HIGH COURT
(BISHO)

CASE No. 57/2003

THE STATE

versus

SIMPHIWE NIVATHI	**Accused No. 1**
NQABA MABHOZA	**Accused No. 2**
VUSUMZI MSUTHU	**Accused No. 3**
MAKWENKWE SONYASHE	**Accused No. 4**

JUDGMENT

EBRAHIM J:

1. In this trial I have been sitting with an assessor, Mr William Toni Qinisile. The four accused are charged with one count of murder, one count of robbery with aggravating circumstances, one count of rape and one count of kidnapping. All the accused pleaded not guilty to each of the charges and confirmed in terms of s 115(1) of the Criminal Procedure Act 51 of 1977 ('the CPA') that they were not disclosing the basis of their defence to any of the charges.

2. Mr Lalla, who appears for accused no. 1, made a number of admissions in terms of s 220 of the CPA. These are set out in a document signed by accused no. 1 and is Exhibit 'A'. The admissions confirm, firstly, the identity of the deceased as Lydia Mankwete; secondly, that she sustained multiple

injuries in an incident on 3 September 2002 and did not sustain any further injuries until Dr D T John, the district surgeon, performed a post-mortem examination on her on 5 September 2002; thirdly, that the deceased died as a result of these injuries which were reflected in the post-mortem report compiled by Dr John; and finally, it was admitted that the contents of the report of the medico-legal post-mortem examination were correct. The report itself was tendered in evidence by Mr Lalla and is Exhibit 'B'. Mr Gabelana, who appears for accused no. 2, made similar admissions in terms of s 220 and the document, duly signed by accused no. 2, is Exhibit 'C'. Mr Manjezi, who appears for accused no. 3, also made similar admissions in terms of s 220 and the document, duly signed by accused no. 3, is Exhibit 'D'. Mr Mazwi, who appears for accused no. 4, likewise made similar admissions in terms of s 220 and the document, duly signed by accused no. 4, is Exhibit 'E'.

3. Mr Kruger, the state prosecutor, then tendered in evidence three affidavits attested to in terms of s 212(4)(a) and 212(8)(a) of the CPA. The first two, Exhibits 'F' and 'G' respectively, were attested to by Tracey Gail Penny and the third, Exhibit 'H', was attested to by Sharlene Otto. These related to forensic tests which they had conducted. There was no objection to the admission thereof nor to the findings therein.

4. Mr Kruger, pursuant to the provisions of s 60(11B)(c) of the CPA, handed in the record of the bail proceedings held in the Magistrate's Court, Peddie, as

same was to form part of the record of this trial. Accused no. 1 objected to its admission. He contended that the magistrate had not explained the provisions of s 60 (11B)(c) to him despite him having recorded that he had done so. The State was accordingly put to the proof thereof and this would necessitate a trial within a trial being held. Accused no. 2, however, did not object to the record of the bail proceedings being admitted in evidence. Accused no. 3 objected to the admission of the record on the basis that he could not recall the magistrate having informed him of the provisions of s 60(11B)(c). This was also the basis upon which accused no. 4 objected to the admission of the record. In view of this Mr Kruger accepted that the State would have to lead evidence to prove that there had been compliance with the provisions of s 60(11B)(c) but requested that he be allowed to do so at a later stage. There was no objection thereto and the request for a trial within a trial to be held at a later stage was granted. In the meantime the State would continue to adduce evidence in the main trial.

5. The State then called Sithembele Eric April to testify. His testimony related to counts 2 and 4, namely, the charges of robbery and kidnapping. He stated that on 3 September 2002 at approximately 8:45pm he and the deceased, Lydia Mankwete were walking towards 5188 NU2 Mdanstane. A red Tazz motor car arrived and stopped in front of them. Six young males got out and confronted them. One of them, accused no. 2, pressed a firearm against his head and instructed him to take off his lumberjacket and T-shirt. He did so but was prevented from taking out his house key and a phonecard. They had

surrounded the deceased and someone said that they should take her with. Accused no. 1 then pushed her into the car. The deceased had asked him to get in but one of the occupants prevented him from doing so by pushing the car door against thereby causing him to fall. They drove off but turned around again and came back to him to ask what he wanted. He replied that he wanted his house key and phonecard. The front seat passenger removed the key from the lumberjacket but was told by the driver that he should not hand it to him (the witness) and that he had to take it. He grabbed the key and a person on the backseat said, '*Shoot this shit*'. This caused him to step back and the car drove off. A little later he met a couple who gave him a tracksuit top to cover himself.

6. He then proceeded to the police station to report what had occurred but was told to return the following day. The next day, after ascertaining that the deceased had not returned home, he proceeded to the police station where he saw a kombi parked outside. He recognised one of the occupants who was wearing the T-shirt which had been taken from him (the witness) in the robbery the night before. It was accused no.2. He conveyed this to a policeman in the kombi who told accused no. 2 to remove the T-shirt and it was then handed back to him (the witness). He also recognised another occupant in the kombi who had been present when he was robbed. He was accused no. 1. When he asked accused no. 1 where his lumberjacket was accused no. 2 replied and said that he knew where it was. A policeman left with accused no. 2 and later returned with the lumberjacket. He identified it

as the one taken from him in the robbery.

7. The witness was shown a yellow lumberjacket, (Exhibit No. 2), by Mr Kruger and identified it as the one that the deceased had worn when she was kidnapped. He was also shown a cream lumberjacket, (Exhibit No. 3), and this he identified as his own.

8. Cross-examination by Mr Lalla, who appears on behalf of accused no.1, was brief and did not reveal anything of significance. When it was put to the witness that accused no. 1 denied forcing the deceased into the car, he refuted this.

9. Cross-examination by Mr Gabelana, on behalf of accused no.2, was also brief. Sithembele April stated that his lumberjacket and T-shirt had been taken by the same person. It was accused no. 2, whom he recognised by his hairstyle and he had pointed him out to the policeman, Mr Mqombothi. It was put to him that in his statement Mr Mqombothi had stated that the witness had pointed out accused no.1 in the kombi as the person who was wearing the T-shirt. He replied that he could not remember doing so as he had been nervous. It was put to him that accused no. 2 denied having pointed a firearm at him and taken his T-shirt but he refuted this.

10. Neither Mr Manjezi, on behalf of accused no. 3, nor Mr Mazwi, on behalf of accused no.4, cross-examined this witness.

11. In reply to questions from the Court, the witness Sithembele April said it was accused no. 1, who had said, '*Let's take this female*'. He could not remember which person had pushed the car door against him. At the police station he had asked the person in the kombi who was wearing his T-shirt where his lumberjacket was. This person had then asked the individual seated on the rear seat about lumberjacket. He then said that he now realised that accused no. 2 was not the person who wore the T-shirt. Accused no. 2 was actually the person who was sitting on the rear seat of the kombi.

12. Vusumzi Mqombothi, an Inspector in the South African Police Services, testified that on 4 September 2002 he and accused nos. 1, 2, 3 and 4 were in a kombi outside the NU 1 police station. The witness Sithembele April had arrived and appeared to be going into the police station. He approached the kombi and pointed to the T-shirt accused no. 1 was wearing and said that he had been robbed of it at NU 5. The T-shirt was Exhibit No. 1. He, Inspector Mqombothi, instructed accused no. 1 to remove the T-shirt and gave it to Sithembele April. Sithembele April pointed to accused no. 2 who was on the back seat of the kombi and asked him where his lumberjacket was. He, Inspector Mqombothi, then accompanied accused no. 2 to a shack in Slovo Park in NU 2 Mdantsane where accused no. 2 pointed out the lumberjacket. He took possession of it and returned to the police station where Sithembele April identified it as his. This lumberjacket was Exhibit No. 3.

13. Cross-examined by Mr Lalla he reiterated that Sithembele April had not

pointed out accused no. 2 as the person wearing the T-shirt.

14. Cross-examined by Mr Gabelana he stated that the four accused and a few policemen were in the kombi. Sithembele April had immediately pointed out accused no. 1 as the person with the T-shirt. If Sithembele April had said that he pointed out accused no. 2 as that person he had made a mistake. However, Sithembele April had also pointed out a second person. The witness was not cross-examined by either Mr Manjezi or Mr Mazwi.

15. Kelvin Cecil Swartbooi, an Inspector in the South African Police Services, testified that his official duties were that of a photographer and a draughtsman of sketch maps. On 4 September 2002 he attended the crime scene at NU 2, Mdantsane where he made his own observations and certain places were pointed out to him by Inspector Kapoyi. He took a number of photographs and drew a sketch plan. On 5 September 2002, he attended the post mortem examination which Dr D T John conducted on the body of the deceased and he took various photos. The sketch plan and photos were compiled in an album with a key thereto and these form Exhibit 'I'. At the post-mortem examination Dr John handed to him a crime kit and a blood sample which was sealed with seal no. 1K0218022. These were recorded in the SAP13 register under reference no. SAP 13/46/2002.

16. Inspector Swartbooi was briefly cross-examined by Mr Lalla. It emerged that the distance from the road to where the body was lying was approximately

50 metres. It appeared to him that the body had been hidden from sight. It had also been difficult for the mortuary vehicle to get to the spot where the body was lying.

17. Re-examined by Mr Kruger he stated that the mortuary vehicle could not drive to exactly where the body was lying and the deceased's body had to be carried to the vehicle. He had also observed drag marks and spatterings of blood on the ground leading to the body. The blood trail was visible on photograph 2 of Exhibit 'I'.

18. In reply to questions from the Court, Inspector Swartbooi indicated that he was unable to say if the pathway was used by vehicular traffic or not. Part of the pathway consisted of a steep decline. The deceased's body had been completely naked except for a pair of green socks and was lying in between the bushes.

19. Jan Jacobus Janse van Rensburg testified that he was an Inspector in the SA Police Services and was stationed at the local criminal record office as a forensic worker and photographer. On 4 September 2002 he attended a crime scene at Mdantsane where he took various photographs. Later that same day he also took photographs at Camp 13 at Woodbrook. These he compiled into an album together with a sketch plan and a key and is Exhibit 'J'. The photographs are, *inter alia*, in respect of a Toyota Tazz motor car and blood marks found thereon. Scrapings were taken of the blood on the

left front door, sealed with seal no. BE5037B, and entered in the SAP13 register under no. 51/2002 and locked in a safe. He also took possession of a crime kit, reference no. EL LCRC 73/9/2002 from Inspector Swartbooi which had been entered in the SAP13 register under no. 46/2002. On 11 September 2002 he personally delivered the exhibits to the Forensic Science Laboratory.

20. Cross-examined by Mr Lalla he stated that he had obtained further blood and hair samples. These were from the undercarriage of the motor vehicle and were also delivered to the Forensic Science Laboratory under a different reference number. His evidence was not challenged by either Mr Gabelana or Mr Manjezi or Mr Mazwi.

21. Re-examined by Mr Kruger he stated that the seal number on the exhibits was 1207. The motor vehicle was also inspected for fingerprints by Captain van der Westhuizen.

22. Questioned by the Court, Inspector van Rensburg stated that the blood and hair on the undercarriage of the motor vehicle had been near to the left front wheel. The spot was indicated on photographs 36 and 37 of Exhibit 'J'. Photographs 34 and 35 of Exhibit 'J' indicated where blood and hair was found on the outside rim of the left front wheel. Samples of these were also sent to the Forensic Science Laboratory.

23. Dr Dominic Thadathilankal John was next to testify. He was a qualified medical practitioner attached to the State mortuary in Mdantsane. On 5 September 2002 he conducted a medico-legal post-mortem examination on the body of the deceased, Lydia Mankwete. His observations and findings were recorded in Post-Mortem Report No. 580-02, which is Exhibit 'B'. His examination revealed that the deceased had sustained multiple injuries and died as a consequence thereof. The primary findings in respect of the external appearance of the body and the condition of the limbs, as recorded by him in the post-mortem report, were the following:

'The body of an african female wearing only a pair of green socks. Blood and mud stains all over the body at places. Pale eyes. Lips:NAD. Fracture of right side of upper jaw bone. Bruised abrasions whole of right side of face, front and sides of nose, below nostrils, left cheek and adjacent areas. Laceration outer border of pinna of right ear. Small bone deep lacerated wound above right eyebrow. The scalp tissues found completely degloved downwards. The skull cap was fragmented with boney defects, brain matter escaping out through the defects on left side. Bruised abrasions back of left arm, elbow and inner left arm. Small abrasions back of left hand. Bruised abrasions, extensive, whole of right upper limb at places. Lacerated wound outer right elbow. Graze abrasions on whole of right breast. Bruised abrasions seen on left breast, front and sides of chest and abdomen at places. Extensive bruised abrasion whole of outer aspect of left thigh. Deep lacerated wound, perimortem, outer half of left thigh and knee, in the outer aspect. Abrasions of front of knees. Small abrasions top of left foot and inner

right ankle. Graze abrasions inner right leg. Extensive bruises whole of outer aspect of right thigh and buttock. Lacerated wound seen over the right iliac crest region. Perimortem abrasions seen on whole of back of trunk and buttocks. Small lacerated wound above left shoulder blade region. Very minimal bruised abrasions back of upper thighs. Blood stained vagina. Laceration, 1 cm seen on right side of vaginal wall, deep fracture of pelvic bone underneath. Another laceration 0.5X0.5 cm on left side of vaginal wall also.'

24. The examination also revealed that the skull cap and the base of the skull were fragmented and that there was extensive laceration of the brain; the left collar bone and the first and second ribs on the left and the first to ninth ribs on the right were fractured; the right lung and the liver, gallbladder and biliary passages were lacerated; both pelvic walls were fractured and there was a dislocation of the spinal column and the spinal cord was partly lacerated.

25. In response to questions from Mr Kruger, Dr John stated that because of the laceration in the vaginal wall he was unable to establish if she had been raped. The abrasions on her breasts and legs were similar to injuries he had observed in motor accident victims and indicated that the deceased had been run over and dragged by a motor vehicle.

26. Dr John was not cross-examined and his evidence thus remained unchallenged. However, in reply to questions from the Court, he confirmed

that photographs nos. 9 - 19 in Exhibit 'I' had been taken while Dr John was conducting the external examination of the deceased's body. Photographs 20 and 21 depicted his external examination of the vagina. The dark discolouration of the skin indicated bruising and extended virtually over the entire body. The lighter areas were the result of the skin having been rubbed off by a hard object. This was often the case in motor accidents where the skin had rubbed against the tarred road surface. Death may have been instantaneous but he could not be sure. Degloving of the scalp tissue meant that the skin had been loosened from the skull bone and had been pushed back towards the neck. This injury occurred prior to her death but he could not say whether or not the deceased was still conscious at that stage.

27. After the testimony of Dr John, Mr Kruger informed the Court that the State was ready to proceed with the trial within a trial to determine the admissibility of the record of the bail proceedings held in the Peddie Magistrate Court. The trial within a trial then proceeded.

28. The State commenced by adducing the testimony of James Jeffrey Fritz, a magistrate stationed at Peddie Magistrate's Court. He stated that on the 8th, 9th and 10th January 2003 he was the presiding officer in a bail application in Case No. 872/2002 in respect of eight accused. The four accused presently before Court were amongst the eight accused who appeared before him. In the bail application accused nos. 1 to 7, amongst whom were the present accused, were represented by a Ms Sonqishe from the Legal Aid Clinic of

Rhodes University, Grahamstown. Accused no. 8 was represented by a different attorney.

29. Magistrate Fritz identified a certified copy of the bail proceedings as a true copy of those proceedings. He stated that he had recorded the proceedings by hand. He further confirmed that he had recorded that he had explained the provisions of s 60(11B)(d) of the CPA 51 of 1977 to all the accused. He had read these provisions to them. He also informed them that if they failed to disclose any previous convictions and any cases pending against them that they could be charged with an offence for failing to do so. He had also recorded that he had explained the provisions of s 60(11B)(c) of the CPA to the accused and the effect thereof. He also explained to the accused that they had the right to remain silent and need not give evidence. Further, if an accused elected to give evidence then what was said could be used in a subsequent trial and become evidence against him or her. All the accused confirmed that they had understood what had been conveyed to them and he had recorded this.

30. In reply to a question from Mr Kruger, Magistrate Fritz stated that the typed record incorrectly reflected that the relevant section was s 60(ii)(B)(c) of the CPA. However, he had reflected the correct section in the handwritten record, namely, s 60(11B)(c). Further, the abbreviation CPA referred to the Criminal Procedure Act 51 of 1977. He had asked each person individually if what had been conveyed had been understood by the person and each had

replied in the affirmative. Thereafter all the accused testified. The services of an interpreter, Mr V Mtshabe, were used but was on leave and would only be returning in August 2003. Magistrate Fritz revealed that he understood and spoke Xhosa quite well and could follow whether his comments were being interpreted correctly or not. He was satisfied that Mr Mtshabe had properly interpreted what was being said.

31. During cross-examination by Mr Lalla, Magistrate Fritz stated that the handwritten record was not a verbatim record of what he had conveyed to the accused. He refuted the contention that the relevant provisions had not been explained to accused no. 1. After the provisions were conveyed, accused no. 1 was asked in Xhosa if he understood and he had replied 'Yes'.

32. Cross-examined by Mr Manjezi, Magistrate Fritz stated that he was able to recall what had occurred on the basis of the record of the proceedings. The provisions were read to the accused directly from the CPA but he had not deemed it necessary to record that this is what he had done. He read the provisions portion by portion and allowed each portion to be interpreted before proceeding to the next. Thereafter each accused was asked if he/she understood. Some had responded verbally by saying 'Ewe' which was 'Yes' in Xhosa and others had nodded their heads up and down thereby indicating that the reply was 'Yes'.

33. During cross-examination by Mr Mazwi, Magistrate Fritz conceded that he

could not recall if accused no. 4 had responded verbally or nodded but he was in no doubt that accused no. 4 had indicated that he understood. He was certain that he had explained the provisions to accused no. 4, and the others, even if accused no. 4 now claimed that he could not recall that this had been done.

34. In reply to questions from the Court, Magistrate Fritz stated that if any of the accused had said that he/she had not understood what have been conveyed he would have repeated the provisions. He would, in addition, have asked the attorney to obtain instructions from that accused and then recorded all of this. The proceedings had been recorded by hand as he was on probation as a magistrate at the time and had been told by the Magistrates' Commission to follow this procedure. Each provision was explained and the responses of the accused recorded before proceeding to an explanation of the next provision. This concluded the evidence tendered by the State in the trial within a trial.

35. Neither accused no. 1 nor accused no. 3 nor accused no. 4 elected to testify and closed their cases without adducing any other evidence. At the Court's request, and with the consent of all the parties, page 6 of the record was admitted and is Exhibit 'K'. This portion of the record dealt only with what had transpired when the relevant provisions were being conveyed to the accused and not with any aspect of their evidence.

36. In addressing the Court on the merits Mr Kruger submitted that the State had

discharged its onus and proven that there had been proper compliance with the provisions of s 60(11B)(c) of the CPA. Each accused had been informed of, and had acknowledged, that he understood the provisions. Moreover, the testimony of Magistrate Fritz stood uncontradicted. He submitted, therefore, that the proceedings in connection with the bail application should be admitted as evidence against the accused.

37. Mr Lalla, on behalf of accused no. 1, conveyed that he would not be making any submissions and left the issue in the hands of the Court. Mr Manjezi, on behalf of accused no. 3, conceded that page 6 of the record of the bail proceedings confirmed that accused no. 3 had been properly informed of the relevant provisions. Mr Mazwi, on behalf of accused no. 4, did not make any submissions and left the issue in the hands of the Court.

38. The Court, after considering the evidence, delivered judgment and held that the provisions of s 60(11B)(c) of CPA had been properly explained to the accused at the bail proceedings. Accordingly, the record of those proceedings was admitted to form part of these trial proceedings and the evidence therein was admissible as evidence in this trial.

39. In view of the Court's findings Mr Kruger tendered the record of the bail proceedings and it was admitted on the aforesaid basis. It is Exhibit 'L'.

40. The next witness to testify was Matheus Okkert van der Westhuizen, a

Captain in the SA Police Services and a fingerprint expert with 14 years experience. His testimony related to the palmprints and fingerprints he had found on various parts of a Toyota Tazz motor vehicle with registration no. CA 17620. One of the palmprints was on the interior rearview mirror. This he compared to the palmprint of accused no.1 and found ten points which corresponded. In his view the palm print on the rearview mirror was that of accused no. 1. It was accepted by courts that if at least seven points corresponded that this was sufficient proof that the prints were those of the same person. A fingerprint on the window of the left front door was compared to the little finger of the right hand of accused no. 2 and there were at least ten points which corresponded. He had no doubt, therefore, that the fingerprint on the car's window was that of accused no.2.

41. Captain van der Westhuizen was not cross-examined and his testimony was left unchallenged.

42. The next witness was Sharlene Otto, a superintendent in the SA Police Services, who was attached to the Biology Unit of the Forensic Service Laboratory in the Western Cape as a chief forensic analyst. Her testimony was in amplification of her affidavit, Exhibit 'H', and related to the DNA tests she had conducted in respect of a blood sample and nail clippings taken from the deceased and blood samples taken from a motor vehicle. She outlined, in broad detail, what DNA constituted of and how it allowed one to identify whether samples of blood or other genetic material came from a certain

person or not. The process entailed extracting the DNA profile of individuals from samples of genetic material such as blood, hair, finger and toenail clippings or saliva and the like. On the basis of these tests she was able to establish that the blood on the exterior of the wheel rim and the undercarriage of the vehicle was that of a human being. However, she could not say whether it was the blood of a male or female person or who that person was. The DNA from the nail clippings, which came from the deceased, corresponded with the DNA in the blood scrapings taken from the left front door of the vehicle. Consequently, it could not be excluded that the blood was that of the deceased.

43. Superintendent Otto was not cross-examined and her evidence was consequently left unchallenged. This concluded the State case.

44. Accused no. 1 elected not to testify or to call any witnesses and closed his case without adducing any evidence.

45. Accused no. 2, Nqaba Mabhoza, elected to testify in his defence. In his testimony he stated that on the night of 3 September 2002 he was a passenger in a red Toyota Tazz driven by accused no.1 in Mdantsane. Accused no. 3 and accused no. 4 were also in the vehicle. During the course of the day he had been drinking wine but he could not recall what quantity he had drank. He was asleep when accused no. 1 drove from NU 17 to NU 2 Mdantsane. Accused no. 2 was also asleep.

46. At some stage he awoke and saw that they were next to Langelitsha School. The car was stationary and the doors open and he got out in order to urinate. Accused nos. 1 and 4 were at the driver's door and the witness Sithembele April was standing in front of the car. He walked towards Sithembele April who handed his lumberjacket to him (accused no. 2) and he put it on. He did not point a firearm at Sithembele April nor did he take Sithembele April's T-shirt and lumberjacket from him.

47. He returned to the car and went to lie down and the other accused also got in. After they had driven off he heard a girl shouting and crying in the car. He did not know how she had gotten into the car and asked accused no. 4 where she was being taken to. Accused no. 1 replied that they were going to draw money. But the girl, who was the deceased, said that she did not have the card. Accused no. 1 turned the car around and drove back to where Sithembele April was. When they stopped the deceased asked Sithembele April to get into the car but he said that they must take her away and they drove off. Accused no. 2 asked accused no. 1 where they were taking the deceased but accused no. 1 told him to keep quiet. Accused no. 1 said that the deceased was cheating him and that since she was telling lies he was going to rape her.

48. They arrived at the Orlando Stadium at NU 2 Mdantsane and accused no. 1 stopped the car. He removed the deceased's lumberjacket and T-shirt and dragged her from the car and accused no. 4 followed them. Accused no. 3

got out and said that he wanted to urinate while he (accused no. 2) remained in the car. Accused no. 1 returned and asked for a knife and he and accused no. 3 replied they did not have one and accused no. 1 left.

49. Shortly thereafter the deceased came to the car and asked him to intervene. She said accused no. 1 wanted to beat her and he tried to intervene. Accused no. 1 was abusive towards the deceased and said she had a big vagina. She replied that she did not know what accused no. 1 was doing as he had got what he wanted. He understood her to mean that accused no. 1 had raped her. The deceased thereupon asked him (accused no. 2) to rape her as accused no. 1 wanted to stab her. He then lay on top of her. Accused no. 1 reversed the car and stopped very close to them. Alighting from the car accused no. 1 asked him whether he did not want to get off the deceased. Accused no. 4 told him to get off the deceased as he was not doing anything and was just lying on top of her. He replied and said that accused no. 1 had not been disturbed when he was raping the deceased. Both accused no. 1 and accused no. 4 then dragged him away from the deceased.

50. Accused no. 1 then pushed accused no. 4 towards the deceased and told him to rape her. Accused no. 4 replied that he did not want to rape her but nevertheless got on top of her and moved his body up and down. In spite of this he could not say if accused no. 4 was raping her. After a while accused no. 4 got up and pulled the deceased by her hair but accused no. 3 intervened to stop him. Accused no. 1 then grabbed the deceased by her hair

and dragged her towards the car where accused no. 3 prevented her from getting inside. Accused no. 1 forced her into the car and said that if he could not find his girlfriend he was going to sleep with the deceased and they drove out of the stadium.

51. On their way to an area in NU 2 known as '41 hundred' he (accused no. 2) fell asleep and only awoke when the car stopped. He heard accused no. 1 say 'Go' and saw accused no. 1 drive into the deceased and knock her down. He had not seen the deceased alight from the car and was not aware that accused no. 1 was going to run her down. He, accused no. 3 and accused no. 4 jumped out of the car immediately while accused no. 1 remained behind. Accused no. 1 then drove over the deceased about six times.

52. He did not associate himself with the actions of accused no. 1 but he did not intervene. Thereafter accused no. 1 called to them to assist him in dragging the body away but they refused since they had not killed the deceased. Accused no. 1 came to accused no. 4, took him to the corpse, and told him that he had to assist as accused no. 1 had allowed him to rape the deceased. Using plastic bags to cover their hands accused no. 1 and accused no. 4 dragged the body away. On their return accused no. 1 said, '*Nobody knows about this tomorrow*'. He, however, told accused no. 1 that he had difficulty in keeping quiet and would report it the following day as it would haunt him. Accused no. 1 replied that he could see that his mind was full of policemen. Accused no. 1 also told him that he wanted Sithembele April's lumberjacket

to which he (accused no. 2) replied that he would give it to him the following day.

53. They got back into the car and accused no. 1 took him home. The following morning accused no. 1 arrived at his home in the company of policemen and he was arrested. Finally he stated that he had not associated himself with, or participated in, the kidnapping of the deceased or the robbing of Sithembele April.

54. During cross-examination by Mr Lalla, accused no. 2 said that he had not seen who had brought the deceased to the car on the first occasion. He denied that he had raped the deceased at the Orlando Stadium. Questioned on his testimony at the bail application that the deceased had asked him to have sex with him he denied that he had sexual intercourse with her. He then said that she had consented to him having sexual intercourse with her as she was afraid of accused no. 1. She was naked when accused no. 1 dragged her back to the car. He denied that accused no. 1 had knocked the deceased down accidentally. He refuted accused no. 1's claim that he had not driven over the deceased. The deceased was no longer alive when accused no. 1 dragged her body away.

55. Cross-examined by Mr Manjezi he said that they fetched accused no. 3 at the house of Unathi. Accused no. 3 was so drunk that he had to be carried into the car. Accused no. 3 was asleep and awoke when the deceased was

screaming. Accused no. 3 had not been awake when the incident with Sithembele April took place and did not participate in the deceased being placed in the car.

56. Cross-examined by Mr Mazwi he refuted that accused no. 4 had remained in the car during the incident with Sithembele April. He insisted that accused no. 4, together with accused no. 1, had pulled him off the deceased. He could not say if accused no. 4 had raped the deceased when accused no. 4 was lying on top of her and moving his body up and down. He agreed that accused no. 4 had said that he did not want to rape her. He also agreed that accused no. 4 had not voluntarily assisted accused no. 1 in dragging the deceased's body away. Accused no. 1 had forced accused no. 4 to do so by holding him by the neck and pulling him to the body of the deceased. But, he did not see if accused no. 1 had a gun.

57. Cross-examined by Mr Kruger, accused no. 2 stated that everything that he had said at the bail application, as recorded in Exhibit 'L', was the truth. Even though he had stated there that, '*I did penetrate the vagina of the lady whilst accused no. 2 and 7 tried to remove me from the lady*', he now denied that he had raped her. Asked to explain why he had then said that he penetrated her vagina, he said that he was unable to provide an explanation. Accused no. 1 had stripped the deceased of her T-shirt and lumberjacket while driving to the stadium. Accused no. 1 had leaned backwards from the driver's seat and pulled her clothes off. He also told her that he was going to rape her.

They were all aware that accused no. 1 intended raping the deceased but none of them had objected to this or taken any steps to prevent it. He had not seen accused no. 1 raping the deceased. When he (accused no. 2) lay on top of the deceased he was fully dressed and did not even move his body up and down. He had not undressed as he realised that if he did so that he would want to rape her. However, he could see that the others did not believe that he was not raping her. When they were at the dump he had appealed to accused no. 1 to let the deceased go when she was outside the car. He was the first to jump out of the car when accused no. 1 knocked the deceased down.

58. In reply to questions from the Court he said that he did not find it strange that Sithembele April had given his lumberjacket to him even though no one had asked Sithembele April to do so. He never asked Sithembele April why he was giving the lumberjacket to him and thought that it belonged to one of the accused. He did not point a firearm at the head of Sithembele April but could not dispute Sithembele April's claim that he had done so. At the stadium, when accused no. 1 had asked him for a knife the deceased had tripped and fallen down. She had held onto him and he then fell on top of her. He did not remain on top of her for long as accused no. 1 removed him. He admitted that when accused no. 1 told him to get off the deceased that he had responded by saying '*You were not disturbed when you were raping her*'. He had said so as the deceased had asked him to rape her until the others left. However, he had told her to wait and did not rape her. The reason why he

had to be dragged off the deceased was because he was not doing anything and accused no. 4 wanted to go home. He was not aware that accused no. 1 would knock the deceased over with the car. In view of the fact that it was night time he did not report to the police what had occurred.

59. In reply to further questions from Mr Kruger, accused no. 2 said that he thought that the lumberjacket belonged to accused no. 1. In spite of him having said to accused no. 1 that he had not disturbed accused no. 1 while he was raping the deceased he now alleged that he had not seen accused no. 1 raping the deceased. It was because of what the deceased had said that he assumed that accused no. 1 had raped her. Hereafter the case for accused no. 2 was closed.

60. Accused no. 3 Vusumzi Msuthu also elected to testify in his defence. He could recall the events of 3 September 2002. He and accused no. 2 and another person had started drinking wine and beer that morning until he eventually passed out. When he awoke he was in a car and it was being driven by accused no. 1 in the area of Mdantstane called '14 hundred'. He had no idea how he came to be in the car. Also in the car were accused no. 2 and accused no. 4 and a girl. He heard accused no. 2 say that the girl had to get out of the car and he (accused no. 3) asked where she was being taken to. Accused no. 1 responded and said that she was going to draw money.

61. At the stadium accused no. 1 stopped the car, got out, and pulled the girl by the hair and undressed her by taking off her tracksuit. He (accused no. 3) and accused no. 4 got out of the car to urinate. On returning he found accused no. 1 raping the girl. He stood over them and asked, '*What's happening*?'. No one replied. He bent down and asked the girl what her name was and she said, '*Lydia*' but did not give her surname. The girl was the deceased. Accused no. 1 told him to leave as he was disturbing accused no. 1. He then went to the car and waited there with accused no. 2. Accused no. 1 stood up and told the girl to kneel down. She did so and accused no. 1 raped her from behind.

62. When he had finished accused no. 1 asked accused no. 2 and him for a knife. He enquired from accused no. 1 what he was going to do and accused no. 1 replied that he was going to stab the deceased. He was not in favour of this and told accused no. 1 that he did not have a knife and accused no. 1 walked to the grass to look for something. With this the deceased ran to accused no. 2 who got out of the car and spoke to her. He did not hear their conversation but saw accused no. 2 lying on top of the deceased.

63. He next heard accused no. 4 say that accused no. 2 was not doing anything. Accused no. 1 thereupon told accused no. 2 that he had to move away from the deceased who was holding onto accused no.2 and kicked her against her head. He also asked accused no. 2 if he was not moving to which accused no. 2 replied, '*You were not disturbed when you were raping her*'. Accused

no. 1 got into the car, reversed and stopped close to the head of accused no. 2. Accused no. 1 alighted and asked accused no. 4 to assist him in removing accused no. 2 and they pulled accused no. 2 away.

64. Thereafter accused no. 1 told accused no. 4 to rape the deceased. When accused no. 4 refused to do so accused no. 1 forced him by pushing him towards the deceased. Accused no. 4 then raped her. Accused no. 4 got up from the deceased after accused no. 1 told him to hurry up. The deceased was then brought to the car by accused no. 1 but he (accused no. 3) refused to let her get in and pushed her away. He refused to allow her to enter as he did not approve of her being raped. Accused no. 1 insisted that she had to get in and finally she did. Accused no. 1 said that he was going to look for his girlfriend but if he did not find her he was going to sleep with the deceased.

65. All of them got in and accused no. 1 told the deceased to sit so that her legs were between the two front seats. He (accused no. 3) handed to the deceased her tracksuit pants and yellow lumberjacket but accused no. 1 took it away. He saw accused no. 1 take a can of spray, named Q20, and spray it into the vagina of the deceased. She cried and said that it was burning and he (accused no. 3) asked accused no. 1 to stop. Accused no. 1 did so after spraying the inside of the car.

66. Accused No. 1 proceeded to the house of his girlfriend but stopped at a dump site and told the deceased to go home. The deceased got out, but as she

was leaving accused no. 1 drove towards her, knocked her down, and drove over her body. He (accused no, 3) was so shocked that he jumped out of the car. Accused no. 2 and accused no. 4 did so as well. Accused no. 1 reversed the car and drove over the deceased again but he (accused no. 3) was unable to watch this. According to him he had to look away when accused no. 1 reversed and drove over the deceased six times.

67. Accused no. 1 then got out of the car and asked them to help him drag the deceased's body away but they refused. Accused no. 1 told accused no. 4 that he had allowed him to rape the deceased and pulled accused no 4 by the scruff of his neck and forced him to assist him by dragging the deceased's body into the forest. Upon their return accused no. 1 said that they should not speak about this. Accused no. 2 replied that he would do so as it would haunt him. Accused no. 1 told accused no. 2 that his mind was full of policemen and that he should be shot and said that he was taking them home.

68. After taking accused no. 2 home, accused no. 1 drove past their homes and went to a garage for petrol. From there accused no. 1 drove to NU 3 where the car got stuck in the sand next to a shack. In the process of pushing the car they collided with another car three times. Someone fired shots at them and he (accused no. 3) was struck in the leg and had to go to hospital for treatment. There he was arrested.

69. Replying to his legal representative accused no. 3 said that he did not see

anyone being robbed or kidnapped. He saw the deceased bein g raped but had not participated in this nor had he associated himself with anyone who was raping her. He had not participated in the killing of the deceased nor had he associated himself with anybody who was responsible for her death.

70. During cross-examination Mr Lalla put it to him that at the stadium accused no. 1 had not pulled the deceased out of the car. He maintained that accused no. 1 had done so. It was also put to him that accused no. 2 and accused no. 4 were the individuals who had raped the deceased. His reply to this was that accused no. 1 had been the first to rape the deceased. He insisted that accused no. 1 had asked accused no. 2 and him for a knife. Further, both accused no. 1 and accused no. 4 had pulled accused no. 2 away from the deceased. He admitted that he could have walked home from the stadium, but he did not do so as it was night-time. Even though it was a built-up area he was still afraid to walk home. He also insisted that accused no. 1 had sprayed Q20 into the deceased's vagina. Although he was drunk he was aware of what was happening. He denied that accused no. 1 had driven to the dump site as accused no. 2 and accused no. 4 wanted to rape the deceased again. He admitted that he had not told accused no. 1 that he disapproved of his actions. He was unable to say why he had not assisted the deceased when she was being raped by accused no. 1.

71. Accused no. 3 was not cross-examined by Mr Gabelana on behalf of accused no. 2. Accused no. 3 during cross-examination by Mr Mazwi, for accused

no. 4, stated that he had not seen accused no. 4 insert his penis in the deceased's vagina. However, he saw accused no. 4 executing up and down movements when he was lying on top of the deceased. He conceded that accused no. 4 had not suggested that they go to the dump site in order to rape the deceased again. Accused no. 1 had simply driven there.

72. Cross-examined by Mr Kruger he said that when he awoke he was sitting on the backseat of the car behind the driver. The deceased was sitting in between him and accused no. 4. He did not ask where she had come from but only where she was going to. The top part of her body was already naked then. Even though he found this strange he did not ask about it as he did not know how they had met the deceased. He did not ask accused no. 1 either why they were entering the stadium. He remained in the car when accused no.1 grabbed the deceased by her hair and pulled her out. She was half naked and had to be dragged over him but he did not do anything to assist her. Accused no. 1 forcibly removed the deceased's tracksuit pants and raped her when she was outside the car. He had asked what was happening but accused no. 1 did not reply. He then asked the deceased for her name.

73. Although there were houses nearby he did not seek help as he did not know what was happening. He did not know if accused no. 2 had seen accused no. 1 raping the deceased. He did not tell accused no. 2, who was in the front passenger's seat, as he did not know how accused no. 1 and the deceased had met. He did not ask accused no. 2 and accused no. 4 to assist in

restraining accused no. 1 as the deceased had run to accused no. 2.

74. He confirmed that his testimony at the bail application as recorded in Exhibit 'L', was the truth. The deceased had taken by accused no. 2 out of the car and then slept with her. Accused no. 4 was forced by accused no. 1 to rape the deceased but he could not say if accused no. 4 had sexual intercourse with her. He was unable to explain why he thought that raping a woman did not mean that a person was having sexual intercourse with her. He could also not explain why he and accused no. 2 and accused no.4 had not prevented accused no. 1 from raping the deceased. When the deceased was forced back into the car and they left the stadium she was completely naked. He had gotten into the car voluntarily.

75. At the dump site accused no. 1 had deliberately driven at the deceased and knocked her down. He could not have prevented this as he did not know that accused no. 1 was going to knock her down and drive over her a number of times. He voluntarily got into the car after accused no. 1 and accused no. 4 had returned from dragging the deceased's body away. Accused no. 1 had left him and accused no. 4 at the hospital and driven off. He did not tell anyone at the hospital that the deceased had been raped and killed.

76. In reply to questions from the Court, accused no. 3 claimed that in the bail application he had said that accused no. 4 had been forced to have sex with the deceased even though the record did not reflect this. He was not alleging,

however, that the record of the bail proceedings was incorrect. The only force accused no. 1 had applied was to push accused no. 4. He admitted that accused no. 1 had not held a gun to the head of the accused no. 4 to compel him to have sex. He knew that what had been done to the deceased was wrong. He could not explain why he had not left the others at the garage nor why he never told the petrol attendants what had occurred. The case for accused no. 3 was then closed without any further evidence being tendered.

77. Accused no. 4, Makhwenkwe Sonyashe, also elected to testify in his defence. He remembered the events which occurred on 3 September 2002. Accused no. 1 had fetched him and was driving a red Toyota Tazz motor car. They fetched accused no. 3 who was so drunk that he had passed out. The deceased and Sithembele April were walking in the street when accused no. 1 stopped the car, got out and pointed a firearm at Sithembele April. Accused no. 2 had also gotten out of the car but went to urinate. Accused no. 1 returned to the car with the deceased, pointing the gun at her and told her to get in, which she did, and they drove off. Accused no. 2 asked where the deceased was going but he did not reply as he feared accused no. 1 because of the gun. Accused no. 1 had replied that she was going to draw money. But, instead of doing so accused no. 1 drove to the stadium.

78. At the stadium accused no. 1 alighted and pulled the deceased by her hair from the car. Accused no. 1 then raped the deceased. They were lying on the ground next to the car. Accused no. 3 also alighted but went to urinate

and asked the deceased what was happening. She replied that she was being raped by this older brother. Accused no. 1 told accused no. 3 to move away as he was disturbing accused no. 1 and accused no. 3 then returned to the car.

79. A little later accused no. 1 approached accused no. 3 and asked him for a knife but accused no. 3 said that he did not have one. Accused no. 1 also asked accused no. 2, who wanted to know what accused no. 1 was going to do with it. Accused no. 1 said he was going to stab the girl and accused no. 2 replied that he did not have a knife.

80. Thereafter accused no. 1 went to look for something in the grass and the deceased ran to accused no. 2 and told him to sleep with her as she was afraid of accused no. 1. Accused no. 2 then lay on top of the deceased. A little later he told accused no. 1 that accused no. 2 was just lying there. He had said so as he wanted to go home. Accused no. 1 asked accused no. 2 to get off the deceased but accused no. 2 replied that accused no. 1 had not been disturbed when he was raping her. Accused no. 1 responded by pulling accused no. 2 off the deceased but he did not assist accused no. 1 in this.

81. Accused no. 1 had then forced him to rape the deceased by grabbing him by the scruff of his neck and telling him to do so. He was afraid of accused no. 1 since he had a gun and went to lie on top of the deceased. However, he did not do anything and did not even undress himself. Because of this accused

no. 1 pulled him away and pulled the deceased by her hair to the car and said he was going to look for his girlfriend.

82. Accused no. 3 handed the deceased's clothing back to her but accused no. 1 took it away and told the deceased to sit on the floor of the car at the rear and to open her thighs. Accused no. 1 then sprayed Q20 into her vagina. The deceased screamed and said it was burning but accused no. 1 told her to keep quiet.

83. They came to a dump site where accused no. 1 again pulled the deceased out of the car by her hair and told her to go home. As she walked away accused no. 1 knocked her down with the car. With this he (accused no. 4) and accused no. 2 and accused no. 3 jumped out of the car. He saw accused no. 1 drive over the deceased six times. He did not intervene as he was afraid of accused no. 1 because of the gun. When accused no. 1 told him to assist in dragging the body of the deceased away he refused. Accused no. 1 then grabbed him by the collar and said that he had to assist as accused no. 1 had allowed him (accused no. 4) to rape her. He did not resist any further as accused no. 1 had the gun in his hand. Accused no. 1 gave him plastic bags to use and they dragged the deceased's body and hid her in the forest. They returned to the car where accused no. 1 said that they should not tell the police that they had killed the deceased and hidden her body. When accused no. 2 said that he was going to tell the police accused no. 1 said that as his mind was full of the police and that he deserved to be shot in

the head. He then said he was taking accused no. 2 home.

84. Accused no. 2 was taken home but accused no. 1 then drove to NU 3 as he wanted to get money from his father. This was unsuccessful and from there they drove to a shack where the car got stuck in the sand. In the process of pushing the car out they bumped into another car three times and someone shot at them. Accused no. 3 was shot in the leg and accused no. 1 drove to the hospital so that accused no. 3 could be treated. There accused no. 1 forced the nurses to treat accused no. 3 but shortly thereafter the police arrived and he (accused no. 4) was arrested. He denied that he had participated in robbing Sithembele April nor had he associated himself with the robbery. He had also not played any role in the kidnapping of the deceased nor had he associated himself with her kidnapping. He had not raped the deceased at the stadium nor had he associated himself with her being raped. He had not played any role in the killing of the deceased nor had he associated himself with the act of killing her.

85. During cross-examination by Mr Lalla accused no. 4 said that he had not consumed any alcohol on the day of the events. In the incident involving Sithembele April accused no. 1 had gotten out of the car. Accused no. 2 only got out to urinate. It was accused no. 1 who pointed a firearm at Sithemebele April. He did not try to ascertain why accused no. 1 had taken the lumberjacket, T-shirt and cap from Sithembele April. Even though Sithembele April was then naked from the waist up he did not realise that accused no. 1

was robbing Sithembele April. Accused no. 1 gave the lumberjacket to accused no. 2 to wear and accused no. 1 wore the T-shirt. He was asked why accused no. 2 had said that Sithembele April gave him the lumberjacket and replied that accused no. 2 was mistaken as he had been drunk.

86. When they were sitting in the police kombi the following day it was accused no. 1 who wore the T-shirt. On the night of the incident it was accused no. 1, and not he, who brought the deceased to the car. When it was put to him that accused no. 1 claimed that it was accused no. 2 who had dispossessed Sithembele April of his clothing he replied that it was accused no. 1 who had robbed Sithembele. Immediately thereafter he again claimed that he was not aware that Sithembele April was being robbed. He could not explain why he had just said that accused no. 1 had robbed him. However, he admitted that what accused no. 1 had done was wrong.

87. He confirmed that he lived in NU 2 Mdantsane which was the area where the Orlando Stadium was located. He denied that he and accused no. 2 had raped the deceased and said that it was accused no. 1 who had raped her. The deceased was naked when he (accused no. 4) lay on top of her but he did not want to, nor did he have sexual intercourse with her. He knew she was there against her will and that she was being humiliated Although he knew that what was happening was wrong he did not leave. He then said that accused no. 1 had threatened him and forced him to rape the deceased. He was afraid of accused no. 1 because it was the first time he had seen him

that night. It was too far to walk to his home and people were also being killed in that area.

88. Accused no. 1 had come to his home to look for accused no. 2. They were not friends and prior to 3 September 2002 he did not know him. In regard to the events at the dump site he denied that accused no. 1 had simply bumped the deceased and driven off. He insisted that accused no. 1 had forced him to assist in concealing the deceased's body. He claimed that at the hospital the police had not told him why they were arresting him.

89. Mr Manjezi's cross-examination of accused no. 4 was very brief and did not reveal anything new.

90. During cross-examination by Mr Kruger, accused no. 4 stated that he did not know what it was to rob someone or to take something from a person by force. It was the first time he had seen this happen. He then admitted that it was wrong for accused no. 1 to have taken Sithembele April's clothes by force. It was also wrong for accused no. 1 to have forced the deceased into the car and then to have pulled her out by the hair at the stadium. The deceased was completely naked when they entered the stadium. Accused no. 1 had taken her top off and had told her to take her pants off while he was driving. Accused no. 1 had leaned backwards from the driver's seat and grabbed hold of the neck of her top and pulled it off. He was asked if he could actually demonstrate this in a car and agreed to do so. The Court adjourned

and accused no. 4 was taken to a car to carry out a demonstration.

91. After reconvening the Court recorded its observations in respect of the demonstration as follows:

'Accused no. 4 sat in the driver's seat while someone else sat on the rear seat of the car. He then stretched backwards and with his left hand grabbed hold of the back collar of the person's jacket and exerted enough pressure to pull the jacket off. While doing this his feet were still able to reach the foot pedals of the car.'

These observations were accepted as being correct by counsel for the State as well as the legal representatives for the four accused.

92. Mr Kruger proceeded with further cross-examination of accused no. 4. It emerged from this that accused no. 4 had not prevented accused no. 1 from pulling the deceased out of the car. She was still wearing her tracksuit pants but the upper part of her body was naked. Accused no. 1 had then taken her pants off. He said he had made a mistake earlier when he said that she had been completely naked. He had not prevented accused no. 1 from raping her as he was afraid of accused no. 1.

93. Questioned about his testimony at the bail proceedings, accused no. 4 confirmed that what he had stated there, as recorded in Exhibit 'L', was the truth. When it was pointed out to him that he had testified in those proceedings that he had raped the deceased he claimed that he had told the

Court that he had only lain on top of her. When he was asked if he was disputing the correctness of the record of those proceedings he failed to answer the question. He also said that when accused no. 1 asked him to assist in dragging the deceased's body away he was not afraid of accused no. 1. However, he had told him he was unable to drag her body.

94. In response to questions from the Court accused no. 4 said that it was only accused no. 1 who had committed any criminal acts. Neither he nor accused no. 2 or accused no. 3 had done anything wrong. At no stage, however, had any of them told accused no. 1 that they were not involved in what he was doing. He had been afraid of accused no. 1 because of his voice. At the bail proceedings he had not mentioned that accused no. 1 was in possession of a firearm. He did not mention this as his legal representative had told him not to say anything about it until he appeared in the High Court. This concluded the case for accused no. 4.

95. Counsel for the State and the legal representatives for the accused addressed the Court on the merits. The Court does not intend repeating all their submissions. Suffice to say that Mr Kruger contended that accused no. 1 should be convicted of the offence of murder (i.e count 1) as he was the perpetrator of this crime. Accused no. 2, accused no. 3 and accused no. 4 were co-perpetrators and should also be convicted of murder. In regard to the offence of robbery (i.e count 2) accused no. 1 and accused no. 2 should be convicted as co-perpetrators of this crime. Accused no. 4 should be convicted

on the basis of common purpose. In regard to accused no. 3 the State was not seeking a conviction on count 2. In regard to the offence of rape (i.e count 3) accused no. 1, accused no. 2 and accused no. 4 should be convicted as co-perpetrators of this crime. Accused no. 3 was an accomplice and should be convicted on that basis. Finally, in regard to the offence of kidnapping (i.e count 4) accused no. 1 should be convicted as he was the perpetrator of the crime and accused no. 2 and accused no. 3 and accused no. 4 on the basis of common purpose.

96. Mr Lalla did not make any submissions on behalf of accused no. 1. He left the determination of the guilt or innocence of accused no. 1 in respect of the various offences in the hands of the Court.

97. Mr Gabelana contended that accused no. 2 should be acquitted of the offence of murder as he had disassociated himself from the actions of accused no. 1. In regard to the offence of robbery he left the determination of the guilt or innocence of accused no. 2 in the hands of the Court. In regard to the offence of rape he urged the Court to accept the version which accused no. 2 gave in his testimony in the trial in preference to the version he had furnished in the bail proceedings. Accused no. 2 should therefore be acquitted of the offence of rape. In regard to the offence of kidnapping he contended that there was no evidence that accused no. 2 had played an active role and should accordingly be acquitted thereof.

98. Mr Manjezi contended that accused no. 3 should be acquitted of the offence of robbery. He had not participated in, nor associated himself, with the robbery since he was asleep at the time. In regard to the kidnapping of the deceased he had actively disassociated himself therefrom and should also be acquitted of this offence. In so far as the offence of rape was concerned the evidence did not establish that he had raped the deceased. He had, further, not conspired with anyone to rape the deceased. In respect of the murder of the deceased, accused no. 3 had not been aware that accused no. 1 intended knocking the deceased down with the car and driving over her repeatedly. He had disassociated himself from the actions of accused no. 1 by immediately jumping out of the car after the deceased was knocked down. He also refused to assist accused no. 1 in dragging the deceased's body away and hiding it. Accused no. 3 should, therefore, be acquitted of the offence of murder.

99. Mr Mazwi contended that accused no. 4 could not be convicted of the offence of murder as there was no common purpose between him and accused no. 1 to kill the deceased. He, like accused no. 2 and accused no. 3, had disassociated himself from the actions of accused no. 1 when he knocked the deceased down and thereafter drove over her. Further, accused no. 4 had been forced by accused no. 1 to drag the deceased's body away and hide it in the bushes. Accused no. 4 had acted under coercion and did not act voluntarily. He conceded, however, that if the Court rejected the version which accused no. 4 gave in the trial he could on the basis of his testimony

in the bail proceedings, be convicted as an accessory after the fact. In respect of the offence of robbery, there was no common purpose between accused no. 4 and accused no. 1 and accused no. 2 to rob Sithembele April and accused no.4 should be acquitted of this offence. In regard to the offence of kidnapping, the evidence did not show that accused no. 4 had assisted in the kidnapping of the deceased. He had also not associated himself with the conduct of accused no. 1 and should be acquitted of this offence. In so far as the offence of rape was concerned, Mr Mazwi urged the Court to accept that accused no. 4 did not have sexual intercourse with the deceased but only pretended to be doing so by moving his body up and down. However, even if he did have sexual intercourse with the deceased then it was only because he had been forced by accused no. 1 to do so. Accused no. 4 had not acted voluntarily and should therefore be acquitted of the offence of rape.

100. The Court will now turn to consider the evidence and deal with the offences in the sequence that they were committed and not in the sequence set out in the indictment. In evaluating the evidence it is clear that the State has proved that Sithembele April was robbed of his sweater, lumberjacket and cap and that a firearm was used by one of the individuals who perpetrated the crime. The question is which of the accused were the actual perpetrators of the robbery and what role, if any, did the remaining accused play therein. The same applies in respect of the kidnapping of the deceased. The evidence establishes that she was forced, against her will, to get into the motor car and

was then taken to Orlando Stadium. There is no doubt that she did not accompany the accused voluntarily. However, what has to be determined is which of the accused were the actual perpetrators of the crime and whether the remaining were either accomplices or accessories after the fact to the deceased's kidnapping. The same issues have to be determined in respect of the rape of the deceased and in respect of her murder.

101. In relation to the conduct of accused no. 1 the evidence adduced by the State and the testimony given by the other accused stand uncontroverted. Accused no. 1 elected not to testify in his own defence nor did he tender any other evidence to gainsay the incriminating allegations against him arising both from the State case and the testimony of his co-accused. However, when he applied for bail in the Peddie Magistrate's Court he admitted, during the course of his testimony, that he had initiated that the rape and killing of the deceased. However, he denied that he had raped her. When he was asked to explain this he refused to answer and said that he would reply at the trial. He has elected not to do so and the Court is left to weigh up this testimony with the remaining evidence in determining the guilt or innocence of accused no. 1. In due course the Court will return to this question.

102. The testimony of Sithembele April that accused no. 1 and accused no. 2 were the individuals who robbed him was not challenged during cross-examination. Although he at first stated that he had identified accused no. 2 in the kombi as the person who was wearing his T-shirt he later, during

questioning by the Court, corrected himself and said that the person was accused no. 1. The fact that it actually was accused no. 1 who was wearing the T-shirt was confirmed by Inspector Mqombothi in his testimony. Inspector Mqombothi also confirmed that Sithembele April had pointed out accused no. 1 and not accused no. 2 who was sitting on the rear seat of the kombi. Further, it was accused no. 2 who responded that he knew where the lumberjacket was and then took the police to his home where the lumberjacket was found. This was never disputed by accused no. 2. What is more, at the bail proceedings accused no. 2 admitted that he had taken the lumberjacket from the victim and then worn it. Accordingly, the fact that Sithembele April had initially erred in his testimony in regard to whether it was accused no. 2 or accused no. 1 who wore the T-shirt it does not, in our view, amount to a material contradiction. It has not been disputed that he pointed out accused no. 1 as the person wearing the T-shirt.

103. Sithembele April was a truthful and credible witness. We accept his testimony that accused no. 1 and accused no. 2 were the individuals who perpetrated the robbery and forcibly dispossessed him of his lumberjacket, T-shirt and cap. We also accept his assertion that a firearm was pointed at him during the course of the robbery. Although he testified that accused no. 2 was the person who did so, it is clear that he has confused accused no.1 with accused no. 2. The person who pointed the firearm at him was accused no. 1 and not accused no. 2. This was confirmed by accused no. 4, who stated during his testimony that accused no. 1 had pointed the firearm at Sithembele April. The

claim by accused no. 2 that Sithembele April handed the lumberjacket and T-shirt to him without even being asked to do so is not simply far-fetched but patently a lie. It is contradicted by his own testimony in the bail proceedings. In those proceedings he admitted that he taken the person's (i.e Sithembele April's) jacket and worn it.

104. In so far as accused no. 3 and accused no. 4 are concerned it is not disputed that they were present when the robbery was committed. However, they are indeed fortunate that the evidence does not establish that either of them participated in the robbery or that they associated themselves with it. The State has failed to link them to the actions of accused no. 1 and accused no. 2. The evidence falls short of that standard required for a conviction.

105. At no stage did he mention that it had been handed to him. There was no reason for him not have provided this version unless, of course, it never happened. There is no doubt that he lied to this Court. The truth is that he and accused no. 1 wrongfully and unlawfully dispossessed Sithembele April of his lumberjacket. It is clear furthermore that they did so forcibly and that accused no. 1 had a firearm which he had pointed at Sithembele April.

106. On the evidence before the Court accused no. 3 was asleep and consequently did not participate in the robbery nor did he even witness it. Accused no. 4, on the other hand, witnessed what was happening but Sithembele April has not alleged that he was a participant in the robbery.

There is no evidence either of a common purpose between accused no. 1 and accused no. 2, on the one hand, and accused no. 3 and accused no. 4, on the other. Accordingly, the evidence presented by the State is insufficient to sustain a conviction even on the basis of common purpose in respect of accused no. 3 and accused no. 4.

107. In regard to the kidnapping of the deceased, it is evident from the testimony of Sithembele April and accused no. 4 that accused no. 1 forced her under threat of a gun, into the motor car and then drove off with her and the other accused in the car. Accused no. 2 did not intervene as he claimed he had fallen asleep in the car after receiving Sithembele April's lumberjacket. He only became aware of the deceased's presence when the car was moving. Accused no. 3, on the basis of his own testimony, which is supported by that of both accused no. 2 and accused no. 4, was asleep when the robbery occurred and the deceased was forced into the motor car. Accused no. 4 had witnessed what had occurred but had not intervened.

108. Accused no. 3 and accused no. 4 are again fortunate and the same applies to accused no. 2 that the evidence does not establish that any of them participated in, or associated themselves with the deceased being forced into the motor car by accused no. 1 after he robbed Sithembele April. In the case of accused no. 2 we are not convinced that he has been truthful in respect of this incident but there is no evidence to gainsay his assertion that he was asleep in the car.

109. In their testimony accused no. 2, accused no. 3 and accused no. 4 also describe what happened thereafter. It is clear from their evidence that, in addition to certain other incidents at the Orlando Stadium, accused no. 1 had dragged the deceased by her hair and again forced her into the motor car.

110. The evidence of what transpired at the Orlando Stadium does not allow us to conclude either that accused no. 2 or accused no. 3 or accused no. 4 had made common cause with accused no. 1 when he dragged the deceased by her hair and again forced her into the motor car. Even though accused no. 3 was the only one to actively oppose the deceased being forced into the car once more by accused no. 1, the evidence fails to establish that accused no. 2 and accused no. 4 assisted accused no. 1. Sadly, they failed to assist the deceased when they were clearly able to do so. Instead they permitted accused no. 1 to savagely manhandle her into the car. As morally reprehensible as their conduct was this in itself does not permit us to conclude that they should be convicted of kidnapping . In our view the evidence in relation to the charge of kidnapping falls short of the standard of proof necessary to permit the Court to find that accused no. 2, accused no. 3 and accused no. 4 are guilty thereof.

111. The evidence establishes that accused no. 1 had forced the deceased to get into the motor car after he robbed Sithembele April. There is also evidence that when he did so he was wielding a firearm. Further, at the stadium, after forcibly removing her from the motor car he later again forced her to get into

the motor car by dragging her by her hair. It is clear therefore, that he kidnapped the deceased.

112. The court now turns to the charge of rape. Dr D T John testified that he was unable to establish whether or not the deceased was raped. This was due to the fact that her vagina had been badly mutilated. In this instance, however, the absence of medical confirmation that the deceased had been raped is not fatal to the State case. There is more than sufficient other evidence that she was indeed raped.

113. Accused no. 2 and accused no. 4 testified that they did not rape the deceased. But, when confronted with the fact that both of them had admitted at the bail hearing that they had raped her they could not explain why they had said so. These admissions were made freely and voluntarily and after they had been warned by the magistrate that their testimony could be admitted at their trial as evidence against them. The attempts by accused no. 2 and accused no. 4 to distance themselves from these have failed. During cross-examination they admitted that their testimony at the bail hearing had been the truth. By direct implication, therefore, their denials in this trial that they did not rape the deceased are obviously lies.

114. Accused no. 1 has not placed any evidence before us to counter his own admission at the bail hearing that he initiated that the deceased be raped and killed. Even if it could be said that he personally did not rape the deceased

then the fact that he admitted initiating her rape makes him as guilty of the act of rape as the actual perpetrator. But, there is compelling evidence that he actually raped the deceased. This evidence eminates from his three co-accused. We are mindful of the fact that they may be motivated to falsely incriminate him in order to exculpate themselves. However, we accept that they have been truthful on this aspect. There is sufficient corroboration in their respective versions of what accused no. 1 did to permit us to conclude they are not falsely implicating him. There are slight differences in the versions of accused no. 2, accused no. 3 and accused no. 4 but these do not reflect adversely on their allegations in respect of the conduct of accused no. 1. There is no indication that they have adjusted their versions so that they may match perfectly.

115. At the bail hearing accused no. 2 stated that accused no. 1 had said in the car that he was going to rape the deceased. This was his evidence also in the trial. Accused no. 2 said further that at the stadium accused no. 1 told the deceased to undress and pulled her out of the car by her hair. He did not, however, say that he saw accused no. 1 rape her. Accused no. 3 stated at the bail hearing that he saw accused no. 1 rape the deceased twice. The second time he had raped her from behind. This was also his testimony in the trial.

116. Accused no. 4 also testified in the bail hearing that he had seen accused no. 1 rape the deceased. In the trial his testimony was of a similar nature.

117. This is not a case where accused no. 1 has been caught by surprise by these allegations. Accused no. 1 was fully aware thereof since they had been made as early as the bail hearing. Yet, he has chosen not to testify in order to refute them. There is an absence of evidence which compels us to reject the testimony of accused no. 2, accused no. 3 and accused no. 4 in regard to the role that accused no. 1 played. We find, therefore, that accused no. 1 indeed raped the deceased.

118. The position of accused no. 2 and accused no. 4 is the same. Their admissions in the bail proceedings override their testimony in the trial. They were unable to provide any cogent answer as to why they admitted at the trial that they had raped the deceased. At the bail hearing accused no. 2 in fact stated that he had penetrated the vagina of the deceased. His testimony here that he did not rape her is clearly false and we reject same. In so far as accused no. 4 is concerned, both at the bail hearing and during the course of his testimony in this Court, he persistently referred to the fact that he had been forced to rape the deceased. His claim that he did not in fact rape her and did not have sexual intercourse with her is rejected. He cannot escape the admissions that he made at the bail hearing. We find, therefore, that accused no. 2 and accused no. 4 are equally guilty of the rape of the deceased.

119. We now proceed to consider the position in respect of the charge of murder. Accused no. 1 is incriminated by the testimony of accused no. 2 , accused

no. 3 and accused no. 4. They allege that accused no. 1 had acted on his own when he deliberately drove the motor car at the deceased, knocked her down and then drove over her six times. They say they had no forewarning that he was going to kill the deceased and were caught completely by surprise by his actions. They also disassociated themselves from what he was doing by jumping out of the motor car. Accused no. 2 and accused no. 3 provided the same version both in the bail hearing and in the trial and were consistent in the details thereof. Accused no. 4 furnished a similar version in the trial. His version in the bail hearing was also similar except that he made no mention of having joined accused no. 2 and accused no. 3 in jumping out of the motor car when accused no. 1 knocked the deceased down.

120. Since accused no. 1 did not testify the versions of accused no. 2, accused no. 3 and accused no. 4 in regard to how the deceased was killed are uncontradicted. Their testimony that the motor car was driven over her body a number of times is supported by the findings of Dr John as detailed in the Post Mortem Report (Exbihit 'B'). It is clear from the injuries that her body was horribly mutilated. Dr John testified that the injuries were consistent with those sustained by a motor accident victim. There can be no doubt, therefore, that the deceased was killed in the manner described by accused no. 2, accused no. 3 and accused no. 4.

121. In the bail hearing accused no. 1 stated that he did not know how the deceased died but that she had been struck by a motor vehicle. Later he said

that she had run in front of the car he was driving and he then knocked her over. However, he claimed, that he did not know whether he drove over her. On the basis of his own testimony in the bail hearing he has admitted that he was the person who knocked the deceased down. The only reasonable conclusion to be drawn from his admissions, taken with the testimony of accused no. 2, accused no. 3 and accused no. 4, is that accused no. 1 was responsible for the injuries inflicted on the deceased. Any suggestion that the incident may have been an accident is refuted by the nature and extent of the injuries and the testimony of his co-accused that accused no. 1 drove over her repeatedly. The conclusion is inescapable that accused no. 1 intended killing the deceased and in fact did so.

122. The evidence does not establish that accused no. 1, accused no. 2 and accused no. 3 associated themselves with the actions of accused no. 1 when he knocked the deceased down and drove over her and then repeatedly reversed the motor car and drove over her body. We are unable to reject their version that they jumped out of the motor car as they were opposed to what accused no. 1 was doing and did not want to have any part therein. We accept, therefore, that neither accused no. 2, accused no. 3 nor accused no. 4 participated in the actual act of murder. We need to mention, however, that we find their failure to report what happened as morally reprehensible.

123. However, this does not conclude the enquiry. The question still remains whether or not they made common cause with accused no. 1 in respect of the

murder. After accused no. 1 had killed the deceased he asked the other accused to assist him in hiding the body. Accused no. 2 and accused no. 3 refused to assist. Accused no. 4 assisted but testified that accused no. 1 had forced him to do so. He claimed that he feared accused no. 1 because he had a gun in his possession. Surprisingly he never revealed this in his testimony in the bail hearing. He was pertinently asked there why he feared accused no. 1 but made no mention that it was because accused no. 1 was in possession of a firearm.

124. On his own evidence there is no basis for the conclusion that accused no. 4 was justified in fearing accused no. 1. Accused no. 4 simply refers to the fact that accused no. 1 had a firearm in his possession but at no time has he said that accused no. 1 had actually threatened to shoot or harm him if he did not assist. Neither accused no. 2 or accused no. 4 made mention of such a threat either. The only force which accused no. 1 applied was to take accused no. 4 by the neck and force him towards the body of the deceased. It is evident that accused no. 1 relied more on verbal persuasion than physical force or actual threats to get accused no. 4 to assist him. Indeed all three of them testified that accused no. 1 had told accused no. 4 he should assist as he had allowed accused no. 4 to rape the deceased.

125. It is apparent that accused no. 4 has fabricated the story of a threat. There was none. He voluntarily assisted accused no. 1 in dragging the body away and in concealing it. He could have refused to do so but clearly chose not to.

By rendering this assistance accused no. 4 has become an accessory after the fact to the murder of the deceased.

126. We have considered the versions furnished by each of the accused. It is evident in each of their versions that are clearly large elements of the truth but it is interspersed with half-truths and lies. All of them tried to distance themselves from the admissions they had made in the bail hearing. They tried to diminish their own roles even to the extent of contradicting the admissions they had made when testifying in the bail hearing.

127. In the case of accused no. 2 he clearly tried to distance himself from having any hand in the robbery. The same applied in regard to the rape of the deceased. We reject his testimony where it conflicts with his testimony in the bail hearing. We do not consider those aspects to be reasonably possibly true. They are clearly false.

128. Accused no. 3 had tried to diminish the involvement of accused no. 2 and accused no. 4 in the rape of the deceased. We treat his evidence in this regard with great circumspection. In any event both accused no. 2 and accused no. 4 admitted in the bail hearing that they had sexual intercourse with the deceased. More than that both admitted that they had raped her. We reject their testimony that they did not do so. Such testimony is clearly false.

129. Accused no. 4 has also tried to diminish his own role in the various incidents. His claim that he did not rape the deceased is patently false and we reject same. The same applies in respect of his testimony in regard to his assisting accused no. 1 to drag the deceased's body away and secreting it in the bushes. As we have stated the evidence does not support his claim that he was coerced into helping accused no. 1. We do not find his claim of coercion to be reasonably possibly true. We reject it as false.

130. After weighing up all the evidence we are unanimously of the view that the State has proved beyond a reasonable doubt that accused no. 1 committed the offences set out in the indictment. We are also of the unanimous view that the murder was premeditated. At the stage that they were at the stadium accused no. 1 had already stated then that he wanted to stab the deceased or kill her. This is why he asked accused no. 2 and accused no. 3 for a knife. It is further self-evident that accused no. 1 deliberately drove the motor car at her in order to knock her down and prevent her from leaving. But, even this was not enough since he then drove over her body a number of times. This demonstrates that he wanted to be absolutely certain that she should not remain alive. We are in no doubt that these actions were premeditated. Accordingly, accused no. 1 is found guilty of:

1. The murder of Lydia Mankwete;
2. The robbery of Sithembele April. We also find that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present as

the accused used a firearm in the commission of the robbery;

3. The rape of Lydia Mankwete; and

4. The kidnapping of Lydia Mankwete.

131. The State has also proved beyond a reasonable doubt that accused no. 2 committed the offences of robbery with aggravating circumstances and rape. Accordingly, accused no. 2 is found guilty of:

1. The robbery of Sithembele April. We also find that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present as a firearm was used in the commission of the offence;
2. The rape of Lydia Mankwete.

In respect of the offences of murder and kidnapping accused no. 2 is found not guilty and discharged.

132. Accused no. 3 is found not guilty of the offences of murder, robbery with aggravating circumstances, rape and kidnapping and is discharged.

132. The State has also proved beyond a reasonable doubt that accused no. 4 committed the offences of rape and that he is guilty of being an accessory to the murder of Lydia Mankwete. Accordingly, accused no. 4 is found guilty of:

1. The rape of Lydia Mankwete; and

2. The offence of being an accessory after the fact to the murder of Lydia Mankwete.

In respect of the offences of robbery with aggravating circumstances and kidnapping accused no. 4 is found not guilty and discharged.

JUDGE Y EBRAHIM **11 AUGUST 2003**