothes for accused 2 as he was not properly dressed. This request was agreed to.

221. On return to the police station accused 3 gave clothes to accused 2. Accused 3's handcuffs were removed in order that he could get dress. While he was dressing a police officer took his bag and shoelaces and Hlatshaneni and Tshabalala arrived with a plastic bag which contained a black firearm with different types of bullets. Accused 3 was informed that the firearm and the bullets were found inside his house and instructed that he be handcuffed again.
222. It was at this stage that accused 3 was taken to another room with a table, chair and computer. There was also a lady sitting in the room.
223. Tshabalala and Hlatshaneni placed the firearm and the papers on the table. Accused 3 informed them that he knew nothing about the gun. Accused 3 was asked if he knew Dewu. Accused 3 replied that if he could see the person, he may be able to say whether or not he knew him. He was given the statement and asked to sign. Accused 3 asked why it was blank and he was told it was because they knew everything. Accused 3 refused and said that he can't sign something that is blank.
224. Tshabalala then hit accused 3 on the right side of the face. Accused 3 fell, stood up again at which stage they kicked him. Tshabalala and Hlatshaneni were kicking him and he was crying. The lady in the room told them that they must stop what they were doing. Tshabalala then said that accused 3 must be taken to the containers so that he can get a hiding to tell them the truth.
225. Accused 3 was made to stand up and was asked to sign. He refused saying that he can't sign a blank paper. In response he was told that they know what they are going to write. Accused 3 was forced to sign while he was handcuffed.
226. Accused 3 testified that he signed his warning statements because he was tired of being beaten as he was beaten the entire day. Thereafter, accused 3's photograph was taken and he was returned to the cells.

227. It was accused 3's version that two warning statements were taken on the same day. One was a statement and the other was blank paper. He did not object to the statement and confirmed that the content reflected what he had told the investigating officer. Accused 3 furthermore confirmed that he gave the statement voluntarily and that he could see that Hlatshaneni was writing down what he told him.
228. Accused 3 was happy with the contents of his statement pertaining to his whereabouts on 19 May 2019 and at the time that he gave the statement he was not assaulted.
229. Accused 3 testified that the back of his head was swollen and that his body was aching as a result of the assault. He asked the lady who was serving them bread and tea for pain tablets and he was given two.
230. Accused 3 did not complain about the assault when he was taken to court.
231. Accused 3 was asked why it was not put to Hlatshaneni that accused 1 and 2 were present during the taking of the statement in respect of Whitehouse when he testified. Accused 3 responded by saying that he told his attorney.
232. Similarly, when he was asked why it was not put to Hlatshaneni when he testified that he (accused 3) was lying on the floor and that he was kicked, accused 3 again testified that he told his lawyer.
233. After his evidence, accused 3 closed his case in the trial within a trial.
234. On 9 November 2023 the court handed down judgment pertaining to the admissibility of the warning statements, which will not be repeated herein.⁴

⁴ A transcript of the judgment in respect of the admissibility of Accused 1 to 3's warning statements will be attached to this judgment for completeness.

235. In his warning statement which was admitted as exhibit **'EE'**, accused 1 states that he was at his friend's house in Site B, W section when he asked Notitombi to accompany him to Mkhaza to direct him to Whitehouse tavern because he heard that there is always gun shots in that tavern and he wanted to see it. Accused 1 further states that he travelled to Whitehouse tavern in a white quantum.
236. Accused 1 also stated that he was accompanied by Athi, Brian, Mateki, Nontmobi, Lonwasbo Cosa, Lundi and other guys. Accused 1 states further that Nontombi showed them the tavern and the persons who went to Whitehouse tavern were accused 1, Lundi, Mateko and Athni. When they arrived at the gate, one person drew out his firearm and asked them what they came to do at Whitehouse tavern to which they responded *"to drink alcohol"*. Accused 1 and Athni proceeded to shoot this person and another guy. Accused 1 states that the reason they shot them was because they asked him to give them his firearm, but he walked backwards and tried to take it out. Accused 1 stated that he received the firearm he was carrying from Brian. Accused 1 states that Mateki took the firearm from one of the guys on the ground and then they ran back to the Quantum.
237. In his statement which was admitted as exhibit **'FF'**, accused 2 stated that on 19 May 2019 he was at his friend's house in Site W when they decided to go to Mkhaza to Whitehouse tavern. He was asked to arrange someone with a Quantum which he did.
238. When they arrived at Whitehouse tavern, the Quantum parked next to Somerset taxi rank and *'Lundi, Sinethemba and other guys went to White house tavern'* with a lady who was asked to show them the tavern. Accused 2 was left behind in the Quantum.
239. In his statement that was admitted as exhibit **'GG'** accused 3 states that during the afternoon of 21 May 2019, Lundi came to his house and asked him to keep a firearm. This firearm was found by the police in his house.

240. Hlatshaneni was the investigating officer from the docket's inception until June 2021 when he handed the investigation over to the new investigating officer.
241. Initially six persons were arrested in the matter, but the 6th accused, Lundi Mvotyo was shot and killed before the trial commenced.
242. Approximately an hour to 30 minutes after Lundi was arrested, Hlatshaneni made the other arrests which were made as a result of information received from Lundi Mvotyo. Lundi Mvotyo also took the police to site B, V section where the police were told that they would find accused 2 and 3.
243. When the police knocked on the door, the door was opened, and they found accused 2 and 3. Police officers also found a firearm under the cushion where accused 2 and 3 were sleeping.
244. Lundi Mvotyo, who was parked in a vehicle outside the premises could see the police when they exited with accused 2 and 3. He confirmed that Hlatshaneni had arrested the correct people.
245. After arresting accused 2 and 3 they were directed to an address in W Section where accused 1 was arrested for possession of mandrax and possession of several cartridges for different firearms.
246. During the course of his investigation, Hlatshaneni traced a witness who was present during the incident. This witness was approached by accused 1 and the same witness took them to Mkhaza to show them Whitehouse tavern where the shooting took place. A photograph identity parade was held on the 26th during which the witness identified accused 1, 2, 3 and 4.
247. Hlatshaneni also received a list of names of about 10 or 11 people who were inside the taxi that transported them to Mkhaza. During his investigation, accused 5 was identified and arrested.

248. The state called Captain Vinjwa who testified that he was a SAPS member for 31 years and that he was stationed at Harare Khayelitsha police station. He was a group leader and his duties included inspecting dockets and writing statements for serious cases. As a captain, he was not involved in the investigation of matters and did not even attend crime scenes.
249. Vinjwa confirmed that he took a warning statement from accused 4 on 18 July 2019. He explained that he was in office and that he was approached by the detective to take accused 4's statement, who was then brought to the office. This was at Harare police station.
250. Vinjwa testified that this was the first time he met the suspect. He welcomed the suspect and gave him a seat to sit. He explained that he had information in front of him and that he needed to take a statement from him pertaining to a shooting that occurred in Mkhaza which resulted in the death of one person and another person being seriously injured.
251. Vinjwa informed accused 4 that he did not have to give him a statement and informed him of his rights and told him that the statement could be used against him. Accused 4 was informed of his right to remain silent and of his right to obtain the services of a legal representative.
252. Vinjwa testified that he can remember doing this because it is the nature of his job and it is what he does on a daily basis in many cases. In response, accused 4 gave him a statement to write down and said that he does not have a problem with it.
253. Vinjwa testified that he completed the warning statement and signed at all the relevant places. Thereafter, after the warning statement was completed, he read it to accused 4 and asked him if he understood what was written down. Accused 4 said that he did and then he signed at the relevant places. Accused 4 signed the warning statement in Vinjwa's presence.

254. When it was put to Vinjwa that Yvette Palm would testify that the warning statement contained signatures which were not the same, he commented that there were so many places accused 4 had to sign that when it got to the end he got tired and was just signing. He was steadfast in testifying that accused 4 had signed the warning statement. Vinjwa testified that he did not rush accused 4 in giving his statement and took his time in completing the warning statement.
255. It was not put to Vinjwa that accused 4 did not sign his warning statement in front of him.
256. Although longwinded, Vinjwa came across as an honest witness who told the court what his role was in taking the statement from accused 4.
257. The state called Captain Liebenberg (**'Liebenberg'**) who is stationed at the questioned forensic science laboratory, Western Cape. She testified that she has been a police officer for almost 15 years and is currently a senior forensic analyst.
258. The state obtained the report of Liebenberg after accused 4's legal representative informed it that it had briefed an expert to show that accused 4 had not signed his warning statement and that the signatures thereon were not his.
259. Both the state and the court were misled in this regard. This is clear from the report of Yvette Palm, the expert appointed by accused 4, that she was presented with a request on 21 November 2023 to assist with establishing the veracity of Liebenberg's findings in her section 212 affidavit. Furthermore, accused 4's legal representative had repeatedly advised both the court and the state that Palm's report was near completion or would be completed when it later became clear that Palm had not yet been formally brief. Two examples of the court and the state being misled occurred on 24 August 2023 when advocate Banderker stated on record that the report would be ready by 12 on Monday, 28 August 2023 and on 30 August 2023 when the state and the court

were yet again informed that the expert's report would be ready in a day or two as she has all the necessary information she required.

260. It became clear during Palm's evidence that she used the materials obtained by Liebenberg and that her report constituted a peer review of Liebenberg's finding. This much is clear from paragraphs 33 to 52 of Palm's report and was conceded by her during her *viva voce* evidence.
261. Liebenberg was tasked with the authentication of handwriting and signatures of approximately 10 cases per year for 15 years. She's attached to the questioned document section of the forensic science laboratory since June 2008 and has obtained a BA degree in Criminology and Psychology from the University of Pretoria; BA (Hons) in criminology from the University of Pretoria and attended internal and external training interventions and has been declared competent and proficient in forensic document examination. She reported that the fundamental principle underlying forensic handwriting and signature examination is the Principle of Analysis, Comparison and Evaluation (**'the Law of ACE'**).
262. In applying the Law of ACE, the analysis aspect would have the sample material reduced to a matter of its discriminating elements. A discriminating element is a relatively discrete element of writing or lettering that varies observably or measurably with its writer and may, thereby, contribute reliably to distinguishing between the writing of different writers.
263. The comparison aspect of the Law of ACE refers to the discriminating elements of the questioned material compared with those of the specimen material. The evaluation aspect of the analysis references the similarities and/or dissimilarities in the discriminating elements will each have certain significance for discrimination purposes, determined by their cause, independence or likelihood of occurrence.
264. Each of the stated propositions is considered and the extent to which either of them, if any, is supported by the evidence, is evaluated.

265. Liebenberg reported that the process is applied by utilising microscopic analyses which entails the use of sufficient magnification for fine detail to be observed. Applicable, verified instrumentation is used in the process.

266. Liebenberg's s212 affidavit states in paragraph 9.1.4 that:

'Correspondence were, however, identified between each of the questioned signatures marked "Q1" to "Q9" and the specimen signatures in respect of, inter alia, their form, placement and dimensions. In assessing the evidence presented by the respective signatures, the following possible scenarios exist for each of the questioned signatures:

- *The questioned signature is a product of the author of the specimen signatures under the following conditions:*
 - *It is a natural signature that varies partially from the design of the specimen signatures and is not adequately represented in the specimens provided;*
 - *There has been an attempt to disguise certain aspects of the signature.*
- *The questioned signature is a forgery.*

Evaluating the significance of the correspondence in conjunction with the limitations identified, an assessment of authorship would need to be based on the balance of probabilities. The reason for this is that the significance of the similarities identified does not nullify the uncertainty that the limitations create, as the likelihood of either scenario for each questioned signature is a realistic possibility. That being said, weighing up the evidence, the probability that each of the questioned signatures have been executed by the author of the specimen signatures is higher than the probability that each of the questioned signatures are forgeries.'

267. Liebenberg concluded that the signatures were probably executed by the author of the specimen signatures.

268. During cross examination, Liebenberg testified that accused 4's signature has remained consistent notwithstanding the 8-year difference between the

impugned signature and the sample signatures. However, she testified that there has been a maturing of the signature.

269. Liebenberg conceded that while there was a limitation in her analysis she found enough consistency to justify a probability finding.
270. Liebenberg was the last witness to testify in the state's case. Thereafter, the state brought an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1988 to admit the statement of Sibabale Gosa (**'Gosa'**) who passed away subsequent to providing a written witness statement to the investigating officer in English.
271. The state sought the admission to provide insight to the conversations which took place in the Toyota Quantum, to show the presence of accused 5 in the Quantum and to show common purpose amongst the accused before court. Subsequent to Gosa making a statement to Hlatshaneni, he passed away and was therefore unavailable to testify.
272. In determining whether to admit the statement the court has to determine whether the interests of justice require the admission of the statement. In making this determination, the court had to consider:
- (i) nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence was tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason for the introduction of the hearsay evidence;
 - (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 taken into account.
273. As set out above, the admission of the hearsay statement was sought to provide insight to the conversations which took place in the Quantum, the

presence of accused 5 in the Quantum and to show common purpose amongst the accused before court and it was brought because Gosa was deceased and could not testify.

274. The admission of the statement was opposed by all the accused.
275. As the statement was sought to be admitted in criminal proceedings, the presumption of innocence would generally militate against admitting it.⁵ Furthermore, it is common cause that the accused could be prejudiced as they would not be able to test the evidence by cross examination.⁶
276. The written statement was a written recordal of what was told to Hlatshaneni, who was able to confirm some of the contents thereof. Furthermore, it was uncontested that the contents of the written statement would not constitute standalone evidence in the sense that there was evidence before the court which would corroborate the contents of the written statement.
277. Insofar as the contents of the statement stood uncorroborated, the court would be alive to exercising caution before placing any reliance thereon.
278. After considering the factors set out in section 3(1)(c) holistically the court was of the view that the admission of Gosa's statement was in the interest of justice and duly admitted same.
279. In his statement, Gosa stated that on a Saturday in May he was with his cousin, Lundi. He noticed that there were five males drinking with Lundi. On Sunday, the following day, Gosa went to Lindiwe's tavern to search for Lundi. He found Lundi and noticed that Lundi was up and down, drinking from different tables. Gosa told Lundi that he had R70.00. Lundi told Gosa that it this would be used to purchase brandy.

⁵ *S v Kapa* 2023 JDR 0762 (CC)

⁶ *S v van Willing and Others* 2002 (6) 305 (SCA)

280. Gosa followed Lundi and some guys to a parked white Quantum. Upon request, Gosa handed his cellular telephone to Mateki who in turn handed it to Sinethemba who made two telephone calls in the taxi. Gosa noticed an unknown woman get into the taxi. Gosa heard this woman give Sinethemba directions to an unknown place.
281. Gosa saw Brian with a nice firearm. He also saw Sinethemba and Stayela with a firearm. Gosa heard that they were on their way to Mkhaza and heard Brian state that *'if they resist they must be killed'*. The rest of the guys in the taxi agreed with Brian.
282. When the taxi arrived at Mkhaza, Gosa gave Lundi R70 and the woman, Sinethemba, Stayela, Mateki and Lundi exited the Quantum. Lundi claimed he was going to buy brandy at a tavern.
283. Gosa stated that he realised that the journey was about hitting people, but he was too scared to leave as he feared that they would kill him as well.
284. The woman returned and told them that she heard gunshots from the tavern's side where she took Sinethemba and others. Lundi was the last person to return and reported that he had lost his cellular telephone.
285. After Gosa's statement was received into evidence, the state closed its case and accused 5, Brian Balangile brought an application in terms of section 174 for discharge. It was argued that there was not a single state witness who gave evidence which could implicate accused 5.
286. In accordance with section 174 of the CPA an accused person should be acquitted if there was no evidence on which a reasonable court acting carefully could convict him or her.⁷

⁷ *S v Zimmerie en 'n Ander* 1989 (3) SA 484 (C)

287. At the end of the state's case the only evidence against accused 5 was the hearsay evidence contained in the statement of Gosa. The evidence was that he saw accused 5 with a firearm and heard him say that *'If they resist, they must be killed.'* Witness K corroborated Gosa in respect that she saw accused 5 in the taxi on the day. Witness K testified that the taxi was rowdy, noisy and full and that people were drinking in the taxi. Ms K did not confirm that accused 5 was in possession of a firearm nor did she confirm that accused 5 had said that *'if they resist, they must be killed.'*
288. Therefore, applying caution to the uncorroborated aspects of Gosa's statement and having due regard to the fact that the reliability of Gosa's observation could not be tested, the court attached no evidentiary weight to the uncollaborated aspects of the statement.
289. The court was obliged to consider whether there was a possibility of accused 5 being implicated by his co-accused. At this stage of the proceedings the court had regard to the warning statements of accused 1 to 4 and was privy to their versions which had been put to the state witnesses. After considering the warning statement before the court and the version of the accused put to the state witnesses, the court was of the view that it was highly unlikely that accused 1 to 4 would implicate accused 5, should they testify in respect of the merits of the matter. Therefore, the court was satisfied that it would be unfair not to discharge accused 5 and to place him on his defence as it was.
290. Therefore, accused 5 was granted a discharge in terms of section 174 of the CPA as the court was of the opinion that there was no evidence on which a reasonable man acting carefully could convict accused 5.
291. Three statements made in terms of section 212(4)(a) and (8)(a) of the CPA were received as exhibits "O", "P" and "Q". However, the court placed no reliance on these statements as the chain of evidence pertaining to the subject matter of these statements was defective.

292. Accused 1 testified in his defence. He testified that he resides in Site B, Khayelitsha which is quite far from Town 2 where Whitehouse tavern is located. It is approximately 30 minutes travel by taxi and an hour on foot.
293. Accused 1 testified that he was arrested at his house and that he was not informed of the reason therefor and was only told of the reason for his arrest at the police station. Accused 1 testified that when he was arrested, he told the police officers that he did not know what they were talking about and that he was not involved.
294. Accused 1 testified that on 19 May 2019 he was at home until approximately after 17h00. He testified that Saturdays and Sundays are used to clean the house and to cook.
295. When he was asked why he was so certain that he cooked and cleaned on 19 May 2019, accused 1 answered that he was certain about this because the next day, 20 May 2025 would be his birthday.
296. Accused 1 confirmed that he was home between 13h00 to 15h00 with his elder brother, Sipho Makaleni and that he told the police this.
297. Accused 1 confirmed that exhibit **EE** was his warning statement. Furthermore, he confirmed that it contained his signature but explained that he was required to sign while he was handcuffed and that the handcuffs were tight. Accused 1 testified that when he signed pages 6 and 7, those sections were blank.
298. Accused 1 denied that he asked Ms. K for directions to Whitehouse tavern. He confirmed that he is familiar with Ms. K who he used to see in the area. Accused 1 testified that Ms. K was someone who sells jeans and that she sold jeans to him. When accused 1 did not have money, Ms. K would sell him jeans on credit.
299. When accused 1 was asked if there was any reason for Ms. K to testify that he was present where firearms were visible and that he asked her for directions to

Whitehouse, he replied that the only reason he can think of is that he owes her R1 200.00.

300. When it was put to accused 1, that Mr. A testified that he was the person who shot Sitishi, he stated that the evidence was incorrect and that he does not even know Whitehouse tavern. Accused 1 also testified that the person who testified that he was the person who came to the Whitehouse's gate was making a mistake as he was at home.
301. Accused 1 testified that they generally eat at one o' clock but it could have been by two o' clock at the latest that they ate on 19 May 2019.
302. Accused 1 testified that he was at home with his two elder brothers, being Sipho and Asanda. During cross examination by the state, accused 1 testified that he only learnt in court that Ms. K was a witness. He went on to testify that he grew up in front of her and that he would normally see her in the street.
303. Accused 1 testified that he had been owing Ms. K money for a long time, over many months but she reminded him that he owed her the money by coming to him and telling him.
304. When he was asked if he communicated telephonically with Ms K, accused 1 testified that he had her number and would contact her telephonically and that sometimes she would come to his house. When it was put to accused 1 that Ms K testified that he had telephoned her on 19 May 2019, accused 1 stated that it was incorrect. When it was put to accused 1 that Ms K testified that he came to pick up her in a Quantum vehicle and for her to show him where Whitehouse tavern was located, accused 1 said it was incorrect.
305. Accused 1 testified that he does not know where Whitehouse tavern is and that he has never been there and that Ms K was lying about him.
306. He testified that he does not know accused 2, he used to see accused 3 but he does not know where he is staying. However, accused 4 is his friend and

known to him. They did drama together at Artscape and he started getting to know accused 4 during 2009 and 2010. He would spend a lot of time socially with accused 4 as they spent time rehearsing on a daily basis and they also went to taverns.

307. Accused 1 testified that he cooked chicken, rice, veggies and he also prepared chakalaka and potato salad. He ate with Sipho as Asanda won't be at home when they are having a meal but sometimes, he comes home and then leaves again.
308. Accused 1 testified that Asanda used drugs, and he was not someone who stayed at home. After they ate, accused 1 and his brother packed away the dishes and then they sat for a while before he left for the informal settlement to look for the kids and then he returned home.
309. When accused 1 left the house, Sipho remained behind. When he returned, Sipho was still at home.
310. Accused 1 knew Lundi Mvotyo by sight as they resided in the same area but he was not friends with Lundi.
311. Accused 1 called his brother Sipho Makaleni to testify in support of his defence. Sipho Makaleni testified that accused 1 is his younger brother and confirmed that he resides with his brother and that they were home on 19 May 2019 between 13h00 and 15h00. Sipho Makaleni testified that when he woke up at approximately 09h00 or 10h00 he went to the Somalians to purchase cigarettes. He confirmed that accused 1 was washing dishes and preparing to cook. If there were no vegetables, he would go and purchase some. He testified further that accused 1 left in the afternoon, before sunset, at approximately 17h00.
312. Although both accused 1 and Sipho were adamant that accused 1 was cooking and cleaning on 19 May 2019, both of them spoke in general terms and in

respect of what would be done on every Saturday and Sunday and not specific to 19 May 2019.

313. Furthermore, both accused 1 and Sipho failed to satisfactorily explain why Sipho did not immediately inform the investigating officer that accused 1 was with him on the day of the shooting when he was arrested and why he waited until the trial to present the alibi evidence. It was also not put to Hlatshaneni during the trial within the trial that accused 1 had an alibi defence.
314. *As in S v Mohammed⁸ accused 1's 'alibi defence lacked credibility, a fact which is exacerbated by its late introduction into the case'.*
315. After the evidence of Sipho Makaleni, accused 1 closed his case.
316. Accused 2 took the stand in his own defence. He testified that he is 40 years old and that he stayed with accused 3, with whom he was arrested. He was friends with accused 3's elder brother, Thabo. When Thabo passed away, he frequently met with accused 3. Accused 2 testified that he does not know accused 1 and accused 4.
317. On 19 May 2019, accused 2 left the house where he was staying. He had planned to meet a driver of a Quantum vehicle to take him to visit his child. He planned to meet the driver halfway and planned to go to Kraaifontein because he wanted to check up on his child. The taxi driver was called Nkosinathi, who was a friend of accused 2.
318. He visited for approximately an hour and a half in Kraaifontein. Thereafter, he returned to the vehicle and found that it was full of people. One of the people in the taxi was Lundi Mvotyo.

⁸ 2011 JDR 0580 (SCA)

319. Accused 2 explained that he had to appear in court on another matter on the 22nd of May 2019. As he resided too far from the court he planned to sleep over at accused 3's house.
320. In respect of his arrest, he testified that he woke up during the early morning hours and he was very thirsty. He took a jug and went to fetch water. A few seconds after he returned to bed, he heard a knock on the door and people shouting accused 3's name. Accused 2 woke accused 3 and informed him that there were people shouting his name. Accused 2 testified that he and accused 3 slept on the same bed.
321. He was assaulted by the police who threw the water in the jug over his face. Accused 2 was handcuffed with his hand behind his back and placed in the police van and was taken to W section. At W section he observed a lot of vans, but he did not see what house they stopped at he was not familiar with the section. After a while they left and proceeded to Y section.
322. They proceeded to the police station where 1 of the police officers asked why he killed Mbazwana, after which he was given a charge sheet. Accused 2 testified that at this stage, accused 3 was sitting next to him.
323. When accused 2 was asked about the firearm found under the pillow where accused 3 was sleeping, he testified that he was showed the firearm at the police station but that he was never shown a firearm at the house where he was arrested. He testified that he and accused 3 were placed in a small cell where they were charged.
324. Accused 2 testified that he does not know Odwa, Sitishi or Yandisa Sithteshe. Accused 2 testified that he does not know Whitehouse tavern, that he has never been there and that he does not know it.
325. During cross examination conducted on behalf of accused 1, accused 2 testified that he was shown a firearm through a see-through police bag.

326. During cross examination conducted on behalf of accused 3, accused 2 confirmed that his main residence was in Worcester and that he resided with accused 3 from approximately 15 May 2019 as a result of a court case he had. Accused 2 testified that Accused 3's house is not a RDP house and that it is cordoned off and has a gate. He went on to testify that there was a dog at the side he and accused 3 were sleeping and that there was a dog close to the toilet and another dog close to the gate. In total there were at least 3 dogs. Accused 2 also testified that the dogs were barking and that accused 3 was awake.
327. Accused 2 testified that he knew about accused 3 being stabbed. It was put to accused 2 that accused 3 has an obvious limp, which he agreed to.
328. The court observed accused 3 walk to and from the witness stand. He did not have an obvious limp and appeared to walk naturally.
329. During cross examination by the state, accused 2 testified that he forgot the surname of the taxi driver.
330. When asked if accused 3 was in the Quantum taxi at the time he travelled therein, accused 2 testified that he cannot say whether or not he was in the taxi, which was full. Similarly, with accused 4, he is unable to state whether he was in the taxi or not.
331. Accused 2 reiterated that accused 3 slept on the same bed as he did and that he was the one who woke accused 3 and told him that there are people who are shouting his name.
332. Accused 2 closed his case after testifying.
333. Accused 3 testified that he resides at Site B, Khayelitsha and that he is 39 years old. He described his house as being made out of zinc plates and that it has vibracrete attached. Accused 3 testified that there is garden close to the

yard and that the front door is cordoned off with wire and corrugated sheets. Accused 3 confirmed that there are family dogs which were housed in the yard.

334. In respect of 19 May 2019 when he was arrested, accused 3 states that he was alone with his girlfriend. He woke up and went to buy something to eat at the fisheries for breakfast. He returned home and spent the entire day with his girlfriend and then took her home. He confirmed that accused 2 was staying with him and that he had slept over at his house on 18 May 2019. However, on the morning of 19 May 2019, he woke up and left and did not sleep at the house on 19 May 2019.
335. Accused 3 testified that he had never been to Whitehouse tavern and that he only learnt where it was during this trial.
336. During the early hours of the morning on which he was arrested, he was woken up by accused 2 who told him that the police are outside. Accused 3 was going to get dress and then open the door but he heard how the police were shouting and decided to open the door without getting dressed. Accused 3 testified that police officers came inside. They asked him for a firearm, and he said that he does not know anything about a firearm. Accused 3 went on to testify that the police officers assaulted him, saying that he was lying and that he must tell the truth. Accused 3 remained adamant that he did not know what they were talking about. The police continued to assault him.
337. Accused 3 testified that Hlatshaneni took a photograph of him with his mobile telephone, whereafter he went outside. The other police officers pinned him down. Hlatshaneni returned inside and said that they should tie him up as he is one of them. Accused 3 was then handcuffed and placed in the police van. At this stage, accused 3 was dressed in a vest and a boxer / trunk. He did not see accused 2, who was placed in a different police van. All the police vans took the same route, and they first went to section W from where they went to Site B police station.

338. Accused 3 testified that Hlatshaneni and Tshabalala were present when he was arrested and that Hlatshaneni was the officer who handcuffed him and placed him in the police van. Accused 3 testified that the first time he saw sergeant Warries was when he testified in court.
339. Accused 3 also testified that he was not aware of the allegation that a firearm had been found at his house and that the first time he learnt that a firearm was found at his house was when he was at the police station.
340. At the police station, accused 3 was taken out of the police van. He was getting cold and his body was aching. As accused 3 was walking, Hlatshaneni saw him limping and allegedly asked him whether this limping was a recent development or whether it was an old thing. Accused 3 told him that the limping was an old thing. When they arrived at the police station, they were placed in a cell which looked like a reception area as it had a computer and there were other police officers as well. Accused 1, 2 and 4 were in the same cell as he was placed.
341. While they were in the police cell, Hlatshaneni came with two police officers. Hlatshaneni was holding a see-through plastic bag that contained a firearm and bullets. Hlatshaneni told accused 3 that the firearm and bullets were found at his home and accused 3 told him that that was not true.
342. When accused 3 was charged, he was asked for his mobile telephone, and he was asked where he was on 19 May 2019. Accused 3 told him that he was at home. Accused 3 told Hlatshaneni that he was getting cold and that his body was aching. Hlatshaneni told him that if he wants his clothes, there is something which he wants from him.
343. Accused 3 stood by his evidence presented during the trial within a trial and basically repeated his evidence presented therein.

344. Accused 3 testified that in 2008 he was stabbed at the back with a sharp object and that it disturbed a nerve which resulted in him being told that he would not be walking normally again.
345. As a result of this injury, accused 3 testified that he is unable to run and when he does run, he trips as a result of his injury.
346. During cross examination, accused 3 testified that the fisheries he went to on the morning of 19 May 2019 was owned by Brian Balengile.
347. Accused 3 admitted to knowing Lundi Mvotyo.
348. During cross examination, accused 3 testified that he was with his girlfriend, Hlishle Kwane during the day of 19 May 2019 and that he told Hlatshaneni this. When it was put to accused 3 that he did not tell the court or anyone else that he was with Hlishle Kwane when the trial started, he testified that he had informed his legal representative. Unfortunately, Kwane had passed away during 2019, approximately 4 to 5 months after his arrest.
349. It was put to accused 3 that it was never put to Hlatshaneni when he testified that he had told him that he was with his girlfriend during the day of 19 May 2019. It was also not put to any of the other witnesses who identified accused 3 as the shooter that he was with his girlfriend.
350. Accused 3 called Siphosetu Magengele to testify in his defence. He testified that he knows accused 3 and became friends with him approximately during 2006. He testified that accused 3 could not run without tripping. After the evidence of Siphosetu Magengele, accused 3 closed his case.
351. As with accuse 1, accused 3 purported to introduce an alibi defence at a very late stage of the proceedings. It was only when he testified in respect of the merits of the matter that it was disclosed that he was with his girlfriend on the day in question. No satisfactory reason was provided why this was not disclosed sooner.

352. Accused 3 signed a warning statement dated 25 May 2019 wherein he stated that on 19 May 2019 he was at Brain's Fisheries and that he never went to Mkhasa, Khayelitsha and had nothing to do with the shooting that occurred. Accused 3 did not dispute the contents nor that this statement was given freely and voluntarily.
353. In a second statement signed also signed on 25 May 2019, accused 3 disputed that the contents were freely and voluntarily deposed to and that he was the source of the contents thereof. This statement was the subject of the trial within a trial and was admitted as exhibit '**GG**'. In this statement, accused 3 stated that on 21 May 2019 during the afternoon, Lundi arrived at his home and said that he must keep the firearm that was found by the police when he was arrested.
354. Accused 4 testified in his defence and stated that he is 31 years old and was staying in Khayelitsha with his mom, sister and aunts. During 2019 he was working as a taxi driver.
355. Accused 4 confirmed that he knows accused 1 whom he met in 2008 or 2009. Accused 1 and himself were involved in a community-based organisations where they did art, music and dance. They would perform in community halls, the Artscape and Baxter theatres. Accused 4 confirmed knowing Lundi Mvotyo and testified that they would meet at times during weekends where they would play soccer.
356. On the morning of 19 May 2019, he woke in the morning. That Saturday of the week was going to be his birthday, and he went to his friends to discuss what they were going to do. On Monday of that week, it was going to be Sinethemba's birthday, and they were planning to combine the birthday celebrations. These discussions took place in Section WB, Site B. It was never put to accused 1 that they would have joint birthday celebrations nor did accused 1 testify to this.

357. Accused 4 testified that he spent the entire day in Section WB from the morning until approximately past 8, something to 9 the evening.
358. Accused 4 testified that he does not know where Whitehouse tavern was situated.
359. Accused 4 testified that Captain Vinjwa did not obtain the information contained in his warning statement from him. Accused 4 denied that his warning statement contained his signature. The warning statement of accused 4 was received as exhibit '**KK**'.
360. The contents of this statement stated that on a date unknown to him in May, he (accused 4) was with Sinethemba Makaleni, Sonwabo, Anga, Brayen and Lundi at Lindiwe's shebeen drinking alcohol. Accused 2 arrived with a Quantum vehicle and requested them to drive with him to Mkhaza informal settlement. The statement reported that there was an unknown female who accompanied them to Mkhaza informal settlement. When they arrived at Mkhaza, he did not see the unknown lady get out of the vehicle as they did. They arrived at the tavern which was not known to him. The statement goes on to state that Sonwabo and Sinethemba approached the entrance of the tavern. Two black unknown men came out from the tavern and approached them and asked them what they wanted. He then informed these men that they had come to the tavern to drink alcohol.
361. The statement then states that Sinethemba and Sonwabo shot at these men with their firearms. Both men fell down. Accused 4 states that he took the firearm off them whereafter they returned to the Quantum and drove away, returning to Lindiwe's shebeen.
362. Accused 4 states that Dewu was also in the Quantum.
363. Accused 4 called Yvette Palm (**'Palm'**) to testify. She testified that she is a forensic document and handwriting examiner. Palm underwent a three-year theoretical and practical in-service training in the examination of questioned

documents with the questioned document unit of the forensic science laboratory of the South African Police Service, the advanced program in forensic criminalistics which is specifically directed to the examination of questioned documents, by the University of South Africa as well as attending various seminars and courses. Palm testified that she had uninterrupted practical experience in a multitude of document and handwriting examinations since 1996 to date. She had also testified in numerous pre-trial consultations as well as *vive voce* testimonies delivered in cases in the High Courts, Magistrate's Courts, disciplinary hearings, bargaining councils in South Africa, Botswana, Namibia, Zambia and Hong Kong.

364. Palm was briefed to establish the veracity of Liebenberg's findings as per her s212 statement. In order to discharge her brief and to affect her own independent examination, Palm requested access to all the documents as was received and examined by Liebenberg.
365. Palm reported that all the signatures, save for the signature sample taken from the warning statement, were all mutually consistent. Palm stated that the emotions at play during his arrest could have had an impact on the signature and went on to state that the only evidence that could clarify this would be sufficient samples from the period, which were not available.
366. She testified that the ISO standards create an objective measure to do an evaluation and transparency between examiners when looking at a document, the examiner's role towards the court and that another expert can look at the same case and come to the same conclusion.
367. Palm reports that the signature in question is on a document dated 18 July 2019 and that there is only one specimen signature for this period. Palm opined that a single specimen signature is insufficient to determine the range of natural variation of an author and that her examination cannot be continued until such time that sufficient additional contemporaneous specimen samples are obtained. However, this is not possible as no other contemporaneous specimens are available.

368. Palm testified that it was a grave concern that there were no contemporaneous signatures with which to compare the sample signature. Consequently, Palm concludes that she could not make a finding in respect of the authenticity of the 10 signatures in question
369. During cross examination, Ms Palm conceded that her report had not been subject to peer review and that her report constituted a peer review of Liebenberg's report.
370. Palm, in her report and in her evidence identified alleged shortcomings in the Liebenberg's report and methodology. However, Liebenberg's evidence was clear and concise and her methodology logically explained. Liebenberg's reasoning in reaching her conclusion is based on the materials available to her and was consistent with the Law of ACE.
371. The redacted statement of Lundi Mvotyo was received as exhibit 'HH'.
372. In exhibit HH Lundi Mvotyo states that on Sunday 19 May 2019 he was on his way to Lindiwe's tavern when he received a call from his friend who instructed him to meet them. These friends parked a white Toyota quantum vehicle along the road and he got inside it. Inside the vehicle was a guy⁹ who was looking for a girl who would show them where they should go. A female known as Nontombi got inside the quantum vehicle. Lundi Mvotyo states further that it was inside the vehicle where he *'...knew what was going to happen as they were talking with Nontombi.'*
373. No evidence was presented nor was it made clear from exhibit HH who the *they* were. Similarly, it was not made clear what Mvotyo understood was going to happen as he does not set out any details of what was discussed or the details of his understanding in his statement.

⁹ This person's name was redacted.

374. Lundi Mvotyo's further stated that Nontombi knew that there are guys who are always shooting randomly at the tavern during the day anytime they wish. The Quantum vehicle proceeded to Mkhaza and parked on the road. Four people, including Lundi Mvotyo exited the taxi and followed Nontombi who pointed out the house and then returned to the quantum vehicle. The others proceeded to the tavern, with Lundi Mvotyo in front. He went straight to the tavern and ordered two beers. He heard gunshots outside the tavern while he was still waiting for his beers. At this stage he became confused and instructed the salesman to return his money. After receiving his money, he ran out of the tavern. Mvotyo panicked and left his cellular telephone inside the tavern.
375. Mvotyo saw two unknown men laying on the ground and that they had been shot. He returned to the Quantum taxi where they waited for Tayo and Mateki who were shooting at the tavern. The firearm that was removed from the tavern was brought by Mateki to the Quantum.
376. On the way back from the tavern, Tayo narrated what had happened. They met two men standing outside the tavern. One of these men took out a firearm and asked them what they were looking for, to which they replied that they had come to drink. The person then returned the firearm to his waist and Stayo shot at the two men and Mateki got one of the deceased's firearm whereafter they returned to the Quantum.
377. Mvotyo returned to Lindiwe's tavern. Mvotyo's contacts in his phone was allegedly checked and he received messages from Anele, his friend who told him that he had received threats from people who said that he, Lundi, will be killed and that he should return the firearm. Mvotyo's girlfriend also came to the tavern and told him that there were people looking for him and if he did not return the firearm that he would be killed.
378. No evidence was presented in respect of the identity and/or birthnames of Tayo or Mateki.

379. It is trite that the state has the onus to establish its case beyond reasonable doubt and that a court must approach the evidence holistically, weighing up all the elements which point towards the guilt of the accused against those which are indicative of an accused's innocence, taking into account the inherent strengths and weaknesses, probabilities and improbabilities of both sides and then to decide where the balance lies.¹⁰

380. I deal firstly with the aspect of whether it has been established that accused 4 signed his warning statement and that the signature thereon was his.

381. As stated above, Vinjwa made a favourable impression on the court as an honest witness. His evidence that he recorded what accused 4 told him in his warning statement and that he witnessed accused 4 sign it was not meaningfully contested.

382. It has been said that:

*'More difficult problems arise when attempts are made to identify a handwriting by comparison with another specimen which has been proved to be genuine. The courts have frequently emphasised that this method of identification must be used only with the greatest caution.'*¹¹

383. In the present matter the court has the benefit of a witness who saw accused 4 sign the warning statement. When this direct evidence is considered together with Liebenberg's opinion that the signatures were probably executed by accused 4, and Palm's opinion that she was unable to make a finding in respect of the authenticity of accused 4's signature, the court is satisfied that accused 4 signed his warning statement.

384. As mentioned earlier, the warning statements of accused 1 to 3 were also admitted.

¹⁰ *S v Chabalala* 2001 (2) SACR 97 (SCA)

¹¹ DT Zeffertt and AP Paizes *The South African law of Evidence* 2nd edition, LexisNexis, page 531

385. During Hlatshaneni's evidence it became evident that he did not fully appreciate what it meant to commission a statement nor why it had to be commissioned. Furthermore, it was not established that the oath was administered to the accused before they signed their warning statements. Therefore, the court exercised caution and only relied on the contents of the warning statements where it was corroborated by other evidence.

386. The benefit of a doubt in favour of the accused cannot be derived from speculation but must have its basis on a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.¹²

387. The state relies on the doctrine of common purpose. Common Purpose has been described 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 the crime.'*¹³

388. Snyman stated that:

*'the essence of the doctrine is that 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.'*¹⁴

389. In order to establish common purpose by way of active association, the state would have to establish that an accused:

- (i) was present at the scene where the violence was committed;

¹² *S v Sauls and Others* 1981(3) SA 172(A); *S v Rama* 1966 (2) SA 395 (A)

¹³ Burchell *Principles of Criminal Law* 5 ed (Juta, Cape Town 2016) at 477

¹⁴ Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 265

- (ii) was aware of the assault on the complainant by somebody else;
- (iii) intended to make common purpose with the person perpetrating the assault;
- (iv) manifested his / her sharing of a common purpose by him/herself performing an act of association with the conduct of the perpetrator; and
- (v) have the requisite *mens rea*.¹⁵

390. In evaluating the evidence holistically, I am satisfied that witness B was not only honest but that he was reliable in identifying accused 1 and 3 as being the shooters on the crime scene on 19 May 2019. Accused 1's warning statement also states that he was on the crime scene and that he discharged a shot.

391. Similarly, witness C was reliable and honest when he identified accused 3 as being on the crime scene.

392. The voluntariness of accused 4's warning statement was not contested. As it was found that his warning statement contained his signature, and it was accepted by both the state and defence that the contents thereof constitute admissions, the contents thereof may be used against him.

393. In evaluating all the evidence, I am satisfied that the state established beyond reasonable doubt that accused 1, and 3 were on the crime scene and that they fired shots. While there may be some inconsistency in respect of whether accused 1 or 3 shot Malema or whether accused 1 or 3 shot Sitishi it has been established beyond reasonable doubt that both accused 1 and 3 had firearms and discharged shots at the crime scene. Furthermore, the evidence establishes that accused 4 was on the crime scene and that he perpetrated an act which manifested a sharing of common purpose by performing an act of association with the conduct of accused 1 and 3. The evidence establishes all the elements required to establish common purpose by active association. All three were on the crime scene and acted in concert with one another, with

¹⁵ *S v Mgedezi and Others* 1989 (1) SA 707 (A); *Govender v S* (221/2022) [2023] ZASCA 70

accused 1 and 3 discharging shots directly at persons present at the crime scene and accused 4 taking a firearm. Clearly, accused 1, 3 and 4 had the necessary mens rea required for the application of the doctrine of common purpose.

394. Therefore, I make the following findings:

By the operation of the doctrine of common purpose:

- (i) accused 1 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019;
- (ii) accused 1 is found guilty of count 2, the attempted murder of Yandisa Sltishi by shooting him with a firearm;
- (iii) accused 1 is found guilty of the unlawful possession of a firearm without a licence; and
- (iv) accused 1 is found guilty of the unlawful possession of ammunition.
- (v) accused 3 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019;
- (vi) accused 3 is found guilty of count 2, the attempted murder of Yandisa Sltishi by shooting him with a firearm;
- (vii) accused 3 is found guilty of the unlawful possession of a firearm without a licence; and
- (viii) accused 3 is found guilty of the unlawful possession of ammunition;
- (ix) accused 4 is found guilty of count 1, the murder of David Mbazwana committed on 19 May 2019;
- (x) accused 4 is found guilty of count 2, the attempted murder of Yandisa Sltishi by shooting him with a firearm;
- (xi) accused 4 is found guilty of the unlawful possession of a firearm without a licence; and
- (xii) accused 4 is found guilty of the unlawful possession of ammunition.

[394]. Although there is evidence that accused 4 removed a firearm at the crime scene, this evidence on its own is insufficient to sustain a conviction of robbery with aggravating circumstances.

[395] All the accused are found not guilty in respect of count 3, robbery.

[396] Accused 2 is found not guilty on all the charges and is acquitted.

HM SLINGERS
JUDGE OF THE HIGH COURT

Appearances

For the State: Adv. R Uys

For accused 1: Adv. O Arend

For accused 2 and 4: Adv. S Bandeker

For accused 3: Adv. Delbrook-Jones