HIGH COURT
BISHO

CASE NO: CC 81/05

In the matter between:

THE STATE

and

NOMATHAMSANQA CYNTHIA KWAZA **Accused No. 1**

LUYANDA LUCAS GQOZO **Accused No. 2**

NTOMBIZANELE KWAZA **Accused No. 3**

NOLUFEFE DIMAZA **Accused No. 4**

JUDGMENT

EBRAHIM J:

Introduction

1. **NOMATHAMSANQA CYNTHIA KWAZA**, who is accused no. 1, is charged with one count of contravening section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956, namely conspiracy to commit murder, one count of murder, one count of unlawfully possessing a firearm and one count of unlawfully possessing ammunition.

2. **LUYANDA LUCAS GQOZO**, who is accused no. 2, is charged with one count of murder, one count of robbery with aggravating circumstances, one count of unlawfully possessing a firearm and one count of unlawfully possessing ammunition.

3. **NTOMBIZANELE KWAZA**, who is accused no. 3, and **NOLUFEFE DIMAZA**, who is accused no. 4, are both charged with one count of contravening section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956, namely conspiracy to commit murder.

4. All four accused pleaded not guilty to the charges preferred against them and, in terms of section 115(1) of the Criminal Procedure Act 51 of 1977 ('the CPA'), confirmed that they were not disclosing the basis of their defences to any of the charges.

Admissions

5. Prior to adducing the oral testimony of any witnesses Mr Walters, who appears for the State, tendered in evidence various admissions set out in Exhibit 'A' that were being made by the accused in terms of section 220 of the CPA. The admissions confirmed *inter alia* the identity and date of death of the deceased in count 2. The correctness of the findings and conclusions of Dr Joseph Ivan Koopowitz arising from the post-mortem examination he conducted on the deceased, was admitted, including the Post-Mortem Report (Exhibit 'B') he prepared. A photo album (Exhibit 'C') with photographs taken during the post-mortem of the deceased's

body and the gunshot wound inflicted on him was admitted. A further photo-album (Exhibit 'D') with photographs of the scene where the deceased's body, including other items, was found was also admitted. Hereafter the State adduced the testimony of various witnesses.

The State case

6. Andre De Villiers Horne, a superintendent in the S A Police Services, is stationed at the Eastern Cape Forensic Science Laboratory and the head of the ballistics section thereof. He testified in amplification of an affidavit (Exhibit 'E') that he attested to on 9 March 2005. He received three sealed exhibit bags marked Whittlesea CR 25/12/04. These contained two 7.65mm calibre firearms with serial nos. 738594 and 687856 respectively plus magazines, eight 7.65mmm calibre cartridges and a brown sock with a hole in the toe area. On examining the sock he found the edges of the fibre around the hole to be frayed. Chemical tests that he conducted revealed the presence of lead. This together with the size of the hole led him to conclude that the hole had been caused by a bullet that was discharged from a firearm inside the sock.

7. Cross-examined by Mr Tini he stated that he was unable to say if the hole had been caused by either of the firearms. He could not say if the firearms had been cleaned recently but the barrel of the firearm with serial no. 687856 was dusty. The other firearm with serial no. 738594 had been fired but he was unable to say how recently that occurred. A 9mm bullet would usually cause a larger hole but it would also depend

on the kind of material involved. The presence of lead was, on its own, inconclusive but this taken together with the shape of the hole and the scorched fibres had led him to conclude that it was a bullet hole. Mr Gabelana did not cross-examine Superintendent Horne.

8. Mr Walters informed the Court that the next witness, Lumko Sedgemore Mguzulwa, was an accomplice in respect of the offence in count 1. He requested that the witness be apprised of the provisions of s 204 of the CPA and this was done.

9. Lumko Sedgemore Mguzulwa stated that he knew accused no. 1 as well as accused no. 3 and accused no. 4. In November 2004 they arrived at his home in an Opel Astra motor car. Accused no. 1 asked him for an unlicensed firearm and he replied that he did not have one. Accused no. 1 said she would return. Accused no. 4 told him that accused no. 1 had a problem with her husband and wanted him killed. After two weeks accused no. 1 returned and said that her husband had won the divorce case. She wanted some goods transported but he told her that his truck was faulty. She asked if he had found a firearm and when he said that he had not she told him she would return. He did not, however, tell her that he had not been looking for one.

10. Sometime thereafter accused no. 1 arrived by car and enquired if he had found a firearm. He told her he had not and she produced R1 000,00 and asked how much he would charge to kill her husband. He replied

that he could not do the job without the help of another person and she said that she would get someone. He took the R1 000,00 as he did not want her to suspect that he was not prepared to kill her husband.

11. At a later stage she again arrived by car and invited him to get in. She produced a firearm from under the driver's seat and said that she stole it from her mother. She wanted the job done and gave him the firearm but he refused to take it and got out of the car. She then left. They met at a traditional ceremony and she called him and told him that she had done the job. But he did not ask what she was referring to and they parted.

12. During cross-examination by Mr Tini he insisted that in addition to being asked to transport goods for her, accused no. 1 also offered him the job of killing her husband. He denied saying in his evidence-in-chief that he could not do this, but then said that he could not dispute that he had said so. He conceded that in his statement to the police (Exhibit 'F') he stated that he could not kill the deceased. He had told accused no. 1 that it would cost roughly R4 000,00 to kill him. When asked why the amount in the statement was R6 000,00 he said that he had not memorised the amount. Confronted with a copy of the decree of divorce (Exhibit 'G') in which it was stipulated that there had been a division of the joint estate, he insisted that she told him she had lost the divorce case.

13. He admitted that he never transported the goods of accused no. 1. He denied that the R1 000,00 was for this and did not fetch the money from

her home. He denied that he was falsely implicating her because he still owed this amount to her. He refunded the R1 000,00 to a person named Nosuko whom accused no. 1 sent to collect it as she was in custody.

14. Cross-examined by Mr Gabelana he admitted that accused no. 3 had not said anything while she was with accused no. 1. He then said that he had made a mistake in saying that she remained quiet. When he testified the day before he could not remember all the details of what had occurred on the day that accused no. 1 approached him. He admitted that aspects of his testimony were contradictory but denied that it was only the transportation of the goods that was discussed. He conceded that accused no. 4 never asked for the firearm but insisted that she had said that accused no. 1 wanted her husband killed.

15. In response to questions from the Court, the witness Mguzulwa said that he did not ask accused no. 1 to clarify why she still wanted an unlicensed firearm if she was hiring him to kill her husband. After she had obtained a firearm he did not ask her why she was still trying to hire him and did not kill her husband herself. He told her to keep the firearm and said that he would look for a second person. It did not occur to him to tell the police that accused no. 1 had approached him to kill her husband and was trying to obtain an unlicensed firearm. He had taken the R1 000,00 as he wanted her to go away. However, at no stage did he tell accused no. 1 that he would carry out the killing.

16. Most of the evidence of the next witness, Vuyisile Ludaka, was irrelevant. The only pertinent aspect concerned a trip to Dongwe on 19 November 2004 when he and Msutwana Mguzulwa accompanied accused no. 2 in a vehicle driven by accused no. 1. On arriving in Dongwe they disembarked and accused no. 1 departed. They boarded another vehicle and together with a person named Sinuka went to his home. Accused no. 2 then said that they were going to a friend who owned an Astra motor car and he would shoot him and take his car. This never transpired, however, as no one was home. Accused no. 2 had also threatened to throw him in the river as he was unwilling to assist.

17. The only relevant issues to emerge from the cross-examination of Mr Tini was that the witness denied that he was falsely implicating accused no. 1 and accused no. 2. He also denied that he was promised a monetary reward. Mr Gabelana did not cross-examine this witness.

18. In order to determine the admissibility of a written statement and the pointing-out made by accused no. 2 a trial-within-a-trial was held. The Court concluded that the State had proved that accused no. 2 made the statement and the pointing-out freely and voluntarily in his sound and sober senses and without being unduly influenced thereto. Accordingly the statement and the pointing-out were admitted in evidence against accused no. 2. Since the Court's decision was not accompanied by reasons these are being provided now.

19. The admissibility of the statement was disputed on four grounds. First, it was not made to a commissioned officer; second, he was not informed of the rights set out in s 35 of the Constitution, Act 108 of 1996; third, the statement was obtained by means of assault and he was forced to sign it; and, fourth, the contents of the statement did not emanate from him.

20. The admissibility of the pointing-out was also disputed on four grounds. First, although he informed the commissioned officer who conducted the pointing-out that he was participating freely and voluntarily, he told her this as he was assaulted the previous night; second, the previous night the investigating officer had taken him to the places that he was to point out the next day; third, the investigating officer and four other policemen had threatened to kill him if he did not point out these places; and fourth, he requested to consult an attorney but was denied the right to do so.

21. Superintendent T Lange, who was the investigating officer, Inspector C J Jacobs, Inspector A Tembani and Superintendent N R Sifanelo testified on behalf of the State. In rebuttal accused no. 2 testified and presented the evidence of Thembisa Kwaza and Dr H G Vaidya.

22. Lange was cross-examined extensively. A measure of criticism may be directed at aspects of his evidence concerning entries in an occurrence book relating to the arrest of accused no. 2 and his removal from the cells for questioning. But, the same is not true of his evidence regarding the arrest of accused no. 2 and the events at the police station. His

version of what transpired when accused no. 2 was questioned and subsequently made the statement is corroborated by Inspector Jacobs and Inspector Tembani.

23. In terms of the State's evidence Lange informed accused no.2, on his arrest, of his legal rights as prescribed in s 35 of the Constitution. Later at the police station Tembani in the presence of Jacobs, Lange and a Constable James again informed accused no. 2 of these rights. The State witnesses denied that they assaulted accused no. 2 and coerced him into signing the statement. They also disputed that Tembani was the author of the statement.

24. The description by accused no. 2 of the circumstances of his arrest are largely very similar to that provided by Lange, save that accused no. 2 claims that Lange assaulted him by kicking him in the ribs. I do not consider this to be true. But, even if such an assault took place accused no. 2 did not allege that it was due to this that he was forced into signing the statement and making the pointing-out. According to him it was the assaults that he was subjected to at the police station that coerced him into doing so.

25. During cross-examination the witnesses were confronted with a general accusation that they had assaulted accused no. 2 without any specific details being disclosed. But, when accused no. 2 testified he described in detail the nature, intensity and duration of the assaults. On the basis

of such an assault the consequences would have been clearly visible on his body. But, the photographs of his upper body, taken the next morning prior to the pointing-out, do not reveal any bruises or visible injuries or any other signs of an assault.

26. Initially accused no. 2 did not dispute that he was informed of his legal rights by Superintendent Sifanelo prior to the pointing-out. But, during cross-examination the position suddenly changed. Mr Tini then informed the Court that accused no. 2 now alleged that these rights, except the right not to do a pointing-out, were not explained to him. Accused no. 2 also claimed that he told Superintendent Sifanelo that he had been assaulted and wanted to be taken to a hospital to be treated by a doctor.

27. I was impressed with the testimony of Superintendent Sifanelo. She was an honest and credible witness and was beyond reproach as a witness. She truthfully recounted what had taken place with the pointing-out. I accept her version in preference to that of accused no. 2 as the truth.

28. There were no material contradictions, inconsistencies or improbabilities in the evidence of the State witnesses. They corroborated each other in regard to what transpired. They were credible witnesses and I find their testimony to be trustworthy. I accept their version of events. It is clear that accused no. 2 was apprised of his legal rights as stipulated in s 35 of the Constitution and understood the import thereof.

29. Accused no. 2 was a poor witness. His testimony was peppered with contradictions, improbabilities, inconsistencies, and blatant untruths. During the course of his testimony his description of the assault became more and more exaggerated. As I have said if he was assaulted in the manner that he claims there should have been numerous bruises and haematomas or other visible wounds on his body. Yet, there is no evidence of this on any of the photographs taken the following morning.

30. Dr Vaidya's examination of accused no. 2 on 13 January 2005 revealed a fracture of the ribs. This was not visible to the naked eye. The injury was equally consistent with him having been kicked or as a result of a fall and was probably one to two days old. But, accused no. 2 did not tell him that he had been subjected to a sustained assaulted by a number of policemen over a period of a few hours. There was also no indication on his body of such an assault. If such a claim had been made he would have examined accused no. 2 further and recorded his findings.

31. The claim by accused no. 2 that he was threatened and assaulted was patently false and a fabrication. His claim that he was coerced into signing the statement because of the assaults is similarly devoid of truth. I also do not find any truth in his claim that he requested the services of a legal representative or was denied such representation.

32. There is similarly no truth in the claim that Tembani was the author of the statement and not accused no. 2. If Tembani was responsible it is

unlikely that he would have stated that accused no. 2 was inside the motor car and not with the deceased when the fatal shot was fired. It is far more probable that he would have implicated accused no. 2 directly and unequivocally, and not by inference, in the murder and the other offences. It is evident furthermore that the details of the incidents set out in the statement could only have been provided by a person who was present and directly involved therein, namely accused no. 2. There is no doubt either that he furnished the statement freely and voluntarily.

33. There is no merit in the objection to the admissibility of the statement on the ground that it was not made to a commissioned officer. Accused no. 2 related what had occurred to Superintendent Lange and Inspector Tembani who recorded what he was saying. The evidence establishes that the statement was confirmed and reduced to writing in the presence of Superintendent Lange. Accused no. 2 did not dispute that Lange holds the rank of a commissioned officer and is a justice of the peace as specified in s 217 of the CPA. Consequently the statement was admissible in evidence against accused no. 2.

34. A trial-within-a-trial was also held to determine the admissibility of written statements made by accused no. 1 and accused no. 4. The Court in an *ex tempore* judgment excluded the statement made by accused no. 4 as the State had not proved that it was admissible in evidence against her. In respect of the statement of accused no. 1 the Court concluded that the State had proved that she made it freely and voluntarily in her sound and

sober senses and without being unduly influenced thereto. The Court accordingly ruled that the statement was admissible in evidence against her. The reasons for this now follow.

35. Accused no. 1 disputed the statement's admissibility on four grounds. First, the policeman who wrote the statement was the author thereof; second, it was not made to a commissioned officer; third, she was not informed of the rights in s 35 of the Constitution, Act 108 of 1996; and fourth, when she indicated that she would speak in court she was told that she did not have the right to remain silent.

36. The testimony of Superintendent Lange and Inspector Tembani was that on separate occasions they each informed accused no. 1 of the rights in s 35 of the Constitution. Lange did so upon her arrest and Tembani prior to her making the statement. Further, at the police station she was shown a document by Inspector Jacobs setting out the rights in s 35 of the Constitution. At her request she was allowed to read the document. Inspector Jacobs asked if she understood it and she confirmed that she did and signed it. The original was handed to her and a carbon copy retained. Later she was questioned about the deceased's death and explained what had happened. She made the statement voluntarily and it was written down by Inspector Tembani and signed by her.

37. Accused no. 1 denied that Lange informed her of her rights when he arrested her. Tembani did not inform of her rights either. She admitted

that she was handed the document in which the rights in s 35 of the Constitution were set out but said these had not been explained to her. However, in response to a question from Mr Tini she acknowledged that after reading the document she understood her rights. She denied that the contents of the statement emanated from her and said that it was the creation of Tembani.

38. During cross-examination she admitted that she had read the document before she was questioned and made the statement. She also admitted that Lange was present when she was interviewed and Tembani was writing the statement. But, Lange was not present when she signed it.

39. It is clear that accused no. 1 was handed a document setting out the rights in s 35 of the Constitution. The State witnesses claim she read it before signing it whereas she claims that she only read it afterwards. Whatever the position, it is beyond any doubt that she did read it. There is no doubt either that she understood these rights. She admitted this unequivocally in response to a direct question from Mr Tini. There is consequently no truth in the claim by accused no. 1 that she was not informed of the rights set out in s 35 of the Constitution.

40. Accused no. 1 did not impress as a witness. There were numerous instances of her contradicting herself in her evidence-in-chief and during cross-examination. Thus, for example, she now conceded that Lange was present while the statement was being written down. It was when

she signed it that he was absent. Then, while it was never raised as a ground of objection to its admissibility she now alleged that she had been forced to sign the statement. She said that the only force exerted on her was that Tembani told her that she was going to sign whether she liked it or not. Confronted with the fact that the record of her bail hearing did not reflect that she had raised this issue she insisted that she had done so. It is obvious that she was not telling the truth.

41. I am satisfied as to the truth of the version of events as related by the State witnesses. The version of accused no. 1 was manifestly false and a deliberate distortion of what occurred. The evidence establishes that she was fully aware of her legal rights before she made the statement. Her allegation that these rights were not explained to her was, on her own evidence, shown to be untrue. The same applies to her claim that she was told she did not have the right to remain silent. She was fully aware of the right not to say anything. This was set out pertinently in the document that was handed to her, which she admits she read and understood. She elected to relate certain events of her own free will and signed the statement without any force being exerted on her to do so.

42. The claim by accused. 1 that the contents of the statement did not emanate from her but was fabricated by Tembani has no merit. If the purpose of the statement was to implicate accused no. 1 so that she was convicted of the murder of her ex-husband, one would have expected Tembani to have described what happened far more explicitly and

incriminatingly instead of relying on inferences having to be drawn from various comments and particulars. It is clear moreover that many, if not all, the details of the happenings relating to the shooting could only have been provided by a person personally involved therein. In my view, there can be no doubt that this person was accused no. 1.

43. The objection to the admissibility of the statement on the ground that it was not made to a commissioned officer is without merit. Inspector Tembani recorded what accused no. 1 was relating to Superintendent Lange and him. It is clear from the evidence that the statement was confirmed and reduced to writing in the presence of Superintendent Lange. Accused no. 1 has not disputed that Lange holds the rank of a commissioned officer and is a justice of the peace as specified in s 217 of the CPA. Further, the evidence also establishes that accused no. 1 made the statement freely and voluntarily in her sound and sober senses and without having been unduly influenced to do so. The statement was consequently admissible in evidence against accused no. 1.

44. At the conclusion of the trials-within-a-trial the statements made by accused no. 1 and accused no. 2 including the notes of Superintendent Sifanelo in respect of the pointing-out made by accused no. 2 were admitted in evidence.

45. Inspector Christiaan Johan Jacobs testified that accused no. 2 had admitted that he was involved in the killing of the deceased. Accused

no. 2 also said that the firearm used belonged to the grandmother of accused no. 1 and that she took it without the knowledge of her grandmother. They went to the home of accused no. 1 introduced themselves and disclosed the reason for their visit. Lange asked for the firearm used in the killing and accused no. 1 told her grandmother to take it out and she fetched it from a drawer in the dressing table. It was a 7.65mm pistol with serial no. 738594 (Exhibit no. 1) with eight rounds of ammunition in the magazine. An Opel Astra motor car bearing registration. no. CJD 074 EC was confiscated from family members of accused no. 1 who resided across the road.

46. Inspector Jacobs testified further that when they interviewed accused no. 1 she confirmed the killing of the deceased. She told them there was a second magazine for the firearm and accused no. 2 confirmed this. She also said that when accused no. 2 shot the deceased the firearm was in a sock and it was in his possession. Accused no. 2. was asked to remove his socks and it was discovered that one had a hole in it. He explained that the firearm was put in the sock when the deceased was shot. The firearm, ammunition and the sock (Exhibit no. 2) were taken to the ballistics centre in Port Elizabeth by Inspector Tembani.

47. A bank statement (Exhibit ‘I’) detailing the transactions conducted on the bank account of the deceased showed that the sum of R1 500,00 was withdrawn at 09:22 on 8 December 2004. The deceased’s cellphone was stolen but had not been recovered. A print-out (Exhibit ‘J’) of the

telephone calls that were made from it revealed that the following were the last three: at 20:45 on 8 December 2004 to telephone number 072-7726318 allocated to a person named Ayanda Nduli; at 23:18 on 8 December 2004 to telephone number 043-7603307 allocated to a person named Noncedo Sontsonga; and at 00:22 on 9 December 2004 to telephone number 072-2354703 allocated to a person named Tembisa Kwaza.

48. Inspector Jacobs confirmed during cross-examination by Mr Tini that two firearms were recovered. The second firearm was taken from a relative of accused no. 1 who did not have a licence to possess it. Both were sent to ballistics for tests but, as no cartridges were found at the scene, neither firearm could be linked to the shooting of the deceased. The only evidence linking the firearm (Exhibit no. 1) to the murder of the deceased was what accused no. 1 and accused no. 2 had said. Accused no. 2 was not asked which person at the home of accused no. 1 had a firearm and replied that it was her mother and brother. Accused no. 2 told them that the firearm used to kill the deceased belonged to the mother of accused no. 1. It was accused no. 1 who told them to check the sock of accused no. 2. The sock was fairly new but had a hole in it. Accused no. 1 had said that it was accused no. 2 who shot the deceased and accused no. 2, in turn, said that it was accused no. 1 who shot him.

49. A further witness who testified for the State was Andile Mbi but his evidence was not relevant.

50. The investigating officer, Superintendent Thozamile Lange, testified that a statement (Exhibit ‘L’) made by accused no. 3, Ntombizanele Kwaza was recorded by him. He arrested accused no. 1 at her home. After informing her that they were investigating the murder of Ayanda Mbinda and that she was involved he explained to her the rights in s 35 of the Constitution. He then asked her for the firearm and she went to speak to her mother who produced it. At the police station he made an entry in the SAP 13 register and locked the firearm in a safe. As a result of information provided by accused no. 1 he recovered a sock that accused no. 2 was wearing. A second magazine was recovered because of information provided by accused no. 2.

51. During cross-examination by Mr Tini, Lange stated that when he went to the home of accused no. 1 he knew who the firearm belonged to and requested accused no. 1 to produce it. He asked her as his information was that it was the murder weapon and was in the possession of accused no. 1. Accused no. 2 had said that the firearm was in the possession of accused no. 1. He denied stating in the trial-within-a-trial that he asked her mother for the firearm. The firearm was given to him by accused no. 1 and not her mother. He disputed the claim of accused no. 1 that she had not said that the sock used was in the possession of accused no. 2. He also disputed the claims of accused no. 2 that he never said that the firearm was put in the sock and that the sock taken from him was new and did not have a hole in it. Further, the sock

handed into Court as an exhibit belonged to accused no. 2. Lange was not cross-examined by Mr Gabelana.

52. The greater part of the testimony of the witness, Msutwana Mguzulwa, was irrelevant. The only pertinent aspect was that he accompanied accused no. 2 to a house in Dongwe on 19 November 2004. Accused no. 2 had said that he was going to kill a friend and take his vehicle. From the description that accused no. 2 gave of the person living there he realised he was referring to Ayanda Mbinda.

53. Cross-examined by Mr Tini he claimed that accused no. 2 wanted him to assist in killing Ayanda Mbinda. He never mentioned this in his testimony as the prosecutor had stopped asking him questions and sat down. He denied that he was false implicating accused no. 2 to benefit financially from a reward.

54. Ayanda Mduli testified that at about 8.45pm on 8 December 2004 the deceased rang her on her cellphone on telephone number 072-7726318. They spoke for approximately 190 seconds and she did not speak to him thereafter. She was not cross-examined.

55. The testimony of Noncedo Sotsonga, who resided at 7859 NU 3 Mdatsane, was that her home telephone was 043-7603307. She knew accused no. 2 as he was in love with her daughter. She did not know the deceased Ayanda Mbinda. When she was asked by Mr Walters if she

received a telephone call from the deceased on 8 December 2004 at about 23:18 she denied this. She was at home alone as her daughter was in Johannesburg at the time. She was not cross-examined. This concluded the case for the State.

Application in terms of s 174 of the Criminal Procedure Act 51 of 1977 for the discharge of accused no. 1 and accused no. 2

56. In terms of s 174 of the CPA Mr Gabelana applied for the discharge of accused no. 1 and accused no. 2 on the charge of conspiracy to commit murder. Mr Walters did not oppose the application. Before pronouncing on the application the Court enquired from Mr Walters whether the State was adopting a similar position in respect of accused no. 1 despite the absence of an application for her discharge from Mr Tini. Mr Walters confirmed that the State would also not oppose her discharge on this charge. Thereupon accused no. 3 and accused no. 4 as well as accused no. 1 were discharged on the charge of conspiracy to commit murder (which is count 1 in the indictment) and found not guilty thereof. Since the Court furnished reasons for its decision in an *ex tempore* judgment no further comment is necessary.

The defence cases

57. In reply to the State case accused no. 1, Nomathamsanqa Cynthia Kwaza, testified in her own defence. She stated that when she and her husband were divorced there was a division of their joint estate. She was contented with this. Lange and Jacobs had lied when they said that

she was involved in the murder of her ex-husband. She did not hire anyone to kill him. It was a lie that she handed the firearm belonging to her mother to them. Lange never asked her for the firearm. He asked her mother for it and she took the firearm from the drawer of the headboard of the bed and handed it to him. She had no knowledge of the firearm being used to kill her ex-husband and never took it from the drawer. It was a lie that she willingly made a statement. The contents came from Tembani and not her. He told her he had heard everything from accused no. 2 and informers and whether she liked it or not she was going to sign. As she was tired she signed the statement.

58. On 8 December 2004 she borrowed her sister's car to transport her mother to the pension payout point at Lower Shiloh. She took her mother there and then went to Dongwe as there were people who owed her money. At 12 noon she fetched her mother and returned home. At the request of her mother she went to payout point in Sada Township to collect money for her and returned at 3.30pm. After 4.00pm, again at the request of her mother, she went to Sada Township once more to collect money from people who were indebted to her mother. It was still daylight when she arrived at home and handed the money to her mother. Accused no. 2 was then at her home. At about 6.30pm she went to the garage to put petrol in the car and accused no. 2 accompanied her and she took him home. She returned the car to her sister and arrived home before 7.00pm and did not go out again. On 9 December 2004 she learnt of the deceased's death.

59. On the evening of 19 November 2004 she was with Mabhabhana and Nonqwaba in a bakkie. At a tavern accused no. 2 whistled and they stopped. Accused no. 2 approached and asked if Mabhabhana was going to Dongwe but he replied that accused no. 1 was going there. Accused no. 2 asked for a lift and called Luyisile Ludaka and Msutwana Muguzulwa and the three of them got onto the rear of the bakkie. At his home Mabhabhana and his wife alighted and she then drove to New Zone in Dongwe where accused no. 2 and the other two alighted. She left and did not see them again.

60. Cross-examined by Mr Walters accused no. 1 stated that she and accused no. 2 were cousins. After she arrived home that evening she spoke to her mother for a few minutes before preparing a meal of pap and meat. She dished the food for her mother and three children named Siyabulela, Yonela and Zimkhita. They completed their meal at about 8.00pm and she washed the dishes. She then put on her nightdress and she and her mother got into bed. It was after 8.45pm and she fell asleep and only awoke the next morning. She agreed that she had not told the police that she had been at home that evening.

61. She denied blaming her ex-husband for the death of her child on 5 October 2004. She did not know why Ntombizanele Kwaza had said in her statement that she blamed him. This was untrue. Her ex-husband had maintained the child properly. She and the deceased had been on good terms before the divorce. But, on one occasion they were at

loggerheads. The deceased had refused to take their sick child to their family doctor and she was forced to hire a vehicle to take the child to the doctor. Her ex-husband had insisted that she take the child to another doctor in Whittlesea. She acknowledged that the deceased had obtained a protection order against her. The reason for this was that she had ordered his passengers to get out of their vehicle on 20 September 2004. She admitted that before the divorce was finalised she asked Lumko Mguzulwa to transport furniture from her marital home and paid him R1 000,00 but he did not transport the goods. He had lied because he still owed her the R1 000,00. The State witnesses who had implicated her were all lying. She denied that she and accused no. 2 killed the deceased and denied they had planned to do so for sometime.

62. Doreen Nolungile Kwaza, the mother of accused no. 1, confirmed that on 8 December 2004 accused no. 1 took her to Shiloh in the car of her daughter-in-law to collect her pension. Accused no. 1 left her there and fetched her later and they went home. She then sent accused no. 1 to Sada to check on people who owed her money. When accused no. 1 returned accused no. 2 was there. She instructed accused no. 1 to put petrol in the vehicle and to return it and thank the owner. Accused no. 1 left accompanied by accused no. 2 and returned alone at about 7.00pm. Accused no. 1 then prepared supper, dished the food and washed the dishes. Thereafter she came to the bedroom, prepared the bed and climbed in and went to sleep. Accused no. 1 did not do out again. She inherited the firearm from her husband and had it licensed in her name.

It was kept in a locked kist in a trunk. At night she placed it in the drawer of the headboard until the following morning. On the night of 8 December 2004 it was in the drawer as usual and the next morning she placed it in the kist. On the day the police arrived at her home the old man asked her for the firearm. She handed it to him and asked when it would be returned. He confirmed it would but did not say anything further.

63. During cross-examination by Mr Walters she said that when accused no. 1 took the car back she was watching the news on television. She could not recall the contents of the news broadcast but people were toyi-toying. However, she could remember what she ate that evening. It was stiff pap and meat as it was after 7.00pm. The 8 December 2004 was a Thursday. It was the day she received her pension. When it was pointed out that it was a Wednesday, she said that she was able to remember specific things and events but not the days. A total of nine of them had supper that evening. If accused no. 1 said that it was the two of them plus three children then she had only counted the older children and not the younger ones. She could not remember which programme she watched after the news but then said it was one called Generations.

64. She could not remember on what date in January 2005 the police fetched the firearm. She could not remember the time either but it was during the evening and they were in bed. She also remembered that they ate stamped mealies with beans and tea that night. She said that

the firearm could not be taken from the drawer and returned without her knowledge as the bedroom door made a noise. She conceded that it could have happened while she was asleep. However, the firearm was always there in the morning.

65. Accused no. 1 and the deceased did not have a harmonious relationship. Accused no. 1 had told her that when the deceased came home he would say that he was smelling shit. They had already separated when the child died. Accused no. 1 blamed the deceased as he did not care too much for the child and did not fulfil his role as a father.

66. The police never told her that they arrested accused no. 1 for the murder of her ex-husband. When she visited accused no. 1 in prison she said they alleged she had killed him. She learnt from a family member that the deceased died on 8 December 2004. Although she informed her relatives that accused no. 1 was at home with her that evening she did not tell the police as they never asked her.

67. Nokwaka Kwaza testified that she was the owner of an Opel Astra motor car bearing registration no. CJD 074 EC. She could recall that on 8 December 2004 accused no. 1 borrowed the car. It was before she left for school but could not remember the time. Accused no. 1 returned the car at about 7.00pm and thereafter the car remained with her for the rest of the evening. She confirmed that the police had removed a firearm that was at her home. This occurred after the arrest of accused no. 1.

68. It emerged during cross-examination by Mr Walters that the police said that they were removing the car as accused no. 1 had murdered her husband and transported him in it on 8 December 2004. She told them that the car was at her home at all material times. But, she did not tell them the car was returned late that day as they never asked and she was arguing with Lange who was threatening her. She then said that she could not remember if the police had mentioned the date. She also claimed that she could not recall having stated earlier that she told the police the car was with her. She then said she was certain that the police did not inform her of the date and time of death of the deceased. She was told by the lawyer she consulted that the car had been used in the commission of a crime on the night of 8 December 2004.

69. She confirmed she had stated in an affidavit that accused no. 1 borrowed the car. She did not mention that it was on behalf of her mother-in-law as she did not know she had to disclose this. When it was pointed out to her that she had also not stated at what time the car was returned to her she was unable to explain why this had been omitted. This concluded the case for accused no. 1.

70. Accused no. 2, Luyanda Lucas Gqozo, testified in his own defence. He denied telling Lange and Jacobs that he was involved in the killing of the deceased. He also denied saying that the firearm that was used was in the possession of accused no. 1. He was asked if there was a firearm at the home of accused no. 1 and had confirmed that there was one. In

regard to the pointing-out he said that the police had shown him which places he should point out. He denied that he made a statement freely and voluntarily. The police had forced him to sign it. In addition, the contents did not emanate from him.

71. On 8 December 2004 he was at home. Sometime during the day he went to the home of accused no. 1 and accompanied her to Whittlesea. Before 7.00pm she took him home. His mother and three children were in the house. He remained there and cleaned his tools.

72. He denied that the sock handed in as Exhibit no. 2 was the same sock that the police had obtained from him. The one he gave to the police was new and did not have a hole in it. He denied that he said that the sock was used to cover the firearm.

73. He remembered the events of 19 November 2004. He was with Msutwana Mguzulwa and Vuyisile Ludaka when Mabhabhana's vehicle arrived. He whistled and Mabhabhana stopped. Accused no. 1 and Nonceba were in the vehicle too. He asked for a lift to Dongwe and was told by Mabhabhana that accused no. 1 was going there. He, Mguzulwa and Ludaka boarded the vehicle and they drove to Mabhabhana's home. Mabhabhana and Nonceba alighted and accused no. 1 then drove to New Zone in Dongwe where he and Mguzulwa and Ludaka alighted at the home of Sinuka. After establishing that Sinuka was there he informed accused no. 1 that she could leave. They accompanied Sinuka

in his car, a Jetta. He denied telling them that he was going to kill someone and take his Astra motor car. He never threatened Ludaka nor did he ask Msutwana to accompany him to kill the person. They were nearly involved in an accident when the steering wheel of the car locked. The police were summoned by a taxi driver and they were then taken to the police station.

74. Cross-examined by Mr Walters, accused no. 2 said that he did not know why Mguzulwa and Ludaka would have lied. He had heard Mr Tini put to them during cross-examination that they did so as they were after reward money. He did not know why this was put. He was not in a position to say if Mr Tini had made this up. He denied that the sock with a hole in it was one of the pair that had been issued to him while he was in prison and that he brought with him on his release. After he came out of prison he bought new socks for himself and used the ones issued to him in prison about seven times. The reason why it had been put to Lange and Jacobs that the socks were new was because the sock taken from him was intact and had a label in it. However, he was not prepared to say that the police replaced the sock that they had taken from him and then placed the firearm inside it and fired a shot to create a hole.

75. He denied that accused no. 1 had requested him to kill the deceased and that he agreed to do so. He did not waylay the deceased or force him into the car at gunpoint. He denied that he shot the deceased in the back of the head. He had no knowledge of the phone call that was made

to the home of his girlfriend after 11.00pm on 8 December 2004 from the deceased's cellphone. He had heard the Court's finding that he provided the contents of the statement taken by the police, but he knew nothing of this as the contents came from the police.

76. Nowisile Moyeni testified that accused no. 1 was her cousin's daughter and accused no. 2 her son. On 8 December 2004 accused no. 2 was at home gardening. At some stage he became tired and left. He returned home before 7.00pm and did not go out again. He remained there the whole night with her and the young children.

77. Cross-examined by Mr Walters she said that she could not remember what accused no. 2 was doing on 12 December 2004. On 6 December 2004 he was at home but she did not know what he did on that day. There were times when he did gardening and this was what he did on 8 December 2004. When she was asked why she could remember what he had done on the 8th but not the 6th or 10th the reply she gave was that it was because she was at home alone. She confirmed that accused no. 2 slept in a different bedroom. On some occasions she would see him but not on others. She conceded that she would not be aware of what happened while she was asleep. She then said that from the time of his release from prison in October 2004 until his arrest in January 2005 she did not have any idea where accused no. 2 was staying. This concluded the case for accused no. 2.

Arguments presented by the State and the defence

78. The State and the defence presented argument to the Court. I do not intend recounting the submissions in detail. I shall where necessary during the course of evaluating the evidence refer to pertinent aspects thereof.

Approach to evaluating the evidence

79. In assessing the evidence the Court must guard against adopting what has been described as a compartmentalised approach. In other words it should not separate the evidence into compartments by examining the defence case in isolation from the State case and *vice versa*. See *S v van der Meyden* 1999 (1) SACR 447 (W) at 449j-450b and also *S v Trainor* 2003 (1) SACR 35 (SCA) at 40f-41c.

80. In *Moshepi and Others v R* (1980-1984) LAC 57, quoted in *S v Hadebe and Others* 1997 (1) SACR 641 (SCA) at 645i-j to 646a-b, the Court provided useful guidance concerning the evaluation of evidence:

> 'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

81. It is trite that the *onus* of proving the guilt of the accused rests on the State. During their testimony both accused raised alibi defences that placed them somewhere else on the night of 8 December 2004 and distanced themselves from the fateful events culminating in the death of the deceased.

82. An accused does not bear the *onus* of proving that her/his alibi is true. It is assessed in the same way as any other evidence, namely whether it can be accepted as being reasonably possibly true or whether it falls to be rejected as being obviously false. See *R v Biya* 1952 (4) SA 514 (A) at 521B-D. But, the alibi is not considered in isolation but in the light of the totality of the evidence and the Court's impression of the witnesses. See *R v Hlongwane* 1959 (3) SA 337 (A) at 340H to 341A.

Evaluation of the evidence

83. I turn now to consider the evidence. Mr Walters submitted that the statements made by accused no. 1 and accused no. 2 were confessions and in terms thereof they had admitted that they murdered the deceased. He contended further that the Court would only reconsider the question of admissibility if there were factors later in the trial that called for such reconsideration. See *S v Mkwanazi* 1966 (1) SA 736 (AD). Since no factors of such a nature had emerged it was not necessary for the Court to reconsider its decision to admit the statements.

84. Mr Tini, on the other hand, contended that the statements did not constitute confessions since neither accused had admitted to shooting the deceased. He was unable to dispute the State's submission that no factors had emerged that required the admissibility of the statements to be reconsidered. He conceded that there was thus no basis for the decision to admit the statements to be reversed.

85. I am in agreement with Mr Tini that neither the statement of accused no. 1 nor that of accused no. 2 amounts to a confession. There are numerous admissions in the statement made by accused no. 1 and in due course I shall comment further thereon. However, what is clearly absent from the statement is an unequivocal admission of guilt to the effect that she had murdered the deceased and was at the time in possession unlawfully of a firearm or ammunition. See *R v Becker* 1929 AD at 171, *R v Viljoen* 1941 AD 366, *S v Grove-Mitchell* 1975 (3) SA 417 (A) and *S v Mofokeng* 1982 (4) SA 147 (T) at 149. In the circumstances I am of the view that her statement does not constitute a confession.

86. The position in respect of the statement made by accused no. 2 is similar. There are also numerous admissions in his statement but it does not contain an unequivocal admission of guilt to the effect that he had murdered the deceased and was then in possession unlawfully of a firearm or ammunition. I am of the view in this instance, too, that his statement does not constitute a confession.

87. Notwithstanding this it is clear that the respective statements of both accused contain admissions that are unquestionably of an incriminating nature. Before dealing with the statements individually it is pertinent to note that in their respective statements each accused admits being present when the deceased was shot. However, whereas accused no. 1 has stated that accused no. 2 was in possession of the firearm and was with the deceased when the fatal shot was fired, accused no. 2 has stated that accused no. 1 had the firearm and shot the deceased.

88. In the statement made by accused no. 1 the following admissions are of particular significance:

    1. She spoke to Lumko Mguzulwa on four occasions with the intention of hiring him to kill the deceased. On the last occasion she gave him an amount of R1 000,00 but he did not carry out the killing.
    2. Thereafter Luyanda Moyeni came to her and, in view of her divorce and how the deceased was treating her, said he was prepared to kill him. She informed him that she did not have any money at that stage to pay him and said, if he did, he was 'doing it for his own sake'.
    3. The next day Moyeni returned with a pistol and three rounds of ammunition and she kept these at his request. She was present when he tested the firearm by firing two bullets. She thereafter kept the firearm but later complained to him that he had to take it back as people would see it.
    4. On 8 December 2004 she was driving an Opel Astra car bearing registration no. CJD 074 EC and gave a lift to Luyanda Moyeni.

5. She told Luyanda Moyeni that Phumeza Tokwe had telephoned to tell her the deceased and Nomsa Ngzongwana was having an affair and they were together. Moyeni then told her that it was time for him to carry out his mission to kill the deceased.
6. She proceeded to a garage in Whittlesea to fill up with petrol and saw the deceased also filling up with petrol and he then left.
7. She drove to Ekuphumleni and there Moyeni went to look for the deceased at his home. Moyeni later returned with the deceased and they got into the rear of the car. She then drove off and at a bridge, between Emadakeni and Ekuphumleni, she pulled off the road. According to her Moyeni had ordered her to do so.
8. She remained in the car and Luyanda Moyeni and the deceased alighted and stood near the vehicle. A shot was fired and the deceased fell down.
9. She then asked Moyeni what he had done and he confirmed that he had shot the deceased.
10. They searched the deceased and removed his pair of black shoes, a black wallet and a Motorolla cellphone.
11. They returned to Sada and Moyeni requested an amount of R100,00. He also said they had to burn the items they had taken from the deceased. The cellphone was taken by Moyeni and the other items were burnt.

89. Certain admissions in the statement of accused no. 1 corroborate various aspects of the testimony of Lumko Mguzulwa. Thus, accused

no. 1 admits that on a few occasions she tried to engage his services to kill the deceased. Further, she gave him a sum of R1 000,00 as payment for this criminal purpose. She does not claim in her statement that the amount was for the transportation of items of furniture as stated by her during her testimony in Court. She also confirms that Mguzulwa did not respond positively to her approaches and never carried out the killing of the deceased. There is no doubt, therefore, that Lumko Mguzulwa truthfully related the interactions that had taken place between him and accused no. 1.

90. Accused no. 1 has also admitted that she had knowledge of the declared intention of Luyanda Moyeni (who it is common cause is accused no. 2) to kill the deceased on her behalf. In spite of this did not make it plain to him that she wanted nothing to do with this and he should not carry out the killing. She claims she told him she did not have money then to pay him and if he killed the deceased it would be for his own sake. But she clearly did not repudiate his offer to kill the deceased on her behalf.

91. More significantly, she has admitted that he brought a firearm with ammunition to her and when he tested the firearm she went with him. She manifestly knew that accused no. 2 intended to use the firearm to kill her ex-husband. By keeping the firearm for accused no. 2 she was acting in concert with him to murder the deceased. She says that at some stage she told him to remove the firearm but, by her own admission, the reason for this was that people would see it. She did not

claim that she did this to disassociate herself from accused no. 2's criminal purpose. It is evident she had more than ample opportunity to distance herself from the planned killing of the deceased but plainly took no steps to this end.

92. Further, after she saw the deceased at the garage in Whittlesea she followed him by car to his house in Ekuphumleni. She did this well knowing that accused no. 2 was going to kill the deceased. There was no other reason to follow the deceased and she does not claim in her statement that she had a non-criminal purpose for following him. It is clear that she made common cause with accused no. 2 to facilitate the killing of the deceased.

93. At Ekuphumleni when accused no. 2 came to the car with the deceased she allowed them to get into the car and drove to a bridge where she stopped, on the instructions of accused no. 2, to enable them to get out. Shortly thereafter a shot rang out and the deceased fell to the ground. While accused no. 1 claims that she asked accused no. 2 what had happened there can be no doubt that she was aware of what was going to happen.

94. The only reasonable inference to be drawn from accused no. 1's description of events, on the basis of what is set out in her statement, is that she knew that the deceased was going to be killed and played an active role in the commission of the murder. She was at the least a

co-conspirator and co-perpetrator in the murder of the deceased if not the one who had actually committed it.

95. If accused no. 1 had really been caught by surprise by the shooting and had not been aware of what was going to happen her actions after the deceased was shot belie this. She admitted in her statement that she was party to taking the deceased's shoes wallet and cellphone. Moreover, she later gave accused no. 2 an amount of R100,00. She also admitted that apart from the cellphone, which she says accused no. 2 took, they burnt the other items. These actions were intended to destroy involvement in the murder and were not the actions of a person innocent of any criminal conduct.

96. The alibi furnished by accused no. I when she testified was contradicted directly by the admissions she made in her statement. She dismissed as liars the witnesses who had incriminated her. She persisted with her claim that she had not voluntarily made the statement even though it had had been admitted in evidence against her. She also persisted with the claim that the contents did not originate from her.

97. Various details in the alibi of accused no. 1 were contradicted by her mother, Doreen Nolungile Kwaza who did not create a good impression with her testimony. Her memory of past events was confined to what had occurred on 8 December 2004. When she was questioned about

events on certain other dates her memory failed her. It is quite evident that she was trying to protect accused no. 1, her daughter, at all cost.

98. Aspects of her alibi were also contradicted by the witness Nokwaka Kwaza who is her sister-in-law. This witness, too, tried to tailor her testimony so that it was favourable to accused no. 1. In the process there were improbabilities and inconsistencies in her story and she contradicted herself. She did not impress me as an honest witness.

99. In the light of all the evidence I do not find the alibi of accused no. 1 to be reasonably possibly true. I find it to be a fabrication and reject it as false.

100. In the statement made by accused no. 2 the admissions that are of particular significance are the following:

1. On 8 December 2004 at about 18:00 he met accused no. 1 driving an Opel Astra motor car.
2. Accused no. 1 requested him to accompany her as she had received a call from Phumeza Tokwe that the deceased was with a girlfriend in front of Phumeza's house in Ekuphumleni and he complied.
3. They proceeded to a garage in Whittlesea and filled up with petrol and saw the deceased doing the same. From there accused no. 2 drove in place of accused no. 1 and followed the deceased to his home in Ekuphumleni.
4. They alighted from their vehicle and went to the house of the deceased. Accused no. 1 was carrying a 7,65mm pistol that she said

she had stolen from her home at Upper Shiloh. She told him she was going to shoot the deceased even if people were watching.

5. The deceased emerged from his house talking on his cellphone. On the instructions of accused no. 1 he spoke to the deceased with the intention of getting the deceased to go with him.
6. Accused no. 1 approached and pointed the firearm at the deceased and ordered him to accompany them which the deceased did. Accused no. 1 and the deceased got into the rear of the motor car and he (i.e. accused no. 2) drove in the direction of Sada.
7. On the instructions of accused no. 1 he pulled off the road at a bridge between Ekuphumleni and Emadakeni and accused no. 1 and the deceased got out and spoke to each other.
8. He then heard a shot and the deceased fell down. The firearm was covered by a sock which retained the cartridge.
9. Accused no. 1 removed the deceased's bank cards, a black wallet, his pair of shoes and bank slips reflecting that the deceased had withdrawn R1 500,00 or R1 600,00 at Fort Beaufort.
10. He then drove to Sada and disembarked at Lopez tavern. He asked accused no. 1 to give him some money to cool his nerves and she gave him an amount of R100,00. She also promised to burn the items that were taken from the deceased.
11. On Saturday of the same week accused no. 1 gave him a further R400,00 so that he should keep quiet and promised him a further R500,00 at a later stage. She also promised him further money once the assets were shared between her and the deceased.

12. The sock used to cover the firearm belonged to him. It was given to him by Sada Correctional Services when he was in prison. He gave it to accused no. 1 to use so that the empty cartridge could be caught in it. He voluntarily handed the sock, which had a bullet hole in the toe area, to a policeman at the Whittlesea police station.
13. In the pointing-out made by accused no. 2 he identified where the body of the deceased was lying after, as he claimed, accused no. 1 had shot the deceased. This was at a bridge at Ekuphumleni.
14. Accused no. 2 also pointed-out where he had met the deceased and, as he says, kidnapped him.

101. Accused no. 2 was a poor witness. During cross-examination he contradicted his previous testimony on a number of issues. His answers were unsatisfactory and evasive and his version of events changed and exposed contradictions and inconsistencies. It is clear that he did not furnish the Court with a truthful version of events.

102. On the basis of accused no. 2's admissions in the statement he saw accused no. 1 on 8 December 2004 for the first time after 6.00pm. He admits he agreed to accompany her to the home of Phumeza Tokwe as the deceased was apparently there with his girlfriend. Accused no. 1 was driving an Opel motor car and they stopped at a garage in Whittlesea to fill up with petrol and saw the deceased there doing the same.

103. He admits he drove car from there and followed the deceased to his home in Ekuphumleni. When they alighted with the intention of going to the deceased's home accused no. 1 was in possession of a 7,65mm pistol and said she was going to shoot the deceased. He admitted he met the deceased as he came out of his house and deceived the deceased into going with him. In the course of the pointing-out accused no. 2 identified the place where he says they kidnapped the deceased. At the car the deceased was forced at gunpoint into the rear of the car by accused no. 1 and she also got in. He admits he then drove towards Sada and stopped at a bridge, albeit on the orders of accused no.1, where she and the deceased got out. The admissions substantiate that accused no. 2 had made common cause with accused no. 1.

104. The admission by accused no. 2 that he deceived the deceased into going with him confirms that he was acting in concert with accused no. 1. He was instrumental in kidnapping the deceased and taking him to the car. Accused no. 1 was armed and she forced the deceased into the car at gunpoint. Prior to that accused no. 2 had already been aware that accused no. 1 intended shooting the deceased. There is no doubt that he had knowledge thereof. In his statement he admitted that she had told him this. It is wholly improbable that he would not have been aware of what was to follow when he stopped at the bridge and the deceased got out with accused no. 1 who, according to accused no. 2 was still in possession of the firearm.

105. Further confirmation that accused no. 2 had formed a common purpose with accused no. 1 is his admission that he gave his sock to her to put around the firearm for the purpose of catching the cartridge. He would only have done this if he knew she was going to shoot the deceased

106. The alibi furnished by accused no. 2 in his testimony was clearly contradicted by the admissions he had made in his statement. He persisted with the claim that he had been coerced into signing the statement despite its admission in evidence against him. He reiterated his claim that the contents did not originate from him.

107. Details in the alibi of accused no. 1 were contradicted by his mother, Nowisile Moyeni. She did not impress with her testimony. She claimed she could remember what happened on 8 December 2004 but could not recall what occurred on various other dates. When asked to explain why this was so her reply was unsatisfactory. Although she tried her best to substantiate the alibi of accused no. 1 her testimony failed to do so.

108. In my view the alibi of accused no. 2, when considered in the light of the totality of the evidence, cannot be said to be reasonably possibly true. It is manifestly a fabrication and I reject it as false.

109. The only reasonable inference to be drawn from the admissions by accused no. 2, and his description of events as set out in his statement, is that he participated therein with full knowledge that the end result was

to be the killing of the deceased. Even if he did not actually pull the trigger he was, at the very least, a co-conspirator and co-perpetrator with accused no. 1 in the crime of murder.

110. There are striking similarities in the statements of accused no. 1 and accused no. 2. These are not simply coincidences. The conclusion is inescapable that they are describing the same events and were engaged in it together. There are discrepancies regarding who drove the car at a particular stages but I do not consider these to be significant. Both of them disclaim being the person in possession of the firearm and firing the fatal shot. Even though the evidence does not establish who did the actual shooting they had made common cause to murder the deceased and acted with a common purpose to attain that result. Accordingly, both of them are equally culpable for his murder.

111. I am satisfied that the evidence establishes beyond a reasonable doubt that accused no. 1 and accused no. 2 are guilty of the offence of murder. I am also satisfied they planned to murder him and consequently that the murder was premeditated.

112. In regard to the charge of robbery there is no evidence that accused no. 2 robbed the deceased of any of the items detailed in the indictment or stole any of them. In the circumstances accused no. 2 is entitled to be acquitted on count 3, the charge of robbery.

113. While there is no evidence that the firearm (Exhibit No. 1) is the one that was used to commit the murder there is no doubt that a firearm was used. Both accused no. 1 and accused no. 2 have denied being in possession of a firearm or ammunition. They have not presented as a defence that either of them was in possession of a valid permit to lawfully possess a firearm and in consequence thereof to also lawfully possess ammunition. In the absence of a permit, possession of the firearm and ammunition was clearly unlawful. See *S v Ndaba* 2003 (1) SACR 364 (W).

114. I am satisfied that the evidence establishes beyond a reasonable doubt that accused no. 1 and accused no. 2 are, on the basis of common purpose, both guilty of unlawfully being in possession of a firearm and ammunition.

115. In the result:

[A] Accused no. 1, NOMATHAMSANQA CYNTHIA KWAZA, is found guilty of the following offences:

(1) The murder of Ayanda Leonard Mbinda as stated in count 2 of the indictment.

(2) The unlawful possession of a firearm, as stated in count 4 of the indictment.

(3) The unlawful possession of ammunition, as stated in count 5 of the indictment.

[B] Accused no. 2, LUYANDA LUCAS GQOZO, is found guilty of:

(1) The murder of Ayanda Leonard Mbinda as stated in count 2 of the indictment.

(2) The unlawful possession of a firearm, as stated in count 4 of the indictment.

(3) The unlawful possession of ammunition, as stated in count 5 of the indictment.

In regard to count 3, the charge of robbery, accused no. 2 is found not guilty and discharged.

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Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO **23 SEPTEMBER 2005**

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES: **THE STATE**

and

NOMATHAMSANQA CYNTHIA KWAZA **Accused No. 1**

LUYANDA LUCAS GQOZO **Accused No. 2**

NTOMBIZANELE KWAZA **Accused No. 3**

NOLUFEFE DIMAZA **Accused No. 4**

- Registrar CASE NO: **CC 81/05**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **BISHO HIGH COURT**

DATE HEARD: 15 August 2005, 16 August 2005, 17 August 2005, 18 August 2005, 19 August 2005, 22 August 2005, 23 August 2005, 24 August 2005, 25 August 2005, 31 August 2005, 1 September 2005, 6 September 2005, 7 September 2005, 8 September 2005, 20 September 2005.
DATE DELIVERED: 23 September 2005

JUDGE(S): **EBRAHIM J**

LEGAL REPRESENTATIVES -
Appearances:
- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): Mr G Walters
- for the accused/defendant(s)/respondent(s): Mr Z L Tini AND Mr T Gabelana

Instructing attorneys:
- Applicant(s)/Appellant(s):
- Respondent(s)/Defendant(s):

CASE INFORMATION -
- *Nature of proceedings*:
- *Topic*: