

SOUTH AFRICA / JUDGMENT

S v Mabilu and Others (CC66/2018) [2022] ZALMPPHC 19 (31 March 2022)

[2022] ZALMPPHC 19

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

CC66/2018

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NUMBER:CC66/2018

REPORTABLE: YES/NO

OF INTEREST TO THE

JUDGES: YES/NO

REVISED

In

the matter between:

THE
STATE
And
KABELO
MAPALA
MABILU
ACCUSED 1
KOPI
BOB
PHOKANE
ACCUSED 2
THAPELO
KGAMARA MAEBELA
ACCUSED 3
ROBERT
MARANGRANG PHOKU
ACCUSED 4
MARUMO
ESROM
PHOKU
ACCUSED 5
LAZARUS
HAPPY
PHOKU
ACCUSED 6
P[....]
C[....]
M[....]
ACCUSED 7
RESHOKETSWE
EDITH MATJIE
ACCUSED 8
ELIAS
ISAAC
MAEBELA
ACCUSED 9
MONDRY
MAREDI
MAEBELA
ACCUSED 10
TEMOSHO
JOHANNES
MABILO
ACCUSED 11
ELSON
PAKENG
MAROBANE
ACCUSED 12
MARTIN
MAEBELA
ACCUSED 13

MMEKENG
AARON
NGOATLE
ACCUSED 14
GERMINAH
MAHLAKA
MABILO
ACCUSED 15

JUDGEMENT

KGANYAGO J

- [1] The accused have been indicted to this court on 9 counts. Count 1 is malicious damage to property which relates to all the accused; count 2 public violence which relates to all the accused; count 3 murder which relates to accused 1,2,3,4,7 and 8; count 4 malicious damage to property which relates to accused 1,2,3,4,7 and 8; count 5 arson which relates to accused 1,2,5 and 6; count 6 arson which relates to accused 1,2,5 and 6; count 7 arson which relates to accused 1,2,5 and 6; count 8 arson which relates to accused 1,2,5 and 6; and count 9 public violence which relates to accused 1,2,5 and 6.
- [2] All the accused have pleaded not guilty to all the counts they are facing. They have given a lengthy plea explanation which in short they are denying any involvement in the charges that they are facing. The State proceeded to call its first witness Kgalema Walter Mohlala. He testified that Chief Bethuel Mohlala is his brother. On 23rd April 2017 he was at church in Moria when he received a missed call from his wife. Later he phoned his brother who informed him that the chief's kraal and his house has been burned. He then phoned his wife who was at her parental home at Gankoana. His wife told him what happened.
- [3] On Monday he went to the police station to open a criminal case. He only went to his house during December 2018 and found that it has been completely burned. It was a nine-bedroom house which was fully furnished. The estimated damage to the house and furniture can be about R700 000-00. There was no one in the house when it was burned down.
- [4] The witness was cross examined and he conceded that in his police statement dated 25th April 2017 he had stated that he did not know who the suspects were.
- [5] The State called Tintswalo Audrey Shikathi who testified about count 5 to 9 as its second witness. He testified that he is a police officer and Lt-Colonel in rank stationed at Mecklenburg SAPS. On 23rd April 2017 he was posted at Diphale village together with his colleagues from TRT and POPS.

- [6] On arrival at Diphale village they saw a black smoke that was coming from an uphill and it was around 11h00 am. They drove to the direction where the smoke was coming from. As they were driving on the road, they saw some burned tyres, big rocks and sticks on the road. They were unable to pass as the road was barricaded. They got off the police vehicle and removed those objects from the road. Community members started throwing stones at them. After removing those objects, they went to where the smoke was coming from.
- [7] On arrival at the place where there was smoke, they found that it was the chief's kraal that was burning. He saw four houses and also two buildings that looked like a hall burning. The four houses and two halls were inside the chief's kraal. As they were at the chief's kraal he saw another house on the downward slope also burning. Some community members started throwing stones at them. They went to the downward slope and found a big house burning. As they were at that house, they saw another smoke from their left hand side.
- [8] They went to the place where the third smoke was coming from and found a double storey house burning. As they were there they saw the fourth smoke coming from uphill. As they went to the fourth house that was burning, they saw people running from that house, but could not reach them as the road was barricaded. When they ultimately arrived at that place, they found a big face brick house burning. They heard that the community members were looting at Moropa's shop. They went to Moropas shop and saw people running towards the mountain. Some of his colleagues gave chase to the people who were running towards the mountain. His colleagues came back with some braai packs and groceries alleging that the said items belonged to Moropa's shop.
- [9] On the second house that was burned he did not see people there. He was told that the house belonged to Mr Matjie and the fourth house belonged to Mr Mohlala. They did not see anyone who had burned the houses because they did not find anyone on the scene.
- [10] The witness was cross examined and he conceded that the village was in complete chaos. He further stated that at the chief's kraal he saw two cars that were burned.
- [11] The State called Debora Mafoshe Maboe as its third witness. She testified that during April 2017 she was staying in Lebowakgomo and she is also having a house at Diphale village. She left Diphale village on 16th April 2017 and went to stay in Lebowakgomo. She fled from Diphale village as community members were troubling them.
- [12] On the 23rd April 2017 she received a call from her daughter Olga Ngwatle informing her that her house was on fire and that a group of people

whom she could identify were at that house. On 24th April 2017 she and her husband went to Diphale village and found their house burned down. She did not know the people who burned it, but she is having suspects in her mind.

- [13] It was a five-bedroom house and the estimated damages to it amounted R1 200 000-00. She suspects that the accused Kabelo Mabilu, Esrom Phoku, Kopi Phokoane and Mbuti Maebela are responsible because they are the leaders of the community that was after them.
- [14] She was involved in MCC Projects as a director and also a teacher at the crèche. She is not comfortable in naming the other directors of MCC. However, Shadrack Matjie is a director of MCC whilst Chief Bethuel Mohlala is not a director. She knows nothing about Bogompane Chrome.
- [15] The witness was cross-examined and it was put to her that the names of the suspects that she had mentioned had nothing to do with the burning of her house and she stated that she only suspects them.
- [16] The State called Mokgale Shadrack Matjie as its fourth witness. He testified that currently he is in hiding. During April 2017 he was staying at Diphale village. He left Diphale village on a Good Friday during April 2017.
- [17] On the 23rd April 2017 he was where he is currently hiding when he received a call that there was a problem at the chief's kraal as community members wanted to burn the chief's kraal, and when they are done with the chief's kraal, they are going to burn his house. There was nothing he could do.
- [18] After about an hour, he received another call that community members have gathered around his house. Later he got another call informing him that his house was burning. He went to open a criminal case with the police. He went to check his house after a long time when he went to attend a funeral of a relative during 2018. He found a completely burned house and there was nothing that he could salvage. They have also burned his two vehicles and have also attempted to burn his tractor. The estimated value of the damage amounted to R1 500 000-00.
- [19] He works at MCC and Makgomo Chrome. Bajabowa Chrome company and Bogompane were merged to form MCC. When his house was burned, Jane Mashaba was staying in that house. MCC benefit 6 communities who gets the benefits after chrome has been processed. Makgomo comprises of 3 companies, MCC, Marula Mine and Impala. MCC hold 50% shareholding whilst Marula 20% and Impala 30%. As for Marula, it is the custodian, whilst 20% is for the community.
- [20] The witness was cross examined and he conceded that in his police statement he had mentioned the names of the suspects. He conceded that those are the names that he had discussed with Debora, the State's third witness. He conceded that the dispute between his group, the chief and mphakathe was about mining. He conceded that Barclays is his son although not biological and that he had bought him a car, though it is still registered in his (witness) names and that Barclays relies on him for survival as he still supports him. He conceded that in his police statement he had stated that the reasons why he suspected the accused was that they were the leaders of mphakathi and that it was not the only reason.

The other reasons are that during 2016 the group of accused 1 interfered with the day to day running of the mine and were also in contempt of a court order. That accused 1 is a troublemaker. Most of the time during cross examination, this witness was evasive, argumentative and giving irrelevant answers.

- [21] The State called Mafete Bethuel Mohlala as its fifth witness. He testified that he is the chief at Tswako Mohlala Traditional Authority. On the 23rd April 2017 he was attending a meeting in Polokwane when he received a call informing him that community members were attending a meeting at the chief's kraal. He requested to be excused from the meeting to go home. He arrived home at Diphale village around 13h00 and found rocks on the road. He forced his way and on arrival at his home he saw flames and smoke.
- [22] He met a certain boy who told him that he saw Kaizer Maboea leading the group of people and that boy fled when he wanted to question him further. Four houses were burned and one of the house had two cars in the garage. Two tribal offices with halls were also burned. The estimated damage could be about R5 000 000-00.
- [23] The witness was cross examined and he conceded that he did not know the people who burned his houses, cars and tribal offices.
- [24] The State called Nokane Aubrey Mokwena as its sixth witness who testified about count 1 and 2. He testified that he is a police officer and W/O by rank. On 15th April 2017 he received a message from his commander that things were bad at Diphale village and that the situation needed a nyala vehicle. He took the nyala and drove to Diphale village. He was told that a person was about to be killed and that her car was burning and further that Moroka and Mecklenburg SAPS where unable to enter the village as the road was barricaded with stones and they were using light vehicles.
- [25] On arrival at the scene he found a car burning and there was a mob which when it saw the police nyala, it fled the scene. He called the person who was said to have been kidnapped and that person told him that he was Barclays Thobejane. One Victor Thobejane who said was Barclay's brother also came. Victor told him that he was amongst the mob. He took Victor and Barclays to the police station. Victor told him that he knows the people who were there at the scene. Victor told him that he was afraid of those people and was also afraid to give a police statement as he feared for his life. He then took Victor and Barclays to Mecklenburg SAPS for safety purpose.
- [26] When he arrived at the place where the car was burning, Barclays was inside the house at a certain homestead. The car was burning outside the yard next to the gate. He also saw people sitting under the tree.
- [27] The witness was cross examined and nothing knew came out.

- [28] The State called Maleta Eric Makgolane as its seventh witness. He testified that he is a police officer, W/O by rank stationed at Mecklenburg SAPS. On the 16th April 2017 he was on duty with captain Maimela and Sgt Seabi when he received a message from Colonel Chuene that someone has been murdered at Diphale Seuwe village. They rushed to Diphale village.
- [29] On arrival at Diphale village at Kgopane's family, they found a white double cab bakkie in smoke showing that it was burning. When they get closer at the bakkie they saw what looked like a human being and had being burned next to the bakkie. What was remaining of that person was a skull, half of the spinal cord and a piece of the foot. They also saw what looked like a big tyre which had also burned. They then phoned the pathologist and fingerprints experts.
- [30] When they asked the people who were around as to what might have happened, they were told that the person might have been killed by community members from Diphale village. They were further told that the deceased was Ntaporosana Anna Maebela-Tau. The witness was cross examined and nothing new came out.
- [31] The State called Barclays Makhudu Thobejane as its eight witness. He testified that on the 15th April 2017 he visited his friend Joel Molamo driving a brown Toyota Etios. On arrival at his friend's homestead, he parked his vehicle at the gate and entered the yard. He did not find his friend and was told that he had gone to visit his sister who did not live far. As his sister was not living far, he left his car parked at the gate and walked to the sister's place where he found his friend.
- [32] He and his friend left the sister's home and went to his friend's home. On the way his friend told him that he was going to church. On arrival to his friend's home, his friend told him that he was going to bath before he goes to church. He then went to his friend's other sister where he was supposed to collect a parcel.
- [33] When he returned to from the other sister's place and was about to reach his friend's homestead, he saw a group of people going towards his friend's gate. He then entered the yard. In that group he saw accused 1, 2, 4 and 8. The group told him to get out of the house as they wanted to stone him to death. Those words were uttered by accused 1, 2, 4 and 8. Other people started throwing stones at the car and smashing its glasses. Those he saw throwing stones were accused 11, ,9 and accused 11's mother whom he does not know her name, 14, 7 and others whom he did not know their names.
- [34] Accused 13 and 12 were throwing stones into the yard. He saw accused 2 in possession of a bottle that contain petrol and he threw it at his vehicle but it did not burn. Accused 1 also took out a bottle and threw it at the car but it did not burn. It was 1,25 litre cool-drink bottle. Then he saw accused 3 opening the fuel cap of the car. He also saw accused 4 and 10 lighting matches and throwing it inside the fuel tank and the car started burning.

- [35] When the car was burning, accused 1 told others to go and fetch the person inside the house so that they can hit him with stones and put him inside the burning car. Some minutes later the mob started dispersing. He then saw the police in a nyala vehicle. The police officer came to him and one of the police officer introduced himself as Mr Mokwena. When the policeman took him, he immediately saw his brother Victor Thobejane next to the nyala and he did not know where he came from. He and his brother left with Mr Mokwena in the nyala vehicle. Mr Mokwena took them to Mecklenburg police station.
- [36] The people who were present at his friend homestead who witnessed the incident are Joel Molamo, Mogatle Molamo, Diphaki Molamo, Albertina Mannye and Neo Mannye. At the police station he made a statement to the police. The accused who were present at the scene were 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14 and Temosho's mother who is accused 15. He knew all the accused for many years. The people whom he had identified, he saw their faces as they were not far from him. When they started throwing stones he was inside the house. The value of his car that was burned was about R140 000-00. He was given the car by Shadrack Matjie and the car was still registered in Shadrack's names.
- [37] The witness was cross examined and he conceded that he was in hiding at an undisclosed location together with Shadrack until June 2018. He conceded that accused 5 and 6 were not at the scene. He stated that he knew all the accused very well as some he grew up with them. He conceded that there were many people at the scene and will not know the number. He conceded that all these incidents that were unfolding, was as a result of mine activities. He conceded that he never felt threatened, and that nobody ever chased him, and that he did not run into the house. He conceded that the mob never threw stones at him. He conceded that the windows of the house that he was in were never damaged by the mob. He conceded that from the mob he did not know who was the first to throw a stone. The witness stated that anything bad that happens at Diphale village is associated with mphakathe group. He also stated that he had told Shadrack that the car was burned by mphakathe group and he knows their names.
- [38] The State called Nkotwane John Moretsele as its 9th witness and he testified about count 3 to 9. He testified that the 16th April 2017 was the day after Ntheke Kgopana was murdered, and on that day he went to Nteke's homestead to pay homage.
- [39] On arrival at Nteke's homestead, he saw accused 1 who was started addressing the people who were at that homestead. Accused 1 told the gathering that there were people who were wiping out the community and that those people came from far places such as Lebowa kgomo. Accused 1 mentioned names like Ntaporosane Maebela (deceased). Accused 1 told the gathering that those who have parked their cars next to that of the deceased's car must move them. Other people who told the people to remove their cars were accused 7, 3, 2, 8, 4.

- [40] The deceased was driving a Toyota double cab. This double cab was parked in the yard where the funeral was supposed to be held. After cars were removed, accused 7, 8 and others went into the house to fetch the deceased. They came out of the house dragging and assaulting the deceased. The deceased was also tied with a lace or robe. She was being dragged by 8 and 7. Stones were also thrown at the deceased and she was also assaulted with sticks. Accused 2, 3 and 4 were assaulting her with stones and other women whose names are unknown to him were using sticks to assault her. Accused 1 and 3 went to fetch a tyre. He does not know where they got the tyre but it seems to have been ready. It looks like to be the tyre of a truck. Accused 1 and 3 put the tyre over the deceased body and accused 2 was having a 5 litre container of petrol. He poured petrol on the car and the deceased. Accused 1, 2, 3 and 4 were having matches and they lit them and the car caught fire. There was pandemonium as everyone was moving back for safety fearing that the car might explode. He then went home.
- [41] He knows accused 1, 2, 3, 4, 7 and 8 as he used to be part of mphakathi with them from 2015 to 2016. He left mphakathi during
2016. They formed mphakathi for the sole purposes of fighting chiefs. He left mphakhathi because he was not pleased in the manner in which they were doing some of the things.
- [42] The 23rd April 2017 was the day on which Ntheke was buried. At the graveside when the coffin was lowered, accused 2 and 6 started firing firearms shots into the air. Accused 1 then told the mourners that after the funeral people who have gone to the deceased homestead must not leave. He further told them that from the deceased homestead they should go to a marula tree at moshate.
- [43] On arrival at the marula tree, accused1 told the elders to leave and go to their respective homes. After the elders have left, accused1 told them that things have gone to the worst and that they should start burning the houses of the people who are against them. He told them that they should start burning moshate first.
- [44] At that stage accused 5 arrived driving his red car. It had a 20 or 25 litre container of petrol. They entered moshate and set it alight. Accused 1 was the one who ran and burned the houses at moshate with that petrol. Accused 2 burned the offices. After they burned moshate, they went on a rampage burning other houses. The last house that he saw them burning was that of Walter Mohlala.
- [45] After moshate and other houses were burned, he ran away to his homestead. As he was going home, he saw the red car coming and its occupants were accused 1, 2, 3, 4, 5 and others that he did not know. The red car went to Walter Mohlala's homestead. At Walter Mohlala's homestead he saw accused 2 shooting Walter's dog in the yard with a firearm. Then he saw accused 2, 3 and 4 entering the yard with a petrol container. Accused 5 together with 6 also entered. Whilst inside the yard, they started breaking the windows of the house. Accused 1 was having a 5 litre container and started pouring it at the houses and thereafter set them alight. After that they dispersed and fled. He also saw accused 2 setting the house

alight.

- [46] If he remembers well, on the 23rd April 2017 the houses that were set alight were that of Ms Maboea, Shadrack Matjie, moshate and Walter Mohlala. However, that day he did not see the houses of Shadrack Matjie and Ms Maboea burning but he believes they were burned that day. The first house was burned around 11h00. He will not know what time they finished burning the houses as this thing was done in a rush.
- [47] The witness was cross examined and he disputed one of the police statement as his and stated that he did not know who might have signed it. The statement that the witness disputes as his has been marked A10 and the one that he accepts as his is marked A4. He stated that he was expelled from mphakathe because he was refusing to burn moshate. He denied that he was a rented witness to come and implicate the accused. However, after lunch break the witness conceded that the statement marked A10 was his and that it was his handwriting that appears on that statement. He stated that he initially disputed it as he was confused by these A10's and A4's. He stated that he started knowing accused 5 during 2015. He conceded that on 23rd April 2017 accused 6 was not at the scene of crime, but at his home.
- [48] The State brought an application for admission of the written statement made by Mmabatho as she does not seem to be willing to come and testify. The application was refused and the State proceeded to close its case. The defence brought an application for a discharge of all the accused in terms of section 174 of the CPA and the application was refused.
- [49] The defence proceeded to call accused 5 to the witness stand and he testified under oath. He testified that there is a dispute between the members of the community of Diphale whom he refers as mphakathi and the members of the royal family regarding mining operations by Impala which operate at Marula Mine. He was part of a march to Sandton against Impala regarding the challenges which the communities face being lack of employment and chrome mining in terms of Impala's social labour plan and corporate investment plan. Impala has given the community permission to mine chrome.
- [50] He (accused) was part of the leaders who were delegated by community members to go to Marula Platinum Mine as the licence holder and enquire from them as to how the community was benefiting as the said project was long ongoing. Marula Platinum Mine in turn called the private companies which were mining chrome. The directors of the said companies were Shadrack Matjie the fourth State witness, who was a director of Makgomo Chrome. However, the directorship of the fourth State witness was terminated during 2020.
- [51] That they also went to the police station as the leaders of mphakathi were always arrested for doing nothing. On 13th April 2017 the leaders of mphakathi which comprised of himself, accused 1 and the late Nteke Andrew Kgopana appointed Noxuko Attorneys to assist the community about the issue of chrome mining. They were supposed to report to the community the following day after the meeting with Noxuko Attorneys. However, he (accused 5) and his wife went Moria Church for the Good Friday celebration as good Friday

was the following day. That he also went to their local priest to report that he was going to Moria. He used his vehicle to go to Moria and he arrived in Moria around 16h00. He was using a red Toyota Hilux which he is the owner of it. That the said vehicle had a car tracker since 2015.

- [52] On arrival at the church he attended the church service and later attended the mokhukhu dance which finished around 20h00. After that he went to sit in his car. Around 21h00 he received a call that Nteke has been shot and killed, and that terrified him. He slept in his car. He left Moria in the early hours of Monday around 3h00. He took his wife to his mother's place and thereafter went back to Moria. He did not want to take his wife to their common home as one of the leaders of mphakathi was shot and killed. He went back to Moria for safety reasons. He went back home on 20th April 2017 as he was phoned by his local branch church and told that they have received a letter from the royal family saying that he (accused 5) and those associated with him were intending to burn Moshate as Moshate has killed one of their associates.
- [53] He drove back home and on arrival he went to his local branch of the church. On arrival at the local church he asked the priest to show him the letter but they failed to show him. He told his local priests that he knew nothing about the intended burning of moshate and did not intend to do that. He told the priest that he was taking shelter in Moria and after that meeting he was going back to Moria. From the meeting with the priests, he went back to his home where he stayed until Saturday the 22/04/2017. On Saturday the 22/04/2017 he went back to Moria and he stayed in Moria until the 7th May 2017.
- [54] When he came back home, he found that there were people who have been arrested. As they were attending court for those who have been arrested, their attorney informed them that his name was amongst those the police were looking for and that he must hand himself to the police. He handed himself to Mecklenburg SAPS on Monday 15th May 2017 and he was arrested.
- [55] That the other directors of Mmakgomo Chrome are Walter Mohlala the first State witness and Debora Maboea the third State witness. That there is also Tswako Mohlala Royal Family Trust headed by Bethuel Mohlala, the fifth State witness. That there are serious disputes between the royal family and the community.
- [56] The accused further testified that he had approached his tracker company to furnish him with a report about the movement of his car, but was told that the package that he has taken was only for when the car was stolen and not about its movement. That on 23rd April 2017 the date of the funeral of Nteke when several houses were set alight, he was in Moria and his cell phone records support his version. That on the date of the incident he was using and is still using the same cell phone number [....].
- [57] The accused was cross examined and he conceded that John Moretsele the State's 9th witness was part of the executive of mphakathi in Seuwe Development Forum up to December 2016 when the forum removed him. The accused conceded that he was working

closely with the late Nteke, and further that they were also related and that the late Nteke was named after their late great grandfather. He stated that he could not attend the funeral of Nteke as he was supposed to do church prescriptions before the specified dates. The accused conceded that the State's 9th witness knew his red bakkie but that on 23rd April 2017 his bakkie was parked in Moria and he never drove it. When it was put to the accused that the cell phone records did not show that the cell phone number was registered in his names, he stated that what he knows is that the cell phone number that he uses is [....]. When it was put to him that according to the cell phone records, the number is registered under Motlashe

Phokoane, he stated that he did not know that person. He denied that on 23/04/2017 he was at the home of Walter Mohlala driving his red bakkie, and that on that particular day, his car was parked in Moria. The accused stated that after coming back from Moria, he at no stage went to Nteke's homestead.

- [58] The defence called accused 6 to the witness stand who testified under oath. He testified that he is employed at Fetakgomo Tubatse Municipality currently as acting manager public participation. That at the time of the incident his job description entailed convening public meetings. That Diphale village falls under Fetakgomo Tubatse Municipality. He is the chairperson of six host community forum since 2016.
- [59] That none of the witnesses for the State had implicated him on the charges of the 15th and 16th April 2017. That on 23rd April 2017, he attended Nteke's funeral which was on a Sunday. That on 22nd April 2017 he had slept at Mandagshoek as after Nteke was shot, most of the leaders of mphakathi had fled from Diphale village. There were rumours from Diphale village that the youth wanted to investigate the mine operations and they assumed that Nteke was killed for mine issues and they were asking themselves as to who was next.
- [60] In the morning of the 23rd April 2017 he went to Nteke's funeral and he was alone. He arrived at the funeral at 7h30 and found that there was no proper arrangement for the funeral, as Nteke's body had not yet arrived from the mortuary. He assisted in the proper arrangement of the funeral that morning. He did not take part in the funeral arrangements during the week as he had fled from his home. They met the mortuary vehicle at Mafete village which is about 4km from Nteke's homestead. From there they took the coffin of Nteke from the hearse and carried it by hands as he was their comrade and took it to Nteke's homestead.
- [61] From there they carried the coffin to the graveyard. At the graveyard there were people who were selected to search the people who entered the graveyard, as they wanted to make sure that there was no one who entered the graveyard with a firearm. He does not have a firearm licence and a firearm.

- [62] After the burial at the cemetery, they went back to Nteke's homestead. At the funeral he, accused 1 and other leaders of mphakathi were running the program of the funeral. He and accused 1 even gave speech at the funeral. On the day of the funeral, accused 5 was in Moria as he was communicating with him telephonically.
- [63] He knew the 9th State witness very well as they used to attend forum meetings with him and the 9th State witness was also given training in the mine. He also knew where the 9th State witness resides. At some stage the 9th State witness was part of the forum. Later the 9th State witness and others were not happy with resolutions taken by the forum regarding the mine and the 9th State witness and others took the register of the meeting of the forum and ran away with it. That resulted in the 9th State witness, Kenneth Maake and Edward Phasha being dismissed from the forum by community members. He disputes the evidence of the 9th State witness against him.
- [64] After the funeral of Nteke, he left with accused 1 as accused's 1 vehicle was recently burned, and during that time accused 1 did not have a car. Accused's 1 car was burned before the funeral. He dropped accused 1 at Mandagshoek at a place called circle and thereafter drove to Witbank. At about 14h00 whilst passing Stofberg on the way to Witbank, his mother-in-law phoned him and told him that moshate was burning. From Nteke's homestead to Stofberg can be about 220 km. As per his cell phone records at about 14h00 it shows that he was at De Hoop Tower which is on his way to Stofberg. His cell phone records also shows that at 14h39 his mother-in-law had phoned him. When moshate started burning, he was already far away from that place.
- [65] He heard through accused 5 that the police were looking for him, and by then some of his co-accused were already arrested three weeks prior to be informed by accused 5. He does not remember when he was arrested, but he went to the police station together with accused 5, the same date he was told that the police were looking for him. On arrival at the police station they found police officer Moitsi. As they were explaining to Moitsi, one police officer Seabi arrived said that they must be arrested and charged with all counts despite Moitsi telling Seabi that they were not present when the murder offence was committed.
- [66] His cell phone records shows that on 23rd April 2017 at 12h58 he had phoned accused 5. What he remembers is that when he phoned accused 5 that day, accused 5 was in Boyne and he was reporting to him that they were done with Nteke's funeral. The accused further stated that after the 9th State witness was dismissed from their forum, the 9th State witness joined the group of the fourth State witness.
- [67] The accused was cross examined at length by the State counsel and he conceded that he had attended the burial of the late Nteke, but that after they came back from the cemetery he did not stay long but had left at 12h30. He further stated that when people started burning houses he was not there. He further stated that he left the homestead of the late Nteke with accused 1, and that he dropped accused 1 at Mandagshoek before 13h00. The accused stated that he learned about the burning of the houses around 15h00 when he was phoned by his

mother in law when he was on his way to his hiding place in Witbank, where he was staying at his brother's house Simon Khosa, and that he arrived there around 16h00 to 17h00. The accused further stated that whilst in hiding in Witbank he was not reporting for work at Fetakgomo Municipality as he had explained his situation to his employer who understood his situation. The accused further stated that on the date of the funeral accused 5 was in Moria.

- [68] The defence called accused 9 to the witness box and he testified under oath. He disputed that he was present when all these incidents happened, but that he was at home. He stated accused 3 is his brother and that accused 3 was arrested before him. That after accused 3 was arrested, he went to court to go and listen to his case and also pay for his bail if granted. Whilst at court the police told him and those he was in company with, that the court will not grant the accused bail as there were other suspects they were still looking for.
- [69] Accused 9 and those with whom they have attended court with, went to the police station to find out whether their names were also on the list of the names of the people whom the police were still looking for. The police refused to give the list of names of the people they were still looking for. Accused 9 and his company approached their legal representative Mr Lebogo to find out from the police on their behalf. The police gave Mr Lebogo that list and when accused 9 checked that list, he found that his name and that of his company appeared on that list. Accused 9 and his company then phoned those who were not at court and informed them that their names appeared on the list of wanted suspects. The following day all those who appeared on the list of wanted suspects went to police station where they were arrested. According to accused 9 he went to the police station knowing that he did nothing wrong. Accused 9 further stated that those who handed themselves to the police are himself up to accused 15.
- [70] Accused 9 further testified that on the day Barclays vehicle was burned, he had met Barclays in the morning and that Barclays was driving his vehicle. After meeting Barclays, accused 9 went home, and later he heard that Barclays vehicle had been burned. That even when the police arrested him, he told them that he knew nothing about the incident, but that he had met Barclays in the morning.
- [71] The accused was cross examined and he stated that on the date of the incident he had met Barclays at about 8h00, but he did not speak to him. Accused 9 denied that on the day of the incident he went to the place where Barclays vehicle was burned. Accused 9 stated that he learned about the burning of Barclays vehicle the same day of the incident around 15h00 to 16h00 whilst at home from many people who were talking about the incident, and also when he was at work at Marula Platinum. Accused 9 further stated that at the time of the incident he was having a plaster of parish on his arm and he could therefore not have been in a position to throw a stone, and further that he was not there where the incident took place.

- [72] The defence called accused 10 to the witness stand who testified under oath. Accused 10 disputed the version of Barclays who had implicated him. Accused 10 disputed that he was at the place where the incident took place but that he was at home sleeping. That he was one of the accused who have handed themselves to the police under the circumstances as testified by accused 9. He further testified that he is one of those who did not attend court but was phoned to be informed that their names were on the list of suspects. When he received the call he was at work at Modikwa Platinum Mine. The following day he went to Moroke SAPS with accused 9 as he knew that he was innocent. He knew Barclays very well and did not have any issues with him. Accused 10 stated that he thinks the motive for implicating him was that he was on the other camp that was opposing Barclays father on issues of chrome.
- [73] Accused 10 was cross examined and he denied that on the 15th he had left his homestead, as the previous night he had spent the whole night at a pub and was having a hangover. He stated that on the day of the incident he was alone at home as his mother and siblings had gone to a church conference in Witbank. Accused 10 stated that he learnt about the burning of Barclays car the same day around 15h00 when passerbys' from the village were talking about it when he was lying on the sofa due to the hangover. He stated that the sofa he was lying on was about 10 to 12 paces from the street.
- [74] The defence called accused 11 to the witness stand and he testified under oath. He disputed the evidence of Barclays that implicate him. He disputed that he was at the place where Barclays vehicle was burned, but that he had gone to Magabaneng to go and watch a soccer tournament. That before that incident, he did not have any problems with Barclays, and that Barclays had a soccer team and he used to call him to play for his team. That in the village there were two groups, one of the chieftaincy and one from the community. Accused 11 testified that he belonged to the community group whilst Barclays belonged to the chieftaincy group. Accused 11 stated that he thinks Barclays implicated him as he thinks that he is the enemy.
- [75] Accused 11 was cross examined and he denied that he was an enemy of Barclays. Accused 11 stated that on the 15th he went to Magabaneng to watch the soccer tournament around 12h00. He denied that he went to Magabaneng as he was running away after the burning of the car, but that the car was not yet burned. That he heard about the burning of the car around 15h00 whilst he was at Magabaneng when he was also told that the police were all over Seuwe village and that it was not safe to go there. He denied that he took part in the burning of Barclays car. Accused 11 further stated that he went to the soccer tournament alone, and that when he returned from the soccer tournament, he was in the company of unknown people.

- [76] The 12th accused took the witness stand and testified under oath. He disputed the evidence of Barclays that implicated him and testified that Barclays was lying. He stated that he knew Barclays before the 15th April, and was surprised why he lied against him. The accused stated that maybe Barclays lied against him because he was a member of mphakathi, and also one of the people who were very active in community issues. That on 15th April he was at home alone and sleeping.
- [77] The accused was cross examined and he stated that he slept in the early hours of the 15th April at about 4h00 as he was from a drinking place, and that he stays with his parents who on that date have gone to attend a church service at Seuwe. The accused further stated that he regarded Barclays as a brother as Barclays had raised him and they used to play soccer together. The accused further stated that he took Mr Shardrack Matjie as his parent as prior to the death of the accused father, Mr Matjie and his father were assisting each other with tractors. The accused stated that he learnt about the burning of Barclays car two days later at a football match. He denied that he was opposed to the chiefs.
- [78] Accused 13 took the witness stand and testified under oath. He disputed the evidence of Barclays that implicated him. He stated that on the day Barclays car burned, he was at home. He heard on a Sunday whilst in a taxi going to town about the burning of Barclays car. He knew Barclays before the 15th April and denied that he had thrown stones at Joel's homestead. The accused stated that it might be that Barclays had mistaken him as when Barclays testified, he had stated that there were many people at the scene.
- [79] The accused was cross examined and he denied that he was in opposition to the chiefs, and stated that at the time of the incident, he was no longer residing in Diphale. He further stated that whilst residing in Diphale, he was actively participating in community meetings. He stated that he moved from Diphale to Natlela during 2015 and that after moving to Natlela, he was no longer participating in community issues of Diphale, and further that Natlela is not part of Diphale village. The accused stated that he was staying with his mother and elder brother, but that on the day of the incident he was alone at home as his brother and mother have gone to visit his maternal grandfather who was not well. He stated that from Diphale to Nyatlela is quite a distance, and not a walking distance.
- [80] Accused 14 took the witness stand and testified under oath. He disputed the evidence of Barclays implicating him. He stated that Barclays is assuming that it was him, but that he was not present at the scene.

[81] The accused was cross examined and he stated that on the date of the incident, he was at his brother's house looking after it as his brother had gone to Moria in Boyne as it was during Good Friday. He stated that on 15th April he left his brother's homestead at about 15h00 to go and attend a birthday party at Matjie's homestead, and he went back to his brother's homestead before sunset. He denied that he was in opposition to the chiefs, and also denied that

he was a member of the community that was opposed to the chiefs.

[82] Accused 15 took the witness stand and testified under oath. She denied the evidence of Barclays implicating her and stated that on the date of the incident, she was at her aunt's place where there were lobola negotiations. She stated that she did not know Barclays by then, and that she started knowing Barclays as she was attending court in this matter. She knew nothing about the issues between the chief and the community concerning chrome. She is a woman who stays at home and looks after the children. She does not attend community meetings. Accused 11 is her son. She does not know why Barclays is implicating her.

[83] The accused was cross examined and when it was put her that Barclays had referred to her as Temosho's mother, the accused stated that it shows that Barclays did not know her as within the community they call her Germina or Lesego's mother, and that if indeed Barclays knew her, he would have referred to her as Lesego's mother. The accused stated that on 15th April she and her husband left at about 5h00 in the morning to go to Diphalleng to attend lobola negotiations and as it was not that far, they just walked. She stated that her husband was part of the delegation that went to Moletji village to go and pay for lobola whilst she remained preparing food for the delegation when it returned from Moletjie. She stated that when she and her husband left their homestead, they left accused 11 and Lesego, and further that accused 11 had requested transport and entrance money as he said he was going to attend a soccer tournament. She stated that they day Nteke was murdered, was the day on which they were baking cookies for the lobola ceremony.

[84] Accused 1 took the witness stand and testified under oath. He testified that he started knowing Shadrack Matjie during 2016 after the community forum had lodged a dispute against the chrome mine. By then Shadrack was a director of Makgomo Chrome. The dispute was about the maladministration of the chrome mine. That the agreement that was signed with Marula Platinum Mine was signed with Tswako Mohlala Traditional Authority and that Shadrack was also part of the Traditional Authority. That there was the second agreement with Impala which was to assist the community in building a chrome plant. According to the accused, the composition of Makgomo was that Impala owned 30%, Marula owned 20% and Marula Community Chrome (MCC) owned 50%.

[85] The accused alleges that they did their investigations and found that in MCC were other companies like Bogompane which owned 52% shares and Majabohwa which had 28% shares. That in Majabohwa that is where the six communities that were affected by Marula

Platinum will receive equal shares. That in Bogompane, the major shareholder was Tswako Mante Royal Trust, whilst minor shareholders were Shardrack Matjie and Esrom Mohlala. He did not know about the status of Debora Maboea. That the directors of MCC were allocated 15% shares in the Management Trust, and 5% to Avacap which was the advisor to the community.

- [86] The accused alleges that when they went to Marula, they did not know that there was a community company. What they wanted was for Marula to account for the past 15 years it had been mining in that area as they did not see any development from the mine. They knew that the social and labour plan was given 5 years before it was renewed. After they have submitted their grievance to the mine, the mine gave them full details of the agreement that they reached during the prospecting time. At that time, they did not know as to who was managing the project as there was no office.
- [87] The mine management wrote a letter to Makgomo mine in order for Makgomo to address the grievance from the community forum. Makgomo did not respond to the letter from the mine management, and by then Shardrack was the chairperson of the board of Makgomo. The mine management gave the community forum the contact details of Makgomo. The community forum wrote several letters to Makgomo without receiving any response.
- [88] During July 2016 when they saw that Makgomo was not responding to their letters, they went back to the mine. After informing the mine about their predicament with Makgomo, the head of security of the mine said it was better if they shut down Makgomo Project in order to attract their attention. The head of security closed down the projects gates but left the plant running. After the project was closed, Shardrack wrote a letter to Department of Mineral Resources (DMR) alleging that a group of boys had shut down the mine. DMR wrote a letter to the mine for the mine to talk to stake holders so that they can meet at the DMR's offices.
- [89] They attended the meeting at the DMR's offices, and after the first meeting, the regional manager of DMR issued a letter in terms of section 93 that the project must be totally shut down, and that the employees must stay at home until Makgomo had submitted audited financial statements. The mine decided to close down the mine operation of the chrome section. At the second meeting at the DMR's offices, they found that the financial statements submitted by Makgomo did not meet the requirements that were debated at the first meeting. DMR decided to shut down the mine until the requirements were met.
- [90] After that decision of DMR, Shardrack and his colleague started threatening the leadership of the forum, telling the leadership that they were interfering with them in the running of the project at the mine. The accused alleges that Shardrack personally told him that he was not from that area, but was giving the children from that area information that they were not entitled to and that he must leave that area or else he is going to regret. The accused alleges that the former general manager of the mine and HR had given him some of the copies of the project from the time it started operating, and how much the project had

generated. The accused took that information and showed it to accused 6 who was the chairperson of the forum. He was the secretary of the forum.

- [91] He and accused 6 discussed the documents and also checked whether they were legit. From there he and accused 6 went to Bethuel Mohlala with the said information so that the situation should not get out of hand. Bethuel told them that he was still waiting for his business advisor from India. They waited and waited, but nothing was forthcoming, and they decided to call Shadrack as the director so that they could have a meeting at the mine. The meeting was held at the mine with Shadrack and his colleagues, but the meeting did not yield any fruits. At that meeting, Shadrack told them that there was no way that he could come carrying a buck for the children, and that the chrome was his, and not anyone else, and further that he was not going to attend to rubbish meetings. After uttering those words Shadrack left the meeting.
- [92] The accused alleges that from the documents that they have obtained from the mine, it shows that more than R100 million was generated from the project, and that the said money was going to the individuals. The forum then arranged a march to the head office of Impala in Sandton where they submitted a memorandum of grievances. After the submission of the memo, Impala facilitated a meeting of all stake holders. However, MCC did not attend that meeting. At that meeting Marula and Impala requested consent to start the operation of the mine as chrome was piling up. They agreed on condition that the project was placed under administration as there were other disputes that remained unresolved. The reason for the project to be run by an administrator was that they wanted the cash flow not to go to the directors until the remaining issues were resolved.
- [93] At the beginning of 2017, Shadrack, in his capacity as chairperson of Makgomo wrote a letter to the mine telling them that he was coming with trucks in order to remove the chrome that was in the storage with his unarmed security. The day Shadrack came to the mine there was a community meeting at the mine, and the gate to where chrome was stored, was locked. Shadrack and his security cut the padlock which was used to lock the gate and entered with two trucks. When Shadrack was supposed to leave the mine, the community who were there to attend the meeting revolted against him and tried to block the gate so that his trucks must not leave the premises. However, Shadrack's security guards who were heavily armed started shooting at the crowd that have blocked the gate. The community members started throwing stones at the security guards, and in turn the security guards started chasing the community members into the village. Some community members were caught by the security guards and taken to the police station, but the police did not arrest them. Some of the community members were assaulted by the security guards. After one to two days, Shadrack wrote a letter to the mine apologising about what had happened.
- [94] Before April 2017, they have held several meetings with the directors of MCC and Marula Mine wherein they discussed about what should happen to the project as they wanted accountability from the chrome mine management as the project was not benefiting the

community, and they also wanted a restructuring of the project. During 2016, Debora Maboea's house was set alight, and he did not know under what circumstances it was set alight, but what he knows is that Debora was on the same side with Shardrack. Nteke was one of the suspect in the torching of Debora's house. At that time Nteke was a member of their committee and also in the executive.

- [95] On 14th April 2017 Nteke was shot and killed. Before he was killed, on 13th April 2017, they have appointed their lawyers to carry forward their dispute as there was no progress. On Good Friday, he never went out of his house as it was raining heavily. That day he talked to Nteke late in the afternoon, and after that he went back to sleep. During 2016 his house was torched whilst he was sleeping with his girlfriend, but they managed to escape from the burning house, together with his grandmother and sibling. The house was petrol bombed, and he managed to see the three people who have petrol bombed it. The whole house and car were gutted down.
- [97] From September 2016, he left his house and only came back on 13th April 2017 and slept in the bathroom that was not burned down. After Nteke was shot, he took it that they were under attack as his house was burned down, and Nteke's shop was also set alight. The three people that he saw throwing a petrol bomb at his house were Chancha Maepa, Fanyana Maepa and Lawrence Matjie. These three were initially members of their committee when the committee was formed during January 2016. Later the three disappeared for 2 to 3 weeks and when they came back, they told them that Shardrack had booked them for a week in Sun City, and had also given them R25 000.00 each to destroy the committee. They apologised in public and were admitted back into the committee.
- [98] Later the three left their committee to go and form their own forum, and some of the members who supported Shardrack joined them. Tshepho Malatji who is from the accused forum, attended the meeting of the newly formed forum. At that meeting, Tshepho heard them saying that they must do something about accused 1 as he was the problem. After he heard that Nteke was shot and killed, he remained in the house and did not go anywhere. The following day and on Sunday he did not go to the area where Nteke was shot, as he did not feel safe. The whole week he did not go to Dipahale's area.
- [99] He did not know Barclays well, but he started knowing him when they were attending meetings and arguing about chrome. Barclays was supporting Shardrack, and he did not know that Barclays grew up in Matjie's family. He knew Moretsele, and he dispute his evidence as he was not at the scene. On the 15th and 16th April he was at his homestead. He thinks why Moretsele is implicating him, was that he was the one who had chaired the disciplinary hearing of Moretsele that led to his expulsion from their committee. After that Moretsele and others formed their own committee which did not have the support of the community, and they decided to join Shardrack's camp.

- [100] He had opened two criminal cases, the first been that of the torching of his house, and the second one was when he was pointed with a firearm by the two Morema's brothers who told him to get out of chrome issues. The cases did not go anywhere. On 23rd April 2017 he attended the funeral of Nteke, and he dispute that after the funeral, he had told the people to go and gather somewhere. That after the funeral, he left with accused 6 who dropped him at Mandagshoek traffic circle, and from there he went home. He does not know Mmabatho. That on 16th April 2017, he had spent the whole day with his cousin Matsene Mabilu at the shop.
- [101] The accused was cross examined and when asked as to who had committed the maladministration in the chrome project, the accused said that they did not say anyone had committed maladministration, but that since the money was not flowing the way it should, there was maladministration. When asked as to who had signed the agreement they received from mine management on behalf of the traditional council, the accused stated that it was Kgoshi Bethuel Mohlala and Shadrack Matjie. He stated that the project was shut down from June 2016 to May 2017. The accused conceded that Moretsele knows him very well, and that he also knows Moretsele. The accused stated that on 16th April he left his homestead at about 9h00 and went to the shop, and remained at the shop with his cousin until 19h00 when he went back to his homestead.
- [102] When asked about the interdict that was granted against him during 2016 that prevented him from interfering with the activities of MCC, he stated that he only heard about the interdict, but was never served on him. When it was put to him that on 23rd April 2017 the houses started burning at 11h00, the accused stated that at 11h00 they were entering the graveyard, and after the funeral he left at about 12h00. The accused stated that he learned about the burning of the houses two to three days later. The accused stated that he started knowing Barclays towards the end of 2016 at the stake holders' meetings. He stated that there was no relationship between him and Barclays and also did not have any clashes with him. He did not know whether Barclays had any grudges with him.
- [103] Accused 2 took the witness stand and testified under oath. He disputed the evidence of Barclays that implicated him. He stated that Barclays was falsely implicating him as he was not at the scene. That on 15th April 2017 he was at his home looking after his cousin Thabiso who had a car accident and was just released from the hospital. He was staying with Thabiso in the same house being the two only. Thabiso was released from hospital on 12th April 2017 and did not have a chance to go out as by then Thabiso could not do anything for himself as he was seriously injured. He had to bath and made food for him, and also assist him to go to the toilet. That the way Thabiso was injured, there was no way in which he could have left him alone.
- [104] From the 12th April 2017 to 25th April 2017 he was house bound as Thabiso was his responsibility. On 16th April 2017 he was not at the crime scene. On 23rd April 2017 he did not attend the funeral of Nteke. He knows Barclays very well, and he is surprised why Barclays is implicating him. He also knows Moretsele and dispute his evidence that is

implicating him. That the letter dated 6th August 2021 from Mecklenburg hospital is proof that Thabiso was admitted at the hospital on 10th April 2017 and discharged on 12th April 2017.

- [105] The accused was cross examined and he stated that he started staying with Thabiso during 2007 being the only two of them. He stated that he started knowing Barclays during 2013, and he took Barclays as a brother as Barclays used to visit his (accused) brother. He denied that he was owning a fire-arm.
- [106] Accused 3 took the witness stand and testified under oath. He stated that the version put to the State witnesses by his counsel is the version of his defence. He disputed the evidence of Barclays implicating him for the incidents of the 15th and 16th April 2017. He denied that he was at the scene of the incidents, but that he was attending a pilgrimage in Moria from the 14th April 2017 to 17th April 2017. That in Moria, there were lot of people and he does not remember the people who have attended the pilgrimage. He knows both Barclays and John the witnesses who are implicating him. He started knowing Barclays during 2016 when the mine problems started. He started knowing John during 2016 when John became the leader of the community. That John was expelled from the organisation at the end of 2016. That he is the one who filled John's position in the organisation after he was expelled, and he think that is the reason John is falsely implicating him.
- [107] The accused further stated that the deceased Ntaporosana was his paternal sister, and that this case has caused a sour relationship within the family. The accused further stated that at the time of the incidents, he was a secretary at church, and that after these incidents, he was removed from his position as secretary.
- [108] The accused was cross examined, and he stated that he was removed as a church secretary as he was charged with murder and arson, and that he was removed during February 2018. He stated that when he travelled to Moria on 14th April 2017, he used a bus organised by the church. He stated that in the bus, he travelled with congregation members like pastor Maepa, treasurer C Mmola, and organiser Ephraim Ngwatle. He denied that there were any of the accused in bus he was travelling in to Moria. He further stated that he returned from Moria on 17th April 2017 around 12h00. The accused stated that pastor Maepa, and Colourboy have since passed away, whilst Ephraim Ngwatle has relocated as he was a contract worker.
- [109] The accused stated that he learned about the death of Nteke on Good Friday when church congregants of their branch were talking about it in the bus. Further that he also learned about the death of Ntaporosana on 17th April 2017 when church congregants were talking about it in the bus as they were heading back home. The accused stated that he did not have proof that he was in Moria, but that it was recorded in the church books. The accused further stated that the church elders are refusing to give him that information, and have told him that their books does not enter court rooms.

[110] The accused denied that he was in opposition to the chiefs, and also denied that he and accused 1 have put a tyre on the deceased and set it alight. He denied that he had problems with Shardrack, but stated that they are greeting each other, and they are also friends. The accused also stated that he is having a good relationship with chief Mohlala, and further that one of his family member is a member of the royal family. He further stated that he did not have a problem with Debora Maboea and Walter Mohlala.

[111] Accused 4 took the witness stand and testified under oath. He testified that the version put to the State witnesses by his counsel is his defence to the charges he is facing. He stated that he knew Barclays from either 2002 or 2003, and that he grew up and schooled with Barclays. Around 2016 the community wanted to know about the work the mine had promised to the community, and in his opinion Barclays think that the community is fighting with Shardrack. He denied burning Barclays car. That when the community enquired from the mine about the services and chrome, the mine referred the community to Shardrack. That they attended several meeting with Shardrack, and that Shardrack had told them that the chrome was his, and that if they think that they will

take it from him, he will touch the heaven.

[112] The accused further testified that on 15th April 2017, he was at his maternal aunt's home Matibidi Meriam Phoku who had passed away on 10th April 2017. That from the 10th April 2017 up to 23rd April 2017, he was assisting with the funeral arrangement for his late aunt. That he was arranging the funeral with his uncle Harry

Phoku, and brother Edwin Boshego. That his uncle has passed away on 27th July 2020, and that his brother is still alive.

[113] The accused testified that he started knowing John during 2016, but that before that he only knew him by sight. That during 2016 he and John were together in the leadership of the community, and that at some stage, John was relieved of his duties by the community. That during the period 10th to 23rd April 2017 when he woke up in the morning, he would go to his aunt's place, and that John is lying by implicating him. He thinks that the reason why John is implicating him, was that John was spreading lies that it was the leadership of the community that made him to be expelled from the position he was holding. The accused stated that he did not attend Nteke's funeral as he once had a relationship with Nteke's girlfriend, and that according to their custom one is not allowed to attend a funeral of the person he once shared a girlfriend with.

[114] The accused was cross examined and he stated that the reason why Barclays was implicating him was that they were fighting with Shardrack for community services, whilst Shardrack was maintaining Barclays and had even bought him a car. The accused stated that Joel Molamo was his close friend. The accused stated that his deceased aunt was also staying in Diphale village which was a walking distance from his homestead. The accused stated that he learned about Ntaporosana's death on 16th April 2017 whilst he was still at his aunt's homestead from one Disebo Mohobedu.

- [115] Accused 7 took the witness stand and testified under oath. She testified that she is residing at Seuwe village with both of her parents. She stated that the version put to the State witnesses by her counsel is her defence. She started knowing Barclays during 2016 when they were attending community meetings. At those meetings, Barclays was introducing himself as Shardrack's son. She never had any relationship with Barclays as sometimes she will greet Barclays but he will not respond to her.
- [116] The accused alleges that Barclays is falsely implicating her as on 15th April 2017 she was in Moria. She left for Moria on Thursday for the Good Friday pilgrimage, and came back on Monday morning. That Barclays is implicating her because she was in the leadership position in the community, and that the leadership was fighting with Shardrack about community services.
- [117] The accused further testified that she knew John from 2016, and that at some stage John was in the leadership position of the community, but was later expelled from that position. That John is falsely implicating her for the murder charge as on the date the deceased was murdered, she was in Moria, and she returned on Monday the 17th April 2017, and her father can attest to that. That she is one of the community leaders who have raised their hands that John be removed from the leadership position. That Nteke was her boyfriend, and further that she did not attend his funeral as according to their custom, she was not permitted to do so.
- [118] The accused was cross examined and she conceded that despite Barclays not greeting her, there were no issues between the two of them. The accused stated that the fight between her and Shardrack was about the development of the community and chrome money that he had misused. When it was put to her that accused 1 never testified about Shardrack misusing chrome money, the accused stated that she had made a mistake. She stated that John had seen her when she raised a hand that John be removed from the leadership position. She stated that in Moria there were many people whom she did not know. She conceded that she did not have proof that she was in Moria because she did not use the bus that was used by their church branch to go to Moria.
- [119] Accused 8 took the witness stand and testified under oath. She testified that she is related to Shardrack and chief Bethuel Mohlala through her sibling who is married to the chief's younger brother. That on 23rd April 2017 it was the burial of Nteke, and that she did not attend that funeral as his sister who is married to the chief's brother was sick, and also both of her parents were sick, and she was looking after them. On 15th April 2017 in the morning, she went to fetch her sick sister from the royal family as she was alone. On 23rd April 2017 her sister was still sick, and she was still looking after her at their parental homestead. The accused further stated that as she was looking after sick people, she could not attend gatherings as according to their custom, that would have derailed their healing process.

[120] The accused further testified that she knew Barclays very well from the time he was adopted by Shardrack. The accused stated that she was having a good relationship with Barclays. As at the 15th April 2017, she did not have any problems with Shardrack. That Barclays and John are falsely implicating her, and does not know the reason for that. On 16th April 2017 she was still at her parental homestead.

[121] The accused was cross examined and she stated that on 15th April 2017 the chief's younger brother had left with their children, and had left her sick sister alone in the house. The

accused further stated that she took her sister to their parental homestead as she was left alone in the house, whilst she was very sick. That her sister did not know the whereabouts of her husband and children. The accused stated that she remained at her parental home for the entire day of the 15th April 2017 as both her parents and sister were very sick, and she could not leave them alone in the house. The accused conceded that the homestead of Joel Molamo is not far from that of her parents' homestead, and that it is a walking distance. The accused stated that the problem that she had with Shardrack was that Shardrack was fighting with her parents. The accused stated that she did not know John, but started knowing him when they attend court in this matter. The accused stated that her sister got healed during 2018, whilst both her parents never got healed and have both passed away.

[122] S[....] M[....] was called in as a witness for accused 7. He testified that accused 7 is her daughter. That accused 7 attends the Zion Christiaan Church (ZCC). The witness stated that during the Easter weekend of 2017 accused 7 had gone on a pilgrimage in Moria. That accused 7 had told him a day before which was on a Wednesday that she was going to Moria the following day. He was satisfied that accused 7 had gone to Moria, as when she came back, she had bought oranges, apples and sugar cane.

[123] That the day accused 7 went to Moria, he (witness) woke up in the morning and went to the mountain to go and look after his cattle. When he came from looking after the cattle, accused 7 had already left. Accused 7 came back the following week either on a Wednesday or Thursday. He was with his wife when accused 7 told them that the following day she was going to Moria.

[124] The witness was cross examined and she stated that her other children are majors and they are staying in their respective homes. The witness stated that the day accused 7 went to Moria, when he went to look after the cattle, accused's 7 child went to her aunt's place whilst accused's 7 mother went to fetch firewood on the mountain. The witness stated that at the time of the incidents, accused 7 was employed at Marula Platinum mine. The witness conceded that he was spending the whole day on the mountain looking after the cattle on a daily basis and does not have a holiday. The witness stated that when accused 7 returned from Moria, he was not present at home as he was still looking after the cattle, and that what satisfied him that accused 7 was in Moria was that she came along with things that they do not have at their village.

[125] Phokwane Sekgalemene testified as accused's 2 witness. He testified that on 10th April 2017 he was involved in a car accident and was admitted to Moroke hospital as a result of the injuries that he had sustained during the accident. As a result of that accident, he had sustained head, eye, nose and leg injuries. He was admitted to hospital for 3 days, and when he was discharged, he could not walk, and had to use a wheelchair.

[126] That at the time of the accident he was staying with accused 2 being the two of them only. Accused 2 is his cousin. Accused 2 is the one who fetched him from hospital after he was discharged. From there it was accused 2 who was looking after him, by bathing, feeding and taking him to the toilet. Accused 2 was also assisting him with the taking of his medication. Accused 2 had to stop going to work in order to take care of him, and accused 2 went back to work after he started recovering. He started to get better around the 27th or 28th April 2017. Regarding the dates it is alleged that accused 2 had committed the offences, accused 2 was with him taking care of him. He would not know whether at some stage accused 2 had left their homestead as some the pills that he was taking would make

him to sleep, but when he woke up, accused 2 would be there.

[127] The witness was cross examined and he stated that the person who wrote a letter confirming that he was admitted at the hospital on 10th April 2017 was a doctor who was referring to the information contained in his hospital file. He conceded that the doctor who wrote

that letter is not the doctor who had treated him whilst admitted at that hospital, but that he wrote that letter in his presence. The witness stated that he was discharged from hospital on 12th April 2017. The witness further stated that on 15th April 2017 he had spent the whole day lying on bed in the company of accused 2, even though at some stages he would sleep, and would not know what accused 2 was doing, but when he woke up, accused 2 will be there. When asked as to who had visited him whilst he was injured, the witness stated that what he remembers is that one day when he woke up, accused 2 told him that his (witness) mother was there to visit him.

[128] The defence called Sefularo Emmanuel Pula to come and testify. He testified that he is a police officer, sergeant by rank, and the investigating officer in the case at hand together with sergeant Moitsi. That the State prosecutor in this case had requested him to go and interview pastor Maepa. The State prosecutor had told him that accused 3 had testified that he was in Moria during the Easter weekend of 2017, and that there are records at church branch to proof that. On Friday the 7th January 2022, he interviewed pastor Maepa regarding the records of the people who went to Moria during the Easter weekend of 2017.

The pastor told him that there was no problem he will go and look for those records, and also consult with the secretary of the branch and that he will phone him on Sunday the 9th January 2022.

[129] On Sunday the 9th January 2022, he met with the pastor and other church members. In that meeting the pastor and other church members told him that since it was an old matter, they doubt whether they are still having those records. Therefore, they could not admit or deny that accused 3 went to Moria, and further told him that during that period they were not yet at that branch. They also told the witness that the records that they are having are from 2019 onwards. The pastor and his company refused to give the witness a statement, saying that they did not want to be involved court matters.

[130] The witness was cross examined and he stated that when he went to interview pastor Maepa, as he was investigating accused 3 alibi defence. The witness stated that he did not verify whether pastor Maepa was already at the church branch during 2017.

[131]. Stephina Mohlala testified as a witness for accused 8. She testified that accused 8 is her sibling, and that she is married to the chief's brother. She and the chief's brother are having 3 children. On 23rd April 2017 the chief's kraal was burned down. During 2017 she was living with her husband and children at the Mohlala's homestead, whilst accused 8 was living with their parents at their parental home. During that period she was very sick and her parents were also sick. Whilst sick, she ended up been at her parental home, and she does not know who took her there. Whilst she

was sick, she did not know what was happening to her husband. She could not tell whether during the Easter weekend of 2017 her husband had attended church service. She stated that she got healed during 2017, but her mother passed away during October 2017, whilst her father passed away during 2019. She was sick for six to seven months. She does not remember who was taking care of her whilst at her parental home. Before she got sick she was employed at Modikwa Platinum Mine.

[132] The witness was cross examined, and she conceded that she did not remember what had happened during April 2017 as she was sick. She further stated that she could not tell whether she was fetched by accused 8 from her marital home.

[133] That concluded the evidence for the accused and they closed their case.

[134] Both counsel for the State and the accused have addressed the court on the merits of the case. The State counsel is asking for conviction of all the accused on the counts each one of them is facing. The defence counsel is asking for an acquittal of all the accused on the counts that they are facing.

[135] The test in a criminal case is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused person is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he had proffered might be true. These are not independent tests, but rather the statement of fact, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two

conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicate him might be false or mistaken. (See *S v Sithole and Others*[1]).

- [136] All the conflicts that came about in this case is in relation to the control of the chrome mine. It also shows a sad state of greediness that can turn people into monsters by eliminating anyone who stand in their way of attaining their wealth. Instead of the mine benefiting the whole community, it is only the few who wanted to benefit. This reminds me of the documentary “blood in the mobile” shot in the Democratic Republic of Congo where different armed groupings were fighting for the control of the mine which resulted in millions of people losing their lives in the process of the fight. In the case at hand people have already lost their lives and properties in trying to get a hand in the control of the mine. Fortunately, in the case at hand it was not millions of people who have lost their lives, but still one life lost is still too many. People should learn to work together in harmony and let the little resources they have benefit all, rather than a few elite.
- [137] All the accused defence is that of an alibi. An alibi defence is essentially a denial of the prosecution’s case on issue of identity. What the accused is simply saying is that he could not have committed the offence as he was somewhere else at the relevant time. It is trite that once the accused raised alibi defence, that alibi has to be accepted unless it was proved to be false beyond reasonable doubt. (See *S v Musiker*[2]).
- [138] The State has called several witnesses in this matter, but it was only two witnesses who led direct evidence which implicate all the accused, and that is the evidence of Barclays Thobejane the 8th State witness and John Moretsele the 9th State witness. Barclays testified about count 1 and 2, whilst John testified about count 3 to 9. In my own analysis of the evidence, there are two groups involved in this matter, that of the chief led by Shardrack, and that of the community which they refer it as mphakathi. All the accused before court are from the mphakathi group. From the chief’s group the main role player is Shardrack and Shardrack seems to be yielding too much power. There seems to be bad blood between Shardrack and Mphakathi as he testified that the reason why he suspected that the accused were the ones responsible for all these offences was that they were the leaders of mphakathi. Further Barclays testified that anything bad that happens in the village was associated with mphakathi. Shardrack went to the extent of alleging that accused 1, (who died in a car accident after he had testified and will still be referred to as accused 1), was a troublemaker, as accused 1 and his group during 2016 interfered with the running of the mine, by taking control of it and forcing the company managed by Shardrack to sell chrome at an auction. John testified that he was once part of mphakathi but was expelled. It is clear that there was a lot of animosity between Shardrack’s group and mphakhathi.

- [139] The evidence of Barclays on count 1 and 2 is that of a single witness, and also the evidence of John on count 3 to 9 is that of a single witness. It is trite that caution should be applied on the evidence of a single witness and also on that of a witness who displays animosity towards the accused. (See *S v Le Roux*[3]).
- [140] Accused 1 has passed away after he had testified and before the trial was finalised. It is trite that under those circumstances, the State will stop the proceedings against an accused person who passes away before his/her trial is finalised. In deed the State had dropped the proceedings against accused 1. The question which this court must determine is what will be the status of the evidence already given by the deceased person. Since the State has stopped the proceedings against the deceased accused, will that evidence still be relevant to the proceedings, and must the court still consider it when analysing the evidence before it.
- [141] In terms of section 214 of the Criminal Procedure Act[4] (Act) the evidence of any witness recorded at a preparatory examination shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court that the witness is dead, and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, the State had a full opportunity of cross examining that witness.
- [142] In the case at hand it is the accused who had passed away. His evidence was presented during the main trial, and the State had a full opportunity of cross examining the accused. The defence had presented the original death certificate to proof that indeed accused 1 was dead, the other accused were also given an opportunity to be involved in the arranging of accused's 1 funeral and also attending that funeral. In my view, it has been proved by the defence counsel to the satisfaction of this court that accused 1 was dead. Therefore, I don't see any reason why the same principle that is applicable to the acceptance of the evidence of a dead witness recorded at a preparatory examination should not also be extended to a co-accused who dies after he had tendered evidence in full during trial, but before the trial is finalised. The evidence accused 1 have met all the requirements of section 214 of the Act, and therefore despite the State having stopped the proceedings against accused 1, his evidence remain admissible in these proceedings.
- [143] As I have already pointed out that all the accused defence is that of an alibi, and that an alibi defence is essentially a denial of the prosecution's case on the issue of identity, the onus is therefore on the prosecution to prove that the accused defence is false beyond reasonable doubt. The two State witnesses Barclays and John have known all the accused for a long time, and some of the accused they grew together, schooled together and are also from the same area. The evidence of prior knowledge of the accused by the two State witnesses was not challenged by the accused, and is therefore regarded as common cause. What this court must determine is the reliability of the identification of all the accused by the two State witnesses.

[144] In R v Skhekelele and Another[5] the court said:

“In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for a possibility of a mistake”.

[145] Count 1 and 2 relates to all the accused and the State witness who is directly implicating all the accused except for accused 5 and 6 is Barclays. Barclays testified that he saw the faces of the accused as they were not far from him, and when the accused started throwing stones he went inside the house. Barclays also gave account of what each of the accused allegedly did. There is no witness to corroborate his version despite having testified that Joel Molamo, Magatle Molamo, Diphaki Molamo, Albertina Maunye and Neo Maunye were present and have witnessed the incident. W/O Mokwena has testified that Victor Thobejane who is Barclays brother had told him that he was amongst the mob that was burning houses and he knows them. No explanation by the State was given why neither of the witnesses whom Barclays have mentioned as having witnessed the incident were called to testify. It is trite that failure by the State to call an available witness may not be without consequences where the State relies on the evidence of a single witness. That failure to call an available witness may in particular circumstances justify the inference that, in the prosecutor’s opinion, such evidence might possibly give rise to contradictions which could reflect adversely on the credibility and reliability of State witnesses. (See S v Teixeira[6]).

[146] Even though Barclays is implicating the accused and had given a detailed account of what each of them has done, it raises some suspicions which affect its reliability and credibility. Barclays himself has conceded under cross examination that anything bad that happens at Diphale is associated with mphakathe of which the accused is part of it. Barclays had stated that after this incident until June 2018 he was in hiding at an undisclosed location together with Shardrack. Shardrack was the one who was funding the costs of this hide out place. Shardrack had conceded that he had discussed the names of the suspects whom he suspect to have committed these offences with Debora and they came to the conclusion that it was the accused before court, and those names he had given them to the police in his police statement. The names of the people they are suspecting as the culprits in this matter are the accused which Barclays is implicating.

[147] Shardrack had conceded that the dispute between his group and mphakathi was about mining and that accused 1 was interfering with the running of the mine and also a troublemaker. Shardrack had therefore an axe to grind against accused 1 and his group who were standing in his way of amassing wealth through the mining of chrome. Shardrack was able to discuss with Debora the names of the people they suspect to have committed these crimes, and there was also nothing preventing him from discussing these names with Barclays before Barclays went to make a police statement and also at their hide out place.

Since Barclays was depended on Shardrack for survival, his allegiance will be on Shardrack.

- [148] All the accused have pleaded alibi as a defence. Accused 2, 7 and 8 have called witnesses who corroborated their alibi defence. Even though the witness for accused 8 did not testify with certainty that it was accused 8 who had fetched her from her marital home, what the witness has confirmed is that she was gravely sick, and her parents were also sick, and accused 8 was looking after them. There was no evidence that rebutted accused 8 version that according to their custom, if you are having a sick person in the house, one is not supposed to attend gatherings, as that will derail the person who is sick a speedy recovery. The courts are bound to respect people's custom and even to develop the customary law.
- [149] There is no duty upon an accused person to prove his innocence. When an accused person elects to testify what the court must determine is whether his version is reasonably possibly true, and not whether it believes it or not. Accused 2, 7 and 8 whom Barclays have implicated in the commission of the offences, have called alibi witnesses who corroborated their versions, and there is no basis to reject their versions as false beyond reasonable doubt.
- [150] Even though other accused did not call witnesses to corroborate their alibi defence on these counts, the version of Barclays has lots of short comings which in turn affect its credibility and reliability. Firstly, the State has failed call relevant witnesses Victor Thobejane, Joel Molamo, Magatle Molamo, Diphaki Molamo, Albertina Maunye and Neo Maunye who have witnessed the incidents to corroborate Barclays version. Even though W/O Mokwena has testified that Victor has told him that he was afraid to give a police statement as he feared for his life, the police if they viewed him as a vital witness, they could have put him under the witness protection program. It does not seem that there was an attempt by the police to put Victor in that program. The only inference to drawn for the failure by the State to call these relevant witnesses is that it was afraid that they will contradict Barclays version. Secondly Barclays himself testified that anything bad that happens at Diphale is associated with mphakathe, of which the accused happens to be part of mphakathi. Barclays is Shardrack's son, and Shardrack had already discussed the names of the suspects with Debora. Shadrack had been in hiding together with Barclays and also carrying the costs of that hiding place. Shardrack had made it clear during his testimony in this court that he will feel safe to return to his homestead if the accused before this court were sent to prison. With the animosity which Shardrack had displaced against mphakathi, immediately after these offences were committed, Shardrack, without facts had already formed his own theory as to who were the suspects, and these suspects happens to be a stumbling block in him amassing his wealth from chrome mining, there was nothing preventing Shardrack and Barclays in discussing the names of the mphakathi whom they regard as troublemakers, and device a plan of getting rid of them. Barclays himself had testified that he had told Shardrack that his car was burned by mphakathi and that he knows their names. In my view, the evidence of Barclays has been compromised by his close ties with Shardrack, and he can in no way give evidence that will be contrary to the wishes of

Shardrack, especially that there is no evidence that corroborate his version.

- [151] Thirdly, Barclays testified that the accused 12 and 13 were throwing stones in the yard. Logic will tell you that if indeed stones were thrown, Barclays would have sought cover in order to protect himself. If he did seek cover, it would have been improbable for him to have an opportunity of have seen what each of the accused was allegedly doing at the time of the incidents. Fourthly, Barclays testified that whilst inside the yard, accused 1, 2, 4 and 8 were calling him to get out of the yard so that they can be able to crash him to death. I find it improbable that the four accused could have said the same words at the same time. In my view, the intention of Barclays is to make sure that each and every accused who is before this court is implicated and sent to prison as per the wishes of his father Shardrack.
- [152] Taking into consideration the evidence of this matter on these counts in its totality and holistically and as testified by Shardrack that accused 1 and his company were troublemakers, they were preventing him in the running of the chrome mine and also that he will feel safe if the accused were sent to prison, and that Barclays evidence is that of single witness which was not corroborated despite there being available and relevant witnesses who have witnessed the incidents of who might have been the culprits, in my view, this is a case where the accused were implicated with the possibility of a motive to get rid of them as they were a stumbling block to Shardrack in achieving his goal of amassing his wealth through the chrome mine. The evidence of Barclays as a single witness is not trustworthy as it influenced by a possibility of motive to assist Shardrack and therefore lacks credibility and reliability as there are many improbabilities in his testimony. His evidence is therefore not satisfactory in all material respects, and this court has not hesitation in rejecting it as false beyond reasonable doubt.
- [153] Count 3 and 4 relates to the incident of the 15th April 2017 where the deceased Ntaporosana was burned to death and also the deceased Toyota Hilux was burned. Count 5 to 8 relates to the incident of the 23rd April 2017 where several houses were burned, and count 9 also relates to the incident of the 23rd April 2017 where it is alleged that the accused acts were intended to disturb public peace and tranquillity by unlawfully and intentionally discharging firearms, throwing stones and causing fire that damaged properties. Count 3 and 4 relates to accused 1, 2, 3, 4, 7 and 8, whilst count 5 to 9 relates to accused 1, 2, 5 and 6. The witness who gave direct evidence on count 3 to 9 is John who is also a single witness on these counts, and his evidence should also be treated with caution.
- [154] According to John, on 15th April 2017 he saw accused 1 addressing a group of people at Nteke's homestead telling them that people like the deceased were wiping out the community. Thereafter accused 1, 2, 3, 4, 7 and 8 told the people who have parked their cars next to the deceased Toyota double cab to remove them. After the cars were removed accused 7, 8 and others went into the house and came back dragging the deceased and also assaulting her. Accused 2, 3 and 4 also took part in the assault together with other women unknown to John by assaulting her with sticks. Thereafter accused 1 and 3 went to fetch a tyre and put it on the deceased. Accused 2 was in possession of a 5 litre container which he

poured it on the deceased and his car. Accused 1, 2, 3 and 4 set the deceased and her car alight, and thereafter there was pandemonium as everyone was running for cover fearing that the car might explode.

- [155] With regard to the incident of the 23rd April 2017, John testified that when the coffin of Nteke was lowered into the grave at the graveside, accused 2 and 6 started firing shot with firearms into the air. John further testified that after the funeral, accused 1 arranged a meeting of the youth that was held at moshate. At that meeting accused 1 told the youth that they should start burning the houses of the people that were against mphakathi. John further testified that at that meeting accused 5 arrived driving a red bakkie. After the address by accused 1, the youth went on a rampage by burning moshate first and thereafter the houses of the other complainants. John also testified that he saw accused 5 red bakkie boarded by accused 1, 2, 3, 4, 5 and others unknown to him going to the homestead of the complainants whom their houses were also burned. According to John, the first house was burned at 11h00.
- [156] According to Lt-Colonel Shikhathi when they arrived at Diphale village around 11h00, they saw the smoke of the chief's kraal that was burning. Chief Bethuel Mohlala testified that he arrived at Diphale village around 13h00 where he met a certain boy who told him that the group of the people who were burning the houses were led by one Kaizer Maboea.
- [157] All the accused defence is that of an alibi. Accused 2, 7 and 8 have called their alibi witnesses to corroborate their versions. Accused 5 alibi is being corroborated by accused 6 and the telephone records. The question which this court must determine is whether the State has proved that the accused alibi defences is false beyond reasonable doubt.
- [158] According to the evidence of John, the deceased was dragged from Nteke's homestead in full view of the people who have gone to pay homage at Nteke's homestead. The evidence presented shows that there were many people who have witnessed the incident. However, none of them were called to corroborate John's version. Even warrant officer Makgolane testified that when he arrived at the scene, he was told that the deceased might have been killed by community members from Diphale. It does not seem that the police officers have put enough efforts to find out as to who was responsible for the said evil deeds from the bystanders.
- [159] Accused 5 testified that when all these incidents were happening, he was in Moria using his red bakkie, and that version is being corroborated by accused 6 and the telephone records. Accused 5 could therefore not have been at the two places at the same. Accused 7 alibi is also being corroborated by his father, and also accused 2 alibi is being corroborated by his cousin. John has testified that the accused have started burning the first house at 11h00. The version of the houses burning at 11h00 is being corroborated by Lt-Col Shikhathi. Accused 1 testified that at 11h00 they were entering the graveyard. Accused 1 and 6 have been actively involved in the running of the funeral programme of Nteke. This version was not challenged by the State. The only inference to be drawn is that when the houses started

burning the funeral service of Nteke was still in progress where accused 1 and 6 were part of it.

[160] According to accused 6, he left Nteke's homestead at 12h30 in the company of accused 1. His telephone records shows that around 14h00 he was in the vicinity of Stofberg which he alleges that it is about 220 km from Diphale village. According to John, before the houses were burned, accused 1 had addressed the youth and incited them to burn the houses of the people who were against mphakathi, and that the address was after the funeral of Nteke. However, the unchallenged version of accused 1 is that at 11h00, the funeral service of Nteke was still in progress. Therefore, it could not have been accused 1 who had incited the mob to burn the houses of the complainants. That will give credence to the version of Chief Bethuel Mohlala that he was told that the mob was been led by one Kaizer Maboea. That piece of evidence of being told by a certain boy amounts to hearsay which under normal circumstances will not be admissible. However, there are exceptions under which hearsay evidence may be admissible.

[161] Section 3(1) of the Law of Evidence Amendment Act[7] provides that:

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

(a)each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b)the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c)the court having regard to-

(i)the nature of the proceedings;

(ii)the nature of the evidence;

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

(iv)the probative value of the evidence;

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

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

(vii)any factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice.”

[162] This piece of evidence emanates from the State witness which does not seem that the police had investigated it. Had the police investigated it and found that it is indeed true, that will exonerate the accused before court. By applying the normal test that is applicable to hearsay evidence and rendering it inadmissible despite it coming from the State witness,

will lead to a travesty of justice. The nature of this piece of evidence is such that if it ignored, might lead to wrong people being convicted. The State would not suffer any prejudice if this piece of evidence is rendered admissible since it emanates from the State's version, and they had the opportunity to investigate its veracity but had failed to do so. The duty of the State in presenting its evidence before court is not to secure a conviction at all costs, but present evidence that will assist the court in arriving at a just and equitable decision. In my view, it will be in the interest of justice if the hearsay evidence relating to the boy who told chief Mohlala that the mob that burned the houses was led by Kaizer Maboea is rendered admissible.

- [163] John in his evidence in chief has failed to disclose that he was expelled from mphakathi and went on to form his own forum which did not take off the ground, and then decided to join Shardrack's group. In his evidence in chief John testified that he had left mphakathi because he was not pleased in the manner in which mphakathi was doing some of the things. However, under cross examination he testified that he was expelled from mphakathi for refusing to burn moshate, whilst from his own version the issue of the burning of moshate was only discussed at the meeting of the 23rd April 2017 long after he has been expelled. That in my view, affect his credibility as a witness in this matter as he is not taking this court into his confidence by making an honest disclosure.
- [164] Debora Maboea has testified that on 23rd April 2017 she received a telephone call from her daughter Mmabatho telling her that her homestead was on fire and that she could identify the people who were burning the house. However, the very same Debora, has frustrated the State in securing the attendance of Mmabatho as a witness to come and corroborate her version. She has made it clear that she does want Mmabatho to be involved in this matter despite Mmabatho being a key witness. However, Debora and Shardrack are able to discuss this matter and come up with own suspects whom they want this court to believe are responsible for all these atrocities. The only inference to be drawn why Debora does not want Mmabatho to come and testify in this matter, is that she is afraid that Mmabatho might come and contradict her version.
- [165] Debora testified that she believes that the accused before court are responsible for burning their houses as they are the leaders of the community that is against them. Shardrack had conceded that the dispute between the chief's group and mphakathi is about mining and that accused 1 and his group were troublemakers as they once took control of the running of the mine and forced them to sell chrome at an auction. John was unceremoniously expelled from the forum, tried to form his own forum that will compete with the one he was expelled from. John new forum did not take off the ground, and he joined hands with Shardrack's group that was fighting with mphakathi which had expelled John.
- [166] It is clear that Debora, Shardrack and John had axe to grind against mphakathi. Debora and Shardrack were able to discuss the names of the people they regard as suspects, and since John was in their camp, and was still bitter with mphakathi, the only inference to be drawn is that they also discussed those names with John since they saw the accused as

troublemakers and also being after them. Accused 2, 5, 6 and 7 have raised strong alibis which this court has no grounds to find it to be false beyond reasonable doubt. The only inference to be drawn as to why John is implicating these accused is the possibility of a motive of revenge and to assist Shadrack in fighting his battles with mphakathi. In my view, even though John has prior knowledge of the accused, his evidence against the accused had some possibility of ulterior motives, and also being that single witness was not reliable and credible. Even though the other accused did not present alibi witness, the manner in which the evidence of John is tainted, its credibility and reliability affect his entire evidence.

[167] Under the circumstances I find that the State has failed to prove that the alibi defence of all the accused was false beyond reasonable doubt. All the accused are therefore given the benefit of doubt on all the counts that they are facing.

[168] In the result I make the following order:

168.1 All the accused are found not guilty and discharged on all the counts that they are facing.

MF KGANYAGO

JUDGE OF THE HIGH COURT OF

SA

LIMPOPO DIVISION, POLOKWANE

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Date of closing address

: 28th March 2022

Date of judgment

: 31st March 2022

[1] 1999

(1) SACR 585 (W)

[2] 2013

(1) SACR 517 (SCA) at para 15

[3] 2010

(2) SACR 11 (SCA) at 20e

[4] 51 of 1977

[5] 1953

(1) SA 636 (T) at 638F-639A

[6] 1980

(3) SA 755 (A) at 764A

[7] 45 of 1988

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