

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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 April 2026

DATE

SIGNATURE

CASE NUMBER: SS29/2025

In the matter between:

THE STATE

and

MOYO CLIFFORD

Accused 1

NCUBE NHLANHLA

Accused 2

JUDGMENT

DOSIO J:

Introduction

[1] The accused are arraigned on numerous counts.

[2] The minimum prescribed sentence of fifteen years imprisonment which is in terms of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'), in respect to counts

1, 2, 3 and 7, Robbery with aggravating circumstances was explained to both accused. The minimum prescribed sentence of life imprisonment, in terms of Act 105 of 1997, in respect to the murder counts on counts 4, 5, 8, 9 and 13 were also explained. Both accused understood the minimum prescribed sentences.

[3] No application was brought for the appointment of an assessor in respect to the murder counts 4, 5, 8, 9 and 13.

[4] The State is represented by Advocate Adonis. Accused one is represented by Mr Davids and accused two is represented by Mr Ngxumza.

[5] The charges are as follows:

Count 1

This is a charge of robbery with aggravated circumstances where the state alleges that on 8 October 2023 at 1[...] D[...] Street, Troyville the accused assaulted Linda Zunguza and Samuel Nduzukulu and robbed them of cash to the amount of R300.00 and a Nokia 510 cell phone. Aggravating circumstances being that firearms were wielded by the accused.

Count 2

This is a charge of robbery with aggravated circumstances where the state alleges, that on the date and place mentioned in count 1, the accused assaulted Sophie Khosa and robbed her of cash to the amount of R50.00 and a Techno cell phone, aggravating circumstances being that firearms were wielded by the accused.

Count 3

This is a charge of robbery with aggravated circumstances where the state alleges that on the date and place mentioned in count 1, the accused assaulted Esther Nzimande and robbed her of cash to the amount of R12 000.00, aggravating circumstances being that firearms were wielded by the accused.

Count 4

This is a charge of murder, in terms of s51(1) of Act 105 of 1997, where the state alleges that on the date and place mentioned in count 1 the accused killed Esther Nzimande.

Count 5

This is a charge of murder in terms of s51(1) of Act 105 of 1997, where the state alleges that on the date and place mentioned in count 1, the accused killed Bekani Nzimande.

Count 6

This is a charge of assault with intent to do grievous bodily harm, where the state alleges that on the date and place mentioned in count one, the accused assaulted Fikile Mbhele by hitting her with a firearm.

Count 7

This is a charge of robbery with aggravated circumstances where the state alleges that on the date and place mentioned on count 1, the accused assaulted Fikile Mbhele and robbed her of a Huawei cell phone, aggravating circumstances being that firearms were wielded by the accused.

Count 8

This is a charge of murder, in terms of s51(1) of Act 105 of 1997, where the state alleges that on the date and place mentioned on count 1, the accused killed Proud Mpofu.

Count 9

This is a charge of murder, in terms of s51(1) of Act 105 of 1997, where the state alleges that on the date and place mentioned on count 1, the accused killed Ntombizodwa Mumpande.

Count 10

This is a charge, only in respect to accused 1, of a contravention of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000'), for unlawful possession of a 9mm calibre firearm, make unknown to the state, on the date and place mentioned on count 1.

Count 11

This is a charge, only in respect to accused 2, of a contravention of s3 of Act 60 of 2000 ('Act 60 of 2000'), for unlawful possession of a 9mm calibre firearm, make unknown to the state, on the date and place mentioned on count 1.

Count 12

This is a charge of a contravention of s90 of Act 60 of 2000 for unlawful possession of 10 x 9mm calibre cartridges on the date and place mentioned in count 1.

Count 13

This is a charge of murder, in terms of s51(1) of Act 105 of 1997, where the state alleges that on 6 October 2023 at Ascot Street, Bertram, the accused killed Mehluli Sibanda.

Count 14

This is a charge, only in respect to accused 1, of a contravention of s3 of Act 60 of 2000 for unlawful possession of a 9mm calibre firearm, make and model unknown, on the date and place mentioned in count 13.

Count 15

This is a charge, only in respect of accused 2, of a contravention of s3 of Act 60 of 2000 for unlawful possession of a 9mm calibre firearm, make and model unknown, on the date and place mentioned in count 13.

Count 16

This is a charge of a contravention of s90 of Act 60 of 2000 for unlawful possession of ammunition, to wit 4 x 9mm calibre cartridges, on the date and place mentioned in count 13.

Count 17

This is a charge, only in respect to accused 2, of a contravention of s49(1)(a) of the Immigration Act 13 of 2002 ('Act 13 of 2002'), in that the state alleges that on 31 October 2023, accused 2 unlawfully and intentionally remained in the Republic of South Africa without any valid permit to do so.

Count 18

This is a charge, only in respect to accused 1, of a contravention of s49(1)(a) of Act 13 of 2002, in that the state alleges that on 29 June 2024 accused 1 unlawfully and intentionally remained in the Republic of South Africa without any valid permit to do so.

- [6] Accused one pleaded not guilty in respect to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16 and pleaded guilty in respect to count 18.

- [7] Accused two pleaded not guilty to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16 and pleaded guilty to count 17.

- [8] The legal representative for accused one made the following admissions on behalf of accused one in terms of s220 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), in respect to count 18, namely that:
 - (a) accused one entered and remained in the Republic of South Africa in 2023 from Zimbabwe through the Beitbridge border post, without being in possession of any legal documentation in the form of asylum or a passport legalising his stay in South Africa.
 - (b) He admitted that on 29 June 2024 he remained in the Republic of South Africa without any valid permit to remain in the country and that he accordingly contravened the provisions of s49(1)(a) of Act 13 of 2002.

(c) He admitted the contents of the 212(1) affidavit compiled by Mr Hetani Terrence Khoza from the Department of Home Affairs detailing his legality status in South Africa.

[9] The legal representative for accused two made the following admissions on behalf of accused two, in terms of s220 of Act 51 of 1977, in respect to count 17, namely that:

(a) Accused 2 entered South Africa in 2021 from Zimbabwe, through the Beitbridge border post, without being in possession of any legal document in the form of asylum or a passport legalising his stay in South Africa and that he accordingly contravened the provisions of s49(1)(a) of Act 13 of 2002.

(b) He admitted the 212(1) affidavit compiled by Mr Gumani Phaswana from the Department of Home Affairs detailing the legality of his status in South Africa.

[10] The following further admissions in terms of s220 of Act 51 of 1977 were made on behalf of both accused, namely:

In respect of Count 4

That the deceased in count 4 is the person named in the indictment, to wit Esther Nzimande. That the deceased person Esther Nzimande died on 8 October 2023 as a result of a gunshot wound to the chest which she sustained at or near Troyville, Johannesburg. That the body of the deceased sustained no further injuries from the time the wounds were inflicted on 8 October 2023 until a postmortem examination was conducted thereupon. That Dr Joel Pule Motsoaleli conducted a postmortem examination on the body of Esther Nzimande on 9 October 2023 and recorded his findings on exhibit "B".

In respect of Count 5

That the deceased in count 5 is the person named in the indictment, to wit Bekani Nzimande. That the deceased person Bekani Nzimande died on 8 October 2023 as a result of multiple gunshot wounds which he sustained at or near Troyville, Johannesburg. That the body of the deceased sustained no further injuries from the time the wounds were inflicted on 8 October 2023 until a postmortem examination was conducted thereupon. That Dr Leonard Mantanga conducted a postmortem examination on the body of Bekani Nzimande on 9 October 2023 and recorded his findings on exhibit "C".

In respect of Count 8

That the deceased in count 8 is the person named in the indictment, to wit Proud Mpofu. That the deceased on 8 October 2023 died as a result of multiple gunshot wounds which he sustained at or near Troyville, Johannesburg. That the body of the

deceased sustained no further injuries from the time the wounds were inflicted on 8 October 2023 until a postmortem examination was conducted thereupon. That Dr Joel Pule Motsoaleli conducted a postmortem examination on the body of Proud Mpofu the deceased person on 9 October 2023 and recorded his findings on exhibit "D".

In respect of Count 9

That the deceased in count 9 is the person named in the indictment, to wit Ntombizodwa Mumpande. That the deceased person died on 8 October 2023 as a result of multiple gunshot wounds which she sustained at or near Troyville, Johannesburg. That the body of the deceased sustained no further injuries from the time the wounds were inflicted on 8 October 2023 until a postmortem examination was conducted thereupon. That Dr Leonard Mantanga conducted a postmortem examination on the body of the deceased on 9 October 2023 and recorded his findings on exhibit "E". That the correctness of the facts and findings of the postmortem examinations are as recorded on exhibits "B, C, D and E". That the contents of the crime scene photographs, and key taken by Warrant officer Ms Sekuba on 08 October 2023 are correct and accepted as exhibit "F".

In respect of Count 13

That the deceased in count 13 is the person named in the indictment, to wit Mehluli Sibanda. That the deceased person died on 6 October 2023 as a result of multiple gunshot wounds which he sustained at or near Bertram, Johannesburg. That the body of the deceased sustained no further injuries from the time the wounds were inflicted on 6 October 2023 until a postmortem examination was conducted thereupon. That Dr Zibonele Manukuza-Qwabe conducted a postmortem examination on the body of the deceased person on 10 October 2023 and recorded her findings on exhibit "G". The correctness of the facts and findings of the postmortem examination are as recorded in exhibit "G". That the contents of the crime scene photographs, and key taken by Sergeant Lucky Natasha Nkuna on 6 October 2023 are correct and accepted as exhibit "H".

[11] No plea explanation was made in respect to the other counts pertaining to accused one. Accused two's legal representative stated that in respect to the other counts pertaining to accused two, that there was a mistaken identity.

[12] The following exhibits were handed in:
Exhibit "A" are s220 admissions made by both accused in respect to the conveyance of the bodies of the five deceased from the scene of the offence, mentioned in respect to

counts 4, 5, 8, 9 and 13, as well as the contents of the post-mortem reports and that all five deceased sustained no further injuries from the time the wounds were inflicted until the post-mortem examinations were conducted.

Exhibit "B" is the post-mortem examination conducted by Doctor Motsoaleli Joel Pule in respect to the deceased Esther Nzimande (count 4).

Exhibit "C" is the post-mortem examination conducted by Doctor Leonardo Mantanga in respect to the deceased, Bekani Nzimande (count 5).

Exhibit "D" is the post-mortem examination conducted by Doctor Motsoaleli Joel Pule in respect to the deceased, Proud Mpofu (count 8).

Exhibit "E" is the post-mortem examination conducted by Doctor Leonardo Mantanga in respect to the deceased, Ntombizodwa Mumpande (count 9).

Exhibit "F" is a photo album and key compiled by warrant officer Magaboke Simon Sekuba of the crime scene situated at 1[...] D[...] Street, Troyeville, Johannesburg.

Exhibit "G" is the post-mortem examination conducted by Doctor Zibonele Petronella Manukuza-Qwabe in respect to the deceased, Mehluli Sibanda (count 13).

Exhibit "H" is a photo album and key compiled by sergeant Natasha Nkuna of the crime scene situated at corner Smith and Klein Hillbrow Clinic.

Exhibit "I" is a statement made in terms of s212(1) of Act 51 of 1977 by Mr Hetani Terrence Khoza.

Exhibit "K" is a statement made by the witness Fikile Mbhele.

Exhibit "L" is a statement made by Sophie Khosa.

Exhibit "M" is a statement made by Brisky Moyo.

Exhibit "N" is the identity parade form held on 1 December 2023.

Exhibit "O" is the photos of the identity parade held on 1 December 2023.

Exhibit "P" is the statement of warrant officer Mogomotsi Motshaba who was the member in charge of the identity parade held on 1 December 2023.

Exhibit "Q" is an identification parade form held on 29 June 2024, compiled by sergeant Mokatsa.

Exhibit "S" is an affidavit of Daniel Kutoane.

Exhibit "T" is a sketch compiled in respect to where an identification parade was held.

Exhibit "U" is an affidavit compiled by sergeant Magoai who assisted in an identification parade on 1 December 2023 at Jeppe Police Station.

Exhibit "V" is the contents of an interview held with accused one.

Exhibit "W" is an affidavit of warrant officer Moabela who assisted in an identification parade held on 1 December 2023.

Exhibit “X” is an affidavit of an officer who is deceased, namely, warrant officer Matshavane, who assisted in an identification parade on 1 December 2023.

Exhibit “Yi and Yii” are affidavits compiled by Detective sergeant Mbonambi who read the rights to accused two on 28 June 2024.

Summary of substantial facts

- [13] The State alleges that on 6 October 2023, at Ascot street, Betrams, the accused approached the deceased on count 13 and killed him by shooting him. The State also alleges that the accused entered a property at 1[...] D[...] Street, Troyville on 8 October 2023 and robbed the complainants on counts 1, robbed and killed the deceased on count 3 and 4 and killed the deceased on count 5. The accused then robbed the complainant on count 2 and assaulted and robbed the complainant on count 6 and 7. The accused then killed the deceased`s on count 8.
- [14] The State called the following witnesses in respect to counts 1 to 12, namely, Fikile Mbhele, Nompumelelo Mbhele, Sophie Khosa and Samuel Nduzukula.
- [15] The State called the following witnesses in respect to counts 13 to 16, namely, Brisky Moyo and Derrick Ncube.
- [16] In respect of the arrest of accused one, the following witness was called, namely, Philip Nkosi
- [17] In respect to the identification parade held on 1 December 2023, the following witnesses were called, namely, warrant officer Motshaba, sergeant Mngoai, sergeant Mbonambi and warrant officer Moabela,
- [18] In respect to the identification parade held on 29 June 2024, the following witnesses were called, namely warrant officer Daniel Kutsane and sergeant Mokatsa,
- [19] The state then closed its case. Accused one elected to remain silent and closed his case. Accused two came to testify.
- [20] This court will not summarise the evidence of the witnesses in the order they were called, but rather chronologically when the alleged events occurred. Accordingly, this

court will start with the first incident that happened, which occurred on 6 October 2023, at Escort Street, Betrams. This relates to counts 13, 14, 15 and 16.

Incident that happened on 6 October 2023 Counts 13 to 16

Brisky Moyo

- [21] This witness testified in respect of incident of 6 October 2023, at corner Lang and Escort Street, in Betrams. The witness testified that he knows accused one and he knows him because they live in the same area, namely Betrams. He has known accused one for approximately 4 to 5 months, and he calls him Skhokho and he is light in complexion. The witness further testified that he once drank alcohol with Skhokho, that is why he knows him. As for accused two, the witness told the court, he knows accused two through accused one and he knew accused two for 2- 5 months. He would see accused two, approximately two to three times a week. Upon being asked whether he has ever socialised with accused two, the witness said “no”. However, this witness testified that he once went to accused two’s place of residence, when accused two was hosting a party. Upon being asked by the state, what he would refer to accused two, the witness testified that, he called accused two “Mji”.
- [22] When the incident happened, the witness was seated with Mehluli, the deceased on count 13, at corner Lang and Escort Street in Betrams. The phone of Mehluli rang. The time was some minutes after eight to nine p.m. Mehluli answered the call. This witness then stood up and Mehluli said he would see him the next day. This witness went to the spaza shop when he heard three gunshots. He then went in the direction that Mehluli had walked.
- [23] While the witness was on his way, he saw two people approaching on the other side of the road, one had a firearm on his hand. While the two men were approaching him, the other one had a firearm tucked in his right side of his waist. The witness further testified that he was able to identify the two males, as they were walking on the opposite side of the Liquor Store. Upon being asked by the State which of the accused had a firearm on his waist, he testified that it is accused two, while accused one had a firearm in his hand.
- [24] This witness was able to identify both accused one and two as there were seven to eight solar lights shining from the liquor store as well as streetlights and he was able to identify the said people as ‘Mji’ and “Skhokho”.

- [25] Upon being asked the distance, where he observed the two suspects, the witness testified that it was a distance of 15 to 17 metres. The witness testified that he later found the deceased in count 13 lying on the pavement at Lang Street, which was 20 metres from where this witness had been standing. The witness upon being asked the description for the clothing of accused one, he testified that accused one was wearing a jacket with an orange reflector, while accused two was wearing a white T-shirt. The lower part of accused one's jacket was blue in colour. The witness further testified that after he heard the gunshots people who were on that street ran to different directions. He stated that one minute passed from him hearing the gunshots and then seeing both accused. Both accused then got into a Datsun motor vehicle, silver in colour and drove away. This witness then called the deceased's girlfriend and they put the deceased in a car and took him to hospital.
- [26] This witness attended two identification parades. At the first identification parade on 1 December 2023, he pointed out accused two. At the second identification parade held on 29 June 2024, he identified accused one.
- [27] During the cross-examination, this witness said when accused one walked to the Datsun motor vehicle, he was still holding the gun in his hand. He did not notice if accused one still had the gun in his hand when he entered the silver-coloured Datsun motor vehicle.
- [28] He stated that he made a statement a few weeks after the incident happened and confirmed that when he made the statement he could remember some things, whilst other things he may have forgotten. He remembered in detail who he saw with firearms, the distance he was standing when he observed this and also that the deceased had one bullet wound in the head.
- [29] It is true that there is a contradiction between the statement this witness made and his oral evidence in court, in that in his statement he mentioned accused one held the firearm in his hand and then put the firearm on his waist, whereas in his oral evidence he stated it is accused two who had the firearm at his waist. This court does not regard this as material. What is of importance is that this witness remembers that both accused one and two had firearms in their possession.

- [30] This witness impressed this court. He did not attempt to fabricate evidence of who actually shot the deceased. He merely testified what he observed. He was honest to say he had been drinking that evening, but even though he had drunk 3 quarts of beer, he was adamant he was tipsy, but not drunk.
- [31] He was adamant he knew accused one as he had drunk with him on three previous occasions and only once with accused two. He stated that accused one, two, Mehluli (the deceased) and himself were all Zimbabwean.
- [32] He was adamant he knew accused two by the name "Mji", as everyone referred to accused two with this name. This witness stated that he only knew accused two by the name "Mji" and not Mjikijelwa. He had no idea how the name Mjikijelwa appeared in his statement. He did however mention that the police officer who wrote down his statement never read it back to him. This police officer was never called to clear up how the name "Mjikijelwa" appeared in the statement of this witness. As a result, the credibility of this witness cannot be questioned as regards the name "Mjikijelwa" appearing in his statement, even though he did not mention this name. What is clear is that "Mji" is definitely an abbreviation of the name "Mikijelwa" and this witness is adamant he knew accused two by this name and that he met accused two through accused one.
- [33] This witness was adamant both accused one and two were at Lang Street on 6 October 2023.

Derrick Ncube

- [34] This witness testified that on 6 October 2023, he was staying at No. 93 Derby Road, Betrams. He was busy drinking alcohol, when he saw Mehluli (the deceased) and Skhokho fighting with open hands. The time was nine p.m. This witness was seated at Lang Street. The witness testified that he does not know how the fight started. While they were fighting, Skhokho stood up before the deceased Mehluli, then a male person appeared and shot the deceased. He did not see the third person's face, all he heard is gunshots but he did not see any firearm. This incident happened two metres from where this witness was seated. He described the person who shot Mehluli as wearing a white T- shirt, he further testified that he knows Skhokho as they used to play dice in the same area and he pointed to accused one in court as being Skhokho. He stated

there was light coming from a liquor store nearby. He confirmed he knew Skhokho four to five months before this incident.

- [35] Derrick Ncube impressed this court. He did not fabricate evidence by stating that he saw a firearm in accused one's possession. He also did not state accused two was at the scene.

Corroboration by the witnesses

- [36] Both Derrick Ncube and Brisky Moyo say there were lights from a liquor store lighting up the area where this incident occurred.
- [37] Both witnesses state there were two men who were with the deceased, namely Mehluli, before he was killed. Both witnesses see Skhokho in the vicinity where the deceased was killed.
- [38] Brisky Moyo says accused one was wearing a jacket with an orange reflector and Derrick Ncube also states accused one had a long sleeve jacket which parts of it were orange in colour. The colour 'orange' features in the evidence of both witnesses. Brisky Moyo says accused two was wearing a white T-shirt and Derrick Ncube says the man who shot the deceased was wearing a white T-shirt.

Contradictions

- [39] Even though Derrick Moyo sees no firearm, the fact remains that he saw blood from the deceased immediately after he heard the shots. The only reasonable inference this court can draw is that the man wearing the white T-shirt, who Brisky Moyo identified as being accused two, must have been the one who fired the shot.
- [40] The fact that Brisky Moyo did not see the fight between the deceased and Skhokho is not material as Brisky Moyo says the deceased had already moved away from him.
- The fact that he sees both accused one and two being close to the deceased and having firearms allows this court to draw, as the only reasonable inference, that they were there to kill the deceased.

Incident that happened on 8 October 2023

Fikile Mbhele

- [41] This witness stated that she is the complainant on counts 6 and 7. She stated that on 8 October 2023, in the early morning hours, she was at her house situated at 1[...] D[...] Street where she has lived for 13 years. She lived there with her father Bekani Nzimande (the deceased on count 5), her mother Esther Nzimande (the deceased on count 4), her daughter called Nompumelelo Mbhele and Kagiso Mbhele who is the owner of the house.
- [42] There were tenants in the house, namely, Proud Mpofu (the deceased on count 8), Precious and Sophie Khoza (the complainant on count 2). Other tenants who lived in the back rooms were Samuel, Morris, Alex and his wife Linda.
- [43] This witness had been sitting with her mother, father and two children watching rugby. She then went to her room. She heard her mom open her bedroom door and asked, "*Samuel what is happening there*" and he replied, "*nothing is happening*". This witness's bedroom door was closed. She did not see who her mother was talking to. The people whom her mother was talking to then replied, "*who are you to ask who we are*". This witness then heard these men ask, "*where is Proud*". The mother of this witness stated she did not know who this person was. Another voice then said, "*you know him, don't make stupid of us*". The mother then replied she would call the police. A second voice then said he is not afraid of the police as he is not from here and his fingerprints are not in the system. The same voice said, "*you think you are smart*". Fikile then heard her mother praying and then she heard the sound of a gunshot. Inside her mother's bedroom was her mother, father and her daughter, called Nompumelelo. The men did not speak proper Zulu.
- [44] Whilst Fikile was in her bedroom with her son, she opened her bedroom door and then a male person approached her and pointed a firearm at her saying, "*this thing is working*". She saw two males. One of the males then hit Fikile with a firearm on her forehead and instructed her to go back to her bedroom. She pointed out accused one as being the person who hit her with the firearm. This witness then heard many more gunshots. At some stage this witness heard a female voice say, "*Skhokho, I love you and never stopped loving you*". She believes the female voice belonged to Precious.
- [45] These men came a second time to her bedroom and kicked the door open. The light

inside her bedroom was off, but the men switched on the light. She was then able to identify accused two as well. She was then asked to hand over her cell phone. The robbery lasted a very short time. The features of accused two were that he was dark in complexion, short in height with a deep forehead which protruded out. His nose was also a bit wide and his lips a bit thick.

- [46] This witness then went into the passage, and she saw Proud's body in the passage. She then came across her father's body that was also in the passage. She went into her mother's bedroom and found her mother's body lying next to the door.
- [47] The first identification parade was held on 1 December 2023 and the second identification parade was held on 29 June 2024. During cross-examination, this witness stated that during the second identification parade held on 29 June 2024, although accused one was on the identification parade she did not point him out. Her daughter namely, Nompumelelo, pointed out accused one in the presence of this witness. This witness stated she did not point accused one at the identification parade as she was nervous. Accused one was present at this second identification parade but there was a difference in that at the first identification parade held on 1 December 2023, she did not have to touch the person, whereas in this second identification parade there was no one-way glass and she had to physically touch accused one. She stated she stared at accused one during the identification parade but did not speak as she was too traumatised. Her daughter even saw her staring at accused one. The police also did not ask her why she was staring at accused one. Although she never pointed him out at the identification parade, she was adamant accused one is the person who hit her with the firearm on her head. She was afraid to point him as she believed he is dangerous and the thought crossed her mind that he may be released. However, she stated she did not prevent her daughter from pointing out accused one. As a result, due to the trauma she had experienced, she never pointed out anyone at the second identification parade. She however stated in court that she remembered accused one from the incident, even though she did not point him out at the second identification parade.
- [48] She was adamant that accused one was wearing the reflector jacket and holding a firearm and that he was the first of the two men who entered the room. She handed over her Huawei cell phone as she did not have money. She was adamant she could see both accused well during the ordeal. Furthermore, she stated that even though the passage was dark, the light from her bedroom, as well as the reflector patches on

accused one's jacket shed more light. She also saw accused one twice that evening which increased her opportunity to observe him.

[49] She repeated during cross- examination by the legal representative of accused two that the first time she saw accused two was when her bedroom door was kicked open. She repeated that whilst accused two went to the wardrobe with her son to look for money, accused one remained pointing a firearm at her. She disputed that the description that she gave of accused two was because she had observed him in court. She conceded that she never looked at accused two's face inside the bedroom and that the only time she saw his face was when accused two closed the door of her bedroom. She stated she pointed out accused two at the first identification parade held on 1 December 2023.

[50] There are some issues that concern this court about this witness and these issues are the following:

- (a) There are many aspects that she stated in court which is not in her statement, for example, the fact that the accused said they were police. However, this court bears in mind that she was on the stand for three days and it is not unreasonable for her to add more to her evidence over and above her statement which was taken when she was still in shock. As stated by this witness, she remembered more things, the more questions were posed to her.
- (b) There is a contradiction in that she says in her statement only one accused had a hat whereas in her evidence in chief she says both had hats. The aspects of how she could see a protruding forehead of accused two had a hat on is also of concern. However, she did attend an identification parade two months later and she did point out accused two.
- (c) There are concerns with the manner in which sergeant Mbonambi conducted the identification parade on 1 December 2023. During the cross- examination of Fikile Mbhele, it was put to her that she took 12 minutes and 53 seconds to point out accused two. At the time she testified, the identification parade form Exhibit "N" was not handed in. Had it been handed in it would have helped this court to understand the situation much better, as the evidence of sergeant Mbonambi when he testified was seriously questionable. According to the identification parade form, namely, the SAPD 329, namely, exhibit "N", the identification parade started at 12h00. The fact that it is noted at paragraph 31 of exhibit "N" that Fikile Mbhele pointed out accused two at 12h53 seems to this court more likely the time of day when she pointed out accused two. The time of day when she pointed out the second man was 12h55

and it couldn't have been that she took another 12 minutes to point out the second man. The court infers this from the entry made in respect to the pointing out by Brisky Moyo of accused two which was at 12h45. The difference between Fikile Mbhele's pointing out and that of Brisky Moyo is that with Brisky Moyo, in addition to sergeant Mbonambi stating the actual time of day when Brisky Moyo pointed out accused two, sergeant Mbonambi added that it took 30 seconds for Brisky Moyo to point out accused two. Sergeant Mbonambi omitted to put in the time how long it took Fikile Mbhele to point out accused two. Such failure on the part of sergeant Mbonambi cannot be used to discredit Fikile Mbhele. The fact that Fikile Mbhele pointed out an additional man at the identification parade on 1 December 2023 is not material in that she stated two further men also approached the house in the early morning hours of 8 October 2023. No one asked her if she was pointing out one of these additional two men.

- (d) If this court looks holistically at the evidence of Fikile Mbhele where she stated she was not afraid to point out accused two at the first identification parade because there was a one-way glass, giving her more assurance, then this court cannot criticise her if she froze and could not point out accused one who was standing right before her, especially if she was reliving the killing of her mother and father and all the other people killed in that house on 8 October 2023.

- [51] As a result, this court finds her evidence credible and her identification of both accused one and two reliable.

Nompumelelo Mbhele

- [52] This witness was 15 years old and testified with assistance of an intermediary. She was 13 years old on 8 October 2023 and was living at 1[...] D[...] Street. She testified that after they finished watching rugby, she went to sleep with her grandmother, (the deceased on count 4) and her grandfather, (the deceased on count 5). Her mother namely, Fikile Mbhele, went to sleep in another room with her son. She was awoken by her grandmother, who went to check what was going on inside the yard. Her grandmother came back running to their bedroom and tried to close the door, when a male person forcefully tried to open the door. The lights were on in the bedroom.

- [53] She testified that the male person managed to overpower her grandmother and got inside their bedroom. This male person was hiding his left arm behind his back. Her grandfather, who was helpless and sick, was sleeping at the time. The child witness

testified that the male person said he is looking for a person, who does haircuts, then this witness responded that he was looking for "Proud".

- [54] Her grandmother responded that this person was not there. This man then responded by saying her grandmother was making a fool of him. This man then produced a firearm and said they must take out the person he is looking for. This man then cocked the firearm and demanded phones and money. Her grandmother attempted to climb on the bed and a plastic fell containing some rental income money. The friend of this male then came in and said the person they were looking for was not there so they must go. This second man referred to the first man by the name of "Skhokho".
- [55] The man with the name "Skhokho" was pointed out in court by this witness, as being accused one. She stated accused one is the man who pointed a firearm at her grandmother. She saw her grandmother praying and that is when accused one shot her once. After accused one shot her grandmother, he counted the rental income money that fell when her grandmother tried to climb on the bed. Accused one asked the other man to help him count the money. The amount was about R1 2000-00. After they counted the money, the men went out looking for Proud and that is when she heard more gunshots. This witness then heard Precious, who is the girlfriend of Proud say to Skhokho, "*Skhokho, I love you and I will never stop loving you*". Skhokho responded by saying, "*Ok, go back to bed and sleep*". She heard these men demanding phones from other tenants like Sofie.
- [56] This witness described accused one as being light in complexion and suffering from a facial skin problem, in that he had a rough facial appearance with deep pimples on his face. He was taller than the person who accompanied him. She stated accused one was speaking isiZulu like a Zimbabwean national. The second man was a bit shorter and more chubby, with a big forehead, big nose and dark in complexion. She pointed out accused two in court as being the man who accompanied accused one.
- [57] She stated that after these two men had left, she went outside and that is when she saw two more men. She thought it was the two men she had seen inside so she ran away to her friend called Nosikeleko. This witness testified over a period of four days.
- [58] At the identification parade held on 1 December 2023, this witness pointed out accused two. At the identification parade held on 29 June 2024, this witness pointed out

accused one within four minutes. She stated she pointed out accused one at the identification parade not merely because of his pimples but because he was the one who committed the offence.

- [59] Many questions were posed to this witness by accused one's attorney regarding the period of time she took to point out accused one at the identification parade held on 1 December 2024. Irrespective of the time spent for this witness to point out accused one, the fact remains that she was certain it was accused one. We are also dealing with a child that was 13 years old at the time the offence happened. In addition, her mother who was present in the identification parade with her, never pointed out accused one. Therefore, the fact that this witness pointed out accused one is due to her own recollection of the facial characteristics of accused one. There is also no proof that she was coached by her mother or any other police officer to falsely point out accused one. She also explained fully why she had mistakenly pointed out accused two as being Skhokho in court, due to the fact that when she was firstly asked to point out the accused she had been in the closed circuit television room and the clarity in court was not that clear. However, when she entered the court and pointed him out there was no window obscuring her vision.
- [60] During the cross- examination by accused two's attorney, this witness repeated her evidence in chief. She repeated that the second man, namely accused two, referred to accused one by the name of "Skhokho". She was adamant accused one shot her grandmother and that when he did, accused two was not in the room.
- [61] She agreed she had less time to observe the shorter man, namely accused two, however, she was adamant she was not mistaken as regards his identification. Furthermore, she stated accused two did come back into the room when he asked her if she had a phone in her possession.
- [62] She conceded she was not sure if the tall man, namely accused one had a hat on that evening, however, she was sure accused two had a hat on. This witness impressed this court.

Sophie Khoza

- [63] This witness testified she was at the scene when this incident occurred. She was asleep when she heard male voices talking to her mother Esther, (the deceased on

count four). This witness told the court she heard gunshots and shortly thereafter her door was kicked and a male person entered her room.

- [64] The male person was close to her bed. He demanded money and a cell phone and told her that the thing he was holding “*can kill*”. This witness got up from her bed, got her wallet, took out money and gave it to the male person. The amount was R50- 00. The male person then demanded a smart cell phone and after searching he found the smart cell phone. This witness further testified that, after he found the cell phone the male person left the bedroom.
- [65] In court, this witness pointed out accused two as the person who entered her bedroom on the day of the incident and further gave a description that he was not tall, he was dark in complexion and had a big nose. Upon being asked by the state how long did she spend with accused two inside the bedroom, the witness testified that it was one to two minutes. The witness was cross- examined on her statement she made to the police, namely exhibit “L”, where in paragraph 3, the only description she gave pertaining to accused two, is that he was short and not skinny. Furthermore, in paragraph 6, all she said in this paragraph is that she will be able to identify the suspect. She explained that she did not give a detailed explanation of accused two in her statement as she was not asked to do so. This witness further conceded under cross- examination that she has eyesight problems and uses spectacles, however, without glasses she is able to see for a while.
- [66] This witness attended an identification parade on 1 December 2023 and within 20 to 25 seconds she identified accused two. The defence attorney for accused two stated she took 20 minutes and 25 seconds to point out accused two, however, the SAP 329 definitely says 20 to 25 seconds.
- [67] Although this witness agreed that there was nothing specific about accused two being short, dark in complexion with a big nose, she was however still positive it was accused two she had seen. This witness impressed this court. This witness was honest in that she never tried to implicate accused one falsely, even though she was aware two men had entered the house.

- [68] This witness testified in respect of the robbery incident at house No. 1[...] D[...] Street in Troyville. He was inside the outside shack with his wife Olinda when the incident happened. The incident happened in the early hours of 8 October 2023. People came to his shack and kicked the door of his shack open. He was asleep when two male persons kicked the door. The tall man said they got into a wrong place, however, the two men still entered his shack. The tall man demanded money and both of them had firearms in their hands.
- [69] The two male persons took money in the amount of R300-00, which was under the amplifier. They also took the cell phone from his wife, namely, a Nokia C10. This witness testified that he was pointed with a firearm by the tall man, while the other male had his firearm tucked in his waist. At the time when the robbery was taking place, the lights were on, because the baby cries if they switch off the lights. This witness could not tell the court how long the incident took and he has never seen these suspects before. He did not know how many shots were fired, but he heard the people in the main house had been shot. This witness attended two identification parades. The first one was on 1 December 2023 where he did not point out anyone. At the second identification parade on 29 June 2024, within three minutes he pointed out accused one whom he described as tall, light in complexion, with pimples on his face. He also pointed out accused one in court.
- [70] This witness stated the light was on in his room when he saw accused one. This witness impressed this court and his evidence is trustworthy. So too is his evidence trustworthy regarding his identification of accused one. He never falsely implicated accused two and stated he only saw the second man had a firearm on his waist. He could not say anything else about the second man.

Corroboration of witnesses in respect to the event on 8 October 2023

- [71] Both Fikile Mbhele and Nompumelelo Mbhele corroborate each other in respect to the facial appearance of accused one and that he wore a reflector jacket with an orange colour in the jacket. Both Fikile Mbhele and Nompumelelo Mbhele state they never saw accused one's photo trending on social media. Both witnesses confirm that at the first identification parade there was a glass separating them from the line- up, whereas at the second identification parade there was no one-way mirror.

- [72] Sophie Khoza remembers accused two was wearing a white hat which corroborates the evidence of Nompumelelo Mbhele.
- [73] Sophie Khoza, Fikile Mbhele and Nompumelelo Mbhele all state the accused appeared to be Zimbabwean. Sophie Khoza even heard the man, whom she did not see, but only heard, asking a phone pin saying, *“if you don’t give me the pin, you don’t know me well. I will shoot you; I am from Zimbabwe.”* It is actually common cause as per their plea of guilty that both admit they are from Zimbabwe.
- [74] Both Nompumelelo Mbhele and Sophie Khoza stated accused two had a big nose.
- [75] Nompumelelo Mbhele and Sophie Khoza corroborate Fikile Mbhele that there were other men seen in the yard over and above the two men who entered the house.
- [76] Fikile Mbhele, Nompumelelo Mbhele and Samuel Nduzukula all state that accused one, at the time they saw him on 8 October, had facial skin with pimples.
- [77] Nompumelelo Mbhele and Samuel Nduzukula pointed out accused one at the identification parade held on 29 June 2024. Samuel Nduzukula stated he and the other witnesses who attended the identification parade on 29 June 2024 did not travel together to the identification parade. As a result, there is no evidence placed before this court that the witnesses, Nompumelelo Mbhele and Samuel Nduzukula, colluded to falsely implicate accused one at the identification parade. In fact, Samuel Nduzukula stated he never discussed the facial features of accused one with either Fikile or Nompumelelo Mbhele.

Contradictions

- [78] There is a difference between the evidence of Fikile and Nompumelelo Mbhele in comparison to Samuel Nduzukula, in that the former two state accused one was wearing a reflector jacket, whilst Samuel states he saw accused one wearing a black jersey. The court does not regard this as a material contradiction as all three remember the facial features of accused one, with specific reference to the rough, pimple marked skin on his face.

Philip Nkosi

- [79] This witness testified that he is a warrant officer with 19 years' experience in the SAP. He arrested accused one and explained to him his constitutional rights. During cross-examination, this witness disputed that the photo he had on his phone of accused one was from Facebook, as he himself stated he does not have Facebook.

Sergeant Mbonambi

- [80] He testified he is the investigating officer of CAS numbers 353/10/2023 and 127/10/2023. He has 21 years' experience as a detective. He stated that both identification parades occurred at Jeppe police station. On 1 December 2023 the parade was conducted by warrant officer Motshaba. He did not get involved in the parade. The late warrant officer Matshabane, who is deceased assisted warrant officer Motshaba. He stated that he received information from an informer that the same people involved in the four murders, (counts 4,5,8 and 9) were probably the same people who committed the murder in Betrams (count13). This is what led him to investigate the two dockets together. The investigation led him to accused two who was arrested on 31 November 2023 at Fleurhof, Florida. Three firearms were found. The three firearms are not part of this case. On 22 June 2024, accused one was arrested at Diepkloof, Soweto. His arrest was by the national intervention unit. The first identification parade on 1 December 2023 was held as accused one was not arrested yet. When accused one was later arrested, a second identification parade was arranged on 29 June 2024

Identification parade held on 1 December 2023

Warrant officer Mogomotsi Motshaba

- [81] He is a warrant officer with 33 years' experience working for a Provincial Investigative Unit, specialising in mass murder crimes. On 1 December 2023, he received a call from the investigating officer sergeant Mbonambi to hold an identification parade. This witness confirmed that he did not take part in the investigation of this matter. He stated he has experience of 30 to 40 identification parades in his career. He stated that the identification parade on 1 December 2023 was held at Jeppe Police Station. It was not a direct parade as it had a one- way glass being utilized. There were two suspects on the parade, Thobani Ngobese and Nhlanhla Ncube. The photographer was Mashao of Johannesburg Central Police Station. This witness testified that he put the numbers on the floor for the people on the parade to pick them. The first witness was Brisky Moyo, who pointed out Nhlanhla Ncube (accused two). There was no change of numbers or clothing of the suspects. Brisky Moyo was followed by Sophie Khoza, who also pointed out Nhlanhla Ncube. There was once again no change of numbers amongst the

accused or the changing of clothing. The third witness Fikile Mbhele came and pointed out Thobani Ngobose and Nhlanhla Ncube. The final witness, Nompumelelo Mbhele, pointed out Nhlanhla Ncube.

- [82] This witness did not impress this court. He conceded that he omitted to write down how long certain witnesses took to identify the accused. Although this witness stated he knows the rules to follow when an identification parade is held, this court found his manner of conducting the identification parade very strange indeed. He also did not fill in who the member was who guarded the witnesses prior to the identification parade or the name of the officer who escorted the witnesses to the identification parade or the officer who escorted the witness after the identification parade. He stated it is not his duty to fill this in, it is the duty of the investigating officer. This was just utter nonsense, as it is clear the parade master must fill in all this information.

Sergeant Malesela Mngoai

- [83] This witness stated that he has 18 years' experience in the SAP and he was involved in an identification parade on 1 December 2023. His role was to take the witnesses from the identification parade and to hand them back to warrant officer Moabelo. He was adamant that he never influenced any of the witnesses. This witness was clearly confused as his affidavit, namely, exhibit "U" that he completed, states that he handed over the witnesses to warrant officer Motshaba. It is clear he played a role on 1 December 2023 and that he is adamant that he did not influence any witnesses. This is probably the only value to be placed in respect to his testimony.

Warrant officer Solly Moabelo

- [84] This witness stated that he was employed at the murder and robbery unit in Wynberg and had 22 years' experience. He was retired when he testified. He stated on 1 December 2023 his role was to take the witnesses from the late warrant officer Matshavane and to take them to sergeant Pule (namely sergeant Mngoai). After the witnesses were finished, sergeant Pule handed the witnesses back to him and he took the witnesses to the charge office. He was not involved in the investigation, and he did not know who the suspects were. None of the witnesses discussed the line-up.

Statement of warrant officer Matsomane

- [85] The statement of warrant officer Matsomane was handed in in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

Identification parade held on 29 June 2024

Warrant officer Daniel Kutoane

- [86] He testified he was the parade master at an identification parade held on 29 June 2024. He received a call from the investigation officer namely sergeant Mbonambi to hold this parade at the Jeppe police station. He was told that the only suspect in this parade would be accused one, namely Clifford Moyo. Sergeant Mokatsa was responsible for taking the photos. Warrant officer Kutoane filled in the names of all the role players on the SAPD 329 form. Four witnesses attended the identification parade and three of them, namely, Nompumelelo Mbhele, Brisky Moyo and Samuel Ndzukula pointed out accused one. He stated this was a direct parade where the witnesses had to enter the same room where the suspect stood.
- [87] This witness stated that he gave accused one the choice to find people that look like him to stand with him on the parade. The officer who guarded the witnesses prior to the parade was sergeant Mtileni. The officer who took the witnesses to the parade was sergeant Hlatswayo and the officer who took the witnesses from the parade was sergeant Tshebesebe.
- [88] He stated he was surprised when Fikile Mbhele and Nompumelelo Mbhele entered the room, however he was told Fikile was the guardian of the juvenile, namely, Nompumelelo. Fikile although looking relaxed also looked nervous. He however, did not write down that she looked nervous. She never pointed anyone out. This witness states that Nompumelelo had her back to the line up all the time until she was told to turn around and point out the perpetrator. She took four minutes to point out accused one. He did not see any conversation between Fikile and Nompumelelo before Nompumelelo pointed out accused one. Samuel Ndzukula took less than three minutes to point out accused one. Brisky Moyo came in and took less than two minutes to point out accused one. Accused one stated to this witness that he knew Brisky Moyo as they live in the same street.
- [89] During the cross-examination by accused one's attorney, this witness disputed that Fikile stared for five minutes looking at accused one. He stated Fikile just looked from left to right and did not point anyone. This witness also denied the version put to him that Nompumelelo had been looking at accused one for nine minutes before she

pointed him out. This witness maintained his version as per his evidence in chief that Nompumelelo had her back to the line-up until he asked her to turn around.

- [90] This witness was adamant that the people chosen by accused one to stand on the parade looked similar to accused one. He stated had he seen the big scars on the skin of accused one he would not have allowed the parade to proceed.

Sergeant Owen Mokatsa

- [91] This witness stated that he had 16 years' experience. He stated that he was asked to photograph the identification parade on 29 June 2024. He stated that according to him all the people on that parade were all of the same complexion, however, he conceded he was not an expert on complexions.

- [92] This ended the State's case.

- [93] Accused one closed his case.

Accused two

- [94] Accused two testified that in October 2023 he was staying at Wolmarans and Claim street, Hillbrow, at the Radebe Church building. He was staying there for 8 months. He was working part-time for seven years in construction. He was staying at this address with his wife, Ntombizodwa. He stated he does not know accused one and only met him in court. He became aware of the cases when sergeant Mbonambi arrested him in November and he was taken to an identification parade.

- [95] The accused testified that he was pointed out at the identification parade which lasted not more than five minutes. They then took photos of him and that ended the identification parade. He was then charged by sergeant Mbonambi in respect to two cases. He stated that he has no knowledge of these crimes. He stated he does not have a firearm and the people who identified him are mistaken. He stated his name is not "Mji" or "Mjikijelwa", but Nhlanhla Ncube. People call him Nhlaks or Ncube. He stated his wife has relocated to Zimbabwe and is at Tshololo. He has no contact with her.

Evaluation

Probabilities emerging from the case as a whole

Counts 13, 14, 15 and 16

- [96] Accused one has remained silent in this regard and accused two stated he knew nothing of the incident of 6 October 2023.
- [97] The witness Brisky Moyo says he saw accused one and two together when the deceased on count 13 was shot. Accused two stated he only got to know accused one when he started attending court. Brisky Moyo also knows accused two by the name of "Mji" which accused two denies as being his nickname. Yet, the investigating officer obtained the name of "Mjikijele" from accused two. Accused two denies this. This court rejects accused two's version in this regard as false. Brisky Moyo did not know the full name of accused two, therefore, the investigating officer must have obtained this name from accused two himself at the time of his arrest. The exhibits "Yi" and "Yii" both show the middle name "Mjikijele". At no stage did accused two ask sergeant Mbonambi to take out this name when he signed "Yi" and "Yii". This court finds it improbable that accused two did not see the name "Mjikijele", which is written in big letters at the top of exhibits "Yi" and "Yii". Accused two also never told his attorney that his name was not "Mjikijele" as a result, when sergeant Mbonambi testified it was never disputed that he had correctly recorded accused two's name as "Mjikijele". As a result, the rejection of the name "Mjikijele" is all a recent fabrication on the part of accused two. When asked by the state advocate why he never corrected the name "Mjikijele" accused two stated, *"I heard them mentioning that name but never bothered myself to have it corrected?"*. This court finds he never corrected it as it is more probable that "Mjikijele" is his real name. Brisky Moyo and the investigating officer are not friends and the fact that the abbreviated name "Mji" is the three first letters of the name "Mjikijele", suggests that Brisky Moyo was telling the truth. No version was ever put to Brisky Moyo that he had a reason to falsely implicate accused two being present on 6 October 2023 when the deceased on count 13 was shot. As a result, this court accepts Brisky Moyo had no reason to falsely implicate accused two. During the evidence of accused two, he merely stated Brisky Moyo made a mistake by pointing him out. The court rejects the version of accused two that Brisky Moyo made a mistake, as there were many people seated at the scene where the deceased on count 13 was shot. Brisky Moyo could have falsely implicated any of these men who were seated. Instead, he saw accused one and two getting into a motor vehicle after the deceased on count 13 was shot. Accused one's legal representative also put it to Philip Nkosi during cross-examination

that accused one only knew accused two by the name “Mji”. This supports the evidence of Brisky Moyo that accused two’s name is “Mji”.

[98] Accused two states that on 6 October 2023, he cannot remember his exact location as he was not writing it down, but at 8 p.m., he states he was at home with his wife or girlfriend, called, Ntombizodwa. This version remained uncorroborated as Ntombizodwa returned to Zimbabwe after she heard accused two had been charged with five counts of murder. Accused two stated it never crossed his mind to ask Ntombizodwa to make an affidavit stating that he was at home on 6 October 2023 with her. The court rejects this as false. It is clear it never crossed his mind as Ntombizodwa could not vouch for his movements on 6 October 2023. Any innocent man would do everything possible to exculpate himself. Accused two also never asked the police to bring Ntombizodwa to the police station at the time of his arrest so that she could exculpate him. This failure to call Ntombizodwa is further exaggerated by accused two stating that he could not call her as she had been evicted. The court rejects all these reasons of failing to obtain an affidavit to support his innocence as mere fabrications and not reasonably possibly true.

[99] Accused two states he does not know the suburbs around Hillbrow, namely, Betrams and Troyville, therefore even if he was in these locations he himself would not know. As a result, if Brisky Moyo saw accused two at Betrams, accused two would not even be able to dispute that.

[100] Brisky Moyo is Zimbabwean and so is accused two. The fact that Brisky Moyo identified accused two as being present when the deceased on count 13 was shot is extremely probable and accused two’s version that he was not present at Betrams is rejected as false.

Identity of the perpetrators on 6 October 2023

[101] When determining identification, a court must consider the factors as set out in the matter of *S v Mthethwa* (3) SA 766 (A) at 768 A to D, which include amongst others, lighting, visibility, eyesight, proximity of the witnesses, opportunity to observe time and situation, the mobility of the scene, corroboration, the accused’s face, voice, build, clothing and gait.

- [102] At the identification parade held on 1 December 2023, Brisky Moyo took 30 seconds to point out accused two. At the identification parade held on 26 June 2024, he took two minutes to positively identify accused one.
- [103] The defence attorney for accused two raised the issue that warrant officer Motshaba had left sections of the SAP 329, namely, exhibit “N” incomplete, in particular paragraphs 14 to 16 of the document. These paragraphs included the names of the SAPS members who guarded the witnesses prior to the parade, who escorted them to and from the parade and guarded them after the parade.
- [104] This omission in the SAP 329 form by warrant officer Motshaba does not render the evidence of the identification parade invalid. In *S v Chabalala* 2003 (1) SACR 134 (SCA, the Supreme Court of Appeal held that discrepancies in notes made by the parade officer were on the facts not considered fatal.
- [105] It was held in the unreported case of *Khunjwa v S* (A505/2013) [2014] ZAGPJHC 116 (19 May 2014) that:
 “While it is desirable that all the portions of the SAP 329 are completed and if not, that reasons therefore ought to be furnished, the mere failure to adhere to these cannot result in the nullity of the identification parade as a whole”. (Ibid para 9)
- [106] There are of course dangers of not complying with all the rules of an identification parade and the court highlighted this in *R v Kola* 1949 (1) PH 100 (A), where the Appellate Division, as it then was, concluded that:
 “But an identification parade though it ought to be a most important aid to the administration of justice may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall- mark of such a test if in fact the hall- mark is spurious. Of course, an identification parade is not necessarily useless because it is imperfect. In some respects, the quality of the parade must necessarily be a question of degree.” [my emphasis]
- [107] To correct the omission of points 14-16 of the SAP 329 form, the state submitted the statement of the late Warrant Officer Matshavani, which was handed in as exhibit “X”, as he had guarded the witness before the parade, as well as the viva voce evidence of

Warrant Officer Moabela who escorted the witnesses to the parade and then out. Finally, the evidence of Sergeant Mogoai was led as the person who received the witnesses from the aforementioned and handed them to Motshaba. There may be some confusion who did what, but what is factual, is that these officers did assist the witnesses on that day and they corroborated each other that the witnesses did not see the suspect prior to the parade and neither did they speak to each other before they pointed out the suspect. This evidence demonstrated to this court that the identification parade conducted on 1 December 2023 was procedurally correct and can be admitted as evidence against accused two.

[108] In the matter of *S v Chabalala* 2003 (1) SACR 134 (SCA), there were various shortcomings in the evidence relating to the parade, namely, that the witness travelled with the parade officer, the investigating officer and witnesses to the parade. In addition, there were discrepancies in completing the form and failure to call witnesses to testify to the regularity of the parade. Despite these shortcomings the court held that:

“All in all, although the evidence about the parade was less than the court was entitled to expect from the prosecution, its fairness judged according to the objective facts was not seriously challenged and the shortcomings were not as to place the value of the identification in doubt”. (Ibid para 14)

[109] In addition to the identification parade, Brisky Moyo pointed out accused two and one in court. There were also no concerns expressed regarding the formalities of the identification parade held on 29 June 2024 by accused one when Brisky Moyo pointed out accused one.

Common purpose in respect to accused one on counts 13, 14 and 16

[110] Accused one during cross-examination disputed there was no common purpose to kill the deceased on count 13. From the warning statement of accused one, namely, exhibit “V” it does not appear that he disputes he was in scuffle with the deceased on count 13. He therefore places himself on the scene. This lends credibility to the evidence of both Brisky Moyo and Derrick Ncube, who say they saw accused one at the scene on 6 October 2023.

[111] The evidence of Derrick Ncube is that accused one and the deceased appeared to be fighting with their bare hands and that when accused one stood up and while the

deceased was still on the ground, the other man shot and killed him. Derrick Ncube testified that although the murder took place two meters from where he was seated, he did not see a firearm, but he heard gunshots and saw the blood a few seconds after he heard the shots. Accused one and the other man then left the scene together. The evidence of Brisky Moyo however is that he saw accused one and two come from the scene of the shooting and they both had firearms in their possessions.

- [112] The only inference the court can draw here is that the deceased was shot by accused two that day and that this shooting caused the death of the deceased.

- [113] The State has argued that both accused committed the offences in the execution of a common purpose.

- [114] The issue this court must decide is whether the actions of accused two can be imputed to accused one on the doctrine of common purpose in respect to the murder of the deceased on count 13.

- [115] The state is required to prove, in the absence of a prior agreement that accused one had an active association with the events which are casually connected to the death of the deceased.

- [116] The definition of “active association” is inferred by the four requirements for liability under the doctrine of common purpose as formulated in the matter of *Mgedezi and Others* (415/1987) [1998] at 705 para I to 706 para C, (“*Mgedezi*”) as follows:
 “...on the basis of the decision in *S v Sefatsa and Others*, only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”

- [117] In respect to common purpose this court finds the following:

- (a) Accused one was present on the scene and partook in the assault of the deceased after which the deceased was shot and killed therefore satisfying the first and second requirements as stated in the matter of *S v Sefatsa and Others* 1988 (1) SA 868 (A) (“*Sefatsa*”).
- (b) After the murder had taken place in his presence, accused one could have easily disassociated himself from the actions of accused two instead, he left the scene with accused two. This action satisfies the third and fourth elements of the abovementioned rule as stated in the matter of *Sefatsa*. The actions of accused one do not show a withdrawal from the common purpose, but rather an agreement and knowledge of a plan.
- (c) Finally, the rule states that accused one must have had the requisite mens rea. As per the evidence of Brisky Moyo, both accused one and two were in possession of firearms. Accused one must have reasonably foreseen that accused two could have used it to commit murder and he reconciled himself with that possibility. It is improbable both the accused were unaware that the other was in possession of a firearm.

[118] The Constitutional Court approved the approach of *Mgedezi* in *Thebus and another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) (28 August 2003) . The issue is put beyond any doubt by Moseneke J at 341 e (para 34) as follows:

“Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence”.

[119] Accordingly, this court finds on the basis of common purpose that accused one acted in common purpose with accused two to murder Mehluli Sibande, the deceased on count 13.

Probabilities emerging from the case as a whole in respect to counts 1 to 12

[120] Accused one has remained silent in this regard and accused two stated he knew nothing of the incident on 8 October 2023 and he has never been to 1[...] D[...] Street.

[121] Accused two states he does not know the witnesses namely Fikile Mbhele, Nompumelelo Mbhele, Sophie Khosa or Samuel Nduzukula. He stated he saw them for

the first time in court. From this, the court can conclude that because these witnesses did not know accused two prior to 8 October 2023, there would as a result be no reason for them to falsely incriminate accused two.

- [122] Accused two stated he completed grade seven in Zimbabwe and the witnesses all state that the two men who they met on 8 October were speaking Zulu with a Zimbabwe accent. During cross-examination he added he speaks Zim Ndebele and also Zulu.
- [123] As regards the incident of 8 October 2023, accused two cannot remember his whereabouts. It also never crossed his mind to ask his girlfriend Ntobizodwa to check her messages on whatsapp to assist in locating his whereabouts on 8 October 2023.
- [124] Accused two's version of all four witnesses making a mistake to point him out at the identification parade is rejected as false. Brisky Moyo is not known to the witnesses who testified about the events on 8 October 2023, therefore, there could not have been any reason for Brisky Moyo and the other witnesses testifying in respect to the incidents of 8 October, to falsely implicate accused two. The version of accused two that he was not present on 8 October 2023 is rejected by this court as false and not reasonably possibly true.
- [125] As regards identification of both the incidents of 6 and 8 October, there is corroboration between Fikile Mbhele, Brisky Moyo and Derrick Ncube. Firstly, Fikile Mbhele said the men that confronted her were speaking Zulu like a Zimbabwean national. Brisky Moyo stated accused one and two are Zimbabwean. Both accused even admitted that as per their plea of guilty in respect to counts 17 and 18 respectively that they are from Zimbabwe
- [126] In addition, as per the statement of Fikile Mbhele, she stated accused one was wearing a reflector jacket with orange and silver colours. Both Brisky Moyo and Derrick Ncube state accused one was wearing a jacket with an orange colour in it. The witness Nompulelelo Mbhele also stated that accused one wore blue jeans and a navy-blue reflector jacket with orange and a lime colour. The common denominator is the reflector jacket and the orange colour. The name "Skhokho" is also heard by Nompumelelo Mbhele and Fikile Mbhele when Precious mentioned this name. There is roughly two days that passed from the incident of 6 October 2023 and the incident of 8 October 2023. The following of the above-mentioned facts cannot be mere coincidence. It is more probable that the same

“Skhokho” wearing a reflector jacket and seen by both Brisky Moyo and Derrick Ncube is the same “Skhokho” that entered the house where Fikile and Nompumelelo Mbhele lived, still wearing the very same clothes and still in possession of a firearm. It is clear that there is similar fact evidence pertaining to both the events of 6 October and 8 October 2023 in that the witnesses corroborate each other on the clothing of accused one and his name namely, “Skhokho”.

Accused one`s failure to testify

[127] The charges against accused one are of a serious nature and if convicted he faces a period of life imprisonment. The state relied on the evidence of multiple eyewitnesses, a formal identification parade and the evidence of witnesses who know the accused. The accused, however, elected not to give evidence in his defence despite the overwhelming evidence against him. Towards the end of the proceedings and after the accused had already closed his case, it suddenly appeared that he intended to call his girlfriend as an alibi witness, but this never materialised.

[128] Despite the fact that an accused person has the right to remain silent and is under no obligation to testify the Constitutional Court in the matter of *Boesak v The State* [2000] ZACC 25, 2001 (1) BCLR 36 (CC) held that:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.” (Ibid para 24)

[129] Similarly, in the matter of *Osman and Another v Attorney- General Transvaal* (CCT 37/97) [1998] ZACC, the Constitutional Court held that our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution`s case may be sufficient to prove the elements of the offence.

[130] In the matter of *S v Mthetwa* 1972 (3) SA 766 (A), the Appellant Division, as it then was, stated that:

“Where... there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability.” (Ibid page 635)

[131] In the matter of *Dos Santos and Another* (726/07) (2010) ZASCA 73 (29//10), the Supreme Court of Appeal held that:

“The choice of each to remain silent in the face of evidence implicating them in criminal conduct is suggestive of the fact that each had no answer to it. For if the evidence implicating the appellants was capable of being neutralised by an honest rebuttal, it ought to have been.”

[132] The version put to Fikile Mbhele that accused one’s face was trending on social media and that this is why she identified him was never proven by accused one. As a result, it is rejected as false. The legal representative of accused one put it to Philip Nkosi that accused one never gave accused two’s full name to him but only gave him the name “Mji”. Accused one’s election to remain silent is extremely prejudicial to him as it seems from the questions posed to Philip Nkosi that accused two was actually known to accused one.

Findings

[133] As regards count one, as per the evidence of Samuel Nduzukula, he pointed out accused one as being the one who robbed him and his wife. Although he could not positively identify accused two, from his evidence, it is clear two men, armed with firearms entered his room. On the basis of similar fact evidence, pertaining to the manner in which the other robberies occurred, namely that both accused one and two were together, this court is satisfied that the state has proved the charge of robbery with aggravating circumstances in respect to both accused and that accused two actively associated himself with the actions of accused one. They are both found guilty of robbery with aggravated circumstances.

[134] As regards count two, as per the evidence of Sophie Khoza, it was accused two who entered her room. As a result, accused two is found guilty of robbery with aggravated circumstances of R50-00 cash and a cell phone and accused one is acquitted of count two.

[135] As regards count three, from the evidence of Nompumelelo, accused one was originally the only person in the room pointing a firearm at her grandmother, yet, accused two did

enter shortly afterwards and saw this happening. Accused two was also present and was asked by accused one to count the rental money. Both were accordingly present when this robbery occurred. On the basis of common purpose, accused one's actions are attributed to accused two and both are found guilty of robbery with aggravating circumstances.

[136] As regards count four, the witness Fikile Mbhele heard two men speaking in the room of her mother Esther Nzimande. Yet, from the evidence of Nompumelelo who was in the room, it is only accused one who was present when her grandmother was shot by accused one. Accused two had already left the room and the door had closed behind him. This court cannot attribute the actions of accused one to accused two in respect to the killing of Esther Nzimande as according to Nompumelelo accused two had even told accused one that the person they were looking for was not there and that they must leave. Accordingly, only accused one is found guilty of premeditated murder on count four and accused two is acquitted on count four.

[137] As regards count five, Nompumelelo states when accused one left, her grandfather followed him and that is when she heard shots being fired. She could not explain who killed her grandfather. On the basis of similar fact evidence, this court finds accused one guilty of the murder of Bekani Nzimande. It is clear he was the only one who was seen by Nompumelelo holding a firearm. This court cannot impute the actions of accused one to accused two as it is not clear that accused two was still in the passage when accused one shot Bekani Nzimande. Accordingly, on count five, accused one is found guilty of premeditated murder in terms of s51(1) of Act 105 of 1997 and accused two is acquitted.

[138] As regards count six, Fikile Mbhele mentions it is accused one who hit her with the firearm. Accordingly, accused one is found guilty of assault with intention to do grievous bodily harm. Accused two was not present before her when accused one assaulted her and accordingly on count six, accused two is acquitted on count six.

[139] As regards count seven, there was a short period of time before the accused one and two returned and kicked open the bedroom door of Fikile Mbhele. They were both present when she was robbed of her cell phone. Accordingly, both accused one and two are found guilty of robbery with aggravating circumstances on count seven.

- [140] As regards count eight, there is no evidence suggesting who shot Proud Mpofu. It is the evidence of Fikile and Nompumelelo Mbhele that both accused one and two were looking for Proud. This appears to be the main reason why these accused came to this house on this evening. Both accused one and two were in this house at the same time and were wielding firearms. This court cannot say who shot this deceased, however, it is clear that they both had a reason to find Proud Mpofu. On the basis of common purpose this court finds they both had the intention to kill Proud Mpofu and accordingly, they are both found guilty of premeditated murder in terms of s51(1) of Act 105 of 1997.
- [141] As regards count nine, there is once again no eye-witness who can say who killed Ntombizodwa Mumpande. On the basis of similar fact evidence, and due to the fact that both accused were in possession of firearms, this court finds that accused one and two both had the common purpose to kill this deceased and they are accordingly both found guilty of premeditated murder in terms of s51(1) of Act 105 of 1997.
- [142] In respect to count 10 it is clear accused one had in his possession a firearm on 8 October 2023. He is accordingly found guilty of possession of a firearm, make unknown to the state, without a valid firearm license which is a contravention of s3 of Act 60 of 2000.
- [143] In respect to count 11 it is clear that accused two had in his possession a firearm on 8 October 2023. He is accordingly found guilty of possession of a firearm, make unknown to the state, without a valid firearm licence and therefore guilty of a contravention of s3 of Act 60 of 2000.
- [144] As regards count 12, it is clear many shots were fired on the evening of 8 October 2023. Accordingly, both accused are found guilty of unlawful possession of ammunition, namely, a contravention of s90 of Act 60 of 2000.
- [145] As regards count 13, both accused are found guilty of premeditated murder, a contravention of s51(1) of Act 105 of 1997.
- [146] As regards count 14, this court is satisfied that accused one had in his possession an unlicensed firearm without a valid license and he is found guilty of a contravention of s3 of Act 60 of 2000.

- [147] As regards count 15, this court is satisfied that accused two had in his possession an unlicensed firearm without a valid license and he is found guilty of a contravention of s3 of Act 60 of 2000.
- [148] As regards count 16, this court finds both accused guilty of being in possession of unlawful ammunition and are both found guilty of a contravention of s90 of Act 60 of 2000.
- [149] As regards count 17, as per the plea of guilty of accused two, accused two is found guilty of a contravention of s49(1)(a) of Act 13 of 2002.
- [150] As regards count 18, as per the plea of guilty of accused one, accused one is found guilty of a contravention of s49(1)(a) of Act 13 of 2002.

Order

- [151] Accused one is found guilty on the following charges:
- Count 1: Guilty- robbery with aggravated circumstances
 - Count 3: Guilty- robbery with aggravated circumstances
 - Count 4: Guilty- murder in terms of s51(1) of the Criminal Law Amendment Act 105 of 1997
 - Count 5: Guilty- murder in terms of s51(1) of Act 105 of 1997
 - Count 6: Guilty- assault with intention to do grievous bodily harm
 - Count 7: Guilty- robbery with aggravated circumstances
 - Count 8: Guilty- murder in terms of s51(1) of Act 105 of 1997
 - Count 9: Guilty- murder in terms of s51(1) of Act 105 of 1997
 - Count 10: Guilty- possession of unlicensed firearm, a contravention of s3 of the Firearms Control Act 60 of 2000
 - Count 12: Guilty- unlawful possession of ammunition, a contravention of s90 of the Firearms Control Act 60 of 2000
 - Count 13: Guilty- murder in terms of s51(1) of Act 105 of 1997
 - Count 14: Guilty- possession of unlicensed firearm, a contravention of s3 of the Firearms Control Act 60 of 2000
 - Count 16: Guilty- unlawful possession of ammunition a contravention of s90 of the Firearms Control Act 60 of 2000
 - Count 18: Guilty- contravention of s49(1)(a) of the Immigration Act of 13 of 2002

[152] Accused two is found guilty on the following counts:

Count 1: Guilty- robbery with aggravated circumstances

Count 2: Guilty- robbery with aggravated circumstances

Count 3: Guilty- robbery with aggravated circumstances

Count 7: Guilty- robbery with aggravated circumstances

Count 8: Guilty- murder in terms of s51(1) of Act 105 of 1997

Count 9: Guilty- murder in terms of s51(1) of Act 105 of 1997

Count 11: Guilty- possession of unlicensed firearm, a contravention of s3 of the Firearms Control Act 60 of 2000

Count 12: Guilty- unlawful possession of ammunition, a contravention of s90 of the Firearms Control Act 60 of 2000

Count 13: Guilty- murder in terms of s51(1) of Act 105 of 1997

Count 15: Guilty- possession of unlicensed firearm, a contravention of s3 of the Firearms Control Act 60 of 2000

Count 16: Guilty- unlawful possession of ammunition a contravention of s90 of the Firearms Control Act 60 of 2000

Count 17: Guilty- contravention of s49(1)(a) of the Immigration Act of 13 of 2002

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JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF THE ACCUSED:

Mr Davids (for accused 1)

Instructed by Legal Aid SA, Johannesburg

Adv Ngxumza (for accused 2)

Instructed by Legal Aid SA, Johannesburg

ON BEHALF OF THE STATE:

Adv. Adonis

Instructed by the Office of the National

Director of Public Prosecutions, Johannesburg