

SOUTH AFRICA / JUDGMENT

S v Nkosi and Another (CC33/2024)
[2025] ZAMPMBHC 61 (30 June 2025)
[2025] ZAMPMBHC 61

COURT
Mbombela High Court, Mpumalanga

BEFORE
M Moleleki

CASE / FILE NUMBER
CC33/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MBOMBELA
CASE NO: CC33/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED YES/NO

DATE

30 June 2025

SIGNATURE

In

the matter between:

THE
STATE
and
THEMBA
CALYSTERS NKOSI
FIRST ACCUSED
SIYABONGA
BONGANI MASEKO
SECOND ACCUSED

JUDGMENT

Moleleki AJ

- [1] Mr Themba Calysters Nkosi and Mr Siyabonga Bongani Maseko have been arraigned for trial on an indictment containing charges of robbery of the late Mr Muzafalo Kamyuka (the deceased) and/or his wife Ms Nokuthula Nancy Kamyuka (the deceased's wife) of their cell phones and motor vehicle, with aggravating circumstances (Count 1); kidnapping of the deceased and his wife (Count 2); the murder of the deceased (Count 3); attempted murder of the deceased's wife (Count 4); unlawful possession of a firearm/ airgun/ deactivated firearm/ muzzle loading firearm/ imitation firearm, with intent to commit an offence, in contravention of section 120(10)(b) of the Firearms Control Act 60 of 2000 (Count 5), alternatively, unlawful joint possession of a firearm of an unknown make, model and calibre; as well as unlawful joint possession of ammunition, in contravention of section 90 of Act 60 of 2000 (Count 6).
- [2] The State alleges that the robbery was committed with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 and that the robbery and murder counts are read with the provisions of section 51 and 51(2) of the Criminal Law Amendment Act 105 of 1997, respectively. The State alleges further that all offences were committed by the accused in the execution of a purpose or design common to both. The State, therefore, relies on the doctrine of common purpose.
- [3] Both the accused were legally represented throughout the proceedings. They pleaded not guilty and elected not to furnish plea explanations, as they are entitled to do.
- [4] The offences were committed on 22 February
2022. Little progress, if any, was made in the investigations until the investigating officer, Sergeant Lukhele, received a preliminary report to the effect that one of the cell phone numbers inserted in the deceased's cell phone belonged to a "Maseko". However, this was not enough to give meaningful leads into the investigations of the matter. Further to that, Sergeant Lukhele received information from a police informant regarding the identity of one of the persons involved.
- [5] This information led Sergeant Lukhele to seek and obtain subpoenas in terms of section 205 of the Criminal Procedure Act, requiring the cell phone data of calls and messages exchanged using specific numbers, as well as the numbers to or from which each call/ message was made. These records covered the period from 7 February to 29 July 2022. The cell phone numbers of the deceased and his wife were also furnished. Once obtained, the cell phone data was analysed by Captain Thabelo Rambuda, who is attached to the Priority Crime Management Centre, Directorate for Priority Crime Investigations (DPCI). The cell phone data provided by the relevant Network Provider revealed the approximate geographical location of the cell phones at issue. As a result, a picture was painted of the use

of the cell phones on the days preceding the incident, the day of the incident and after the incident.

- [6] On 20 July 2022, five months after the incident, Sergeant Lukhele coordinated with his colleagues, based on the information received from the informant, to provide him with backup for the arrest of Accused 1. The arrest of Accused 1 led to the arrest of Accused 2.
- [7] During the trial, the State sought to introduce into evidence a written statement that had allegedly been made by Accused 1 to Sergeant Ruben Nkosi on 20 July 2022. A separate hearing (a trial-within-a trial) was therefore held to first determine whether the foundational requirements for the admission of an extra-curial statement were satisfied before the statement could be used as evidential material.
- [8] Both Counsel for the State and for Accused 1 classified the statement as an admission. It is important to point out that a court is not bound by the view of the parties as to the classification of a statement.
- [9] When I gave my ruling at the conclusion of the trial-within-a-trial, I indicated that the reasons for the ruling would be given when the judgment in the main trial is given. Those reasons had been prepared before the ruling was made. I now proceed to give those reasons in the paragraphs that follow, and thereafter return to the main trial from paragraph 28.
- [10] Mr Kekana, on behalf of Accused 1 submitted that Accused 1 does not dispute the entire statement, save for the fact that part of the content was disputed. The admissibility of the statement was objected to on the grounds that he was compelled to make the disputed content of the statement; that his constitutional rights were not explained to him; and that he was assaulted by the police officers prior to making the statement.
- [11] I ruled that the statement was admissible in evidence against its maker, that is, Accused 1.

Onus

- [12] The onus of proving both facts and conclusions relevant to an enquiry into the admissibility of evidence rests on the State and must be discharged beyond reasonable doubt.[1]
- [13] The state led the evidence of the following witnesses: Sergeant Ruben Ernest Nkosi, Sergeant Bheki Sayitsheni Khoza, Sergeant Sibusiso Derrick Lukhele, Captain Caiphus Musa Mpapane and Constable Ntokozo Richard Masuku.
- [14] As stated, the statement was classified as an admission, which the court agrees with. Therefore, the statement that had allegedly been made by Accused 1 may not be admitted unless proven to have been made freely and voluntarily. The statement must also, in terms of the provisions of section 35 of the Constitution, be excluded if it was obtained in a manner that violates any right in

the Bill of Rights, and if its admission would render the trial unfair or be detrimental to the administration of justice.

- [15] The incident forming the subject matter of the charges against the accused occurred on 22 February 2022, at or near Elukwatini in the district of Eerstehoek at about 19h30. It is common cause that Accused 1 was arrested as a suspect at eManzana (Badplaas) on 20 July 2022 by Sergeant Lukhele. In essence, the evidence of the State is that Sergeant Lukhele received information from an informant around 08h30 on the morning of 20 July 2022, about the whereabouts of Accused 1. The information was to the effect that Accused 1 was at the Country King store. Sergeant Lukhele had been given the description of Accused 1 and of the clothing he was wearing. Sergeant Lukhele sought backup from his colleagues for the arrest of Accused 1. Sergeant Lukhele and some of his colleagues approached Accused 1 inside Country King store. He introduced himself to Accused 1, informed him of his rights and that he was investigating a case of kidnapping, robbery and murder and that Accused 1 was a suspect therein. Thereafter, he asked Accused 1 if he had any knowledge of a Samsung Galaxy Note 5 cell phone, which is one of the articles taken during the commission of the offences.
- [16] In response, Accused 1 stated that he has knowledge of the cell phone as he picked it up at a hiking spot in Badplaas. Accused 1 was, however, unable to respond when asked where the cell phone was. Sergeant Lukhele requested the accused to take the police to his house in search of the cell phone. Upon their arrival, they requested Accused 1 for permission to search his house. Accused 1 gave them permission. During the search, Sergeant Lukhele found the Samsung Galaxy Note 5 on the pedestal in the accused's bedroom. At this point, Sergeant Lukhele once again informed Accused 1 of his rights and that he was placing him under arrest for kidnapping, robbery and murder. He informed him of his right to remain silent and the right to legal assistance. Sergeant Lukhele further asked Accused 1 if he had in his possession any other article which is linked to the case. His response was that there is a vehicle battery which he gave to his girlfriend, and that he put it in his girlfriend's motor vehicle, which was at Masoyi village. Accused 1 went on to inform the police officers that he obtained both the cell phone and the vehicle battery from Accused 2.
- [17] Accused 1 took the police officers to Tjakastad, where Accused 2 was arrested after his constitutional rights were explained to him. It was put to the State witnesses that before taking Accused 1 to Elukwatini Police Station, he was taken to Badplaas Police Station where he was assaulted by Sergeant Lukhele and other police officers. These assertions were denied by all the witnesses.

[18] It is common cause that Sergeant Lukhele detained both accused at Elukwatini Police Station as suspects. Further, Sergeant Lukhele furnished both accused with copies of SAP 14A forms, which are exhibits “H1” and “H2” respectively, that notified them of the reason for their detention and of the section 35 constitutional rights of detained and arrested persons. It is not in dispute that Sergeant Lukhele read the rights to the accused in IsiSwati and that they confirmed that they understood what had been read to them.

[19] As stated, the statement in question was obtained from Accused 1 by Sergeant Ruben Nkosi. Sergeant Ruben Nkosi testified that he was present when both accused were arrested. Upon their arrival at Elukwatini Police Station, Accused 1 was interviewed by Captain Mpapane, who requested Sergeant Ruben Nkosi to obtain a statement from Accused 1 as it had transpired during the interview that Accused 1 may become a witness for the State. Sergeant Ruben Nkosi stated that he fetched Accused 1 from the cells into his

office. He explained to Accused 1 that the reason for approaching him was to obtain a statement from him. He further explained that Accused 1 was not obliged to make a statement, and that should he elect to make a statement, it may be used against him in a court of law. What Sergeant Ruben Nkosi could not recall is whether he explained the right to legal representation to Accused

1. Subsequent thereto, Accused 1 confirmed that he was willing to make a statement. According to Sergeant Ruben Nkosi, it appeared that Accused 1 sought to exonerate himself by making the statement.

[20] Accused 1 elected not to testify as he is entitled to do. It is his fundamental right to remain silent. It does not, however, mean there are no consequences to exercising the right to remain silent. If evidence has been presented that calls for an answer and an accused choose to remain silent in the face of such evidence, a court may conclude that the evidence so presented is enough, in the absence of an explanation by an accused that he made the statement. The absence of evidence to the contrary is relevant in the evaluation of evidence relied on by the State for a conviction in a criminal case. Once a prima facie case is made demanding answers from the accused, disputes by mere cross-examination cannot suffice, unless it is repeated as evidence

under oath and tested through cross-examination.[2]

Evaluation

[21] The totality of the evidence, including the version put to the witnesses, was considered. The state witnesses were impressive in their testimony during the trial within the trial. Their evidence was coherent and satisfactory in all material respects. They drew a full picture of what transpired and corroborated each other. Cross-examination did not diminish the wealth of their credibility as witnesses, nor did it cast doubt on the reliability of their account of the events.

Assault

- [22] Insofar as the assault is concerned, Accused 1 made vague propositions of the alleged assault on him by the police officers. It was not asserted to any of the State witnesses whether he had sustained any injuries as a result of the alleged assault. It is improbable that Accused 1 could have been assaulted by several police officers at two different locations and not sustain injuries. No report was made to the police officers in the police cells. The accused appeared before a Magistrate two days after the alleged assault. No report was made to the Magistrate during the first two appearances. It is common cause that from his first appearance, he was legally represented. Yet, not even his legal representative raised the issue. The issue was raised for the first time during his bail application. The fact that no such report was made supports the State's version that he had not been assaulted.
- [23] The police officers implicated by accused 1 as having assaulted and tortured him vehemently denied in their evidence that any of them maltreated the accused. The State presented a strong case on the issue of whether the statement was made freely and voluntarily and without undue influence.
- [24] The evidence of the state called for an answer. It is trite that an arrested person has the right to remain silent at different stages, and he may not be compelled to make an admission that could be used in evidence against him. He may also elect to remain silent at a trial stage. However, the fact that an accused has no obligation to testify does not mean there are no consequences attaching to a decision to remain silent. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence and fails to produce evidence to rebut such evidence, he is at risk.
- [25] Consequently, in the absence of rebuttal, the evidence of the State proved the requirements stipulated in section 219A of the Criminal Procedure Act for the admission in evidence of the statement that had allegedly been made by Accused 1. It is found that the statement had not been obtained in an unconstitutional manner notwithstanding the fact that Sergeant Ruben Nkosi was not certain whether he explained the rights to legal representation or not. Evidence of Sergeant Ruben Nkosi was approached with caution as he was a single witness in respect of the taking of the statement. I have no reservations in finding that he was impressive as a witness. He was honest enough not to insist that he explained the rights to legal representation to Accused 1.

Conclusion

- [26] On the totality of the evidence, the State discharged the onus of proving beyond reasonable doubt the requirements for the admission in evidence of the statement which had been made by Accused 1, that it had not been obtained in an unconstitutional manner. Consequently, the disputed statement of Accused 1 is admitted as an extra-curial admission against him only.
- [27] The court having admitted the statement, its contents were read into the record and it was marked Exhibit "J".

The Main Trial

- [28] I now return to the main trial. Both the accused made certain admissions in terms of section 220 of the Criminal Procedure Act, >inter alia, relating to: the identity of the deceased; the date and cause of his death; that he sustained no further injuries after the incident; and the correctness of the findings of the postmortem examination conducted on the body of the deceased by Dr. Mojapelo (Exhibit “A”, “A1” and “A2”); the postmortem photographs Exhibit “B”. Additionally, the photographs of the three scenes of the incident, the surrounding areas, the home of the victims, the area where the deceased was shot at, the deceased’s motor vehicle, the photo album of the cell phone of the deceased, the section 212 and sketch plan thereof, as compiled by Warrant Officer Sipho Daniel Shongwe (Exhibit “C”, “C1” AND “C2”). As well as the correctness of the ballistic tests and the findings in respect thereof exhibits (Exhibit “D”, “D1” and “D2”); Cellular Phone Data Analyst Report (Exhibit “E”); Identification Parade Form, chain evidence thereof and the photo album (“F”); and applications in terms of section 205 of the Criminal Procedure Act (Exhibit “K”).
- [29] The State, in the main trial, led the evidence of 14 Witnesses. They are Ms Fikile Elizabeth Fakude, Ms Nokuthula Nancy Kamyuka; Captain Thabelo Rambuda; Doctor Moleka Vincent Mojapelo; Warrant Officer Sydney Vusi Motha; Captain Abel Patrick Nkosi; Constable Eddie Derrick Mathebula; Sergeant Philisiwe Patricia Nkosi; Captain Sarah Baratang Mokwana; Captain David Vusi Nkosi; Warrant Officer Pontsho Jeff Nkadimeng; Warrant Officer Sipho Daniel Shongwe and Sergeant Sibusiso Derrick Lukhele.
- [30] Ms Nokuthula Nancy Kamyuka, who is the wife of the deceased, testified that when she and the deceased, together with their five-year-old daughter, arrived home at around 20h00 on 22 February 2022, she alighted from the vehicle to go unlock the house. She suddenly heard a gunshot, and three men emerged from the corners of the house. The one man approached her at the door, whilst the other two approached the driver’s side of the motor vehicle where the deceased was seated. The two men, one of whom was wearing a face mask, assaulted the deceased and placed him in the backseat of the motor vehicle where their daughter was sleeping. There was an electric light that was illuminating the veranda of the house. She was, as a result, able to see the man who had approached her. She identified this man to be Accused 2. Accused 2 dragged her to the backseat of the motor vehicle as well.
- [31] At the backseat, she was seated in the middle with her daughter seated on her lap. They travelled for about 5 minutes through an area called Crossings. During this time, she was able to see the faces of two of the assailants as there was illumination from the streetlights around Crossings. She identified Accused 1 as a front seat passenger and Accused 2 as the driver. The third assailant was sitting with them in the backseat, and his face was covered with a mask; hence, she could not identify him. The assailants drove with them to a secluded place towards the direction of Badplaas. They were robbed of their belongings, including the deceased’s two cell phones and the motor vehicle. Thereafter, they were ordered to leave.

- [32] When they left, the deceased's wife was carrying the daughter and running, with the deceased following behind her. There was a gunshot, and soon thereafter, she tripped over a fence which she could not see because it was dark. When she fell to the ground, her daughter slipped out of her hands. She stood up and searched for her daughter. Having found the daughter, she searched for the deceased. She found the deceased lying face down on the fence. She touched him, but he was not responsive. When the assailants robbed them of their belongings, she was able to hide her cell phone. She therefore used the cell phone torch to check on the deceased. She discovered that he was bleeding. She sought assistance telephonically. Her family members and colleagues arrived together with the police officers and the paramedics. The deceased was declared dead upon arrival at the hospital.
- [33] When she was visited by the police officers at her home to obtain her statement, the deceased's wife informed the investigating officer, Sergeant Lukhele, that she would be able to identify the two assailants whose faces were not covered. According to the deceased's wife, corroborated by Sergeant Lukhele, she gave the description of the two men, even though this was after her statement had already been written down and signed.

Evidence relating to the finding of the Exhibits

- [34] The sum of the evidence of the State is that, acting on information that he had received, the investigating officer, Sergeant Lukhele, requested police backup in order to arrest a suspect in the case he was investigating, that is, Accused 1. Accused 1 was approached by the police officers inside a store known as Country King. Sergeant Lukhele introduced himself to Accused 1 and informed him of the case he was investigating. He informed Accused 1 of his rights and asked Accused 1 if he had knowledge of the whereabouts of a Samsung Galaxy Note 5, which was robbed from the deceased. Accused 1 admitted that he knew about the cell phone but that he had picked it up at a hiking spot, somewhere in Badplaas. However, when asked about the whereabouts of the cell phone, he proffered no response. It was on this basis that the police officers sought to go to Accused 1's place of residence. He went with the police officers to his home in Manzana (Badplaas) at their request. Upon their arrival, the police officers requested to search

the house and Accused 1 gave them permission to do so. Sergeant Lukhele retrieved the deceased's cell phone (Samsung Galaxy

Note 5) from the pedestal in the accused's bedroom. He was placed under arrest, and his constitutional rights explained.

- [35] Sergeant Lukhele questioned Accused 1 once again as to where he got the deceased's cell phone from. This time around, Accused 1 stated that the cell phone was given to him by Accused 2. He was asked whether there were any further articles in his possession linked to the case. In response, Accused 1 mentioned a vehicle battery. At this point, Sergeant Lukhele and Captain Abel Nkosi probed him about the battery and its whereabouts. Accused 1 informed them that he put the battery in his girlfriend's motor

vehicle, which was at Masoyi village. Accused 1 took the police to Accused 2's place. Accused 2 was placed under arrest after his rights were explained to him.

[36] Investigations followed up on the vehicle battery. Ms Fikile Fakude, Accused 1's girlfriend, was contacted. She confirmed that there was a red Sabat battery inside her vehicle, which was with the mechanic at the time. During her testimony, Ms Fakude stated that she was in a romantic relationship with Accused 1. However, the relationship ended, but she was not sure of the date on which it ended. During the subsistence of their relationship, she was residing with Accused 1 at his place. When she moved back to her home at Mhata village, Hazyview, after the relationship ended, she left her motor vehicle, a Mercedes-Benz, at Accused 1's premises. According to Ms Fakude, her motor vehicle had mechanical problems. Two weeks after she left Accused 1's place, she hired a tow truck to tow the vehicle to a mechanic in Bushbuckridge. She did not notice whether the battery was in the vehicle as she never checked. On 21 July 2022, a day after the arrest of the accused, she was contacted by the police officers regarding

the battery. Arrangements were made, and she handed the battery over to the police officers.

Cellphone Data

[37] Captain Thabelo Rambuda, a data analyst attached to the DPCI, commonly known as The Hawks, was requested by Sergeant Lukhele, the investigating officer, to analyse cell phone data relating to this case. Sergeant Lukhele supplied Captain Rambuda with the cell phone data that he was to analyse.

[38] Captain Rambuda classified the three different points of the crime as crime scenes 1, 2 and 3, respectively. Crime scene 1 being the home of the victims where they were accosted by the assailants, crime scene 2 being the area where the deceased was shot, and crime scene 3 being where the deceased's motor vehicle was abandoned.

[39] He also used the Global Positioning System (GPS) to establish the GPS coordinates of the crime scenes. The data also showed that Accused 1 and 2 inserted their respective SIM cards into the deceased's cell phones at different times.

[40] On 22 February 2022, at approximately 18h10, the accused's cell phone activated the Immelmesdal tower. Shortly before the incident, the cell phones of both accused activated the same tower at approximately 19h30, which is the tower closer to the home of the victims. In the early hours of the morning after the incident, their cell phones activated the Immelmesdal tower, which is the tower closer to where the deceased's motor vehicle was abandoned. At 21h15, the deceased's cell phone activated the tower at Elukwatini, which is closer to where he was shot. At 21h37, it activated the tower at Nelshoogte.

The Defence Case

[41] Both the accused pleaded alibi as their defence. Accused 1 testified that he was at home in Badplaas on the day of the incident. It was his son's birthday, and they had a celebration. As a result, he never left his place. Accused 2, on the other hand, testified that he travelled to Barberton. Upon his return, he went to his girlfriend's place. He spent the night there and left in the early hours of the morning. The accused denied that they were in each other's company on that day. The version of Accused 1 regarding his description by the deceased's wife was that he does not have a sharp nose, nor is he taller than Accused

2. Although both accused confirm that they were informed on 20 July 2022 that an identification parade was going to be held on 22 July 2022, they maintained that when warrant officer Motha arrived in the morning, he did not explain anything to them, and they were not even aware what the procedure of the identification parade was. According to the accused, the deceased's wife was guided by the police officers to point them out.

[42] That concluded the evidence led.

[43] The State bears the onus to prove its case beyond reasonable doubt. The court in *S v Van Der Meyden*[3] stated the following regarding the onus of proof:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent."

[44] The evidence relied upon by the State to prove that the accused were the perpetrators of the crime is both direct and circumstantial. It may be convenient to start off by emphasising that circumstantial evidence is no less cogent than direct evidence. On the contrary, it may be the more convincing form of evidence. Circumstantial, as opposed to direct evidence, is evidence of the surrounding facts from which a court may, within certain parameters, infer the guilt of the accused person in respect of the offence charged to him.

[45] When dealing with evidence and the inferences to be drawn, all the evidence must be examined. A court must not look at the evidence

implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, nor should it look at the exculpatory

evidence in isolation in order to determine whether it is reasonably possible that it might be true. The correct approach is to consider all evidence in the light of the case.[4]

[46] The court in *R v Blom*[5] laid out two rules of logic to be followed: (a) the inference sought to be drawn must be consistent with all the proven facts; and

(b) the proven facts must be such that they exclude every other reasonable inference. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[47] The body of evidence that implicated the accused is the following: their sim-cards were inserted in the deceased's cell phones at different times after the incident; the Samsung Galaxy Note 5 belonging to the deceased was found in the possession of Accused 1 upon his arrest; Accused 2 admitted under oath that he was in possession of both cell phones belonging to the deceased at some point after the incident; the motor vehicle battery that was stolen from the deceased's motor vehicle was found in the motor vehicle of Accused 1's ex-girlfriend after Accused 1 had informed the police officers of its whereabouts; and both accused

were positively identified by the deceased's wife at the identification parade.

Identification Parade

[48] It is settled that identification by a witness is to be approached with caution. This is due to the fallibility of human observation.

Identification depends on a variety of factors such as, lighting, eyesight, visibility, proximity and prior knowledge of the suspect by the witness. This list is not exhaustive. It is for this reason that evidence of this nature must be scrutinised closely.[6]

[49] The deceased's wife was not only an identification witness but also a single witness in relation to the incident. Even though the evidence of identification and of a single witness should be approached with caution, the exercise of caution should not displace the exercise of common sense. The submission by the accused's legal representatives, that the deceased's wife did not have enough opportunity to observe the assailants, is not borne out by the facts. She was approached by Accused 2 whilst she was attempting to unlock the door at her house. The electric light at the veranda of the house was illuminating. Their encounter at this stage may have taken approximately 2 to 3 minutes. Accused 2 dragged her to the motor vehicle. Both Accused 1 and 2 occupied the front seat passenger and driver seats of the motor vehicle, respectively. She was seated in the middle, in the backseat of the motor vehicle. From where she was sitting, she could see the side profiles of their respective faces.

[50] It was a 5-minute drive from their house to Crossings. Although all the streetlights at crossings may not have been working, there was no suggestion that the lighting was poor. The deceased's wife observed the two, with the assistance of the lighting at Crossings, as they were driving past, for approximately 2 to 3 minutes. From there, they undertook a 20-minute drive to a point

where the motor vehicle came to a stop. Throughout this travel, she was only relying on the lighting provided by the vehicle radio.

According to the deceased's wife, the radio was in the form of a screen. This may suggest that it could give some form of

illumination. Accused 2 would often look back and ask her what she was staring at. The evidence of the deceased's wife on this aspect was not challenged in cross-examination, and it therefore confirms her version that she was staring, which prompted Accused 2 to even confront her.

- [51] All of this cannot be said to have happened in a short period of time. Her observation can, therefore, not be described as a fleeting glance. She paid attention to detail and was able to tell that Accused 2 had more weight than when he was in court. This is borne out by the photographs that were taken during the identification parade. There is further objective evidence, as shall be shown below, that strengthens the identification evidence and dispels any risk of mistake.
- [52] It was contended on behalf of both accused that there was an issue relating to the exercise of the rights of the accused during the identification parade. The issues were that the accused were not informed of their rights to legal representation; photographs of the accused were taken by the police officers, probably to show them to the witness so that she knows who to point out; the witness was in the office of the investigating officer prior to the identification parade and Accused 2 was taken to the same office so that he could be seen by the witness; Accused 2 was made to dress differently to the others who were in the line-up with him; and that the witness was shown who to point out by the officer in charge of the parade.
- [53] There were 16 participants, including both accused, who constituted the line-up. Six of the participants were wearing head coverings, and some, including Accused 2, were wearing short pants. The officer in charge, Warrant Officer Motha, gave a full picture of how the identification parade unfolded. The police officers who assisted him testified about their roles during the parade. The only discrepancy was with regard to the evidence of Constable Mathebula, who was adamant that the witness was alone in the waiting room prior to the identification. However, Captain David Vusi Nkosi confirmed that his role was to keep guard of the witness

prior to the witness going into the identification room. I am of the view that this discrepancy is not material to render the evidence of the State unreliable. This discrepancy may be attributed to failure of memory, regard being had that the witnesses testified about 32 months after the incident.

- [54] The deceased's wife was able to identify both accused, approximately 5 months after the incident. She was adamant from the very first interview with Sergeant Lukhele that she would be able to identify the assailants. Although it was not reduced to writing, her testimony that she gave the description of the assailants was corroborated by Sergeant Lukhele. The discrepancy in her description of Accused 1 was that he was taller than the other two assailants. It turned out during my observation in court that Accused 2 was taller than Accused 1 by inches. It cannot, however, be said that she did not have enough opportunity to observe the assailants. Furthermore, the fact that the description of the assailants does not reflect in her statement to the police or that Accused 2 is in fact a few inches taller than Accused 1, does not detract from the fact that she subsequently identified

the accused. It is difficult to see how these aspects could even have affected the credibility and reliability of her evidence.

- [55] In *S v Mpilo*[7] the court, in dealing with criticism of identificatory evidence, said the following:

“The appellant’s counsel criticised the identificatory evidence because the witnesses had not mentioned the features ... Now I know that points of this kind are often raised in criminal trials, but I am not much impressed by them. It is not often that a face presents itself with one, let alone two or more, remarkable features. Nevertheless, human beings are highly adept at recognising faces and voices. A constellation of multiple minor variations in standard facial features combines to make up a facial appearance, which in its own way, is as unique as a fingerprint. The laborious process followed by Identikit artists in teasing out from a witness the facial features of a perpetrator shows that people can readily match a face to a perpetrator without being able to verbalise a description.”

- [56] The evidence shows that the deceased’s wife was able to pick both accused without any hesitation, though emotional, during the identification parade. The images of the accused had clearly been imprinted on her mind.
- [57] The deceased’s wife impressed the court as a person whose evidence may be believed. She was a credible witness, and there were no intrinsic improbabilities in her evidence. Her evidence was corroborated by other State witnesses and by the objective evidence in the form of cell phone data.
- [58] Section 37(1)(b) of the Criminal Procedure Act stipulates that those identified to participate in the identification parade cannot refuse to do so. The provision further empowers any police official to make an arrested person available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine.
- [59] Warrant Officer Motha testified that he informed the accused of the procedures and gave them permission to swap positions if they so wished. It was Accused 1 who requested to change positions. Following their identification, none of them noted any dissatisfaction with the way the parade was conducted. The accused contended that had they been informed of their right to legal representation, they would have preferred their respective legal representatives to have been present.
- [60] The evidence of Warrant Officer Motha is supported by the contents of the identification form, SAP329, that the accused did not register any dissatisfaction with the way the identification parade was conducted. Where a request was made by Accused 1 to change positions, the photographs serve as corroboration as well. In response to the issue of legal representation, Warrant Officer Motha referred to the identification form, which merely requires him, as the officer in charge, to ask the accused if they have legal representatives. The accused told him they did not have legal representatives and confirmed that the identification parade could proceed.

[61] The empowering provision on identification parades is clear on the powers it confers to the officer in charge of the identification parade. The court in *S v Tshuma*[8] stated the following regarding the role of legal representatives at identification parades.

“A legal representative present at a parade can enjoy no greater rights than those of the accused, his client. He cannot advise him not to participate, nor can he proffer advice as to the position the accused might take in the line-up, nor offer advice as to the clothing that he should wear, unless permitted to do so by the police officer in charge. He may, if present, obviously make suggestions to the police as to the conduct of the parade but these can legitimately be ignored. At best, he can advise the accused to remain silent or not draw attention to himself but this at a properly conducted parade will be achieved by the policeman in charge of the parade.”

[62] The rules that have been developed for use in the conduct of identification parades are intended to ensure fairness and should not be regarded to be rigid requirements. They are there to serve as guidelines. Non-compliance thereof, will not necessarily affect the admissibility of the parade, but would, at most, affect the weight to be attached to the parade and the weight to be attached to the identification of the witness.

[63] I am satisfied that the identification parade was properly constituted and conducted. The procedure followed was noted in the identification form. When taking the evidence relating to the identification parade into consideration, the procedural aspects of the identification of the accused were reliable and credible. Consequently, the suggestion that the witness was assisted or guided as to who to point out and that had the legal representatives been present, the parade would have turned out differently, is rejected as having no basis and is therefore false.

The Physical Exhibits Recovered

[64] Although there is direct evidence linking the accused to the offences, there is additional evidence that strengthens this direct evidence, which is circumstantial. The various items belonging to the deceased, which were linked to the accused play a revealing role and tell a story of their own.

[65] Accused 1 was found in possession of one of the cell phones belonging to the deceased on the day of his arrest, a Samsung Galaxy Note 5. Accused 2, on the other hand, was linked by cell phone data, which revealed that he had inserted his SIM card into the deceased's Samsung Z Flip from 1 March 2022, which is about a week after the incident. Further to that, Accused 2 admitted

during his testimony that he indeed had both cell phones but that they were given to him by Accused 1 and another person.

[66] The undisputed evidence against both accused is, therefore, that: they have known each other for several years; they would communicate with each other and would regularly meet; and they were in possession of the deceased's cell phones at different times after the incident and had inserted their respective SIM cards therein. It is also undisputed that the

cell phones were taken from the deceased at the time of the robbery and murder of the deceased. Furthermore, the battery that was removed from the deceased's vehicle was found in the vehicle of the ex-girlfriend of Accused 1. This evidence is of a serious incriminating nature against both the accused.

Cell Phone Data

- [67] The data obtained from the cell phone numbers of both accused is highly relevant. The data is informative considering that the accused claimed that they were not in each other's company on the day of the incident. The suggestion is that them being pointed out by the deceased's wife at the identification parade is a mistake. The cell phone data shows that prior to the incident, at approximately 18h10, the cell phones of both accused were activated by the same tower, Immelmesdal tower. This is just about an hour before the incident. The two cell phones activated the same tower once again at approximately 19h30, which is the Elukwatini tower. This is the tower in the vicinity of the home of the deceased. At around the same time, the cell phone of the deceased's wife activated the same tower. In the early hours of the morning, at approximately 03h25/03h28, both accused's numbers activated the same tower, which is the tower closer to where the deceased's motor vehicle was abandoned. Clearly, the cell phone data reveals that the cell phone numbers of the accused were activated through cell phone towers at the times and places which are relevant to the issues before me. There is no plausible reason proffered in the evidence save to insist that they were not together at the relevant times and places.
- [68] The evidence from the cell phone data analyst is that when a cell phone is turned on, it logs on to the nearest tower. The case sought to be made out by the State against the accused is based on the cell phone data concerning their movement and location relative to the time and place of the crime scenes.
- [69] Having regard to the cell phone records and the towers activated, the accused are placed in the same vicinity prior to the commission of the offence and at crime scene 3, where the deceased's motor vehicle was abandoned. It would appear from the data that the accused had to make contact prior to the commission of the offences. In the absence of a plausible explanation consistent with innocence, the picture that comes up from the cell phone data is that the accused contacted each other just over an hour before the incident. In the early hours of the morning, they were together where the deceased's vehicle was abandoned.
- [70] Captain Rambuda, the data analyst, was an excellent witness. He analysed the data and produced several diagrams illustrating cell phone traffic between the accused's cell phone numbers and the towers which the said numbers activated.

- [71] The court in *S v Sauls and Others*[9] made it clear that the exercise of caution must not be allowed to displace the exercise of common sense. In applying common sense and logic to the evidence, the cell phone data justifies, as the only reasonable inference that, when the accused's cell phones activated the same tower at Elukwatini at around the same time as the cell phone of the deceased's wife, they were there for the commission of the crime.
- [72] It cannot be disputed that both accused are placed in the geographical location of the house of the deceased, where they were initially kidnapped. The inference sought to be drawn, that the accused and their companion approached the deceased's family, kidnapped, robbed them of their valuables and fired shots at them, thus killing the deceased, is consistent with the proven facts.
- [73] What remains to be established is whether this inference excludes other reasonable inferences that can be drawn.

Alibi

- [74] The alibi defence of both accused must be considered by the court within the totality of the evidence. Holmes AJA in *R v Hlongwane*[10] said: "The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's

impressions of the witnesses". If, on all the evidence, there is a reasonable possibility that this alibi evidence is true, it means that there is the same possibility that he has not committed the crime.[11] The court must apply its mind not only to the merits and demerits of the state witnesses and defence witnesses, but also to the probabilities of the case.[12]

- [75] The accused were not impressive as witnesses. Their evidence was marred by inconsistencies and improbabilities. They adjusted their respective versions as the trial proceeded. The evidence of the accused did not exclude the possibility of their involvement in the commission of the offences.

- [76] Regarding the alibi raised by the accused, the only reasonable inference that can be drawn is that they conspired to mislead the court. They did so in order to discredit the deceased's wife and other witnesses. Although the accused maintain that the witnesses were falsely

implicating them, no reasons were advanced as to why they would do that. The State's evidence is sufficiently strong to prove that the accused perpetrated the offences. I, therefore, reject the accused's alibi defence.

Accused as Witnesses

- [77] Both accused were unimpressive as witnesses. They contradicted each other in material respects. The contradictions extended to issues such as the nature of their relationship with each other and whether Accused 1 knew where Accused 2 stayed. As the case proceeded, they started distancing themselves from each other, to the extent of implicating each other.

[78] The accused do not dispute that they were in possession of the cell phones at different times after the incident. Their evidence on how they came to be in possession thereof is at odds with the probabilities. As this drama played itself out in court, they were blaming one another for their respective possession of the cell phones. The contents of the statement made by Accused 1 are telling. I find it improbable that the police officers would have found Accused 2's place of residence unless they were taken

there by Accused 1. Had the police known of Accused 2, as Accused 1 would like this court to believe, they would have arrested him long before Accused 1. In his evidence, Accused 2 confirmed that Accused 1 knows his place of residence and Accused 1 knows Accused 2's father. Similarly, I find it improbable that the police would have known of the whereabouts of the vehicle battery unless they were given that information by Accused 1. I therefore find that the statement obtained from Accused 1 by Sergeant Ruben Nkosi was made by Accused 1 and it has probative value as it supports the reasoning by inference that Accused 1 is the one who informed the police officers about the battery and to whom it was given (his ex-girlfriend). It has already been determined that there was no violation of the rights of Accused 1 when the statement was obtained from him.

Recent Possession

[79] The doctrine of recent possession permits the court to make an inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence, and in certain instances was also a party to the initial offence. The court in *Mothwa v The State* stated the following:

"The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person. ... It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having being found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession."[13]

[80] The accused were in possession of the cell phones belonging to the deceased. It was confirmed through the data analysis report that Accused 2 was in possession of the Samsung Galaxy Z Flip approximately a week after the deceased was murdered. Accused 2 confirmed this under oath and admitted that he was in possession of the Samsung Note 5 as well. Accused 1 was not only in possession of the Galaxy Note 5 but of the battery belonging to the deceased as well.

[81] Even though items such as cell phones and a vehicle battery are easily and readily traded, the link between the accused's possession thereof and the incident is too strong to sustain the conclusion that they were party to the initial offence. The possibility that the accused could have innocently received and possessed the cell phones is very slim, if not non-existent. Considering the time lapse together with the rest of the evidence, it is difficult to

imagine any other circumstance under which the cell phones could have been innocently acquired. Had there been any such circumstance, the accused could have disclosed it to the police officers. Even when they were giving evidence, they were unable to explain how they came to be in possession of the items. The probabilities are therefore that the stolen items had not yet passed out of the hands of the original perpetrators.

Common Purpose

[82] It must be determined whether the accused had common purpose to rob and murder. It is trite that the basis of common purpose can be by way of prior agreement, which may be express or implied. It may also be by association between the co-perpetrators. It is not necessary to show that the participation of the co-perpetrators was causally connected to the consequent crimes. It is enough for the State to prove that one of the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants. [14] The State would therefore have to prove beyond a reasonable doubt that each of the participants intended the criminal result or foresaw the possibility of the result ensuing and nonetheless actively associated himself or herself, reckless as to whether the result was to ensue.[15]

[83] The evidence before court shows that there was planning. Despite that the accused had been in regular communication days before the incident, they communicated shortly before the incident. The deceased was assaulted, and he and his family were kidnapped, taken to a secluded area where they were robbed of their belongings and were told to leave. Whilst they were a few meters away, two shots were fired, and one bullet struck the deceased, leading to his death. All the assailants were present when all these events unfolded. The deceased's wife testified that all three assailants were armed with firearms.

[84] Both accused shared with another who is not before court the purpose of kidnapping and robbing the deceased and his family of their valuables. They were all in possession of firearms. They must have envisaged the use of potentially deadly force. They reconciled themselves to the consequences of such use. Clearly, they participated in the planning and the execution thereof. Their active participation is clear, and their active association never stopped. None of them disassociated themselves from the attack on the deceased and his family. The only reasonable inference is that each of the accused foresaw the possibility of the deceased being

killed. They each had the necessary mens rea to sustain a conviction for murder.

[85] In this case, the required form of mens rea is *dolus eventualis*. In *S v Mgedezi*, [16] approved in *S v Thebus*, [17] the legal limits of *dolus eventualis* are stated as follows: "... 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."

[86] It is not always easy to determine what any accused subjectively foresaw; accordingly, subjective foresight can be determined by way of inferential reasoning.[18]

Attempted murder (Count 4)

[87] It was submitted on behalf of the accused that there was no attempt to kill the deceased's wife, on the basis that she did not see the direction from where the bullet that killed her husband came or was aimed at. It was further submitted that the two gunshots that were fired could not have been aimed at the deceased and the deceased's wife, because the deceased's motor vehicle was eventually found with gunshot damage as depicted in Exhibit "B", photo number 14 and 15. The suggestion is that the one bullet hit the vehicle, and the other struck the deceased. I agree with the State's submission that the accused's speculative assertion is in complete disregard of the evidence by the deceased's wife, that the first gunshot was fired whilst they were at the first crime scene, which is at her place of residence. That was before they were taken to the second crime scene, where the two gunshots, one of which killed the deceased, were eventually fired. Therefore, it cannot be said that one of the two gunshots that were fired at the second crime scene is the one that damaged the deceased's vehicle.

[88] The unchallenged evidence of the State is that the deceased, with his wife carrying their daughter, was running towards the same direction when the gunshots were fired. The gunshots were aimed towards their direction and could therefore have come into contact with either of them. In the court's view, the assailant who fired shots was aware that there were two people running in the

direction from which shots were fired, hence he fired shots thereat. Therefore, he should reasonably have foreseen that any one of them could be struck by a bullet, and he reconciled himself with that possibility. The principle of *dolus eventualis* is applicable.

[89] Although no firearms linked to the shooting were found, cartridge cases and projectiles were collected from the scene. The post-mortem report also confirmed that the deceased died of a gunshot wound. There is no doubt that the deceased was killed by a bullet and that the attempt on his wife's life was a result of the shots which were fired from a firearm. Cartridge cases were forwarded to the ballistic laboratory for examination, and it was established that the cartridges were of a 9MM Parabellum, and they were fired from a firearm.

[90] In terms of section 1 of the Criminal Procedure Act, aggravating circumstances are defined for the purposes of robbery as:

90.1 The wielding of a firearm or any other dangerous weapon;

90.2 The infliction of grievous bodily harm; or

90.3 A threat to inflict grievous bodily harm

- [91] The definition of “aggravating circumstances” is relevant to the sentence that may be imposed and not whether the robbery took place. Aggravating circumstances are facts that objectively exist.[19] In this case, the objective fact is that the deceased and his wife were threatened and had shots fired at them. In light of all the circumstances, these threats were closely connected to the taking of cell phones and the motor vehicle. In the court’s view, this constitutes aggravating circumstances within the meaning of Section 1 of the Criminal Procedure Act.

Kidnapping

- [93] Insofar as the count of kidnapping is concerned, I am of the view that the deprivation of liberty of the deceased and his wife was predicated on a continuous intent in pursuance of one criminal transaction to rob, which led to murder. In this instance, justice would demand that the count of kidnapping be dealt with as one with the robbery and murder to ensure a substantially fair trial.

Firearms and Ammunition

- [94] Count 5 relates to the contravention of section 120(10)(b) of the Firearms Control Act. In the alternative, unlawful joint possession of a firearm of an unknown make, model and calibre.
- [95] Section 120(10)(b) forbids the possession of firearms with the intention to commit an offence or to use the firearm to resist arrest or prevent the arrest of another person. It was submitted on behalf of the State that the section creates a totally different offence and that its elements differ from those of joint possession. Further, it was submitted that the circumstantial evidence presented by the state has established the facts upon which the court should draw only one inference, which is that the accused possessed firearms with the intention to commit offences.
- [96] I am, however, of the view that the possession of firearms is an integral element of all the charges. Therefore, to convict the accused of the contravention of section 120(10)(b) would amount to a duplication of convictions.
- [97] In so far as the alternative to count 5, unlawful joint possession of firearm as well as count 6, unlawful joint possession of ammunition are concerned, the State presented no evidence from which it can be inferred as the only reasonable inference that the accused intended to possess the firearm and ammunition jointly with their companion, nor can it be inferred that the one who is not before court intended to hold a firearm and ammunition on their behalf. It must be considered that possession of firearms played a role in respect of the count of robbery, which essentially means that the robbery was with the use of firearms. It follows therefore that the accused have to be acquitted on count 5 and its alternative as well as count 6.

[98] The only reasonable inference that can be drawn is that the accused acted in common purpose, murdered the deceased, robbed him and his wife of their valuables as contemplated in section 1 of the Criminal Procedure Act and attempted to kill the deceased's wife.

[99] When looking into the totality of the case, there is so much that gives credence to the evidence of the State. The reliability of the identifying witness, the legitimacy of the identification parade, the cell phone data, as well as the evidence of the police officers.

Verdict

[100] Accordingly, the following order is made:

1 Accused 1 and 2 are found guilty of:

1.1 Count 1, robbery with aggravating circumstances as contemplated in section 1 of the Criminal Procedure Act 51 of 1977, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

1.2 Count 3, the murder of Mr Muzafalo Kamyuka, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

1.3 Count 4, attempted murder of Ms Nokuthula Nancy Kamyuka.

2 Both accused are acquitted in respect of count 2, count 5 and the alternative count thereof, as well as count 6.

M R MOLELEKI

ACTING JUDGE OF THE HIGH COURT

Appearances

For the First Accused: Adv. Maesela V Kekana Instructed by: Legal Aid, Mbombela Third Floor, High Court Building MaeselaK@legal-aid.co.za For the Second Accused: Adv. P C Naude Instructed by: AN Ngcangca Office 109 18A First Floor Caltex Building Bell Street, Nelspruit For the State: Adv MSIBI Instructed by: NDPP 4th Floor, High Court Building Office of the DPP, Mbombela

Judgment

delivered on: 30 June 2025

[1] S v Zuma and Others 1995 (2) SA 642 (CC).

[2] S v Boesak

[2000] ZACC 25; 2001 (1) SA 912 (CC) at p 914 para A-D.

- [3] S v Van Der Meyden 1999 (2) SA 79 (W) at 80H; see also R v Difford 1937 AD 370 at 373 and 383.
- [4] R v Hlongwane 1959
- (3) SA 337 (A) at 341A.
- [5] R v Blom 1939 AD 188 at 202 and 203.
- [6] S v Mthethwa 1972
- (3) SA 766 (A) at 768A-B.
- [7] S v Mpilo 2021
- (1) SACR 661 (WCC) par 23.
- [8] S v Tshuma
- [2022] ZAGPJHC 543 para 94.
- [9] S v Sauls and Others 1981
- (3) SA 172 (A) at 180E-G.
- [10] R v Hlongwane 1959
- (3) SA 337 (A) at 341A; see also S v Khumalo
- [1991] ZASCA 70; 1991 (4) SA 310 (A) at 327.
- [11] R v Biya 1952
- (4) SA 514 (A) at 521.
- [12] S v Singh 1975
- (1) SA 227 (N).
- [13] Mothwa v The State
- [2015] ZASCA 143 paras 8 and 10.
- [14] Sithole and Another v S
- [2017] ZAGPPHC 169 para 24; see also S v Le Roux and Others 2010
- (2) SACR 11 (SCA) para 17.
- [15] S v Thebus and Another
- [2003] ZACC 12; 2003 (2) SACR 319 (CC) para 49.
- [16] S v Mgedezi 1989

(1) SA 687 (A).

[17] Thebus at fn 15 above para 20.

[18] S v Dougherty 2003

(4) SA 229 (W).

[19] Minister of Justice and Constitutional Development and Another v Masingili 2014 (1) BCLR 101 (CC) para 12.

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