

SOUTH AFRICA / JUDGMENT

S v Mpangane and Another (CC12/2022)

[2024] ZAMPMBHC 88 (28 June 2024)

[2024] ZAMPMBHC 88**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

CC12/2022

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: CC12/2022

In the matter between:-

STATE

versus

SKHUMBUZO MPANGANE

Accused 1

BONGINKOSI SHAKOANE

Accused 2

JUDGEMENT**INTRODUCTION**

[Pursuant to Section 18 of the Witness Protection Act 112 of 1998, names of certain witnesses and other persons have been anonymized.]

[1] Mr Skhumbuzo Mpangane and Mr Bonginkosi Shakoane was arraigned as Accused 1 and 2 on 37 counts emanating from 6 sets of events alleged to have been committed between December 2020 and June 2021. The counts are made of primary offences, secondary offences as well as alternative counts. They are:

1.1 Case 1, which is alleged to have been committed on 26 December 2020, relates to Counts 1 to

8;

1.2 Case 2, which is alleged to have been committed on 17 March 2021, relates to Counts 9 to 15;

1.3 Case 3 which is alleged to have been committed on 9 April 2021, relates to Counts 16 to 19;

1.4 Case 4, which is alleged to have been committed on 15 June 2021, relates to Counts 20 to 25;

1.5 Case 5, which is alleged to have been committed on 16 June 2021, relates to Counts 26 to 32 and

1.6 Case 6, which is alleged to have been committed on 16 June 2021, relates to Counts 33 to 37.

[2] The State in terms of the Section 144(3)(a) of the Criminal Procedure Act (CPA) statement, alleges that Skhumbuzo and Bonginkosi and their co-perpetrators acted in execution or furtherance of a common purpose to pursue a person called Johan Ndlovu in order to kill him. In pursuing Johan Ndlovu, the two Accused and their co-assailants were terrorizing and killing people or close family members of Johan Ndlovu around Madras Trust, Mariti Trust and Mandela Village in the district of Bushbuckridge in a quest to exert pressure on Johan Ndlovu to emerge his hiding place.

[3] The counts in respect of :

3.1 Case 1, committed on 26 December 2020 at Madras trust are:

3.1.1. Count 1: Assault with the intent of causing grievous bodily harm of AN;

3.1.2. Count 2: Assault with the intent of causing grievous bodily harm;

3.1.3. Count 3: Pointing of a firearm of AN and SN;

3.1.4. Count 4: Attempted murder of Johan Edward Ndlovu;

3.1.5. Counts 5: Murder of Yandile Welcome Selemela; and

3.1.6. Count 6: Unlawful possession of a firearm with the intention to use said firearm to commit the murder;

3.1.7. As alternative Counts 7 and 8: Illegal possession of a firearm and illegal possession of ammunition.

3.2 Case 2, committed on 17 March 2021 at Madras trust are:

3.2.1. Count 9: Assault with the intent of causing grievous bodily harm of Martha Ndlovu;

3.2.2. Count 10: Assault with the intent of causing grievous bodily harm of Reginald Shabangu;

3.2.3. Counts 11: Assault with the intent of causing grievous bodily harm of CN;

3.2.4. Count 12: Assault with the intent of causing grievous bodily harm of IN;

3.2.5. Count 13: Kidnapping of IN;

3.2.6. Count 14: Pointing of a firearm of Martha Ndlovu, Reginald Shabangu, CN and IN;

3.2.7. Count 15: Possession of an unlawful firearm as alternative charges.

3.3 Case 3, committed on 9 April 2021 at Mariti trust are:

3.3.1. Count 16: Murder of Msheki Kgotso Mokoena;

3.3.2. Count 17: Unlawful possession of a firearm with the intention to commit the offence of murder of Msheki Kgotso Mokoena;

3.3.3. Count 18: Unlawful possession of a firearm, as alternative to Count 16;

3.3.4. Count 19: Unlawful possession of ammunition, as alternative to Count 16;

3.4 Case 4, committed on 15 June 2021 are:

3.4.1. Counts 20: Housebreaking with the intent to kidnap;

3.4.2. Count 21: Assault with the intent of causing grievous bodily harm;

3.4.3. Count 22: Discharge of a firearm in a built-up area;

3.4.4. Count 23: Unlawful damage to property;

3.4.5. Count 24: Robbery;

3.4.6. Count 25: Kidnapping of Nontokozo Sweetness Ndlovu

3.5 Case 5, committed on 16 June 2021 at Madras trust are:

3.5.1. Count 26: Housebreaking with the intent to commit murder;

3.5.2. Count 27 and 32: Housebreaking with the intent to commit murder, murder of Eckson Five Ndlovu at Madras Trust on 16 June 2021.

3.5.3. Counts 26 and 28: Housebreaking with the intent to commit murder, murder of Martha Ndlovu and arson at Madras Trust on 16 June 2021.

3.5.4. Count 29: Housebreaking with the intent to commit murder and murder of Permission Ndlovu at Madras Trust on 16 June 2021.

3.5.5. Counts 26 and 30: Housebreaking with the intent to commit murder, murder of Lovenasha Ndlovu at Madras Trust on 16 June 2021.

3.5.6. Count 31: Attempted murder of AN at Mariti Trust on 16 June 2021.

3.5.7. Count 32: Arson of the home and property of Eckson Five Ndlovu, Martha Ndlovu, Permission Ndlovu, AN and Lovenasha Ndlovu.

3.6 Case 6, committed on 16 June 2021 at Mandela Village are:

3.6.1. Counts 33 and 34: Murder and arson of Caswell Maphanga;

3.6.2. Count 34: Arson of Caswell Maphanga and Neah Lucia Maphanga;

3.6.3. Count 35: Unlawful possession of firearm to commit the offence of murder of Eckson Five Ndlovu, Martha Ndlovu, Lovenashia Ndlovu and Permission Ndlovu.

3.6.4. Count 36: Alternative charges to Counts 25 and 32: unlawful possession of a firearm.

3.6.5. Count 37: Unlawful possession of ammunition.

[4] The State contended that in re Counts 5, 16, 27, 28, 29, 30 and 33 the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act find application, and in re Counts 12, 20, 24, 15 and 26 the provisions of Section 51(2) and Part II, III and IV of Schedule 2 applied.

[5] At the commencement of the hearing, the State intimated that due to its inability to secure the witnesses, they are withdrawing Case 3 (Counts 16 to 19), Case 4 (Counts 20 to

25) and Case 6 (Counts 33 to 37). Pursuant to the first Section 174 of the CPA application, as more fully dealt with later, Accused 2 was discharged and found not guilty in respect of Counts 1, 2 and 3.

[6] Both Accused were legally represented throughout. Mr. Maphanga represented Skhumbuzo Mpangane (Accused 1) and Mr. Mculu represented Bonginkosi Shakoane (Accused 2).

[7] The Accused were advised of the applicability of the prescribed minimum sentence applicable. The Accused pleaded not guilty to all the charges. In terms of Section 115 of the CPA, both Accused elected not to provide a plea explanation and to remain silent, save for the formal admissions made in terms of Section 220 of the CPA statements, received into evidence as Exhibits A and B, and further dealt with below. The State was thus required to prove the Accused's guilt in respect of the offences charged, without the knowledge of the Accused's respective defenses thereto. As the trial progressed and as alluded to during cross-examination, it crystalized that the defenses raised by each of the Accused were in the nature of an alibi.

[8] This trial raised some novel considerations in respect of:

8.1 Nontokozo Sweetness Ndlovu, the untraceable State witness who, after her statement was received into evidence in terms of the Law of Evidence Amendment Act, act 45 of 1988 ("Hearsay Act"), and after the State had closed its case, surprising appeared at court;

8.2 the deemed reopening of the State's case for purpose of cross-examination and Nontokozo Sweetness Ndlovu's evidence being lead after she was declared a hostile witness and

8.3 the entitlement of the Accused to enjoy the benefit of a second Section 174 of the CPA in light of that which transpired.

- [9] For the benefit of the reader, it is thus necessary to briefly mention the structure of this judgment. The formal Section 220 admissions and uncontested facts will be dealt with, followed by the disputed issue of identity. Thereafter the state's application to admit the statement of the State witness (Nontokozo Sweetness Ndlovu) in terms of the Hearsay Act, followed by the first Section 174 application, the surprising turn of events, the attendance of the untraceable witness (Nontokozo Sweetness Ndlovu), the deemed re-opening of the State's Case, the application by the State to declare Nontokozo Sweetness Ndlovu a hostile witness, Nontokozo Sweetness Ndlovu's viva voce evidence in court, the evidence of the recalled witness (Colonel Mbokane), the Second Section 174 application, Accused 1's Section 317 application and the Defense's evidence. Thereafter the evaluation, the findings and the verdict.

SECTION 220 ADMISSIONS

- [10] In terms of Section 220 of the CPA, the following was admitted, and the exhibits (and the contents thereof) were received into evidence by agreement.
- [11] Case 1 – Relating to the deceased, Yandile Welcome Selemela: Exhibit C: Death declaration/ Certificate of death, Exhibit C1: Identification of body document, Exhibit C2: Transportation form/affidavit, Exhibit C3: Death register number DR320/2020, Exhibit C4: Section 212(4) affidavit, Exhibit D: SAPS 13 register, Exhibit D1: Sworn statement/affidavit by W/O Seerane, Exhibit D2: Key to photographs,
- and Exhibit D3: Photo album consisting of 14 photographs.
- [12] Case 5 – Relating to the murder of Eckson Five Ndlovu, Martha Ndlovu, Permission Ndlovu and Lovenashia Ndlovu: Exhibit E, E1, E2 and E3: Respective death declaration forms, Exhibit F, F1, F2 and F3: Respective identification of body documents, Exhibit G, G1, G2 and G3: Respective transportation forms, Exhibit H: Death register number DR192/2021, Exhibit H1: Death register number DR 193/2021, Exhibit H2: Death register number DR 194/2021, Exhibit H3: Death register number DR 195/2021, Exhibit H4: Section 212(4) affidavit, Exhibit J: SAPS 13 register, Exhibit J1: Sworn statement/affidavit of Serg. Masenya, Exhibit J2: Key to photographs, Exhibit J3: Photo album consisting of 155 photographs and Exhibit K: Report of forensic science laboratory by W/O Sindi.

UNCONTESTED FACTS

Introduction

- [13] What follows is a summary of the relevant facts which are either common cause or not seriously challenged, bearing in mind the nature of the defenses which crystalized during the trial, and the absence of countervailing evidence proffered on behalf of the Accused. Below is not reflective of the sequence in which the evidence was lead. The core disputed issue as crystalized during the trial, is the identity of the assailants. As such, and in that which follows directly herein below, reference is not made to the identities of the assailants.

This is dealt with later on when the disputed issues are addresses.

[14] For convenience and ease of reference, these facts are grouped under the incidences which gave rise to the various charges, being:

14.1 Case1 - 26 December 2021: Assault of AN and SN, attempted murder of Johan Ndlovu and murder Yandile Welcome Selemela at Theki's Tavern.

14.2 Case 2 - 17 March 2021: Assault of IN, CN, Martha Ndlovu, Reginald Shabangu, kidnapping of IN, possession of firearm at Madras Trust.

14.3 Case 5 – 16 June 2021: Murder, attempted murder of Eckson Five Ndlovu, Martha Ndlovu, Permission Ndlovu and Lovenasia Ndlovu and arson at Madras Trust.

[15] Detective Sergeant Mpulampula, the investigating officer linked to the Organized Crime: Anti-gang Unit on provincial level, commenced investigating the above Cases during September 2021. The Cases were directed to his unit pursuant to gang-related violence in the Bushbuckridge and Mariti area, and after a provincial level task team was created to investigate crimes relating to gang rivalry between inter alia the Covid 19 Gang and the Ellesse Gang. In his analysis as investigating officer the crimes committed and relevant in these proceedings are all gang related. According to him, Accused 1 has his own gang called Covid 19, and Johan Ndlovu has a gang called Ellesse.

26 December 2020 – Case 1

[16] AN, SN and Johan Ndlovu testified in respect of Counts 1 to 8. On 26 December 2020, AN received a telephone call from Johan Ndlovu, inviting him to Theki's Tavern (also referred to as Sondela Tavern) where he was. He in turn invited SN. AN and SN were about to reach the tavern, when they were assaulted by two assailants. One assailant was known as Dannyboy, who has since passed away on 15 March 2021, and the identity of the other assailant is in dispute and will be referred to as "Assailant 1". Assailant 1 took out a big gun and pointed both AN and SN with it. Said assailant demanded from them the whereabouts of Johan Ndlovu and if they were his siblings.

[17] Assailant 1 proceeded to assault AN with the gun, and Dannyboy kicked SN. Whilst being pointed with firearms, they were instructed to remain on ground as the assailants moved in a backward direction towards the tavern. AN saw them entering the tavern and thereafter heard gunshots being fired. SN witnessed that the assailants started shooting in the direction of the tavern's shelter, at the moment they reached the tavern wall.

[18] Johan Ndlovu was present in the tavern, sitting by the shelter in the direction of which assailant 1 shot. He escaped out the back by jumping over the fence, he was approached by a third assailant who shot at him. He continued running in the direction of a playground where he was picked up by a person he called for assistance. He attended to the police station where he was told that a case for murder had already been opened in respect of Yandile Welcome Selemela. He provided a statement to the police. He

was informed that Dannyboy and the two other assailants wanted to kill him and left the area on 27 December 2020.

- [19] This incident was not report to authorities by AN or SN, nor did they receive medical attention. On 27 December 2020 they returned to Sabie, where they resided at that time.
- [20] Yandile Welcome Selemela was shot on the day at Theki's Tavern and died from a gunshot wound to the chest, with a cut aorta with hemorrhagic shock. Two bullet casings were recovered in the tavern yard, one approximately 8 meters from the tavern and the other in the tavern shelter.

17 March 2021 - Case 2

- [21] On 17 March 2021 IN heard the sound of their yard gate being opened. Shortly thereafter a gunshot. Assailant 1 entered, she described his attire. He asked her where her father was. He proceeded to insult her, whilst pointing her with a firearm. He continued to question her about the whereabouts of her father. He repeated that he was asking about her father, Johan. She said Johan is not her father but her brother. She was taken to her mother's room still being pointed with a firearm. In that room was four men

and her two siblings (Lovenashia Ndlovu and Permission Ndlovu) and her mother Martha. The same assailant 1 pointed her mother with a firearm, asking where Johan was. Her mother responded that she had last seen him on 26 December 2020 in the evening. She was asked about the house situated on the same premises. She said Reginald and his girlfriend lives there. It was demanded that they go there. The door was open. Reginald and his wife were there. Whilst in the house, she witnessed an engagement between one of the assailants, according to her Reginald's wife may have been raped, in the room where she was not present.

- [22] IN and Reginald were instructed to move out of the room and away from the door. She was then asked who the person in the photo was, and she was shown the picture. It was CN in the picture. They enquired where he was, and IN indicated that he stays downwards, not far. They demanded that they all go there. They walked there whilst she was being pointed with a firearm. At times she was dragged by the arm.
- [23] At CN's house, Assailant 1 made her standby the door. He instructed her to knock and call out CN's name. When CN opened the door, she was pushed into the house and CN fell, and was assaulted with the gun. She heard CN enquiring why the assailant was hitting him, mentioning him by the name "Skhumbuzo". Prior to that she did not know the assailant's name. The assailant continued to assault CN with the firearm and she heard him say to CN that "you go out killing people. You go out and kill people". Assailant 2 tied CN's hands behind his back. CN's girlfriend, Agreement, and their baby of 2 months was also present. They went out of the house, CN was found lying on the ground. Two of the assailants were pulling Reginald by both his arms. IN was slapped with an open hand.

- [24] They went back to her parental home. CN and Reginald's wife was instructed to remain at the gate. She was told to go in. Inside, her mother was questioned about the herbs or the charm that she gave to Johan, causing him to not be found and insulted. Assailant 1 and 2 pointed her mother with a firearm. Assailant 1 instructed her mother to call Johan. The phone was on loudspeaker, and her mother said "people are looking for you". Johan asked "who is those people", and her mother replied she does not know. Assailant 1 took the phone from her mother. Johan enquired what they wanted, and Assailant 1 said "you killed our friend". Johan ended the call. Assailant 1 called again and the conversation repeated itself. Assailant 3 took a hammer and hit her mother on the arm. Assailant 2 took the hammer and hit her mother on the leg.
- [25] They instructed IN to take them to the house of Johan's girlfriend, Gracious. The got into a black car with 2 doors. All 5 assailants got into the car and IN was made to sit on one's lap and directed them. They arrived but IN remained outside and did not witness what transpired inside the house. Johan phoned on her mother's cellphone which was with Accused 1. She was told to bid her goodbyes with 2 firearms being pointed at her. A shot was fired in the air by an Assailant. IN was left there where she remained for the night. The assailants returned later and left her mother's phone. She sought medical attention for her eye which was injured from the assault.
- [26] CN materially corroborated the evidence of IN. It is not necessary to summarize all, save for that set out hereafter. Assailant 1 entered shoving CN who fell to the ground. Assailant 1 had a big firearm in his possession. He was asked "where is Johan", whilst being hit with the firearm on his body. He uttered "Skhumbuzo you are injuring me", to which Assailant 1 replied "do you know Skhumbozo?" Assailant 1 engaged with Agreement as his "sister", and advised her that "you are dating the enemy". They proceeded outside to the gate where they placed him at the gate. In the yard he witnessed Assailant 1 assaulting Reginald, asking him about Johan. The assailants then proceeded with IN back into the maternal home. They then came out of the home with IN, taking IN with them. According to him, there were 4 of 5 assailants. CN confirmed to have seen the injuries inflicted upon his mother, particularly her left arm.
- [27] Johan Ndlovu corroborated the evidence of IN in respect of the telephone call, save for the discrepancy in respect of who's phone was used.
- [28] The written statement of Martha Ndlovu was received into evidence by agreement as Exhibit Q. The content thereof was admitted and materially corresponds with that set out above, although not in all respects and with the same degree of detail. She confirmed 6 assailants, that she was assaulted by slapping with an open hand, being hit with a hammer and that she was pointed with a firearm.

16 June 2021 – Case 5

- [29] During the evening of 16 June 2021, AN was home with Eckson Five Ndlovu (aged 59), Martha Ndlovu (aged 53), Lovenashia Ndlovu (aged 14) and Permission Ndlovu (aged 12). It was a two-bedroom RDP house. All windows and doors were locked. Eckson Ndlovu and Martha Ndlovu were sleeping in the one room, and he and the children were asleep in the other. At approximately 02h00 he heard people outside talking, saying “we will enter into the house and kill everyone in the house”. Shortly thereafter he heard gunshots outside the house.
- [30] Pursuant to the gunshots, he heard his mother shouting and apologizing, and he realized the people were inside the house. According to him, there were three assailants who entered the room where he was with the children, which door was open and through which door a light was shining in, as the two lights in the dining room were switched on. The bed on which they were faced the door. The house has no passage. Gunshots were fired towards them, whereafter he fell on the floor next to the bed. More gunshots followed. At some point the gunshots stopped and he heard the assailants conversing that the gun was “locked”. According to him, Lovenashia Ndlovu was at that stage breathing in an abnormal wet and grunting sound. One of the assailants gave the other a new firearm, and further shots were fired at Lovenashia Ndlovu.
- [31] Whilst on the ground, he was keeping his eyes open ever so slightly. One of the assailants moved towards the bed, bent down and fired a shot underneath the bed. The assailants left the room and threw a liquid substance, which he assumed to be paraffin, against the wall and lighted same, causing the liquid to ignite. He escaped through a window. On his return, he found CN attempting to put out the fire.
- [32] The layout of the home as described by AN was consistent with the photos contained in the photo album. The ballistic evidence confirm that at least 5 firearms were used and at least 33 shots were fired. The photo album confirms that shots were fired both from the outside of the house and inside the house. The photo album further confirms extensive fire damage to be present.
- [33] CN’s home is close to his parental home, he heard gunshots in the middle of the night. He went outside to investigate. He realized the shots were fired at his parental home. He entered the neighbors’ premises situated directly opposite his parental home. At his parental home, the outside lights were switched on. He hid in a bush at the neighbors’ yard some 10 meters from where he could see what was happening. He confirmed IN testimony in respect assailant 1 and 2’s attire description. He witnessed the first assailant shooting with a big gun towards his mother’s bedroom from the outside. After shooting towards the door, three assailants entered and another was standing by the wall. According to him there was one lady amongst them. He also recognized the second assailant, whose face he saw in the yard in the light, from the outside lights being on. He does not know exactly what

transpired in the home, but heard gunshots fired inside the house. He then telephone called Johan Ndlovu. The assailants exited the house and threw what he believed to be a petrol bomb towards the house. When they left, he proceeded to attempt to put out the fire, and AN arrived.

[34] Johan Ndlovu confirmed receiving a phone call from CN, who advised that their parents and siblings were murdered, and that the house was on fire.

Evidence in support of the admission of statement of Nontokozo Sweetness Ndlovu

[35] In support of the admission of the witness statement in terms of the Hearsay Act, the investigating officer (Detective Sergeant Mpulampula) testified that Nonotokozo Sweetness Ndlovu, although she shared the surname with other State witnesses, was not related to them. She was also the complainant in Case 4 (Counts 20 to 25), which was withdrawn by the State at the commencement of the proceedings. She was a witness who was present during the happenings of Case 5 (Cas 100/06/2021) of 16 June 2021, as well as the murder charge (Cas 107/06/2021) relating to Counts 33 to 37, the murder charge of Caswell Maphanga which was also withdrawn.

[36] It was confirmed that she deposed to a statement wherein all of the incidents in which she was involved in, were dealt with. Nontokozo Sweetness Ndlovu's whereabouts were unknown, nor was it known whether she was still alive or not. She was in witness protection, and attended the identity parade, which was to be held, as dealt with elsewhere in this judgment. She left witness protection of her own volition sometime after January 2022.

[37] As to attempts made to secure her as a witness, he confirmed that once it became known that she was intended to leave witness protection, they attended to the bus terminal where she was supposed to arrive, but she never arrived on the said bus. The phone numbers previously provided and used were no longer operational. They also attended her known address, with no success. At her home he was informed that she was fearing for her life and that she will not be found. They were further informed that she was no longer to cooperate.

[38] He testified that her statement was taken down by a Colonel, who was a Commander of the Detective Branch in Bushbuckridge, by the name of Mbokane.

[39] He testified that the other known witnesses in respect of Case 1, Busi Mathebula and Bright Mlimi, were similarly not traceable, and their families confirmed that these persons no longer sought to be involved as they feared for their lives. Their homes were last visited in January 2023. He testified that notwithstanding the fact that they could not be traced, he saw some of them in court on the first day, and enquired from them as to their whereabouts. He asked them how they knew that they ought to attend the court proceedings. According to him they were called by a private number, telling them to come to court in Nelspruit. That was not him. He left the witnesses, and upon returning, they were no longer present. He has not seen them since.

- [40] He testified that extreme difficulty was experienced during the investigation in respect of witnesses, as witnesses were being intimidated and even murdered. The Mariti community lost confidence in the justice system, as this is known to them.
- [41] He confirmed that AN, SN and CN were all shot at, but luckily not killed. He confirmed that he was surprised when he was instructed to testify.
- [42] The State proceeded to present the evidence of Colonel Mbokane. He confirmed that he is a Colonel at Bushbuckridge, a Detective Commander of 32 years and he has been a Colonel for 4 years.
- [43] He confirmed that he took the statement of Nontokozi Sweetness Ndlovu, which was commissioned on 18 June 2021 at 00h30. He confirmed that it was taken down in Swati and written in English, and then read back to her, and that no objection was raised in doing so. He confirmed that he was not involved in the investigation of the matter, but was only attending to taking of the statement after he was instructed by a superior to attend the home of Adelaide Maphanga pursuant to the murder of her brother, Caswell Maphanga.

DISPUTED ISSUE - IDENTITY

Case 1 - 26 December 2020

- [44] AN testified that Assailant 1 is Accused 1. He testified that Accused 1 was wearing a green knee-length jacket and had a face mask, the type that can be described as a buff, covering his mouth and chin from the nose downwards. This encounter took place in daylight and can be described as a face-to-face engagement or confrontation in respect of Counts 1 to 3. He testified that on the day he was sober, but felt a little dizzy after he assault.
- [45] According to him, it was not the first time that he saw Accused 1. The first time that he saw Accused 1 was when he was with his girlfriend at Letsatsi Tavern. He confirmed that there was nothing preventing him from seeing Accused 1 accurately. This was in 2020, the same year as the concerned incident, more particularly on 23 December 2020. He later changed the aforesaid date to 24 December 2020 at approximately 17h00. He could not confirm the clothing worn by Accused 1 during said encounter, nor that anything

peculiar took place on that day.

- [46] SN testified that the assailant in respect of Counts 1 to 3 was Accused 1, who was wearing a long jacket, which might be green or blue. He confirmed that he knew who Accused 1 was, as he saw Accused 1 on 24 December 2020 when he was released from prison and in the company of his brother's (Johan) wife, Gracious. On noticing Accused 1, Gracious advised him that they should rather leave the place where they were at, being Letsatsi's Tavern. This was at night. He testified that Accused 1 is known to him through sight, and on 24 December 2020, when he saw Accused 1 in the evening, Accused 1 was standing close to a big light. During

cross-examination it was put to him that it appeared that he and Gracious had a big interest in Accused 1, who was apparently a

stranger. He responded that they did as that was the first time he saw him.

[47] In respect of the relevant incident, SN confirmed that he saw Accused 1's face and noticed that he had a nice haircut, which he described as a haircut of his own style. Accused 1 further had a mask on, which is the type that goes around your neck and can be pulled down. When he saw Accused 1, this mask was lowered, nearly covering his chin. He further testified that assailant 1 was light in complexion. He further confirmed that he enquired from his brother, Johan Ndlovu, as to Accused 1. When this exactly was done, was not elaborated upon during cross-examination.

[48] The identify evidence of AN and SN are direct evidence in respect of Counts 1 to 3, and circumstantial evidence in respect of Counts 4 to 6.

[49] In respect of Counts 4, 5 and 6, Johan Ndlovu testified that Accused 1 was one of the three assailants, the second being Dannyboy and the third assailant being Accused 2. He testified that on the day, Accused 1 was wearing a green lumber jacket that was long up to his knees, blue jeans, and he had yellow Fila "tekkies" (sneakers) on. He was also wearing a mask that covered his chin, going downwards.

[50] He testified that he knows Accused 1, as they live in the same area, and when he was released from prison 2018/2019, he came to them. He described them as friends who would talk about anything and do things together. He knows where he stays. He knew his siblings, and therefore he was regarded to know Accused 1 very well.

[51] He testified that he knows Accused 2, as the latter's grandmother's house is close to his maternal aunt's place where he used to stay. Accused 2 was friends with Thulani, a friend of his. When they were alone, Accused 2 would be a nice guy but when he as with Accused 1, he was different.

[52] He confirmed that it was Accused 1 who entered the tavern from the front and started shooting at him, and when he escaped, Accused 2 came from the back and shot at him, attempting to kill him.

[53] According to him, he saw Accused 1 on 24 December 2020 at the marketplace when they passed by one another, and that Accused 1 did not greet him. He was surprised by this.

[54] A large extent of the criticism of the evidence by AN and SN was that the incident was not reported, and only reported after the happenings of 16 June 2021. It was suggested that pursuant thereto, there was a decision by the Ndlovu family to attribute anything that happened to them or their family to Accused 1 and 2.

Case 2 - 17 March 2021

- [55] IN testified that 5 men entered her parental home on 17 March 2021. The first assailant had a long green jersey on that came up to his knees. She testified that Accused 1 had a big gun in his possession She identified him in court as Accused 1.
- [56] The second assailant she described as a person wearing a white jersey, who she identified in court to be Accused 2. The third assailant she described as being a short man with a big belly, and whose face she did not see. The fourth assailant was described as a black man wearing an orange golf shirt, who did not hide his face. This assailant is known to her. He stays in Mariti and his name is Charles. Charles she believes is family of Accused 1.
- [57] The fifth assailant was described as a man wearing Ellesse branded zip-up jersey who covered his face with a hoodie by pulling the two strings closed. She further testified that she overheard Accused 1 referring to this assailant as “Mojoro”, and referred to Accused 2 as “Bongikosi”.
- [58] She confirmed that she only became aware that Accused 1’s name as Skhumbuza when they entered CN’s home, and CN uttered “Skhumbuzo why are you beating me”.
- [59] She testified that she did not know Accused 1’s surname initially, but after discussing the incident with AN , who asked her to describe Accused 1. She did so with reference to his light complexion and lady’s cut. AN searched Facebook and showed her a picture. She confirmed that it was Accused 1 and the person referred to by CN as “Skhumbuzo”. She testified that on the picture there were hats on a table and Accused 1 was wearing a black T-shirt.
- [60] Confronted in cross-examination with why her statement did not contain details of the assailants, she explained that she said that she did not know them, the reason being that she wanted to avoid saying their names because of her future. She knew that by mentioning their names, anything could happen to her, and she travels a great distance school each day. She further explained her reluctance to give any statement to the police at all, and that the statement which was signed by her she merely signed in order for the police to stop enquiring.
- [61] She conceded that the only time that she saw Accused 1 was during the events of 17 March 2021, and that it was her second time seeing him in court. She persisted that notwithstanding the fact that she only saw Accused 1 in 2021 and again in 2023, there is no room for mistake. She conceded that if his face was concealed on the day, she might not have been able to recognize him again, but it was not.
- [62] CN testified that when his home was entered on 17 March 2021, it was done so by Accused 1, and Accused 2 was also present. According to him he knows Accused 1 from a tavern where they were drinking liquor, and he was pointed out to him during 2018. He confirmed that he only saw the Accused once. He further testified that on the day in 2018, Accused 1 was arrested at the tavern by the police. He conceded that he could not recall what clothes Accused 1 was wearing in 2018, but that it was a memorable day as Accused 1 is

feared by people. He confirmed that in 2019 and 2020 he did not see Accused 1 again but heard on 24 December 2020 that he was back in the area as he was released from prison.

[63] He testified that Accused 2 is known to him since 2017, as Accused 2 lives close to his maternal aunt's place, and friends also pointed Accused 2 out to him to be one Bonginkosi. He could not recall the year in which this occurred. He testified that Accused 2 also partook in the game kickball, which they regularly played at the marketplace.

[64] He confirmed that Accused 1 was wearing a maroon Redbat short sleeve and yellow Fila "tekkies" (sneakers). CN was unable to confirm what the other assailants present on the day of 17 March 2021 were wearing. The whole ordeal lasted an extensive period of time, approximately 2 to 3 hours, allowing time to observe.

[65] Johan Ndlovu's evidence in respect of identification relating to Case 2 was as follows. On 17 March 2021 he received a call from Accused 1, who gave the phone to his mother, who told him that he should come back home as she was being assaulted and that Accused 1 was looking for him. He then proceeded to talk to Accused 1 telephonically. There were 2 phone calls, the first one was

when he spoke to his mother, and the second was when he spoke to IN. His evidence as to whose phone was used and it being Accused's

1 phone contradicts the evidence of IN who confirmed it was her mother's phone.

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[66] According to AN, the assailants who entered his parental home on 16 June 2021, were Accused 1, Accused 2 and a third person whom he did not see. He testified that during the incident, the light in the dining room was on, which light can be seen from the bedroom, and the bed where he was sitting, was facing directly to the door. There is no passage in the house, as it is a small RDP house with only 3 rooms, being 2 bedrooms and a dining room area.

[67] When he first noticed the accused, he was sitting on his bed, facing the door. Directly after bullets were fired, he fell to the floor and was lying on the ground, slightly under the bed, still looking at the door with his eyes slightly closed.

[68] He testified that it was not the first time that he saw Accused 1 and 2, although he has never had a conversation with Accused 2. He testified that the first that he came across Accused 1 was in 2020 at Letsatsi's Tavern. The second time was at Theki's Tavern on 26 December 2020.

[69] According to AN, after the incident, Accused 1 called him and told him that he was not the one responsible for his family's death, but that it was Accused 2. No such call records were produced.

- [70] He further testified that Accused 1 was sending him lists of witnesses in the case, and shifting the blame to Accused 2. No such records were produced.
- [71] In respect of Accused 2, he testified that although he never spoke to him, he knows who he is, as he is a troublesome person. He also described him as a famous person. He attached the name to the face, as they are also Facebook friends, explaining that Accused 2's Facebook profile picture is a picture of a taxi.
- [72] Johan Ndlovu's testimony in respect of the identities of the perpetrators on 16 June 2021 was merely that he received a call from Accused 1, informing him that he had finished off everyone at his homestead, and that he had to come and bury them.
- [73] In respect of the involvement of Accused 2 in the events of 16 June 2021, Johan Ndlovu confirmed that he cannot say that he saw him or that he specifically knows that he is involved.
- [74] CN's identification evidence can be summarized as follow. From the bushes where he was hiding, he saw the assailants who included Accused 1. He knew him as the person who came to assault them previously. Accused 1 was wearing a green long-sleeve jacket with a hoody, which went up to his knees, and Fila "tekkies" (sneakers). He testified that they were approximately 5 with a lady. One was standing at the wall fence, the other at the tap and 3 of them entered the house.
- [75] He further testified that another assailant was known to him to be Accused 2, and he recognized him by his action and the way he walked. He also saw his face, as there was lighting in the yard at his parental home on the outside. He was wearing a white T-shirt, dark-colored/black pants or jeans and red shoes.
- [76] He also testified that Accused 1 is the only person who is known to have a big gun and who carried it around in the village.
- [77] He testified that the point from where he was witnessing the events was approximately 10 meters away.
- [78] He testified that initially, when they were firing at the house, he only saw their backs. But as they came out, the light on the outside of the property was illuminating towards the gate, and that is where they were going. He was not able to confirm what the other 3 assailants, who remained outside, were wearing.
- [79] According to CN, the lady present was wearing a dress, but he could not see more as she was standing aside in the dark. He thinks, but is unsure, that the dress had flowers on it.

Identity parade

- [80] No identity parade was held the reasons for same was explained by the investigating officer, Detective Sergeant Mpulampula. He testified that after arrest of Accused 1 the necessary arrangements were made to hold an identity parade. Accused 1 elected to have his erstwhile

legal representative, Mr. Chilobane, present. Contact was made with Mr. Chilobane on 30 December 2021 for the purpose of the identity parade. It was to be held on 3 January 2022 at 09h00. All witnesses attended, including Nontokoza Sweetness Ndlovu and Accused 1 was also present. Mr. Chilobane did not arrive, and upon an enquiry directed to him, he advised that when the date for the identity parade was arranged, he was under the influence of alcohol and he won't be attending, as his offices were closed until 14 January 2022.

- [81] Aforesaid was relayed to Advocate Maroshane, who was tasked with the preparation of the indictment, and who indicated that a statement needed to be filed and that the matter stood to proceed without an identity parade considering the evidence already available.

STATE'S APPLICATION TO ADMIT HEARSAY EVIDENCE AS CONTEMPLATED IN SECTION 3(1)(c) OF ACT 45 OF 1988

- [82] The State applied for the statement of Nontokoza Sweetness Ndlovu to be admitted as evidence in terms of the Hearsay Act. In doing so the State relied on the evidence of the investigating officer and Colonel Mbokane. The State placed reliance on *S v Rudman*; *S v Mthwana* 1992 (1) All SA 294 (A) and *S v Ndlovu* 2003 (3) All SA 760 (SCA), *Kapa v State* 2023 ZACC 1 and *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC).
- [83] The defense regarded the application an ambush and as the State did not forewarn the Defense that they intend to do so. They were given time to consider. The defense's argument was focused the poor qualify of police work employed, to secure the witness and that no confirmation that she was dead. It was thus distinguishable from *Kapa supra*.
- [84] The statement was received into evidence in terms of Section 3 of the Hearsay Act and marked as Exhibit R. The reasons for said ruling are briefly as follows:

- [85] Section 3(1)(c) of the Hearsay Act provides as follows:

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

...

- (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 other 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 interests of justice.”

[86] Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interest of justice for it to be admitted, taking into account the factors referred to in Section 3(1)(c)(i) to (vii) above. The Supreme Court of Appeal in *Ndhlovu supra* held that Section 3(1)(c)’s criteria – which must be “interpreted in accordance with the values of the Constitution and the ‘norms of the objective value system’ it embodies” – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of Accused persons.

[87] In considering the admission of the statement, this court must consider all the factors listed in Section 3(1)(c). These factors must be viewed holistically and weighed collectively in determining whether it would be in the interest of justice to admit the hearsay evidence/ statement. – Guidance in assessment is found in *Kapa supra* but also and on equal footing in the matter such as *Ndlovu supra*.

[88] *S v Ramavhale* 1996

(1) SACR 639 (A) at 649D-E the Appellate Division (as it then was) concluded that “a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an Accused, unless there are compelling justifications for doing so”.

[89] When Section 3(1)(c) is carefully considered, it is suggested if not clear that the probative value of this evidence needs to be considered with the totality of all the evidence that is presented in court, which would include the evidence of the Accused. So, the probative value of the evidence, in my view, for the purpose of this Section, cannot be viewed in isolation. It appears the legislature, fused the concept of admissibility with the evidential value of evidence. That being as it may, the ruling as to the admissibility of the hearsay evidence is required to be made now and not at a later stage, or after the Accused have presented their

case. Nor is it legally sound to provisionally allow the statement. This is to ensure that the Accused know exactly the extent of the evidence that has been placed before court in support of the State’s case.

[90] To this court, particularly in criminal proceedings, the overriding factor in assessing each of these factors would be whether it would impact on the Accused’s right to a fair trial in terms of Section 35(3) of the Constitution. In this regard the court will also refer to the Case of *S v Molimi* [2008] ZACC 2; 2008 (2) SACR 76 (CC), a Constitutional Court Case, with specific reference the following:

“[36] When addressing the safeguards that must be adhered to when receiving hearsay evidence under the Act, the Supreme Court of Appeal in Ndhlovu said that courts must be careful to ensure respect for the fair trial rights in s 35(3) of the Constitution. It said -

First, a presiding judicial officer is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, '(i)t is the duty of a trial Judge to keep inadmissible evidence out, [and] not listen passively as the record is turned into a papery sump of "evidence"'.
...

Third, an Accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its Case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its Case, the trial Judge must rule on admissibility, so that the Accused can appreciate the full evidentiary ambit he or she faces. (Footnote omitted.)

[37] The admissibility of the statements has been criticised on various grounds. It was contended that the vague and late ruling on the admissibility of the statements against the applicant was prejudicial to him and thus rendered the trial unfair. Section 3 indeed permits the provisional admission of hearsay evidence subject to the conditions set out in ss (3). However, the provisional admission of hearsay evidence is not, in my view, without problems. This Case clearly exemplifies the prejudice created by not having a clear and timeous ruling on the admission of hearsay evidence that plays a significant part in convicting the Accused and is admitted only at the end of the Case. The Supreme Court of Appeal, in *S v Ramavhale*, cautioned that in such a situation a judge should hesitate in admitting such evidence.

[38] The Supreme Court of Appeal hardly dealt with the enumerated factors in s 3(1)(c) and paid attention only to the first and third safeguards mentioned in *Ndhlovu*. It paid insufficient regard to the applicant's fair trial rights and did not ensure that he knew what the evidence against him was at the end of the State's Case or that inadmissible evidence was left out of account at that stage. The Supreme Court of Appeal correctly acknowledged that vague provisional rulings 'may be prejudicial to an Accused. It conflates the admissibility of the evidence with its weight and may leave an Accused unfairly in a state of uncertainty.' The court nevertheless found that the inexplicit and late admission of the hearsay evidence was not prejudicial to the applicant.

- [39] What compounds the problem is that even though the Supreme Court of Appeal expressed regret about the manner in which the trial court discharged its judicial obligation when determining the admissibility of the hearsay evidence, it opined that counsel for the applicant should have requested the trial judge to clarify the position before deciding whether his clients should testify in their defence. I cannot agree. The statement had not been admitted against the applicant and counsel had no duty to ask for clarification.”
- [91] A ruling on admissibility such as the one this court was faced with, remains interlocutory in nature and can be revisited should circumstances demand or evidence produced thereafter and before the court finds the Accused not guilty and acquits or maybe guilty. The ruling ought to be considered and if justified amended or revisited in light of the totality of the evidence presented. Therefore the possibility of re-appearance of the witness as argued for by the defence can be addresses if the need arise.
- [92] In considering the nature of these proceedings, this being a criminal trial, it is apparent that such evidence is of an incriminating nature, and it may be, if sufficient weight is attached to it, considered as evidence which may lead to a conviction of the Accused. The court is well aware of this fact, and the general reluctance a court should have in permitting such evidence as warned in the case of *S v Ramavhale* 1996 (1) SACR 639 (A). Without demonising that said directly before, the evidence will indeed be untested, but the Accused would still be able to challenge same, particularly considering the defence that has crystallised up to now.
- [93] As held in the constitutional matter of *Kapa v the State* at paragraph [79], at two stage enquiry find application, being (1) the extent to which the evidence can be regarded as reliable and (2) the weighing of the probative value of the evidence against the prejudicial effect. In re the first, the statement was made shortly after the event. The statement extensively deals with detail of that which transpired on the 15th (the events in respect of which charges have been withdrawn) but also the 16th of June 2021. Nontokozo Sweetness Ndlovu may have had an interest in the outcome regarding the charges now withdrawn. The statement was confirmed under oath, it corroborate

evidence of other State witnesses as an independent witness, but also contradicts it in some respect, which brings balance to its

independence. A large portion of the statement finds application to the undisputed or uncontested facts of this matter. The identity

evidence needs to be viewed with caution, but Nontokozo Sweetness Ndlovu is not a single witness in that respect.

- [94] The obvious purpose for which it was tendered was to link that the Accused and strengthen the state case, together with the corroborating evidence as argued by the State to bolster its case. The purpose is further to address the alibi defence which crystalised during the trial of the Accused, and addressing the complaint of independency, considering that other State witnesses are all related to the deceased.

- [95] As stated above, the probative value, should be weighed with the advantage of the totality of the evidence, including that of the Accused. But considering the stage of the proceedings it will only be done in regard to the State's Case. I have already dealt with those aspect in re the probative value. At the heart of the statement is the identification of Accused 1 and 2 by name. This court is cautious in respect of the reliability of same. No further descriptive identification is given, but equally the latter may be irrelevant when a person is known to you. Her evidence per the statement is however not the evidence of a single witness before this court.
- [96] The reasons why the evidence is not given by Nontokozo Sweetness Ndlovu herself is founded on the testimony of the investigating officer. Ordinarily the Hearsay Act would find application in circumstances where a witness had passed away, but it does not exclude the facts of this Case. All the State witnesses thus far were present at court in full armored bullet proof attire, the evidence thus far is that most of them have experienced an attempt on their lives, the investigating officer testified as to the difficulty experienced with witnesses. Duly allowing for the defense argument that the police should have done more, what they have done proved unsuccessful. It would surely have been less troublesome to ensure her attendance at court if they could find her oppose to running the risk of this application. Considering the totality of the evidence before this court to date, the reason is not farfetched.
- [97] The prejudice of not being able to test this evidence under cross examination. The extent is exacerbated by the constitution entitlement to a fair trial and effect thereon has been dealt with above.
- [98] Other factors considered is inter alia withdrawal of charges in general and in this matter, what gave rise thereto, the bulk of witnesses being in witness protection, the shooting of State witnesses, mindful of the fact that these shootings took place whilst the Accused were incarcerated, as well as the location and timing of these events.
- [99] In reaching a conclusion for or against the admission, it does not mean and should not be taken to mean that all the factors were found to be favourable to the admission or against it, but the factors once considered and weighed against the other and against the body of the existing evidence thus far inform same.
- [100] Having done so the admission of the hearsay evidence in the prevailing circumstances was found in the interest of justice.

CONTENT OF AFFIDAVIT BY NONTOKOZO SWEETNESS NDLOVU

- [101] The hearsay evidence of Nontokozo Sweetness Ndlovu is set out in Exhibit R and so admitted and the relevant portions can be summarized as follow. She resides at Nkanini, Mariti, and on 15 June 2021 at approximately 23h00, she was at home sleeping. She was woken by a knock at the door, the people announcing themselves as police

officers, speaking Siswati and saying “Simaphoyisa Vulani”. The door was kicked open and 4 African males entered, they were armed with rifles and pistols. Of the 4 men she knew Skhumbuzo. She knew him from Facebook pictures. He enquired from her if she knows him, and she responded she did not. He asked why she was writing shit on Facebook, to which she responded that it was not she who posted on Facebook, but her boyfriend (Thulani Maphanga) posted on her account. She met Skhumbuzo for the first time on Facebook during March 2021, after Dannyboy’s arrest, and when a certain person named Donald posted that someone “shitted too quick”. She commented in affirmation, saying “truly he shitted too soon”. In response, Skhumbuzo posted that she will die for what she does not know, and swore at her mother’s vagina. According to her, this was the reason why Skhumbuzo enquired from her about her postings on Facebook.

[102] Skhumbuzo then asked where Thulani was. She said she did not know. Skhumbuzo then started slapping her with an open hand on the face, asking for Thulani. An unknown male instructed her to call Thulani and tell him to come to her. She called him and told him that he should come home, as she had a problem with her pregnancy and was bleeding. Thulani advised her to call an ambulance, but she insisted that he should come. Thulani did not come, the reason for which she suspected that Thulani had heard that she was captured when one of the men whispered to her while she was on the phone and the phone was on loudspeaker. While still at home, Skhumbuzo received a call on his phone.

[103] They forced her into a black Polo. They drove to Thulani’s home. The black Polo then drove to Johan Ndlovu’s home in Madras Trust. There were 5 men in the black Polo when they went to Johan Ndlovu’s home. They stopped a short distance away from the home. They ordered her to come with to Johan Ndlovu’s home.

At his home, they started firing into the house and burned the house. She did not see if people were injured and the extent of the damage.

[104] They returned to the black Polo and ordered her to show them where Thulani’s home is in Bushbuckridge. When they were close to Thulani’s home, they left the car and walked. They entered the house next to Thulani’s home. A lady opened and she asked if Thulani was home. The lady showed it was next door. They went to Thulani’s home, and she was left in the street. The men went into the house, she heard gunshots and saw their house burning. After that, they went back to the car and drove towards Mariti.

[105] She was raped by two unknown assailants. They got into the car and ordered her not report at the police station, for they will know if she reported them, and they will also kill her family. They then drove away, leaving her in the dark of the night. She walked home and found that her brother and his wife and children were not there. She went to her aunt’s home, Lina Ndlovu, in Nkanini. She told her aunt what happened, but not about the rape because she did not want the police involved.

- [106] On 16 June 2021 at about 10h00 Thulani called her and she told him she was raped. She also told Thulani's sister, Adelaide Maphanga, of the rape. She counted 8 men whilst they were at her house. Of the 8 she knows Skhumbuzo, Freedom and Bonginkosi. The other 5 she does not know. Bonginkosi is related to her by grandmother, and she knows Freedom from Facebook.
- [107] In the Polo it was herself, Skhumbuzo and 3 men she did not know. She described the unknown men as tall, slender, dark, round face. The other one short, slender, long face and light in complexion, and the third one short, fattish and dark in complexion.

SECTION 174 APPLICATION

- [108] At the end of the case for the State, the Defense applied for discharge in terms of Section 174. Section 174 permits a trial court to return a verdict of not guilty at the close of the Case for the State, if the court is of the opinion that there is "no evidence", meaning evidence upon which a reasonable person might convict.
- [109] I do not consider it necessary to deal with the contentions of the parties in any detail, save to state that the Defense contended that the identification evidence by the State witnesses was not proper and called no witnesses to confirm that they were the person who informed the State witnesses of the identity of the Accused. No proper descriptions of the assailants were placed before court. The identify evidence was so poor that it cannot be relied upon. The State contended that it overcame the applicable test of a prima facie Case.
- [110] The application in respect of Accused 1 was refused, and partially granted in respect of Accused 2 in that he was discharged and found not guilty in respect of Counts 1, 2 and 3. The reasons were shortly the following:
- [111] The starting point must be the wording of Section 174 of the CPA and *S v Lubaxa* 2001
- (4) SA 1251 (SCA), the locus classicus on applications of this nature. The relevant section reads as follows:

"Accused may be discharged at close of Case for prosecution"

If, at the close of the Case for the prosecution at any trial, the court is of the opinion that there is no evidence that the Accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

- [112] The following dicta in *Lubaxa* is relevant and I quote from paragraphs [10] and [19]:

"[10] Section 174 of the Act repeats in all material respects the terms of its predecessors in the 1917 and 1955 Criminal Codes. It permits a trial court to return a verdict of not guilty at the close of the Case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict: S v Khanyapa 1979"

- (1) SA 824 (A) at 838F - G) that the Accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge.

...

- [19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."
- [113] It is trite law that the standard which the State's evidence must meet at the close of its Case, in order to avoid an Accused being discharged, is lower than the standard that it must meet to secure the Accused's conviction. For example, in *R v Louw* the Appellate Division rejected an argument by the defense that the Accused should have been discharged at the close of the state's Case, because "the evidence produced at the trial was so inconsistent with the innocence of the Accused". In dismissing this approach, the court said that it does not follow that because in a certain view of the facts the evidence might suggest innocence, the Accused must be acquitted, and that the jury may (and did) not take that view.
- [114] This was also the case in *R v Shein* 1925 AD 6, where the court found that the existence of the following evidence on a count of arson was sufficient to refuse a discharge at the close of the State's Case: (i) clear evidence that the fire was deliberate; and (ii) circumstantial evidence that the Accused had committed the crime (including motive and presence at the property around the time the fire would have been set).
- [115] The imperfections in the State's evidence did not necessarily mean that there was no evidence upon which a reasonable person might convict.
- [116] In *S v Shuping* 1983 (2) SA119 (B) there was evidence in the form of an eye-witness account which was not disqualified. That the witness was a single eyewitness, or given that there was no corroborating evidence, or that aspects of her testimony were contradicted by other eye-witnesses (as Hiemstra CJ noted) - did not mean that there did not exist admissible evidence probative of the elements of theft.
- [117] The only exception to this rule in South African law is that a court may discharge an Accused when the State's evidence is of such poor quality that no reasonable man acting carefully could convict thereon. This exception which permits a limited probe into credibility, appears to be a difficult line to tread.

[118] The decision of the court in *S v Agliotti* 2012 (1) SA SACR334 (W) warrants the conclusion that the court was confused about the limitations of the inquiry into credibility at the stage of the Section 174 application - when it concluded that the State's key witness lacked credibility to such an extent that a discharge of the Accused was merited. That evidence adduced by the State should only be ignored if it is of such poor quality that no reasonable person could accept it,

[119] By contrast, the correct approach was displayed in *Masondo In Re S v Mthembu* 2011

(2) SACR 286 GSJ, where Kgomo J said:

"The gist of the matter herein is that as opposed to situations where there is no evidence on record, in this Case there is indeed evidence led against him which, if found to be cogent and credible, may amount to a prima facie Case against him. I must make it clear that I am not saying the Accused's guilt on these two counts have been proved beyond reasonable doubt. I am saying the evidence led, when juxtaposed to the forensic evidence and the evidence of pointing out which has already been accepted against Accused 2 is such that it calls for reply."

[120] Considering the evidence before this court at close of the State Case and employing the principles crystalized by aforesaid authorities to the facts of this matter, there is a prima facie Case against the Accused. The evidence is not of such a poor quality that no reliance can be placed upon the evidence.

SUPRISING TURN OF EVENTS – ATTENDANCE OF UNTRACEABLE WITNESS AND DEEMED REOPENING OF STATE'S CASE

[121] The matter was scheduled to proceed on the Monday following the above ruling on the preceding Friday. One of the defense legal representatives were was ill. The matter was rolled over to the next day. On said day the below novelty arose which requires mention.

[122] At the commencement of the day, Mr. Maphanga reminded the court of his argument in respect of the admission of the statement of Nontokozo Sweetness Ndlovu and the possibility that the witness is alive, available and willing to come and testify. He announced that she was present at court and apparently had been in court before. He submitted that before the Accused could testify, he would require a consultation with the witness, Nontokozo Sweetness Ndlovu, as the Accused 1 will be confronted with her admitted hearsay evidence during his cross- examination. It was submitted by Mr. Mculu that the State should re-call the witness and the Defense be afforded an opportunity to cross-examine.

- [123] The State submitted that the circumstances appear to be suspect, considering the effort having been employed to apply for the admission of her statement when now it appears the Defense knew something that the State does not bear knowledge of, specifically in re her prior attendance. It was intimated that the State does not intend making her available as she remains a State witness, nor does the State intend to re-open its Case. It was submitted that the court stands to re-call the witness.
- [124] Having considered the circumstances that unfolded, and rationalized the emotion expressed by the State and Defense, it was held that Nontokozo Sweetness Ndlovu is still a State witness, and the State was therefore not ordered to make her available for consultation with the Defense.
- [125] That said, it is enshrined in our Constitution and the laws flowing from it that an Accused person has a right to cross-examine any witness who gives evidence against them in a court of law. In the present circumstances the witness was not available initially when her evidence was received per the hearsay statement. Thereafter she was present and seemingly willing and available to testify. The Accused should have the benefit of cross examination. Therefore the State will, should it so elect, be entitled to request its case to be reopened and lead the evidence of this witness. Considering the position of the State that it does not intend to reopen its case and call the witness, this court is enjoined to recall a witness. This however does not change the status of the witness, as she remains a State witness. The State's Case will be deemed reopened and Nontokozo Sweetness Ndlovu is recalled as a witness.
- [126] It is was open to the State to make an election how it wants to deal with her evidence henceforth. The State can lead her evidence, if it is content with the evidence introduced per the hearsay statement. She will be subjected only to cross-examination by the Defense. The State will be entitled to re-examination, but should the State elect not to lead her evidence, and stand by that already before court, as per normal the State will be limited in its re-examination to only that which arise from cross-examination.
- [127] The State elected to recall Nontokozo Sweetness Ndlovu and lead her evidence pursuant to consultation. Before dealing with her viva voce evidence and from a point of logic to her below summarized evidence, the State applied to declare her a hostile witness, which application was brought after her viva voce evidence commenced, and pursuant to the witness testifying that the statement to the police of 18 June 2021 was false. This needs to be dealt with.

APPLICATION TO DECLARE WITNESS HOSTILE

- [128] The State applied in terms of Section 190

(1) that the witness be declared a hostile witness. The application was opposed by the Defense on the basis that it was an irregularity as the state held out that she could not be found, then did she in fact appeared and now they seek to declared hostile without any basis. It was further contended that the application is premature.

[129] The witness was declared hostile the reasons for said ruling is briefly as follows: Section 190 deals with hostile witnesses. Section 190(1) provides as follows:

“Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party”

[130] As explained in Hiemstra’s Criminal Procedure Section:[1] “Section 190(1) refers to the situation where a party is left in the lurch by its own witness. Subsection (1) retains the remedy of the English law of evidence which applied in South Africa on 30 May 1961, namely declaring such witnesses hostile in order that they can be cross-examined by the party that called them.”

[131] The test in terms of Section 190(1) was stated in Meyer’s Trustee v Malan 1911 TPD 559 at 561 – to be as follows: “the court must decide whether the witness is adverse from his demeanor, his relationship to the party calling him and the general

circumstances of the Case, the Case is not predicated on proof of a subjective intent to prejudice”.
[2]

[132] In applying same, this court had the opportunity to witness the witness’s verbal and physical demeanor. From the start of her viva voce evidence she demonstrated an underlying irritation with the prosecution, her answers were short and abrupt, her response appeared to be directed to the Accused or gallery oppose to the court or the prosecution putting the question to her. Her responses were aimed at getting a point across and devoid of any detail. Her physical demeanor was closed off, arms folded with no eye contact directed to the court or the prosecution. She after almost every answer would briefly direct her eyes at the Accused and/or the gallery. The events which led to her viva voce testimony being led is a relevant consideration in respect of general circumstances of the Case, and then there was her evidence up to that stage in direct contradiction of the statement already before court as hearsay evidence.

[133] Before dealing with Nontokozo Sweetness Ndlovu’s viva voce evidence it stands to mentioned that during her evidence and after observing an uncanny uneasiness in the demeanor of the witness, her gaze being directed to the Accused and or the gallery continuously to the extent where it can be described as searching in affirmation or determining who is witnessing her testimony. The coherency of her evidence appeared to be reduced by her preoccupation with the gallery and or accused and after it being placed on record by the state that a threatening gesture was made by Accused 1. It was ordered in

terms of Section 153 of the CPA that the gallery be cleared for the duration of her evidence. The basis being the proper administration of justice that witnesses should feel free to testify in this particular Case without fear of retribution, intimidation for as far as same is possible. The decree of efficacy of the order was considered.[3] The circumstances of this particular Case demanded same. [4]

NONTOKOZO SWEETNESS NDLOVU'S TESTIMONY IN COURT

- [134] She confirmed that she knows about the incident of 16 June 2021 where people were killed, and confirmed that she was present. She confirmed that she saw the murders. According to her the people responsible for the killing is from Witbank. She, Thulani and Johan ran away with drugs from Witbank.
- [135] Another person by the name of Kenneth joined them. Thulani and Johan was to sleep over by her. Those people from Witbank came to her home and Kenneth was amongst them. They kicked down the door, asking the whereabouts of Thulani and Johan. She told them they must ask Kenneth, as he was the one that was with them. She was then instructed to phone Thulani on his phone and tell him that she was sick. She did so, but he never came. The men then told her to take them to Johan's place. Kenneth then told her to take them to Johan's place.
- [136] She accompanied them to Johan's residence, and upon their arrival they got inside the house, fired shots at Johan's mother, father and two siblings. They then told her to take them to Thulani's place, but she was not certain where he resides. They were directed to Thulani's house next door. At Thulani's house they went in and shot Thulani's brother.
- [137] On the morning of 16 June 2021, Johan Ndlovu phoned her and told her about the incident that occurred, and told her to mention that it was Skumbuzo, Bonginkosi and Freedom also known as Mojoro, when the police comes, whilst it was not.
- [138] On enquiry of the description of these assailants, she confirmed that some were dark and some light in complexion, some elders some young, faces not covered and they were all dressed in black jackets. She confirmed that she lied to the police when she made her statement but was today telling the truth.
- [139] Col. Mbokane arrived on 17 June 2021 at night, whilst she was at Thulani's residence. She confirmed that the content of the statement is partially correct and partially wrong the main issue being the identification of the assailants as Accused 1, 2 and Freedom.
- [140] The State proceeded to deal with the statement made, at which point she indicated that she was forced to mention that set out therein. When asked did you make statement due to treat by Johan Ndlovu she responded "no he only told me implicate". She confirmed that no specific threat was made, but he just told her to do it, which she did.

- [141] She testified that she told Thulani that Johan wanted her to implicate people who did not commit the crime. He was fine with it, as she was doing it for their sake. She could not recall when she told Thulani, it was after 16 June 2021.
- [142] She testified that at a point Johan contacted her, and she told him that what he wanted her to do was unfair, and that he was pushing her into a corner. He said that “you will do what I say anytime I tell you”. Then on a certain day, while she was in witness protection in Durban, therefore after her statement was made.
- [143] As to the date of the statement, she testified that she entered the witness protection program on 18 June 2021, after she made the statement. She later on testified that her statement was made after or while under witness protection at Mkutlu. She confirmed that the statement was not made at Thulani’s house when the police arrived. She confirmed that she knew Accused 1 as they were attending school at Modibeng, and Accused 2 was her neighbor at Nkanini.
- [144] She testified that she was told by Johan to implicate a specific Skhumbuzo, who stays at Madras Trust, and tell the police about the Facebook. She confirmed that the portion of the statement dealing with her being assaulted by Skhumbuzo was also what Johan Ndlovu told her to say, but denied telling a lie to the police whilst knowing it a lie. She testified that she was fearful that if she mentioned it was the true perpetrators, they would come back, because they know where she resides.
- [145] She confirmed that she attended an identity parade in 2022 and did not tell the police she made a false statement. According to her she would not have point out Accused 1 and 2.
- [146] She confirmed that the reason she was in witness protection was because she witnessed a crime and was being protected from the true assailants who she did not identify, not the accused before court.
- [147] She testified that she left witness protection, because she did not trust anyone. She came back and resided at Nkanini, but not return to the same address. She denied that the police did not know where she was, as they were to leave a message with her aunt in Nkanini, who would have passed the message on to her. She intimated that she wanted the police to find her, because she wanted to testify.
- [148] She testified that she knew she had to come to court, as Johan Ndlovu told her that he had already attended court, and the court wanted her. He told her so through Facebook, but she was unable to say when he did so. She later mentioned it was per telephone.
- [149] According to her, she attended court and just as she attended the first time Her statement was being admitted. According to her Johan Ndlovu told her that her statement was admitted. Later she testified that on attendance on the first day, she did not know what happened, nor did she introduce herself to the prosecutor or the police. On the second day she again merely decided to sit in the gallery. On the third day she overheard the court saying that a decision would be taken about her statement and how to go about it.

According to her she came the first time on 18 May 2023, the second time on 9 June 2023 and the 30 May 2021. Directly thereafter the corrected stating 18 May 2023, 30 May 2023 and 13 June 2023.

- [150] She explained that the purpose that she came to court was to testify and give the correct facts. But did not advise anyone of her presence as she did not know who to tell. According to her, both Accused saw her in attendance on 18 May 2023 and again on 30 May
2023. She testified that she wanted to be seen at court, but did not make any effort identifying herself to anyone. She confirmed that during consultation with the prosecutor, she advised that she moved from her known residence. She left witness protection because of the manner they dealt with her, and did not check on her on a daily basis. In re-stating of the question as to what Johan told her to say, she testified that if the court asked where she knew the Accused from, she must say Facebook.
- [151] When pushed in cross- examination by state, she accused the prosecutor of threatening with arrest if she does not tell the truth.
- [152] Asked why she thinks Johan Ndlovu would want to implicate Accused 1, she testified that Johan Ndlovu was once assaulted by members of public and Accused 1 was present, so she was not sure what the problem was.

Evidence of Col. Mbokane when recalled

- [153] Col Mbokane was re-called with no objection from the Defense, pursuant to the evidence of Nontokozo Sweetness Ndlovu. He testified that when the statement was taken from Nontokozo Sweetness Ndlovu, he was already off duty. He received a call from the Station Commander, who advised that a certain lady by the name of Addelaide, whose brother passed, and that he was required to attend for the purpose of taking her statement. This was on 17 June 2021. Upon arrival, he found Addelaide Maphanga. She directed him to Nontokozo Sweetness Ndlovu. She was then interviewed at the police station and a statement was obtained from her. This commenced at approximately 22h00 and finales after midnight.
- [154] He denied knowing Johan Ndlovu or that he was phoned by this Johan Ndlovu to meet Nontokozo Sweetness Ndlovu. He testified that there were no signs of apparent duress or pressure whilst taking the statement. He expressed that he had no doubt that she was telling the truth, as she confirmed personally being there and personally experiencing that which he noted in the statement.
- [155] He confirmed that the statement mentions no surnames, but only the names and description of how the deponent knew the assailants.

SECOND SECTION 174 APPLICATION

[156] Pursuant to the state case being closed again, the legal representatives of both Accused brought a second Section 174 application on the basis that the hearsay evidence previously before court of Nontokozo Sweetness Ndlovu has fallen away, as she has tendered viva voce evidence. The Defense sought a re-consideration of Section 174 on the evidence now before court, but sought same in re all the charges and not only the charges to which Nontokozo Sweetness Ndlovu's statement and viva voce evidence find application. The remaining submission was similar to that in the first Section 174.

[157] The second applications for discharge in terms of Section 174 was refused for the following reasons:

157.1 S v Rathumba and S v Mathonsi does not in this matter find application at this point in time and during an enquiry for the purpose of Section 174 – nor does the specific treatment of Nontokozo Sweetness Ndlovu's evidence at this point in time call for any specific treatment different from that which a court would apply to evidence by the State during a Section 174 application;

157.2 the scope of this application is limited to Case 5 and therefore Counts 26 to 32. This court have already pronounced on all the counts – it is thus devoid of the jurisdiction to review or reconsider and sits as an appeal court in re its own findings;

157.3 the evidence which was placed before court related only to Case 5 – the broader effect argued for specifically by Mr. Mculu on behalf of Accused 2 – calls for consideration when it comes to credibility – an intensive credibility inquiry is not appropriate at this stage;

157.4 even excluding the prior hearsay evidence and accepting the viva voce evidence, Nontokozo Sweetness Ndlovu was reliable on identification, which this court is not now doing but merely for the purpose of it reasoning, there are evidence implicating the Accused before court, the credibility of which will be properly assessed in due course. The evidence remaining is not so poor that it stands to be rejected at this stage.

SECTION 317

[158] Accused 1 applied for a special entry in terms of Section 317(1) to be made. The application was refused, the court's reason for doing so were as follows:

[159] Section 317(1) of the CPA provides as follows: -

“(1) If an Accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the

application would be an abuse of the process of the court.”

[160] The basis upon which such application was founded was set out under oath in an affidavit by Accused 1, as follows: -

“The purpose of my application is to apply for special entries to be recorded due to a number of irregularities which have occurred the cause (sic) of my trial and which irregularities are so gross that they render my trial unfair and that such irregularities can vitiate the entire proceedings and further that such irregularities could result in the Superior Court’s interfering with the interlocutory orders made herein.”

[161] From aforesaid it appears that the focus of the application relates to interlocutory orders made by this court. The further grounds set out under oath were as follows:

“

4.

The prosecution led evidence through W/O W Mpulampula that witnesses are threatened and killed in this Case and that Ntokhoso Ndlovu was in hiding as a result of those threats which were made and therefore she is unable to attend court and give evidence under oath. The honourable court made a decision based on the hearsay and false evidence of W/O Mpulampula to admit the statement of Ntokhoso Sweetness Ndlovu in terms of so-called hearsay evidence.

5.

I submit that I have suffered prejudice in that W/O Mpulampula did not make a prior statement which would have been disclosed to my legal representative as part of docket disclosures which would have assisted in preparing for my defence. I submit that this was an irregular step which has infringed on my constitutional right to have a fair trial.

6.

I submit that the honourable court made a decision to admit the above statement of Ntokhoso Ndlovu on an interlocutory basis taking into account the possibility of such witness being traced and cause to give evidence viva voce.

7.

It is common cause that the witness indeed did emerge and that the prosecution refused to re-open their Case and/or recall the witness

and the honourable court deemed the State’s Case reopened. I am advised that was an irregular step taken by the honourable court and that resulted in my rights to a fair trial being infringed and that a further injustice and an irregular step resulted in the prosecution declaring the witness hostile which they did not call. I need to emphasise that it was the honourable court that advised the prosecution to thoroughly deal with the statement of the witness lest (sic) the re-examination becomes limited. It is submitted with respect that was also an irregular step in that

re-examination by its nature is determined by cross-examination.

8.

I submit that when judgment was delivered in respect of my application for discharge, no mention was made to the effect that either her statement which was admitted in terms of interlocutory order was made a final or not. This decision leaves me in a conundrum in that I do not know how to deal with such a statement and that infringes on my constitutional right to have a fair trial in that I will be litigating from the dark.

9.

I submit that I was advised by my legal representative that the above honourable court does not have an inherent jurisdiction to re-open the State's Case without an application made by the prosecution and that it was practically impossible for the honourable court to have invoked the provision of Section 186 at stage due to the fact not all witnesses had tendered evidence at that stage and therefore it is crystal clear that the irregularity that occurred at that stage was so fatal to the extent that it has rendered my proceedings vitiated. In other words the defect or irregularity is so fatal that it cannot be resuscitated and thus requiring the interference of the superior courts at this stage of our proceedings.

10.

I submit further that a witness who would be called during the re-opening of a Case cannot be declared a hostile witness due to the fact that there are requirements which had to be fulfilled before such witness is called and such requirements do not include declaring a witness hostile and therefore by allowing the prosecution to declare Ntokhoso Ndlovu hostile has resulted in an irregular step and such irregularity was fatal in nature and has rendered my trial unfair.

11.

I submit that my proceedings when Ntokhoso Ndlovu was testifying and without no application made by either party, the honourable court made an order to have the proceedings held in camera contrary to the provisions of Section 150 of Act (sic) of 1977 and I also attach a letter wherein the parties were directed to file heads of argument and the State opted not to file same thus giving an impression that there is a different set of rules for parties.

12.

I submit that I have laid proper grounds to have special entries recorded in our proceedings and further that there are compelling

reasons which require that superior courts interfere with these proceedings at this stage and that I should not wait until the

finalisation of this matter as there are real prospects that I will suffer irreparable harm."

[162] In S v Khoza and Others 2010

(2) SACR 207 (SCA) it was held as follows:

"[44] The grounds open to a trial judge in refusing to note a special entry are restricted: that the application is not bona fide; or that it is frivolous or absurd; or that the granting of the application would be an abuse of the process of a court. There is a further ground not expressly mentioned in s 317(1), but inherent in the section: When the irregularity appears from the record itself the special entry procedure, whilst convenient, may be unnecessary because of the wide powers of appeal enjoyed by the SCA in terms of s 316 of the Act.

[45] In an application for leave to appeal against the refusal to note a special entry, it is necessary for an applicant to show a reasonable prospect of success on appeal, whether the irregularity appears ex facie the record or not.

[46] Even if the court considers that the trial of the appellants was rendered unfair by the presence of an irregularity, that is not enough vitiate the proceedings, unless the irregularity is per se such as to have that effect, or there has been a failure of justice, in that the evidence (and credibility findings, if any) unaffected by the irregularity was insufficient to prove guilt beyond a reasonable doubt."

[163] In *S v De Vries and Others* 2012

(1) SACR 186 (SCA) at paragraph [29] the Supreme Court of Appeal, referring to *S v Staggie*[5] stated that 2 requirements must be satisfied for a valid special entry: (1) the irregularity affecting the trial must not appear from the record; (2) the attack cannot relate to a ruling made during the course of the proceedings.[6]

[164] In *S v Nkabinde* 2017

(2) SACR 431 (SCA) at paragraph [27] Schippers AJA said:

"[27] The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(1) of the Act. The latter section provides, inter alia, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. Recently this Court has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record. As is shown below, all of the so-called special entries are not proper special entries but grounds of appeal under s 316 of the Act, because they appear on the record. Some 60 years ago this Court held that the special entry procedure is of vital importance and should be utilised where the irregularity does not appear on the record of the proceedings. So, the

statement in the application for leave to appeal to this Court that a special entry is 'simply a method of applying for an appeal in regard to irregularities on or off the record' is quite wrong."

- [165] The purpose of a special entry is to record irregularities that do not appear on record. This court does not have a discretion to refuse once the requirements are satisfied, unless it is of the opinion that the application is not made bona fide, or that it is frivolous or absurd, or that the granting of the application would be an abuse of the process of the court.
- [166] Section 317 expressly applies only to something the Accused thinks were “irregular or not according to law”. It postulates an irregular departure from the formalities, rules and principles of the criminal process according to which a criminal trial must be lawfully initiated and conducted.[7] In other words, not any departure found an application in terms of Section 317, but only one that can be described as irregular.
- [167] It is not for a trial court to decide that there was an irregularity. That enquiry is reserved for the appeal court to determine whether there has been an irregularity, and thereafter decide on the merits and consequences thereof.[8]
- [168] In *S v Nkabinde* (supra) at par [32] the court held that it must be stressed that an application for a special entry is not there for the asking; the requirements of Section 317(1) of the CPA must be met, and the court must satisfy itself that the application is bona fide and that it is not frivolous, absurd or an abuse of court process.

Whether the requirements for invoking Section 317 have been satisfied

- [169] I now turn to deal with each of the grounds or irregularities relied on per the affidavit, although not all of them were addressed in oral argument and submissions provided to court.
- [170] Ad paragraph 4 of Accused 1’s affidavit as quoted above relates court’s decision to admit the hearsay evidence founded on false evidence and hearsay. Considering the authorities set out above, this irregularity relates to a ruling found on the record of proceedings, and does therefore not satisfy the two requirements for a valid special entry on the basis of the matter of *De Vries* (supra), *Staggie* (supra) and *Nkabinde* (supra). Therefore, the granting of an application and noting of the entry on this basis would be an abuse of the court process.
- [171] Ad paragraph 5 of Accused 1’s affidavit as quoted above, which relates to the fact that Detective Sergeant. Mpulampula testified absent a prior statement. Similarly, this irregularity alleged to have been committed is founded on the record. This argued for irregularity is absurd/frivolous, as no reasonable person could possibly expect to succeed on this basis.
- [172] Ad paragraph 6 as quoted above, relating to the court’s ruling to admit as hearsay evidence in terms of Section 3(1)(c) of the Hearsay Act, the statement of Nontokozi Sweetness Ndlovu. The content of this paragraph incorrectly paraphrases the ruling made, which ruling is found on record. It appears to restate the reasoning provided by the court wherein it was stated that a ruling on admissibility such as the one court is face with, remains interlocutory in nature and can be revisited should circumstances demand, or evidence produced thereafter and before the court finds on the guilt or innocence of the Accused.

This irregularity relates to a ruling found on the record of proceedings, and does therefore not satisfy the two requirements for a valid special entry on the basis of the matter of De Vries (supra), Staggie (supra) and Nkabinde (supra). Therefore, the granting of an application and noting of the entry on this basis would be an abuse of the court process.

- [173] Ad paragraph 7 as quoted above, relating to the court deemed re-opening the State's Case, and recalling Nontokozo Sweetness Ndlovu for the purposes of cross-examination by the Defence. This irregularity relates to a ruling found on the record of proceedings, and does therefore not satisfy the two requirements for a valid special entry on the basis of the matter of De Vries (supra), Staggie (supra) and Nkabinde (supra). Therefore, the granting of an application and noting of the entry on this basis would be an abuse of the court process.
- [174] So too the ground that the court advised the State to thoroughly deal with the statement of the witness, otherwise the re-examination becomes limited, is an incorrect portrayal of the record, as on record it would appear that the court held that Nontokozo Sweetness Ndlovu is recalled as a witness. In doing so if the State wishes, it can lead her evidence if the State is content with the evidence as led, she will be subjected only to cross-examination by the Defence, and the State will be entitled to re-examine. But should the State elect not to lead her evidence and stand by that already before court, and as per the norm, the State will be limited in the re-examination to only that which arises from cross-examination.
- [175] Ad paragraph 8 as quoted above, wherein it is held that the court in its Section 174 ruling did not mention whether the admissibility of Nontokozo Sweetness Ndlovu's statement was made final or not, results in an infringement of Accused 1's constitutional right to a fair trial is found on record that the statement was admitted, but can be revisited before the court finds on the Accused's guilt. This irregularity
- relates to a ruling found on the record of proceedings, and does therefore not satisfy the two requirements for a valid special entry on the basis of the matter of De Vries (supra), Staggie (supra) and Nkabinde (supra). Therefore, the granting of an application and noting of the entry on this basis would be an abuse of the court process.
- [176] Ad paragraph 9 as quoted above, relating again to the court's ruling on record, calling Nontokozo Sweetness Ndlovu for the purpose of cross-examination pursuant to her surprising appearance after her statement had been admitted on the strength of the Hearsay Act. That set out in above in respect of the ruling to admit the hearsay evidence, is repeated.
- [177] Ad paragraph 10 as quoted above, relating to the ruling by the court declaring Nontokozo Sweetness Ndlovu a hostile witness is similar to that dealt with already.
- [178] Ad paragraph 11 as quoted above, relating to the court's order in terms of Section 153, incorrectly referred to as Section 150, appears on record and relates to a ruling made by the court and argued to be wrong.

- [179] Lastly, the set-out irregularity that the parties were directed to file heads of argument, but the State elected not to do so, gives the impression that there is different set of rules for parties, is not only on record but frivolous and absurd, as the order made clearly stated that the order was based on a request by the Defence to file written submissions, and an opportunity was granted to the State should it elect to do so in response.
- [180] For as far as paragraph 12 is concerned, and the content thereof that there exists compelling grounds and real prospects that irreparable harm will be suffered, it is not for this court to decide whether irregularities had occurred, but only to consider this application against the principles set out by the authority dealt with above, and (1) whether the requirements have been met for a valid entry; and (2) whether it is of the opinion that the application is not made bona fide or that it is frivolous or absurd, or that the granting of the application would be an abuse of the court process.
- [181] The irregularities contended for does not satisfy the requirements for valid special entries, but merely amount to grounds of appeal, and are therefore not so-called special entries but grounds of appeal under Section 316 of the CPA, because they appear on the record and relate to rulings argued by the Defence to have been wrongly made. The defence having argued extensively before each of these rulings were made.
- [182] In *S v Nkabinde* (supra) it was emphasised that the application for special entry is not there for the taking. The court must be satisfied that it meets the requirements set out in Section 317. Having considered the submissions made on behalf of the Accused, as well as the affidavit which the application was founded on, I am of the view that the application is unnecessary and granting it would constitute an abuse of court process for the reasons set out above. The application must therefore fail.

DEFENSE'S EVIDENCE

Accused 1

- [183] He denied that he was at Letsatsi's Tavern on 24 December 2020. He testified that on said day he was released from prison at the Bushbuckridge Correctional Services. He departed therefrom at approximately 17h30 and went straight to Tekwane and arrived there after 19h00. He was transported there by one Pethe, also nicknamed "Tjoppa". He never returned to the Mariti area.
- [184] Accused 1 testified that the first time he saw AN, SN, IN and CN was in court. He confirmed that he knows Nontokozo Sweetness Ndlovu and that her oral testimony was the truth. Accused 1 testified that the testimony by AN and Johan Ndlovu, seeing him at the market on the 24th is a clear indication that this matter was discussed.

- [185] Accused 1 denied that he was present at Mariti on 26 December 2020. He also denies ever being friends with Johan Ndlovu. In respect of 17 March 2021, he testified that he was not present at Madras Trust where the incident took place, and that he was in Tekwane. He testified that on 16 June 2021 he was in Tekwane at a place called Jackie's Tavern. He went there on the 15th and remained there until the early hours of the 16th.
- [186] Accused 1 confirmed that he was released from the Bushbuckridge Correctional Facility, and his address and where he stays are in Mariti, and that the terms of his release were that he would stay at Mariti. That was also the place where he would be monitored. In explaining why, that it was his home, that it was a term that he would stay in Mariti and that he would be monitored there, he breached the terms and travelled to Tekwane on the same day. Accused 1 testified that same is allowed, and that "you are even allowed to travel to Johannesburg as long as you report to the office of the correctional service that you are travelling".
- According to him he reported that on the same day of his release, and told the officers that if they wanted him to sign, as he was required to do in terms of his terms of release, they will have to phone him as he is no longer high risk.
- [187] Questioned about why, having been released from prison, he did not meet up with family and friends, but decided to leave directly to Tekwane South and remain there until 20 June 2021 when he was again arrested, Accused 1 explained that he was not in a position to go home as he was needed in Lekazi. He testified that pursuant to his release on 24 December 2020, he never visited his family.
- [188] He further confirmed that during the period of his release between 24 December 2020 until his arrest on 20 June 2021, he was never monitored, because he was never phoned to be monitored. He confirmed that his parole period, which required monitoring, would end in January 2025. Accused 1 explained that he did not find the absence of monitoring strange, as he was accordingly to him not high risk.
- [189] He confirmed that he was released in February 2018 pursuant to his 15 years sentence, but was then re-arrested and in that matter, he was released on parole on 24 December 2020. He confirmed that part of his terms of release was that he was doing community service, generally known as serving hours. He confirmed that the serving hours were only related to his release in 2018, and he did 380 hours at Madras Clinic. According to Accused 1, for his release on 24 December 2020, he was not required any community service.
- [190] According to Accused 1, notwithstanding the fact that he was required to sign at Bushbuckridge, and if you told them you found a job elsewhere, they allow you to go, there is nothing strange. His Case was however distinguishable as he did not find a job. He went to his girlfriend in Tekwane.

- [191] According to Accused 1, he was not advised how many times he would be required to sign, for example daily or weekly, and if high risk, they would come to you or to your work to sign. Confronted with the question whether it bothered him that during the whole period that he was on parole, he was never visited by any parole officer, Accused 1 explained that it did not bother him, as he felt it was their duty and they needed to phone him if they were looking for him.
- [192] When requested to provide details of his whereabouts on 26 December 2020, he indicated that he was in a house in Tekwane, alone, and his girlfriend only returned with her two sisters between 13h00 and 14h00. He spent the afternoon with his girlfriend and her two sisters, not doing anything specific or important. He did not recall anything specific, save that it was the day after Christmas.
- [193] When enquiring whether his girlfriend and her sisters would be able to confirm his testimony, he responded that they would if they can be found, as they were broken up since.
- [194] Accused 1 confirmed that he knows Theki's Tavern and that he has been there in the past, but that it was many years ago, during
2006. He confirmed that he knows Dannyboy from school, and only knows Johan Ndlovu from site, around Mariti. He confirmed that he commenced knowing Johan after his release in 2018.
- [195] On a question whether he regarded himself as a popular character in Madras and the Mariti area, Accused 1 testified that he was not offering any entertainment whereby he would consider himself as popular. He confirmed that his family are taxi owners and is regarded as a known family in the taxi business. He confirmed that as he was a resident of Mariti, people generally knew him. According to Accused 1, as a parolee you were entitled to move freely and go anywhere without anyone specific knowing your whereabouts.
- [196] In respect of 17 March 2021, he testified that he was still in Tekwane South. Nothing particularly happened on said day, and it was possible that on certain days he might not be able to give any particularity as to what he did. His certainty, that he was not at Madras Trust, is based on the fact that he never departed from there. Not going to White River or not going out of Tekwane. He could not recall where exactly he was on 17 March 2021, but could confirm that he may not have been home, but definitely did not leave Tekwane.

- [197] He explained that his understanding of high risk meant that you would be monitored more often. After some time a parolee would become low risk and they would not be checking up on you all the time. According to him the risk was dependent on the period of parole remaining, and if you were recently remaining, you were considered high risk. According to him, as he was on parole during 2020 for the 2018 matter, which parole would have lapsed in 2025, therefore he was no longer high risk.
- [198] In respect of 16 June 2021, he testified that he was in Tekwane, at home. He relayed that he commenced drinking at Jackie's Tavern on the 15th around 19h00, and remained there until 05h00 when they closed on the 16th. He confirmed that during his attendance, he was with a person called Thamisoko, and when he returned home, he was with his girlfriend.
- [199] According to him, the home that he stayed at in Tekwane South was a rental property of Helen Mnisi, his ex-girlfriend, but when she moved out, she left him there and he continued with the rental.
- [200] He testified that on 16 June 2021 he slept the whole time, as he was drunk. On 17 June 2021 he cannot remember what he did.
- [201] Accused 1 explained that Nontokozo Sweetness Ndlovu's testimony stands to be accepted, as she explained fully who was with her on the day, and it was not him. He opined that the State witnesses were fighting a losing battle and it made no sense in light of the evidence of Nontokozo Sweetness Ndlovu.
- [202] He indicated that he has known Nontokozo Sweetness Ndlovu for a long time, dating her friend. He confirmed that he never saw Nontokozo Sweetness Ndlovu at court up until the day that she gave her testimony. He explained that if she was sitting at the back, he might not have seen her. However, the times that he looked back into the gallery, she was not present.
- [203] He confirmed the terms of his parole were that he had to change his address, that he had the right to do so if he found a job, and that he had the right to inform them if he wanted to leave the province, and that should he commit a further crime, he would be re-arrested and would be returned and detained until finalization of that matter. Should he be found guilty of another offence, it would be regarded that he broke the terms of his parole, and if not guilty, he would be given another change. Further, he was
- not to consume alcohol. He confirmed that he never changed his address or provided an exact address to the correctional service upon his release, and neither where he was to stay in Tekwane. He confirmed that they had his contact details and his cellphone number.
- [204] He confirmed that he was arrested on 20 June 2021 in Lekazi in the vicinity of Tekwane. He confirmed that upon his release, someone has to sign for him. The purpose thereof was in order to monitor the person's presence at the address where he would be situated, and the person taking responsibility for his release. He testified that he was not aware that to change an address, a formal application needed to be made on paper, as that address needs

to be confirmed before the application is granted. He conceded that that was not done in his Case, but he did inform them and was not concerned about it, as the correctional service allowed him, after he told them that he was going to reside with his girlfriend in Tekwane.

- [205] He confirmed that he used to drive a black Polo, but between December 2020 and June 2021 he had no vehicle. He testified that said vehicle was not his, but belonged to a certain young man.

Accused 2

- [206] Accused 2 testified that on 26 December 2020 he was at home at Nkanini, not in Mariti. He was home the whole day and did not go out. He was there with his girlfriend, his child and his cousins. His family, being Lillian Shakoane, Richard Shakoane, Nkolongwa Shakoane and their children were present, as well as his mother, his stepfather and his grandmother. They were having a braai and drinking. He only recalls Lillian drinking and not the others.
- [207] He testified that he does not know Johan Ndlovu, AN, IN, CN and SN, and that he saw them all for the first time in court. The only person he knows was Nontokozo Sweetness Ndlovu, as she was his neighbor and he saw her daily.
- [208] He testified that on 17 March 2021 he cannot recall where he was during the day, but he was definitely home at night, as he never returns home later than 17h00 when he goes out. He was there with his girlfriend and his child. He confirmed that there was nothing special about that day. He cannot even recall what day of the week it was.
- [209] He testified that there are days that he does not sleep at home, such as 15 and 16 June 2021 as well as 18 April 2021. He testified that these were not the only days, but that these are the ones that he could recall off-hand.
- [210] He testified that on 16 June 2021 he was at his girlfriend, Angela Mokwene, at Mariti the whole day, with a person named Terrance.
- [211] He testified that on 15 June 2021 he went over to his friend, Terrance, who just arrived back from work in Witbank, and on 16 June 2021 he held a braai to celebrate Youth Day.
- [212] When asked whether he expected Nontokozo Sweetness Ndlovu, being his neighbor and person he knows well to advise him that she was forced to implicate him in a crime he did not commit, he indicated that she never informed him but did not expect her to come and advise him, as she would have been scared of the people who forced her to do so.

Alibi witness in respect of Accused 2

- [213] Angela Mokwena testified as alibi witness on behalf of Accused 2. She confirmed that he is her boyfriend and the father of their child, and that before his arrest on 27 January 2022 they were staying in Pretoria.

- [214] She testified that on 26 December 2020 she was at Nkanini where they had a small family function. At the function Accused 2's family was present, being Lillian, his mother, his stepfather, his uncles and older aunts, but she did not recall their names notwithstanding being the accused girlfriend for 6 years and having child with him. In respect of the happenings of 26 December 2020, she confirmed that a lot of people were drinking, but the only person that she could remember drinking was Lillian. She described the function to be attended by approximately 35 people.
- [215] She testified that on 17 March 2021 she left the Accused 2's home and went to her homestead, and returned just before dark. When she arrived, he was present. They watched movies on her laptop and then fell asleep.
- [216] She testified that on 16 June 2021 they were at her parental home with Accused 2. They went there on 15 June 2021, and remained there until the 16th. She testified that she knows the place called Madras, and that it is in Mariti, but she has never gone there. She denied knowing Johan Ndlovu.
- [217] She confirmed visiting Accused 2's place regularly. When being question on how she recalled what she did on 17 March 2021, she explained that after his arrest, he called and advised her that he was arrested, but she already knew. She enquired what he was arrested for, to which he explained what was alleged. She asked him what were the dates on which this occurred. That trigged
- her to be inquisitive to know where she was on the day. She confirmed that Accused 2 was not unsure about his whereabouts, which caused her to figure it out. She was asked whether Accused 2 informed her that they are implicating him, but on those days "I was at my place". She denied it and said that in the conversation he said they are implicating him in those offences, and that he was at home.
- [218] She confirmed that on being advised of the dates of the alleged offences, she sat down, trying to remembered were Accused 2 was on said dates, she also consulted their WhatsApp conversation on said dates to establish what they spoke about.

DISCUSSION AND EVALUATION

- [219] The criminal standard of proof is proof beyond a reasonable doubt, and the courts have articulated its meaning in a number of different ways. In *S v Sithole* 1999
- (1) SACR 585 (W) it was stated that: "There is only test in a criminal Case, and that is whether the evidence establishes the guilt of the Accused beyond a reasonable doubt. The corollary is that the Accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true."

[220] In evaluating the State's Case and applying aforementioned test, the enquiry as to whether the evidence establishes the guilt of the Accused beyond a reasonable doubt, and whether there exists no reasonable possibility that an innocent explanation, which has been put forward by the Accused, may be reasonably possibly true, is inseparable, each being the logical consequence of the other.[9]

[221] As to the yardstick of reasonable doubt, such doubt does not include "all doubt", but is limited to that which is regarded to be reasonable in the circumstances.[10]

Treatment of the Evidence of Nontokozi Sweetness Ndlovu

[222] It is prudent first to evaluate the most contentious issue in respect of the State's evidence, and that is the treatment of the evidence of Nontokozi Sweetness Ndlovu.

[223] That which played out during the hearing in respect of the witness Nonthokozi Sweetness Ndlovu, is rather novel. The State termed it suspicious whereas the Defence ascribed it to poor police work. Whichever the Case may be, the question which falls to be answered is how to treat her evidence. Is the statement still hearsay considering

that she provided viva voce testimony? Does her viva voce testimony erase the statement as was contended by the defence, during the second Section 174 application? Which of the two pieces of evidence are creditable and reliable, if any?

[224] Neither the State nor the Defence pertinently dealt in argument with the issue of how the evidence of Nontokozi Sweetness Ndlovu should be treated, save that the State placed reliance on the evidence as presented in her statement, whereas the Defence placed reliance on her viva voce evidence in court wherein she distanced herself from the identification.

[225] I deal with above in turn. The fact that the witness after admission of her statement testifies orally in court does not simply erase the admitted hearsay evidence. The issue of admissibility of an extra-curial statement of a witness can take many forms. Sometimes the statement is that of a witness who is also an accomplice, or the witness is an Accused whose statement is sought to be admitted into evidence against a co-Accused, or like in this Case, the witness may

be neither an Accused or an accomplice.

[226] In circumstances where a person who made a statement is called to testify, but denies making the statement, the first question to be decided is whether the evidence admitted exists at all, and if so, whether it is attributed to the witness. In the present instance that is not the case as there is no doubt that she made the statement.

What then stands to be decided is whether its probative value depends upon the credibility of the person giving the evidence. It does in the present matter. She testified and denied the truthfulness contained in her statement, and she was available to be cross-examined so as to test both the statements content and her later denial. Therefore, the probative value of the statement does

depend upon her. Where she confirmed making the statement, notwithstanding the denial of the correctness thereof, there is no basis to outright and completely exclude the statement, as an opportunity to test same was available under cross-examination. The

probative value to attach thereto still needs to be determined as in the case of other witnesses who testified.

[227] In *Makhala and Another v S* (438/2020) [2021] ZASCA (18 February 2022) at paragraph [64] it was held that:

“(T)he correct interpretation of the Hearsay Act is that once a court has determined that an extra-curial statement was made by a witness called to testify, the extra-curial statement is not hearsay, and it may be admitted without determining whether it is in the interest of justice to do so by recourse to Section 3(1)(c). Admitting the extra-curial evidence does not render the right to cross-examine nugatory. On the contrary, cross-examination of the

witness must be given full reign to permit the trial court to determine whether the extra-curial statement has any value at all,

and if so, what weight should be attached to it.”

[228] In addition to the witness being available for cross-examination by the Defence, and resultant from the declaration of hostility, the State also cross-examined the witness. This empowered the court to determine the value of the statement, if any, as well as what weight to attached thereto, having the benefit of cross examination by both

the state and the defence.

[229] The dangers of hearsay evidence framed fully in *S v Ramavhale* 1006(1) SACR 639 (A) are not present when the extra-curial statement of a witness called to testify at trial is under consideration. The witness testified under oath and is subject to cross-examination by the party against whom he or she is called i.e. the defence and in this instance the State. Therefore, the witness’s power of perception, her opportunity for observation, her attentiveness in observing, the strength of her recollection and her disposition to speak the truth could all be tested.

[230] That said, for a prior statement to be admissible and in addition to the availability of the witness to give evidence at trial and face cross-examination, there are two further requirements that must be met. First, the evidence contained in the prior statement must be admissible as if it had been given in court, that is to say there must not be some other basis for exclusion other than the application of the Hearsay Act. Secondly, the prior statement must have been made

voluntarily. Further, the reliability, accuracy and appreciation of the circumstances under which the statement was made must be

considered.

[231] In the present instance there was no other rule of evidence that would have excluded the statement. The content of the statement is not that of a single witness in respect of the undisputed issues nor in respect of identity. For as far as caution should be attributed to the fact that the statement contains identity evidence, same was not single to the statement and it is not a rule of evidence to exclude same. The evidence in the statement is circumstantial to the extent that she did not witness the crimes of murder and attempted murder being committed. This calls for the cardinal rule of logic, as set out in *R v Blom* 1939 AD 188 at 2002-3, to be applied, but again does not found a basis for outright exclusion.

[232] In respect of whether the statement was made voluntarily and without improper inducements. It is clear that no such circumstances exist in respect of the police or when the statement was made. What stands to

be considered is whether the fact that she wilfully deposed to an untruthful statement, implicating the Accused on request of Johan

Ndlovu, justifies the conclusion that the statement was not made voluntarily and therefore made under duress. I find that it does not.

[233] Her viva voce testimony has already been summarised and need not be repeated save for mentioning the following. She testified that Johan Ndlovu at approximately 7am on 16 June 2021 told her about the incident that occurred and that she must mention that it was “Skhumbuzo”, “Bonginkosi” and “Freedom”.

The instruction was telephonically. She testified that she acceded to the request, as Johan Ndlovu was fearing for his family if she mentioned that it was the true perpetrators. When specifically questioned about whether there was a threat at that stage, her

response was “no”. Johan Ndlovu was arrested later during the morning of 16 June 2021. The events were then relayed to Colonel Mbokane on 17 June 2021, and a statement was deposed to and commissioned in the early hours of 18 June 2021. She immediately

thereafter went into witness protection. She testified that she was only told to implicate the Accused, not threatened. The instances of threats where all events post fact, after she had already made the statement and whilst in witness protection.

[234] At no point, prior to her testimony in court, was the fabricated nature of her statement made known to the police or the person overseeing the witness protection program she was in. She even attended the identity parade which was to be held, more than a year after making the statement under oath.

[235] I am aligned with the view expressed by the Supreme Court of Appeal above in *Makhala and Another v S*. The statement is no longer hearsay and admissible evidence in court which stands to be evaluated as all other. The law does not require more than that set out above, nor that it must be found to be in the interest of justice before same is admitted.

[236] In evaluating the evidence, this court ought to have regard to all the evidence presented as a whole.[11]

[237] In addition to the shortcomings highlighted above, Ntohokoza Sweetness Ndlovu viva voce evidence left an impression of mendacity with the court. The evidence was at times most incoherent and directed to one purpose and that being to disassociate from the identification made in her statement. Her demeanor was seeking affirmation from the Accused and/or the gallery.

[238] Her evidence of attendance at court cant not be correct as it is contradicted by the record of hearing days and what transpired on the respective days in court. Her internal contradiction superseded any corroborative content. The facts deposed to under oath in the statement details the totality of the events that could only have

been within her knowledge, for example the persons present at her home when the assailants attended her house, yet she told the court Johan Ndlovu almost paragraph per paragraph told her what to say in the statement.

[239] She testified that she was told to implicate Bonginkosi being Accused 2, but Johan Ndlovu himself did implicate Accused 2. The specificity in respect of the knowledge of the accused through Facebook is such

that it aligns with person experience of a person and not a story one was told to really. These facts are also easily investigated and countered if found to be incorrect. The detail about Danboy was also contrary to the known facts by Johan Ndlovu who knew he was deceased by 13 March 2021. She mentioned persons present with her at her home, who she must have foreseen may be interviewed by the police and who may provide a different version, these risks mitigate against fabrication.

[240] Her statement relayed what appeared to be an accurate eyewitness account and did not over exaggerate that which she witnesses. A fact which can with ease be expanded upon if you wanted to ensure the wrong person are with certainty implicated in a crime. Yet in court she alleged to have witnesses the murders directly and even mentioned

the four victims by name.

[241] None of the other state witnesses identified Mojoro (Freedom) to be part of the assailants, therefore Johan Ndlovu would not have known this fact to relay to her as his information came from CN and later

AN. Her viva voce evidence is found unreliable and rejected.

Uncontested

facts

[242] The credibility of witnesses has to be weighed against the evidence tendered by other witnesses to see if there are no 'own goals' in the form of contradictions or being unreliable. Although not all the State witnesses made an equally favourable impression on the court, the less favourable impressions made were not such that such witnesses' evidence stood to be rejected as a whole in respect of the uncontested facts.

[243] AN, SN, CN and IN are in witness protection, they were all dressed in bullet proof armoured clothing and was noticeably uneasy in giving their evidence. At some point the proceedings were interrupted with a request for the protection officers to be closer stationed than what they were. SN's distress was such that he could physically not express himself. His testimony was by agreement and order received through close circuit television. The obvious anxiety caused was understandable considering the attempt made on AN's and CN's lives by unknown gunmen as testified to. The former plays no decisive or significant role in the assessment of their evidence but was an obvious hinderance to the natural and expected presentation and flow of their evidence.

[244] As to the uncontested facts, the evidence of the three relevant State witnesses relating to the events of 26 December 2020 corroborated each other materially. Cumulatively considered, and weighing one against the other, it provided a reliable exposition of what transpired on the days in question, which is aligned with the objective facts. The marginal discrepancies, which were highlighted during cross-examination, are not material in this respect. The ballistic evidence further confirmed Johan Ndlovu's evidence in respect of the location the shots were directed to. The circumstantial evidence of AN and SN as to the assailants entering the tavern, shooting towards the shelter and the murder of Yandile Welcome Selemela and attempted murder of Johan Ndlovu is consistent to the proven facts. The facts are such to exclude every other reasonable inference and are further corroborated by the evidence of Johan Ndlovu. The undisputed evidence proved intent in the form of *dolus directus*.

[245] In respect of the incident of 26 December 2020 (Case 1), the State has succeeded in proving, save for the issue of identity, the commissioning of the individual crimes (which formed the subject matter of the charges dealt with under Case 1) the prerequisite actus reus or criminal conduct which constitutes each relevant offence.

[246] IN made a most favourable impression, she reflected independence. She provided single evidence in respect of Count 12. Approaching same with caution, her evidence in this respect is consistent with the probabilities[12] and demonstrated reliability of accounts. It was clear and satisfactory in every material respect. Her evidence in relation to Count 9 was materially corroborated by the written statement of Martha Ndlovu.

[247] Her evidence in respect of that which transpired during the remainder of the events of 17 March 2021 was further materially corroborated by CN and the written statement of Martha Ndlovu. There was no justified

criticism in respect of her evidence for as far as the uncontested facts are concerned. The evidence in respect of CN was in turn

corroborated by IN. The contradictions between their evidence were marginal and indicative of independent accounts and reliability.

[248] Therefore, on a conspectus of the evidence in respect of the second incident of 17 March 2021, the commissioning of the individual crimes (which forms the subject matter of the charges relating to Case 2)

has been proven in the sense that the pre requisite actus reus which constitutes each relevant offence has been proved, excluding

identity.

[249] On a conspectus of the evidence relied on by the State in respect of the incident on 16 June 2021 (Case 5), the State has succeeded in proving, but for the issue of identity, the commissioning of the individual crimes (which form the subject matter of the charges relating to Case 5), in the sense that the prerequisite actus reus or criminal conduct which constitute each relevant offence has been proved. The facts are such to exclude every other reasonable inference. This is so found notwithstanding the criticism in respect of discrepancies argued for by the Defence. The discrepancies and contradictions were not material to attach on the reliability of CN's evidence compared to that of Nontokozo Sweetness Ndlovu, and the clothing she was wearing does not detract from his evidence, nor was it canvassed with the witness when she testified in court.

[250] As held in *S v Mkohle* 1999 (1) SACR 95 (A), contradictions per se do not lead to the rejection of a witness's evidence; they may simply be indications of error. Not every error made by a witness affects his or her credibility; in each Case the tryer of the facts has to make an evaluation, taking into account such matters as the nature of the contradiction, the number and the importance as their bearing on other parts of the witness's evidence.

- [251] Each of the witnesses who testified in respect of this incident gave evidence of their experience, which was separate from that of another witness, in that AN was inside the house when the incident took place, CN was an external observer and Nontokozo Sweetness Ndlovu relayed that which she witnessed having been present with the assailants. Her statement does not corroborate the entering of the house but merely that the assailants shot at the house and set it alight. She did not see if anyone was injured. Albeit that the latter witness was unimpressive and unsatisfactory, her statement as confirmed in her viva voce evidence was materially corroborated by the evidence of AN and CN pertaining to the events highlighted above. It further corroborates CN's evidence that a lady was present.
- [252] Further corroboration is found in respect of the events that transpired on 16 June 2021 in the photo album, as well as the ballistic evidence which confirmed the layout of the house as described by AN, the use of at least five firearms, that shots were fired outside and inside the house and the extensive fire damage. The State's evidence in respect of this incident is aligned with the objective proven facts. The circumstantial facts are such to exclude every other reasonable inference and prove intent in the form of *dolus directus*.

Identity

- [253] In assessing the dependability of identity evidence and observations made in respect of identity, such evidence should be treated with caution. Even the most honest of witnesses are susceptible to making a positive identification of the wrong perpetrator. In removing the risk associated with identity evidence, the factors set out in *S v Mthethwa* 1972 (3) SA 766 (A) calls for consideration, but is not individually decisive. The factors per *Mthethwa* (which are not exhaustive) need to be weighed, the one against the other and against the totality of the evidence and probabilities.
- [254] As stated in *R v Dladla and Others* 1962(1) SA 307 (A) the probability of an identification being reliable is strengthened when the person who has been identified was known beforehand to the identifying witness, yet again not decisive and should be tested against the whole body of available evidence.

Case 1 – 26 December 2021

- [255] AN gave a detailed description of the clothing which assailant 1 was wearing. This was corroborated by both SN and Johan Ndlovu. AN had an opportunity to observe assailant 1 and had an unobstructed view during the face-to-face encounter. Assailant 1's face was not covered although he wore a buff-type mask, which was below the nose

covering his mouth and chin. SN had a similar opportunity to observe, and added in his testimony that assailant 1 was light in complexion and had a nice haircut which was described as a haircut of his own style. Both confirmed that assailant 1 had a big gun in his possession. The observation of the attire is insignificant on its own.

[256] AN identified Accused 1 as assailant 1 in court. SN similarly identified Accused 1 in court. Such dock identification generally carries little weight absent prior knowledge.

[257] AN had prior knowledge of Accused 1 whom he saw a couple of days earlier on 24 December 2021 at a Letsatsi Tavern where he was with his girlfriend. On this occasion he had a similar unobstructed view and opportunity to see Accused 1 clearly whilst it was day-time and around 17h00. He conceded in cross-examination that nothing peculiar took place at this tavern which would have caused him to notice Accused 1.

[258] SN had prior knowledge of Accused 1. He saw the Accused 1 later the same day as AN at the same place. Accused 1 was released from prison and was pointed out to him by Johan Ndlovu's girlfriend, Gracious, in whose company he was. He took specific notice of Accused 1 as Gracious advised they should rather leave due to the presence of Accused 1. On this occasion he could observe Accused 1 clearly as Accused 1 was standing by a big light. In cross-examination he was confronted for having a great interest in Accused 1, who apparently was a stranger. SN acknowledged same by stating that "yes we did have an interest as it was the first time to see him". He thereafter made enquiry with his brother about Accused 1.

[259] Johan Ndlovu testified that it was Accused 1 who entered Theki's Tavern and shot at him, killing Yandile Welcome Selemela. He knows Accused 1 well, the detail of which is already set out above. On the day his view was unobstructed when the Accused entered Theki's Tavern and the incident happened in broad day light be it that it could not have been a lengthy observation considering the facts. He also saw the Accused on 24 December 2021, but at the marketplace.

[260] The Defence challenged the reliability of above evidence on the basis that it amounts to hearsay, as the persons accompanying AN and SN on 24 December 2021 were not called. The court was not directed to any specific authority in support of this submission. It's not agreed that that it amounts to hearsay and is therefore inadmissible. It related to how the witnesses' obtained prior knowledge. Much was made about their failure to report the incident immediately. This was answered by the testimony that they never reported it until they were interviewed in respect of the third incident. Within the context and circumstances of this Case that is not strange. This incident was however reported on the day by Johan Ndlovu who made a statement on the same day. Mindful that his earlier identification is inadmissible on the basis of self-corroboration, the existence of the

statement is relevant and admissible as to the suggestion by the defence of fabrication. Through the trial it was strongly contended

that there was a concerted effort by the Ndlovu family to attribute any and everything that happened to them to Accused 1 and 2. No support was found for this in the evidence about the assailants in this incident and the fact that the witnesses were victims on its own does not give credence to it. Specifically having regard to IN's expression dealt with below. If that was the case, it would have been the easiest of fibs to replace Dannyboy's involvement with that of Accused 2, as Dannyboy passed away in March 2021, which SN knew.

[261] In respect of Accused 2, Johan Ndlovu is a single witness on the issue of identity, and as such his identity evidence is approached with great caution. He testified that in an attempt to escape the attack in the tavern, he escaped out the back by jumping over the fence and he was running. During this escape, the third assailant appeared and shot at him. He continued to run towards the playground. He identified this assailant as Accused 2. His identification was based solely on his prior knowledge of Accused 2,

whom he knows though a mutual friend and that Accused 2's grandmother lives in the same area as his maternal aunt. His evidence

was devoid of any particularity in respect of obstruction, opportunity to observe, time or distance. From his evidence it is unavoidable that the scene was mobile. He was fleeing and the proximity was changing by each step he took. There was further no evidence as to whether he was being shot at from the front or from behind, or whether he was pursued whilst fleeing.

Case 2 – 17 March 2021

[262] IN identified 5 men to be present. She was able to describe each of them by physical features and clothing. She identified assailant 1 in court as Accused 1. He had a big gun in his possession. CN's account of Accused 1's clothing was inconsistent with the evidence of IN and he could not recall the attire of Accused 2. As held supra, said descriptions are insignificant on its own. She also observed them face-to-face during the incident. Accused 1 and 2's faces were not concealed, she enjoyed good visibility in the various homes they were in, she had ample opportunity to observe during the incident which lasted 2 to 3 hours. She was made to sit in close proximity to the assailants in the vehicle. CN also had a similar opportunity to observe albeit to a lesser extent than IN.

[263] In addition, IN testified that a name was brought to the face when CN addressed Accused 1 as "Skhumbuzo". So too in respect of Accused 2, when Accused 1 referred to Accused 2 as "Bonginkosi" and the other assailant as "Mojoro".

She knew the fourth assailant as Charles, who lived in Mariti and who she believes is family of Accused 1.

[264] Post fact she discussed the incident with AN, who asked her to describe Accused 1. She did so with reference to his light complexion and lady's cut. AN showed her a Facebook picture she confirmed that it was Accused 1 and she became aware of his surname.

- [265] Her reluctance to cooperate with the police and resultant statement were acceptably explained. She earnestly conceded that it was only the second time she saw Accused 1 face-to-face in court. She was steadfast in cross-examination on her identification.
- [266] Save for the inconsistencies highlighted above, CN corroborated IN's identification of Accused 1 and 2. He had prior knowledge of the both Accused. He knows Accused 1 from a tavern and he was pointed out to him during 2018, whilst Accused 1 was being arrested. AN held out that Accused 1 was known as a feared person. He confirmed that he had only seen Accused 1 once before. Accused 2 he knows since 2017, as Accused 2 lives close to his maternal aunt's place, and friends also pointed Accused 2 out to him to be one Bonginkosi and who partakes in the kickball game he also plays regularly at the marketplace.
- [267] Johan Ndlovu's evidence in respect of identification is limited to two telephone calls he had with Accused 1 during the incident. The telephone calls were corroborated by IN's evidence, but as to whose phone was used was contradicted. In isolation Johan Ndlovu's evidence carries little weight.
- [268] AN, testified that both Accused and a third person entered the house with firearms. He saw them when they were inside, facing the bedroom door with the two dining room lights illuminating the small RDP house. His opportunity to observe was limited before the gun shots sounded in his direction and he fell to the ground still looking at the door, but from a lesser vantage point. He identified both Accused in court, and so did CN.
- [269] He had prior knowledge of Accused 1 from Letsatsi's Tavern in 24 December 2020 when he was with his girlfriend, and shortly thereafter at Theki's Tavern on 26 December 2020 when he was assaulted by Accused 1. He testified to post fact telephonic contact with Accused 1. He also had prior knowledge of Accused 2, although he never spoke to him. He knows who he is, as he is a famous troublesome person, but also a Facebook friend.
- [270] Johan Ndlovu's testimony in respect of the identity only relates to Accused 1. He conceded that he has no personal knowledge of Accused 2 being involved. In respect of Accused 1 he received a call informing him that he finished off everyone at his homestead and he should come bury them. This evidence was uncorroborated and carries no weight.
- [271] CN's witnessed 5 assailants and a lady. Three entered the house. The others and the lady remained outside. He observed for some time as they entered and again exited the house. He observed from the bushes approximately 10 meters away. The light on the outside of the house was on. He recognized Accused 1 and 2 as the same persons from the previous incident two months earlier. His identification was corroborated by AN. Accused 1 was said to have a big gun and was only person to have such a gun in the village, he was wearing a green long-sleeve jacket with a hoody, which went up to his knees, and Fila tekkies. Accused 2 was wearing a white T-shirt, dark-coloured pants and red shoes.

- [272] Nontokozo Sweetness Ndlovu's statement corroborates the evidence of CN as to her presence and position. It further corroborates the evidence AN and CN in respect of a Skhumuzo and a Bonginkosi being part of the assailants present at the scene (described as Johan Ndlovu's home) where she was also present. She had prior knowledge of Skhumbuzo through Facebook interactions in March
2021. Bonginkosi is known to her as they are related by grandmothers. Her statement does not corroborate any of them entering the house but merely that they shot at the house and set it alight.
- [273] IN gave a very detailed and comprehensive explanation as to how the events unfolded. She was very precise about the finest of detail. It is impossible to have been so exact and accurate in the expression of detail if foretold. Her demeanour in court was candid and impressive even during ardent cross-examination. She gave uncensored expression about her feelings towards Johan Ndlovu and that she attributed the blame for the incidents to him.
- [274] AN, SN, Johan Ndlovu and CN appeared more reticent in their evidence, although they withstood hefty cross-examination without departure. The impression they left was that there was far more to tell than what they were prepared to divulge to the court.

The Accused's alibi

- [275] Both Accused denied their involvement in totality. They raised as defence an alibi in respect of all 3 Cases.
- [276] Where an Accused, as in this Case, relies on the defence of alibi, there is no duty or onus upon the Accused to prove the truth of the alibi, as the onus remains on the State to rebut the Accused's defence.[13] What the State is required to do is to present evidence that would prove that the Accused committed the offence charged and that his or her alibi defense is falls beyond reasonable doubt. The approach the trial court has to follow is to consider the alibi in light of the totality of the evidence[14]; regard being had to the credibility of the respective witnesses testifying for the State and the Defence, and the reliability of such evidence. The court is not required to consider the alibi defence in isolation. If the alibi in light of all the evidence adduced might reasonably be true, and the Accused is otherwise unconnected to the offence charged, then the court must acquit.
- [277] Accused 1 testified to his alibi and called no witnesses in corroboration of his alibi. The latter detracts no adverse inference, nor does it detract from his alibi, as there is no onus upon the Accused.
- [278] Accused 2 testified to his alibi and called his girlfriend in corroboration.
- [279] Accused 1's testimony was summaries above and will not be repeated here, save for the following. He denies being anywhere close to the 3 respective incidents on the days in question. He testifies to have been in Tekwane ever since his release on parole from

Bushbuckridge Correctional Services on 24 December 2020. He departed with transport by one Pethe also known as “Tjoppa” from there at 17h30 and arrived in Tekwane at 19h00. Although he was released in the area as that is his home but he did not go home, he went directly to Tekwane. He was never monitored during his parole, nor did he ever attend to sign as required and testified that if his parole officer was looking for him, he could have phoned him as he told them he was going to Tekwane. Correctional Services never required an address from him where he would stay in Tekwane yet he conceded that you are realized in the area where you are to stay that a family member or someone would confirm where you will be and sign for you on your release. Further that you would then be allowed to travel or move from that release area if you found a job elsewhere.

- [280] He knows Johan Ndlovu from sight pursuant to his release in 2018, but denies ever being friends with Johan Ndlovu. AN, SN, IN and CN are unknown to him. He confirmed that he knows Nontokozo Sweetness Ndlovu and that her oral testimony was truthful.
- [281] On 26 December 2020 he was in Tekwane at home. His girlfriend returned with her two sisters between 13h00 and 14h00. He spent the afternoon with his girlfriend and her two sisters, not doing anything specific or important. He did not recall anything specific, save that it was the day after Christmas.
- [282] In respect of 17 March 2021, he testified that he was still in Tekwane. Nothing particularly happened on said day. He could not recall where exactly he was on 17 March 2021, but could confirm that he may not have been home, but definitely out of Tekwane.
- [283] On 16 June 2021 he was in Tekwane at a place called Jackie’s Tavern. He went there on the 15th and remained there until the early hours of the 16th. He testified that on 16 June 2021 he slept the whole time, as he was drunk. On 17 June 2021 he cannot remember what he did.
- [284] He confirmed that he used to drive a black Polo, but between December 2020 and June 2021 he had no vehicle. He testified that said vehicle was not his, but belonged to a certain young man.
- [285] Accused 1 was resolute in his version particularly pertaining to obvious breach of general parole conditions. He appeared aloof as to that which should have happened on his own version in respect of monitory but did not. Nor did he display any concern that if found in contravention of parole terms that he may face arrest. He left a poor impression. His aversion to make the slightest of concessions or where he did he provided a wholly improbable explanation, exacerbating the adverse impression made on court.
- [286] Accused 2 testified that on 26 December 2020 he was at home at Nkanini, not in Mariti. He was home the whole day and did not go out. He was there with his girlfriend, his child and his cousins and other family. They were having a braai and drinking. He only recalls Lillian drinking and not the others.

- [287] He testified that he does not know any of the state witness and that he saw them all for the first time in court, excluding Nontokozo Sweetness Ndlovu, as she was his neighbor and he saw her daily.
- [288] He testified that on 17 March 2021 he cannot recall where he was during the day, but he was definitely home at night, as he never returns home later than 17h00 when he goes out. He was there with his girlfriend and his child. He confirmed that there was nothing special about that day. He cannot even recall what day of the week it was.
- [289] He testified that on 15 June 2021 he went over to his friend, Terrance, who just arrived back from work in Witbank, slept at there and on 16 June 2021 with girlfriend, Angela Mokwene, at Mariti the whole day, with Terrance they held a braai to celebrate Youth Day.
- [290] He testified that he could recall dates on which he did not sleep at home but not all, he can recall he did not sleep at home on 15 and 16 June 2021 and 18 April 2021.
- [291] Accused 2 did not make any impression. He responded almost robotically to the question, never got marginally excited when pushed under cross examination. He answered the question in a routine type fashion. His evidence was diluted to the bare minimum with no elaboration.

Accused 2's alibi witness

- [292] His girlfriend Angela Mokwena testified as alibi witness on behalf of Accused 2. She confirmed that he is her boyfriend and the father of their child. She confirmed every respect of the Accused evidence almost identically.
- [293] She testified that on 26 December 2020 she was at Nkanini where they had a small family function with Accused 2's family was present, but she could not recall all their names although he has been her boyfriend since 2018. She could also only recall Lillian drinking.
- [294] She confirmed that on knowing the dates of the alleged offences, she sat down, went back and remembered and enquired from their WhatsApp conversation and what they spoke about to establish what they did.
- [295] This witness never looked at the court during her testimony. Her demeanour created the impression of duplicity and the telling of well-rehearsed story. She became agitated and noticeably aggressive when confronted with questions already asked. When evidence were paraphrased for the purpose of a follow-up question she would response instantly and abruptly "you must not twist my words, let me tell my story".
- [296] Neither of the Accused raised their alibi defences prior to the commencement of the trial, more particularly never before cross-examination and even then it was put to the State witnesses with no specificity. It was not raised upon arrest, which could have been to their advantage if properly investigate at the time. At no stage during the 3 Case managements held over a period of over one year, was any mention made by the Accused about their alibi defence. In *S v Thebus and Another* [15] per Lewis, AJA who, in a similar situation,

remarked as follow at 583e-g:

“[13] What is more telling, in my view, is that the version was raised only at the trial, some two years after the incident. It is equally not possible that the first appellant himself, having so cogent an alibi when arrested and charged, did not advise the police or the prosecution that this was the Case. The only inference that can be drawn from his failure to advise the police, and from the other witnesses' failure to do so, is that the alibi had no truth in it at all.”

[297] The right of an Accused to remain silent has always been acknowledged by the courts; more so, since the advent of the Constitution through which a fair trial is guaranteed – a right that the courts have interpreted to also include the process of bringing an Accused person to trial i.e. during pre-trial proceedings.

[298] However, as shown above, although an Accused person has the right to remain silent and is not obliged to disclose the basis of his defense during pre-trial proceedings and even the trial itself, the decision to do so, depending on the circumstances of the Case, may not be without consequences for the Accused, as the court will be entitled to draw inferences adverse to the Accused's Case from such failure.

[299] In *Maila v The State* (429/2022) [2022] ZASCA 3 (23 January 2023) the Supreme Court of Appeal stated as follows in paragraphs [21] and [22] of the judgment:

“[21] The only responsibility an Accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate Cases, in practice, the prosecution can even withdraw the charge should the alibi defence, after investigations, prove to be solid.

[22] The alibi defence has received the attention of our courts, in particular that of the Constitutional Court in *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC), where it is stated:

‘. . . [A] failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

“But where the presiding Judge merely tells the jury that, as the Accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection.””

[300] In the circumstances of the present Case, I find it difficult to comprehend that the Accused, when falsely Accused of three sets of crimes, inclusive of murder that they did not commit, would not have spoken out and advised the police, the State or the court at the first occasion afforded to them to do so. Thus, regard being had to the evidence adduced pertaining to the Accused's alibi defence. This is something the court obviously may take into account when assessing the evidence adduced, but again on its own by no means conclusive.

[301] When considering the Accused's alibi defence in the light of the totality of the evidence adduced, full regard being had to the merits and demerits of the evidence given by the State and the Defence witnesses respectively, as well as the probabilities, the court is convinced that the alibi defence of the Accused is not reasonably possibly true and accordingly, is rejected as false beyond reasonable doubt.

Common purpose

[302] The doctrine of common purpose was set out in the Case of *S v Mgedezi* 1989 SA 687 (A) for one Accused to be held liable for conduct in common purpose: "In the absence of proof of a prior agreement, Accused [..], who was not shown to have contributed causally to the killing or wounding of the occupants of room [...], can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988

(1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on [victims]. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea ; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[303] In respect of the requirements, applied to this Case, one has to look at each requirement, each of which must be proved by the State.

[304] Case 2 – 17 March 2021 (Count 9 to 14) common purpose has been established though inter alia below:

304.1 Firstly, both Accused were proved to be at present the house where Martha Ndlovu was assaulted and IN was assaulted and moved together with IN in their presence whilst depriving her of her liberty and freedom of movement to the house of Reginald and CN where they were again present together. Both were armed with firearms and pointed it.

304.2 Secondly, both were aware of the various individual assaults.

304.3 Thirdly, both had the intent to make common cause with the other who actually perpetrated the assault by partaking, instructing, tying up or facilitating the assaults;

304.4 Fourthly, both manifested their share in the common purpose with the other and other perpetrators of the assault by actively participating or by not dissociating him from what had transpired, not withdrawing from the conduct of the other and leaving the house, or exploring some escape.

304.5 Fifthly, they had the requisite mens rea ; so, in respect of the assaults they must have had the intention to assault and cause grievous bodily this is evidenced by the pointing of a fire arm, and continuous presence of the firearms in respect of all, the use of hammer in respect of Martha Ndlovu and use of a fire arm in respect of CN. In respect of the kidnapping the continuous presence and active association and failure to at any point disassociate.

[305] Case 5 – 16 June 2021 (Count 26 to 32) common purpose has been established though inter alia below:

305.1 Firstly, both Accused were proved to be at present the house where the violence was committed. Accused 1 and 2 were placed on the scene by the evidence of AN, CN and Nontokozi Sweetness Ndlovu.

305.2 Secondly, both were aware of the individual conduct breaking open the house, killing the victims by multiple shots and setting the house on fire as it was done in each other's presence.

305.3 Thirdly, both had the intent to make common cause with the other who actually perpetrated by actively partaking, and/or facilitating the housebreaking, murder and arson;

305.4 Fourthly, both manifested their share in the common purpose with the other by both entering the house in the same manner, both shooting simultaneously or one after the other at the victims by actively participating or by not dissociating and not withdrawing from the conduct of the other and leaving the house, or obstructing the other when arson was committed;

305.5 Fifthly, they had the requisite mens rea ; so, in respect of the murder, both must have had the intention to kill or must have foreseen the possibility of killing when shooting at the victims at least 33 times with 5 different guns being used. Having completed the murder they associated with the order conduct of arson and left the scene together.

[306] In applying about to Case 1 – 26 December 2020 (Counts 1 to 5) no common purpose has been established.

[307] The court in its final analysis of the evidence, despite having rejected the alibi defence, still needs to determine whether the State succeeded in proving the Accused's guilt beyond reasonable doubt? After consideration of all the evidence, due regard being had to the merits and demerits of the State and Defence witnesses as well as the probabilities of the Case, in doing so it is found that:

307.1 the State failed to prove beyond reasonable doubt that:

Case 1 – 26 December 2020, that Accused 1 assaulted SN with the intent to do grievous bodily harm.

Case 1 – 26 December 2020 , that Accused 2 attempted to kill Johan Ndlovu, and killed Yandile Welcome Selemela and had in his possession a firearm with the intent to use the firearm to commit such murder.

307.2 the State has proved beyond reasonable doubt and that the Accused's alibi defenses are false beyond reasonable doubt, and not reasonably possibly true, that:

Case 1 – 26 December 2020 – Accused 1 assaulted AN with the intention to do grievous bodily harm; and pointed AN with a firearm, attempted to kill Johan Ndlovu, intentionally killed Yandile Welcome Selemela, and had in his possession a firearm with the intent to use the firearm to commit such murder.

Case 2 – 17 March 2021 – Accused 1 and 2 assaulted Martha Ndlovu, Regional Shabangu, CN and IN with the intention to do grievous bodily harm, deprived IN of her liberty and freedom of movement and had in their possession firearms with the intent to use the firearm to commit such pointing of a firearm.

Case 5 – 16 June 2021 – Accused 1 and 2 committed housebreaking with the intention to commit murder, intentionally killed Eckson Five Ndlovu, Matha Ndlovu, Permission Ndlovu and Lovenashia Ndlovu and attempted to kill AN and arson.

VERDICT AND ORDER

[308] It is found and an order is made that:

Count 1: Assault with the intent of causing grievous bodily harm of – Accused 1 is found guilty. Accused 2 is found not guilty pursuant to his earlier discharge.

Count 2: Assault with the intent of causing grievous bodily harm– Accused 1 is found not guilty. Accused 2 is found not guilty pursuant to his earlier discharge.

Count 3: Contravention of the provisions of Section 120(6)(B) read with Sections 1, 103, 120(1)(A); Section 121 read with Section 4; and

Section 151 of the Firearms Control Act 60 of 2000 – Accused 1 is found guilty. Accused 2 is found not guilty pursuant to his earlier discharge.

Count 4: Attempted murder - Accused 1 is found guilty. Accused 2 is found not guilty.

Count 5: Murder, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997– Accused 1 is found guilty. Accused 2 is found not guilty.

Count 6: Contravention of the provisions of Section 120(10)(B) read with Sections 1, 103, 117, 120(1)(A); Section 121 read with Section 4; and Section 151 of the Firearms Control Act 60 of 2000: Possession of a firearm/ammunition with the intent to commit an offence – Accused 1 is found guilty. Accused 2 is found not guilty.

Count 9: Assault with the intent of causing grievous bodily harm – Accused 1 and 2 are found guilty.

Count 10: Assault with the intent of causing grievous bodily harm – Accused 1 and 2 are found guilty.

Count 11: Assault with the intent of causing grievous bodily harm – Accused 1 and 2 are found guilty.

Count 12: Assault with the intent of causing grievous bodily harm – Accused 1 and 2 are found guilty.

Count 13: Kidnapping read with Section 51(2) and part IV of schedule 2 of the criminal law amendment act 105 of 1997– Accused 1 and 2 are found guilty.

Count 14: Contravention of the provisions of Section 120(10)(B), read with Section 1, 103, 117, 120(1)(A), Section 121 read with Schedule 4, and Section 151 of the Firearms Control Act 60 of 2000,– Accused 1 and 2 are found guilty.

Count 26: Housebreaking with the intent to commit murder read with provisions of Section 51(2) and Part IV of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 - Accused 1 and 2 are found guilty.

Count 27: Murder, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 – Accused 1 and 2 are found guilty.

Count 28: Murder, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 – Accused 1 and 2 are found guilty.

Count 29: Murder, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997– Accused 1 and 2 are found guilty.

Count 30: Murder, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997– Accused 1 and 2 are found guilty.

Count 31 – Attempted murder – Accused 1 and 2 are found guilty.

GREYLING-COETZER AJ

DATE OF HEARING: 17-21 April 2023, 24-26 April 2023, 28 April 2023, 11-12 May 2023, 22-24 May 2023, 30 May 2023, 9 June 2023, 12-15 June 2023 20-21 June 2023, 3 July 2023, 10 July 2023 12 July 2023, 26-29 September 2023, 23 October 2023, 4 December 2023, 6-8 December 2023, 8 April 2024, 30 April 2024 DATE OF JUDGMENT: 27 to 28 June 2024 FOR THE STATE: Adv Z Mata obo Director of Public Prosecution, Mpumalanga, Mbombela Ref: 10/2/11/1 – M35/2021 ATTORNEY FOR

ACCUSED 1: Mr B Maphanga Brian Maphanga Attorneys Inc (Middelburg) ATTORNEY FOR
ACCUSED 2: Mr LS Mculu LS Mculu Attorneys Inc (Mbombela)

- [1] page 23-23
- [2] See also *Makhala v the State* 2022 (1) SACR 485 (SCA)
- [3] *S v Leepile and Others* (1) 1986 (2) SA 333 (W)
- [4] *Mothopeng and Others* (1) 1979 (2) SA 180 (T)
- [5] 2012
- (2) SACR 311 (SCA) at par [16]
- [6] At [29]: “As this court has recently been at pains to point out, the purpose of a special entry is to record an irregularity affecting the trial that does not appear from the record; and an attack upon a ruling made by a trial court during the course of proceedings does not qualify.”
- [7] *Hiemstra* 31/29 Issue 11 and *S v Mofokeng* 1962 (3) SA 551 (A) at 557G-H
- [8] *S v Botha* 2006 (1) SACR 105 (SCA) at par [3] and [4]
- [9] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448
- [10] *S v Ntsele* 1998 (2) SACR 178 (SCA); *S van Jackson* 1998 (1) SACR 470 (SCA)
- [11] *S v Mbuli* 2003 (1) SACR 97 (SCA)
- [12] *S v Texeira* 1980
- (3) SA 755 (A) 761
- [13] *R v Biya* 1952 (4) SA 514 (A); *S v Khumalo en Andere* [1991] ZASCA 70; 1991 (4) SA 310 (A) at 327G-I
- [14] *R v Hlongwane* 1959 (3) SA 337 (AD)
- [15] 2002
- (2) SACR 566 (A)

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Prepared on 13 October 2026 · Esheria