

SOUTH AFRICA / JUDGMENT

S v Mdhuli and Others (CC47/2021)

[2024] ZALMPPHC 94 (5 August 2024)

[2024] ZALMPPHC 94**COURT**

Limpopo High Court, Polokwane

BEFORE

Pillay

CASE / FILE NUMBER

CC47/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****LIMPOPO****DIVISION, POLOKWANE****CASE****NO: CC47/2021****DATE:**

2024-06-11

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

5 August 2024

SIGNATURE:

In
the matter between
THE
STATE
And
PRINCE GIFT MDHLULI &
2 OTHERS
Accused

JUDGMENT

PILLAY (AJ): The three accused are adult males, being charged with the following offences, where it is alleged that they were acting in common purpose with each other in the commission thereof:

Count 1

Robbery with aggravated circumstances, read with the provisions of Section 51 of Act 105 of 1997, as amended;

In that upon or about the 14th of March 2018, and at or near Bothashoek in the district of Sekhukhune, the accused did unlawfully and intentionally threaten to assault Sibaya Elliot Nhlapo and with force and threat of violence did take the following property:

An Amarok double-cab motor vehicle with registration number J[...];

3 cellular phones;

Bank card; wallet

ID book

His property or in his lawful possession and did rob him of the same.

The aggravating circumstances being the threat of violence during the incident.

Count 2

Attempted murder

In that on the 14th of March 2018, and at or near Bothashoek in the district of Sekhukhune, the accused did unlawfully and intentionally attempt to

kill Sibaya Elliot Nhlapo by firing gunshots towards him.

Count 3

Robbery with aggravating circumstances, read with the provisions of Section 51 of Act 105 of 1997, as amended;

In that upon or about the 25th of April 2018, and at or near Burgersfort, in the district of Sekhukhune, the accused unlawfully and intentionally threatened to assault Malekutu, Lazarus Makoto, Solly Sekatane, Zachariah Makoti, and did then and there with force and threat of violence did take:

Cash in the sum of R800 000,00;

2 firearms;

Their property or in the lawful possession of the said Malekutu Lazarus Makoto, Solly Sekatane, and Zachariah Makoti.

The aggravating circumstances being present in that there were threats of violence during the incident.

Count 4

In that upon or about the 25th of April 2018, and at or near Burgersfort, in the district of Sekhukhune, the accused had unlawfully intentionally attempted to kill Malukutu Lazarus Makoto, Solly Sekatane, Zachariah Makoti by shooting them with a firearm.

Count 5

Murder, read with the provisions of Section 51(1) of Act 105 of 1997 as amended;

In that upon or about the 25th of April 2018, and at or near Burgersfort, in the district of Sekhukhune, the accused did unlawfully and intentionally kill Mpho Barry Ngalo, an adult male.

Count 6, 7, 8 and 9 involved the contravention of the Firearms Control Act 60 of 2000 in respect of the various firearms and ammunition recovered on the scene on the 25th of April 2018.

Counts 10, 11, 12, 13, and 14 are all in respect of accused 1 only, and deal with the issues of fraud as well as the issues of contravention of the Immigration Act.

The provisions of Section 51 of Act 105 of 1997 as amended in respect of various charges were explained to the accused. They indicated they understood the competent verdicts as contained in the Criminal Procedure Act 51 of 1977 as amended in respect of the potential competent verdicts that they could face if the state was unable to prove the main charges.

The state was represented by Advocate Sabelebele and Advocate Maluleke, represented accused 1 and 2. Advocate Machobeni, accused

3. During the defence's case, Advocate Maluleke continued to represent accused 3, in light of accused 3's legal representative being no longer available.

The accused indicated they understood the charges preferred against them by the state and pleaded not guilty to the charges. Counsel confirmed the accused's plea of not guilty as being in accordance with their instructions and elected to give a plea explanation which was based on an alibi defence, denied the allegations in terms of Section 115 of the Criminal Procedure Act. The accused confirmed this.

Section 220 admissions were made concerning the following, which were made by the three accused in respect of count 5, the murder charge, and received as exhibits. The state elected not to address the Court in terms of Section 150 of the Criminal Procedure Act 51 of 1977.

The state led the evidence of 11 state witnesses, namely Josane Elias Mbumbe, Captain Kgare, Solly Sekatane, Zachariah Mkoti, Johannes

Roos, Portia Fumba, Lieutenant Commander M Nemukula, Provincial Commander Sekete, Warrant Officer Marojele, Warrant Officer Mogoshoa, and Mr Nhlapo. All these witnesses testified under oath and, where necessary, use was made of a language practitioner.

The following exhibits were received by Court during the proceedings, namely:

EXHIBIT A to C, being the Section 220 admissions by accused 1, 2, and 3.

EXHIBIT D, the Section 212 Affidavit and post-mortem report compiled by Dr Ramunenyiwa in respect of the deceased Mr Ngalo.

EXHIBIT E, the photo album.

EXHIBIT G, collection and storage of exhibits from the scene.

EXHIBIT H, partial print lifted from the motor vehicle.

EXHIBIT J, comparison print of accused 1.

EXHIBIT K, court chart in respect of the print.

EXHIBIT L, print taken before court, evidence by Warrant Officer Kgare as photographer and fingerprint expert evidence.

EXHIBIT F, photo album compiled by Sergeant Setumu.

EXHIBIT M, statement of the state witness Z Makoti.

EXHIBIT N, Section 220 admissions by the three accused.

EXHIBIT O, the Section 212 Affidavit by P Fumba.

EXHIBIT P, 212 affidavit by Warrant Officer Scheepers.

EXHIBIT Q and R, proof of the qualifications of Warrant Officer Kgapane and Sergeant Mokgale in collecting buccal samples.

EXHIBIT S, 212 affidavit of Warrant Officer Morojele.

EXHIBIT T, 212 affidavit of Warrant Officer Mogashoa.

EXHIBIT U1 and U2, affidavit of the complainant, Mr Nhlapo.

EXHIBIT V, heads of argument on behalf of accused 1 and 2 in respect of the Section 174 discharge.

EXHIBIT W and X, heads of arguments handed in by the state and the defence.

All these exhibits were handed in by consent. The contents thereof admitted. That concluded the evidence for the state and the state closed its case. The discharge application in terms of Section 174 of Act 51 of 1977 was opposed and refused by Court.

The defence addressed the Court in terms of Section 151 of the Criminal Procedure Act. The three accused testified in their defence and led the evidence of Lieutenant-Colonel Mokofane that each testified under oath and when necessary use was made of the language practitioner. The defence thereafter closed their case.

Both the state and the defence argued at length concerning the merits of the case. The state conceded that accused 1 be acquitted in respect of counts 1 and 2. The state sought the conviction of accused 1 in respect of count 3 to count 14, accused 2 and 3 in respect of count 3 to 9, and that the state proved the case against the accused and they had to be convicted as per the indictment. The defence submitted that the accused be acquitted on all the offences charged.

Brief background;

On the 14th of March 2018 and at or near Bothashoek, Mr Nhlapo was hijacked and his VW Amarok motor vehicle with registration number J[...] was stolen, including his personal belongings.

Not long thereafter, this vehicle was involved, on the 25th of April 2018, in a cash heist from the Fidelity Security Company in Burgersfort, where an amount of R800 000,00 and 2 firearms were stolen. This money belonged to ABSA and was being collected by Fidelity when the incident occurred.

Employees of the SBV Security Company were in the vicinity when the incident unfolded. They got involved in trying to apprehend the perpetrators and recover the money which was taken. The shootout between the SBV Security and the perpetrators resulted in the VW Amarok motor vehicle colliding with the VW Polo, capsizing off the road and landing on the side of the road striking the electric transformer.

The perpetrators fled from the Amarok vehicle on foot and Mr Ngalo, one of the perpetrators, was shot by the SBV employee and succumbed to his injuries and died on the scene. The scene was contained, the recovered money returned to ABSA via Fidelity. The exhibits collected and dispatched for forensic investigation.

The three accused were subsequently arrested and have been indicted in respect of the various charges with the state seeking conviction against them for the various offences based on the evidence tendered in the case.

The Evidence;

In respect of count 1 and 2, the state led the evidence of Mr Nhlapo who testified that on the 14th of March 2018, he had returned home at about 21H45 p.m. He stopped at the gates and switched off his motor vehicle Amarok J[...].

He climbed out of the motor vehicle and approached the gate of his premises. A person touched him on his back and asked for the keys of his motor vehicle. He threw the keys away and tried to run away and the person fired a shot at him whilst he was running away.

Whilst trying to escape, he saw 2 people in his motor vehicle driving towards town. He was unable to identify the perpetrators, EXHIBIT U1 and U2 were received as his statements pertaining to the incident. On the 25th of April 2018, Solly Sekatane, an employee of Fidelity Cash Solutions, was on duty at the Twin City ABSA in Burgersfort.

He was part of a three man crew, the driver, Mr Makoti, Mr Mokoto, who was to enter the bank to collect money, and himself as the third man, armed with a rifle to guard his colleague. On arrival, he noted the banking area was busy and requested the security from ABSA to clear the crowd. He exited the vehicle and gave Mr Makoto the go-ahead to enter the bank.

While observing his colleague exiting the bank with the money, he felt a gun at the back of his right ear and was forced to lie down. His colleague was also made to lie down. Whilst lying down, he was only able to observe the feet as he was afraid to raise his head. He did not see what was happening, but heard between five to seven gunshots and the Fidelity van moving. His rifle, his colleague's 9mm firearm, and the bag containing the money was taken.

He confirmed the scene as described in photo 13 of EXHIBIT F. He was unable to identify the perpetrators and later informed that the Amarok, being driven by the perpetrators, was involved in a collision near the St Thomas School, where he later went with his crew to collect the recovered money. He confirmed that there was a hiking spot in front of the school and that Mr Makoto's services were terminated by Fidelity.

Mr Z Makoti testified that on the date question, he was the driver of the Fidelity motor vehicle. He reversed, parked the vehicle, and observed his colleagues exit the vehicle at the ABSA Twin City. He noted that Mr Makoto returned and went back to ABSA and returned, this time in possession of a money bag.

It was at this stage that two men armed with rifles approached him from the front, shooting at the vehicle. The one male, who was not having any covering on his face, came to the driver's side and started shooting at his window. The shooting was for approximately four to five minutes and the person was approximately 3 metres away.

He realised that the bulletproof window was no longer able to protect him. He then drove this vehicle out of the parking area, colliding into various vehicles in his attempt to flee. He drove to the police station, called the police, and returned to the scene. On his return, he found his crew without the money bag.

The area was cordoned off and he later collected the cash from the scene at St Thomas School. He identified accused 1 when he came to court for the first time. The accused was chained. He identified the accused's face, however, indicated that the current scar on the face of the accused was not present at the time of the incident. He was taken at length under cross-examination with specific reference to the identity of the accused 1.

He indicated he was called to court in respect of the Fidelity case and then he realised that accused 1 was the perpetrator. He did not recall where he was at the time he was called as a witness, if it was High Court or elsewhere. He confirmed making a statement to the police, which was handed as EXHIBIT M, wherein there was no mention of the witness being able to identify the perpetrator.

He was confronted with conflict between his evidence and that of his colleague concerning the number of times that Mr Mokoto had gone into the bank. In response, he indicated that the witness, Solly Sekatane, may have not observed this occurrence. He was confronted with accused 1's version of being out of South Africa at the time of the incident and he was adamant that it was not the case.

Elias Mbumbe, an employee of the SBV, was on duty as a driver with his 3 colleagues. They were at the Total Burgersfort when he heard the gunshots and saw the Fidelity vehicle. His colleague looked to see what was happening and the perpetrator started shooting at him and he returned fire.

Mr Mbombi moved the vehicle to give his colleague some cover and also started shooting at the assailants. The assailants fled in an Amarok motor vehicle and he gave chase with his colleague during which a shootout ensued between them and the Amarok. The Amarok, trying to overtake, collided with the VW Polo, lost control, capsized and landed on the side of the road, striking the electric transformer.

During this process, the money bag fell out of the vehicle on the ground. Mr Mbumbe was driving at a high speed, passed the Amarok and had to reverse. He was still observing them from a distance of 10 metres, when he saw 2 men exit the vehicle, still shooting and ran across the road towards the mountain.

The second two pointed the guard of the school and was allowed access into the school. They continued shooting at him and he was also returning fire but then stopped, as it was break and there were children all over. The last occupant exited the vehicle running towards the school gate and was shooting at them.

They returned fire and this person was shot and killed outside the school. Shortly thereafter there was a person who came out of the school carrying a bucket containing clothing and gloves. He confirmed the photos taken at the scene in front of the school and the picture of the deceased, money bags, firearms and the Amarok vehicle.

He indicated that one of the perpetrators who ran towards the mountain was missing a sneaker, which he found with the bags of money. He indicated, however, that he did not see what shoes the perpetrator was wearing as they were shooting at him. The police and Fidelity arrived, and the scene was handed over. Fidelity collected the money and left whilst he remained on the scene.

Lieutenant Commander Nemukula testified that on the 25th of April he assisted the police with the investigation of the cash in transit at Burgersfort. On his arrival at ABSA Bank Twin City he was informed that the employees of the cash in transit was robbed of cash and the perpetrators drove off in an Amarok motor vehicle.

The crew of the Fidelity was trying to evade the scene, and in an attempt to leave, he crashed with four motor vehicles. Whilst still busy interviewing the owners of the motor vehicles who were involved, he received information that the Amarok was involved in a collision and was now stationary next to St Thomas College.

He attended the scene and saw the Amarok, which had collided with the electric box and the SBV motor vehicle. He observed a deceased person lying next to the SBV motor vehicle. He noted that there was a bucket on the scene and he gave instructions that the contents of the bucket be packaged for investigation at the Forensic Science Laboratory.

The reason for this instruction was based on the fact that the deceased was dressed in similar clothing and there were other work wear on the scene matching the items in the bucket. He was not involved in any of the accused's arrests. His evidence was tested under cross-examination with specific reference to who arrived at the scene first between himself, Colonel Nemukula, and Captain Kgare.

Captain Gideon Kgare is an expert crime scene investigator and fingerprint expert stationed at Polokwane. At the time of the incident he was a warrant officer and he reported to the scene of the incident where he was responsible for the collection, photographic, and forensic investigation at the St Thomas School.

He testified in respect of EXHIBITS E, the photo album compiled by him, G, collection and storage of exhibits from the scene, H, partial print lifted from the motor vehicle, EXHIBIT J, the comparison print of accused 1, EXHIBIT K, the Court chart in respect of the print, and EXHIBIT L, the print taken before Court.

At his arrival he was pointed out various locations and items. He took photos and collected and sealed the 60 items which were dispatched to the Forensic Science Laboratory. He made specific reference to the following:

A white cap located at the scene 1, number 37 in photo 78;

The contents of a bucket located at scene 1, number 16, photo 39;

A grey Nike tekkie located at scene 1, number B12 on photo 154.

This was outside of all the other exhibits. Save for the firearms which he transported himself to the FSL, the exhibits were sent by courier.

He was responsible for the lifting of the left thumb partial print from the left front door of the Amarok motor vehicle. He indicated that the print was fresh as it was adhering to the powder quickly and that it was not older than 24 hours.

He subsequently received a set of prints of accused 1 which he compared and concluded 7 points of comparison between the print lifted and accused 1's left thumbprint. No two persons has the same prints and he concluded that accused 1 was the person to have deposited the print in the Amarok motor vehicle.

He was taken under cross-examination concerning the whereabouts of the bucket and who collected these exhibits. He indicated he was not concerned as to the collector of the items and from where they were removed. He confirmed that Skynet was responsible for the transportation of the exhibits to the Forensic Science Laboratory.

It was put to him that the accused 1 had driven the said Amarok motor vehicle prior to the date of the incident. However, he stood firm at the belief that the fingerprint left on the motor vehicle was no longer than 24 hours due to its fresh condition. He confirmed that the items in the bucket were approximately 7 to 10 metres from the vehicle.

He indicated that he took photos inside the vehicle and then removed the items to the outside for him to properly identify and see. He indicated that the partial print was found on the left door of the vehicle inside the frame of the door between the window and the lock of the door. It was marked X on the photo 102 and is reflective of the location of the fingerprint except that this print was located on the passenger side front door frame.

Johannes Roos, he is the manager of Fidelity, the cash-in-transit. He testified that he received information from Mr Mokoti that there was a robbery at ABSA Twin City. On his arrival, he noted that the motor vehicle was shot at, his staff were not injured, save for the shock in respect of the incident.

Two firearms were taken, being an R5 and a 9mm. On his arrival at St Thomas College, he noted the SBV vehicle, the Amarok motor vehicle, the deceased, the stop-loose bags that contained the cash, and after the scene was secured by the police, he was instructed to remove the exhibits containing the cash back to the cash centre.

He indicates that R1,528 000,00 was given to the crew that morning. The cash recovered was R728 000,00. The shortfall was R800 000,00. To date, none had been recovered. The two firearms were recovered but were still in the custody of the police under investigation. His evidence was not tested under cross-examination.

The evidence of the Provincial Commander Thapiso Sekete was to the effect that Captain Kgapane and Sergeant Mogale, both employees of the South African Police Services, had both received training in respect of the collection of buccal samples and handed in EXHIBIT Q and R as proof of same.

Portia Fumba, an employee of the Department of Home Affairs, testified concerning counts 10 to 14 in respect of accused 1. Her affidavit was received as EXHIBIT O, including a copy of the accused 1's passport and visa stamps contained therein. There is also a copy of the movement control record for accused 1.

She indicated that the movement control system is a computer-generated record of the movement of the accused 1 into and out of South Africa. According to her information, accused 1 departed South Africa on 8th of March 2018. There is no record on the system of his return to South Africa.

She disputed the authenticity of the stamps contained in the passport belonging to accused 1. She highlighted that there was a problem with the font size and the description as reflected on the passport. She indicated that there was an employee assigned to the stamp numbers who were responsible for ensuring that the stamps were always safely stored.

That the entry stamp for 11th of March 2018, the exit stamp for 23rd April 2018, and the entry stamp for 5 May 2018 were all fraudulent and were not the property of the Department of Home Affairs. Numbers 488 and 458 were employees of the Department of Home Affairs and were either on duty or on leave when these stamps were used.

She was taken at length under cross-examination concerning her expertise in respect of the various font sizes. She conceded that the employee, Lamola, reported that there was a problem with the stamp and was issued a new stamp. This occurred around 8th of January 2019. Flowing from this incident, the Lebombo Port was under investigation and Mr Lamola is on suspension.

Warrant Officer Wilson Morojele testified concerning his qualifications and expertise and is currently employed in the Forensic Science Laboratory as a reporting officer and an expert in extracting and analysing DNA. He confirmed EXHIBIT S being his report, wherein he compared the DNA sample of accused number 3 against a piece of cloth that was recovered from the scene. He confirmed that the blood that was located on the piece of cloth belonged to accused 3.

Warrant Officer Mogashoa testified concerning his qualifications and expertise and is currently employed in the Forensic Science Laboratory as a reporting officer and an expert in extracting and analysing DNA. He confirmed the contents of EXHIBIT T and that he did analysis on the blood stain on a jacket and tekkie and epithelial cells on a white cap and compared the DNA to that of the sample of accused number 2 and found them to be a match.

That no two people had the same DNA and the blood and epithelial cells found on those exhibits belonged to accused number 2. He was taken at length under cross-examination and accused number 2's version concerning his presence of the scene which he was unable to comment on.

In respect of the various exhibits, the Court took cognisance of the admissions made by the accused in respect of EXHIBIT A and EXHIBIT N, the post-mortem report as contained in Annexure 1 to EXHIBIT D and the chief post-mortem findings were multiple gunshots to the body of the deceased Mpho BW Nkalo, EXHIBIT F, the affidavit by Sergeant Setumu concerning the photos of the scene at the ABSA Twin City.

That in brief was the evidence for the state and the state subsequently closed its case. The defence sought an application in terms of Section 174 in respect of the three accused insofar as the charges and handed in EXHIBIT V. It was opposed by the state. The application was dealt with at length and ventilated. In respect of count 1 and 2, the accused 2 and 3 were found not guilty and discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977.

The three accused were placed on the defence in respect of all the other counts. Accused 1 testified, denying the allegation against him. He denied the allegation with specific reference to count 1 and 2. He does not own a firearm, nor does he know how to use one. He explained that his friend, Sicelo Mdluli was driving an Amarok motor vehicle and used to visit him at his tavern.

He requested him on a few occasions to help transport his stock from the store to the tavern, and he even moved the vehicle once whilst loading the stock. He travelled in the motor vehicle on 23rd of April 2018 on the morning prior to leaving for Mozambique, and that it was possible on the trips with the vehicle that his print was left in and on the motor vehicle.

He denied involvement in the offence as he left South Africa for Mozambique on the 23rd of April 2018 and returned on the 5th of May 2018. He denied involvement in the commission of the offence and he indicated that the witness was mistaken concerning seeing him at the scene as he was not in South Africa. He explained the system in the border post concerning his exit and entry between South Africa and Mozambique with specific reference to how many times his passport is requested and seen by the staff and police at the border.

Moreover, he emphasised the fact that the person entering and leaving Mozambique has a photo taken of them at the border. He denied being identified by the security officer from Fidelity. He indicated that this person said at the time of the incident that he was unable to ID anyone, then went on to say 4 to 5 years later that it was him.

He made a statement to the police on his arrest and surely if the person was able to identify him, they should have held an ID parade and this person could have identified him then, not so many years later in court when he was in the accused dock. He was taken at length under cross-examination concerning the stamps in his passport. He indicated that at the Mozambican border, one's photo was taken on entry and exit.

He was unable to explain the incorrect years reflected in the passport, but indicated that according to the movement control system, it reflected him leaving and entering on the dates when the Mozambican stamps were defective. He did not have any of the stamps for South Africa or Mozambique and was not involved in any activity in respect of the manufacture or duplication of the stamps.

Accused 2 testified that on the 24th of April 2018, he was at Steelpoort where he was looking for employment as a truck driver. He was wearing a black T-shirt, jeans, a pair of boots and a white cap. He only finished after 5pm and due to the lateness of the hour, slept over in a truck.

The following morning, he went to the hiking spot approximately 10 metres near the school entrance where a group of people was gathering to hike. He heard gunshots from far and then got nearer, he started running away, he tripped over the paving, fell down, injured his finger and his knee.

He saw the vehicle in the distance and like a movie, he saw himself running for his life because of the gunshots. He managed to escape the scene, leaving behind his cap. He injured his finger where his nail came out and he was bleeding from his injuries.

He denied owning a firearm, ammunition, being involved in any robbery of the Fidelity security at the Twin City in Burgersfort. He denied any involvement with the shootout with the SBV security or any knowledge of the persons that were shot and killed at the school where he was hiking.

He was unable to explain how his blood landed on the Nike shoe as depicted in photo 153 and 154 which was located under the damaged VW Amarok. He was unaware how his blood ended up on the blue work jacket as depicted in the bucket. He did not enter the school and according to him, he had left the scene prior to the Amarok colliding with the electricity box.

He was taken at length concerning how his blood was located on the exhibits. He stated that he did not know, but denied being the owner of the jacket and tekkie. He had no desire to return to the scene where his cap had fallen and denied being in the motor vehicle and being injured in the scenario as indicated by the state.

He indicated that the police warned him of his constitutional rights and he remained silent. He did not know his co-accused or the deceased. He resided outside Bushbuckridge, but did not know accused 1 or his tavern. The cap was given to him and on getting the lift, it seemed that the passengers thought the gunshots was a result of taxi violence.

Accused 3 testified that he was well-known in Burgersfort area due to his involvement with the EFF. He owned a tow truck and on the 25th of April 2018, he was between 7 and 10 a.m. parked at the Burgersfort at the location which was reputed for motor vehicle incidents, especially on the 25th of every month.

He cut his finger on the V-frame which was located under the motor vehicle where it is used to tow a motor vehicle. He used a piece of cloth and wrapped it around his finger. He walked down to the river where he daily went to pray around 7 a.m. and then decided to walk to the KFC in town.

En route along the passage where you would turn right to join the Burgersfort main line, he heard the sound of brakes and heard a noise of cars hitting something. He started hurrying towards the sound with the idea of possibly getting a job. He had taken the 5 steps into the passage when he heard the sound of gunshots.

He saw people running towards his direction and the children in the school running towards the back of the school. He heard from one of the persons there that they were shooting. He also turned around and it was at this location where he believed he lost the cloth which was wrapped around his hand.

He went back via the squatter camp and river to his motor vehicle where it was located and left the area. He denied being involved in the hijacking of the Fidelity vehicle and robbing them of the money, he indicated he was popular in the community and the people would have identified him had he been involved in the robbery. He did not know either the accused 1 or 2 nor the deceased.

He did not know how the piece of cloth with his blood ended up in a bucket and indicated that the best person to explain that would have been the person that collected the items in the bucket. He indicated that the passage he referred to was located on the side of the school with the school fence to the left and he walked from the back towards the front of the school.

He never entered the school premises. He indicated that the pathway was used as a route from the shacks to the town and there were three people that were coming from the front who informed him of the shooting. He was taken at length under cross-examination with specific reference to the cloth which was wrapped around his left hand which was, as he indicated, holding tight to stop the blood.

He believed that when he heard about the shooting and seeing the children screaming and running and the three people running, he also turned and fled and in that state of shock, he only realised later that he had lost the cloth. He confirmed that the piece of cloth fell outside the school premises.

He was unable to assist the Court in respect of explaining how the cloth which was on the outside of the fence of the school was found in the bucket that was brought to the school gate, except to indicate that he believed it was picked up from outside and put into the bucket.

He did not know accused 2 and had no comment concerning how the blood of accused 2 was also located in this bucket. He did not see the Amarok motor vehicle on the day in question. He denied the allegations of being a passenger in this vehicle and that he was in any way involved in the incident, especially as he indicated he is known in the area.

Lieutenant Commander Mokofane testified that he was at a detective cluster meeting in Burgersfort when he was requested to attend the scene of a cash-in-transit heist and assist with the scene. On his arrival at this area, it was already cordoned off and he believed that Colonel Ngele, being the most senior, was the crime scene manager who tasked him with the duty of preventing anyone from entering the area.

He was responsible for pointing out certain locations and items to Captain Kgare. Amidst not being in charge of the scene, he had no idea who Lieutenant Commander Nemukula was on the day in question. This in brief was the evidence for the defence and the defence closed its case.

Both the state and the defence provided the Court with written heads of argument and same as received at EXHIBIT W and X. They are both thanked for their detailed summations. The state sought acquittal of accused 1 in respect of counts 1 and 2 and conviction of all 3 accused in respect of the remaining counts against all 3 of them. The defence sought the three accused's acquittal in respect of the charges.

The following was not disputed. That on the 14th of March 2018, Mr Nhlapo was a victim of a robbery with aggravated circumstances where his Amarok motor vehicle was stolen. It was during this process that the perpetrators fired gunshots at him in an attempt to kill him.

On the 25th of April 2018 in Burgersfort, the Fidelity Security was attacked and robbed of their money bag containing cash. The perpetrators used firearms to shoot at the employees of the Fidelity Security Company and fled the scene in the Amarok motor vehicle.

SBV Security was also present in the area and a shootout ensued between them and the perpetrators in the Amarok motor vehicle. Whilst evading capture, the Amarok was involved in a collision, capsized and landed near an electric transformer next to St Thomas College School.

Five occupants fled the vehicle, 2 running towards the mountain, 2 running to the school. The last 1 was shot and killed on the scene. A bucket containing items was brought and left at the entrance of the school. The police attended the scene where photos were taken and exhibits collected. All these exhibits were properly sealed and sent off for forensic and ballistic examination.

The cash that remained on the scene of the incident was counted and it was established that an amount of R800 000,00 was stolen and not recovered. The deceased was identified as Mpho Barry Nkalo. The cause of his death was multiple gunshots to the body. The accused 1's fingerprint was lifted from the left passenger door. The DNA was lifted from exhibits on the scene. The buccal samples were taken from accused 2 and 3 by the authorised police officials. A comparison was done.

It was established that the DNA found on the scene belonged to accused 2 and 3. The 212 ballistic report in respect to the firemen and ammunition, which was collected at the scene, pertained to count 6 to 9 of the indictment and was admitted as being correct.

Aspects in dispute. The involvement of three accused in the commission of the offence as alleged in the indictment. Whether the state proved beyond reasonable doubt that the accused acted in common purpose with each other and the deceased in the commission of the robbery and then the subsequent death of the deceased. Whether the alibi defence raised by accused 1 was reasonably possibly true. Whether the accused 2 and 3's denial of the allegations and their version was reasonably possibly true.

Now in light of the concession made by the state concerning the lack of evidence implicating accused 1 in respect of counts 1 and 2, I will not evaluate the evidence concerning counts 1 and 2. The evaluation of evidence was crystallised in the case of Chabalala 2003 (1) SACR 134 (SCA) at paragraph

15. The Honourable Judge Hefer AJA, as he was then, said, and I quote:

"To weigh up the elements which point towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

In assessing evidence, regard was had to what was said in State v Civa 1974 (3) SA 844 (T), where Margo J, as he was then, stated, and I quote:

"The evidence must be weighed as a whole, taking account of the probabilities and the reliability and opportunity for observation of the respective witnesses, the absence of interest of bias, the interesting merits or demerits of the testimony itself, and the

inconsistencies or contradictions, corroboration, and all other relevant factors."

The onus rests on the state to prove the guilt of the accused beyond reasonable doubt.

There is no burden of proof on each of the accused to establish his innocence. If there is a reasonable possibility that the account of the accused may be substantially true, then he must be acquitted insofar as his version does not constitute a crime or offence on which he may be convicted by virtue of the provisions of the Criminal Procedure Act in relation to the various competent verdicts.

The Court must consider the definitional elements of the offence in relation to the facts in dispute and establish whether the state proved the elements that are in dispute.

In respect of the robbery with aggravating circumstances, it is unlawful and intentional appropriation of the property of another with force.

Aggravated circumstance was defined in the Criminal Procedure Act in relation to a robbery or attempted robbery to mean the wielding of a firearm or any dangerous weapon, the inflicting of a grievous bodily harm, or a threat to inflict grievous bodily harm by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

Murder is the unlawful and intentional killing of another human being. Contravention of the Firearms Control Act 60 of 2000 in respect of the unlawful possession of the firearm and ammunition as alleged in counts 6 to 9 of the indictment, in respect of accused 1, the contravention of the Immigration Act 13 of 2002 and fraud in respect of the said passport.

As highlighted above, it is common course that on the 25th of April, the Fidelity cash and transfer was robbed. The state is relying on the evidence presented to prove the involvement of the accused in the commission of this offence and the subsequent death of the deceased. The state relies on the direct evidence implicating the accused in the commission of the offence, firstly being the single witness evidence of Mr Makoti, the driver of the Fidelity motor vehicle.

He gave detailed evidence concerning the circumstances before the incident, the offence, as well as what followed after the incident. He highlighted to the Court the fact that he was able to identify the perpetrator as being the accused 1 because of observing him for four to five minutes whilst his window was being shot at prior to driving away.

The state argued that he was an honest and truthful witness and his evidence can be relied upon as satisfactory in all material respects amidst the dock identification, which the state argued was corroborative based on the allegation of the accused not having a scar on his face at the time of the commission of the offence and now having a scar on his face.

The Court accepts that he was a single witness concerning the identity of the perpetrator. The Court must be mindful of the intrinsic dangers of such evidence and approach such evidence with caution. Section 208 of the Criminal Procedure Act provides that:

“A Court may convict an accused person on any offence charged with on the single evidence of a competent witness.”

The principle that was held in the State v Artman en andere 1968 (3) SA 339A to B, and I quote:

“In accepting the evidence of a single witness, all that is required is that his evidence should be clear and satisfactory in all material respects.”

In response, the defence argued that the evidence was not satisfactory. The witness was conflicted concerning fearing for his life and being able to do proper observation of the perpetrator at the time that the window was being shot.

The witness's allegation of observing the accused 1 for four to five minutes without flinching regardless of the bulletproof window cannot be sustained. Further, the witness made a statement to the police whilst the incident was still fresh in his mind, yet he failed to indicate that he was able to identify the perpetrator who shot at his window.

The defence highlighted the case of Sauls and Mtetwa concerning the need for caution and that the Court must be alive to the fact that there was no description by the witness of the perpetrator save for the dock identification, which occurred later at the time the accused appeared in court.

When considering the arguments raised by both the state and the defence, the Court considered the evidence of this witness with specific reference to the case of *S v Sauls and others*, 1981 (3) SA 172 (A) at 180 E to G, where it was said, and I quote:

"There is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness.

The trial judge will weigh his evidence, will consider its merits and demerits, and having done so, will decide whether there was a shortcoming or defect or contradiction in his testimony.

If he is satisfied that the truth has been told, the cautionary rule referred to by de Villiers, JP in 1932 in (*R v. Mokwena*), may be a guide to a right decision, but it does not mean "that the appeal must succeed, if any criticism, however slender, of the witness's evidence were well-founded." It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

And with regard to identity, it was held that a distinction should be made between the reliability of a witness's evidence and his credibility.

As was noted in the case of *Zitha* 1993 (1) SACR 718 (A), this aspect was clearly enunciated in *Khumalo* [1991] ZASCA 70; 1991 (4) SA 310 (A) 328, where it said:

"The honesty and conviction of a witness must never influence the separate investigation into the reliability of the identification by the witness. However honest and credible a witness may seem, his evidence about the identity of an accused may be unreliable.

It is for that reason that the cautionary rule applicable in evidence of identity exists."

In *Mtetwa* 1972 (3) SA 766 (A) at 768, the Court highlighted the following, and I quote:

"Because of the fallibility of human observation, evidence of identification is approached by the Court with some caution.

It is not enough for the identifying witness to be honest.

The reliability of his observation must also be tested independently, depending on various factors such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, built, gait, and dress, the results of an identification parade, if any, and the evidence by or on behalf of the accused.

These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other in the light of the totality of the evidence and probabilities.”

The Court accepted that this was a mobile, volatile scene, as clearly depicted in EXHIBIT F, photos at ABSA Bank, Twin City.

It is disconcerting that the witness was unable to ascertain what happened to his crew, nor find a clear path out of the parking area without colliding with other parked motor vehicles. There was no video evidence from either the camera inside the Fidelity motor vehicle, nor from the Twin City complex itself.

He did not see the Amarok motor vehicle on the scene, and he was not clear concerning how the observation of the accused through the window was not detracted by the gunshots being fired at the window itself. Mr Seketane was unable to corroborate this evidence in respect of identity of the accused 1, as on his own evidence he did not see the perpetrators.

He indicated that there was a crowd of people waiting in a queue to access the ATM machines, who were made to move away, yet no evidence was led from any of the bystanders who possibly observed the incident without being directly involved. He also indicated that he was called to safety after the incident by the staff of the shops, but again, no evidence was forthcoming in this regard.

He did not see the Amarok motor vehicle. Mr Makoti's dock identification of the accused is based on the facial features of accused 1, specifically with regard to a new scar which was not present at the time that the offence was committed, according to him. In motivation of this allegation, Mr Makoti indicates he would not forget the face of the perpetrator, yet he failed to mention the fact that he saw the perpetrator's face when making his statement to the police. The Court must also be cautious in respect of dock identification, for the mere fact that when the accused was seen following the incident, he was shackled and under the control of the police, which by normal course creates an adverse inference that as the accused is in the dock, he must have committed the offence.

Mr Mbumbe, the SBV driver's evidence, starts at the time the shooting began at Twin City. He saw the Fidelity motor vehicle and was actively involved in the shootout and attempt at apprehending the perpetrators. He is also a single witness and the Court appreciates that his evidence was not challenged in respect of how the scene unfolded.

He was responsible for shooting and killing the deceased. He did not testify concerning the Fidelity vehicle leaving the scene. However, because of the shootout, he was focused on the Amarok and the fleeing perpetrators. He indicated that one of the two perpetrators who ran towards the mountain had on only one tekkie and the other 2 perpetrators had run into the school.

And after the shooting had stopped, someone carried out the bucket and its contents from the school. He did not know the details of the person responsible for same. He impressed the Court as a witness, whose only role in the date in question was to foil the escape plan and stop the robbers. He was unable to identify any of the perpetrators and did not assist the police to identify the person carrying the bucket out of the school.

Captain Kgare was responsible for the bagging and tagging of the exhibits and lifting of the fingerprints from the motor vehicle. He was adamant that the print was fresh, no longer than 24 hours, as it adhered easily to the powder. His expertise was not disputed. However, he confirmed that the location of the print was in an obscure position that would not easily be disintegrated.

It was not put to him that accused 1 was specifically inside the motor vehicle on 23 April 2018 for him to comment on the degradation of the print. The state therefore argued that this adverse inference must be drawn against accused 1. Now, the state relies on the fingerprint evidence connecting accused 1 and the Amarok motor vehicle as corroboration for the single witness allegation of the presence of accused 1 at the scene.

The Court accepts that the fingerprint evidence is not disputed. What, however, is disputed is when the fingerprint was left in this motor vehicle. The defence alleged that they were out of South Africa at the time the offence was committed and thus denied the involvement of accused 1 in the commission of the offence.

Concerning the real evidence of the fingerprint, regard was had to the case of *Banana 2000(2) SACR 1 (ZSC)* on page 8C, where Gubbay CJ, delivering the judgement of the majority of that court, as he was then, stated the following, and I quote:

“Where the evidence of a single witness is corroborated by any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and the acceptance facilitated.

But corroboration is not essential.

Any other feature which increases the confidence of the Court in the reliability of the single witness may also overcome the caution.

It is proper for the Court to convict an accused on circumstantial evidence, provided it has the necessary probative value to warrant a conviction.”

Regard was had to *Rex*

v. *Blom* 1939 AD 188 at 202-3: where the Court said, and I quote:

“The inference sought to be drawn must be consistent with the then-proved

facts.

If it is not, the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them, save for the one sought to be drawn.

If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

The Court must have regard to all the circumstantial evidence and everything else that could possibly link the accused to this allegation of robbery with aggravated circumstances, murder, the unlicensed possession of firearms and ammunitions.

And for the accused to be convicted in these circumstances, there must be a nexus between the accused, the offences charged, and the deceased, and the fact that the death can be inferred from the circumstances that leaves no grounds for reasonable doubt.

The circumstantial evidence can be found in the fingerprint evidence implicating accused 1, and the DNA evidence implicating accused 2 and 3. From the onset, the Court accepts that the collecting, sealing, bagging and packaging of the exhibits to the Forensic Science Laboratory is not disputed, nor is the dispute that the police officer that took the buccal samples from accused 2 and 3 were authorised to do so, and the results confirm the presence of accused 2 and 3 at the school on the date in question.

It is prudent at this stage to focus attention on the bucket that was carried from the school to the entrance where it was left. The state argued that since this was done shortly after the two perpetrators had ran into the school premises, that the Court must accept that the contents of the buckets were belonging to the perpetrators.

And due to the short lapse in time, the Court must infer that the DNA found in those exhibits as contained in the bucket are indicative of the perpetrators who committed the robbery, being namely accused 2 and 3. The defence in response highlighted that there was no evidence tendered concerning where these items were recovered from, and it was improper for these items to be simply included as part of a crime scene, without even verifying where and how these items landed in the bucket.

And these exhibits were fruit from a poisonous tree, and the state, without proving the authenticity of these items, cannot rely on them, and as such the evidence should be excluded by Court. Now, it is quite disconcerting that the police officers who tended the scene, namely Nematikulu and specifically Kgare, appeared so nonchalant about the appearance of this bucket.

It was taken for granted, because the items looked similar to other items on the scene, that it must be the items of the perpetrators. No evidence was led concerning who retrieved these items, how these items were retrieved, and where these items were retrieved from. It was simply accepted – because the items were there, it must be accepted as part of the crime scene.

The bucket containing items was simply photographed. No effort was made to even examine the bucket for fingerprints or other fibres. Whether this bucket belonged to the school or not is also unknown to the Court. The state elected not to place the Court in their confidence concerning whether any investigation was done inside the school to trace the bucket carrier or any witnesses to the escaping perpetrators.

The state relies on the contents of this bucket to link accused 2 and 3 to this incident by way of the presence of their DNA as found in the blood contained in the cloth and shirt located in the bucket. Therefore, it is relevant to verify the chain in respect of the handling of these exhibits and to trace where they came from.

It is not sufficient merely to argue that since they were brought shortly after the perpetrators ran into the school, that they were items that belonged to the perpetrators. It is not the only inference that can be drawn from the facts. A Court was also reluctant to draw an adverse inference against an accused person based on evidence that cannot be verified in respect of how, where and by whom this incriminating evidence was located.

In this regard, the state sought in argument that the Court should invoke the provisions of Section 186 and call witness testimony concerning the layout of the school and its access points. Section 186 of the Criminal Procedure Act provides as follows:

“The Court may at any stage in a criminal proceeding subpoena or cause to be subpoenaed any person as a witness at such a proceeding and the Court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the Court essential to the just decision of the case.”

Now, this section gives the Court a discretion to subpoena witnesses or cause witnesses to be subpoenaed if the evidence of such witness appears to the Court essential to the just decision of the case.

The section introduces an inquisitorial element and essentially caters for two situations, namely the Court’s discretion to call a witness and then the Court’s duty to do so. And this is as per Joubert, Criminal Procedure Handbook, 12th Edition, at 335. In the former situation, the Court has a discretion which it is bound to exercise judicially, bearing in mind that an accused has a constitutional right to have his trial conclude within a reasonable time, see Basson 2007 (1) SACR 566 (CC).

In the latter situation, the section places a duty on the Court to call a witness if it is essential to the just decision of the case, Helm 2015 (1) SACR 550 (WCC). Now, the state was of the view that this process would assist the Court concerning the movement of the perpetrators once in the school. In my view, this section does not imply that the Court must take over the prosecution of the matter to close gaps in the evidence of the state or poke holes in the defence's evidence.

The Court can only invoke the section if, upon assessment of all the evidence placed before it, it considers that unless it hears a particular witness, it is bound to conclude that justice will not be done in the end result. And the case of Gabaatlholwe and another 2003 (1) SACR 313 (SCA) at 316, it was mentioned.

In other words, the Court will call such witness if it appears to the Court that the evidence of that witness is essential to the just decision of the case. Now, clearly, had the state been in the opinion that the layout of the school and movement of the perpetrators whilst inside the school would assist in the trial, then this argument needs extending to the person who handled the bucket being traced.

This was not done by the state, and the Court is of the view that section 186 would be unhelpful to empower or strengthen the investigating by the state in respect of this particular aspect. Surely, if they intended relying on it, they should have investigated it.

Now, Mr Roos' testimony concerned the handling of the money that was recovered at the scene. He confirmed the staff on duty, verified exactly how much money was stolen and that the recovered firearms were not returned to Fertility Security. His evidence was formalistic in nature concerning the amount of money that was not recovered.

The section 212 affidavits and the post-mortem report reflected the deceased's death as a result of a gunshot injury. From the accepted evidence,

the deceased was an occupant in the Amarok motor vehicle at the time of the shootout with the SBV security. The state led no evidence

concerning any connection between the deceased and the accused in respect of the involvement prior, during, or post the altercation.

In respect of the ballistic report, the authorisation for taking of buccal samples and the eventual DNA evidence, I am satisfied that the expertise of these witnesses were not disputed, and the contents and findings made in accordance with justice and same cannot be faulted.

This is with specific reference to the firearms recovered on the scene as well as the comparison of the DNA retrieved from the scene and the comparison with the accused buccal samples to connect accused 2 and 3 to the incident of the 25th of April 2018.

Now, Portia Fumba was called as evidence in rebuttal to accused 1's alibi of being outside the Republic of South Africa at the time the incident occurred. An affidavit as contained in EXHIBIT O and evidence was to the effect that she was an expert in the employ of the Department of Home Affairs and had access to the movement control system for the monitoring of persons entering and leaving South Africa.

Now, according to the system, the accused left South Africa on the 8th of March 2018. There is no record on this movement control system of his return into South Africa. The stamps recorded in his passport for his entry into South Africa on the 11th of March 2018, his exit stamp on the 23rd of April 2018 and return on the 5th of May was fraudulent amidst the fact that the stamp numbers in accused 1's passport were assigned to immigration officers and they were stationed at the Lebombo border post.

There was a problem with the font size and demarcation on the said stamps. She conceded that the employees assigned to the specific stamp number reported a particular stamp as being defected some months after the said stamp was endorsed in accused 1's passport. Unfortunately, she had no expertise when it came to font size and description in respect of the stamps.

She was adamant that the movement control system must be relied upon as the only true reflection of the entry and exit of the accused in South Africa. The state led no evidence pertaining to the officials that were assigned these particular stamp numbers, concerning their involvement in stamping this particular passport.

Therefore, it is uncertain whether or not the stamps were endorsed in the passport of accused 1 by them during the course and scope of their employment and for the purpose of entry or exiting South Africa. Amidst the speculation of the employee's suspension, the silence is damaging to rebut the accused 1's version.

It would be remiss for the Court not to take cognisance of the fact that the movement control system is not an independent information source. It relies on the border control officials entering information into the system and capturing that information.

Therefore, inasmuch as it is relied upon as a true reflection of an individual's movement, surely the person responsible for capturing the information would be the most reliable source of information concerning the circumstances as to why or whether such information was or was not captured rather than Ms Fumba.

Now the Court is attentive of the fact that in accepting the state's case, is not a sufficient reason to reject the evidence presented by the defence. It is necessary for the Court to believe the witnesses for the state beyond a reasonable doubt and to disbelieve the accused before convicting him or her. In the case of State

v. Stevens 2004 ZASCA 70, it was held that:

“A Court should not follow what has been called a ‘compartmentalised approach’ to the assessment of evidence, namely an approach which divorces the evidence before the Court into compartments by examining the

defence's case in isolation from the state's case.”

This view was confirmed by the Supreme Court of Appeal in Naude and another v. S 2010 ZASCA 138 where the Court said, and I quote:

“The totality of the evidence must be considered.

Therefore, the Court must evaluate the evidence of the accused and any witnesses called on his behalf.”

As long as the accused's version is reasonably possibly true, they must be given the benefit of the doubt. The Court does not have to believe his version and does not have to find that it is the truth, as was highlighted by the case of Shackle v. S 2001 (4) ALL SA (SCA).

Now, the accused 1 denies his involvement in the commission of any of the allegations made by the state in the indictment. He raised an alibi defence of not being in South Africa at the time the Fidelity Security was robbed. He testified that he was an occupant of the Amarok motor vehicle whilst it was under the control of Mr Mdluli.

He requested to use the vehicle for the purpose of purchasing stock for his business. He had travelled in this vehicle on three occasions. In one instance, he had to drive the vehicle to move it from blocking another vehicle that was loading. He last occupied the vehicle on the morning of the 23rd of April 2018.

That afternoon, he travelled to Mozambique and only returned on the 5th of May. He therefore motivated that his fingerprint could legitimately be in the vehicle and that on account of him not being in South Africa, he could not have been involved in the cash-in-transit heist. He explained in great detail the process to enter and leave South Africa and Mozambique.

He highlighted that his photograph was taken at the border control in Mozambique. He had no control of the passport once it was handed over to the immigration officials. He did not know how and what they did with it. He did not purchase any immigration stamps and was unable to explain why the immigration officer failed to capture his details on the movement control system.

Now, the state argued that the two defective Mozambican stamps dated 15 February 2019 and 10 November 2016 reflected in his passport,

evidenced to the fact that his passport was unreliable to prove his alibi concerning him being out of South Africa at the time of the incident. Now, the Court took cognisance of the fact that the movement control system correctly reflected the accused's entry and exit from South Africa on the date of the 15th of February 2018 and the 10th of November 2017.

were the correspondent dates to the devious stamps as the dates as contained in the stamps for Mozambique, which was relied on by the state. It would be difficult to expect an accused person to explain the state of mind of an immigration official who was responsible for stamping his passport.

But to take an educated guess, the initial date of 10 June 2016 could not be the correct date as he only started travelling to Mozambique in the year 2017. The second date, the 15th of February 2019, clearly had to be an error, as at that time the passport was already confiscated and still in the year 2018. Moreover, I took cognisance of the fact that the accused 1's movement into and out of South Africa was the issue, not anywhere else.

It bears importance to note that insofar as the accused 1's version concerning the legitimate placing of his fingerprint on that vehicle, no evidence was placed before the Court in rebuttal that the vehicle was under the control of Mr Mdluli and that the accused 1 was able to access the vehicle through him.

Concerning the age of the fingerprint, the state argued that there was something that should have been put to the witness under cross-examination. I am inclined towards agreeing with the defence that there is no onus on an accused to prove his defence, but merely to raise a defence that is reasonably possibly true.

Accused 1's evidence was tested under cross-examination, but he stood firm and his version in respect of his alibi and lack of involvement in the commission of any of the offences alleged by the state and presented a reasonable explanation for the presence of his fingerprint as located in the motor vehicle, which was not rebutted.

Identity is crucial for the state's case in respect of implicating the accused 1 as being present on the scene. The state argued that the witness's identification of accused 1 being present was corroborated by the presence of his fingerprint in the motor vehicle.

The state argued that the discrepancy in the accused 1's passport should be reason to reject his alibi as false and find that he was one of the perpetrators actively involved in robbing the Fidelity Security on the date in question. This approach cannot be accepted by the Court.

All the relevant case law dealing with this aspect clearly highlight that evidence of identity, especially if it is in dispute, must be proven sufficiently. The Court considered the case of *S v Charzen* and another 2006

(2) SACR 143 (SCA) where the Court held, and I quote at 147(1) to 149A, paragraph 11-15 that:

"The Court had repeatedly emphasised in matters of identification, honesty and sincerity were simply not enough.

There must be certainty beyond reasonable doubt that the identification was reliable.

Now, in his police statement, the complainant had described 1 of his attackers as a man with dreadlocks, but neither at the identification parade nor at trial did the accused have dreadlocks.

What was significant about this was not the absence of the dreadlocks, which was eminently removable, but the complainant's response to this absence.

He referred to the accused as having put on a hat of some kind, raising the possibility that there may in fact have been no dreadlocks at all.

Whilst it is true that facial characteristics was more reliable source of identification than variable features such as hairstyles, the complainant had mentioned the dreadlocks twice in his statement, and the very precision of his recall in other respects made the unaccounted-for error in respect more obtrusive."

Now, when considering, in light of accused 1's explanation for the presence of his fingerprint in the motor vehicle and his alibi defence, put into question the reliability of the observation of this witness in respect of the identity of the perpetrator, it is uncertain why the police did not hold an identity parade, especially when the police were clearly aware of the alibi defence raised by accused 1.

Surely that would have strengthened the state's case for this witness to have identified the accused at an identity parade, rather than the dock identification, which was based on a scar which was previously not on the face of the accused. Moreover, the witness never highlighted such facial descriptions at the time it was most freshest in his mind.

Now, accused 2 denied being involved in the incident. He placed himself in Burgersfort on the 24th of April 2018, at Steelpoort to seek employment as a driver. His version for his presence in Burgersfort was left unchallenged. The Court must therefore accept his version that he slept over in Steelpoort and woke the following day to hitchhike home.

He heard the gunshots, people screaming and the chaos. He tried fleeing, tripping, fell, injured himself and then continued to flee the scene. He was unable to explain how his blood ended up on the shirt as well as the tekkie. He confirmed that his epithelial cells were found on the white cap which he was wearing and fell off while he was running away.

He denied any involvement in the commission of the incident which took place on the 25th of April 2018. Under cross-examination, he stood by his version indicating on the photos where he was, when he was hitchhiking, and how he subsequently fell and injured himself on his knee and lost his nail on his finger.

He denied being the owner of the tekkie as well as the shirt or jacket or work top. He was unable to explain how his blood ended up on these two exhibits. He denied entering into the school premises but was in front of the school premises. It was argued by the state that his version was improbable especially for the location of the blood on the tekkie which was found underneath the Amarok motor vehicle and the shirt which was found in the bucket.

Now, accused 3's version was also a denial in respect of the allegations concerning the incident on the 25th of April 2018, he confirmed that he cut his finger and was using a piece of cloth to stop the bleeding and protect the injury. This cloth was misplaced when he heard the gunshots and started to run away from the scene.

At the time, he was running away from the side of the school premises by the fence. He believed that it was where the piece of cloth had fallen. His version as to why he was in Burgersfort as a tow truck driver was left unchallenged. It is unknown to the Court whether the business was in operation on the date in question and he stood firm with his denial of any involvement in the armed robbery and possession of any firearms or ammunition.

The state led no evidence verifying whether this route followed by accused 1 was possible and if one would following this route, start at the parked pick-up motor vehicle and end up at or near the KFC in town. Now, the state relying on the evidence in the bucket as it is only real evidence implicating the accused 3 in the commission of the offence and in respect of accused 2, it is the shirt in the bucket, the tekkie with his blood, which was under the Amarok and the white cap containing accused 2's epithelials.

It is true that the state relied on the accused acting in common purpose with each other and the deceased in the commission of the robbery, and thereafter the subsequent death of the deceased. No evidence was led in respect of the nexus between the three accused and the deceased either by way of cellular communication, banking details and/or the tracing of their movement prior, during and after the incident. This would also be applicable to Mr Mdluli, who according to the accused 1 was in possession of this vehicle which was used in the cash-in-transit heist.

From the photos of the scene and the admitted evidence of approximately 60 exhibits being handed in for examination, it was surprising that there was no evidence, save for the answered fingerprint of accused 1, placing any of the accused inside the motor vehicle nor the location of their fingerprints on any of the firearms or ammunition.

Now, regard was had to the case of Ngcina 2007 (1) SACR 19 (SCA). Here the appellant was convicted in a Regional Court of robbery with aggravated circumstances and unlawful possession of a firearm. He was convicted and sentenced and he was on appeal unsuccessful to the Provincial Division. He appealed further. The sole issue on the appeal was the adequacy of the evidence that identified the appellant as the gun-wielding member of a group of three robbers. The Supreme Court of Appeal held that:

"The identification by the complainant had not been shown to be sufficiently reliable.

At the identification parade, the complainant had relied on the appellant's height to identify him, but his description on how he is distinguished between two tall persons on the parade was inconsistent and uncertain.

Identification with reference to mark on a finger of the gunman, which the complainant had mentioned in the evidence, was dangerous.

It had not been a decisive fact in identification and no such mark at the time of the trial.

This and the lack of any other corroboration for the identification had left the trial court with no means of testing the complainant's say-so.

Which itself depended on the reliability of observation in the restricted and pressurised circumstances of the robbery.”

Now, the Supreme Court of Appeal there went further to say, and I quote:

“While the appellant’s alibi evidence was not satisfactory, it was not to be treated as a separate issue to the identification.

An alibi defence was essentially a denial of the prosecution’s case on the issue of identification.

There is no doubt as to the complainant’s honesty. However, he could not be regarded as a reliable witness on the crucial question of identification and the possibility could not be excluded that the appellant had been elsewhere at the time of the robbery.

Accordingly, his guilt had not been proven beyond reasonable doubt.”

In paragraphs 18 and 19 at 25C to H:

“It is trite the onus of proving the guilt of the appellant rested squarely upon the respondent, and it was necessary for the trial

court to reject the evidence of the appellant as not being reasonably possibly true before it could convict him.

And faced with two mutually destructive versions and bearing in mind the onus, the Magistrate had no solid reason to prefer the evidence of the complainant to that of the appellant.”

This was in Patterson

v. S 2006 JRL 16082 (SCA).

Now, as previously highlighted, the duty of the Court is to assess all the evidence, not consider evidence in isolation of each other which would be favourable to one or the other side. In as much as the Court appreciates the route taken by the state in its heads of arguments, focussing on the relevant issues and connecting the evidence to the accused, the Court is obliged to focus its attention in holistically evaluating all the evidence, which includes the version of the accused in response to those allegations.

The Court is satisfied that insofar as the bucket evidence is concerned, the state failed to prove beyond reasonable doubt the whereabouts of the person that handled the bucket and the location where the items were recovered from. Inasmuch as they implicate accused 2 and 3, due to the lack or due to the source where and who collected these items not being determined, the Court is not in a position to reject the accused version pertaining to same with specific reference to accused 3.

The reliance of the state on the evidence is misplaced and cannot be relied on by the Court in respect of connecting the two accused to the incident via the bucket evidence. Now, inasmuch as the state relies on the circumstantial evidence with specific reference to the tekkie is concerned, it is unfortunate it was not the only shoe on the scene.

Mr Mbombi was unable to give a description of the said tekkie and it cannot be the only conclusion to be inferred by Court that the perpetrator that was running to the mountain with the one shoe on was in the company of accused 2 and that the other shoe underneath the Amarok containing accused 2's blood was present there because accused 2 was involved in the commission of the robbery.

The state's evidence as highlighted in the state's heads of arguments, although individually was sound prior to cross-examination and the defence version being considered, once holistically viewed, proved to be containing flaws which cannot simply be ignored. The inference sought to be drawn by the state is not the only inference and the defence's response thereto was not found to be unreasonable in light of all the evidence tendered.

Moreover, where a defence of alibi has been raised and the evidence in support thereof is not disproved as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct.

This is consistent with the approach to alibi evidence laid down by the Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A) at 521C to D, Greenberg JA, as he was then, said and I quote:

"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is, a reasonable possibility that this alibi evidence is true, it means that there is the same time possibility that he has not committed the crime."

Now the case law supports the fact that the unchallenged alibi defence cannot be mere moto rejected by the Court. Accused 1 specifically with the alibi and the three accused throughout the entire trial maintained that witnesses were mistaken about them being the perpetrators. Their versions were not proven to be false and cannot be rejected in light of the evidence in totality.

The Court is faced here with two mutually destructive versions and although the Court accepts that the deceased lost his life on this fateful date, the state's version failed to prove beyond reasonable doubt, the common purpose element as alleged, the three accused's involvement in the incident and disproved the alibi defence raised by accused 1.

Moreover, the state failed to prove that the circumstantial evidence was not rebutted by the evidence of accused 2 and 3. The state still has to discharge the onus it carries as Maya JA, as she was then, at paragraph 13 of Mohong

v. S 2009 (1) ALL SA 237 (SCA) stated, and I quote:

“But whilst it is entirely permissible for a Court to test an accused’s evidence against the probabilities, it is improper to determine his or her guilt on a balance of probabilities.”

The standard of proof remains proof beyond reasonable doubt, as evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime.”

During the evaluation of the evidence, the Court referred to the weaknesses existing in the state’s evidence. In light of the totality of the evidence, doubt exists in the Court’s mind whether the guilt of the accused has been proven beyond a reasonable doubt.

Yes, the Court may presume, speculate and assume, but these on their own cannot materialise to prove beyond reasonable doubt. The defence’s response to the implicating evidence was reasonably possibly true and the accused are entitled to the benefit of the doubt and you may now all stand. Therefore, in the result:

The accused, 1, 2 and 3 are hereby acquitted in respect of all the offences charged in the indictment and they are excused.

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