

SOUTH AFRICA / JUDGMENT

## S v Mthethwa and Others (CC62/2021) [2025] ZAGPPHC 316 (30 March 2025)

[2025] ZAGPPHC 316

COURT

North Gauteng High Court, Pretoria

BEFORE

LA van Wyk

CASE / FILE NUMBER

CC62/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: CC62/2021

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

30/03/2025

## SIGNATURE:

In  
the matter between  
The  
State  
and  
1.  
Sipho Goodwill Mthethwa [deceased]  
2.  
Khumbulani Mpofu  
3.  
Jabulani Jones Tshabalala

## JUDGMENT

- [1] The three accused, of which accused 1 has since passed away[1], appears in the High Court of South Africa, in the Delmas Circuit Court, which was later transferred to the Vereeniging Circuit Court, on two counts of kidnapping, robbery with aggravating circumstances, two counts of theft, two counts of murder, and the unlawful possession of a firearm and ammunition. The State alleged that the accused acted with a common purpose.
- [2] All the accused were legally represented for the most part of the trial. Mid trial the second legal representative on behalf of accused 2 did not return to court, where after accused 2 elected to conduct his defence in person.
- [3] The accused pleaded not guilty on all counts. Counsel for the three accused confirmed that minimum sentences were explained to the accused as well as competent verdicts.
- [4] Accused 1 gave a brief plea explanation in that he was in possession of the Land Rover Discovery in count 2, and that it was given to him by KG to search for a potential buyer. The admission was noted in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977. He further explained that he was in possession of an affidavit by the owner of the Land Rover, her identity document, as well as the registration papers for the vehicle.
- [5] Accused 2, in his plea explanation, stated that his name is Khumbulani Mpofu, and not KB. KB is his halfbrother by the name of Nhlanhla Mpofu. On 26 June 2019 he asked to borrow KB's phone, as his phone did not have airtime. Accused 2 phoned Zukile from cell number 0[...].
- [6] Accused 3 gave no plea explanation and elected to remain silent.
- [7] Exhibit A (admissions in terms of section 220 of the CPA), Exhibit B (the post mortem for Sydney Ncube), Exhibit C (the post mortem for Ediemore Ncube), Exhibit D (a photo album of the scene where the deceased were found) and Exhibit E (a photo album of the post mortems) were submitted into evidence by agreement. It was admitted by all three accused that the deceased

died between 26 June 2019 and 10 July 2019, and that their bodies were found at or near Daveyton or Delmas in an open field near

Witklipbank Farm. The cause of death as noted in the post mortems were admitted.

The State called 9 witnesses in the main trial to prove their case:

- [8] Lettinah Chigwandere (witness number 1) testified that she was the wife of Sydney Ncube, the deceased in count 6. The deceased left the house on Wednesday 26 June 2019 between 8am and 9am. At the time he was wearing a blue work suit and black Nike tekkies. Around 3pm, she received a call from the deceased, requesting R20 000. She ultimately transferred R10 000 into the bank account of Ediemore Ncube, the deceased in count 7. This was also the last conversation she had with Sydney Ncube. Much of her evidence contains hearsay evidence, which will not be summarised as the makers of such statements were not called to testify. However, based on the information they received, Ms Chigwandere and the second State witness conducted their own investigation.

She testified that photos 5 to 10 in Exhibit F depicted the shoes that the deceased Sydney Ncube was wearing on 26 June 2019 when he left the house. The last page was the registration documents for the Land Rover. She testified that the Land Rover was not for sale. The registration papers for the Land Rover as well as an affidavit by Miss Chigwandere was in the Land Rover as her husband had used the Land Rover to travel to Mozambique recently.

Ultimately Sonya assisted in the arrangements to meet with people who were selling the Land Rover. They met at a mall in Daveyton, where she saw the Land Rover as well as a white Mercedes Benz. She identified accused 1 and 3 in the dock as the men whom she met at the Mall. Sonya introduced to her accused 1 and 3 as Sipho and Jabu. Accused 1 and 3 informed them that KB had their husbands. They said they will take R1 000 for fuel and airtime, and that they will collect the person whom had their husbands. Accused 1 informed them that the person who had their husbands were from Bulawayo Mozambique, had only one eye, and was called Mdala. Accused 1 and 3 left in the white Mercedes Benz. According to Miss Chigwandere's understanding, Mdala and KB was the same person. She had however never met accused 2, KB or Mdala before. During crossexamination on behalf of accused 2, Ms Chigwandere reiterated that accused 1 referred to KB as Mdala.

- [9] Tshugai Mongomrimbo (witness number 2), testified that she is the wife of Ediemore Ncube. He disappeared on 26 June 2019. At the time he was driving a Land Rover which belonged to his brother. She had contact with him via a Whatsapp video call at around 12h00. He informed her that he was on his way to the workshop. Between 14h30 and 15h00 he phoned her twice, requesting her to transfer R10 000 and later R4 000 into his bank account. She eventually deposited R4 000 into an FNB account.

She later realised that R4 000 was withdrawn from her Nedbank account of which Ediemore Ncube was in possession of her bank card. She identified the deposit of R4000 made into the FNB bank account of Para Trucks with account number 6[...] at 16h16 on 26 June 2019, where after Exhibit G was submitted into evidence. She realised at 18h00 her late husband was missing when his phone did not go through.

She identified her Nedbank account with number 1[...] where two withdrawals were made on 26 June 2019 for the amounts of R100 and

R3900, referred to in count 5. She was unable to identify any person in the photo album depicting these withdrawals. Exhibits H1 and H2 were submitted into evidence. The time stamp in the photo album runs from 17:09 to 17:12.

The Court needs to pause here. None of the counsel raised it as an issue that the account numbers and bank names referred to, did not correspond with those referred to in counts 4 and 5 in the Indictment. Hence, the defects in the charges were cured by the

evidence in terms of section 88 of the CPA.

Ms Mongomrimbo and the first witness conducted their own investigation. Miss Mongomrimbo testified that she recognised accused 1 and 3 from the Mall in Daveyton when the Land Rover was recovered. Sonya introduced Siphon and Jabu. Siphon informed them that their husbands were with a man called KB. This was confirmed by Jabu. KB was described as a man from Zimbabwe Bulawayo, and that he only had one eye. She explained that what was meant is that the eye looked different from the others. Exhibit J was submitted into evidence depicting the white Mercedes Benz that accused 3 was driving. R1000 was handed to Siphon for fuel and airtime.

Their friends said that they knew a person whom fit the description that was provided. Thereafter they paid Makamu a visit in Johannesburg.

Miss Mongomrimbo however knew Makamu. The description they had received did not fit Makamu. Makamu's one eyelid was partially cut

off; he did not miss an eye, and he was from Mozambique and not from Zimbabwe. Makamu has since passed away.

During crossexamination by accused 1, it was denied that he had provided them with information about KB, or knew the whereabouts of the two deceased. The version of accused 1 was that he had received the Discovery from KG with instructions to sell the vehicle. Further, that accused 1 had requested accused 3 to call KG. Accused 1 explained to them that he and accused 3 will contact KG and inquire about the whereabouts of the two deceased.

The version of accused 3 put to this witness was later retracted after he had appointed new counsel. Advocate Mogale then put to this witness that accused 3 had accompanied accused 1 to sell the Discovery. Accused 1 told him that he was to sell the Discovery on behalf of KG. Accused 3 was unaware of the hijacking of the Discovery as accused 1 was in possession of the papers for the Discovery.

Accused 1 had told accused 3 that he would pay him R2000 to accompany him.

[10] Sebenzile Nolwazi Mokoena (witness number 3) testified that accused 3 is her husband, and accused 2 to is her husband's friend. She confirmed that it was explained to her that she had a right not to testify against accused 3. She testified that she knows accused 2 by the name Kumbulani Mpofu. Further, that she is fond of calling him 'Mdala', as that is how accused 3 referred to accused 2. She knows that his nick name is KB. She saw accused 2 on many occasions visiting accused 3 at their home. She even sought marriage counselling from accused 2.

She and accused 3 had two residences. One is located in Mandela, Etwatwa and the other in Kombiza, Daveyton. Accused 3 used to drive her sister's white Mercedes Benz. Ms Mokoena testified that accused 3 was at home on 26 June 2019. She went to her place of employment. During the day, after 3pm and nearing the time for her to knock off duty, accused 3 called her and uttered the word 'Batho'. He requested her to meet him at Kombiza. That was at their second property where they did not reside. Ms Mokoena went to this second property. Upon her arrival at this property she found about 4 people, whom were strangers to her, standing around at the door. She was told that accused 3 was not present, where after she left. The white Mercedes Benz was not at Kombiza. When she arrived at their residence, accused 3 was not at home.

During the period 26 to 29 June 2019 accused 2 had requested accused 3 to pay him a visit in Benoni. After the meeting, accused 3 had left their residence in a green or silver Toyota Carola. Ms Mokoena did not know whether accused 2 was present. Ms Mokoena testified that she knows accused 3 has a friend called Manelo who resides in Delmas. During the period 26 to 29 June, she knows that accused 3 had to meet with Sipho in Delmas, and that accused 2 was in Sipho's company. Accused 3 had to meet with them along the way, after 4pm, and he only returned around 23h00.

During cross examination she testified that she overheard another man calling accused 2 by the name KB. She testified that she heard

accused 2 also calling accused 2 KB a couple of times. It was denied on behalf of accused 2 that he is called KB. It was pointed out to the witness that she did not mention the name KB in her witness statement. She responded that the officer who took her statement did not ask about KB. Mdaka however had asked her about the name KB. On behalf of accused 3 it was denied that he ever referred to accused 2 as KB.

The witness statement of Ms Mokoena, signed on 08 August 2019, was submitted into evidence as Exhibit L. In her statement she declared that accused 3 was contacted on 26 June 2019 by Khumbulani Mpofu, also known as Mdala. Khumbulani Mpofu wanted to meet with accused 3 in Benoni. Accused 3 returned in the company of Sipho, Mdala and another unknown man. They all left in a green or grey Toyota Carola. Accused 3 returned after Ms Mokoena went to bed at around 22h00.

[11] Israel Mncube (witness number 4) testified that he knew both of the deceased. They grew up together in Bulawayo, Zimbabwe. He testified that he also knew the younger brother of accused 2 whose name was Nhlanhla Mpofu.

Mr Ncube testified that he believed that Nhlanhla Mpofu had passed on during the period 2013 to 2014. His nickname was Nhla. He heard other people at home refer to Khumbulani Mpofu as KB. He had however never spoken to accused 2, nor met or seen him.

His evidence in short is that he was in the market to buy a big vehicle and he came across the Land Rover being advertised. He eventually was present at the attempted sale of the Land Rover at the Mall. He was however not present when accused 1 and 3 were confronted about the Land Rover.

During cross examination he conceded that he had never met accused 2. It was put to the witness that accused 2 was the halfbrother of Nhlanhla Mpofu. The witness did not know that accused 2 in court was KB. He saw accused 2 for the first time in court. Accused 2 denied that Nhlanhla Mpofu could have met with Mr Mncube in 2019, as he had already passed away. During cross examination by Adv Motsweni. The witness testified that the Nhlanhla Mpofu that he knew passed away in 2007 or 2008.

[12] Enoch McDonald Skhosana (witness number 5) testified that he resided in Delmas from 1995. He confirmed that he knew accused 1 and

3. Accused 2 was introduced to Mr Skhosana by accused 1 and 3. He testified that on 26 June 2019 at around 19h00, accused 1, 2 and 3 came to his house and left a white Land Rover at his house, as they did not want to travel to Witbank in two vehicles. The Land Rover was driven by accused 2, and accused 1 was a passenger, while accused 3 was driving a white Mercedes Benz. Accused 3 had called before 7pm to make arrangements to park the Land Rover at his premises. They arrived approximately 20 to 25 minutes after the call was received.

Accused 2 was introduced to him as Mdala from Johannesburg. He was not sure whether from Randburg. Mr Skhosana asked accused 2 whether he may use the Land Rover, and accused 2 gave his permission as well as the keys. Accused 2 instructed Mr Skhosana to wash the Land Rover should it get dirty. The Land Rover was only collected the following night at around 9pm by accused 1 and 3 traveling in a white Mercedes Benz. Accused 1 informed Mr Skhosana that accused 2 had taken an Uber to his house the previous night. The keys to the Land Rover was handed to accused 1. Mr Skhosana attended an identification parade, where he pointed out accused 1, 2 and 3.

On behalf of accused 2, it was denied that he was at the house of Mr Skhosana on 26 June 2019. His witness statement was submitted as Exhibit N, and in which he had stated that the accused arrived at his house at approximately 21h00. In his statement he indicated that this man had a damaged eye. It was put to the witness that the identity parade was held 2 years and 4 months after he saw accused 2 for the first time, and that accused 2 was the only person in the lineup who had had a damaged eye. Further; that it took Mr Skhosana

2 minutes and 30 seconds to point out accused 2.

It was further pointed out to Mr Skhosana that another state witness Zukile Wandile Ngema in his statement declared that he took accused 2 from Etwatwa to Primrose in Johannesburg at 21h00, which is also the version of accused 2. It was further put to this witness that accused 2 was with his brother KB on 26 June 2019 at Mandela. He borrowed his brother's phone to call Zukile requesting transport. Accused 2 denied that he was in Delmas on 26 June 2019. It was further pointed out to Mr Skhosana that he did not mention the name Mdala in his statement.

On behalf of accused 3 it was put to this witness, that accused 3 arrived in his Mercedes followed by KG and accused 1 in the Discovery. A photo album depicting a lineup was submitted into evidence as Exhibit M.

[13] Sipho Alfred Dlamini, (witness number 6) also known as Sonya, testified that he knew both the deceased as well as their wives. He received a call from Mr Thulani Sibiya (now deceased), about a Land Rover that was in possession of Sipho, who was selling the vehicle. Mr Dlamini is in the business of buying and selling vehicles. Accused 1 and Mr Sibiya arrived at the house of Mr Dlamini. Accused 1 was in possession of papers for the vehicle. He went to Mr Sibiya's house the following day to inspect the vehicle. He then realised that the vehicle belongs to Sydney Ncube because of printing on the vehicle. He checked the papers and realised that it was the ID document of Sydney Ncube's wife. He then tried reaching Sydney Ncube and his wife.

Eventually he spoke to Lettinah Chigwandere. She informed Mr Dlamini that her husband had been missing for three days. He then called Accused 1 informing him that he has a buyer for the vehicle. Arrangements were made to meet at Mayville Square. They found the Land Rover already parked at the Mall. Accused 1 and Jabu (accused 3) arrived in a white Mercedes Benz. They explained that the vehicle belongs to a man called KB from Zimbabwe, who resides in Johannesburg. They were selling the vehicle on his behalf, and did not know where the deceased were. They said that they will help to trace KB. After they left, he was unable to contact them from 5pm, after they had left to seek KB. They took R1000 for petrol.

During cross examination Mr Dlamini conceded that he was uncertain about the dates, but that the meeting regarding the sale of the vehicle was on a Saturday. He had arranged to buy the vehicle from Accused 1. Mr Dlamini was adamant that Accused 3 also promised to look for KB. Mr Dlamini testified that Accused 3 took the Land Rover's keys from his pocket and handed it to Accused 1, who then handed the keys to him. He conceded that he had made a deal with accused 1 to buy the Land Rover. His statement was submitted into evidence as Exhibit O.

[14] Evidence was presented in a trial within a trial of an alleged confession made by accused 3. The document containing the alleged confession was ruled admissible, and submitted into evidence as Exhibit V.

[15] Lt Col Maria Susanna Jacoba Beetge (witness number 7), a data analyst in the SAPS testified next. She received a list from the Investigating Officer, containing five names and cell phones numbers. Sipho Mthethwa (0[...2]; Khumbulani Mpofu (0[...]); Jabulani J. Tshabalala (0[...3]; Edmund Ncube (0[...4] and Sydney Ncube (0[...5). She testified that she picked up a number as a common link belonging to Manelo Skosana (0[...6). She analysed data from 25 June 2019 to 30 June 2019. Exhibit W was submitted into evidence. She received a request to analyse data in respect of specific towers. The coordinates of the specific towers can only be provided by the service providers. After her analyses, she concluded that accused 1 to 3 communicated with each other.

During cross examination, Lt Col Beetge conceded that she is not able to say whether any of the cell numbers were RICA'd. Her analyses were based on information or data received from the service providers. The data, she had requested by way of a section 205 subpoena, contained only the cell numbers. If the owner of the cell number is needed, such information must be obtained through a RICA request. On behalf of accused 2 it was stated that the number 0[...] does not belong to him. The witness stated that she only received cell numbers.

On behalf of accused 3 it was denied that the number 0[...]3 belongs to him. The witness was not in a position to respond. Exhibits X1, X2, X3, Y1 (cell phone data for 0[...]), and Y2 (cell phone data for 0[...2) were submitted into evidence. No cell phone data for cell number 0[...]3 were submitted, which the

prosecution alleged belonged to accused 3, into evidence.

[16] Captain Albert Mdaka (witness number 8), testified that he is the investigating officer since the beginning of this case. When accused 1 was arrested, he provided the cell number of accused 2. During cross examination he conceded that no statement to this effect was taken from accused 1. Two numbers were provided to wit 0[...] and 0[...]7. Accused 1 informed them that these numbers belonged to KB, that KB has an eye injury, that KB came from Zimbabwe and that he resides in Primrose. Accused 1 did not provide any other names for

KB. Accused 1 was unable to point out the house that KB resided in.

The Uber driver Zukile Wandile Ngema also provided the number 0[...] to the Police. On 26 June 2019 accused 2 called Ngema from the 082number after 9pm. At the time accused 2 was in Daveyton, Etwatwa. Captain Mdaka testified that he did not know where Ngema was. He was arrested on a case in Norwood and appeared in a court in Johannesburg, where after he disappeared.

Ngema did however make a statement to Captain Mdaka. The statement of Ngema was provided to Captian Mdaka to identify. The prosecution pointed out to the Court that the statement was not presented to prove the truthfulness of the contents, and merely to prove that a statement was made to Captain Mdaka.

The prosecution proceeded to proof the statement. Paragraph 2 was read into the record. It reads as follow:

"On 26/06/2019 I have received a call from one of my client, Khumbulani Mpofu while I was on my way to Delmas. He was using his cell phone number 0[...]."

The wife of accused 3 also provided this number for accused 2. Ms Mokoena also provided the number 0[...]8. Ms Mokoena had paid bail for accused 2 in another case in which he was arrested for in Norwood. When accused 2 was arrested, the 082number was no longer in use. The cell number for accused 3 was provided by accused 1 as well as by Ms Mokoena, the wife of accused 3. The numbers were however not RICA'd in the names of accused 2 and 3.

During cross examination on behalf of accused 3, Captain Mdaka testified that he had downloaded the contents of the number 0[...]. The contact numbers of accused 1 and 3, as well as Ms Mokoena's numbers were contained in the phonebook or contact list on this cell phone number. This cell phone number was used to contact people of interest in this case. The cell phone was also at a spot where money was withdrawn from the account of the deceased. This number was also used to call the Uber driver Ngema. The cell phone was also in Delmas on 26 June 2019 around 21h00 where the bodies of the deceased were found.

The statement of Zukhile Wandile Ngema was submitted into evidence by agreement as Exhibit Z. The warning statement of Zukhile Wandile Ngema was submitted as Exhibit AA.

[17] The State presented the evidence of Sergeant Moses Mabasa by way of a section 212 statement submitted into evidence as Exhibit BB. Sgt Mabasa received four handsets from Captain Mdaka. Three cell phone handsets were noted as that of accused 2. One cell handset was noted as that of accused 1. No cell phone numbers were provided to him. The information contained in the XRY file were of Khumbulani Mpofu (IMEI no 3[...]; with IMSI no 6[...]<sup>2</sup> as well as IMSI no 6[...]<sup>3</sup>). None of these numbers are connected to the cell number testified to by Lt Col Beetge regarding 0[...].

In respect of Sipho Goodwill Mthethwa (IMEI no 3[...]<sup>2</sup> with IMSI no 6[...]<sup>4</sup>), these numbers link up with cell number 0[...]<sup>2</sup>, as

testified by Lt Col Beetge belonging to accused 1. Exhibit BB pages 1 up the first half of page 11, relates to accused 2. The prosecution

did not point out any names in his list of contacts being relevant to this case. The second half of page 11 up to page 19 relates to the contact list of accused 1. The prosecution alleged that certain nick names in this contact list is that of accused 2 and 3.

[18] The case for the State was then closed. Adv Mogale took issue with the prosecution not recalling the first witness, and not producing a death certificate. Ultimately, the prosecution applied for the reopening of the case for the State, and called Shalton Gwatswaira (witness number 9.) He testified that Letinah Chingwandere was his sister in law, and that she had passed away. Her body was sent to Zimbabwe with the original death certificate. Copies of the documents were handed in as an Exhibit CC. The defence had no questions for this witness. The prosecution closed its case.

[19] Both accused applied in terms of section 174 of the CPA for a discharge on all of the charges. The arguments and Judgment are contained in a separate Judgment. Suffice to note that in respect of accused 2, that he was discharged in respect of counts 8 and 9. Accused 3 was discharged in respect of counts 6, 7, 8 ad 9.

[20] The rights of accused 2 was explained to him as well as the doctrine of recent possession, where after Accused 2 testified in his own defence. He testified that he was in Daveyton on 26 June 2019, and not in Delmas. He was visiting a spiritual healer, which he met at the house of Jane Modau after 6pm. They went to the bushes for a cleansing ceremony, and he only returned after 8pm to the house of Jane Mudau. He was informed that the taxi's do no operate past 7h30pm.

Accused 2 called his halfbrother Nhlanhla Mphofu inquiring where he was, so that he can take him home. His airtime ran out and Nhlanhla Mphofu had to call him back. His brother said that he was nearby and would be with him in 10 minutes. He would meet him at the taxi rank opposite the mall, near the house of Jane Mudau. When he arrived, he informed accused 2 that he was in fact on his way to Mpumalanga, but would assist him in getting transport.

Nhlanhla Mphofu called Zukile Ngema who was known to both of them. Zukile Ngema is an Uber driver. Zukile informed accused 2 that he was on the N12 on his way to Delmas, ferrying passengers. He informed accused 2 that he will pick him up afterwards. Zukile arrived after 25 minutes, after he had called for directions. On their way home, accused 2 received a call from a client who owed him money. He then first went to meet with the client at McDonalds in Johannesburg, where after he went to his home in Primrose.

Accused 2 denied that the 082number was his cell phone number. He conceded that a cell phone is an extension of a person. He conceded that he was picked up by Zukile at around 9pm. He pointed out that Lt Col Beetge testified that the 082number remained in or around Daveyton. She did not testify that the 082number left Daveyton to Benoni, Boksburg, Johannesburg and Primrose. She testified that the 082number was in Daveyton, Mpumalanga, and Ethathwa.

Accused 2 denied that he was driving the Land Rover as testified to by Manelo Skhosana. Skhosana stated in his witness statement that he saw accused 2 at 9pm, but when he testified he stated it was 7pm. Accused 2 testified that he could not be in two places at the same time. He testified that Skhosana pointed him out at an identity parade as he was told to point out the person with an eye injury. He testified that the identification parade was unfair, as he was the only person in the lineup with an eye injury. He further testified that the prosecutor failed to call any witness in respect of the identification parade, and relied on only the photo album.

He testified that Ms Mokoena did not see him on 26 June 2019. He was referred to as Mdala due to his age and the African culture. He further pointed out that he was not present at the sale of the Land Rover. He testified that Mr Mncube could not meet with his brother Nhlanhla Mpofu in 2007, as he had passed away in 2005. Exhibit DD, the burial order of Nhlanhla Mpofu was submitted into evidence. Mr Mncube had never met or seen accused 2. Accused 2 testified that Mr Mncube pointed him out in court as he was told about the eye injury, and that in 2014 he did not have the eye injury, as can be seen in his passport. He only sustained the eye injury early 2019. He testified that there is no evidence to prove that he was in fact KB. A copy of his passport was submitted into evidence as Exhibit EE1 and EE2.

On questions from the Court, accused 2 testified that the number 0[...] belonged to his half brother Nhlanhla Mphofu. His halfbrother did not have an eye injury, but had a squinting eye. He was unable to explain why his half brother was called KB.

[21] Accused 2 called Jane Nomasonto Mudau as a witness. He informed the Court that the witness could no longer recall any events.

[22] Accused 2 next called Jan Kozlowski as a witness. He is an optomologist and testified that he had examined accused 2 on 22 November 2016. He found that accused 2 was totally blind in his right eye due to a cataract. He had damage to the retina in his left eye due to a cataract, which left him with approximately 20 to 30% eye sight. He did not know whether accused 2 obtained glasses. He testified that glasses would improve his eye sight, but that he should not be driving legally. Exhibit FF1 and FF2 were submitted into evidence. During cross examination, referring to Exhibit FF2 which indicates that accused 2 was driving, he testified that if accused 2 wanted to drive, he could, but should not do so legally.

[23] Exhibit GG was submitted into evidence. This is a statement by the mother of accused 2 with regards to his halfbrother Nhlanhla Mphofu. This evidence is untested by the prosecution. Accused 2 thereafter closed his case.

[24] Accused 3 testified in his own defence. No witnesses were called on his behalf. He testified that he knows nothing about the crimes. He conceded that his wife has a house in Kombiza. He testified that he did meet with Mr Skhosana on 26 June 2019 in Delmas. He received a call from Accused 1 after 8pm to request him to arrange for parking at Skhosana's house in Delmas. He travelled to Delmas in his own vehicle. He found Accused 1 driving a Land Rover, and his friend seated in the passenger side. They left the Land Rover at Mr Skhosana's and went to Witbank, Mpumalanga to inspect another vehicle. After the vehicle inspection at

Witbank, Mpumalanga, the three of them returned to Daveyton.

The following day he travelled with Accused 1 to Mr Skosana to collect the Land Rover. Accused 1 took the key and they left. Accused 1 informed Accused 3 that the Land Rover was for sale, and showed him the papers of the Land Rover. Accused 1 informed Accused 3 that he would get a percentage of the sale of the Land Rover if he assisted with finding a buyer. On the 29th Accused 1 called to say that Sonya had a potential buyer for the Land Rover. He instructed Accused 3 to travel to Mayfield and he would receive a portion of the sale. He found Accused 1 and the Land Rover already at the mall. Accused 1 received R800 from Sonya and gave R400 thereof to Accused 3.

He testified that after he was arrested and assaulted, he met with Mtjali. Mtjali only asked him 4 questions. He further made him to sign a lot of papers. He took his fingerprint and left the office. Mtjali would look at some papers and then write things. He placed his thumbprint as he was under duress, and frightened at the time.

On a question from Court, Accused 3 conceded that he did call his wife to meet at Kombiza, but when he arrived he found a group of young men and woman there, which discouraged him from entering his house, and he left. He further conceded that he did not know Mtjali before the day of the taking of the confession. He testified that Mtjali and Mdaka concocted a version, and that the document was already written when he was made to sign. He was asked why Mtjali would write the confession in such a way as to exculpate him on the two murder charges. He answered that he did not know why. Mtjali was writing while referring to other documents, and perhaps he worked with an informer. Accused 3 thereafter closed his case.

[25] The prosecution requested the Court to call the wife of accused 3 in terms of section 186 of the CPA to clarify the issue of his cell phone number. The Court denied the request as in the view of the Court it would be:

- 1) Trial by ambush as the prosecution knew from the start of the trial that the cell phone numbers are in dispute;
- 2) The prosecution once requested to the State's case to be reopened and which request was granted. Nothing had prevented them from doing so again;
- 3) The Court recalling the wife of accused 3, would only be to potentially fill a lacuna in the prosecution's case which they had been aware of all along;
- 4) In the view of the Court, calling the wife would come across as if the Court is no longer impartial.

EVALUATION OF THE EVIDENCE:

[26] The State witnesses created overall a good impression on the Court. Ms Chigwandere and Ms Mongorimbo were honest and testified that they could not identify accused 2 as they have never met him. It was not in dispute that they saw accused 1 and 3 at the Mall where the Discovery was recovered. It was at the Mall where the name KB came up for the first time when accused 1 and 3 made mention of this name as well as the name Mdala, linking both nick names to that of accused 2.

Ms Mokoena's evidence in respect of when accused 3 were to meet with accused 1 and 2 became a little evasive, but this may be due to the fact that she only testified approximately 3 and a half years after the incident. She testified that accused 2 is called Mdala, and that she had heard him being referred to as KB. Accused 2 did not deny that Ms Mokoena called him Mdala.

Mr Mncube was criticized because it was argued that he would not have been able to talk to Nhlanhla Mphofu, the biological brother of accused 2, as he had already passed away at the time that the witness testified that he had spoken to him. The witness had however during cross examination conceded that he may have passed away in 2007/2008. In any event, it was never put to Mr Mncube that accused 2 he had a halfbrother and a biological bother carrying the same name.

Mr Skhosana is a single witness in respect of identification. It is however not in dispute that he knew Accused 1 and 3 prior to the 26th of June 2019. The fact that Accused 1 and 3 were at his house in Delmas, and leaving the Land Rover behind on 26 June 2019, was also not in dispute, or that the Land Rover was collected the following day. It was the first time for him to see Accused 2. He was in his company for about 20 minutes. He saw when the Land Rover arrived and that Accused 2 was the driver. Accused 2 was also the person who had handed him the keys to the Land Rover and gave him permission to use the Land Rover. Accused 2 was the person who had instructed him to wash the Land Rover if it got dirty. Accused 2 was introduced to him as Mdala. Mr Skhosana testified that Accused 2 was from Johannesburg, but unable to recall whether from Randburg. The day of collection, he was informed by Accused 1 and 3 that Accused 2 had taken an Uber the previous night, when he inquired where the owner of the Land Rover was.

The evidence of Mr Dlamini alias Sonya, merely corroborate the fact that he had made arrangements that set in motion the buying of the Discovery. He testified that they were told that the Land Rover was sold on behalf of KB. Mr Dlamini testified that Accused 3 took the Land Rover's keys from his pocket and handed it to Accused 1, who then handed the keys to him. He conceded that he had made a deal with Accused 1 to buy the Land Rover.

The evidence of Lt Col Beetge and Sergeant Mabasa does not take the case any further. The cell phone numbers were not RICA'd. Exhibit X1 and X2 are compiled from data received from the service provider. No cell phone data was submitted into evidence regarding the alleged cell phone number of accused 3. Lt Col Beetge testified that only the service provider can give evidence in respect of the location of each cell phone tower.

The contact list on the cell phones seized from accused 2 did not refer to accused 1 and 3 or any other person of interest. Accused 3 was confronted with the contact list and certain nicknames retrieved from the cell phone of accused 1. In any event, it was never in dispute that accused 1, 2 and 3 knew each other.

[27] The only evidence that was submitted in respect of the identification parade was a photo album. The defence raised the issue of an unfair identification parade, and that the Rules for a fair identification parade were not followed. The prosecution pointed out that the necessary witnesses will be called, but failed to do so. Accused 1 and 3 were known by Mr Skhosana. Accused 2 however was not, and he raised the issue that he was the only suspect in the lineup who had an eye injury, and therefore the parade was unfair. As a result, no weight can be attached to the identification parade.

[28] Several references were made to what other people would have said or told the wives of the two deceased. Where the prosecution failed to call such witnesses, the evidence was not considered as the prosecution did not apply that such evidence ought to be accepted as an exception to the rule against the admission of hearsay evidence.

[29] Ms Chigwandere testified that her husband left their home between 8 to 9pm wearing black Nike tekkies. Ms Mongorimbo testified that she had a video call with her husband at 12pm. Between 14:30 and 15:00, she received a call from her husband requesting that she deposit R10 000 into his account, and he told her that he would explain when he arrived back home. She reminded him that he was in possession of her Nedbank card. At 3pm Ms Chigwandere received a call from her husband that she must deposit R10 000 into the bank account of his brother, and that he would later explain to her what was happening. According

to Exhibits G, H1 and H2, deposits were made as follow:

1. 15:12 R10 000
2. 16:16 R4 000

Withdrawals from the bank accounts soon followed:

1. 16h45 R 8000
2. 16:46

R2 000

3. 17:0917:12 R100 and R3 900

After the deposits were made, the wives of the deceased no longer had contact with them.

[30] On 29 June 2019 Accused 1 and 3 attempted to sell the Discovery. Accused 1 made admissions in terms of section 220, that at his arrest he was in possession of an affidavit by the owner of the Land Rover, a copy of her ID document, and the original papers for the Land Rover. Ms Chigwandere testified that these papers were in the Land Rover as her

husband had recently travelled to Mozambique. Accused 1 is depicted in photo 3, 4 and 5 in Exhibit F, wearing black Nike tekkies. Accused 1 was arrested on 04 July 2019, 8 days after the disappearance of the two deceased. Ms Chigwandere

pointed out that the tekkies depicted in photos 5 to 10 in Exhibit F, looks the same as the tekkies in which her husband had left the house on 26 June 2019. In Exhibit D, neither of the deceased are wearing shoes.

The only inference that the Court can draw from this evidence is that Accused 1 was part of what had happened to the two deceased. He was wearing black Nike tekkies, while Sydney Ncube' tekkies were unaccounted for. Accused 1 was in possession of the documents that were in the Land Rover on 26 June 2019.

#### THE CASE AGAINST ACCUSED 2:

[31] The case against accused 2 is circumstantial. The "two cardinal rules of logic" which cannot be ignored when it comes to reasoning by inference, are as follows:

The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

See R v Blom 1993 AD 188 in this regard.

[32] The case against accused 2 rests on the identification by Mr Skhosana, who is a single witness in respect of identification. Section 208 of the CPA provides that:

"An accused may be convicted of any offence on the single evidence of any competent witness."

In S v Miggel 2007(1) SACR 675 (C) the court held as follow regarding the evidence of a single witness:

"That it was settled law that the evidence of a single witness had to be approached with caution. In the normal course of events, the evidence of a single witness would only be accepted if it were in every important respect satisfactory or if there were corroboration for that evidence. The corroboration that was required was confirmatory evidential material outside the evidence that was being corroborated. The corroboration did not necessarily need to link the accused with the crime.

Held, further, that the court had to be satisfied that the witness making the identification was not only honest, but also reliable. Honesty by itself was no guarantee of reliability. Consequently, a witnesses' honesty and own conviction as to the correctness of his or her identification could never be allowed to take the place of an independent inquiry into the reliability of the identification

itself."

With regards to identification, the following was held in *S v Mthetwa* 1972(3) SA 766 (A):

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities."

Mr Skhosana spent 20 minutes in the company of accused 2. He was under no duress at the time which may have influenced his ability to properly observe accused 2. He had interacted with accused 2 regarding the use of the Land Rover.

[33] Due to the fact that Mr Skhosana is a single witness in respect of identification, it is advisable to seek corroboration for the sayso of the witness as a safeguard to ensure a reliable identification. In *S v Gentle* 2005(1) SACR 420 (SCA) the court held that:

"by corroboration was meant other evidence which supported the evidence of the complainant, and which rendered the evidence of the accused less probable, on the issues in dispute."

When such corroboration is found, it has been held, however small, one is no longer dealing with a single witness.[2]

Mr Skhosana testified that accused 2 had a damaged eye. Indeed accused 2 has a scar on his right eye. This injury is clearly depicted in photo 6 in Exhibit M, and was described by the Court during the proceedings. Accused 2 testified that he had sustained the eye injury early 2019. The events in this case started to unfold on 26 June

2019. The scar in photo 6 would have presented differently at the time when Mr Skhosana saw accused 2 for the first time, shortly after the injury was sustained.

[34] When accused 2 did not return to collect the Land Rover on 27 June 2019, Mr Skhosana inquired from accused 1 and 3 where he was. He was informed that accused 2 had taken an Uber home the previous night. This statement is corroborated by the affidavit deposed to by Zukile Wandile Ngema submitted as Exhibit Z, that he had picked up accused 2 on 26 June 2019 in Daveyton, after he had called him at 21:00 for directions.

[35] Accused 2 testified that he was in Daveyton on 26 June 2019 from 6pm until after 8pm. He called his halfbrother on the 082number, and which he testified belonged to his halfbrother. Zukile Ngema, an Uber driver, was called after 8pm, and arrived 25 minutes later, at around 9pm. Accused 2 first went to McDonalds in Johannesburg Central, before returning to his home in Primrose. Zukhile however stated that he had only called accused 2 for directions at 21:00 where after he had picked up accused 2 in Daveyton.

[36] Exhibit Y1, the data for the 082number belonging to the halfbrother of accused 2, does not reflect a call to Zukile Ngema after 8pm. It reflects a call received from Zukhile Ngema at 21:12. Calls to him was made at 21:10; 21:16; 21:17, and 21:21. Exhibit Y1 further indicates the following movements of the handset:

1. 16:39 Benoni
2. 17:17 Lakeside Square
3. 18:26 Etwatwa
4. 20:32 Etwatwa
5. 20:35 Daveyton
6. 20:43 Benoni
7. 21:34 Daveyton
8. 22:12 Johannesburg Central.

At 21:34 the handset was still in Daveyton, with the cell tower reflected as Daveyton Station. This align with the witness statement

of Zukile Ngema, who only called for directions at 9pm and thereafter picked up accused 2.

[37] According to Exhibits G; H1 and H2, withdrawals were made from the two bank accounts as follows:

1. R8 000 at 16:45;
2. R2000 at 16:46;
3. R100 and R3900 between 17:09 and 17:12.

The handset for the 082number was in Benoni a couple of minutes before the withdrawals, according to the data on the 082number, as well as the evidence of Captain Mdaka, who testified that the handset was in Benoni near the places where the withdrawals were made.

- [38] The handset was in Daveyton around 20:35. Mr Skhosana testified that he met with the three accused around 19:00. His statement however indicated that the three accused arrived at around 21h00. His statement was taken on 06 August 2019, when the events were still fresh in his mind. The fact is that the handset was in Daveyton at 20:35. The error in times does not make the witness unreliable. He only testified on 08 November 2022, more than 3 years later.
- [39] Accused 2 testified that his halfbrother stayed with him until the Uber arrived, where after he supposedly left to Mpumalanga. The handset however was picked up by a cell phone tower in Johannesburg Central at 22:12. This handset not only followed the withdrawal of the money, but also followed the movements of accused 2.
- [40] After the arrest of accused 2, he has never heard from his halfbrother. Captain Mdaka testified that he had made calls to the 082number in July 2019, and the calls were never answered. The phone was inactive. Accused 2 was arrested August 2019. Not only did the half brother of accused 2 disappear, but also the 082number became inactive. Although the prosecution did not prove that this cell phone is the property of accused 2, the Court can only draw one inference, and that is that this cell phone was in possession of accused 2.
- [41] The Court accepts the evidence of Jan Kozlowski with regards to the poor eye sight of accused
2. He however also testified that if accused 2 wanted to drive, he could, although he should not. In Exhibit FF2 from Torga Optical 'YES' is indicated at the section 'DRIVE', which can only be interpreted that accused 2 was driving at the time.
- [42] The evidence of accused 2 is that he has a halfbrother called Nhlanhla Mpofu. He had almost on a daily basis contact with this brother up until his arrest. Thereafter he no longer had any contact with his brother and does not know where he is. His wife was also unable to trace this brother, who accused 2 testified also resided near them in Primrose. According to accused 2, his wife found that the brother had moved away from Primrose. Exhibit GG is an affidavit by the mother of accused 2. She was also unable to trace her sister and the half brother of accused 2. Accused 2 was unable to explain why his halfbrother was called KB. The Court finds it highly improbable, that if indeed such a brother exists, that he would make no contact with accused 2, or his wife, since the arrest of accused 2 on 08 August 2019, considering that they previously kept such close contact with each other, and checked in on each other on a regular basis.

#### THE CASE AGAINST ACCUSED 3:

- [43] It is not in dispute that Accused 3 had arranged for parking for the Discovery at Mr Skhosana in Delmas, that he went back to collect the vehicle the following day and was present at the attempted sale of the vehicle. It is not in dispute that he knew Accused 1 and 2.

[44] Before the trial within a trial commenced, the defence on behalf of Accused 3 placed on record that not only was the rights of Accused 3 not explained and that he was assaulted, but also that the contents of the confession were in dispute. The onus was thus on the prosecution to not only prove the admissibility of the confession, or rather the document containing the confession, in terms of section 217 of the CPA, but also to prove the contents of the confession. Section 217 of the CPA deals with the admissibility requirements for a document containing a confession, while the issue with regards to the contents of a confession is a question of credibility.

After the Court gave judgment in the trial within a trial, it was noted that Accused 3 was dissatisfied with the outcome. At the time, the Court had explained to Accused 3 that although the confession was ruled admissible, the contents were still in dispute. Lt Col Mtshali had passed away, and could not be called. The prosecution did not present any further evidence with regards to the contents of the confession.

[45] Accused 3, on the other hand, testified that he did not provide the information contained in the confession; that it was concocted by Captain Mdaka and Lt Col Mtshali. When the contents of a confession are disputed, it becomes a credibility or reliability issue. The issue of voluntariness has been insulated in the trial within a trial in a compartment separate from the main trial. In the main trial, the issue of guilt is to be determined.[3]

[46] Lt Col Mtshali could not testify, as he had passed away. The contents of the confession thus amount to hearsay evidence. The prosecution did not bring an application that the hearsay ought to be admitted as evidence as an exception to the rule against receiving hearsay evidence.

[47] In *S v Mabaso* 2016(1) SACR 617 (SCA) the conviction of the accused was based on a pointing out that was admitted after a trial within a trial was held. The notes kept by the Police Officer who conducted the pointing out, contained a confession. The notes were kept in English, while a Zulu interpreter was made use of. The notes were not read back to the accused. Prior to the pointing out, the accused had requested legal representation, but was not assisted to obtain such. The court held that:

"a pointing out by an accused was regulated by section 218(2) of the CPA which entitled the prosecution to adduce the evidence of a pointing out notwithstanding that it formed part of an inadmissible confession. The provision did not, however, authorise the production of a confession in the guise of a pointing out. In the present matter the circumstances giving rise to the pointing out, as well as the manner in which the police officer questioned and obtained the damning answer from the appellant, constituted a confession elicited from him. This placed the admissibility of the pointing out itself in question.

Held, further, that in the light of the failure of the police to allow the appellant to obtain legal advice from his sister-in-law before the pointing out, serious doubt existed whether the pointing out or the appellant's utterance was admissible in the light of his right to a fair trial. In the circumstances both probably had to be excluded under section 35(5) of the Constitution.

Held, further, that as the statement had not been read back to the appellant, it followed that the appellant had at no stage confirmed the correctness of the pointing out notes. The result was that the handwritten notes did not constitute admissible probative material and constituted nothing more than inadmissible hearsay statements. On this basis alone the evidence of the confession ought not to have been admitted.

The appeal was upheld and the conviction and sentence set aside."

[48] The following was held in *S v Ngwenya* (unreported, GP case no CC 73/15, 30 July 2015) ([2015] ZAGPPHC 654) where the contents of a confession made to a magistrate was disputed:

"Magistrates are extremely busy people and should as a rule not be called to give evidence in matters before another court. This is exactly the reason why section 217(1)(b)(i) provides that the confession statement (including the contents thereof) may be proven upon mere production thereof at the proceedings. However, where in a case, such as the current, it is averred that the contents of the statement are false, more especially that the contents of the statement have been made up by the magistrate and I or interpreter and that something has been recorded which the accused did not say, it is necessary that the magistrate and interpreter be called to testify to refute those averments. It is especially then that the court has to take cognisance of the contents of the statement and compare the accused's averments to the magistrate's and interpreters responses to determine who is speaking the truth."

[49] The following was held in *S v Dhlamini and another* 1971(1) SA 807 (A):

"Strictly speaking, the question of fact whether an accused has made or not made an alleged confession is not directly relevant to the question whether or not that alleged confession is admissible in evidence. Further, if at the end of the trial it is still an issue whether the accused had in fact made the alleged statement, tendered in evidence consequent upon the trial Judge ruling it admissible, it is for the Court, consisting of Judge and assessors if so constituted, in considering the question of the guilt or innocence of the accused on the totality of the evidence, to decide whether it has been proved, that the accused had made the confession, as is its function in respect of every other alleged factum probans. Nevertheless, however clear the distinction between the making of a confession and the circumstances under which it is alleged to have been made, as reflecting upon admissibility, may be in theory, the line is not always so easily drawn in practice. In view of this a trial Judge can hardly be faulted in such a case for embarking upon a trial within a trial where both the making of the confession and, if made, the circumstances under which it was made as reflecting upon admissibility, are challenged by the defence."

and further,

"at the end of the trial, the Court (i.e. as constituted by Judge and assessors) had failed to apply its mind to the question whether the alleged confessions had in fact been made. This failure, it is suggested, flows from the fact that after the ruling on the question of admissibility it was simply assumed that the confessions had in fact been made by the appellants, without any proper proof being placed before the Court. It is true that, in rejecting the appellants' evidence and accepting that of the State in the trial within a trial, the teamed Judge in effect found that the appellants had made the statements to Major van der Merwe and Captain van der Linde respectively, but there is not the slightest indication that he ever considered this to be a finding binding upon his assessors. The wording of the ruling, quoted above, is, perhaps, not as felicitous as it might have been, but at least it makes it abundantly clear that he intended to do no more than open the door for the State to place before the Court (constituted by Judge and assessors) such evidence as it saw fit in respect of the alleged confessions."

[50] In the matter before this Court, Lt Col Mtshali passed away, and his evidence regarding the contents of the confession is therefore not on record. The prosecution failed to rebut the averment by accused 3 that the contents of the confession were not the questions that were directed at him. There is no evidence to suggest that the contents were read back to accused 3. Throughout the trial, accused 3 had made use of an interpreter. The contents of the confession are written in English. There is no evidence on record that what was written in the confession had been read back to accused 3 before he had signed the

confession. In the result, the contents remain hearsay, and is therefore inadmissible. No application was made to accept the contents of the confession under one of the exceptions to the rule against hearsay.

[51] Returning to accused number 2, soon after money was deposited, the cell phone was in Benoni where the withdrawals were made between 16:45 and 17:12. The evidence of Zukile does not support the evidence of accused 2 that he was picked up at 9pm. Zukile only received directions at 9pm. The statement of Skhosana indicates that at around 9pm he received the Land Rover. He testified that he was told the following day, that the owner, accused 2 had taken an Uber home after he had left the Land Rover in his care. It is no coincidence that accused 2 had indeed taken an Uber home. From the time of the last withdrawal of money at 17:12 until the Land Rover was left at Skhosana is less than 4 hours. Accused 2 acted as if he is the owner of the Land Rover when he arrived at the house of Skhosana. Captain Mdaka testified that the area where the deceased were found, is 4 km

from where the Land Rover was parked. It is clear from the photos of the bodies of the deceased that their hands and feet were tied up and they had died as a result of gunshot wounds. This leads to the inference that they did not part willingly with the Land Rover. The cell phone with the 082 number, followed the movements of accused 2 to Johannesburg Central.

[52] With regards to accused 2, considering the doctrine of recent possession and that of common purpose, the Court finds that the prosecution has proved its case beyond a reasonable doubt. The only inference that the Court can draw, is that accused 2 was on the

scene where the bodies of the deceased were found. It is irrelevant who on the scene had pulled the trigger, whether accused 1 or 2. The only inference that the Court can draw, is that the two deceased were kidnapped, killed and the Land Rover stolen. Money had to be deposited in haste, and shortly after the deposits, the money was withdrawn by people whom Ms Mongorimbo did not recognise from the photos in Exhibit H2. The two deceased did not make the withdrawals themselves. The evidence shows that R10 000 was withdrawn from the FNB account and R4000 from the Nedbank account. The evidence of Dr Kozlowski and the statement by Zukile does not support the version of accused 2, but rather that of the prosecution. The version of accused 2 is so improbable, that it is found to be false and therefore rejected.

[53] With regards to accused 3, having found that the contents of the confession were not proven and therefore inadmissible evidence, the only evidence that remains are that accused 3 was assisting in the sale of the Land Rover. Accused 1 had made admissions that he was in possession of the papers for the Land Rover as well as an affidavit by the owner and her ID document. His admission that he had arranged parking for the Land Rover is not sufficient to prove that he had knowledge of what had transpired before accused 1 and 2 came into possession of the Land Rover, or that he had known that accused 2 was in possession of a stolen vehicle. The following was held in *S v ScottCrosley* 2008(1) SACR 223 (SCA):

"the fact that the version of an accused coincided with that of a State witness on a particular point did not provide corroboration for the tatters evidence. Matters which were common cause between the State and an accused could not provide corroboration for matters in dispute."

[54] The witnesses at the Mall were inconsistent with the information that was provided by accused 1 and 3. The wives of the deceased testified that accused 1 and 3 explained that KB had their husbands, while Mr Dlamini, alias Sonya, testified that accused 1 and 3 said that they did not know where their husbands were. They were merely selling the Land Rover on behalf of KB. The following was held in *S v V* 2000(1) SACR 453 (SCA):

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one believes him is not the test. As pointed out in many judgments, the test is whether there is a reasonable possibility that the accused's evidence may be true. Accordingly, it is a misdirection for a trial court to regard an accused's failure 'to convince' it as a guarantee of the veracity of the evidence tendered by the State."

The Court is therefore of the view that the prosecution did not prove its case against accused 3. His version is reasonably possibly true.

[55] In the result, the Court makes the following order:

Accused 2 is found guilty on the following counts:

1. Count 1: Kidnapping of Ediemore Ncube;
2. Count 2: Kidnapping of Sydney Ncube;
3. Count 3: Robbery with aggravating circumstances of a Land Rover Discovery 4 with registration number Z[...];
4. Count 4: Theft of R10 000 from FNB account number 6[...];
5. Count 5: Theft of R4 000 from Nedbank account number 1[...];
6. Count 6: Murder of Sydney Ncube;
7. Count 7: Murder of Ediemore Ncube.

[56] Accused 3 is found not guilty on counts 1, 2, 3, 4, and 5.

LA van Wyk AJ

Acting Judge of the High Court of South Africa

North Gauteng Division, Pretoria

Appearances:

For Accused 2: in person

For Accused 3: Adv Mogale

For the State: Adv D Ngobeni, DPP Pretoria

Date of delivery: 20 March 2025

[1] Exhibit K

[2] See *S v Letsedi* 1963(2) SA 471 (A) 473; *S v Snyman* 1968(2) SA 582 (A) 5867; *S v Khoza* (unreported, KZP case no AR 278/18, 22 November 2019) at [20]

[3] See *S v De Vries* 1989(1) SA 228 (A)

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Prepared on 12 October 2026 · Esheria