

SOUTH AFRICA / JUDGMENT

S v Bveni (CC 08/2019) [2020] ZAWCHC 190 (3 December 2020)

[2020] ZAWCHC 190

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

CC 08/2019

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC 08/2019

In the matter between:

THE STATE

v

BLESSING BVENI

Accused

Court: Justice J Cloete

Heard: 5 and 10 – 13 February 2020; 9 – 10, 16 – 19 March 2020, 12 May 2020, 12 – 14 and 26 October 2020

Delivered: 3 December 2020

JUDGMENT ON CONVICTION

CLOETE J:

Introduction

[1] The accused, Mr Blessing Bveni (a Zimbabwean national), faces 12 counts, namely two of murder, one of attempted murder, two of assault with intent to cause grievous bodily harm, four of robbery with aggravating circumstances, one of attempted robbery with aggravating circumstances, one of using a false temporary asylum permit to reside in South Africa, and one of possession of a false passport. This last count was abandoned by the State during closing argument.

[2] These, with the exception of the last two counts, all relate to a series of attacks on mostly hikers and cyclists in the Silvermine area near Fish Hoek during the period October 2017 to March 2018. After the applicable minimum sentences in respect of the relevant counts were explained to him, the accused pleaded not guilty on all charges and exercised his right to decline a plea explanation.

He did however make certain formal admissions in terms of s 220 of the Criminal Procedure Act[1] which were entered as Exhibits “A” to “H”.

[3] The State relied on the testimony of 21 witnesses. The accused testified in his defence but called no other witnesses after I refused his request for a further postponement to call his sister for this purpose on 26 October 2020. My ruling and the reasons therefor are part of the transcribed record[2] and will thus not be repeated.

[4] During the trial a further 20 documentary exhibits (“I” to “BB”) were handed in and the State also relied on 2 physical exhibits (“P1” and “P2”). By the close of the State’s case all of these exhibits were

formally entered by consent, save for Exhibits “I” and “N” which were excluded by agreement, Exhibit “V”

which was admitted but only as to the authenticity of the document itself, and Exhibit “X”.

The undisputed facts

[5] The evidence established the following. The accused first entered South Africa from Zimbabwe in 2012 and returned there in 2014. He re-entered South Africa in 2016 and has remained here ever since. According to him, he has never held a passport or any form of residence permit, and on all three occasions he passed through the Beit Bridge border post after paying a bribe. It is unclear where he resided in Cape Town between 2012 and 2014, but he lived in the Fish Hoek area for about 2 years after his return

in 2016 before moving to Lower Crossroads in Phillipi East.

[6] Count 1 is assault with intent to cause grievous bodily harm. On 11 October 2017 at around 9am the complainant, Mr David Bucklow, was cycling down from the mountain in the Silvermine Nature Reserve towards a small bridge in an isolated area when he saw a man standing on the bridge looking down at the river. When Bucklow was about 10 metres away

the man turned towards Bucklow, making movements to block his path with his arms outstretched. Bucklow decided to continue riding past the man without slowing down but, as he did so, the man kicked out at his right leg, causing Bucklow to almost fall off his bicycle.

- [7] Enraged, Bucklow stopped a few metres ahead, took out his mace spray and approached the man, swearing at him, while he just stood there, staring him down fearlessly. He wore a red hoodie which obscured his hairstyle, but Bucklow could still see his face clearly. Bucklow realised the danger of the situation (he also thought there might be other attackers hiding nearby) and returned to his bicycle, cycling away.
- [8] Counts 2 and 3 are robbery and attempted robbery with aggravating circumstances. Given that the complainants were minors at the time, one is still a minor, and having regard to s 154(3) of the Criminal Procedure Act as well as the decision of the Constitutional Court in *Centre for Child Law and Others v Media 24 Ltd and Others*,^[3] I will refer to them as M and D respectively.
- [9] On the afternoon of 12 January 2018 M, a girl then about 15 years old and her brother D, then about 17 years old went hiking up to Peers Cave in the Silvermine Nature Reserve. During their hike they encountered a man on a few occasions. Both recalled that the man was wearing a light blue collared shirt with buttons down the front and dark pants which they thought might have been jeans. During her testimony M was shown a shirt matching this description (Exhibit “P2”) and identified it as that worn by the man. D was not asked to identify the shirt but gave the same description as M.
- [10] D explained that on the first occasion they saw the man M became nervous, but after they greeted and he told them he was up there to pray, D reassured her, thinking there was no cause for concern. Later they came across him while close to the cave, which made them uncomfortable. They decided to wait until he moved away and then make their way home.
- [11] The man moved off and they were walking roughly 30 metres behind him. As they got closer he turned rapidly towards them, threatening them with a knife. He demanded their possessions and searched them. He removed M’s cell phone from her back pocket. D told him that all he had was some tobacco which he offered to him. The man took out a napkin and pen and demanded M’s phone password which he wrote down. She asked for her sim card and he allowed her to remove it from the phone. He demanded her jewellery but she refused. D engaged with the man to distract him, telling M to run, which she did. The man moved off and D joined his sister, thereafter hurrying home.
- [12] Counts 4 to 6 are assault with intent to cause grievous bodily harm, robbery with aggravating circumstances and murder. On the morning of 28 January

2018 Mr Douglas and Mrs Julia Notten were hiking on the mountain in the Silvermine Nature Reserve above Kalk Bay (in close proximity to Fish Hoek), walking down an area called Kleintuin or Tuinkloof. Mrs Notten was walking in front.

- [13] It was a clear but windy day and her conversation with her husband was hampered by the wind. Either asking or answering something, she turned back to her husband and saw a man approaching from behind them about 25 to 30 metres away. As she recalled, he wore a light olive coloured short sleeve shirt and light khaki trousers. Something about the pace at which he was moving alarmed her.
- [14] She suggested to her husband that they move aside to let the man pass and stepped onto a rock about a metre off the path. As she turned her head to the left, expecting her husband to be joining her, the man was suddenly right behind Mr Notten and moved around to face him. He said nothing at all but had an angry, disturbing look on his face.
- [15] The man pulled a knife from his pocket and began stabbing Mr Notten in the back, causing him to scream and double over in agony. While she stood there, shocked to the core, the man started pelting her with rocks. After the first rocks hit the area of her collarbone she ducked down and remembered she had a small can of pepper spray in a bag around her waist. While trying to remove it the man threw a rock at her hand, injuring her thumb.
- [16] She sprayed at him. He turned and walked about 4 steps away but then back towards her. She tried to spray again but the canister was empty. She shouted at the man, telling him to leave them alone and offering to give him their possessions.
- [17] In response the man dragged Mr Notten, who was still bent over, further away down the path and she saw him hammering the knife into her husband's body. She realised she had to run for help. By the time it arrived, Mr Notten passed away. The attacker took their small backpack containing a few cheap items, as well as an old cell phone and the worn gym shoes Mr Notten was wearing.
- [18] The post mortem report of forensic pathologist Dr Yolande Van der Heyde (Exhibit "C") reflects that Mr Notten sustained 6 penetrating incised wounds in addition to numerous other incisions. One penetrated the right artery and vein in his armpit area as well as the right lung, and another penetrated Mr Notten's brain. In all he was stabbed at least 21 times on his head and upper body. She thus concluded that the cause of death was multiple penetrating stab wounds.
- [19] Counts 7 and 8 are attempted murder and robbery with aggravating circumstances. On the morning of 7 February 2018 Mr Malcolm Esterhuizen, a member of the Sun Valley Neighbourhood Watch, was carrying out a routine patrol. He was walking down a path towards Brigantine Road when he saw a man approaching about 30 metres away. He wore a sky blue shirt with a collar and buttons down the front, which Esterhuizen thought had long sleeves, with dark coloured slacks. During his testimony Esterhuizen was shown Exhibit "P2". He immediately recognised the colour, collar and buttoned down front of this shirt, stating that he might have been mistaken about the length of the sleeves.

- [20] Returning to the incident, at the time Esterhuizen was on a phone call and was holding his cell phone in his right hand. As the man drew alongside him, he slammed into Esterhuizen who fell to the ground on his back. He saw that the man held a screwdriver with a yellow and black handle and realised he was being attacked.
- [21] Without a word the man bent over him, stabbing him repeatedly while holding the screwdriver in both hands. He managed to deflect several blows (seemingly he is trained in karate) but was nonetheless stabbed at least 9 times, as reflected in the medico-legal report of Dr Nabeela Amien (Exhibit “H”) who also recorded that at least one to the right lung, which was punctured, was life-threatening.
- [22] Eventually the man stepped back, demanding Esterhuizen’s watch and cell phone which he handed over. His neighbourhood watch radio had become dislodged from his belt and the man picked it up. The man turned and ran off in the direction of a sports field.
- [23] Esterhuizen was fortunate in the sense that the person on the end of the phone heard him shouting during the attack and notified his wife. He was taken to False Bay Hospital for emergency treatment and transferred to Vincent Pallotti Hospital where he remained for one and a half days. The police later recovered his cell phone and community radio, which he positively identified.
- [24] Two days after the attack on Esterhuizen, on 9 February 2018, Ms Anel Nortier (a chief inspector with the Department of Fisheries) was travelling down Mervyn Road, Fish Hoek, with a colleague at around 1pm. As they approached Upper Recreation Road a large rock passed across the windscreen of her vehicle and they saw two men fighting. One was chasing the other and both were throwing rocks.
- [25] They pulled over and grabbed the men, making them sit on the pavement while they called the neighbourhood watch for assistance. One of the men was the accused, as confirmed by the photographs taken at the scene by Nortier (Exhibit “K”) and the evidence of the accused himself. A screwdriver with a yellow and black handle was found on the scene and placed on the ground. According to Nortier, it was found in possession of the accused. The accused’s version during the State’s case was that he had no idea where it came from, although he admitted that the screwdriver was found on the scene.
- [26] Counts 9 and 10 are robbery with aggravating circumstances and murder. At 7am on 13 March 2018 Mr Ian McPherson left his home for a 2 hour cycle training ride on a recently purchased GT mountain bike in preparation for a competition. A GPS was fitted to the bike and, along with the usual kit, he also had his CAT cell phone and a card bearing his personal particulars and emergency numbers. The CAT phone was a distinctive one, purchased for him as a gift by his son Robert.

- [27] At around 9am that morning Mr Steven Howells was jogging along the same path on which Esterhuizen was attacked towards a small bridge leading to a track running to the back of a series of sand dunes. As he crossed the bridge he saw a man speeding towards him on a bicycle. When the man passed him he bumped the bicycle against Howell's shoulder and said the word 'ola'. He described the bike as a green and black GT mountain bike.
- [28] Howells found this strange. Not only was the bicycle a clearly expensive one, the man was casually dressed in a dark shirt and trousers and was sweating heavily. A short distance later Howells came across McPherson, lying, severely injured, on his back, still in his cycling gear with his helmet on. His bicycle was nowhere in sight. There was a gaping wound to his abdomen and he was struggling to breathe. Howells removed his t-shirt and tried to stem the wound, telling McPherson he was going for help. When he returned,

McPherson passed away.

- [29] The post mortem report of forensic pathologist Dr Laura Taylor (previously Peddle) (Exhibit "B"), reflects 5 stab wounds to McPherson's chest and back, penetrating incised wounds to both lungs and the left kidney, and parallel incised wounds on the right forearm, leading her to conclude that the cause of death was multiple stab wounds.

- [30] In her testimony Dr Taylor explained that several of the wounds to the back and chest were of considerable depth. Two punctured through bone and one right through the front of the abdomen to the kidney. This demonstrated that a significant degree of force

was applied. The wounds on the forearm were consistent with defence type injuries when McPherson tried to fend off the attacker. Any one of the three wounds penetrating the chest cavity would on their own have been fatal.

- [31] Mr Robert McPherson travelled from the United Kingdom to South Africa on 14 March 2018 after learning of his father's death. On the same day he was contacted by Detective Sergeant Nicolette Damon, the investigating officer, with the request that he attend on Fish Hoek police station to see whether he could identify a cell phone that had been found. He was shown the CAT phone

which he had purchased for his father and identified it immediately (Exhibit "P1").

- [32] On the following day he was again contacted by Damon to identify a bicycle and accompanying equipment. Although it had been wrapped in plastic, seemingly by someone for transport purposes, there were some parts protruding which he recognised. He was familiar with the bike because after his father bought it, he video called him asking for advice on the assembly parts. Once the wrapping was removed he recognised the bike in its entirety. He described the basic colour of the bike as black with neon writing, blue and yellow decal and random splashes of neon colour. It had bright blue handlebar grips.

[33] He also identified his father's equipment and the card bearing his personal particulars and emergency details. One of the items was a Leatherman Skeletool which he bought for his father in the United States. A Traser watch, also given by him to his father, and the Garmin Edge GPS were never found.

The events leading to the accused's arrest

- [34] Sergeant Ranger James Minye is a master tracker (one of 7 in South Africa) who has been employed by SanParks in the Table Mountain National Park for the past 15 years. He testified that two days before McPherson's murder he was on duty with a colleague on patrol in the Silvermine Nature Reserve.
- [35] They were parked at an outlook point called Dassenberg above the Noordhoek area for surveillance purposes. He spotted the accused through his binoculars. The accused was wearing a sky blue shirt and dark trousers.
- [36] He was walking from the direction of Masiphumelele ('Masi') along a footpath, pausing on top of the dunes while looking across towards Fish Hoek and a sports field. He then started walking rapidly towards the sports field where an elderly man was alone walking his dog.
- [37] Keeping him in sight Minye drove towards the accused. It took only a few minutes for his vehicle to reach the edge of the footpath where he intercepted the accused. This area is off limits to the public.
- [38] Minye introduced himself and asked the accused for his name. Without hesitation he provided the names Blessing Bveni. Minye explained that he was not permitted in that area without a permit, which the accused accepted. He gave Minye permission to take his photograph on his cell phone (Exhibit "M").
- [39] The only available copy of this photograph is in black and white. In the photograph the accused is wearing a light coloured short sleeved shirt with a collar and buttons down the front, dark trousers and what appears to be athleisure footwear. Minye identified the shirt worn by the accused in the photograph as the sky blue shirt handed in as Exhibit "P2", and denied the accused's version that, although he was wearing a similar shirt that day, it was darker blue in colour. He was one hundred percent certain that it was the same shirt.
- [40] Minye described the accused's hairstyle in the photograph as a 'brush cut', which is virtually shaven. In the distance is a sports field. Minye testified that this was not the first time he had seen the accused. He explained that there is a small informal settlement adjacent to the Glencairn expressway (in the direction of Masi) where the accused lived. He had seen him there from time to time. One of Minye's duties was to check the settlement regularly to ensure that it did not expand onto SanParks property. As such, he became familiar with the residents and even knew some of their names.

- [41] On the morning of McPherson's murder Minye was on duty again. He was in the Tokai area when he received a call from the neighbourhood watch at around 9am to report a mugging at Peers Hill. He instructed his colleagues to go to Peers Cave which he described as being right on the boundary of Ou Kaapse Weg.
- [42] He drove to Peers Cave where there are a few informal dwellings. He walked to the first two. He saw the tracks of a bicycle and footprints leading to a dwelling in which one Xolani lived, evidence that someone had pushed a bike at that spot. The prints indicated that the person was wearing takkie type footwear. Xolani was not at home. Minye instructed his colleagues to remain there to cordon off the area and he drove on to the crime scene.
- [43] At the scene he spotted two sets of footprints which he noted showed a struggle between two people. He also noted that a person had pushed the bike for a few metres from this spot and then cycled in a westerly direction towards Noordhoek. He followed the tracks and observed that the person moved along the footpath but at a stage had to push the bike because the sand was too thick.
- [44] He followed the tracks over a few dunes to the fence of a residential development in the Noordhoek area known as Chapmans Bay Estate. After the person pushed the bike along the fence for a while he veered off into thick vegetation, carrying the bike.
- [45] Minye continued following the foot tracks which proceeded in the direction of the settlement at Peers Cave. The tracks led him to Xolani's house but he was still not at home.
- [46] Although the bicycle tracks stopped there the foot tracks continued up to Ou Kaapse Weg which is a tarred road. Minye was thus unable to follow them any further once he reached that road.
- [47] As Minye returned to his vehicle he spotted Xolani walking up the tarred road towards him. He returned with Xolani to his house and specifically looked at Xolani's footwear and the way he was walking on their return. His footwear and the manner in which he walked did not match the foot tracks Minye had followed. He searched Xolani's house but did not find either the bicycle or any footwear matching the tracks.
- [48] He told Xolani to accompany him as well as another resident he met there earlier, one Tsiyetsi. As they reached the vehicle he heard over the radio that the police had tracked McPherson's cell phone to an address in Myeza Street in Masi.
- [49] He drove there. Upon his arrival the name Blessing came up and the police showed him an identikit of a person who he did not recognise as the Blessing he knew (he thought it might have been Exhibit "J", which I will return to later). Minye offered his own photo of the accused and forwarded it to the cell phone of the officer in charge at that scene. Xolani moves around a lot and Minye was not able to locate him to testify at the trial, it would seem on the State's request.

[50] Minye remained steadfast in his testimony that the accused was one of the residents of the settlement adjacent to the Glencairn expressway. He recalled having noted down his name in the past during his attendance there to ensure that new people did not move into the area, thus causing the settlement to expand onto SanParks property. He even recalled admonishing the accused to move his structure a few metres back since he had built it right on the SanParks boundary. He dismissed the accused's claim that he had already moved to Phillipi at the time of their encounter on the path as untrue.

[51] He was also consistent in his testimony that he found the accused on the day he took his photograph in a restricted area and not, as the accused claimed, while he was walking in public space from Masi to the beach. He had taken the accused's photograph (Exhibit "M") while the accused stood in the same direction in which he was walking, with Noordhoek beach behind him. Although Minye had not compared the footwear worn by the accused in the photograph to the tracks he followed after McPherson's

murder, he expressed the opinion that the tracks made by the footwear fell more or less into the same category as that worn by the accused in the photograph.

[52] Mr Chris Chirova testified that at around 3 to 4pm on 13 March 2018 (the afternoon of McPherson's murder) he met with the accused for the first time in Masi. The accused wanted to sell a cell phone, and he was in need of one at the time. At the accused's suggestion they agreed to do a swop, with Chirova exchanging the phone for his iPhone and an extra R400. Chirova identified the phone he bought from the accused as Exhibit "P1", a black CAT phone with a small yellow mark on the back, and the same one identified by Robert McPherson as his father's.

[53] On the following morning Chirova was contacted by his work colleague, Mr Adam Mapondo, who told him that the CAT phone was being sought by the police. After they arrived, they took Chirova to his home where he handed the phone to them. He was arrested and charged, but the charge(s) against him were subsequently withdrawn.

[54] Chirova agreed with the accused's version that he first approached Mapondo to sell him a phone. Mapondo did not have enough money and suggested the accused try Chirova, since he knew he wanted to buy one.

[55] Mapondo confirmed this when he testified. He differed from Chirova in the following respects. First, he recalled having referred the accused to Chirova at around 5 to 6pm that day. Second, his evidence was that he called Chirova at about 8pm that same evening as soon as he became aware that the police were looking for the phone. Third, he maintained that Chirova already knew the accused at the time he bought the phone.

- [56] Mapondo identified the phone which the accused tried to sell him as the same as Exhibit “P1”. Although he was challenged about his failure to recollect precisely where the piece of yellow was located at the back of the phone, it is undisputed that Exhibit “P1” has this mark and, indeed, when Chirova testified it was the accused’s version that the phone he sold him had a piece of yellow on the back.
- [57] Mr Ngonidzashe Toriro testified that he is the owner of a cell phone shop at 19 Myeza Street in Masi, called I Fix It Pro. At around 10am on 13 March 2018 the accused approached him. He knows the accused as well as his name of Blessing through the accused’s uncle, Mr Darlington Nyamayaro. The accused was wanting to sell a black CAT phone. Toriro specialises in Apple products and told the accused he did not wish to buy it. They parted ways and Toriro left for other business in Salt River.
- [58] Two hours later one of Toriro’s work colleagues called him to say that the police were at his shop. They were searching for a CAT phone and had electronically tracked its last location to his shop. He told his colleague what happened earlier, and agreed to go to the police station as soon as he returned.
- [59] On his way, Toriro went past the accused’s uncle’s house. He obtained the accused’s cell phone number from the uncle and loaded the accused’s WhatsApp profile picture – of the accused himself – onto his own phone. He then showed it to Damon, the investigating officer, confirming the identity of the accused as the person who tried to sell him the CAT phone. He also gave Damon the accused’s cell phone number.
- [60] Toriro was unshaken in cross-examination. He rejected the accused’s version that he had never met him, never tried to sell him a cell phone, and had no uncle living in the area, as false.
- [61] Mr Lucas Shimango testified that he owns a barber shop in Masi. He knows the accused, since the accused lived locally and came for regular haircuts. At around 9 to 10am on 13 March 2018 the accused came to Shimango’s shop for a haircut, but also with a bicycle which he wanted to sell to him. Shimango described it as a mountain bike, blackish in colour with blue markings.
- [62] The accused told him he had received the bicycle from his boss and wanted R2 000 for it. Shimango decided he would buy it, and thereafter shaved off the accused’s short ‘brush cut’ hairstyle as he requested. Shimango stored the bike at a friend’s home and wrapped it in plastic for safekeeping until he could transport it to his home country. Later on the same day the police pressurised him into showing them where the bicycle was stored and, after photographing it in his presence, they confiscated it.

- [63] Shimango identified a copy of that photograph (Exhibit “L”) and confirmed that it was he who wrapped it in the manner depicted therein. Shimango also confirmed that the accused arrived at his shop with the same ‘brush cut’ depicted in Exhibit “M”, being the photograph taken by Minye two days earlier.
- [64] Sergeant Kyle Johannes, who was also involved in the accused’s arrest, testified that he received information from Crime Intelligence about Shimango’s possible involvement with the bicycle on 13 March 2018. After confronting Shimango at a shebeen called Andrew’s Place, he denied that he bought a bicycle. Johannes searched the premises with Shimango’s consent and found the bike wrapped in blue plastic. He opened it and saw that it fit the description of the stolen bicycle.
- [65] Shimango then admitted to him that he bought it for R2 000 and was planning to courier it to Mozambique. After arresting Shimango for possession of stolen property, Johannes confiscated the bike and booked it into the SAP 13. I will return to the rest of his evidence a little later.
- [66] Constable Luvuyo Banda testified that he is stationed at the Wynberg Cluster. He became involved in this case after reporting for duty at midday on 13 March 2018. He was one of the officers who travelled straight to the McPherson crime scene, where they were briefed. Some of the units had been tracking McPherson’s cell phone and had located its last signal at Myeza Street. After making enquiries Banda was shown the accused’s WhatsApp profile picture and told that his name was Blessing who, it was thought, was in Phillipi East.
- [67] After asking informants to locate the accused’s address, Banda received a call at around 1pm the following day with a possible location. He drove with the informant to Phillipi East where the accused’s potential residence was pointed out to him. Banda drove back, dropped off the informant, and returned alone to the address for surveillance purposes. He noted four informal structures behind the main residence. He decided to wait.
- [68] Just before 8pm he saw two people approaching, one of whom fitted the description of the accused. He called one of his team members in the area (Johannes) for assistance. Banda followed the two men to an address about six or seven houses away, where there was a free-standing room behind the main residence. The door of the room was partially open.
- [69] When Johannes arrived he and Banda entered the room where three men were sitting drinking. One was the accused and the others were introduced as his neighbours. Banda asked the accused for his name and he replied that it was Russell, but people called him Blessing.

- [70] Banda informed the accused that he was there with Johannes in connection with the murder and robbery in Fish Hoek, which the accused indicated he knew about, but claimed to have been with someone called Allan. Banda explained the accused's rights to him and then asked him for the location of the bicycle. The accused replied that it was at Masi in front of Andrew's Place.
- [71] Banda asked him about the missing watch. The accused denied any knowledge, and told Banda and Johannes they could search his room but would find nothing. Acting on this invitation, Banda found a small community hand radio, a cyclist's microfiber bag and a silver emergency blanket. The hand radio was the one that Esterhuizen subsequently identified as his property, and the cycling equipment was later identified by Robert McPherson as belonging to his father.
- [72] According to Banda, he placed the items in two forensic bags and sealed them in the accused's presence. It is not in dispute that the serial numbers on the bags match those in the SAP 13 register, and that they were not tampered with at any stage prior to being booked in. Banda and Johannes then drove the accused to Fish Hoek Police Station where they handed him over.
- [73] In order to provide a chronology, it is necessary to deal interchangeably with the evidence of Banda and Johannes. I thus return briefly to that of Johannes, who was also part of the Major Offences Reaction Team briefed in the Wynberg Ops Room about the McPherson murder and robbery. He confirmed Banda's evidence in chief about the tracking of McPherson's cell phone, his arrival with Banda at the accused's room in Phillipi East, the presence of the three men in the room and what the accused told Banda
- about his name. He also confirmed Banda's testimony about the accused's invitation to search and what was found, but added that Banda also found a head flashlight. The place where Johannes earlier located McPherson's bike was where the accused told them it would be.
- [74] Banda's evidence was further that on 15 March 2018 he was called to a briefing at Fish Hoek Police Station. The team was instructed to take the accused back to his room for a further search, and his rights were explained to him in Banda's
- presence as part of the team.
- [75] On their arrival the owner let them in. In the presence of the accused a further search was conducted and more items were found. It was Banda who found the sky blue shirt, Exhibit "P2". He recognised it from one of the photographs provided to the team which he identified as Exhibit "M", being the one taken by Minye two days before McPherson's murder. One of the team suspected that the stains on the shirt were bloodstains. According to Banda, he bagged and sealed the shirt in a forensic bag at the premises in the presence of the accused.

- [76] Banda did not check what happened to the other items found. He also did not hand in the bagged shirt at the SAP 13 himself, but gave it to one of the other officers to do so, namely Sergeant Luke.
- [77] Banda denied that when he and Johannes arrived at the accused's room on the first occasion they forced their way in. He confirmed however that when entering they pointed their firearms at the three men. He could not recall whether he gave the sealed forensic bag containing the shirt to Luke at the search and seizure or later at the police station, but knew for a fact that he gave it to Luke on the same day he found it.
- [78] Banda accepted that the extract from the SAP 13 register (Exhibit "W") reflects that it was only booked in by Luke five days later on 20 March 2018. He conceded that he could have booked it in himself but explained that, by that stage, the detectives (including Luke) were also involved, so he handed it over to him. Banda dismissed the accused's claim that he was left outside the premises during both searches as making no sense, since as police officers they would never have left the accused outside on his own.
- [79] Banda remained consistent in his testimony. He was referred to an extract from the Occurrence Book at Fish Hoek Police Station (Exhibit "Y"). Entry 1076 on 15 March 2018 reflects that he escorted the accused from the cells to Wynberg Police Station at just after 2am. What is also noted is that Banda specifically recorded the accused's name and surname as Russell Wine, despite the accused's denial that he gave Banda the name of Russell.
- [80] Johannes corroborated Banda that they did not force their way into the accused's room. He differed though from Banda when he maintained they had not pointed firearms. In response to the accused's claim that Banda took him outside before the first search, Johannes pointed out this was impossible, given that it was Banda who found the first items. Johannes was not part of the team that returned to the accused's premises for the second search.
- [81] Sergeant Nimrod Luke, stationed at the Wynberg Cluster during March 2018, was one of the detectives in the McPherson murder and robbery. He testified that he became involved on 15 March 2018 as part of the task team in the search and seizure operation at the accused's residence.
- [82] As the team entered the accused's room they saw a passport with his names and photograph on a table, as well as a number of items of clothing, some of which looked expensive, scattered about. They also saw various cell phones. The accused told them he had been given these items by his employer in Fish Hoek where he worked as a gardener. They explained to the accused that they were

taking the items to Fish Hoek Police Station for further investigation. They left with the items and the accused. On their arrival at the police station the items were separated and sealed in forensic bags in the presence of the accused.

- [83] Among these items were a stained blue shirt, running shoes and takkies, and a CAT and three Samsung cell phones. Luke could not remember exactly but thought there might also have been a hand radio (like a walkie talkie). He identified the blue shirt found as Exhibit “P2”.
- [84] According to Luke, Banda asked him to book the shirt into the SAP 13 since he saw that he was headed in that direction. Luke booked the blue shirt in its forensic bag into the SAP 13, signing his name, although it was Constable Plaatjie who wrote the entry. Luke thought Banda might have given Plaatjie the information reflected in the register because he did not do so.
- [85] The serial number in the entry matches that of the bag containing the shirt tested for DNA by forensic examiner Warrant Officer Rebecca Francis-Pope on 15 June 2018 (Exhibit “U”).
- [86] Her finding that the blood on the shirt matched McPherson’s (obtained from the post mortem) was formally admitted. At the close of the State’s case the accused also formally admitted that this shirt is the same as that reflected in the SAP 13 register (Exhibit “W”).
- [87] According to Luke, Banda gave him the bag containing the shirt at Fish Hoek Police Station. Luke initially claimed that it was he, and not Banda, who sealed the forensic bag, but later accepted it was already sealed when Banda gave it to him.
- [88] Luke first testified that he booked the shirt into the SAP 13 on the very same day but later conceded, given the entry date of 20 March 2018, that it may have been later, and could not say with certainty what day he actually booked it in since he was involved in the case over a period of three days and was also very busy with other cases.
- [89] Luke did not know what happened to the passport found in the accused’s room, but thought that the investigating officer (Damon) would know. However the State did not call Damon to testify. Luke corroborated Banda’s evidence that the accused’s rights were explained to him before the team left for the operation. His recollection was that it was the Cluster Commander, Colonel

Sheldon, who did so. He also corroborated Banda’s evidence about the presence of the accused during the operation itself.

- [90] Constable Plaatjie testified that Luke handed him a sealed forensic bag containing the blue shirt which he entered into the SAP 13 register. He confirmed that the entry was in his handwriting. He thereafter handed over the register to the CSC Commander, as is standard procedure.
- [91] He recalled having received the shirt a day or two after the operation (in which he was also involved) but conceded that, given its entry date of 20 March 2018, it must have been five days later. He believed that Luke must have given him the information which he noted in the register since Luke was the officer who booked it in.

- [92] According to Plaatjie, Luke told him that he kept the bagged shirt in his locker (to which only Luke had the key) between the time it was seized and booked into the SAP 13. Their Cluster was very busy over that period, and when Luke previously wanted to book it in, the CSC Commander, who had the register, was not available. Plaatjie accepted Luke's evidence that Banda gave him the shirt to book in, since he had no personal knowledge thereof.
- [93] Because Plaatjie was also part of the task team during the search and seizure operation on 15 March 2018, he was aware that the blue shirt had been found there although he could not say exactly who found it.
- [94] Although he could also not say what the accused was told before arriving in Phillipi East, Plaatjie was present when his rights were explained to him at the premises before the search. The owner handed over the keys to the accused's room. Plaatjie dismissed the accused's version that no items at all were recovered from his room as untrue.
- [95] The dates of the accused's arrests for the various offences were as follows. On 14 March 2018, on counts 9 and 10 (McPherson's murder and robbery with aggravating circumstances). On 15 March 2018, on counts 7 and 8 (the attempted murder of Esterhuizen and robbery with aggravating circumstances). On 29 March 2018, on counts 2 and 3 (robbery with aggravating circumstances of M and attempted robbery with aggravating circumstances of D). On 12 April 2018, on counts 4, 5 and 6 (the assault with intent to cause grievous bodily harm of Mrs Notten and the murder and robbery with aggravating circumstances of Mr Notten). On 17 May 2018, on count 1 (assault with intent to cause grievous bodily harm on Bucklow). It is unclear when the accused was arrested on counts 11 and 12 relating to false documentation. This leads me to the issue of identification.

Identification

- [96] It is common cause that identikits of the suspect were obtained at an early stage from Howells and Mrs Notten. It is also common cause that only photo identity parades were conducted at a later stage, after the accused's arrest for the McPherson attack. Sergeant Alrod Opperman conducted those for Howells, Esterhuizen and Bucklow, and Damon the parade for M and D.
- [97] Howells testified that a police officer came to his home about two hours after McPherson's murder for the purpose of compiling an identikit (Exhibit "J"). He described the attacker to the officer and she compiled the identikit on her computer using, it would seem, a programme which allows for a number of possible features.
- [98] The description he gave her was of a man with dark skin, a big nose, small ears, very short scruffy 'dreadlocks' and who was quite short and stocky. In compiling the identikit the officer was unable to make the attacker's skin as dark as Howells recalled it and his ears and other features were not drawn as accurately as Howells would have liked.

- [99] The identikit reflects that the attacker also had a small moustache and was described as approximately 30 to 35 years of age, with average height and a muscular build. He was a black male, possibly a foreigner since he said the word 'ola' to Howells.
- [100] On 16 April 2018 Howells was called to the Fish Hoek Police Station for the photo identity parade. He drove there on his own and waited in a room. Opperman arrived and showed him a set of 8 colour photographs (part of Exhibit "J"). As with the others in this case, the photographs only show the head and partial shoulders of male individuals.
- [101] Exhibit "J" reflects that the parade started at 9.36am and finished at 9.52am. Howells identified the accused at 9.42am, i.e. within 6 minutes. It also records how Howells recognised the accused, as follows: 'I remember that the male had small ears and was very dark of complexion. His body shape was between well built and normal. He was shorter than me. I remember that he had a small moustache. He was wearing dark clothing on the day.' It is also recorded that the witness identified the suspect 'with a fair degree of certainty and confidence, without hesitation'.
- [102] During his evidence Howells explained that he focused on the attacker's face as he approached from a few metres away on the bicycle. He was able to get a good look at his face while he stood and waited for the man to pass. Opperman did not suggest to him that the suspect's photograph might be included on those shown to him. According to Howells, the faces of the 8 males were not similar to each other.
- [103] Esterhuizen testified that whilst serving as a permanent member of the South African Navy from 1969 to 1975 he was a member of its photographic unit. He is a keen photographer and has kept up this hobby over the years. His main area of interest is portrait photography.
- [104] On 19 April 2018 he was called to the Fish Hoek Police Station for the purpose of a photo identity parade. He drove there alone and, like Howells, waited in a room on his own. He was then escorted to a room where he met Opperman.
- [105] Opperman asked him whether his attacker was among the set of 8 colour photographs shown to him (Exhibit "R"). It is not in dispute that the same individuals in the set were those shown to Howells, although there is no suggestion that Esterhuizen was aware of this, and the sequence in which they appear is different, save in one respect (which is not the photograph of the accused).
- [106] Esterhuizen estimated that it took him about 20 to 30 minutes to identify the accused. At one point he got up and walked away since, to his trained eye, one or two photographs were distorted and he needed to see through the distortion. He was comfortable taking his time because Opperman had invited him to do so. Upon reflection he was confident that he had made the correct identification, which was the photograph of the accused. Exhibit "R" reflects that the parade commenced at 9.22am and finished at 10.17am. Esterhuizen made the identification at 9.52am, which confirms his testimony.

- [107] His evidence was further that throughout the attack his main focus was on the accused's face and eyes because, due to his training, he knew that these features are an important indicator of the attacking blows to follow. Esterhuizen added that the photographs were on a computer screen and Opperman allowed him to enlarge them, given his concerns about their quality.
- [108] Exhibit "R" also reflects that Esterhuizen recognised the accused because 'he was very dark of complexion, he was taller and younger than me (between late 20's to early 30's in my opinion). He had mini dreads... I also remember the lower part of his face as well as facial expressions that he made.' Opperman recorded that Esterhuizen identified the suspect with a fair degree of certainty and confidence. Like Howells, Esterhuizen was of the opinion that the individuals in the photographs did not look similar to each other.
- [109] He was asked about his description recorded by Opperman that the accused had mini dreadlocks. He explained that at the time of the attack the accused's hair was styled in a very short type brush cut, which he would not have described as mini dreads. It was Opperman who told him the description he gave meant 'mini dreads'.
- [110] Bucklow testified that he is a professional fine artist, including portraiture. Shortly after the incident on the bridge, while cycling with his wife, he saw the man at the top of Ou Kaapse Weg, carrying water containers. On this occasion he confronted the man, who denied having tried to attack him on the bridge. On a subsequent occasion he saw him walking in Fish Hoek as he drove past with his wife.
- [111] Bucklow had not previously considered reporting the incident on the bridge to the police since he had not been seriously injured or robbed despite the manner in which he was attacked, and only sustained some bruising. However, as the months passed and attacks in the area escalated, his wife persuaded him to do so. He gave a statement to the police on 15 March 2018, just after McPherson's murder.
- [112] On 10 May 2018 Bucklow was called to the Fish Hoek Police Station for the purpose of a photo identity parade. He too drove there alone and waited on his own. He immediately identified the accused from photographs shown to him by Opperman on a computer screen. The record of the photo identity parade (Exhibit "Z") shows the same individuals as those on Exhibits "J" and "R", although again the sequence is different, save for one on Exhibit "J" and two on Exhibit "R" which are not the accused. Again, there is no suggestion that Bucklow was aware of this when he made the identification.
- [113] It also shows that the parade started at 10am and finished at 10.25am. Bucklow made the identification immediately at 10am which confirms his testimony. The description of how Bucklow recognised the accused demonstrates his trained eye, including thick lower lips and eyes oval in shape, positioned far apart. It also shows that Bucklow reported having seen the accused a week after the incident carrying water containers on Ou Kaapse Weg,

which again confirms his testimony. Opperman recorded Bucklow's reaction to the identification as follows: 'Witness identified the suspect instantaneously without hesitation and with a high degree of confidence and certainty.'

- [114] Bucklow confirmed that at no stage did Opperman suggest to him that the suspect might be on the photographs shown to him. He simply asked him whether he recognised any one of them. Bucklow agreed with Howells and Esterhuizen that the individuals in the photographs were not similar to each other. He agreed with Esterhuizen that the photographs are of poor quality. He testified however that, based on his experience, it is actually more difficult to identify someone from a photograph than in real life, since photographs can distort certain features, particularly if their quality is poor. In his words: '... a person can look different in one photo and ...then the next photo you can look... completely different, so I mean you have to really know what the person looks like to recognise them.'
- [115] Opperman testified that the standard procedure for photo identity parades, of which he has conducted a number, is as follows. He receives an instruction letter in a sealed envelope from the official who compiles the photo parade. He opens the envelope in the presence of the witness. He then logs onto the NPIS (National Photo Imaging System) with his username and password.
- [116] Thereafter he enters the biographical details of the witness (name, address etc). There is a check box which he must select before showing the photos to the witness, in which he must confirm having told the witness he is impartial (not involved in the investigation) and that the suspect might not be among the photos to be shown. The photos can only be accessed on the screen once this confirmation has been entered.
- [117] If a witness makes an identification the NPIS asks two questions, first, what the witness did and second, how the witness recognised the suspect. There are only 500 characters available to summarise the answers to these questions. He listens to the witness and makes his own summary from these available characters.
- [118] For the recognition part he asks the witness if there is anything he or she can remember in terms of facial features, height, age, any visible tattoos or jewellery and so on. Once this part of the process is completed, he reads back to the witness what he has typed into the particular fields and if the witness agrees, he continues to the next step.
- [119] This involves him typing in his own description of how the witness reacted during the photo parade and, where a witness has been escorted by a police guard, inserting those details as well. The system then generates a document (SAPS 329) which is a full recordal, inclusive of when the parade started, when it finished and the time the identification was made. The witness is taken through each page to confirm its correctness before signing. Thereafter Opperman hands over the SAPS 329 to the investigating officer. He confirmed that in all three instances in the current case he followed this procedure.

- [120] Opperman did not have the photo identikit of Howells when he held that parade. He saw it for the first time when testifying. Opperman has no part in the selection of the photos themselves, which are generated from the NPIS database by other officials. The official generating the photos does so independently of the investigating officer.
- [121] The NPIS system makes provision for a known suspect to be legally represented at a photo identity parade. However when Opperman conducted the three parades in question there was no indication from the investigating officer, Damon, that a legal representative had requested to be present, which is the usual procedure.
- [122] If a description of the suspect was given earlier by a witness, this would have been to the investigating officer. Opperman did not know whether this was done in the present case. The official compiling the photos enters certain criteria into the system, such as the suspect's age, height, race and so on. The system also allows for a range, for example five years younger and older than the suspect, as well. The system automatically generates photographs based on these criteria. The official does not see the names of those selected. Only Opperman sees them when he opens the envelope.
- [123] He explained that when he records an identification made with a fair degree of certainty, what he means is that the witness takes a bit longer than an immediate identification. Opperman will not, and does not, confirm the correctness of any identification even if asked. Howells confirmed this in his testimony.
- [124] Opperman accepted that there were differences in the features of the individuals in the photographs, but in his opinion they were suitable for the purpose of each parade. This is why he did not, as he was entitled to, request other photographs. He did not know whether the suspect had been arrested at the time of the parades. He is stationed in the War Room at Cape Town Police Station and was not involved in the investigation in any way. He also did not know if a formal identity parade was ever held.
- [125] As far as Esterhuizen's testimony about the 'mini dreads' is concerned, Opperman recalled that, based on Esterhuizen's description, he asked him if the hairstyle was similar to Rastafarian dreadlocks to which Esterhuizen replied yes, but much shorter. This is probably why he (Opperman) reflected it as mini dreads.
- [126] Opperman also testified that where the witness is asked to explain how he or she recognised the suspect, the photographs are no longer visible on the screen due to the progressive check box system. Accordingly the witness does not have the identified photograph in front of him or her when giving the description.

- [127] He agreed that by the time of the second and third parades he was aware that Howells had identified one of the individuals on the set of photographs as the suspect. When challenged about his independence he replied that, in accordance with standard procedure, he only opened the sealed envelope when in the presence of Esterhuizen (the second parade) and Bucklow (the third parade), and then only saw the photos once they were loaded on the screen thereafter.
- [128] He also pointed out that he would not have realised they related to the same suspect in each case upon receiving each instruction because each had a separate docket number, although he accepted that the selection number 5456 was the same in each instance on the written instruction.
- [129] When asked why he did not withdraw from the two later parades in these circumstances, he reasonably replied that it is impossible for him to independently remember all selection numbers. At no stage was he informed by the investigating officer that it was the same suspect in all three different cases, nor was he otherwise aware of this.
- [130] Mrs Notten testified that during the weeks after she and her husband were attacked the police presented her with various photographs. She was also asked to attend at the Muizenberg Police Station for the purpose of compiling an identikit, where she was again shown photographs. She did not recognise the attacker in any of these photographs.
- [131] She was also not comfortable with the identikit generated by the computer programme, which had to be changed based on her description until it looked better. She added that 'what I tried to tell them the computer never wanted to draw' in respect of the attacker's hairstyle.
- [132] The identikit (Exhibit "S") records that the suspect was described as between 30 to 35 years of age, approximately 1.9 metres tall, of medium build, and was a black male with a very dark complexion. She did not believe that she provided the attacker's height to the officer concerned because that would mean he was taller than her husband, and she would definitely have said no. All she knew was when the attacker stood opposite her husband they were roughly the same height.
- [133] Although she could not recall the date, it is undisputed that Mrs Notten identified the accused from a set of eight photographs shown to her at her home on 17 March 2018 (also Exhibit "S"). The individuals in this set are all different to those used in the parades for Howells, Esterhuizen and Bucklow, with the exception of the accused. On the last page of Exhibit "S" is a list of their names. The accused's appears as Russell Wine.
- [134] According to Mrs Notten, two or three police officers arrived unannounced. They told her they had some new faces for her to look at. She was not told that the suspect might be on the photographs. She could not remember the names of the officers, but did recall that one of the police involved in the investigation was Plaatjie.

- [135] Although the accused's hair was longer at the time of the attack she recognised something about his eyes, which initially looked 'quite nice' but during the attack became small and frenzied, as if he had taken drugs. She identified him immediately. After she made the identification she asked whether she was correct, but was told that they were not allowed to talk about this. This did not matter to her because she was in no doubt whatsoever that it was him.
- [136] She also testified that it would have been easier to recognise him in person but did not get the chance. She could not recall having told the police officer who showed her these photos (who it turned out was Plaatjie) that she wanted a formal identification parade as well, although she would have been willing to attend one.
- [137] Plaatjie testified that that he was the first investigating officer in the Notten case. He met Mrs Notten on three occasions for identification purposes. The first was at the Muizenberg Police Station where he showed her an album of photographs. She was asked to take her time to see whether she recognised her attacker. She was not able to identify anyone. The accused was not included in this album.
- [138] The second occasion was when he showed her the identikit which she had been asked to assist in compiling. Plaatjie had not been involved in that process, and did not know who had compiled it. He was then transferred to the Wynberg Cluster but took the docket with him.
- [139] On 17 March 2018 he obtained a photo of the accused after his arrest at Fish Hoek Police Station, with Damon's consent. He prepared a set of photos which he compiled from the NPIS with faces of male individuals who he believed were similar in appearance to the accused and included the accused's photo as well (Exhibit "S"). He took these photographs to Mrs Notten at her home. Sergeant Jones accompanied him. Mrs Notten immediately identified the accused.
- [140] It is undisputed that Plaatjie did not conduct a formal photo identity parade as Opperman had. Plaatjie is aware that one of the requirements for identity parades is that they be conducted by someone who is not involved in the investigation. As a precaution, he took Sergeant Jones, who was not part of the investigation, with him. According to him, Jones was present when Mrs Notten made the identification.
- [141] He confirmed Mrs Notten's testimony that she had not requested a formal identity parade. He was referred to his statements made on 18 March 2018 and much later on 17 October 2018 when he recorded that she had requested a formal line-up.
- [142] He replied that he did not remember her asking for one, but that she said even if one was held she would be able to identify the accused. It was for this reason that he contacted the prosecutor involved at the time, who gave him the go-ahead to requisition the accused

although he had not yet been charged for the Notten attack. He did not arrange one since shortly thereafter he was sent on a course and the docket was taken over by another detective. He was subsequently seconded to the anti-gang unit and had no further official role in the investigation.

- [143] Plaatjie was challenged about the differences between the facial features and apparent ages of the individuals in the photographs from which Mrs Notten made an identification. In his view they were sufficiently similar. He was told that Mrs Notten herself testified about their visible differences. I will accept that this was a genuine mistake, given that she gave no evidence to this effect.
- [144] Plaatjie confirmed that, had the formal identity parade taken place, he would have arranged for someone else to conduct it. He denied that he was required to follow the same procedure when showing photographs informally to a witness. It had never been his intention to hold a formal photo identity parade with Mrs Notten.
- [145] On 29 March 2018, M and D attended on Fish Hoek Police Station at Damon's request to view a set of 103 photographs (Exhibit "V"). Both testified that they looked at these photographs together in Damon's office. According to M, Damon asked them if there was anyone they recognised, and made sure that they viewed all of them before making any identification.
- [146] M identified three photographs, all of which were different ones of the accused. D ultimately agreed with two, but they disagreed on the third. Neither identified a fourth photo of the accused (on the second page, second from the right, in the second last row).
- [147] M's testimony in relation to the identification was clear and consistent while D's was confusing, but in fairness he repeatedly stated that his memory of the identification process was very poor. D differed from M in that he recalled going to the police station on two occasions, and on both they identified their attacker. According to D, after making the first identification Damon confirmed that it was correct. This raises the unanswered question why Damon would have called them back again. Given the State's decision not to call Damon to testify, the Court is left in the dark on this aspect.
- [148] All of the complainants who testified, as well as Howells, also made dock identifications of the accused. To this it must be added that both M and D testified that the accused had a bad stutter.
- [149] Although the State maintained that the accused stuttered during his testimony, I did not detect this. However I cannot rule it out since the acoustics in the court are poor, the accused's testimony was translated, and both the accused and I were behind Covid-19 protective screens. A further factor is that M and D's evidence about the accused's stutter was not challenged, and nor did the defence take issue with this when the State confronted the accused about it during cross-examination.

The temporary asylum permit

[150] Mr Bradley Solomons is an immigration officer employed at the Department of Home Affairs in its Inspectorate Unit. His duties entail

inspection, detention and deportation of persons who contravene the Immigration Act.

[151] He testified that he was provided with a copy of an asylum seeker's temporary permit (Exhibit "X"). This reflects the name Blessing Bveni, date of birth 7 August 1988, nationality Zimbabwean and an expiry date of 16 September 2017. Accordingly, the permit expired more than three years ago.

[152] Solomons entered the permit number into the Home Affairs system. None of the accused's details on the copy of the permit were verified. Instead the system reflected the names Albert Mawanga, also a Zimbabwean national, with date of birth 28 March 1983. The defence conceded that the photograph appearing on the copy of the permit is that of the accused. Solomons also testified that the system has no record of the accused being legally in this country.

[153] As previously stated, on the accused's own version, he is not legally in South Africa. However, the charge he faces in this regard is being in possession of a fraudulent temporary asylum seeker's permit. The only witness who testified about the seizure of documentation of this nature was Luke, but he only testified about having seen a passport containing the photograph and personal details of the accused. No evidence was led by the State as to how the copy of the temporary asylum seeker's permit bearing the accused's photograph and personal particulars came to be in possession of the police. In fact, I was informed that the original cannot be located. Again, this is an aspect about which I would have expected the State to call Damon to testify.

The accused's evidence

[154] The accused testified that he is currently 33 years old. He moved to Phillipi from Fish Hoek sometime between November 2017 and January 2018.

[155] He could not recall where he was on 11 October 2017, the day of Bucklow's attack. He has never heard of the bridge in question. He does not even know where the Silvermine Nature Reserve is. He also does not know where Ou Kaapse Weg is. Bucklow was lying about him being the attacker.

[156] He could not recall where he was on 12 January 2018, the day of the M and D attack. He does not know where Peers Cave is and first heard of it from his lawyer. Both M and D were lying about his identity.

[157] He could not recall where he was on 28 January 2018, the date of the Notten attack. He does not know the area where the attack took place, or even that it existed before he was shown photos of it by his lawyer (presumably Exhibits "F" and "G").

He does not know the person in the identikit compiled with Mrs Notten's assistance (Exhibit "S"). He is

1.78 metres tall, whereas the identikit reflects that the attacker was about 1.9 metres tall. It was not him who attacked the Nottens.

[158] Although he had lived in the Fish Hoek area for at least two years, he did not know where Brigantine Road is. He could not recall where he was on 7 February 2018, the day of the Esterhuizen attack. He also knew nothing about a screwdriver. Esterhuizen was lying. It puzzled him why Esterhuizen identified him at the photo identity parade because he had never met him.

[159] He wondered why the police had not conducted a formal line-up where Esterhuizen would have had to point him out in person and not just from a photograph. He had never had Esterhuizen's community hand radio. The police were lying when they said they found it at his residence. The first time he heard about the hand radio was from his lawyer.

[160] He was arrested on 9 February 2018 in Fish Hoek (Exhibit "K") after he had an argument with the other man depicted in those photos over a cigarette lighter. The man had insulted him 'saying I did... I didn't want to share, because the person saw me smoking a cigar'. The argument continued and he picked up a stone to throw at the man.

[161] During their scuffle a white woman (Anel Nortier) saw what was happening, stopped her vehicle and called for help. Security personnel arrived and questioned the two men. They saw a screwdriver lying close to the other man while the accused was holding a stone. The screwdriver came from the other man, which differed from the version put to Nortier when she testified.

[162] His evidence was further that he was then arrested and held in custody at Fish Hoek Police Station for two days. The police told him there was a person who was stabbed with a screwdriver and they wanted to investigate whether he was the perpetrator. They later told him that he was innocent and he was released from custody.

[163] He could recall where he was on 13 March 2018, the day of the McPherson attack. He was in Phillipi. He knew nothing about the attack, has never been to Brigantine Road and repeated that he does not know where it is. He was shown a photo (Exhibit "E"), the scene of McPherson's attack, which is close to the sports field. He has never been there. He did not know the person in the identikit compiled with the assistance of Howells (Exhibit "J"). In his opinion they look completely different.

[164] Early in the morning of 13 March 2018 he received a phone call when he was in Phillipi from a Thulani who lives in Fish Hoek in an area called Nyongoloza. Thulani told him he was selling a bicycle and a cell phone. The accused bought and resold items for a living. He decided to buy them.

- [165] He travelled to his sister's home in Masi where he had arranged to meet Thulani. He paid him for the items and Thulani left. He sold the bicycle to a barber (Simango). He sold the cell phone to a man called Chris (Chirova) on 14 March 2018 at around 4.30pm, although he had not earlier challenged Chirova's testimony that he bought it from the accused late on the afternoon of 13 March 2018. He did not dispute Simango's evidence that he bought the bike from the accused at around 9 to 10am on 13 March 2018.
- [166] The accused confirmed that he was arrested at his residence in Phillipi. He claimed he was sitting with two friends when police kicked the door open and pointed three firearms at him. One was holding a photo of him. They said this is Blessing and arrested him.
- [167] It was the same photo that Minye took of him two days before the McPherson attack. He denied that the shirt depicted in that photo
- (Exhibit "M") is the same as Exhibit "P2". He had never seen Exhibit "P2" before it was shown in court, and the police never retrieved a shirt from his residence.
- [168] The accused could not recall the police removing any items from his home at the time of his arrest. Banda was lying about him giving the name of Russell Wine. The only time items were placed in forensic bags in his presence was at Fish Hoek Police Station, and this was only the clothing he was wearing.
- [169] He confirmed having been taken back to his residence but maintained the police never told him where they were taking him. All he recalled was the police knocking on the owner's door while he was left behind in the vehicle. He was never shown any items allegedly seized during the search and seizure operation.
- [170] After returning thereafter to Fish Hoek Police Station the police interrogated and severely assaulted him. He thought that if he did not make something up they would kill him, so he lied, telling them he had hidden the knife at the beach. This had not been put to any of the police officers when they testified.
- [171] In the early hours of the following morning the police took him to a beach close to Fish Hoek Police Station. It would seem that this was not for the purpose of retrieving the knife since the accused testified that there were three homeless people waiting, two men and a woman. The police gave them the go-ahead to assault him, which is how he came to have scars on his head. He never reported these assaults because the police threatened him, not even to the court during any of his prior appearances in Simonstown. This too had not been put to the relevant State witnesses, even though, in the case of Banda at least, it is undisputed that it was he who booked the accused out of the cells in the early hours of 15 March 2018 and that no-one else had done so.

- [172] After the assault on the beach he was taken to Wynberg Police Station. He remained in police custody for four to five days (from the time of his arrest) before being transferred to Pollsmoor Prison. The accused never had the passport and temporary permit of which copies are contained in Exhibit “X” in his possession.
- [173] Although his sister lived in Masi at the time, he did not know her address but only how to get there. He never bothered to establish the name of the street where she lived. Thulani also lived in Masi. Minye was lying about the direction in which the accused was walking on the day he intercepted him, two days before McPherson’s murder.
- [174] When he still lived in Masi the accused’s residence was opposite Andrew’s Place. He never asked his landlord for its street address. He simply knew how to get there. Minye was also lying about him having lived in the informal settlement adjacent to the Glencairn expressway. The accused did not know that settlement, although he somehow knew there were structures there made of plastic. When challenged he claimed to have been referring to plastic structures behind his own residence in Masi.
- [175] Minye was also lying about knowing the names of other residents of the settlement. So too was Toriro about the accused approaching him to sell him the CAT phone. The first time the accused laid eyes on Toriro was when he testified.
- [176] Luke was lying about having found the passport containing his personal particulars in his residence. Although the extract from the passport before the Court, Exhibit “X”, shows that it was issued to one Allan Ngoni Marozva, but bore the name Blessing Bveni, Banda was lying when he said the accused told him he had been with Allan on 13 March 2018.
- [177] He was surprised to see his photo on the temporary permit because the same photos had been in his residence. He also never told the police where they could find the bicycle, although the address it was found was opposite where, on his version, he had lived in Masi. When confronted by Nortier’s testimony that he had the screwdriver on 9 February 2018, he claimed for the first time that following the incident the security personnel arrested not only him, but also the other man involved.

Evaluation

- [178] All of the State witnesses who testified, with the exception of Simango and Luke, and D (but only insofar as the photo identity parade is concerned), impressed as honest, reliable and credible witnesses. Pivotal witnesses such as Robert McPherson, Howells, Chirova, Nortier, Toriro, Minye, Esterhuizen, Mrs Notten, M, Banda, Taylor, Opperman and Bucklow were unshaken in their testimony. The differences in the testimony of Chirova and Mapondo were not material, nor were those between the evidence of Banda and Johannes.

[179] What the testimony of Chirova and Mapondo established is that the accused approached them on the day of McPherson's murder to sell the CAT phone. That Banda did not recall finding the head flashlight at the accused's premises, but Johannes recalled that he had, lends support to the honesty of their versions and shows that they did not conspire to tailor their evidence.

[180] It is also necessary to bear in mind the fact that the police officers who testified were recalling events which occurred about 2 years before they gave evidence. Given their workload and the challenges they face in the form of resources and the like, it is to be expected that not every single detail of what occurred would be fresh in their memories so long after the event.

[181] I have my doubts that Simango's intentions when he bought McPherson's bicycle were as honourable as he claimed. However

it is undisputed that he bought the bike from the accused sometime between 9 and 10am on the morning of 13 March 2018, which was within an hour of McPherson's murder. He also had no reason to lie about this.

[182] Toriro and Minye, who were particularly impressive, were entirely independent witnesses who had no reason to falsely implicate the

accused. Toriro had the presence of mind to obtain the accused's cell phone number from his uncle and load his WhatsApp profile

picture onto his own cell phone in order to identify the accused to the police as the man who tried to sell him the CAT phone which

Robert McPherson identified without hesitation as his father's.

[183] The accused's denial that he had an uncle who lived in Masi at the time leaves unexplained how Toriro obtained his WhatsApp profile picture and cell phone number. It is also undisputed that the police traced McPherson's cell phone to Toriro's shop within two hours of McPherson's murder.

[184] I have considered Luke's testimony that a CAT phone was found at the accused's premises during the search and seizure operation. In my view this evidence must be rejected as an embellishment of the truth. Robert McPherson testified that this is a distinctive phone. None of the other officers involved in the operation testified that it was found there. Moreover to accept Luke's evidence on this aspect would have the necessary consequence that the credible evidence of Mapondo, Chirova and Toriro would have to be rejected.

- [185] Minye demonstrated his tracking expertise in the course of his testimony. It is undisputed that the tracks he followed (both foot and bicycle) were fresh and that he did so within an hour of McPherson's murder. Such was Minye's independence that he took careful steps to eliminate Xolani, at whose house the bicycle tracks had stopped, from suspicion, in circumstances where he could easily have pointed the finger at him.
- [186] As far as the differences in the testimony of Banda and Luke in respect of the blue shirt is concerned, on the crucial aspect, namely finding it at the accused's residence within 2 days of McPherson's murder, they corroborated each other. Where there were differences in their evidence about the bagging of the shirt, Banda's makes more sense. Their evidence revealed that Banda was more careful in his approach during his involvement in the investigation, whereas the impression I gained from Luke's evidence was that this was just another duty to fulfil as quickly as possible given all of his other commitments, both work related and personal. Banda's explanation that he gave the shirt to Luke to book in is reasonable, i.e. that since detectives were now involved, he was comfortable in handing it to one of them.
- [187] Luke's approach is borne out by Plaatjie's evidence that Luke stored the bagged shirt in his locker after his first attempt on the day he was handed it by Banda to book it into the SAP 13 failed. Further, Luke's concession that the bag containing the shirt was already sealed when Banda gave it to him supports Banda's version. It is also more probable that Banda had already sealed the shirt in the bag prior to their return to Fish Hoek Police Station as Banda himself testified.
- [188] The shirt worn by the accused in Exhibit "M", taken by Minye just two days before McPherson's murder, was identified by Minye, M, Luke and Banda who found it, as Exhibit "P2". The defence was right in levelling criticism at Luke's evidence in relation to the chain of evidence about this shirt. There is no excuse, no matter how busy one is, for dealing so sloppily with a vital piece of evidence in a very serious crime.
- [189] However, what must also be taken into account is that there is no evidence, nor indeed any suggestion, that any of the police officers involved in the search and seizure operation had access to a sample of McPherson's blood between the time Banda found the shirt at the accused's residence and it was booked into the SAP 13.
- [190] The post mortem report of Dr Taylor (Exhibit "B") records that she conducted her examination three days after McPherson's murder on 16 March 2018 at 10am. It will be recalled that the search and seizure operation took place a day earlier on 15 March 2018, and the shirt was then taken directly to the police station.
- [191] Dr Taylor's report also records that she personally drew a sample of McPherson's blood, sealed it in an evidence bag with a particular serial number, and handed it to pathology officer T Gempies. The only police officer in attendance at the post mortem was Sergeant

Terence Gertze, a police photographer stationed at the Local Criminal Record Centre (LCRC) in Cape Town, as was formally admitted by the accused (Exhibit “D”). There is no evidence that Gertze had any involvement whatsoever in the investigation itself, and it was never suggested that he somehow managed to independently obtain a sample of McPherson’s blood, which could have been used by one of the officers involved to plant this crucial evidence on the shirt and thus falsely implicate the accused.

[192] The accused also formally admitted that, as reflected in her report (Exhibit “U”), Warrant Officer Francis-Pope used the same sample drawn by Dr Taylor in concluding that it was McPherson’s blood on the shirt, since the two serial numbers are identical.

[193] In *State v Moti*[4] the Supreme Court of Appeal dealt with the issue of photo identification. Given that the judgment itself is in Afrikaans I will, for convenience, quote from the headnote in English.

[194] The Court held that it was not necessarily wrong to show eye-witnesses photographs of suspects who were still at large. That could be done in order to find clues or to confirm existing suspicions. The primary object was not to gather evidence for later production in a trial court, but rather to promote the investigation of the crime. For precisely that reason it would be inappropriate to impose upon such a photo identification the strict requirements of a regular identity parade or line-up. Evidence of what occurred during such a photo identification is thus in principle admissible. Proof that eye-witnesses of a crime had pointed out a photograph as being that of a person involved in the crime, together with evidence that it was a photograph of the accused, could therefore play an important, and even a decisive, role in the conviction of the person so identified.

[195] However, because all the external guarantees for a regular identity parade would sometimes be absent, such evidence has to be approached

carefully and with caution. Two questions need to be answered. First, was the identification proper and second, was the evidence reliable.

[196] As to the first question, it would, for example, be improper to arrange a photo identification, instead of an identity parade, after the accused had already been arrested. As to the second question, reliability depends on a variety of factors. These include the

credibility of the eye-witness concerned, whether the person conducting the parade was part of the investigation team; the opportunity which the witness had to observe the suspect during the commission of the crime; whether he or she previously gave a description of the suspect to the police which corresponded with the photograph; the circumstances in which the photo of the suspect was shown to the witness; and in particular whether he or she was informed that the suspect was possibly included in the photographs.

[197] Others included whether the witness was alone when he or she made the identification or was in the presence of other potential witnesses,

the nature and clarity of the photographs in question, the number of other photographs displayed; the comparability of the other

photographs to that of the suspect; and whether those shown to the witness were still available and placed before the Court, so that it might form its own impression and assess the comparability thereof.

[198] There is no evidence to suggest that Howells, Bucklow, Esterhuizen and Mrs Notten even knew each other before all separately identified the accused. Esterhuizen and Bucklow have particular skills in recognising and recalling facial features. Both Howells and Mrs Notten complained about the accuracy of the identikits they were asked to assist in compiling, and accordingly these identikits cannot have influenced them in their subsequent photo identifications which were without hesitation. Esterhuizen was very careful, taking his time during the photo identity parade, to satisfy himself that he had the right person.

[199] This was also after Mrs Notten had been shown photographs on other occasions but recognised no-one in them. This is therefore not a case where she was willing to identify just anyone. Even when she testified two years after the attack she was still visibly

traumatised, yet she showed no personal animosity towards the accused. She only wanted to understand why he did it.

[200] I am satisfied that, having regard to the totality of the evidence on this aspect, Opperman was entirely independent and that he conducted the photo identity parades according to the book.

[201] The defence made much throughout the trial of the apparent lack of similarity between the individuals on the photographs, as confirmed

by Bucklow, Howells and Esterhuizen. I am mindful of what was stated in Moti in this regard. I am far from convinced, subjectively speaking, that these differences are as great as the defence would have me conclude. Moreover, it is the NPIS which generates the available comparable photographs. This is a system used by the police nationally, and it is not for me to simply disregard this important objective fact. The set compiled by Plaatjie cannot, in my subjective view, be criticised either.

[202] All of these witnesses had sufficient opportunity to closely observe the accused's face during the incidents. Opperman's evidence established that there are safety checks in the system itself, for example, that when a witness is asked to explain how he or she recognised the suspect, the photo identified is no longer on the screen and the witness is thus again obliged to resort to his or her recollection only.

[203] While it is so that the photo identity parades for Howells and Esterhuizen followed after the accused's arrest for those specific

offences, the following factors fall to be taken into account and accorded due weight in determining whether, on this ground alone,

those identifications should be excluded.

- [204] Opperman himself did not know that the accused was already arrested at that time. Howell's testimony demonstrated that the identification of the accused in the photo identity parade merely served to reinforce his earlier description two hours after the incident and reflected, on his own testimony, in an inaccurate identikit. The photo identity parade was therefore not the only tool made available to Howells by the police for this purpose, and in any event he was able to accurately identify the accused in 6 minutes.
- [205] As far as Esterhuizen is concerned, his evidence and demeanour persuaded me that he is a careful, considered, meticulous person. He took his time to satisfy himself that he had identified the right person on the photographs. There is also no evidence that he knew the accused had already been arrested in relation to the attack on him at the time.
- [206] These factors show that Esterhuizen was not out to find someone who he could implicate as quickly as possible. It is therefore my view that the mere fact of the accused's arrest on these counts (i.e. McPherson and Esterhuizen) at the time of the parade is, without more, nothing other than a neutral consideration. The evidence relating to their respective identifications is accordingly admitted.
- [207] As previously stated Mrs Notten was challenged about the reference in her identikit as well as her statement to the suspect's height. In my view her responses were honest and credible. Moreover, on his own version the accused is 1.78 metres tall and the post mortem report of Dr Van der Heyde (Exhibit "C"), formally admitted by him, reflects that Mr Notten was 1.8 metres tall, which accords with Mrs Notten's recollection that they were about the same height.
- [208] I am also satisfied it is so improbable that all these witnesses would have independently and co-incidentally identified the same suspect, that this in itself is an important indicator of the reliability of their respective identifications. This, together with their credibility and their consistent and reliable testimony, leads me to conclude that they correctly identified the accused.
- [209] Criticism must however be levelled at the manner in which Damon apparently conducted the photo identity parade for M and D, based on their own evidence. If the State had called Damon to testify a clearer picture may have emerged, but having regard to the principles in *Moti* and the only available evidence of M and D, I am obliged to find that the process was so flawed that this Court should have no regard whatsoever to that parade.

- [210] That being said, M was an extremely good witness despite her youth, and both she and D were patently honest. Accepting their version, both had considerable opportunity on the day of their attack to closely observe the accused's facial features. Both identified the blue shirt in Minye's photograph. Both were adamant in their testimony that it was the accused who attacked them. I thus have no hesitation in accepting that they were telling the truth.
- [211] That of course is not the end of the matter, since although the weight of evidence stacked against the accused in respect of the attacks is overwhelming, he is nonetheless entitled to his acquittal in the event of reasonable doubt, and even if subjectively I do not believe him.
- [212] I had the opportunity to observe the accused while the evidence was led over 15 ½ days, including when he testified. There is no doubt in my mind that he is a highly intelligent individual. He listened intently throughout and instructed his counsel to raise challenges during the State's case that only someone of superior intellect would have thought of as the evidence progressed. His testimony demonstrated the same.
- [213] While of course the accused bears no onus, which rests on the State throughout to prove his guilt beyond a reasonable doubt, it is incomprehensible to me that he would not have instructed his counsel to put his version of the events of 13 March 2018 about the purchase of the bicycle and cell phone to a single State witness. This version was given for the very first time when the accused himself testified.
- [214] There are also serious improbabilities in his version. First, the shortest route from Phillipi to Fish Hoek is a distance of 22.5km and a 40 minute drive by private transport, whereas according to the accused, he only travelled by train which logic dictates would have taken him much longer. This does not take into account the distance that he would have to walk thereafter from the train station to Masi.
- [215] McPherson was murdered at around 9am, which is the earliest Thulani could possibly have come into possession of his bicycle, but if the accused is to be believed, he was somehow able to travel from Phillipi to Fish Hoek, buy the bike and phone from Thulani, sell the bike to Simango, and try to sell the phone to Toriro, all by 10am. This is simply not possible.
- [216] Second, Thulani's name came up during Chirova's testimony on the fourth day of the trial, when the accused instructed his counsel to ask Chirova if Mapondo had a friend by that name. Chirova replied that he did not know. It came up again in Mapondo's subsequent testimony, and Mapondo denied this. On both occasions the possible involvement of Thulani was not taken any further.
- [217] It is also highly improbable that the accused, as he claimed, had lived in the Fish Hoek area for at least two years but did not even know of the existence of the Silvermine Nature Reserve which takes up most of that area.

- [218] There is no reason whatsoever to reject Minye's clear evidence about where the accused actually lived, on the edge of the Reserve, that he was mobile and regularly seen moving about that area, and it is patently obvious from the photo taken by Minye, as well as my own extensive observations of the accused, that he is fit, healthy and muscular in a lean way.
- [219] In addition, on his own version, the accused could easily walk the distance of 6.9km from Masi to Fish Hoek train station, as well as the distance of 8.3km from Masi to Noordhoek beach. Moreover, both direct routes either border on, or at times fall within, the Reserve, as is evident from any Google map of the area.
- [220] Taking all of the evidence into account, including that of the accused, and having given appropriate weight to the objective evidence, the inherent probabilities, and the probabilities and improbabilities of the testimony of the many witnesses as I have considered in some detail above, I have come to the conclusion that on counts 1 to 10 the accused's version cannot reasonably possibly be true. Indeed it is so improbable that it must be rejected as false beyond reasonable doubt.
- [221] However, in respect of count 11, namely the contravention of s 49(14) read with s 1 of the Immigration Act 13 of 2002, and while I have my suspicions, the failure by the State to lead any evidence on how the police came to be in possession of a copy of the permit about which Solomons testified, renders me obliged to conclude that it has failed to prove this count beyond reasonable doubt. The accused is thus entitled to an acquittal on this count, along with an acquittal on count 12.
- [222] The following order is made:
1. On counts 1 to 10, the accused is found GUILTY; and
 2. On counts 11 and 12, the accused is found NOT GUILTY.

J I CLOETE

- [1] No 51 of 1977.
- [2] Record pp1064-1068.
- [3] 2020 (1) SACR 469 (CC).
- [4] 1998 (2) SACR 245 (SCA).

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