REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS211/14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE__________ __________________
SIGNATURE

STATE

And

PHUMLANI NGWANE	ACCUSED 1
INNOCENT HLELANI ‘MZAMELENI’ NGUBANE	ACCUSED 2

JUDGMENT

I WILL APPROACH THE JUDGMENT IN **FOUR PHASES**.

FIRST PHASE: SUMMARY OF EVIDENCE INCLUDING THE EVIDENCE OF THE TRIAL WITHIN A TRIAL.

SECOND PHASE: MY REASONS FOR ALLOWING THE POINTING OUT AND STATEMENTS BY ACCUSED NUMBER ONE FOR WHICH A TRIAL WITHIN A TRIAL WAS CONDUCTED.

THIRD PHASE: REASONS FOR ALLOWING EXHIBIT "M" THE WARNING STATEMENT MADE BY SANDILE KHUMALO.

FOURTH PHASE: JUDGMENT ITSELF.

PHASE ONE
SUMMARY OF EVIDENCE

[1] **First state witness: Mr T Pablowitz**

He testified that he downloaded the surveillance footage. His evidence was not disputed by the defence. His evidence was handed in as EXHIBIT "1" AND "2".

The footage depicts the robbery and shooting of the deceased. Digital surveillance footage originating from various surveillance cameras installed at or near the Shell Garage and Denver Truck, a company adjacent to the garage, was presented as Exhibit "2". Exhibit "1" consists of Google aerial maps depicting the location, distance and route between the Shell Garage and the Denver Hostel as well as Google Street View images of the Shell Garage and surrounding area. From the footage, it is clear that the attack on the deceased was executed by three men. The first two lodged the initial assault with the third suspect, arriving at the scene shortly thereafter. He shot the deceased. The shooter entered the Shell Garage premises within seconds after the first two robbers who are visible in the side street next to the Garage.

[2] **Second state witness: Mr. Siyabonga Ngubane**

He is a relative of accused 2, he testified that between 19h00 and 20h00 on 10 May 2013 accused 2 concealed a firearm on top of the ceiling close to his room. Accused 2 told the witness that it was his own firearm which he will come and fetch at a later stage. He did not tell the witness anything further. During July 2013 the police arrived at Siyabonga's room and searched the ceiling area where they discovered the said firearm. Mr. Siyabonga Ngubane was present when the police recovered the firearm. He further testified that from the time accused 2 had placed the firearm in the ceiling until the time it was recovered by the police, he did not touch it or tell anyone about it. He was initially arrested for the unlawful possession of the firearm. The case was however later withdrawn against him. After having left the firearm on the ceiling, accused 2 left for 'Msinga' where he originated from. Mr. Siyabonga Ngubane does not know accused 1. Mr. Siyabonga Ngubane identified the shooter on Exhibit "2", as accused 2.

[3] He knows accused 2 very well as a family member. He knows the way accused 2 walks. When accused 2 brought the firearm to his room on 10 May 2013, he was wearing the same hat ('kotoi') as he is wearing on the footage. According to him the jacket the accused was wearing in Court was the same he had worn on the evening of 10 May 2013. There were no problems and or conflict between him and accused 2.

[4] **The third state witness: Mr. Ernest Thabiso Shabalala**

He testified that on 10 May 2013 he was at the Kwadlamini Tavern from approximately 15h00. At approximately 20H00, Sandile Khumalo and another unknown man arrived at the Tavern in a red vehicle. Sandile approached him with two Toshiba laptops which he had for sale. He arranged for a buyer for the laptops, to wit, David Msomi. He took the laptops to Msomi who bought them for R2700. Ernest was driving a 4X4 Isuzu Double Cap Bakkie. Upon his return at the Tavern, he gave Sandile R2000. Whilst at the Tavern he did not see accused 1. He was arrested and took the police to David Msomi where one of the laptops he had sold to Msomi was recovered.

[5] The footage of the robbery was shown to Shabalala in Court during which he identified the robber who was overpowered by the deceased as Vusi Khumalo. This evidence was not contested. Shabalala further testified that initially he was accused 1 in this matter. He however entered into a Plea and Sentence Agreement with the State enabling the case against him to be finalized.

[6] **4th State witness: Mr. Gabriel Thethane**

He is a petrol attendant at the Shell Garage. He explained that he had noted down the registration number of a red car in which the robbers fled. He handed this information to the police.

[7] On 16 May 2013, he identified Sandile Khumalo at the same identification parade at which Ernest Shabalala was in the line-up, thus confirming the evidence of Shabalala that Sandile was pointed out at the parade. Mr. Thethane alleges that Sandile was the driver of the get-away vehicle. This evidence was not contested. During November 2013, he attended a second identity parade where he identified accused 2 as the person who had shot the deceased.

[8] He further confirmed that no one had told him or hinted to him who he would see at the said parade and or who he was to identify. This evidence was not contested. He further testified that he did not see accused 2 again after the identity parade.

[9] **5th State witness: Constable Pretorius**

He testified to the arrest of Shabalala and Msomi as well as the recovery of the Toshiba laptop which he later booked in at the SAP 13 store of the Cleveland Police Station.

[10] **6th State witness: W/O Raletsemo**

He confirmed that the laptop was later identified by the deceased's mother as one of the laptops which were robbed from the deceased. He confirmed that both Sandile Khumalo and Vusi Khumalo had since passed away.

[11] **7th State Witness W/O Van Der Schyff**

A detective with 27 years' service, held the I.D. parade where accused 2 was identified. He rewrote the names of the attendees as they first had to write it down and state their addresses.

[12] **8th State Witness: Lt Col Mbotho**

He is the commander at the Cleveland Detective Branch. He testified to the taking of the 'Warning Statements' of Sandile Khumalo (Exhibit "M") and accused 1, Phumlani Ngwane (Exhibit "K") on 11 May 2013.

He confirmed that he had taken a Warning Statement, Exhibit "K", from accused 1 on 11 May 2013. The statement contains printed Constitutional Rights which Lt Col Mbotho confirms he had read and explained to the accused. During cross-examination by defence counsel for accused one it was put to Lt Col Mbotho that he did not read the statement back to the accused nor did he give the statement to the accused to read. No version of any assault or coercion to make a statement or pointing out was ever put to Lt Col Mbotho.

[13] **9th State witness: Constable Nhlapo**

He testified to the arrest of accused 1 and Sandile Khumalo on 11 May 2013.
On 16 May 2013, Ernest Shabalala, David Msomi, accused 1 and Sandile Khumalo were in the line-up at a formal identity parade conducted by the police. Sandile Khumalo was pointed out at this parade. He further identified Sandile Khumalo on photo 5, 6, 7 and 8 of Exhibit "H", a photo album of the said parade. Sandile is visible as the person holding number 21 in front of him. This evidence was not contested.

[14] He testified to the arrest of accused 1 and Sandile Khumalo who is now deceased. Both accused 1 and Sandile were informed of their Constitutional Rights which were also explained to them at the scene.
When Accused 1 disputed this evidence, Nhlapo repeated this explanation in Zulu in Court. The correctness of the explanation given by him was not contested.

[15] At the police station, Cst Nhlapo issued both Sandile and accused 1 with official Notice's of Rights. (Exhibit "N" and "O"). As with the first explanation at the scene of arrest, accused 1 indicated that he understands. During cross-examination by his Counsel, accused 1 disputed that Nhlapo explained to him the Rights noted on Exhibit "O".

[16] Accused 1 does not contest that he did indeed sign for and received a Notice of Rights**,** Exhibit "O".

[17] **10th State Witness: W/o Motlaung**

His evidence is discussed at the trial within a trial, he testified in both.

[18] **11th State Witness: Constable Mngomezulu**

He testified to the arrest of accused 2 in KZN on 23 July 2013 as well as certain admissions accused 2 had made to them at the time of the arrest. Such admissions include him telling the arresting officer where he had hid the firearm, that he blamed his other gang members for his arrest as they dropped a firearm in a pool of water at the crime scene and that the white man did not have a lot or any money.

[19] **12th State Witness: Constable Dladla**

He testified to the arrest of accused 2 in KZN on 23 July 2013.

[20] **13th State Witness: ConstableZungu**

He testified to the arrest of accused 2 in KZN on 23 July 2013. He testified that accused 2 said the firearm was with his cousin Siyabonga.

[21 **STATE WITNESSES FOR THE TRIAL WITHIN A TRIAL**

The 1st official witness for the state was Warrant Officer Motloung

He was the first investigating officer. He testified that on 13 May 2013 he had warned accused 1 and the other three detainees of their rights before and after their court appearance. On 15 May 2013 he again warned all the detainees of their rights as they were to attend an identity parade on 16 May

2013. After the parade was held, Motloung again warned accused 1 of his rights, especially his right to silence as accused 1 wanted to convey, what can only be inferred to be incriminating information. This followed after he was informed that Motloung had seen a person on the surveillance footage of the robbery dressed in identical or similar clothing to that the accused was wearing. On 17 May 2013 Motloung again warned accused 1 of his rights prior to the pointing out.

[22] W/O Motloung was appointed as investigating officer in this case. Four suspects were in custody on this date. They were accused 1, Sandile Khumalo, Thabiso Shabalala and David Msomi. When he received the case docket he read the Warning Statements of Sandile Khumalo and accused 1, (Phumlani Ngwane.) The latter's statement was exonerating in nature. Motloung charged the four suspects at which time he explained them their Constitutional Rights. They were taken to the Magistrate's Court where the case was placed on the court roll. At Court, he was given an instruction to hold an identity parade. After their court appearance, he warned them again of their Rights.

[23] He was not alone with accused 1 at any stage on that day. That was also the first day that he had ever seen accused 1. He went to the Shell Garage to view the surveillance footage that was recorded on 10 May 2013.

[24] Motloung returned to the Shell Garage where he again viewed the footage. He realized that the clothing, (in particular the pants and shoes), of one of the suspects visible on the footage, was nearly identical to the clothing accused 1 was wearing at the time he had seen him on 13 May 2013.

[25] He did not see or speak to accused 1 on the 14th of May 2013. On 15 May 2013 Motloung went to the holding cells where he informed and warned all four suspects of an identity parade that was scheduled to be conducted on 16 May 2013. He was not alone with accused 1 on this day. Subsequent to the identity parade, Motloung saw accused 1 in an office used for interviews which is situated in the cell area of the police station. He informed accused 1

of the footage he had viewed in which one of the robbery suspects wore clothing nearly identical to that of the accused. He explained that accused 1 was shocked when he heard this. The accused then spontaneously indicated to Motloung that there is something he wanted to show the witness. He further wanted to explain something to Motloung.

[26] During re-examination by the State, Motloung testified that when he told the accused what he had seen on the video footage, the accused never denied that it was him on the footage.

[27] Motloung stopped the accused from talking any further and explained to him his rights to legal representation and that to silence as the explanation was incriminating in nature. He did this as he was not a commissioned officer. The accused indicated that he understood and that he elects not to have a legal representative present.

[28] Motloung booked the accused back into the cells and went to his commander, Lt Col Mbotho. He explained to Lt Col Mbotho what had happened and that accused 1 wanted to show him something. Lt Col Mbotho arranged for an officer to whom the accused could point out/show that which he wished to show.

[29] Motloung denied that he had assaulted the accused during this interview. He further denied that W/O Raletsemo was present during the interview with the accused. In this regard he explained that Raletsemo had nothing to do with the investigation until he, Motloung became incapacitated to continue with his work. That occurred at the end of July 2013. He does not know to whom the case docket was booked out after he had left work at the end of July 2013. He further denied the allegation that this interview occurred in his office.

[30] During cross-examination by Adv Sidwell, Motloung explained that the reason for the interview that day was to see the reaction of accused 1 when he told him about the footage and the suspect that was similarly clothed as the accused.

[31] It was further put to Motloung that he was supposed to warn the accused prior to telling him of the footage as Motloung must have anticipated that accused 1 might incriminate himself. To this Motloung answered that it is precisely the reason why he had stopped accused 1 from explaining/talking further as he warned him again of his right to silence.

[32] The confiscated clothing was entered into evidence as Exhibit "3". It consisted of a pair of 'tekkies', a pair of denim pants and a tracksuit top. In respect of the alleged assault it was also put to Motloung that *Raletsemo referred to Motloung as Zack. They sprayed a black rubbish bag with some sort of spray. They put the bag over the accused's head which made it impossible for him to breath. Motloung said he wanted the accused to talk as he, the accused, knows the case.*

He was told to stamp his foot three times on the floor when he was ready to talk whilst the bag was over his head. This instruction was given a number of times.
He did stamp his foot on the floor a few times. When the bag was then removed the accused told Motloung and Raletsemo that he knows nothing. The bag was then again placed over his head.
The accused became very tired and weak, he was dazed. Water was then splashed on him.
Motloung then told the accused that he will take the accused to the Garage where the accused can show him what happened. The accused told Motloung that he does not know the scene and or the crimes.
After the water was thrown over the accused, Raletsemo left the office. Another thin man came into the office. Motloung talked to this man.
Motloung told the accused that Sandile had said that the accused had done it. Motloung further told him that he, Motloung would take the accused to the garage and show him where everything happened. Motloung also told the accused that he must say he, (the accused), knows and then Motloung will help the accused to get bail or drop the case against him. When the accused

heard this he agreed. Motloung, the accused and another man then went to the garage.

At the Garage the three of them were standing on the steps of the bridge opposite the Garage. From there Motloung pointed out certain scenes to the accused.

Back at the police cells, Motloung brought him food and said that is what he wanted and that he was trying to help the accused. The accused did not sustain any injuries due to the assault.

When Col Nazo took him for the pointing out on 17 May 2013, the accused did not say anything about the assault because of fear that it would be repeated again. He made the pointing out as a result of the assault.

[33] Motloung denied these allegations of assault and compelled pointing out. On 17 May 2013 W/O Motloung booked accused 1 from the cells and took him to his office prior to the arrival of the officer who was to assist with the pointing out by the accused.

[34] He explained that during this time he had again explained to the accused his Constitutional Rights including the right to legal representation and his right to silence. He did this in order to establish if the accused still wanted to proceed with the pointing out and also to ensure that the accused understood that he was not compelled to make any pointing out should he not want to. He further explained to the accused that whatever he says will be written down and will be used as evidence against him in Court. The accused understood this explanation.

[35] At the time he saw the accused, Motloung did not know the identity of the officer who would assist with the pointing out and or at what time he would arrive.

[36] The witness denied that the accused was assaulted or intimidated during this interview. This followed after it was put to the witness that *on 17 May 2013 he had booked accused 1 out from the cells and took him to his office. There Motloung would have explained to him that he must not tell the officer who*

was to assist with the pointing out that he was assaulted and also that he does the pointing-out out of his free will.

[37] Subsequent to this contact with accused 1, Motloung did not have any further contact with the accused. He later received the pointing out documentation which he filed in the police docket. He confirmed that Sandile Khumalo did not make any pointing out or confession. On 18 May 2013 he confiscated the clothing which accused 1 was wearing subsequent to booking same into the SAP 13 store.

[38] **2nd State Witness Cst Van Wyk**

He took the accused to Nazo and later received the accused from Nazo. He testified that the accused did not complain to him about anything.

[39] **3rd State Witness Cst Masethe**

He was the police photographer who took the photos. He did not see any visible injuries.

[40] **4th State Witness W/O Mokoena**

He was the driver at the time of the pointing out. Accused two did not complain.

[41] **5th Witness Col Nazo**

He testified to the pointing out and the documentation completed by him prior to, during and after the pointing out. From the said documentation, Exhibit “P”, it is noted that Col Nazo did explained and warn accused 1 of his Constitutional Rights. Col Nazo confirmed that he indeed explained the recorded Rights to the accused.

He confirmed that when he saw the accused on 17 May 2013, there were no visible injuries on the accused. The accused said to Nazo he was not assaulted or coerced to make a pointing out. Photographs (Exhibit “R”), taken prior to and after the pointing reveal marks on the face of the accused. Nazo testified that same were explained by the accused as old scars he had sustained during a previous motor vehicle accident.

[42] **6th Witness W/O Raletsemo**

He was only appointed as investigating officer during September 2013. Prior to this date he had nothing to do with the case.

During cross-examination it was put to Raletsemo that after the arrest of accused 1 and during the period between 11 to 17 May 2013, there was one incident when he and Motloung conducted an interview with the accused in the office of Motloung. During this interview, accused 1 was assaulted by Raletsemo and Motloung as they wanted him to tell them about this case. Raletsemo wanted the accused to point out the crime scene. The accused denied any knowledge of the offences. Raletsemo left the office.

Raletsemo denied these allegations. He testified that from 13 May 2013, he was at the Palm Ridge Court where one of the cases he is the investigating officer of, went on trial. This enrollment was indeed confirmed during cross-examination by counsel for accused one as she verified same from the Registrar's file.

[43] **Accused One**

The accused testified that on 11 May 2013 there were approximately 8 people in the room where he was arrested. Sandile Khumalo, Sbu and Vusi were amongst them. The names of Sbu and Vusi were never put to Cst Nhlapo when he was cross-examined.

[44] The accused testified that after the police had entered the room they ordered the occupants to 'hold' the wall. They did not say anything else. However, when Nhlapo was cross-examined, it was put to him that upon entering the room he said: "It is your car downstairs". In further contradiction hereto, the accused further testified that the police never mentioned anything about the motor vehicle outside when they were in the room.

[45] Nhlapo was also confronted with the version that when he entered the room, he had pointed his firearm. This version was not repeated when the accused testified.

The accused testified that he and Sandile were kept in different police vehicles after being removed from room 94. This version was never put to Nhlapo.

[46] The accused testified that Cst Nhlapo, Lt Col Mbotho, W/O Motloung and Col Nazo all lied when they testified to the fact that they had warned the accused of his Constitutional Rights. Therefore all lied except the accused. This version, so it is averred, is, for the reasons as set out infra, inherently so improbable that it cannot be true.

[47] He further testified how he was taken up the steps to the top of the bridge opposite the Garage before being taken half way down the steps again. He explained that he sat on the steps in such a way that his legs were hanging from the stairs. Motloung would then have pointed to him the different directions from which the robbers came including the person who had shot the white man. Motloung said that the shooters name was Ngubane. He also showed the accused where the white man died.
Motloung further indicated to a concrete wall where the white man's car was parked. He further told the accused that one Sibiya, who was the 'frontman' and who had planned the robbery, was standing on the bridge.

[48] After this evidence, the accused indicated that Motloung did not tell him anything else except what he had mentioned in his evidence.
The accused did not confirm his initial version that was put to Motloung that after this visit to the Garage Motloung had brought him food in the cells.
The accused testified that prior to the actual pointing out he was taken to Motloung's office where Motloung had told him that the other person was coming and that he, the accused must do as he had told him. The accused agreed as he was afraid of a further assault. He did the pointing out because Motloung had told him to do so.

PHASE TWO

REASONS FOR JUDGMENT ON THE TRIAL WITHIN A TRIAL

[49] A dispute arose about the admissibility of a pointing out with accompanying statements made by accused 1 on 17 May 2013. The dispute arose due to an allegation by the accused that he was assaulted prior to the pointing out which occurred on 17 May 2013.

[50] The court finds that the pointing out and statements were not a confession but an admission. The said statements do not unequivocally acknowledge accused 1's participation in the robbery and murder, as it does not exclude all other exonerating hypothesis. The actual physical actions of accused 1 in making the pointing out, without an exculpatory explanation, amount to an admission by conduct.[1]

[51] In the trial within a trial the state must prove that the evidence obtained must have been obtained within the corners of our Constitution[2] (especially section 35) and obtained from an accused "freely, voluntarily and without undue influence."[3] And another element that is overlooked, it must have been done whilst an accused is in his sober senses.

[52] The state called six witnesses and the accused testified in his own defence. The state also relied, correctly, on the evidence of Lt-Col Mbotho and constable Nhlapo although they were not called in the trial within a trial as witnesses. The basis for the reliance is the fact that they testified earlier in the main trial.

Concerning this issue, Schutz, J ruled that evidence already gathered in the main trial can be used in the trial within a trial.[4] He said: "It seems to me that it is the misapplication of phrases like 'insulating the inquiry' (*per* Nicholas AJA in *S v De Vries* 1989 (1) SA 228 (A)) and 'a watertight compartment' (*S v*

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[1] *Sheehama*1991 (2) SA 860 (A).

[2] Act 108 of 1996

[3] S v Melani 1996(1) SACR 335 (E) at 339 f-g

[4] *S v Muchindu* 2000 (2) SACR 313 (W)

*Sithebe*1992 (1) SACR 347 (A) at 351*b*) that has led to the error." [5] The judge said:

"If regard could not be had to the evidence already given or admitted in the main trial, the trial-within-the-trial would hang in the air, an unsupported abstraction devoid of setting."[6]

[53] I agree that the trial within a trial is not an isolated trial, the learned judge Schultz, in my opinion correctly and aptly says:" After all, the trial-within-the-trial is but an evidentiary moment, if sometimes a long moment, in a trial."[7]

I ruled that the pointing out was to be admitted based on the following:

1- LEGAL REPRESENTATION

[54] From the Charge Sheet, (Exhibit "S"), it is clear that accused 1 appeared in the Magistrate's Court on 20 May 2013, 3 days after the pointing out. The accused was legally represented by an attorney with the surname Ramos. No complaints of any assault or forced pointing out was reported to the Court on that day or on any of the other 29 Court appearances that followed of which the accused's attorney was at Court on 24 occasions. The accused admitted such omission during cross-examination by the State.

2 - RIGHTS EXPLAINED

[55] If there is one thing that the police at Cleveland could do, then it is reading or telling rights. All state witnesses knew the rights out of their head and could say it better than a nursery rhyme.

At the police station, Cst Nhlapo issued both Sandile and accused 1 with official Notice's of Rights. (Exhibit "N" and "O"). As with the first explanation at the scene of arrest, accused 1 indicated that he understands. Accused one testified he received the notice concerning his rights but it never crossed his mind to read the Notice of Rights. He just took it and placed it in his pocket. He does not even remember what he did with the document. This evidence of

[5] *S v Muchindu* 2000 (2) SACR 313 (W)
[6] *S v Muchindu* 2000 (2) SACR 313 (W)
[7] *S v Muchindu* 2000 (2) SACR 313 (W)

such conduct is inherently improbable in the light of the allegation of the accused that he did nothing wrong and that he did not know why he was arrested. If such a version was indeed true, one would have expected him to do anything in his power to understand why he was detained. The court found him to be a very intelligent person whilst testifying. However, he would be very evasive when he battled with a question put to him.

[56] During cross-examination by his Counsel, accused 1 disputed that Nhlapo explained to him the Rights noted on Exhibit "O". Nhlapo repeated this explanation in Zulu in Court. The correctness of the explanation given by him was not contested. I must remark that I was impressed in the way a constable could recite the rights without looking at any notes.

3 - ASSAULT

[57] W/O/ Motloung testified that him telling the accused on 16 May 2013 about the similar clothing he had seen on the footage of the robbery lead to the accused making a pointing out. Contrary hereto, the accused alleged that the trigger to the pointing out was an assault perpetrated on him by Motloung and Raletsemo.

The truthfulness of Motloung's version of events and his denial of the allegations of assault finds corroboration in the following: The evidence of Raletsemo that he was not present during this interview with the accused as he had no involvement in the investigation at that stage. This evidence finds support in the fact that his explanation, Col Nazo confirmed that the accused made the said pointing out without hesitation but with certainty. The accused never indicated to him that he was assaulted. This evidence was not contested.

The accused made his second Court appearance only 3 days after the pointing out. His attorney, Ramos, was present in Court. No complaint was made or any request to the Magistrate to intervene by way of altering the place of detention or ordering that the accused be medically examined. His claim that the injury under his eye was visible. He therefore even had proof of such an allegation, yet he did not report it to the Court;

[58] It is to be noted that the details of the assault to which the accused testified in his evidence in chief were never put to Motloung or Raletsemo. During cross-examination of the accused by the State, counsel for accused one alleged that the version that the accused did not sustain any injuries was solely in respect of the allegation that a plastic bag was put over his face. This was never put to the witness.

[59] The accused added details of the alleged assault which were never put to the witnesses. This omission, negatively impacts on the credibility and probative value thereof. This, coupled with two years silence, proves that his version of the alleged assault is a recent fabrication.
The accused admitted that he had told Thabiso Shabalala of the assault on him. It would therefore be expected that any injuries and or physical signs would have been visible to Shabalala.

[60] The police photographer who took the photos did not see any visible injuries. The court looked at the photos and could not be convinced that it depicts somebody who was assaulted. There are photos where the face is showed as a close-up photo, if I were the person taking the photos I would not dream that he was assaulted, if I was in charge of the pointing out, and I saw what looked like marks and it was explained that it was old scars, then I would have believed it. Even the photos at the garage do not show one side of the face to be more swollen than the other side. I do not see how the court could rule on the photos that an assault took place.

4 - POINTING OUT NOTES

[61] The contents of paragraph 8 of Exhibit "P", (the pointing out notes) where it is recorded that "I got the information from the investigating officer" was explained by Col Nazo to mean that the Investigating Officer explained to the accused about a pointing out. This accords with the evidence of Motloung in that the latter had warned the accused of his rights prior to the pointing out including the consequences of such a pointing out. The accused's concession that Nazo may have understood that sentence as Nazo testified further corroborates the version of Nazo.

The sentence would have been open for interpreting that Motloung gave the information about the case to the accused, but it is brought to naught when one compares the accused's version and his evidence.

5 - CLOTHING

[62] Motloung had booked the clothing of accused 1 in at the SAP 13 store and presented it to Court thus accepting the risk of being challenged on his observation that the clothing was similar to that of the robber visible on the footage. This conduct and certainty of Motloung, coupled with the fact that there are definite similarities between the shoes and pants, (the shoes have white soles with dark upper side with what can be described as white connecting line on the side which is the Nike sign and dark pants), underscores his honesty and bona fides especially in respect of the events that preceded the pointing out. The similarities exclude any possibility of him having influenced the accused to incriminate himself by using a falsity.

[63] The first accused admitted during cross-examination that Motloung did tell him about his clothing being visible on the footage. There is nothing inherently wrong when a policeman gathers evidence from an accused. But the accused had a chance to hand over his clothes, and as the State put it he could have said: "I am telling you, you are making a mistake".

6 - SANDILE KHUMALO AS ALIBI WITNESS

[64] The accused testified that he was assaulted mainly because he denied any knowledge about the offence. In this regard it is important to note that on his own version he was 'babalas' on 11 May 2013 at the time of his arrest as he and Sandile were drinking at the Kwadlamini Tavern from the previous evening until the early morning hours. Sandile was an alibi witness of the accused. This fact was confirmed by the accused during cross-examination by the State. Sandile was arrested and detained with the accused. He made an exonerating statement which did not include any reference to any drinking session with accused 1 at the Kwadlamini Tavern as part of an alibi.

Accused 1 never told Lt Col Mbotho or Motloung about his alibi which could have been verified by Sandile who was also in custody. Such disclosure

would have surely prevented the alleged assault, hence the inevitable inference that such assault never occurred.

The state has a valid point by arguing that although accused 1 alleges that Sandile was allegedly assaulted at the time of his arrest, such alleged assault did not result in a fabricated confession or pointing out. The state is correct to say this proves that accused 1 was never assaulted and that he did indeed make the pointing out freely and from his own knowledge.

7 - COACHING BY W/O MOTLOUNG

[65] The accused testified in chief that Motloung had showed him from what directions the robbers came. He never mentioned the name Vusi and only referred to the shooter as Ngubane. However, the accused told Nazo that Vusi pulled out a firearm and cocked it as they approached the white man. The two struggled for the gun. This information originated from the accused's own knowledge.

In his evidence in chief the accused did not testify about any information given to him by Motloung as to what happened with the bags with laptops and the Galaxy phone of the deceased during and after the robbery, however in the pointing out notes it is recorded that the accused explained that after the shooting Vusi had taken same. Yet again it cannot but be inferred that this information came from the accused's own knowledge.

The accused never testified to the exact instructions Motloung would have given him in making the pointing out as these facts only came to light during cross-examination by the State.

8 - EVIDENCE NEVER PUT TO WITNESSES

[66] The following evidence of the accused was never put to Motloung or Raletsemo:

The accused, for the first time in the trial within the trial alleged that the assault was the cause of the injury under his right eye. In this regard Nazo testified that the accused had told him that the marks of old injuries on his face were as a result of a motor vehicle accident. This evidence was not disputed. During cross-examination by the State, the accused further added to his second version that he only told Nazo about the old scars and not the

injury under his right eye. The accused admitted that he did not tell Nazo about the assault or that Motloung coached him to make the pointing out as he was afraid of further assaults.

9 - CONCLUSIONS

[67] The State witnesses were consistent when testifying. Their evidence is without any material contradictions or improbabilities. They corroborated each other in all material respects. They testified with confidence and made a good impression when testifying.

The same cannot be said about accused 1. He was evasive as witness. He also added to versions and he changed his versions without explanations or with feeble explanations. The state proved its case beyond reasonable doubt.

PHASE THREE

ADMISSION OF EVIDENCE IN TERMS OF THE PROVISIONS OF SECTION 3 OF ACT 45 OF 1988

[68] The court ruled that the statement made by Sandile Khumalo be allowed as evidence. He is deceased but was also a co-accused. He was arrested on 11 May 2013 and thereafter made a statement to Col Mbotho. In the said statement he explained that he was indeed the driver of the Red Aveo and that he had gone to the Shell Garage at the request of Vusi, who had also since passed away. The statement of Sandile is exonerating in nature.

The court however, said that the probative value was still to be ascertained.

[69] The following were the reasons for allowing the evidence:

INTERESTS OF JUSTICE AS RATIONALE FOR THE APPLICATION OF SECTION 3(1) OF THE LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988

1. The interests of justice includes the expectation that those guilty, be convicted and those not guilty, be acquitted.

2. In more practical terms that the interests of justice typifies a variable that occupies the one scale of justice *viz a viz* the interests and rights of an accused person. Upon the mere establishment of each, inevitable mutual exertion of influence is bound to follow.
   Key v Attorney General, Cape Provincial Division 1996 (2) SACR 113 (CC).

[70] **<u>The court looked at the factors which the said act prescribes in section 3:</u>**

(i) The nature of the proceedings: The current matter is a criminal case.

(ii) The nature of the evidence: The statement of Sandile could confirm the reliability and therefore the accuracy of Mr. Thethane's observation ability and his identification of Sandile as driver of the 'get-away' car. The statement of Sandile was taken down by Col Mbotho at 10h20 on 11 May 2013, thus approximately 16 hours after the robbery and shooting of the deceased.

(iii) The purpose for which the evidence is tendered: The purpose for the application for the admission of the statement is aimed at rendering corroboration for the accuracy of Gabriel's identification of Sandile as driver of the 'get-away' car and also to be considered in respect of the reliability and therefore the accuracy of Mr. Thethane's observation ability pertaining to his identification of accused 2 as the shooter.

(iv) The probative value of the evidence: The credibility and reliability of the statement made by Sandile finds material corroboration in: The uncontested evidence of Ernest Thabiso Shabalala that Sandile was the driver of a red car when he brought the laptops to Shabalala on 10 May 2013 to be sold; The uncontested evidence of Cst Pretorius and Raletsemo proving that the laptop sold by Sandile on 10 May 2013, which was recovered from David Msomi belonged to the deceased; The statement of accused 1, Exhibit "K", implicating Sandile as the driver of the red Aveo when they came from KZN shortly before the robbery and murder.

(v) The possibility of prejudice: the admission of hearsay evidence will always be prejudicial to the party against whom it is allowed, because

the source of the evidence is not present to be cross examined. But as the author is deceased, one should make room for this.

(vi) Any other factor: The court took into account the fact that Sandile appeared in court and it was never put on record by him or his lawyer that he suspected foul play or that he was assaulted. He was satisfied that he distanced himself from the crime. Yet he fully knew, being caught with the Aveo whose details came from an eyewitness, that he was linked to the crime scene.

[71] The considerations contained in section 3(1)(c) of the Act, and the interests of justice made the court admit the statement of Sandile in order to corroborate the accuracy and reliability of the identifying evidence of Mr. Thethane.

[72] **PROBATIVE VALUE AS OF THIS DAY**

Today in this judgment the court will not make use of the statement. The reason being that since the court allowed the statement, the Constitutional Court has also ruled that extra curial statements from one accused are inadmissible against other accused. The state reasons that this is not the case as the statement is merely corroboration for evidence given by witnesses. I also was of the same view, hence the reasons given above under (iv).

[73] Yet what the state confirmed is that Sandile was a co-accused. He is not one anymore. What would have been the position if he was a section 204 witness? At least then he could have been cross-examined. But he stands as a co-accused, if he was alive then it would not have been used against any accused even if the court ruled it to be admissible. At the very worst for the co-accused he could have testified against or for them!

[74] In 2014 the Supreme Court of Appeal made it clear that admissions should be treated as confessions.[8] The court expressed itself as follows:[9]

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[8] *S v Litako and others*2014 (2) SACR 431 (SCA)

[9] *S v Litako*, par 53, 54

"In *S v Ralukukwe*2006 (2) SACR 394 (SCA) this court thought it important to draw a distinction between admissions and confessions, reasoning that s 219A, referred to above, did not in express terms bar the use of admissions by an accused against his co-accused. Section 219A was contrasted with s 219 which expressly forbade the use of a confession by one person against another."

[75] It is not immediately apparent on what basis such a distinction can be drawn. As we have shown with reference to the earlier authorities, no such distinction existed at common law. Moreover, s 219A in terms provides that: '(E)vidence of any admission made extra-judicially by *any person* in relation to the commission of an offence shall . . . be admissible in evidence against *him.*' [Our emphasis.] Quite clearly the 'any person' and 'him' refer to one and the same person — the maker of the statement. Thus, although there is no statutory bar as with a confession, the legislature, consistent with the common law, albeit less emphatically, has secured the same protection in s 219A for a co-accused in respect of an admission as it did in respect of a confession."

[76] The Constitutional Court per Theron, J.A. has now confirmed that extra-curial admissions of an accused are inadmissible against co accused.[10] It was held that it could not be admissible in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. The court concluded: "The common law position before *Ndhlovu,* that extra-curial statements against co-accused are inadmissible, must be restored. Admitting extra-curial admissions against a co-accused unjustifiably offends against the right to equality before the law."

[77] Theron, J.A. did not make a ruling on the "Common law exception". The common law exception was only touched upon.[11] In par 39 and 40 the remarks are as follows: "At common law, there is an exception to the exclusion of extra-curial statements of co-accused: if the statement

[10] *Mhlongo v S; Nkosi v S* [2015] ZACC 19

[11] *Mhlongo v S; Nkosi v S* [2015] ZACC 19 at par 39 and 40

constitutes an “executive statement” by an accused, it may be admissible against a co-accused if it was made in furtherance of a common purpose or conspiracy. There must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account. The State would have us pronounce on whether this common law exception survives a finding of constitutional invalidity of the admissibility of extra-curial statements of an accused against a co-accused. It is not necessary to determine this issue. The facts do not arise. The extra curial statements here were not “executive” in nature, as conceded by the State, and would not fall under this exception. Determining this matter without any factual matrix to guide our understanding is unnecessary and undesirable. This question was not fully ventilated before us and we thus have insufficient information to make a determination in that regard.”[12]

[78] Hoffmann and Zeffertt[13] explain this by distinguishing between two types of statements that relate to common purpose. These are “executive statements” and “narrative statements”. The former are made in furtherance of a common purpose and are admissible evidence against a co-accused while the latter are an account or an admission of a past event. Narrative statements are not admissible against a co-accused because admissions in general are not vicariously admissible but may be admissible against the person making them. In other words in order to be admissible, the statement needs to form part of the acts done in the commission of the crime.

The conclusion therefore is that the evidence in the trial within a trial can only be allowed against the accused person and not his co-accused.

PHASE FOUR

JUDGMENT

[79] The accused are arraigned in the High Court on four counts as set out in the indictment. The accused pleaded not guilty to all the counts. In his plea

[12] *Mhlongo v S; Nkosi v S* [2015] ZACC 19 at par 39 and 40

[13] *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 190

explanation, accused 1 denied that he was at the crime scene on 10 May 2013. He also denied any knowledge of the crime. Accused 1 further alleged that on the said date he was at the Kwadlamini Tavern from the late afternoon until that night. He also denied the allegations of unlawful possession of firearms and or ammunition.

In his plea explanation, accused 2 did not deny that the alleged offences were committed. He however denied any involvement in such offences. He further proffered an alibi by alleging that he was in Kwa-Zulu Natal on the 10th of May 2013.

[80] Both accused made certain formal admissions in terms of the provisions of section 220 of Act 51 of 1997, which are recorded in Exhibit "A". At the end of the trial accused 1 made a further admission which was recorded on Exhibit "AA".

[81] Both accused were legally represented throughout the trial. The main point of dispute is the identity of the perpetrators who accosted, robbed and shot the deceased as it is common cause, especially from the evidence given by the first witness, Mr T Pablowitz whose evidence was not challenged. The evidence presented by him and by surveillance renders it beyond dispute that the three attackers visible on the surveillance footage, acted in the furtherance of a prior agreement to commit the crime of robbery with aggravating circumstances with the foreseen ability that such actions could result in the further perpetration of murder as set out in the indictment, alternatively that they acted in the furtherance and or in the execution of a common purpose.

[82] The Court must make a value judgment about the footage. The Court cannot but agree with Van Dijkhorst J, who was particularly alive to the fallibility of human memory when he commented on the value of video footage, in the matter of *S v Baleka and Others* (1) 1986 (4) SA 192 (T), when he remarked as follows: *"…it does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness's recollection, even more so. The best word artist cannot draw his verbal picture as accurately and as*

clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself."

In this case before the court, the video footage confirmed the methods used by the robbers, the onlookers, the perpetrators. In years to come security cameras will be upgraded so that by zooming in one would be one hundred percent sure about the identity of those depicted on the cameras.

[83] Although the admissibility of Exhibit "1" and "2" was not contested, the evidence of T Pablowitz and Mr. Thethane were presented in order to authenticate the footage and photographs. Such authentication, occurred in accordance with the principles governing the admission of real evidence as set out in *S v Mdlongwa* 2010 (2) SACR 419 (SCA) at 424 [14].

[84] The accused testified in their own defence. Accused two called one witness. The state called 13 witnesses in the main trial.

[85] The state relied on identification witnesses. Concerning this, one should bear in mind what was said in *S v Mehlape* 1963 (2) SA 29 (A)

"In a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification. The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combinations of factors which may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely bona fide and honest. It is necessary, however, for the court to be properly satisfied in a criminal case on both these aspects. If, in regard to a question of identification, any reasonable possibility of error in identity has not been eliminated by the end of a criminal case, it could clearly not be said that the State has proved its case beyond reasonable doubt."

Evidence concerning accused number one

The Pointing out

[86] The Court found the evidence of the pointing out made by accused one to be legit. The accused pointed out the direction from which he and Vusi came before Vusi accosted the deceased. He also showed Nazo from where Ngubane came before firing at the deceased. He further indicated where the deceased's vehicle was parked.

In explaining the pointing-out he explained that he was with Vusi when they approached the deceased. Vusi cocked his firearm before the deceased grabbed him and they struggled for the firearm. Ngubane arrived and shot the deceased. Vusi grabbed the bags and they ran to the car that was driven by Sandile. The person who planned the robbery, Sibiya was standing on the bridge. Accused one gave detailed descriptions of the place and people at the scene as follows: Accused 1 pointed on the ground and towards the West when stating: *"We came from this direction".* On a question from Col Nazo, accused 1 added that it was *"myself and Vusi."* (See: Photo 11 of Exhibit "R" and Exhibit "P").

[87] From the screen prints of Cam 12 and 5 of Exhibit "2", it is clear that the first two perpetrators did in fact approach the deceased from the side street adjacent to the Garage as was pointed out by accused 1. Accused 1 indicated that *"Ngubane came from that side."* (See Exhibit "R", photo 12). He further stated that "Ngubane *shot the white man whilst he and Vusi were still on the ground as the white man was struggling with Vusi*."

[88] **Corroboration as to Accused number one's pointing out**

The pointing out is seen as an admission. Accused number one's pointing out is corroborated and confirmed in the following evidence:

1st corroboration: The direction from which 'Ngubane' came as pointed out by accused 1 finds corroboration in footage contained in Cam 12 and 5 of Exhibit "2" .

2nd corroboration: The identification of 'Ngubane' as referred to by accused 1 finds corroboration in the evidence of Siyabonga Ngubane who identified

accused 2, (Innocent Ngubane) as the person depicted on the footage as the shooter. He further testified that accused 2 hid the murder weapon in the ceiling near his room in the Denver Hostel on 10 May 2013 at approximately 20:00.

[89] 3rd corroboration: Mr. Gabriel Thethane corroborates the statement of accused 1 in that he identified accused 2 at an identity parade held on 16 November 2013, as the shooter.

[90] 4th corroboration: The statement of accused 1 that "”Ngubane' shot the *'white man'*, finds conclusive corroboration in the Ballistic Reports proving that the spent cartridges found at the crime scene were fired from the firearm accused 2 had hid in the ceiling near Siyabonga's room at the Denver Hostel on 10 May 2013.

[91] 5th Corroboration: Accused 1 pointed the place where the deceased's vehicle was parked as per photo 13 of Exhibit "R". This pointing–out is corroborated by the footage visible on Cam 13, Exhibit "2".

6th Corroboration: The correctness of the footage and therefore the positioning of the vehicle of the deceased were further confirmed by Mr. Thethane.

[92] 7th Corroboration: Accused 1's explanation that "*He came from the shop and as he opened the back of the car to load two bags he was carrying, Vusi took out the firearm, cocked it as we approached him, the white man turned and charged at Vusi, they struggled for the firearm (handgun) and both fell on the ground here..",* is similarly corroborated by the footage contained on Cam 13 on Exhibit "2". The footage contained on Cam 5 clearly shows how "Vusi", pulled out a firearm prior to the altercation with the deceased.

8th Corroboration: Accused 1's explanation that Vusi was armed is further corroborated by the fact that a pistol was indeed found in the pool of water where the deceased had overpowered Vusi. This pistol is depicted in photo 7 and 8 of the Crime Scene Album, Exhibit "C".

[93] 9th Corroboration: The explanation of accused 1 implicating Ngubane as the only shooter, so it is averred, finds conclusive corroboration in the fact that the two spent cartridges that were found on the crime scene, were linked to the firearm accused 2, Innocent Ngubane, hid in the ceiling near room 60 at the Denver Hostel after the shooting. No ballistic evidence was found in order to link the firearm that was found in the pool of water, thus the firearm Vusi possessed.

[94] 10th Corroboration: By way of inferential reasoning coupled with the footage as contained in Exhibit "2", it is clear that Vusi did not fire any shots, thus rendering the version of accused 1 that Ngubane fired shots true.
11th Corroboration: Accused 1 explained that after the shooting, *"Vusi woke up, went to the car and took the two bags the white man was carrying".* This statement is corroborated by the footage contained on Cam 5 of Exhibit ""2", of which screen prints are attached hereto, which clearly depicts the correctness of the statement of accused 1.

[95] 12th Corroboration: Accused 1's statement that after Vusi had removed the bags they ran *"to where our get-away car was waiting, it was driven by Sandile Khumalo".* This statement is corroborated by the footage contained on Cam 6 of Exhibit "2" which clearly shows accused 1 and Vusi running away whilst each one is carrying a black bag. Cam 16B of Exhibit "2" depicts the 'get-away' car and two people getting in to same.
13th Corroboration: Mr. Thethane's evidence that he had seen the suspects entering into the "get-away" car which was driven by the person he later identified, to wit, Sandile Khumalo, further corroborates this statement of accused 1.

[96] 14th Corroboration: Thabiso Shabalala's evidence that on 10 May 2013 at approximately 20:00 he had received two black bags with laptops from Sandile Khumalo in order to find a buyer to sell to, so it is averred, conclusively establishes the correctness of accused 1's statement.

[97] 15th Corroboration: Accused 1 pointed out the place where the "*white man"* and Vusi fought as per photo 14 of Exhibit "R". This pointing-out corresponds with the footage contained on Cam 5 of Exhibit "2".

[98] 16th Corroboration: Accused 1's admission that he was in the company of Vusi at the time of the robbery and shooting, finds corroboration in the fact that the shoes and pants confiscated from accused 1, resemble similar colors as that visible on the footage. The trousers are dark grey in color and the shoes are dark on top with white soles.

The court again confirms that the court itself, could clearly see the similarities of the clothes and shoes. It does not take an expert to see this. However, if the footage was the only means of identifying the accused and if the clothes were not handed in as an exhibit, then the state would have had difficulty on proving its case based solely on the footage.

[99] The conclusion is clear: Accused one knew what happened as he was there. The court is also at liberty to find that his evidence of the pointing out is corroborated at least 15 times.

Accused one was on his own version also in the company of Sandile after the robbery as they were drinking at the Kwadlamini Tavern on the evening of 10 May 2013 until the morning hours of 11 May 2013. This as it was put to Nhlapo that he and Sandile were still 'babalas' at the time of his arrest.

Accused one contradicted his earlier version as he later alleged that he only saw the red car on the Wednesday of their arrival and when he was arrested.

[100] The accused testified that he sought to come to Johannesburg to see the city as he had never been here before. This version of the accused is inherently so improbable that it cannot be true. Contrary to what is submitted to be expected conduct of a tourist, the accused further had great difficulty in explaining what he had seen and where he had been to when he allegedly joined Sbu and Vusi on a tour of Johannesburg on 10 May 2013.

[101] On 16 May 2013, thus prior to the pointing-out, Motloung told the accused about the similarities between the clothing of one of the robber's visible on the

surveillance footage and that the accused was wearing. Motloung testified that the accused was shocked and that he did not deny that it was him on the footage. The accused then started to make a report to Motloung which was incriminating. The fact that the accused was shocked and made no attempt to deny that there were similarities and or deny that it was indeed him on the footage, amounts to an admission by conduct. *Nombewu* 1996 (2) SACR 396 (E); *Qolo* 1965 (1) SA 714 (A)).

[102] The accused remained silent for two years before disclosing that he had an alibi. The version of the accused does not refer to specific times as to when he arrived at the Tavern and when he left.

Ernest Shabalala testified that on 10 May 2013 from approximately 15:00 until Sandile arrived at approximately 20:00, he was outside the Kwadlamini Tavern. This evidence was not contested. He did not see accused 1 at the Tavern. This evidence of Shabalala was similarly not contested. Based on these facts it means that accused 1 could not have been in the company of Sandile at the Kwadlamini Tavern before 20:00 on 10 May 2013. As the robbery occurred at approximately at 17:50, the accused is therefore left with no version as to his whereabouts at that time as Shabalala did not see him at the Tavern from his arrival at 15:00.

[103] The fact that Shabalala was detained with accused 1 from 11 May 2013 renders it impossible that if he had seen accused 1 at the Tavern he would not have recognized him. At the end of the State's case, the accused realized this impairment. He attempted to rectify the problem by materially amending his evidence. He now alleged that he was at the tavern with one Sbu and Vusi from a time after 16h00. Sandile now only arrived between 20h00 and 21h00. Shabalala was a credible witness. He at no stage implicated accused 1 or 2 in any way. In this regard it is also significant to note that when Shabalala was cross-examined by counsel for accused 1, the version that accused 1 was at the tavern was never put to him.

[104] <u>The alibi is false for the following reasons:</u>

One: he never disclosed his alibi (the new and amended version thereof), to Constable Nhlapo, the arresting officer and Col Mbotho who had taken his Warning Statement, Exhibit "K" on 11 May 2013.

Two: The accused alleged that Sbu and Vusi were also in the room where Nhlapo had arrested him and Sandile. Lt Col Mbotho was also never requested to get someone to collect Sbu and or Vusi in order to verify his alibi as they were available in room 94 of the Denver Hostel.

Three: He also made no attempt to tell Motloung on 13 May 2013 prior going to court. His alibi witness, (on his initial version), Sandile Khumalo was also arrested and therefore available at all times to confirm the truth of the alibi.

[105] The state witnesses implicating accused one were reliable, honest and truthful. They had no reason to falsely implicate accused one. The same cannot be said, I already gave an opinion about accused one's trustworthiness and again confirm that he is a liar.

[106] **<u>The case against Accused Two</u>**

Accused two had been identified at an I.D. parade by Siyabonga Ngubane. Mr. Ngubane linked accused two with the murder weapon within less than 3 hours after the robbery when testifying that accused 2 hid the firearm in the ceiling at or near his room at the Denver Hostel on 10 May 2013. The same witness, who is a relative of accused 2 identified accused 2 on the video footage contained in Exhibit "2" as the shooter.

This identification is based on the fact that he knows accused 2 and even the way he walks too, very well. He further identified the cap the shooter is seen wearing on the footage as the same cap the accused was wearing on 10 May 2013. He knows this cap as accused 2 had worn it before.

[107] Mr. Siyabonga Ngubane and Thethane corroborated and supported one another as far as the identity of Accused two is concerned. Mr. Siyabonga Ngubane had no conflict with the accused, only during cross-examination did accused two allege that there was indeed conflict between him and Mr. Siyabonga Ngubane due to the sale of two puppies for which the latter wanted

his money back. A new version for which he could not give an explanation why this version was never put to Siyabonga.

[108] Accused two initially testified that he was never in Johannesburg before his arrest. This version was later amended in a contradictory manner when he explained that when he came to Johannesburg driving a taxi, he would stay in Vosloorus. This evidence fully corroborates the evidence of Mr. Siyabonga Ngubane when he testified the accused had told him that he stayed in Vosloorus.

[109] Mr. Thethane identified accused 2 at an identity parade that was held on 16 November 2013 as the person who had shot the deceased. The integrity of the parade was not contested.

What was contested is the fact that Thethane in a previous statement shortly after the murder, said that he would not be able to identify the accused. Yet this stands in contrast to how he explained that the conditions prevailing at the time were good thus enabling him to see well. There were lights which were shining whilst he saw the shooter from a relatively short distance. This evidence was not contested.

[110] The court finds that Thethane was an honest witness. He indicated that he cannot identify any of the other two robbers who had entered the premises on foot. This evidence accords with the fact that accused 1 was also at the first parade where Mr. Thethane only identified the late Sandile Khumalo.

[111] Statement by Mr. Thethane

Why would Mr. Thethane say in a statement that he would not be able to identify the accused if he then did it? My impression from the video footage is that there were enough lights on, it was not pitch dark yet, the garage is well lit, he had ample time to observe, it was a traumatic event. Mr. Thethane is a very clever man who acts swiftly and calmly in times of danger. The video footage speaks for itself, he observed, watched, took the number down calmly. He did not panic as the other petrol attendants did, they rushed to the

deceased and backed off, we do not see one attendant trying to save his life, alternatively they could have thought that it was to no avail.

[112] The court is mindful that eyewitness memory is vital and unless contradict, proved to be false, it is valuable to draw inferences. Memory is a constitutive process involving a complex retrieval system sampling an extensive knowledge base. It has also been established that "Quite often the original "eye-witness" of today himself trims the story to its bare essentials; and at other times (a most important matter) the one who first writes it down, keeping an eye on his space, trims it." [14]

[113] There are some specific conclusions that can be drawn from the study of recollective memory by psychologists. The following factors seem to be important:[15]

1) Unique or unusual event. The common notion is that such events are more likely to be remembered. The unexpectedness of the event makes it more memorable.

2) Event that is important to a specific person. What we forget is the trivial and the insignificant which might not be insignificant for other people.

3) An event in which a person is emotionally involved. However, evidence on the effect of emotion on memory is in fact quite complex.

4) Dating: There is much evidence that collective memories exclude absolute time information from most events. A typical recollection will include information on location, actions, persons, emotions, and the time of day but the recollection of dates are very uncommon. If people wish to date these memories, they usually do so by inference from other information that the memory does contain.

S v Bruiners 1998 (2) SACR 432 (SE), compelling an analyses of the purpose of such statements, its nature, their impairments and the manner in which same ought to be assessed.

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[14] Glason, T F "The Place of the Anecdote,"32 (1981) p 145.

[15] Brewer, "What is recollective memory?" at p 39 in D.C. Rubin, ed., "Remembering our Past". (p86), Cambridge University Press, 1996

[114] The purpose of a police statement is to obtain details of an alleged offence enabling a decision whether or not to institute a prosecution. The police statement of a witness is not intended to be a precursor to that witness' evidence in court; such statements are usually taken down in a language other than the mother tongue of the deponent or the officer recording same. The contents of the statements do not resemble the *ipse dixit* of the later evidence of the witness and therefore constitutes a mere summary of events. The statement is not taken down whilst the witness is under cross-examination, therefore explaining why it is not surprising that oral evidence would often differ from that contained in a statement.

[115] If I now test the above with the contents of two statements Mr. Thethane had made to the police, both statements were recorded in English, then in the first Statement: 11 May 2013 It is noted in paragraph 6 of the statement that *"I won't be able to identify the suspects because there was dark outside".*

The witness was cross-examined at length in respect of this sentence as he had identified accused 2 as the shooter at an identity parade on 16 November 2013, thus approximately 6 months after having signed the above statement. Mr. Thethane denied that he had told the police officer who took down the statement that he cannot identify the suspects. He testified that he in fact told the officer that he can identify the suspect(s). Although he signed the statement, he denied that the statement was ever read back to him or that it was given to him to read.

[116] During re-examination it was confirmed that Mr. Thethane is Pedi speaking and the officer who took the statement was Zulu speaking. They communicated in Pedi. No interpreter was used in the taking down of the said statement.

[117] A further point of dispute arose from the contents of paragraph 3 of the statement in which it is noted that: *"I then suddenly saw two other suspects coming also and I heard a sound of a gun"*. In his evidence in chief, Mr Thethane testified that he had heard 2 gunshots. He was confronted by

counsel for accused two with this aspect as an alleged contradiction in his version *vis a vis* the contents of his statement.

[118] Gabriel's denial that he had told the police officer who took the first statement that *"I won't be able to identify the suspects because there was dark outside"*, cannot be faulted as the Zulu speaking officer conversed in Pedi with Mr. Thethane with no interpreter. Cst Ndlovu who testified for the defence admitted that no interpreter was used. He further admitted that he made a mistake in respect of the true meaning of the description of what the deceased had done with the two laptop bags. On his evidence, so it is averred, it cannot be excluded those language barriers might have caused a recording in error.

[119] During cross-examination Mr. Thethane was asked a question as to why he would sign a document if he did not know the contents thereof. Mr. Thethane explained that he was convinced that what the police officer recorded was correct.

[120] Gabriel's identification of Sandile and later accused 2, finds material corroboration in the evidence of other witnesses not related to him. This fact, renders sufficient support for the truthfulness of his version that he did in fact tell the police officer who took down his first statement that he can identify the suspects.

[121] I found Mr Thethane to be an honest and reliable witness, never hesitating and being open and frank in answering questions, this apparent contradiction can only be put at the police officer's feet.
Weinkove AJ, in *Johnson v Road Accident Fund* 2001 (1) SA 307 (C) at 310H 311E gives a superb summary:

"The real test of truth does not lie in a comparison between what the witness is alleged to have told someone else and what he now tells the Court. What a witness is alleged to have told someone else leaves room for misstatements, misunderstandings and misconstructions. The statement, however carefully

drafted, can never be as reliable as listening to the ipsissima verba of the witness himself. Signing or otherwise confirming the content of a previous statement does not remove the inherent deficiencies of the hearsay nature of the evidence and all its other inherent faults. The best test of the accuracy and truth of what a witness says lies in an independent assessment of his actually spoken words. It lies in the Court's ability to observe and note any degree of hesitancy or uncertainty which may or may not attend upon a concession by the witness or his affirmation of a given fact. Ultimately this Court is the trier of facts of the case and the credibility of a witness does not entirely depend on the score he may achieve in testing inconsistencies between what he now says and what someone else says he told them."

[122] I found accused two to be an evasive witness, changing his version as was very clear from saying that "me and Siyabonga don't get along in the family", only when cross examined by the state. He even stated that if Siyabonga said they grew up together, then he is lying. Also, his evidence that Siyabonga would frame him for the firearm just because they had a row about puppies, cannot stand.

[123] Mr. Siyabonga Ngubane was an honest witness. No lies came from his lips. Mr. Thethane who identified the accused was an honest witness. The same cannot be said about accused two. He was evasive and at some stages confrontational. His versions are impaired by material contradictions, amendments and improbabilities.

The state proved its case beyond all reasonable doubt.

[124] **COMMON PURPOSE**

Can it be said that both the accused at all times relevant to the offences, acted with the co-accused as well as the late Vusi Khumalo and Sandile Khumalo in the furtherance of a common purpose to rob the deceased with the foreseeability that shots may be fired which will cause injury or death to the deceased?

[125] The common purpose is clear from the footage as contained on Exhibit "2":

One: The first two robbers approached the deceased directly just as he was busy loading the laptops in the boot of his car.

Two: The usage of a getaway car.

Three: The robbers did not intend to go to the cash office but went straight for the deceased.

Four: The robbers targeted the bags.

Five: The robbers ran away after the shots were fired.

Six: The robbers clearly worked together, they worked together to overpower the deceased and did not hesitate to use force and the second armed carrier came in to help.

The only conclusion is that the robbers worked together with a common purpose. The robbery was pre-planned.

[126] ***DOLUS EVENTUALIS***

Dolus eventualis in relation to murder is present where the accused, without an actual intent to kill, but foreseeing the real possibility of his or her act resulting in death to another, persists in it, reckless of whether death ensues or not. The multiple aspects of this form of intention have been described as: Subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another. Persistence in such conduct, despite such foresight. An insensitive recklessness (which has nothing in common with *culpa*). The conscious taking of the risk of resultant death, not caring whether it ensues or not. The absence of actual intent to kill". *S v De Bruyn* 1968 4 All SA 211 (A); 1968 4 SA 498 (A).

[127] Accused 1 did in fact foresee and reconciled himself with the deadly consequence that should the firearms possessed by Vusi and accused 2 be used during the robbery, hence the inference that he acted with *dolus eventualis* in respect of the murder of the deceased.

Accused two fired the shots as is clear from the video footage and evidence. He intended to kill.

[128] **UNLAWFUL POSSESSION OF FIREARMS AND AMMUNITION**

The admitted ballistic Reports in respect of the two recovered firearms, Exhibit "D" and "E", so it is averred, proves beyond all doubt that the two firearms are indeed firearms as defined in section 1 of the firearms Control Act, Act 60 of 2000.

[129] The robbery was pre-planned with each robber having a specific role, which included firearm carriers, back-up support and 'get-away' driver, this means that each robber was aware of his role and that of his co-perpetrators. Accused 1 must have known that Vusi and accused 2 were armed. Considering the detail of planning done prior to the robbery, accused 1 must have agreed to an arrangement that Vusi and accused 2 would possess the firearms on behalf of the group and themselves prior to, during and after the robbery.

[130] I follow the reasoning in *S v Mtsweni* 1985 (1) SA 590 (A) at 594B-D where *Smallberge*r AJA dealt with the difference between inference and speculating by referring to the remarks of Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 722at 733 which was quoted in *S v Essack and Another* 1974 (1) SA 1 (A) at 16D, when he stated *that "there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."*

[131] The requirements for joint possession of the firearms as were set out in *S v Mbuli* 2003 (1) SACR 97 (SCA) by Nugent J.A. at paragraph 71: What is prohibited by both those sections is the existence of a state of affairs (ie having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if

they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case.

[132] Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view, Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in *S v Nkosi* 1998 (1) SACR 284 (W) at 286*h* - *i*:

'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that: *(a)* the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and *(b)* the actual detentors had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.'

[133] **The Court makes the following order:**

1. Accused one and two are found guilty of the following charges:

    1.1. Count 1 - Robbery with aggravating circumstances;

1.2. Count 2 – Murder;

1.3. Count 3 – Contravention of section 4 of the Firearms Control Act - Unlawful possession of a firearm;

1.4. Count 4 – Contravention of section 9 of the Firearms Control Act – Unlawful possession of ammunition.

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M KLEIN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the State: Adv D Van Wyk

Counsel for accused 1: Adv G Sidwell

Counsel for accused 2: Adv J Penton

Date of Hearing: 14 April 2015

Date of Judgment:21 July 2015