

SOUTH AFRICA / JUDGMENT

S v James and Another (SS 29/10)

[2010] ZAWCHC 596 (2 December 2010)

[2010] ZAWCHC 596**COURT**

Western Cape High Court, Cape Town

BEFORE

Weinkove

CASE / FILE NUMBER

SS 29/10

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IN THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT

Case No. SS 29/10

In the matter between

THE STATE

Versus

1. KWANELE JAMESAccused 1
2. MZUVUKILE THOSWAAccused 2

JUDGEMENT:

2 DECEMBER 2010

WEINKOVE, AJ The accused were arraigned before this court on the following counts: Count 1: Arson; Count 2: Murder Provisions of the Act on Minimum sentences, 1997 (Act 105 of 1997) are applicable First alternative contravening section 18(2)(a) of the Riotous Assembly Act 1956 (Act 17 of 1956)

Second alternative contravening section 18(2)(b) of the Riotous Assembly Act, 1956 (Act 17 of 1956). Count 3: Murder Provisions of the Act on Minimum sentences, 1997 (Act 105 of 1997) are applicable First alternative contravening section 18(2)(a) of the Riotous Assembly Act 1956 (Act 17 of 1956)

Second alternative contravening section 18(2)(b) of the Riotous Assembly Act, 1956 (Act 17 of 1956). Count 4: Attempted Murder; Count 5: Attempted Murder; Count 6: Attempted Murder; Count 7: Contravening of Section 1(a) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957) Count 8: Contravening of Section 1(b) of the Witchcraft Suppression Act 1957 (Act 3 of 1957); and

Count 9: Contravening of Section 27(1) of the Explosives Act 1956 (Act 26 of 1956) Alternatively, contravening Section 28 of the Explosives Act, 1956 (Act 26 of 1956) [1] It is alleged by the State in respect of count 1 that on or about 2nd March 2009 at or near 54 529 Sidwadwa Street, Kuyasa in Khayelitsha unlawfully and intentionally and with the intent to injure

NONJENGEZINYE MATWA in her property set fire to and thereby damage or destroy her house, being an immovable structure, and the property or in the lawful possession of the complainant. [2] In respect of counts 2 - 6, it is alleged that on that night the complainant, NONJENGEZINYE MATWA, her adult daughter YALEZWA PUWANA, her minor daughters, THEMBAKAZI MATWA and ANELISA MATWA, as well as her minor grandson LIYEMA PUWANA were at her house at 54 529 Sidwadwa Street, Kuyasa, Khayelitsha. During the night NONJENGEZINYE MATWA and her children woke up to find the house burning. When NONJENGEZINYE MATWA tried to open the door she found it to be locked or shut in such a manner that she was unable to open it. Members of the community arrived and kicked down the door and allowed them to escape. Evidence of the remains of a so-called petrol bomb was found on the scene. The house was severely damaged. [3] All the victims were transported to hospital, but LIYEMA PUWANA (minor grandson) and YALEZWA PUWANA (daughter) later died in hospital as result of burn wounds they sustained.

WEINKOVE, AJ

The accused were arraigned before this court on the following counts:

Count 1: Arson;

Count 2: Murder

Provisions of the Act on Minimum sentences, 1997 (Act 105 of 1997) are applicable

First alternative contravening section 18(2)(a) of the Riotous Assembly Act 1956 (Act 17 of 1956)

Second alternative contravening section 18(2)(b) of the Riotous Assembly Act, 1956 (Act 17 of 1956).

Count 3: Murder

Count 4: Attempted Murder;

Count 5: Attempted Murder; Count 6: Attempted Murder;

Count 7: Contravening of Section 1(a) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957)

Count 8: Contravening of Section 1(b) of the Witchcraft Suppression Act 1957 (Act 3 of 1957); and

Count 9: Contravening of Section 27(1) of the Explosives Act 1956 (Act 26 of 1956)

Alternatively, contravening Section 28 of the Explosives Act, 1956 (Act 26 of 1956)

[1] It is alleged by the State in respect of count 1 that on or about 2nd March 2009 at or near 54 529 Sidwadwa Street, Kuyasa in Khayelitsha unlawfully and intentionally and with the intent to injure

NONJENGEZINYE MATWA in her property set fire to and thereby damage or destroy her house, being an immovable structure, and the property or in the lawful possession of the complainant.

[2] In respect of counts 2 - 6, it is alleged that on that night the complainant, NONJENGEZINYE MATWA, her adult daughter YALEZWA PUWANA, her minor daughters, THEMBAKAZI MATWA and ANELISA MATWA, as well as her minor grandson LIYEMA PUWANA were at her house at 54 529 Sidwadwa Street, Kuyasa, Khayelitsha. During the night NONJENGEZINYE MATWA and her children woke up to find the house burning. When NONJENGEZINYE MATWA tried to open the door she found it to be locked or shut in such a manner that she was unable to open it. Members of the community arrived and kicked down the door and allowed them to escape. Evidence of the remains of a so-called petrol bomb was found on the scene. The house was severely damaged.

[3] All the victims were transported to hospital, but LIYEMA PUWANA (minor grandson) and YALEZWA PUWANA (daughter) later died in hospital as result of burn wounds they sustained.

[4] In respect of counts 7 and 8 the State alleges that the death of LIYEMA PUWANA and YALEZWA PUWANA resulted from or is directly

related to any offence contemplated in Section 1(a) to (e) of the WITCHCRAFT SUPPRESION Act, 1957. (Act 3 of 1957). [5] In respect of count 9, the State alleges that the accused wilfully caused an explosion whereby life and property of NONJENGEZINYE MATWA were endangered.

Alternatively were in possession of or had under their control, an explosive under such circumstances as to give rise to a reasonable suspicion that they intended to use such explosive for the purpose of injuring NONJENGEZINYE MATWA and/or damaging her house at number 54 529 Sidwadwa Street, Kuyasa, Khayelitsha. [6] Both the accused pleaded not guilty to all nine (9) charges and the alternate charges. [7] Adv Haldenby on behalf of the accused gave a plea explanation in terms of Section 115(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

Accused 1 denies any involvement in this crime and that he was never at the crime scene at the material times. His defence is one of alibi, that he spent the night at accused 2's place where they watched videos with two lady friends. [8] The plea explanation with regards to accused 2 is the same. If in terms of Section 220 of the Criminal Procedure Act, 1977 (Act 51 of

1977) the defence made on behalf of both accused formal admissions, as contained in Exhibit "A", regarding the post mortem examination on the bodies of the deceased. Dr GAVIN MARTIN KIRK concluded that the cause of death in respect of LIYEMA PUWANA was as result of "burns" and Dr JANETTE VERSTER concluded that the cause of death in respect of YALEZWA PUWANA was "consistent with burns and the consequences." [9] On 24 November 2010 the accused further formally admitted that the sand collected on the outside of the window frame of the bedroom where the alleged petrol bomb entered the room, had been

analysed by Captain Manqaba, a Senior Forensic Analyst, and that he found that the exhibit contained GASOLINE, which is comparable to the commercial product of petrol. That Captain Manqaba correctly noted his findings in the forensic report. That the sand which was collected on the crime scene contained a commercial product namely "petrol" - exhibits "M" and "N". [10] That Dr Khadah of the Khayelitsha Heath Centre on 2 March 2010 examined the complainant, NONJENGEZINYE MATWA and her two daughters ANELISA MATWA and THEMBAKAZI MATWA and she made the following findings: That the complainant NONJENGEZINYE MATWA had burn wounds on her face and arms - Exhibit "0";

That ANELISA MATWA had inhaled smoke - Exhibit "P"; That THEMBAKAZI MATWA had inhaled smoke - Exhibit "Q". [11] Photo's and key to photos of the scene of the crime were provisionally handed in as Exhibit "B". The following aspects of this case appear to be common cause: (a) That the complainant NONJENGEZINYE MATWA resides at No 54 529 Sidwadwa Street, Kuyasa, Khayelitsha (b) That on the Sunday evening of 2 March 2009, she was sleeping in her house with YALEZWA PUWANA (her adult daughter), THEMBAKAZI MATWA (her minor daughter), ANALISA MATWA (minor daughter) and LIYEMA PUWANA (her minor grandson). (c) That on the said date complainant's house was set on fire by a petrol bomb. (d) That LIYEMA PUWANA and YALEZWA PUWANA died of burn wounds sustained during the burning of the house. (e) That NONJENGEZINYE MATWA, THEMBAKAZI MATWA and ANALISA MATWA all received medical treatment for minor burn wounds and smoke

inhalation. [12] In view of the accused's plea explanation, the question the court is required to answer in this case, is still whether the accused committed the crimes as set out in the charge sheet. [13] The State called several witnesses in order to prove its case. (a) Nonjengezinye Matwa, the complainant, was the State's first witness. She resides at 54 529 Sidwadwa Street, Kuyasa, Khayelitsha. She described how on 1 March 2009, a Sunday night, she had gone to bed and was sleeping in her room in the same bed with her adult daughter Yalesha Puwana and her daughter's child Liyema Puwana (her minor grandson of 2 years). The complainant was sleeping with her head at one end of the bed and her daughter and grandchild sleeping at the other end of the same bed. Her two (2) minor children were asleep in the kitchen. She said that at some time past 23h00 she was awoken and heard voices outside and a knocking at the door. She said a male voice asked whether he could buy some offal [complainant sells offal and sheep heads]. She heard a male voice. Only one person spoke. She did not recognise the voice of the person. She said she looked at her watch; it was about 23h10 at the time. She told the person she did not have any sheep heads for sale. She further testified that she was not sure whether she was "sleeping", but shortly afterwards she heard a "thing" coming through her bedroom window and when she looked she saw her children in flames; they were burning. Another object thrown at the kitchen window exploded, but landed outside the house. YALISWA, the mother of the child was burning and she had already left of the bedroom. The complainant stated that she then grabbed the child LIYEMA PUWANA. She took a blanket and wrapped it over the child. She then shouted to THEMBAKAZI MATWA and ANELISA MATWA who were in the kitchen area (her [14] The next state witness, THEMBAKAZI MATWA testified that she is 17 years of age and the daughter of NONJENGEZINYE

MATWA. On the evening of Sunday 1 March 2009, she was sleeping in her mother's house in the kitchen area with ANALISA MATWA (minor daughter). She confirmed the evidence of her mother regarding what happened that evening. [15] ANALISA MATWA stated that she is 13 years of age and the daughter of NONJENGEZINYE MATWA. She testified that she slept in the kitchen area with her sister THEMBAKAZI MATWA on the Sunday evening of 1 March 2009. Her testimony about the events on that evening, confirms the evidence of her sister and her mother. [16] The State then called THULISA MALUWANE who was later identified by her nickname, which was Nontiti. Her evidence was that she was 18 years of age and at the time of the incident and was living with her mother in a shebeen adjacent to the complainant's house. A summary of her evidence in chief was that on Sunday during the day, her friend, a taxi driver, Andile arrived at the shebeen. The accused also arrived at the shebeen. She knew the accused from seeing them in the area. Accused no 1 borrowed a bottle that the family used to keep water in the fridge. It was given to them by her mother who was reportedly under the influence of alcohol. Nontiti described it as a "four-cornered two or three litre plastic bottle". Andile then said she must go with him to friends in MAKHAZA. The accused then asked Andile for a lift to the BP garage to buy petrol. Andile agreed to give the accused a lift to the garage. According to Nontiti, the accused alighted with the empty bottle at the garage and filled the container with "red" petrol. The accused then climbed into the taxi with the container filled with petrol. She testified that she could see that it was petrol. The contents was red and she also smelled it. She quarrelled with the accused in the taxi for using their mother's water bottle for the petrol. On their way back to her house in Kuyasa, the accused alighted with the petrol near the SPARI - shop. She estimated the time at 5 o'clock the afternoon when they came back to her house. She further testified that at approximately seven o'clock in the evening, she saw the accused outside her house standing at a dustbin drinking. The accused were joined by XOLEWA and BABALWA. The four of them left together, but she did not notice the time. She further stated that it is possible for her to drink the whole day and then only get drunk at night when she goes to sleep. [17] Initially NONTITI made a good impression on this court and frankly conceded that she was accustomed to drinking. As the case proceeded it appeared that on the day in question, she had started drinking in the morning and continued to do so until later afternoon/evening. She drank a concoction which was described as "storm" consisting of cider drink mixed with vodka. In examination in chief, Nontiti said she does not know how many bottles of "storm" she drank. It seems most probable that she was far drunker that day than she would admit. (a) In cross-examination and when other witnesses were called, it became increasingly apparent that Nontiti was not altogether a reliable witness, obviously because of the extent to which she had been "imbibing" liquor that Sunday. The court considered that although she tried her best to recollect the events as accurately as possible, she was confused. It would, therefore, be dangerous to accept any part of her evidence, unless that evidence was corroborated by other acceptable testimony. The witness was cross-examined at length and her evidence revealed several shortcomings and contradictions. As it would play no real part in the outcome of this case the court is not going to elaborate on these aspects of her evidence. The issues corroborated by the testimony of Andile is, however, extremely relevant to this case and is accepted by the court as true and convincing. (b) It follows from the foregoing that the court accepts her evidence that Accused No. 1 asked Nontiti's

mother if he could borrow a container and was allowed to take the refrigerator water bottle. The court further accepts that both accused requested Andile to give them a lift to the BP garage so that they could purchase petrol. The court also accepts his and Nontiti's evidence that the Accused took the plastic bottle with them and when they got to the BP garage, alighted from the vehicle and had the bottle filled with petrol. The court accepts that the container had petrol in it because both Nontiti and Andile described the smell of the petrol and Andile confirmed Nontiti's evidence that she had reprimanded the Accused for using the family water bottle to convey petrol in it. Andile said he heard this altercation and smelt the petrol.

[4] In respect of counts 7 and 8 the State alleges that the death of LIYEMA PUWANA and YALEZWA PUWANA resulted from or is directly

related to any offence contemplated in Section 1(a) to (e) of the WITCHCRAFT SUPPRESION Act, 1957. (Act 3 of 1957).

[5] In respect of count 9, the State alleges that the accused wilfully caused an explosion whereby life and property of NONJENGEZINYE MATWA were endangered. Alternatively were in possession of or had under their control, an explosive under such circumstances as to give rise to a reasonable suspicion that they intended to use such explosive for the purpose of injuring NONJENGEZINYE MATWA and/or damaging her house at number 54 529 Sidwadwa Street, Kuyasa, Khayelitsha.

[6] Both the accused pleaded not guilty to all nine (9) charges and the alternate charges.

[7] Adv Haldenby on behalf of the accused gave a plea explanation in terms of Section 115(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977). Accused 1 denies any involvement in this crime and that he was never at the crime scene at the material times. His defence is one of alibi, that he spent the night at accused 2's place where they watched videos with two lady friends.

[8] The plea explanation with regards to accused 2 is the same. If in terms of Section 220 of the Criminal Procedure Act, 1977 (Act 51 of

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[9] On 24 November 2010 the accused further formally admitted that the sand collected on the outside of the window frame of the bedroom where the alleged petrol bomb entered the room, had been analysed by Captain

Manqaba, a Senior Forensic Analyst, and that he found that the exhibit contained GASOLINE, which is comparable to the commercial product of petrol. That Captain Manqaba correctly noted his findings in the forensic report. That the sand which was collected on the crime scene contained a commercial product namely "petrol" - exhibits "M" and "N".

[10] That Dr Khadah of the Khayelitsha Heath Centre on 2 March 2010 examined the complainant, NONJENGEZINYE MATWA and her two daughters ANELISA MATWA and THEMBAKAZI MATWA and she made the following findings:

That the complainant NONJENGEZINYE MATWA had burn wounds on her face and arms - Exhibit "O";

That ANELISA MATWA had inhaled smoke - Exhibit "P";

That THEMBAKAZI MATWA had inhaled smoke - Exhibit "Q".

[11] Photo's and key to photos of the scene of the crime were provisionally handed in as Exhibit "B".

The following aspects of this case appear to be common cause:

- (a) That the complainant NONJENGEZINYE MATWA resides at No 54 529 Sidwadwa Street, Kuyasa, Khayelitsha
- (b) That on the Sunday evening of 2 March 2009, she was sleeping in her house with YALEZWA PUWANA (her adult daughter), THEMBAKAZI MATWA (her minor daughter), ANALISA MATWA (minor daughter) and LIYEMA PUWANA (her minor grandson).
- (c) That on the said date complainant's house was set on fire by a petrol bomb.
- (d) That LIYEMA PUWANA and YALEZWA PUWANA died of burn wounds sustained during the burning of the house.
- (e) That NONJENGEZINYE MATWA, THEMBAKAZI MATWA and ANALISA MATWA all received medical treatment for minor burn wounds and smoke

inhalation.

[12] In view of the accuseds' plea explanation, the question the court is required to answer in this case, is still whether the accused committed the crimes as set out in the charge sheet.

[13] The State called several witnesses in order to prove its case.

- (a) Nonjengezinye Matwa, the complainant, was the State's first witness. She resides at 54 529 Sidwadwa Street, Kuyasa, Khayelitsha. She described how on 1 March 2009, a Sunday night, she had gone to bed and was sleeping in her room in the same bed with her adult daughter Yalesha Puwana and her daughter's child Liyema Puwana (her minor grandson of 2 years). The complainant was sleeping with her head at one end of the bed and her daughter and grandchild sleeping at the other end of the same bed. Her two (2) minor children were

asleep in the kitchen. She said that at some time past 23h00 she was awoken and heard voices outside and a knocking at the door. She said a male voice asked whether he could buy some offal [complainant sells offal and sheep heads]. She heard a male voice. Only one person spoke. She did not recognise the voice of the person. She said she looked at her watch; it was about 23h10 at the time. She told the person she did not have any sheep heads for sale.

She further testified that she was not sure whether she was "sleeping", but shortly afterwards she heard a "thing" coming through her bedroom window and when she looked she saw her children in flames; they were burning. Another object thrown at the kitchen window exploded, but landed outside the house. YALISWA, the mother of the child was burning and she had already left of the bedroom. The complainant stated that she then grabbed the child LIYEMA PUWANA. She took a blanket and wrapped it over the child. She then shouted to THEMBAKAZI MATWA and ANELISA MATWA who were in the kitchen area (her

[14] The next state witness, THEMBAKAZI MATWA testified that she is 17 years of age and the daughter of NONJENGEZINYE MATWA. On the evening of Sunday 1 March 2009, she was sleeping in her mother's house in the kitchen area with ANALISA MATWA (minor daughter). She confirmed the evidence of her mother regarding what happened that evening.

[15] ANALISA MATWA stated that she is 13 years of age and the daughter of NONJENGEZINYE MATWA. She testified that she slept in the kitchen area with her sister THEMBAKAZI MATWA on the Sunday evening of 1 March 2009. Her testimony about the events on that evening, confirms the evidence of her sister and her mother.

[16] The State then called THULISA MALUWANE who was later identified by her nickname, which was Nontiti. Her evidence was that she was 18 years of age and at the time of the incident and was living with her mother in a shebeen adjacent to the complainant's house. A summary of her evidence in chief was that on Sunday during the day, her friend, a taxi driver, Andile arrived at the shebeen. The accused also arrived at the shebeen. She knew the accused from seeing them in the area. Accused no 1 borrowed a bottle that the family used to keep water in the fridge. It was given to them by her mother who was reportedly under the influence of alcohol. Nontiti described it as a "four-cornered two or three litre plastic bottle". Andile then said she must go with him to friends in MAKHAZA. The accused then asked Andile for a lift to the BP garage to buy petrol. Andile agreed to give the accused a lift to the garage. According to Nontiti, the accused alighted with the empty bottle at the garage and filled the container with "red" petrol. The accused then climbed into the taxi with the container filled with petrol. She testified that she could see that it was petrol. The contents was red and she also smelled it. She quarrelled with the accused in the taxi for using their mother's water bottle for the petrol. On their way back to her house in Kuyasa, the accused alighted with the petrol near the SPARI - shop. She estimated the time at 5 o'clock the afternoon when they came back to her house. She further testified that at approximately seven o'clock in the evening, she saw the accused outside her house standing at a dustbin drinking. The accused were joined by XOLEWA and BABALWA. The four of them left

together, but she did not notice the time. She further stated that it is possible for her to drink the whole day and then only get drunk at night when she goes to sleep.

- [17] Initially NONTITI made a good impression on this court and frankly conceded that she was accustomed to drinking. As the case proceeded it appeared that on the day in question, she had started drinking in the morning and continued to do so until later afternoon/evening. She drank a concoction which was described as "storm" consisting of cider drink mixed with vodka. In examination in chief, Nontiti said she does not know how many bottles of "storm" she drank. It seems most probable that she was far drunker that day than she would admit.
- (a) In cross-examination and when other witnesses were called, it became increasingly apparent that Nontiti was not altogether a reliable witness, obviously because of the extent to which she had been "imbibing" liquor that Sunday. The court considered that although she tried her best to recollect the events as accurately as possible, she was confused. It would, therefore, be dangerous to accept any part of her evidence, unless that evidence was corroborated by other acceptable testimony. The witness was cross-examined at length and her evidence revealed several shortcomings and contradictions. As it would play no real part in the outcome of this case the court is not going to elaborate on these aspects of her evidence. The issues corroborated by the testimony of Andile is, however, extremely relevant to this case and is accepted by the court as true and convincing.
- (b) It follows from the foregoing that the court accepts her evidence that Accused No. 1 asked Nontiti's mother if he could borrow a container and was allowed to take the refrigerator water bottle. The court further accepts that both accused requested Andile to give them a lift to the BP garage so that they could purchase petrol. The court also accepts his and Nontiti's evidence that the Accused took the plastic bottle with them and when they got to the BP garage, alighted from the vehicle and had the bottle filled with petrol. The court accepts that the container had petrol in it because both Nontiti and Andile described the smell of the petrol and Andile confirmed Nontiti's evidence that she had reprimanded the Accused for using the family water bottle to convey petrol in it. Andile said he heard this altercation and smelt the petrol.
- (c) As far as the time when this incident occurred is concerned, the court prefers the evidence of Andile that this journey was

undertaken in the evening at about 21h00, not in the afternoon at about 16h00 or 17h00, as stated by Nontiti in her evidence. Both accused admit they travelled in the taxi that evening, but deny that they got out of the vehicle at the BP garage, or carried any container with them, or purchased any petrol, or conveyed any petrol in a container. In this respect the court prefers the evidence of Nontiti to the extent that it is confirmed by Andile that he saw the accused going towards the petrol pumps. We also accept Nontiti's evidence that when the container was filled with petrol it was placed on the floor of the taxi in the seat-row immediately behind the driver, close to where Nontiti was sitting. (d) It is also common cause that both of the Accused requested to be dropped off shortly before the taxi got back to Nontiti's home and they alighted at the shop which is called

Spari. (e) Nontiti said that the Accused had offered as an explanation for transporting the petrol that they intended to use it to fill a motor vehicle belonging to Accused No. 2's sister and then use that vehicle to travel to another shebeen or bar in Delft known as The Italian Pub. The court does not accept this evidence because it is not corroborated by Andile who, according to Nontiti, was the one who asked the question as to what they were going to do with the petrol. Andile did not give such evidence and it is denied by both Accused. The importance of Nontiti's evidence, as read together with Andile's evidence, is that on that Sunday, shortly before the incident, both Accused obtained possession of a plastic container suitable to transport petrol, requested Andile, who had a taxi, to give them a lift to a BP garage, bought petrol, filled the container with petrol and then got off the taxi shortly before arriving at the home of Nontiti and were later seen against at that place without any petrol. Similarly, the court prefers the evidence of Andile that when he got to the BP garage, he did get out of the vehicle and he inflated the tyres of his vehicle, while both accused left the taxi to fill the container with petrol, that the accused got back into the taxi with the petrol and that he, Andile, on his way back to Kuyasa, dropped them off near the Spari shop. [18] The State called as a next witness BABALWA DONASHE. She is 19 years of age and is employed in a restaurant. She testified she met her friend, the witness, Xolelwa at her house at about 20h00 on the evening of 1 March 2009. She stated that they met the two Accused at 22h30 outside the house of Nontiti. They were standing beside a dustbin, drinking beer. There were some empty beer bottles. She says she and her friend were asked by Accused No. 1 to join them and they shared a glass of beer between them. The witness says that this was the first glass of alcohol she'd had that day. She says that Accused No. 1 then said they should go to accused No. 2's hokkie, which seems to be some kind of small shack where he was living behind his family's home. She described how accused No. 2 gave them music CDs/videos and they watched the videos and listened to the music over the TV set. She said there was nothing to drink there and said that the accused said they would go to buy some drink. She described that after some time both accused took off the shirts they were wearing and each put on T-shirts. They were asked why they were taking off their shirts and putting on T-shirts, but they did not reply. She described accused No. 2's shirt as being white with small black stripes and accused No. 1's shirt as being black with small white stripes. She said she was unable to recall the colour of the T-shirts, but said that both were short sleeved. She said that when her friend, Xolelwa, wanted to go with the Accused to buy the liquor, she was told she could not go because they felt that if she went out she would want to go home. They then took about three empty

Castle bottles and they left. They claimed that they were going to go to Nontiti's place to buy beers and they left the two girls

watching the videos. She said the bottles were brown in colour. She said that after about 20 minutes they came running back and said that skollies were chasing them. She described them opening the door in a rush and that they still had the empty bottles with them in a plastic bag. They then put the plastic bag down, took off the T-shirts that they had been wearing previously and put their other shirts back on. She said the accused did not tell the girls why they were again changing shirts. They then said that all of them should go together and look for beers and they did so. They left the shack and walked in the direction of Xolelwa's home - in the direction of the

Spari shop. She said that that must have been past midnight. (a) She said that near a creche in the vicinity they came across the fire brigade and the two girls wanted to know what was happening.

She said she and her friend asked the person driving the fire engine but they got no answer because it just continued on its way. She said that the fire brigade was moving in the direction opposite to which they were walking, the witness then said she left the group and went home. (b) In cross-examination, the witness said that it was probably cold in April at that time but she said that when the Accused took off their shirts, they took off long sleeved shirts and put on short sleeved T-shirts. (c) In cross-examination, it was put to this witness that the Accused will say that they did not change their shirts. They say they put on jerseys because it was cold. She emphatically denied any likelihood that she could be making a mistake on this issue. It was put to this witness that the Accused will say they rushed into the house because they were being chased by the Neighbourhood Watch, who thought they were skollies. The witness insisted that they said they were being chased not by the Neighbourhood Watch but by skollies. (d) It was put to the witness that the Accused will say they never saw the fire engine at all. The witness said they heard a siren and that Accused No. 1 had said that perhaps the Neighbourhood Watch were telephoning the Police. He had then suggested that they all go back to Accused No. 2's house and abandon the search for beer. (e) When Babalwa shouted to the fire engine driver where the fire was they did not get a response but Accused No. 1 had said "nothing

of yours has burnt so let's go" [Record p.212(18)]. The court regards this as a spontaneous response by accused 1. The question

is, how would he have known that nothing of the witness had been burning. [19] The State called LOYISO MALINDI a constable stationed at Harare police station. He stated that he has seven [7] years experience in the police service. Constable Malindi testified that he was on routine patrol duty in the area on 1st/2nd March

2009. At approximately half past twelve [12h30 am] on 2 March he received a complaint from radio control that a house was burning in KUYASA. He then proceeded to the house which was reported to be burning. It took him about 20 minutes with the police van to get to the scene. The siren of the police van was on. He was accompanied by a colleague. (a) On his arrival people were extinguishing the fire in the house with water and soil. He was then told that there were no people inside the house but that three persons, one a minor child, had been taken to hospital by private car to be treated for burns. (b) The fire brigade arrived about 30 minutes later, but soon left as the fire was extinguished.

(c) As far as the time when this incident occurred is concerned, the court prefers the evidence of Andile that this journey was

undertaken in the evening at about 21h00, not in the afternoon at about 16h00 or 17h00, as stated by Nontiti in her evidence. Both accused admit they travelled in the taxi that evening, but deny that they got out of the vehicle at the BP garage, or carried any container with them, or purchased any petrol, or conveyed any petrol in a container. In this respect the court prefers the evidence of Nontiti to the extent that it is confirmed by Andile that he saw the accused going towards the

petrol pumps. We also accept Nontiti's evidence that when the container was filled with petrol it was placed on the floor of the taxi in the seat-row immediately behind the driver, close to where Nontiti was sitting.

- (d) It is also common cause that both of the Accused requested to be dropped off shortly before the taxi got back to Nontiti's home and they alighted at the shop which is called Spari.
- (e) Nontiti said that the Accused had offered as an explanation for transporting the petrol that they intended to use it to fill a motor vehicle belonging to Accused No. 2's sister and then use that vehicle to travel to another shebeen or bar in Delft known as The Italian Pub. The court does not accept this evidence because it is not corroborated by Andile who, according to Nontiti, was the one who asked the question as to what they were going to do with the petrol. Andile did not give such evidence and it is denied by both Accused. The importance of Nontiti's evidence, as read together with Andile's evidence, is that on that Sunday, shortly before the incident, both Accused obtained possession of a plastic container suitable to transport petrol, requested Andile, who had a taxi, to give them a lift to a BP garage, bought petrol, filled the container with petrol and then got off the taxi shortly before arriving at the home of Nontiti and were later seen against at that place without any petrol. Similarly, the court prefers the evidence of Andile that when he got to the BP garage, he did get out of the vehicle and he inflated the tyres of his vehicle, while both accused left the taxi to fill the container with petrol, that the accused got back into the taxi with the petrol and that he, Andile, on his way back to Kuyasa, dropped them off near the Spari shop.

- [18] The State called as a next witness BABALWA DONASHE. She is 19 years of age and is employed in a restaurant. She testified she met her friend, the witness, Xolelwa at her house at about 20h00 on the evening of 1 March 2009. She stated that they met the two Accused at 22h30 outside the house of Nontiti. They were standing beside a dustbin, drinking beer. There were some empty beer bottles. She says she and her friend were asked by Accused No. 1 to join them and they shared a glass of beer between them. The witness says that this was the first glass of alcohol she'd had that day. She says that Accused No. 1 then said they should go to accused No. 2's hokkie, which seems to be some kind of small shack where he was living behind his family's home. She described how accused No. 2 gave them music CDs/ videos and they watched the videos and listened to the music over the TV set. She said there was nothing to drink there and said that the accused said they would go to buy some drink. She described that after some time both accused took off the shirts they were wearing and each put on T-shirts. They were asked why they were taking off their shirts and putting on T-shirts, but they did not reply. She described accused No. 2's shirt as being white with small black stripes and accused No. 1's shirt as being black with small white stripes. She said she was unable to recall the colour of the T-shirts, but said that both were short sleeved. She said that when her friend, Xolelwa, wanted to go with the Accused to buy the liquor, she was told she could not go because they felt that if she went out she would want to go home. They then took about three empty

Castle bottles and they left. They claimed that they were going to go to Nontiti's place to buy beers and they left the two girls

watching the videos. She said the bottles were brown in colour. She said that after about 20 minutes they came running back and said that skollies were chasing them. She described them opening the door in a rush and that they still had the empty bottles with them in a plastic bag. They then put the plastic bag down, took off the T-shirts that they had been wearing previously and put their other shirts back on. She said the accused did not tell the girls why they were again changing shirts. They then said that all of them should go together and look for beers and they did so. They left the shack and walked in the direction of Xolelwa's home - in the direction of the Spari shop. She said that that must have been past midnight.

- (a) She said that near a creche in the vicinity they came across the fire brigade and the two girls wanted to know what was happening.

She said she and her friend asked the person driving the fire engine but they got no answer because it just continued on its way. She said that the fire brigade was moving in the direction opposite to which they were walking, the witness then said she left the group and went home.

- (b) In cross-examination, the witness said that it was probably cold in April at that time but she said that when the Accused took off their shirts, they took off long sleeved shirts and put on short sleeved T-shirts.
- (c) In cross-examination, it was put to this witness that the Accused will say that they did not change their shirts. They say they put on jerseys because it was cold. She emphatically denied any likelihood that she could be making a mistake on this issue. It was put to this witness that the Accused will say they rushed into the house because they were being chased by the Neighbourhood Watch, who thought they were skollies. The witness insisted that they said they were being chased not by the Neighbourhood Watch but by skollies.
- (d) It was put to the witness that the Accused will say they never saw the fire engine at all. The witness said they heard a siren and that Accused No. 1 had said that perhaps the Neighbourhood Watch were telephoning the Police. He had then suggested that they all go back to Accused No. 2's house and abandon the search for beer.
- (e) When Babalwa shouted to the fire engine driver where the fire was they did not get a response but Accused No. 1 had said "nothing

of yours has burnt so let's go" [Record p.212(18)]. The court regards this as a spontaneous response by accused 1. The question

is, how would he have known that nothing of the witness had been burning.

- [19] The State called LOYISO MALINDI a constable stationed at Harare police station. He stated that he has seven [7] years experience in the police service. Constable Malindi testified that he was on routine patrol duty in the area on 1st/2nd March

2009. At approximately half past twelve [12h30 am] on 2 March he received a complaint from radio control that a house was burning in KUYASA. He then proceeded to the house which was reported to be burning. It took him about 20 minutes with the police van to get to the scene. The siren of the police van was on. He was accompanied by a colleague.
- (a) On his arrival people were extinguishing the fire in the house with water and soil. He was then told that there were no people inside the house but that three persons, one a minor child, had been taken to hospital by private car to be treated for burns.
 - (b) The fire brigade arrived about 30 minutes later, but soon left as the fire was extinguished.
 - (c) Const Malindi placed a police cordon around the house and then summoned Const Swart a police official to take photos of the scene. Const Swart arrived on the scene at 01h55 am and took photographs of the house and scene. He took pictures inside and outside the house, including an exterior photo of a piece of cloth and broken green beer bottle glass. [By agreement the photos and key to photos were handed in as exhibit "B".] He then also called the standby detective Const NDWANE, who on arrival then called the Dog Unit to the scene. Detective Constable Malindi left the scene and went to the Site B day hospital where he found doctors attending to the burned patients. His evidence does not really bring the matter much further, however, Detective Constable Malindi's evidence that he received a report at 12h30 am, confirms the complainant's evidence regarding the time that her house was set on fire. His testimony also corresponds with the evidence of Babalwa Donashe and Xolelwa that when they left the "hokkie" of accused 2 past 12 o'clock and on their way to the Spari shop, they heard a siren (police van). The accused in cross-examination stated that there was a siren in the distance. This evidence clearly confirms that the accused were in the close vicinity of the burning house, shortly after the incident occurred. [20] The State then called XOLEWA KEWUTI who testified that on Sunday 1 March 2010 at 11h00 pm. She was at her house with her friend BABALWA. They then decided to visit a friend NONTITI at her mother's shebeen. She told the court that on arriving at the shebeen at 11h30 pm, they met Kwanele [accused 1] and BEZA [accused 2]. They were standing drinking outside the shebeen beside a dustbin drinking. BEZA [accused 2] invited herself and Babalwa to his shack to listen to music. It took about 25 minutes to walk to the shack. She stated that the accused wore shirts with short sleeves. The accused then said they were going to look for beer at ENKANINI a shanty town near Kuyasa. They changed their shirts and put on short sleeved T-shirts. She never saw jerseys. They left the shack and she and BABALWA stayed behind listening to music. Suddenly accused 1 and 2 came rushing in without beer and out of breath, saying they have been chased by skollies. (a) Her evidence in chief and cross-examination differed from that of her friend BABALWA, and but she was a less convincing witness than BABALWA. In some respects her version contradicted that of BABALWA who was with her at the shack. When faced with the contradictions

between her version and that of BABALWA, she sometimes said she did not remember. Although her evidence was generally unconvincing, some aspects of her testimony relevant to the case, was corroborated by the evidence of BABALWA. That they met the accused on that evening outside NONTITI's place

That they walked to the "hokkie" of accused 2 to listen to music

That the accused later changed their smart shirts by putting on short sleeved T-shirts

That the accused left the shack for about 20 minutes and came rushing back, out of breath That the accused told Xolelwa and BABALWA they were chased by "skollies". It seems to us that the evidence of Babalwa and Xolelwa demonstrates no more than that the accused had a clear window of opportunity to commit this offence. Their alibi is accordingly non-existent. [21] The State called as a next witness ANDILE NOMNGANGA, 24 years of age who told the court that he suffers from HIV and had contracted TB. He testified that in March 2009 he worked as a taxi driver of a QUANTUM vehicle in Kuyasa, Khayelitsha. He stated that on Sunday 1 March 2009 he arrived at NONTITI's house [shebeen] at about 6 pm [18h00]. He was sitting there drinking beer and playing music. (a) He only had half a glass of beer that evening and gave the balance to his friend Sol. It then came to his mind that he needed to put air in the taxi's tyres as one had a slow puncture. At that time his taxi was parked outside and NONTITI and her friends were playing music in the vehicle (taxi). Andile then asked Nontiti and her friends to accompany him. As he got into the taxi, accused 2 who was with accused 1, approached him and asked where he was going. Andile told accused 2 that he was going to the BP garage in Makhaza. He then told the court that Biza [accused 2] and Kwanele [accused 1] asked for a lift as they wanted to buy some petrol. He testified that they were carrying a water bottle. [Nontiti in her testimony said it was the water bottle her mother used to keep water in the fridge]. According to Andile it could have been a one litre water bottle. He estimated they left Nontiti's place at about 9pm and that it took about 10 to 15 minutes to reach the BP garage at MAKHAZA. At the BP Garage, Andile said he inflated his tyres. He noticed that the accused alighted and he saw them buying petrol. The accused then came back and climbed into the van. (b) Andile testified that he could smell the petrol and that he could hear the accused 1 and Nontiti arguing about using her mother's

water bottle for petrol. It was smelling in the taxi and Nontiti chided them for not putting the cap on properly. [His evidence

corroborates Nontiti's evidence regarding the quarrel over the petrol in her mother's water bottle.] On his way back to Nontiti's

shebeen as he entered Kuyasa, the accused asked to be dropped off. They alighted and disappeared among the RDP houses. Andile then drove to Nontiti's house where he at approximately 9h40 pm dropped Nontiti and the children off and then went home. (c) In cross-examination, the defence put to the witness that the accused would tell the court that there was no container. But Andile stuck to his evidence that Nontiti argued with them over the container (water bottle). (d) The court was impressed with this witness. Throughout his evidence, he distanced himself from the accused and from Nontiti and her friend, whom he constantly

described as children. He made the point that he did not mix with children and regarded himself as an adult. We find Andile a credible and convincing witness and have no doubt that on this occasion the accused obtained a lift with Andile, went with him to the BP Garage in MAKHAZA and purchased petrol in a container [plastic water bottle] which they had borrowed from Nontiti's mother. [22] The state called MONGEZI JAMES, the uncle of accused 1 as the next witness. Mr James presented as a respectable middle-aged man. He testified he was telephonically summoned during March 2009 by his sister, NONGONGA JAMES of Cradock and she requested him to hurry to her house in Kuyasa as there was a problem. NOMBONGO, his niece, was living in his sister's house in Kuyasa with accused 1 and his nephew Xolani. He went to the house and noticed that the house opposite [in front] of his sister's house was burnt. Nombongo then made a report to him about the burnt house. Kwanele [accused] was not at home; he was told that Kwanele was at work. People from the community [residents] arrived and they made inquiries about the whereabouts of Accused 1. (a) The residents then told MONGEZI to go to a community meeting to hear what happened as he was accused 1's uncle. On arriving at the place in the street where the community members were, he found a girl and a young boy [identified in evidence as accused 2] being interrogated by community members. He did not know the two young people as he saw them for the first time on that day. Kwanele [accused 1] was not present at this community meeting.

- (c) Const Malindi placed a police cordon around the house and then summoned Const Swart a police official to take photos of the scene. Const Swart arrived on the scene at 01h55 am and took photographs of the house and scene. He took pictures inside and outside the house, including an exterior photo of a piece of cloth and broken green beer bottle glass. [By agreement the photos and key to photos were handed in as exhibit "B".] He then also called the standby detective Const NDWANE, who on arrival then called the Dog Unit to the scene. Detective Constable Malindi left the scene and went to the Site B day hospital where he found doctors attending to the burned patients.

His evidence does not really bring the matter much further, however, Detective Constable Malindi's evidence that he received a report at 12h30 am, confirms the complainant's evidence regarding the time that her house was set on fire. His testimony also corresponds with the evidence of Babalwa Donashe and Xolelwa that when they left the "hokkie" of accused 2 past 12 o'clock and on their way to the Spari shop, they heard a siren (police van). The accused in cross-examination stated that there was a siren in the distance.

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stated that the accused wore shirts with short sleeves. The accused then said they were going to look for beer at ENKANINI a shanty town near Kuyasa. They changed their shirts and put on short sleeved T-shirts. She never saw jerseys. They left the shack and she and BABALWA stayed behind listening to music. Suddenly accused 1 and 2 came rushing in without beer and out of breath, saying they have been chased by skollies.

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That they met the accused on that evening outside NONTITI's place

That they walked to the "hokkie" of accused 2 to listen to music

That the accused later changed their smart shirts by putting on short sleeved T-shirts

That the accused left the shack for about 20 minutes and came rushing back, out of breath

That the accused told Xolelwa and BABALWA they were chased by "skollies".

It seems to us that the evidence of Babalwa and Xolelwa demonstrates no more than that the accused had a clear window of opportunity to commit this offence. Their alibi is accordingly non-existent.

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them buying petrol. The accused then came back and climbed into the van.

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water bottle for petrol. It was smelling in the taxi and Nontiti chided them for not putting the cap on properly. [His evidence

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shebeen as he entered Kuyasa, the accused asked to be dropped off. They alighted and disappeared among the RDP houses. Andile then drove to Nontiti's house where he at approximately 9h40 pm dropped Nontiti and the children off and then went home.

- (c) In cross-examination, the defence put to the witness that the accused would tell the court that there was no container. But Andile stuck to his evidence that Nontiti argued with them over the container (water bottle).
- (d) The court was impressed with this witness. Throughout his evidence, he distanced himself from the accused and from Nontiti and her friend, whom he constantly described as children. He made the point that he did not mix with children and regarded himself as an adult. We find Andile a credible and convincing witness and have no doubt that on this occasion the accused obtained a lift with Andile, went with him to the BP Garage in MAKHAZA and purchased petrol in a container [plastic water bottle] which they had borrowed from Nontiti's mother.

[22] The state called MONGEZI JAMES, the uncle of accused 1 as the next witness. Mr James presented as a respectable middle-aged man. He testified he was telephonically summoned during March 2009 by his sister, NONGONGA JAMES of Cradock and she requested him to hurry to her house in Kuyasa as there was a problem. NOMBONGO, his niece, was living in his sister's house in Kuyasa with accused 1 and his nephew Xolani. He went to the house and noticed that the house opposite [in front] of his sister's house was burnt. Nombongo then made a report to him about the burnt house. Kwanele [accused] was not at home; he was told that Kwanele was at work. People from the community [residents] arrived and they made inquiries about the whereabouts of Accused 1.

- (a) The residents then told MONGEZI to go to a community meeting to hear what happened as he was accused 1's uncle. On arriving at the place in the street where the community members were, he found a girl and a young boy [identified in evidence as accused 2] being interrogated by community members. He did not know the two young people as he saw them for the first time on that day. Kwanele [accused 1] was not present at this community meeting.

(b) When the meeting ended, it was already late, so he asked the police at Harare police station to take him to his house in Site C. The next morning the Tuesday, he went back to Harare police station to look for accused 1 and found him there. Accused 1 was carrying a piece of paper in his hand asking for the investigating officer in charge of the inquiry into the burning of the house. Accused 1 was not arrested at that stage. (c) The investigating officer (detective) then arrived. He said that no one had laid a charge and that he must take accused 1 back to his (uncle's) home in Site C and keep him there. If accused 1 was required he would phone. Mongezi testified that as they left Harare Police station accused 1 disappeared. He went back to his house in Site C and later took a taxi to Kuyasa. Mongezi could not find accused 1 at his sister's house. He then sat and waited for the residents to arrive. Cousin Grey Witbooi also arrived. (d) The residents then told them that they wanted to see accused 1 on Wednesday at a community meeting. As they arrived back in Site C, they saw accused 1 leaving the house. They shouted to him to get back inside the house and he did so. The witness described how he had a conversation with accused 1. His children, a girl of 17 and a boy of 9 were in the house. They were sitting on a bed watching television. Grey Witbooi, was also present. Mongezi asked accused 1 what happened in Kuyasa and accused 1 gave him a statement about what happened in the presence of Mr Witbooi and the two children. (e) At this stage, the defence objected to admitting the statement made by accused 1 to the witness on the grounds that the making of the statement violated accused 1's constitutional rights not to be forced or compelled to make any admission or confession and on the basis that any statement made by accused 1 was not freely and voluntarily made. Further that there was a causal connection between what was said to Mongezi James (uncle) and what then followed with regards to with what was said to the police. Further that accused 1 was acting under threat and intimidation from community members. (f) Adv Haldenby requested that the evidence regarding accused 1's statement to Mongezi James, what was said at the community meeting and what was eventually given to the police should be held within one trial within-a trial, as the different statements could not be separated into distinct sections. (g) Adv Haldenby further stated that she was not saying that the witness Mongezi James threatened accused 1, but that certain things happened on the Monday and Tuesday when he spoke to this witness and when accused no 1 went to the community meeting, those factors were playing on his mind and that he was acting under threat and duress when he made the statements. [23] The court then commenced with a trial within a trial in respect of the following statements made by accused 1 and accused 2 respectively: (a) the verbal statement regarding the incident made by accused 1 to his uncle Mongezi James at his house in Site C. (b) the verbal statements regarding the incident made by accused 1 and accused 2 at community meetings. (c) The written statement [confession] made by accused 1 to Capt Mgwandla. (d) The written statement [confession] made by accused 2 to Capt van der Merwe. The state called the following witnesses in the trial within a trial in order to prove that the statements were made voluntarily and without any undue influence or threats [as alleged by the defence]. Mongezi George James - uncle of accused 1;

Nopmbongo James - sister of accused 1;

Khaniso Nyudwana - a detective constable and also investigating officer in this case [recalled on 3 November 2010]; Capt Fumanukile Mgwandla from Khayelitsha police station in respect of the statement made to him by accused 1; Capt Isak Johannes van der Westhuizen from the S A Police Station, Harare; Capt Lenandi van der Merwe from the SA Police station. Harare in respect of the statement made to her by accused 2. After the state called the said witnesses and the accused testified regarding the admissibility of the statements, the court evaluated

the evidence and made the following order: (a) that the statement made by accused 1 to his uncle Mongezi James, be provisionally admitted as being freely and voluntarily made; (b) that is far as statements made at the community meetings by either of the accused implicating themselves, nothing should be admitted as evidence. The court does not intend to say more on this issue as it is self evident that these types of interrogations do not produce statements that can be regarded as being freely and voluntarily made; (c) that the statement [confession] made by accused 1 to Capt Mgwandla be provisionally admitted as being freely and voluntarily made; (d) that the statement made by accused 2 to Capt van der Merwe be provisionally admitted as being freely and voluntarily made. After conclusion of the trial within a trial the prosecution and defence handed in a statement of agreement Exhibit "S" whereby they agreed that the evidence led within the trial within a trial be admitted as evidence in the main trial, and be subjected to credibility assessment by the trial court, except any evidence emanating from the community meetings held with the accused. This is in accordance with the court's ruling that such evidence be regarded as inadmissible. [24] At this stage of the proceedings the defence approached the court to allow the interposition of a defence witness who was otherwise not available in the ordinary course of the proceedings. The court allowed the defence to call Babalwa Thuswa, the sister of accused 2. Her evidence will be considered as part of the defence case. [25] In view of the court's ruling that the confession made by accused 1 to Capt Mgwadla was admissible in evidence, the State recalled the witness to testify regarding the contents of the statement. He confirmed the contents of the statement and read it into the court record as exhibit "K". In the statement accused 1 stated that he on the day in question went to the garage with Andile's taxi and that he bought petrol. That he and accused 2 set the complainant's house on fire. They used three Amstel beer bottles filled with petrol to set the house alight. (a) In cross-examination it was put to the witness that the statement made by accused 1 was false. That the statement was simply what accused 1 was told to say by the police. The witness denied it. Capt Magwadla stated that he wrote what accused 1 told him. Further, that accused 1 never told him that he was afraid to be sent back to the community to confront them if he did not co-operate. He testified that he explained accused 1's rights and that there was no one to fear. He assured him not to be afraid. Accused 1 appeared to be cool and relaxed at the time he took the statement. Statement handed in as exhibit "K". (b) Capt Mgwadla is an experienced police officer. The court was impressed with his demeanour in court. He did not contradict

himself. Accused 1 had the opportunity to inform Capt Mgwadla of any threats and/or any other concerns. The court is satisfied that accused 1 made the statement freely and voluntarily. The allegation that accused 1 simply said what he was told by the police to say, is rejected in view of the fact that it was a very detailed statement and would have been difficult for the accused to

memorise all that information. The court is satisfied that accused 1 was properly warned of his rights and had made a spontaneous statement. [26] Mongezi James testified with regard to accused 1's statement to him that he had a discussion with accused 1 on the Tuesday night at his house in Site C. The people present were himself, his cousin Grey Witbooi and his two children. He asked accused 1 what is that he did. He remained silent. After a while accused 1 told him he did do something in Kuyasa. Then accused 1 said that he burnt or set a house alight in Kuyasa. Accused 1 told us that he set the neighbour's house alight in Kuyasa. Accused 1 did not say why or when he burnt the house. Mongezi James stated that they never pressurised accused 1 to make the statement. He denied asking accused 1 many questions for a long time or forcing him to admit anything. (a) In cross-examination it was put to the witness that accused 1 denied any involvement in the incident. The witness then referred to three cellphone messages he received from accused 1 in October 2010. First one saying "I have read your statement "boetie" I was asking that you try to change it. It is better that you don't go, and if you do go then there will be a great problem. I want us to talk you don't want to". [Mongezi explained that "boetie" means elder brother]. Second message: "uncle, I ask you to listen to me. What I have to say is very important."

- (b) When the meeting ended, it was already late, so he asked the police at Harare police station to take him to his house in Site C. The next morning the Tuesday, he went back to Harare police station to look for accused 1 and found him there. Accused 1 was carrying a piece of paper in his hand asking for the investigating officer in charge of the inquiry into the burning of the house. Accused 1 was not arrested at that stage.
- (c) The investigating officer (detective) then arrived. He said that no one had laid a charge and that he must take accused 1 back to his (uncle's) home in Site C and keep him there. If accused 1 was required he would phone. Mongezi testified that as they left Harare Police station accused 1 disappeared. He went back to his house in Site C and later took a taxi to Kuyasa. Mongezi could not find accused 1 at his sister's house. He then sat and waited for the residents to arrive. Cousin Grey Witbooi also arrived.
- (d) The residents then told them that they wanted to see accused 1 on Wednesday at a community meeting. As they arrived back in Site C, they saw accused 1 leaving the house. They shouted to him to get back inside the house and he did so. The witness described how he had a conversation with accused 1. His children, a girl of 17 and a boy of 9 were in the house. They were sitting on a bed watching television. Grey Witbooi, was also present. Mongezi asked accused 1 what happened in Kuyasa and accused 1 gave him a statement about what happened in the presence of Mr Witbooi and the two children.
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 - (d) The written statement [confession] made by accused 2 to Capt van der Merwe.

The state called the following witnesses in the trial within a trial in order to prove that the statements were made voluntarily and without any undue influence or threats [as alleged by the defence].

Mongezi George James - uncle of accused 1;

Nopmbongo James - sister of accused 1;

Khaniso Nyudwana - a detective constable and also investigating officer in this case [recalled on 3 November 2010];

Capt Fumanukile Mgwandla from Khayelitsha police station in respect of the statement made to him by accused 1;

Capt Isak Johannes van der Westhuizen from the S A Police Station, Harare;

Capt Lenandi van der Merwe from the SA Police station. Harare in respect of the statement made to her by accused 2.

After the state called the said witnesses and the accused testified regarding the admissibility of the statements, the court evaluated

the evidence and made the following order:

- (a) that the statement made by accused 1 to his uncle Mongezi James, be provisionally admitted as being freely and voluntarily made;
- (b) that is far as statements made at the community meetings by either of the accused implicating themselves, nothing should be admitted as evidence. The court does not intend to say more on this issue as it is self evident that these types of interrogations do not produce statements that can be regarded as being freely and voluntarily made;
- (c) that the statement [confession] made by accused 1 to Capt Mgwandla be provisionally admitted as being freely and voluntarily made;
- (d) that the statement made by accused 2 to Capt van der Merwe be provisionally admitted as being freely and voluntarily made.

After conclusion of the trial within a trial the prosecution and defence handed in a statement of agreement Exhibit "S" whereby they agreed that the evidence led within the trial within a trial be admitted as evidence in the main trial, and be subjected to credibility assessment by the trial court, except any evidence emanating from the community meetings held with the accused. This is in accordance with the court's ruling that such evidence be regarded as inadmissible.

- [24] At this stage of the proceedings the defence approached the court to allow the interposition of a defence witness who was otherwise not available in the ordinary course of the proceedings. The court allowed the defence to call Babalwa Thuswa, the sister of accused 2. Her evidence will be considered as part of the defence case.
- [25] In view of the court's ruling that the confession made by accused 1 to Capt Mgwadla was admissible in evidence, the State recalled the witness to testify regarding the contents of the statement. He confirmed the contents of the statement and read it into the court record as exhibit "K". In the statement accused 1 stated that he on the day in question went to the garage with Andile's taxi and that he bought petrol. That he and accused 2 set the complainant's house on fire. They used three Amstel beer bottles filled with petrol to set the house alight.
- (a) In cross-examination it was put to the witness that the statement made by accused 1 was false. That the statement was simply what accused 1 was told to say by the police. The witness denied it. Capt Mgwadla stated that he wrote what accused 1 told him. Further, that accused 1 never told him that he was afraid to be sent back to the community to confront them if he did not co-operate. He testified that he explained accused 1's rights and that there was no one to fear. He assured him not to be afraid. Accused 1 appeared to be cool and relaxed at the time he took the statement. Statement handed in as exhibit "K".
 - (b) Capt Mgwadla is an experienced police officer. The court was impressed with his demeanour in court. He did not contradict

himself. Accused 1 had the opportunity to inform Capt Mgwadla of any threats and/or any other concerns. The court is satisfied that accused 1 made the statement freely and voluntarily. The allegation that accused 1 simply said what he was told by the police to say, is rejected in view of the fact that it was a very detailed statement and would have been difficult for the accused to memorise all that information. The court is satisfied that accused 1 was properly warned of his rights and had made a spontaneous statement.

[26] Mongezi James testified with regard to accused 1's statement to him that he had a discussion with accused 1 on the Tuesday night at his house in Site C. The people present were himself, his cousin Grey Witbooi and his two children. He asked accused 1 what is that he did. He remained silent. After a while accused 1 told him he did do something in Kuyasa. Then accused 1 said that he burnt or set a house alight in Kuyasa. Accused 1 told us that he set the neighbour's house alight in Kuyasa. Accused 1 did not say why or when he burnt the house. Mongezi James stated that they never pressurised accused 1 to make the statement. He denied asking accused 1 many questions for a long time or forcing him to admit anything.

(a) In cross-examination it was put to the witness that accused 1 denied any involvement in the incident. The witness then referred to three cellphone messages he received from accused 1 in October 2010. First one saying "I have read your statement "boetie" I was asking that you try to change it. It is better that you don't go, and if you do go then there will be a great problem. I want us to talk you don't want to". [Mongezi explained that "boetie" means elder brother].

Second message: "uncle, I ask you to listen to me. What I have to say is very important."

Third message: "I request you don't go to court. If you go to court that will be the end of me. Please. Accused 1 stated that he had no access to cellphones in Pollsmoor. (b) Accused 1 denied sending the text messages. The only explanation accused 1 could give was that he had no access to a cellphone in Pollsmoor Prison. Who else would send text messages relating to the incident to Mongezi? The only inference that can be drawn is that accused 1 sent the text messages to his uncle. The text messages refer to Mongezi as "boetie" or "uncle". Accused 1 told the court that there was bad blood between him and his uncle and that their relationship was not good. The court, however, got the impression that his uncle was very concerned about him. Mongezi testified that he went to look him on more than one occasion and also took him to his house for the night for his own safety. The accused 1 made the statement to his uncle within the family environment where he was among his own people. The uncle is an immediate member of the family and brother of accused 1's late mother. Mongezi impressed the court as a calm and composed person and found him to be a credible witness. [27] The State called Capt Lilandi van der Merwe to testify regarding the statement (confession) she took from accused 2. Capt van der Merwe is a senior female Captain with the South African Police Services, (more than 20 years service) She described in detail how accused no 2 was brought to her and that he seemed cool and relaxed and certainly not agitated. She described how he had been brought to her by Capt van der Westhuizen and described how accused 2 sat alongside her at a table. She said that he spoke coherently in English; she described how he was properly warned of his rights in terms of

the Constitution and of his rights against self-incrimination. As indicated in my reasons for admitting the confessions made to the two Captains, I find that the evidence of the two Captains to be satisfactory in every respect and that the statements made to them were freely and voluntarily made with full knowledge of rights in law and in terms of the Constitution. The witness impressed with her conduct in court. She was precise, confident and clear in all respects. [28] Nonbongo James testified that she is accused No. 1's older sister, described how her mother fell ill in 2007 and then died

mysteriously. She testified for the state that Accused No. 1 said a person in Nyanga could be consulted by the family. She said that in 2008 Accused No. 1 said they should try to discover the reason for their mother's death. She said that she, Accused No. 1 and the previous witness (the Accused's uncle, Mongezi James) went to Nyanga. The woman was "Abigail" some sort of fortune teller with a "magic mirror". Only one visitor could gaze into the mirror, but could then tell what was seen. This occurred in September 2008. Accused No. 1 and her uncle, Mongezi James, sought

to know why his mother died. (a) Accused No. 1 drank a potion, his shoes were removed and he sat alone in front of "the mirror". As he watched, he related what he saw, denied by accused 1 later. He said he saw his mother in their home in Kuyasa. He then saw complainant put powder near or under the door of the house. He saw his mother cross this powder when she went out to work. Accused No. 1 described the powder as being whitish/black. (b) She said Abigail was paid R350 by Accused No. 1's uncle, Mongezi James, and Accused No. 1's brother. (c) The witness described how on the night of the burning in the middle of the night (after midnight) she heard screaming. She described how the house burned. (d) One day later she said that she was at a meeting when Accused No. 1 was being questioned by the community, but said that he could not answer as the investigating officer (Det Const Nduywana) arrived and took him away. She did not know the reason why the house was burnt, but said community members wanted to see Accused No. 1 and alleged they threatened to burn down the family house and murder the youngest brother, (uncorroborated) She testified that on that Monday, immediately

after the burning down of the house, their younger brother, Xolani, was sent to the Eastern Cape. This conflicted with evidence from Accused No. 1, who cites a date long after. She confirmed that a man with the broomstick (Patrick) had wanted to hit Accused No. 1. The witness said Accused No. 1 did answer the community and the answers made interrogators angry. Later, however she denied seeing any broomstick. [29] Detective Constable Nyudwana was the investigating officer in this matter and his testimony and cross examination runs from page 419 of the record up to page 514. Most of this is cross-examination is not relevant. It appears that he described his office as being room no 34 and later corrected this to read room no. 10. Other than this, he never contradicted himself in any way. He described the circumstances of the arrest of the two accused and described the circumstances under which they made statements at the community meeting. In view of the fact that this court has found that any statements by any of the accused could not have been freely and voluntarily made it is not necessary to deal with this witness's evidence in connection with what they said at these meetings. His evidence is however relevant in connection with the circumstances surrounding the making of these statements to the two

captains in the police force on the 5th of March. A great deal of time was spent in cross-examining this witness as to what he told the two accused before they made statements to the captains and the general challenge that was made against his evidence that both the accused were fully informed of their constitutional rights and their rights not to implicate themselves in any statement. Again in the light of the evidence given by the two captains concerned, it is not necessary to analyse in depth the cross-examination of this witness, because in both instances, the captains who took the statements from the accused were unconnected with this prosecution and were actually stationed at another police station. No inroad into their testimony was made by the cross examination of these witnesses and this court is satisfied that the statements made to the two captains were made under circumstances where the accused were fully informed of their rights; they had elected to make these statements. The statements were freely and voluntarily made. (a) Insofar as an attack has been made on the credibility of Detective Constable Nyudwana, we as the court found him to be a satisfactory witness and we are satisfied that his merits as a witness and the demerits of the accused as witnesses are beyond question. We found Detective Constable Nyudwana to be a satisfactory witness in every respect and we prefer his evidence where it conflicts with the testimony given by either of the accused. Again as previously indicated it is not necessary to rely on the evidence of the Constable for the purposes of determining the credibility of the accused. However, we are satisfied that both accused voluntarily elected to make statements and we accept that they requested the detective to take them to make written statements. (b) It is significant that in cross-examining Detective Constable Nyudwana it was put to him that accused 2 was "dragged out of his home, dragged out of his bed on Monday morning and taken to a meeting". That evidence differs substantially from the evidence ultimately given by accused no 2's sister. (c) It is significant that this witness said that he had advised accused no 1 and his uncle that they should not attend the meeting of the community the evening that he was ultimately arrested [record page 456 line 15]. Again, I do not propose to deal with the events at that meeting because I'm not satisfied that anything that either of the two accused could have said at these community meetings could have been freely and voluntarily made. (d) This court is also satisfied that Detective Constable Nyudwana properly and adequately warned both accused of the implications of them making a statement to the captains concerned and adequately informed them of their rights in regard to the making of statements and in regard to the Constitution. In any event, we are completely satisfied and it was certainly not challenged in cross examination, that both accused were again given proper and adequate warnings by the Captains concerned and had their constitutional rights explained before they made any statements. [30] In the evidence of Captain Mgwandla, he described the accused no 1 as being cool and relaxed record p 544 line 15. The only thing put to him in cross examination was that accused no 1 will say that he was actually very anxious and worried. Because of Ms Haldenby's complaint that she thought that she was only cross-examining Constable Nyudwana on behalf of accused no 1 he was recalled for further cross-examination. She then proceeded to put more statements on behalf of accused no 1, to this witness. I do not propose to saddle either the accused with any blame for the conduct of Ms Haldenby save to note that her insistence of cross-examining Const Nyudwana "on behalf of accused no 2" seemed to me to be contrived. Similarly I do not propose to hold accused no 2 responsible for statements made on his behalf when Ms

Haldenby said that Const Nyudwana "started rushing around and panicking" when he received a phone call from accused no 1's uncle. That wasn't the evidence which accused no 2 gave, he also for example said that the Const said that he told accused no 2 that accused no 1's life was in danger. As to whether Constable Nyudwana actually asked accused no 2 to accompany him to the community meeting where he was apparently going to rescue accused no 1 with a police back-up, we cannot find accused no 2's evidence on this respect acceptable at all. He said that he was asked to accompany the Constable in order to show him where the meeting was and when he got there he was asked to lie flat in the vehicle so that the community wouldn't see that he was there. We find this story far-fetched and highly improbable. We prefer the evidence of Const Nyudwana that he knew perfectly well where the meeting was being held because he lives and works in that area and he certainly would not take a co-accused with him to show him the way. To the extent that it is relevant we do not accept the evidence given by and on behalf accused no 2 that he was detained in a holding cell at the police station between 12 o' clock and 4pm. We prefer the evidence of Const Nyudwana that people cannot be held in a holding cell for longer than 1 hour and it made no sense for the Constable to hold accused no 2 at that time in a holding cell until 4 pm and then release him with the instruction that he return at 7pm. Similarly we prefer the evidence of Const Nyudwana that he did not give accused no 2 a lift to Makasa to rendezvous with accused no 2's sister the afternoon of his ultimate arrest. For reasons, we will later deal with, we find that the evidence of accused no 2's sister on this and many other aspects unacceptable.

We consider that the whole question relating to the Const giving accused no 2 to Macasar was engineered by accused no 2 and his

sister to create an area of conflict between himself and Const Nyudwana. If it actually happened there was no reason for Const

Nyudwana to deny this episode, but there is every reason to try create an area of conflict between the Constable's evidence and the evidence given by accused no 2 on a collateral issue. We also reject the evidence given by accused no 2 and his sister that they waited at the police station until Constable Nyudwana returned from the meeting with accused no 1 and his sister. They would also wait at the police station until accused no 1 was arrested and put in the cells and thereafter accused no 2 was arrested. This sequence of events is highly illogical and we prefer Const Nyudwana 's evidence that when he returned from the meeting he contacted accused no 2 and asked him and his sister to come back to the police station. By the time they arrived, accused no 1 had been arrested and committed to the cells. I also find quite unacceptable, the explanation given by Ms Haldenby as to why this remarkable story was not put when she was cross examining the Constable on behalf of accused no 1 the first time. [31] Capt van der Westhuizen was the Capt who took accused no 2 to make a statement to Capt van der Merwe. He testified that he took accused no 2 and walked with him from the cells to the office where Capt van der Merwe was waiting and handed him over to Capt van der Merwe. He said that he took accused no 2 after he had made his confession, back to the cells. That evidence was not challenged in cross examination save to the extent that accused no 2 repeated his allegation that Const Nyudwana took him to make the statement and that he first took him into an office where he allegedly told

him what to say. This witness' testimony lends the lie to accused no 2's statement and nothing in the cross examination changes this court's finding that this was a very senior and responsible Captain whose evidence could be relied upon and whose testimony negates the allegations made by accused no 2 about his being influenced or instructed by Const Nyudwana to make any particular statement to Capt van der Merwe. The state then closed its case. [32] The defence elected to interpose the accused 2's sister Babalwa Thuswa who testified on his behalf. She testified that she is the sister of accused 2, working as a social worker in Durban. At the time of the incident, she too lived with the family of accused 2 in Kuyasa. She gave the court the appearance of a well educated [four year degree from UWC] woman, but later in her testimony she appeared to be not so convincing. She said she did not know accused 1 prior to the incident. She said the residents had forced her brother to attend a meeting but they wanted accused no 1. She says a policeman left a phone number at their home asking them to go to Harare Police Station. They did. She again saw her brother later. She said the investigating officer told her to take her brother for food and return him by 7pm (denied by the investigating officer) she said accused 2 was "locked up".) When they returned she said the policeman arrived and took a call on his cell, took accused 2 and went to get accused 1 from a resident's meeting (also denied by the investigating officer) and the court thought it strange that a policeman would take the accused back to the community of which he was so afraid. She said thirty minutes later the investigating officer returned and accused 1 was in a holding cell at that stage. Her brother [accused 2] was taken into an office. She said she was called in and accused no 2 was crying - saying "I am sorry". He was arrested, had his shoelaces and belt removed. Later she told the court, her brother said "two men" had (he told her) stolen his cell phone in the court cells. [33] The accused elected to testify. Each accused pleaded alibi and in their testimony they insisted they had nothing to do with the incident nor had they been at the scene, or had in any way been involved with the burning of the house. Further, the state witnesses in most instances lied and also the statements made to the uncle and the confessions to the police had not been made freely and voluntarily as their legal rights had not been explained. [34] To sum up the salient facts of this case are as follows:- It is common cause that the complainant's house at 54 529 Sidwana Street, Kuyasa was set on fire on Sunday evening 2 March 2009.

Further that the complainant's daughter and grandson died as result of the fire and that complainant and her other two daughters had to receive medical treatment for burn wounds and smoke inhalation. [35] The state witnesses, THULISA MALUWANE (nickname Nontiti) and ANDILE NOMNGANGA gave testimony in respect of the plastic container [water bottle] that was borrowed by the accused from Nontiti's mother, a visit to the BP garage ([petrol station] in MAKHAZA by accused 1 and accused 2 in Andile's taxi to buy petrol the buying of the petrol and transport of the container with petrol by the accused to a point near the SPARI shop where they requested to be dropped off. In their evidence Nontiti and Andile corroborated each other. [36] The evidence regarding the container with petrol runs like a golden thread through the case. [37] The accused testified that both these witnesses were telling lies on these issues. We reject this allegation and accept the evidence by Nontiti and Andile as the truth. In the confession made by accused 2 this evidence was confirmed. Accused 1 also stated in his confession that the petrol

was used to make the bombs. [38] The witnesses BABALWA and XOLELWA testified that they met accused 1 and accused 2 on that Sunday evening at ±21h00 outside Nontiti's house. They were invited by the accused to accused 2's shack to listen to music videos. This evidence is confirmed by the accused. [39] According to the two ladies the accused left the shack late that evening to buy beer. Both women testified that the accused changed their shirts and denied that they simply put on jerseys because it was cold. Accused 1 and 2 accused the two ladies of lying. What is strange that these jerseys were not worn later that evening when the accused and the ladies went out to buy beer. Accused 1 and accused 2 accused the two ladies of lying when they said that accused 1 and 2 after ±20 minutes returned to the shack in a rush because they were chased by "skollies". They say that BABALWA and XOLELWA are lying on this issue and insisted that they said they had been chased by the neighbourhood watch. [40] The four of them shortly after the accused returned, left the shack to buy beer. Babalwa testified that on the way a fire engine came past them and she shouted to the driver to find out where the fire brigade was going. Accused 1 then assured her that it was unnecessary to find out where the fire engine was going because "there is nothing of yours that is burnt". How would accused 1 know that? [41] The evidence of Babalwa and Xolelwa confirms that the accused left the shack late in the evening and that they came running back breathing heavily. It does not really matter who chased them. When they left the shack they heard a siren in the distance. That probably was the siren of Constable Malindi's police van. Constable Malindi testified that he received a radio call at ±12h30 of house burning in Kuyasa. The inference can be drawn that the house was set alight after 12h00. His testimony corresponds with the evidence of Babalwa and Xolelwa that when they left the "hokkie" of accused 2 about 5 minutes after they returned, past 12 o'clock the night on their way past a creche, they heard a siren (police van). The accused in cross-examination conceded that there was a siren. We find that they had a window of opportunity to get to the complainant's house and set it on fire. [42] Mongezi James, the uncle of accused 1 is a key witness in this case. Although accused 1 tried to suggest a bad relationship between himself and his uncle, he failed to do so. The court is satisfied that the statement made to his uncle, was made within his family environment, freely and voluntarily. We already dealt with this issue. Accused 1 admitted that he set the house alight in Kuyasa. Accused 1's evidence that his uncle forced him to admit complicity in the of the complainant's house, is unpersuasive. After conclusion of the trial within a trial, I admitted the statement made by accused 1 to his uncle. The uncle also in cross-examination testified that he received three text messages with a request that he not go to court. [43] I have admitted the confession made by accused 1 made to Captain Mgwadla and by accused 2 to Captain van der Merwe. After the trial within a trial was concluded, I admitted both statements as exhibit "K" and exhibit "L" respectively. Both police captains made a good impression on the court and the court had no hesitation in accepting that in respect of both statements the rights of the accused were properly explained and the statements made freely and voluntarily. This evidence had been fully dealt with in this judgment. The fact that the confessions made to both captains were long and detailed negates any suggestion that they were made to appease the investigating officer. [44] In both statements accused 1 and accused 2 admit they set the house of the complainant alight. [45] Contents of the confessions confirm the circumstantial evidence of the

state witnesses regarding the issues relevant to this case. [46] Both accused pleaded alibi and in terms of Section 115 gave a plea explanation that they were not involved in this offence or were at the scene of the crime. [47] Throughout the trial the accused stuck to their alibi. According to them witnesses were telling lies and statements made by them were false in all instances where the evidence implicated them. [48] Based on the evidence placed before the court the defence of an alibi has failed dismally. [49] Accused 1 and accused 2 on their own confessions were involved in the commission of the offences and they were at the scene. [50] The commission of the offences was probably as result of "revenge" by accused 1. In cross-examination accused 1 admitted that he believed that his mother had been bewitched by the complainant and was to blame for her death. He also said that he believed in witchcraft. This would account for him taking revenge on the complainant and her family. In the process accused 2 was a willing partner. It is clear that the aim was to kill the complainant. The plan however resulted in others being killed. [51] This is clearly a case of *dolus indirectus*. Hiemstra's Criminal Procedure at page 258 reads as follows: "Actual indirect intention (*dolus indirectus*). This intent exists when the prohibited result (in murder, the death of the deceased) is not a main intention, but the perpetrator knows that the prohibited result must necessarily follow if the main purpose is sought. The perpetrator sets a house alight in order to burn to death the woman who is inside. If he perpetrator knows that there are children with her, it does not help him to allege that he had no intent to harm the children." [52] The court is satisfied that the state proved beyond reasonable doubt and we accordingly find that the accused 1 and accused 2 are guilty of the following offences: (i) Count 1 - Arson; (ii) Count 2 - Murder; (iii) Count 3 - Murder; (iv) Count 4 - Attempted Murder; (v) Count 5 - Attempted Murder; (vi) Count 6 - Attempted Murder; With regard to counts 7 and 8 the state alleged that the accused are also guilty of offences relating to the practice of witchcraft as set out in paragraphs 1(a) and 1(b) of Act, 3 of 1957 which provides as follows: "Offences relating to the practice of witchcraft and similar practices. Any person who: 1

- (a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard:
- (b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person,"
- The evidence in this case does not reveal that either of the accused is guilty of the conduct set out in the sub-paragraphs. At most it might be suggested that accused no 1 imputed the cause of death of his mother to sorcery engaged upon by the complainant. The problem is that he imputed that circumstance to himself and not to any other person other than perhaps some of his family He did not pretend to possess supernatural powers in order to come to that conclusion. He claimed to have had a vision when looking into a magic mirror. Accused no 1 did not pretend to have supernatural powers and his conduct was simply a misguided attempt to murder the complainant which ended up causing the death of two other people. I do not accept that the Witchcraft Suppression Act, has anything to do with this matter and to prefer charges under this Act would in the first place be misguided and in the second place constitute a splitting of charges. The accused are, therefore, acquitted of

counts 7 and 8 of the charge sheet. In respect of count 9 the state alleged that the accused contravened section 27(1) of the Explosives Act, 1956 [Act 26 of 1956]

- causing an explosion whereby life or property is endangered. Alternatively contravening of section 28(1) of the Explosives Act, 1956 [Act 26 of 1956] - a person who is found to have in his possession or under his control any explosive under such circumstances as to give rise to a reasonable suspicion that he intended to use such explosive for the purpose of injuring any person or damaging any property.

In section 28(2) an "explosive" includes a "petrol bomb". Adv Colenso argued that this Act had been repealed by the Explosives Act, 2003 [Act 15 of 2003]. This Act has to date still not been assented to. In terms of the Explosives Act 1956, [Act 26 of 1956] a petrol bomb is deemed to be an "explosive" for the purpose of a section 28 offence. This provision is not applicable to section 27 of the Act. The inclusion of a petrol bomb under "explosives" was clearly designed only for the purposes of section 28. In order to secure a conviction in terms of section 28(1) the court must find that the accused was "found in possession of the explosives ["petrol bomb"]". In this instance the accused were not found to be in possession of such explosive. The extended definition of explosives is not applicable in respect of section 27 of the Act. The accused are therefore acquitted in respect of section 27 and on the alternative of section 28 of the Act. I would add that it is quite absurd for the Act to have a special definition of an "explosive" for the purposes of section

28 whereas the rest of the Act has a more reasonable and logical definition of explosive.
WEINKOVE, AJ

Third message: "I request you don't go to court. If you go to court that will be the end of me. Please. Accused 1 stated that he had no access to cellphones in Pollsmoor.

- (b) Accused 1 denied sending the text messages. The only explanation accused 1 could give was that he had no access to a cellphone in Pollsmoor Prison. Who else would send text messages relating to the incident to Mongezi? The only inference that can be drawn is that accused 1 sent the text messages to his uncle. The text messages refer to Mongezi as "boetie" or "uncle".

Accused 1 told the court that there was bad blood between him and his uncle and that their relationship was not good. The court, however, got the impression that his uncle was very concerned about him. Mongezi testified that he went to look him on more than one occasion and also took him to his house for the night for his own safety. The accused 1 made the statement to his uncle within the family environment where he was among his own people. The uncle is an immediate member of the family and brother of accused 1's late mother. Mongezi impressed the court as a calm and composed person and found him to be a credible witness.

- [27] The State called Capt Lilandi van der Merwe to testify regarding the statement (confession) she took from accused 2. Capt van der Merwe is a senior female Captain with the South African Police Services, (more than 20 years service) She described in detail how accused no

2 was brought to her and that he seemed cool and relaxed and certainly not agitated. She described how he had been brought to her by Capt van der Westhuizen and described how accused 2 sat alongside her at a table. She said that he spoke coherently in English; she described how he was properly warned of his rights in terms of the Constitution and of his rights against self-incrimination. As indicated in my reasons for admitting the confessions made to the two Captains, I find that the evidence of the two Captains to be satisfactory in every respect and that the statements made to them were freely and voluntarily made with full knowledge of rights in law and in terms of the Constitution. The witness impressed with her conduct in court. She was precise, confident and clear in all respects.

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The woman was "Abigail" some sort of fortune teller with a "magic mirror". Only one visitor could gaze into the mirror, but could then tell what was seen. This occurred in September 2008.

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to know why his mother died.

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- (b) She said Abigail was paid R350 by Accused No. 1's uncle, Mongezi James, and Accused No. 1's brother.
- (c) The witness described how on the night of the burning in the middle of the night (after midnight) she heard screaming. She described how the house burned.
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She did not know the reason why the house was burnt, but said community members wanted to see Accused No. 1 and alleged they threatened to burn down the family house and murder the youngest brother, (uncorroborated) She testified that on that Monday, immediately

after the burning down of the house, their younger brother, Xolani, was sent to the Eastern Cape. This conflicted with evidence from Accused No. 1, who cites a date long after. She confirmed that a man with the broomstick (Patrick) had wanted to hit Accused No. 1. The witness said Accused No. 1 did answer the community and the answers made interrogators angry. Later, however she denied seeing any broomstick.

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It appears that he described his office as being room no 34 and later corrected this to read room no. 10. Other than this, he never contradicted himself in any way.

He described the circumstances of the arrest of the two accused and described the circumstances under which they made statements at the community meeting. In view of the fact that this court has found that any statements by any of the accused could not have been freely and voluntarily made it is not necessary to deal with this witness's evidence in connection with what they said at these meetings.

His evidence is however relevant in connection with the circumstances surrounding the making of these statements to the two captains in the police force on the 5th of March. A great deal of time was spent in cross-examining this witness as to what he told the two accused before they made statements to the captains and the general challenge that was made against his evidence that both the accused were fully informed of their constitutional rights and their

rights not to implicate themselves in any statement. Again in the light of the evidence given by the two captains concerned, it is not necessary to analyse in depth the cross-examination of this witness, because in both instances, the captains who took the statements from the accused were unconnected with this prosecution and were actually stationed at another police station. No inroad into their testimony was made by the cross examination of these witnesses and this court is satisfied that the statements made to the two captains were made under circumstances where the accused were fully informed of their rights; they had elected to make these statements. The statements were freely and voluntarily made.

(a) Insofar as an attack has been made on the credibility of Detective Constable Nyudwana, we as the court found him to be a satisfactory witness and we are satisfied that his merits as a witness and the demerits of the accused as witnesses are beyond question. We found Detective Constable Nyudwana to be a satisfactory witness in every respect and we prefer his evidence where it conflicts with the testimony given by either of the accused.

Again as previously indicated it is not necessary to rely on the evidence of the Constable for the purposes of determining the credibility of the accused. However, we are satisfied that both accused voluntarily elected to make statements and we accept that they requested the detective to take them to make written statements.

- (b) It is significant that in cross-examining Detective Constable Nyudwana it was put to him that accused 2 was "dragged out of his home, dragged out of his bed on Monday morning and taken to a meeting". That evidence differs substantially from the evidence ultimately given by accused no 2's sister.
 - (c) It is significant that this witness said that he had advised accused no 1 and his uncle that they should not attend the meeting of the community the evening that he was ultimately arrested [record page 456 line 15]. Again, I do not propose to deal with the events at that meeting because I'm not satisfied that anything that either of the two accused could have said at these community meetings could have been freely and voluntarily made.
 - (d) This court is also satisfied that Detective Constable Nyudwana properly and adequately warned both accused of the implications of them making a statement to the captains concerned and adequately informed them of their rights in regard to the making of statements and in regard to the Constitution. In any event, we are completely satisfied and it was certainly not challenged in cross examination, that both accused were again given proper and adequate warnings by the Captains concerned and had their constitutional rights explained before they made any statements.
- [30] In the evidence of Captain Mgwandla, he described the accused no 1 as being cool and relaxed record p 544 line 15. The only thing put to him in cross examination was that accused no 1 will say that he was actually very anxious and worried.

Because of Ms Haldenby's complaint that she thought that she was only cross-examining Constable Nyudwana on behalf of accused no 1 he was recalled for further cross-examination. She then proceeded to put more statements on behalf of accused no 1, to this witness. I do not propose to saddle either the accused with any blame for the conduct of Ms Haldenby save to note that her insistence of cross-examining Const Nyudwana "on behalf of accused no 2" seemed to me to be contrived. Similarly I do not propose to hold accused no 2 responsible for statements made on his behalf when Ms Haldenby said that Const Nyudwana "started rushing around and panicking" when he received a phone call from accused no 1's uncle. That wasn't the evidence which accused no 2 gave, he also for example said that the Const said that he told accused no 2 that accused no 1's life was in danger.

As to whether Constable Nyudwana actually asked accused no 2 to accompany him to the community meeting where he was apparently going to rescue accused no 1 with a police back-up, we cannot find accused no 2's evidence on this respect acceptable at all. He said that he was asked to accompany the Constable in order to show him where the meeting was and when he got there he was asked to lie flat in the vehicle so that the community wouldn't see that he was there. We find this story far-fetched and highly improbable.

We prefer the evidence of Const Nyudwana that he knew perfectly well where the meeting was being held because he lives and works in that area and he certainly would not take a co-accused with him to show him the way.

To the extent that it is relevant we do not accept the evidence given by and on behalf accused no 2 that he was detained in a holding cell at the police station between 12 o' clock and 4pm. We prefer the evidence of Const Nyudwana that people cannot be held in a holding cell for longer than 1 hour and it made no sense for the Constable to hold accused no 2 at that time in a holding cell until 4 pm and then release him with the instruction that he return at 7pm. Similarly we prefer the evidence of Const Nyudwana that he did not give accused no 2 a lift to Makasa to rendezvous with accused no 2's sister the afternoon of his ultimate arrest.

For reasons, we will later deal with, we find that the evidence of accused no 2's sister on this and many other aspects unacceptable.

We consider that the whole question relating to the Const giving accused no 2 to Macasar was engineered by accused no 2 and his

sister to create an area of conflict between himself and Const Nyudwana. If it actually happened there was no reason for Const

Nyudwana to deny this episode, but there is every reason to try create an area of conflict between the Constable's evidence and the evidence given by accused no 2 on a collateral issue. We also reject the evidence given by accused no 2 and his sister that they waited at the police station until Constable Nyudwana returned from the meeting with accused no 1 and his sister. They would also wait at the police station until accused no 1 was arrested and put in the cells and thereafter accused no 2 was arrested. This sequence of events is highly illogical and we prefer Const Nyudwana 's evidence that when he returned from the meeting he contacted accused no 2 and asked him and his sister to come back to the police station. By the time they arrived, accused no 1 had been arrested and committed to the cells. I also find quite unacceptable, the explanation given by Ms Haldenby as to why this remarkable story was not put when she was cross examining the Constable on behalf of accused no 1 the first time.

[31] Capt van der Westhuizen was the Capt who took accused no 2 to make a statement to Capt van der Merwe. He testified that he took accused no 2 and walked with him from the cells to the office where Capt van der Merwe was waiting and handed him over to Capt van der Merwe. He said that he took accused no 2 after he had made his confession, back to the cells. That evidence was not challenged in cross examination save to the extent that accused no 2 repeated his allegation that Const Nyudwana took him to make the statement and that he first took him into an office where he allegedly told him what to say. This witness' testimony lends the lie to accused no 2's statement and nothing in the cross examination changes this court's finding that this was a very senior and responsible Captain whose evidence could be relied upon and whose testimony negates the allegations made by accused no 2 about his being influenced or instructed by Const Nyudwana to make any particular statement to Capt van der Merwe.

The state then closed its case.

[32] The defence elected to interpose the accused 2's sister Babalwa Thuswa who testified on his behalf. She testified that she is the sister of accused 2, working as a social worker in Durban. At the time of the incident, she too lived with the family of accused 2 in Kuyasa.

She gave the court the appearance of a well educated [four year degree from UWC] woman, but later in her testimony she appeared to be not so convincing. She said she did not know accused 1 prior to the incident.

She said the residents had forced her brother to attend a meeting but they wanted accused no 1. She says a policeman left a phone number at their home asking them to go to Harare Police Station. They did. She again saw her brother later. She said the investigating officer told her to take her brother for food and return him by 7pm (denied by the investigating officer) she said accused 2 was "locked up".) When they returned she said the policeman arrived and took a call on his cell, took accused 2 and went to get accused 1 from a resident's meeting (also denied by the investigating officer) and the court thought it strange that a policeman would take the accused back to the community of which he was so afraid.

She said thirty minutes later the investigating officer returned and accused 1 was in a holding cell at that stage. Her brother [accused 2] was taken into an office.

She said she was called in and accused no 2 was crying - saying "I am sorry". He was arrested, had his shoelaces and belt removed.

Later she told the court, her brother said "two men" had (he told her) stolen his cell phone in the court cells.

[33] The accused elected to testify. Each accused pleaded alibi and in their testimony they insisted they had nothing to do with the incident nor had they been at the scene, or had in any way been involved with the burning of the house. Further, the state witnesses in most instances lied and also the statements made to the uncle and the confessions to the police had not been made freely and voluntarily as their legal rights had not been explained.

[34] To sum up the salient facts of this case are as follows:-

It is common cause that the complainant's house at 54 529 Sidwana Street, Kuyasa was set on fire on Sunday evening 2 March 2009.

Further that the complainant's daughter and grandson died as result of the fire and that complainant and her other two daughters had to receive medical treatment for burn wounds and smoke inhalation.

- [35] The state witnesses, THULISA MALUWANE (nickname Nontiti) and ANDILE NOMNGANGA gave testimony in respect of the plastic container [water bottle] that was borrowed by the accused from Nontiti's mother, a visit to the BP garage ([petrol station] in MAKHAZA by accused 1 and accused 2 in Andile's taxi to buy petrol the buying of the petrol and transport of the container with petrol by the accused to a point near the SPARI shop where they requested to be dropped off. In their evidence Nontiti and Andile corroborated each other.
- [36] The evidence regarding the container with petrol runs like a golden thread through the case.
- [37] The accused testified that both these witnesses were telling lies on these issues. We reject this allegation and accept the evidence by Nontiti and Andile as the truth. In the confession made by accused 2 this evidence was confirmed. Accused 1 also stated in his confession that the petrol was used to make the bombs.
- [38] The witnesses BABALWA and XOLELWA testified that they met accused 1 and accused 2 on that Sunday evening at ±21h00 outside Nontiti's house. They were invited by the accused to accused 2's shack to listen to music videos. This evidence is confirmed by the accused.
- [39] According to the two ladies the accused left the shack late that evening to buy beer. Both women testified that the accused changed their shirts and denied that they simply put on jerseys because it was cold. Accused 1 and 2 accused the two ladies of lying. What is strange that these jerseys were not worn later that evening when the accused and the ladies went out to buy beer. Accused 1 and accused 2 accused the two ladies of lying when they said that accused 1 and 2 after ±20 minutes returned to the shack in a rush because they were chased by "skollies". They say that BABALWA and XOLELWA are lying on this issue and insisted that they said they had been chased by the neighbourhood watch.
- [40] The four of them shortly after the accused returned, left the shack to buy beer. Babalwa testified that on the way a fire engine came past them and she shouted to the driver to find out where the fire brigade was going. Accused 1 then assured her that it was unnecessary to find out where the fire engine was going because "there is nothing of yours that is burnt". How would accused 1 know that?
- [41] The evidence of Babalwa and Xolelwa confirms that the accused left the shack late in the evening and that they came running back breathing heavily. It does not really matter who chased them. When they left the shack they heard a siren in the distance. That probably was the siren of Constable Malindi's police van. Constable Malindi testified that he received a radio call at ±12h30 of house burning in Kuyasa. The inference can be drawn that the house was set alight after 12h00. His testimony corresponds with the evidence of Babalwa and Xolelwa that when they left the "hokkie" of accused 2 about 5 minutes after they returned, past 12 o'clock the night on their way past a creche, they heard a siren (police van). The accused in cross-examination conceded that there was a siren. We find that they had a window of opportunity to get to the complainant's house and set it on fire.

[42] Mongezi James, the uncle of accused 1 is a key witness in this case. Although accused 1 tried to suggest a bad relationship between himself and his uncle, he failed to do so. The court is satisfied that the statement made to his uncle, was made within his family environment, freely and voluntarily. We already dealt with this issue. Accused 1 admitted that he set the house alight in Kuyasa. Accused 1's evidence that his uncle forced him to admit complicity in the of the complainant's house, is unpersuasive. After conclusion of the trial within a trial, I admitted the statement made by accused 1 to his uncle. The uncle also in cross-examination

testified that he received three text messages with a request that he not go to court.

[43] I have admitted the confession made by accused 1 made to Captain Mgwadla and by accused 2 to Captain van der Merwe. After the trial within a trial was concluded, I admitted both statements as exhibit "K" and exhibit "L" respectively. Both police captains made a good impression on the court and the court had no hesitation in accepting that in respect of both statements the rights of the accused were properly explained and the statements made freely and voluntarily. This evidence had been fully dealt with in this judgment. The fact that the confessions made to both captains were long and detailed negates any suggestion that they were made to appease the investigating officer.

[44] In both statements accused 1 and accused 2 admit they set the house of the complainant alight.

[45] Contents of the confessions confirm the circumstantial evidence of the state witnesses regarding the issues relevant to this case.

[46] Both accused pleaded alibi and in terms of Section 115 gave a plea explanation that they were not involved in this offence or were at the scene of the crime.

[47] Throughout the trial the accused stuck to their alibi. According to them witnesses were telling lies and statements made by them were false in all instances where the evidence implicated them.

[48] Based on the evidence placed before the court the defence of an alibi has failed dismally.

[49] Accused 1 and accused 2 on their own confessions were involved in the commission of the offences and they were at the scene.

[50] The commission of the offences was probably as result of "revenge" by accused 1. In cross-examination accused 1 admitted that he believed that his mother had been bewitched by the complainant and was to blame for her death. He also said that he believed in witchcraft. This would account for him taking revenge on the complainant and her family. In the process accused 2 was a willing partner. It is clear that the aim was to kill the complainant. The plan however resulted in others being killed.

[51] This is clearly a case of *dolus indirectus*. Hiemstra's Criminal Procedure at page 258 reads as follows:

"Actual indirect intention (*dolus indirectus*). This intent exists when the prohibited result (in murder, the death of the deceased) is not a main intention, but the perpetrator knows that the prohibited result must necessarily follow if the main purpose is sought. The perpetrator sets a house alight in order to burn to death the woman who is inside. If he perpetrator knows that there are children with her, it does not help him to allege that he had no intent to harm the children."

[52] The court is satisfied that the state proved beyond reasonable doubt and we accordingly find that the accused 1 and accused 2 are guilty of the following offences:

- (i) Count 1 - Arson;
- (ii) Count 2 - Murder;
- (iii) Count 3 - Murder;
- (iv) Count 4 - Attempted Murder;
- (v) Count 5 - Attempted Murder;
- (vi) Count 6 - Attempted Murder;

With regard to counts 7 and 8 the state alleged that the accused are also guilty of offences relating to the practice of witchcraft as set out in paragraphs 1(a) and 1(b) of Act, 3 of 1957 which provides as follows:

"Offences relating to the practice of witchcraft and similar practices.

Any person who:

1

- (a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard:
- (b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person,"

The evidence in this case does not reveal that either of the accused is guilty of the conduct set out in the sub-paragraphs. At most it might be suggested that accused no 1 imputed the cause of death of his mother to sorcery engaged upon by the complainant. The problem is that he imputed that circumstance to himself and not to any other person other than perhaps some of his family. He did not pretend to possess supernatural powers in order to come to that conclusion. He claimed to have had a vision when looking into a magic mirror. Accused no 1 did not pretend to have supernatural powers and his conduct was simply a misguided attempt to murder the

complainant which ended up causing the death of two other people. I do not accept that the Witchcraft Suppression Act, has anything to do with this matter and to prefer charges under this Act would in the first place be misguided and in the second place constitute a splitting of charges. The accused are, therefore, acquitted of counts 7 and 8 of the charge sheet.

In respect of count 9 the state alleged that the accused contravened section 27(1) of the Explosives Act, 1956 [Act 26 of 1956]

- causing an explosion whereby life or property is endangered.

Alternatively

contravening of section 28(1) of the Explosives Act, 1956 [Act 26 of 1956] - a person who is found to have in his possession or under his control any explosive under such circumstances as to give rise to a reasonable suspicion that he intended to use such explosive for the purpose of injuring any person or damaging any property.

In section 28(2) an "explosive" includes a "petrol bomb". Adv Colenso argued that this Act had been repealed by the Explosives Act, 2003 [Act 15 of 2003]. This Act has to date still not been assented to. In terms of the Explosives Act 1956, [Act 26 of 1956] a petrol bomb is deemed to be an "explosive" for the purpose of a section 28 offence. This provision is not applicable to section 27 of the Act. The inclusion of a petrol bomb under "explosives" was clearly designed only for the purposes of section

28.

In order to secure a conviction in terms of section 28(1) the court must find that the accused was "found in possession of the explosives ["petrol bomb"]". In this instance the accused were not found to be in possession of such explosive.

The extended definition of explosives is not applicable in respect of section 27 of the Act. The accused are therefore acquitted in respect of section 27 and on the alternative of section 28 of the Act.

I would add that it is quite absurd for the Act to have a special definition of an "explosive" for the purposes of section

28 whereas the rest of the Act has a more reasonable and logical definition of explosive.

WEINKOVE, AJ

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