FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ: **178**

PARTIES**:**
THE STATE

and
LUDWE MASHUMPA **ACCUSED NO 1**
DAVID ALEXANDER BEST **ACCUSED NO 2**

- Registrar: **CC27/2007**
- Magistrate:
- High Court: **EAST LONDON LOCAL CIRCUIT DIVISION**

DATE HEARD:
DATE DELIVERED: **11/05/2007**

JUDGE(S): **Froneman J**

LEGAL REPRESENTATIVES –

Appearances:
- for the Appellant(s):
- for the Respondent (s):

Instructing attorneys:
- Appellant(s):
- Respondent(s):

CASE INFORMATION -
- *Nature of proceedings* : **Criminal case**

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON LOCAL CIRCUIT DIVISION)

In the matter between

THE STATE
and
LUDWE MASHUMPA **ACCUSED NO 1**
DAVID ALEXANDER BEST **ACCUSED NO 2**

JUDGMENT

Killing of an unborn child not murder – no prospective declaration to extend current definition or application of murder to include such killing made – legislature better suited to reform law in that regard if considered necessary – injury to unborn child can be dealt with at sentencing stage where assault perpetrated on mother.

Froneman J (sitting with two assessors).

[1] On the morning of 14 February 2006 Ms. Melissa Shelver, a young pregnant mother, and the baby's father, Mr. David Best, consulted the gynaecologist monitoring Ms. Shelver and the baby's progress at a medical facility in Southernwood, East London. They had been doing so regularly during the pregnancy. The examination revealed that things were going well with both mother and baby. The would-be parents had been following the progress of the baby in Ms. Shelver's womb by way of modern technology and they knew it would be a daughter. They had decided to name her Jenna-May. The baby was in the 38th week of pregnancy and her birth was imminent. There were no complications during the pregnancy and an uneventful birth was anticipated.

[2] They returned to and entered their car after visiting the gynaecologist. Having done so, Mr. Ludwe Mashumpa also got into the back of the car. He threatened them with a gun and ordered Mr. Best to drive to an isolated area near Fort Jackson outside East London. There he and Mr. Best got out of the car. Mr. Best was then shot in the shoulder by Mr. Mshumpa. Mr. Mshumpa returned to the driver's side of the vehicle and shot Ms. Shelver twice through the stomach from her right side to her left. He then made off with certain goods of Mr. Best, namely his watch,

wallet and cellphone, without taking anything from Ms. Shelver. Mr. Best got back into the car and with some difficulty managed to drive to an emergency medical aid station. Both he and Ms. Shelver were taken from there to hospital. They were fortunate. Both of them survived. The shot to Mr. Best's shoulder missed his lungs by a couple of millimeters. Ms. Shelver would have died had she not received medical treatment.

[3] The unborn child in Ms. Shelver's womb was not so fortunate. Despite apparently excellent immediate emergency treatment by two teams of doctors, treating both mother and child, the baby did not survive. A ceasarian section was performed in theatre, but despite valiant efforts at resuscitation the baby's life could not be saved. She was stillborn, a result of the two gunshots fired into Ms. Shelver's stomach shattering parts of her cervical spine. Poignancy was added to this tragedy by the fact that Ms. Shelver held the baby after birth, thinking that she was alive, only to be told later that she had indeed been stillborn.

[4] The kind of attack perpetrated on 14 February 2006 is unfortunately not so uncommon to South Africans, but the shooting of a baby in the mother's stomach as part of the exercise is nevertheless quite unusual and shocking. The shooting of an unborn child in the mother's womb raises the vexing legal question of whether such a killing constitutes a separate crime of murder, besides the offence aimed at the mother carrying the unborn child. So, even on the undisputed facts thus far described, the case would have been out of the ordinary. The prosecution of Mr. Mshumpa alone would have required the consideration of unusual factual and legal issues. It is no surprise that he is indeed an accused in the matter - Accused no 1. But, in true Alice in Wonderland terms, things only get curiouser and curiouser. Mr. Best, himself a victim of the shooting, is also an accused - Accused no 2. This is but the beginning of a very strange tale.

[5] The indictment is a good place to start the tale. Both Mr. Mshumpa and Mr. Best are charged with the murder of the unborn child in the womb of its mother (count 2), the attempted murders of Ms. Shelver and Mr. Best (counts 3 and 4), attempting to defeat or obstruct the course of justice (count 6) and the unlawful possession of a firearm and ammunition (counts 7 and 8). Mr. Best alone faces two further charges of statutory conspiracy, incitement, instigation or procurement of other persons to commit, firstly (as count 1), the offences just set out - that is, counts 2 to 8 - and, secondly, unrelated to the incident that took place on 14 February 2006, to kill Mrs. Hester Jacoby and Mr. Richard Schultz (count 9).

[6] Briefly stated it is the State's case that as a result of personal reasons resulting from Mr. Best's entangled love relationships with Ms. Shelver and another girlfriend, Ms. Tanya Jacoby, he approached a state witness, Mr. Andile Tukani, for assistance in getting rid of the unborn child. Mr. Tukani in turn involved Mr. Mshumpa, accused no 1, in the plot. The eventual plan entailed obtaining a gun, which was then to be used in a staged shooting and robbery. To make things convincing to the outside world Mr. Best would himself be shot in the shoulder during the so-called robbery. Care also had to be taken to shoot Ms. Shelver through the stomach so that the unborn child should be killed and not Ms. Shelver herself. No valuables were to be taken from her either. Effect was given to the plan when Mr. Tukani, in the company and with the knowledge of the two accused, procured a gun and ammunition in the township. Mr. Mshumpa then completed the execution of the agreed plan by the shooting and robbery on 14 February 2006, in the manner already described.

The plan to kill Mrs. Jacoby and Mr. Shultz never really got off the ground beyond discussion between Mr. Best and Mr. Tukani of some bizarre, even farcical, schemes of how to give effect thereto.

[7] Both accused pleaded not guilty to the respective charges against them. During the trial it emerged that Mr. Mshumpa did not dispute his participation in the events of 14 February 2006,

but his defence was that he did so under compulsion and threats from Mr. Tukani. His evidence confirmed the existence of a plan involving himself, Mr. Best and Mr. Tukani, but differed in some details from the scheme already described.

[8] Mr. Best denied any involvement in the offences he was charged with. He claims that Mr. Tukani falsely implicated him in a plot probably hatched by Tukani, with the connivance of Mr. Mshumpa. He attributed the need for Mr. Tukani to do so to the latter's desperate greed for money and the necessity of him having to settle some underworld debt.

[9] The main factual issues that we need to determine thus relate mainly to the respective involvement, if any, of the three main protagonists (Mashumpa, Best and Tukani) in the events leading up to what happened on 14 February 2006. What happened on that fateful day after Mshumpa got into the car is largely common cause. It is what happened before then that will determine the guilt or otherwise of the two accused before court.

[10] Whatever the outcome of that factual enquiry, Mr. Marais, who appears for the State, also argued that our law has reached the state of development where the intentional killing of an unborn child in the womb of the mother constitutes murder, a contention strenuously opposed by Mr. Cilliers and Mr. Price, counsel who appeared for, respectively, Mr. Mshumpa and Mr. Best. In addition they also raised certain other points of law relating to the various charges brought against the accused. During the course of the trial we also made certain rulings on the admissibility of statements made to a clergyman and a senior policeman by Mr. Best after trials within a trial on those issues, and I also made a ruling about the propriety of attempting to obtain a ruling on the admissibility of the statement to the police officer before a decision was made by the defence on whether to call Mr. Best as a witness in that particular trial within a trial. We indicated that reasons for these rulings would be given in this judgment.

[11] What I intend to do is to deal first with the reasons for the two rulings on the trials within a trial, which will include reasons for the procedural ruling that the defence had to decide whether to call Mr. Best as a witness in the second trial within a trial before the admissibility of the statement could be determined.

We will then deal with the factual issues that arose in the main trial itself.

Once we have set out our factual findings I will then deal with the legal issues raised during argument and the effect of this on the final findings relating to the guilt or otherwise of the two accused.

<u>The admissibility of Mr. Best's statement to Reverend Gernetzky</u>

[12] The state called Director McLaren, Inspector Coetzee and Reverend Gernetzky as witnesses in this trial within a trial. Mr. Best elected not to give evidence. His failure to testify and challenge the factual correctness of what the state witnesses testified to meant that there was no material basis to reject the factual correctness of their testimony. McLaren and Coetzee testified that Best freely and voluntarily agreed to see Reverend Pate. Why it was necessary for Reverend Gernetzky to accompany Reverend Pate in seeing Best is not, on the evidence, entirely clear to us, but it matters little because it was conceded in cross-examination of Reverend Gernetzky by Mr. Price that he sought permission from and was given it by Best to attend the meeting. Perhaps

because of his unfamiliarity with court procedure Reverend Gernetzky did not appear altogether convincing to us in some of his responses to questions posed in cross-examination by Mr. Price, but in the end his evidence that Best asked him to convey the contents of the conversation to Ms. Shelver and his own family remained uncontested in the trial within a trial (we will deal with Mr. Best's evidence in the main trial about this later in this judgment). Whether this permission justified Reverend Gernetzky to tell his whole congregation about the conversation from the pulpit the following Sunday is irrelevant to the legal enquiry whether the Reverend was obliged by law to divulge to this court the contents of that conversation. Undisputed in the trial within a trial was the fact that Best asked for the contents of the conversation to be divulged to others. For the purposes of legally protected privilege (assuming without deciding for present purposes that such a privilege may exist in respect of spiritual advisors under our Constitution, or independently as an aspect of the constitutional right to privacy), that uncontested fact of relinquishing the confidentiality or privacy of the conversation meant that Reverend Gernetzky was obliged and entitled in law to divulge to a court what was said during the conversation (compare Zeffertt and others, *The South African Law of Evidence*, at 585 to 587). With no basis to challenge that the statement was made freely and voluntarily, or without undue influence, it was admissible in evidence. Mr. Price sought to make something of the fact that the police only became aware of the contents of the conversation by its later public disclosure by Reverend Gernetzky in church, and that they initially regarded the conversation as private. He submitted that these facts made the statement's subsequent admission as evidence constitutionally unfair. The short answer to this submission is that it was Mr. Best's uncontested initial permission to make the content of the conversation known to others who were not present at the meeting that destroyed its confidentiality or privacy for legal purposes, not the subsequent disclosure in church.

The admissibility of Mr. Best's statement to Captain Dewing

[13] Director McLaren, Captain Dewing and Dr. Wingreen testified for the state, and Mr. Best and Mr. Mickey Webb, a local attorney and probational minister of religion, for the defence in this trial within a trial. The statement was taken at midday on 23 February 2006. The background to its taking was that both Mr. Mshumpa and Mr. Tukani had been arrested in the early hours of that morning. Both admitted to their involvement in the plan, allegedly hatched with Mr. Best, to shoot him, Ms. Shelver and the unborn baby. Mr. Tukani agreed to meet Mr. Best at the East London library. Their conversation was recorded on tape. After hearing the content of the conversation Director McLaren considered that there were sufficient grounds for the arrest of Mr. Best. He was arrested by Inspector Middleton. Middleton told McLaren that he had arrested Best and that he had been warned of his rights. Mr. Best was asked whether he wished to make a written statement to a senior police official or a magistrate. According to Director McLaren he chose the former and Captain Dewing, a police officer not involved in the

investigation of the matter, and connected to another unit of the police services, was phoned to come and take down the statement. He duly did so.

[14] On Director McLaren's own version Mr. Best was told upon his arrival at the police station that Mr. Tukani and Mr. Mshumpa had made statements implicating him. He was also told that his conversation with Mr. Tukani earlier in the day had been recorded. He was invited to respond and given a further warning of his constitutional rights. After indicating a desire to make a statement to a police official he made the statement to Captain Dewing.

[15] At the conclusion of the testimony of the state witnesses Mr. Price sought to argue the issue of admissibility of the statement on the basis of that evidence, before deciding whether to call evidence on behalf of the accused. It was, to me, a novel procedure that he suggested should be followed. Mr. Price readily conceded that he had no authority in either the case law or the Criminal Procedure Act 51 of 1977 to support the proposed use of this procedure. I disallowed its use, indicating that I will give reasons for my ruling in this judgment. They now follow.

[16] Section 174 of the Criminal Procedure Act provides that if, at the close of the case for the prosecution at a trial, the court is of the opinion that there is no evidence that the accused committed the offence the court may return a verdict of not guilty. Such a situation is in my view not analogous to the situation where an accused must decide whether to testify in a trial within a trial where the objection to the admissibility of the statement is made on the basis that the requirements of section 217 of the Act have not been proved beyond reasonable doubt - namely that it was not made freely and voluntarily and in the absence of undue influence. In a section 174 situation the underlying consideration for a discharge is that a person should not be prosecuted in the absence of a minimum of evidence merely in the expectation that he or she might at some stage incriminate him- or herself (*S v Lubaxa* 2001 (2) SACR 703 (SCA)), or, perhaps too, because a failure to discharge an accused in that kind of situation would compromise the constitutional presumption of innocence, the accused's right to remain silent and not to testify, and the incidence of the onus of proof (compare Du Toit and others, *Commentary on the Criminal Procedure Act*, at 22-32I). These considerations do not normally arise in a trial within a trial determining the admissibility of an alleged voluntary statement, made without undue influence, by the accused. The issue in such a trial is not the accused's guilt, but the voluntariness (in a broad sense) of the statement. The evidence presented in such a trial should normally not touch upon the contents of the statement in particular or the guilt of the

accused in general. The underlying rationale for a procedure similar to the section 174 procedure, namely safeguarding an accused's constitutional rights or that he should not be expected to incriminate himself, does not exist in a situation such as the one that presented itself here.

A further consideration in the present context is that Mr. Price relied on an alleged breach of Rule 10 of the Judges' Rules for his argument that the statement should be held inadmissible even before the accused decided whether to testify. In this regard he relied heavily on the decision of Kroon J in *S v Colt and others* 1992 (2) SACR 120 (E), especially the passage at 133 h-i, where Kroon J states, with reference to the particular facts before him, that the 'playing off' of one accused against another without administering the usual caution in an effort to elicit a statement is 'a practice repugnant to the principles upon which our criminal law is based'. I do not understand Kroon J's comment to mean that the mere infringement of that particular Judges' Rule is objectively sufficient to exclude a statement made after its infringement without enquiring into its subjective effect on the accused at all. Earlier, at 127f-g, in a summary of the approach of our courts in this regard, he stated:

"The object of the enquiry is to evaluate the freedom of volition of the accused and this of its very nature is an essentially subjective enquiry. Whether his will was affected by outside influence is the concern. Of course, evidence of a factor which is objectively calculated to influence the will of a person will, from a pragmatic point of view, render it difficult to persuade a court that there is no reasonable possibility that that the factor in fact subjectively influenced the particular accused and, conversely, a factor which is not objectively calculated to influence an accused will, practically speaking, not readily be accepted as founding a reasonable possibility that the will of the accused was in fact subjectively influenced."

I can see no prejudice to the accused in a case such as the present for disallowing the use of the procedure suggested by Mr. Price. The same argument for inadmissibility may be raised after the accused had made his decision to testify or not. If the point can in fact be determined on an objective basis alone the accused's testimony, or lack of it, will not change the position. If the

enquiry also has a subjective side to it, as in my view it obviously has here, the reason for a purely objective enquiry falls away entirely. Either way the accused will not suffer any prejudice. If anything bearing upon the issue of his guilt, and not the mere voluntariness of the statement, arises from his evidence, any prejudice or unfairness flowing from that may be addressed by the presiding judge by ordering that the evidence should not be used in any manner to the detriment of the accused in the main trial.

[17] In the event Mr. Best did testify in the trial within a trial. The version he testified to was not, in our judgment, credible or coherent. During cross-examination Mr. Best in effect conceded that neither the fact that he was given the statements of Mr. Tukani and Mr. Mshumpa, nor the alleged failure to warn him of his right to consult an attorney of his choice, would on their own have influenced him to make a statement. This rendered the evidence of Mr. Webb irrelevant. The crucial feature, on his version, was the alleged threat made to him by Director McLaren, to the effect that he had two choices, namely to play along and make a statement, or disappear. Had he not been threatened in this manner he would not have made the statement. But, he said, the statement he made was not an incriminating one: Captain Dewing wrote certain things down that he did not say and he only noticed this at the bail hearing (the contents of what was contained in the statement was not disclosed in the trial within a trial). This is simply being too clever by half. If the admissibility of a confession is challenged under section 217 as having being made under undue influence and not freely and voluntarily it implies that the accused made an incriminating statement. It often happens that an accused states that he was forced to make an untrue incriminating statement, something which notionally and sometimes plausibly may have happened. But to state, as Mr. Best did, that he was forced by Director McLaren's threats to make a true statement which was not incriminating makes little sense. He added at some stage during cross-examination that he also said nothing incriminating to Middleton or McLaren either. The notion of McLaren threatening him with disappearance in order to repeat an exculpatory statement to a senior police officer simply beggars belief.

[18] We found no material reason to reject the evidence of Director McLaren and Captain Dewing. They were not seriously challenged in cross-examination to the extent that material inconsistencies or improbabilities were shown up in that questioning. It would have been very unwise and foolish for a senior police official in the position of Director McLaren to threaten Mr. Best with disappearance in circumstances where the public of East London was being kept informed by the media of developments in the alleged shooting of Mr. Best and Ms. Shelver. Such conduct would have put the possible successful investigation of the matter at risk from a very early stage. It also appears improbable to us that, even had such a threat been made, that an intelligent person such as Mr. Best would have believed it, or not raised the threat with Captain Dewing or Dr. Wingreen immediately afterwards when he had the opportunity to do so. The suggestion that Captain Dewing, who was not involved in the investigation of the case, somehow fabricated incriminating details of Mr. Best's involvement, is similarly unconvincing. We conclude from the contents of the J 88 forms completed by Dr. Wingreen after examining the two accused and Mr. Tukani that he might have been overhasty in his examination and questioning of them, but this criticism does not bear materially on his integrity, nor on the real issues at stake in the trial within a trial.

[19] For these reasons we found that the statement made to Captain Dewing was proved by the

State, beyond reasonable doubt, to have complied with requirements for its admissibility under section 217 of the Act. In addition we find that Director McLaren's evidence of the manner in which Mr. Tukani's and Mr. Mshumpa's statements were made known to Mr. Best, as well as making known that a tape recording of his conversation with Mr. Tukani existed, constituted no material breach of Rule 10 of the Judges' Rules. Mr. Best was warned of his constitutional rights by Middleton and McLaren. The decision in *S v Colt* , referred to earlier, is thus clearly distinguishable on the facts from the present matter.

Determination of facts in main trial

[20] During argument at the end of the main trial Mr. Price urged us to reconsider the rulings we made earlier on the admissibility of the two statements. This is permissible, as our earlier rulings were interlocutory in nature and should be reconsidered in circumstances where new evidence has emerged or where the evidence presented could be viewed in a different light (*S v Mkwanazi* 1966 (1) SA 736 (A) at 743). We will do so, but in the context of viewing the evidence as a whole and not as a separate issue. The law requires us to consider the evidence as a whole, and not in a piecemeal fashion. It also requires us to assess the evidence in this manner in order to determine whether the State has proved its case beyond reasonable doubt. The accused bear no onus - if their respective versions may reasonably possibly be true they are entitled to an acquittal.

[21] Much was said in argument about the caution with which we should approach the evidence of Mr. Andile Tukani: with justification, as he is an admitted accomplice (and on certain aspects a single witness) and has much to gain if he is granted immunity from prosecution under section 204 of the Act. (I may interpose here to emphasize that the issue of indemnity stands separate from determining whether the evidence establishes the guilt of the accused beyond reasonable doubt. The issue of indemnity will not be addressed in this judgment, but only at a later stage when Mr. Tukani's legal representative will be afforded the opportunity to make representations in that regard on his behalf.) In conformity with such a cautious approach it appears necessary to us to consider, first, what evidence there is against each of the accused, independent of Mr. Tukani's evidence.

[22] Facts that are common cause or undisputed

Mr. Best and Mr. Tukani knew each other well. They were at school together, at some stage lived

in close proximity to each other, and saw and spoke to each other on a regular basis throughout the year 2005 up until 23 February 2006. During the latter part of 2005 Mr. Best was introduced to Mr. Mshumpa as well. Although the number and purpose of such occasions are contested, it is also common cause that the three of them traveled to various places in Mdantsane during that time in Mr. Best's car. The important point, for present purposes, is that by 14 February 2006 they all knew each other quite well.

[23] On the morning of 14 February 2006 Mr. Best traveled to Mdantsane and brought Mr. Mshumpa and Mr. Tukani to town in his vehicle.

[24] Later that same morning Mr. Mshumpa gets into Mr. Best's car without any attempt to disguise his identity and ordered Mr. Best to drive to Fort Jackson where the events that was described right at the outset of this judgment occurred. Mr. Best did not protest at what was done to him and Ms. Shelver by Mr. Mshumpa.

[25] In the early hours of the morning of 23 February first Mr. Mashumpa and then Mr. Tukani were arrested. They admitted their involvement and co-operated with the police. The latter agreed to meet Mr. Best at the Post Office and the conversation between them was taped. The transcribed contents of the conversation were admitted by Mr. Best as being correct, but incomplete. However incomplete the transcription may be it is common cause that he never protested his innocence during the conversation. He expressed no surprise that either Mr. Tukani or Mr. Mshumpa were involved in what happened on 14 February 2006. He urged Mr. Tukani to ensure that Mr. Mshumpa must get rid of the cellphone and watch, and that he had to leave town that night. He also enquired as to what happened to the gun. He expressed concern that Mr. Mshumpa might say something and indicated that he would organize two phones for him when he gets to Plettenberg Bay after leaving East London. He arranged for Mr. Tukani to phone him and to meet with him again that evening. He promised not to identify Mr. Mshumpa. Out of his own accord he mentioned that R8000.00 had been deposited into his bank account and that the reason why he was not able to go to the bank earlier was because Mr. Mshumpa had taken his wallet as well. He promised to look after Mr. Mshumpa and also promised that he would have the money for Mr. Mshumpa ready that night. He urged Mr, Tukani to tell Mr. Mshumpa to say it was not him, Mshumpa. He stated that they "will burn all that stuff" after being referred to the items taken from him. He also sought reassurance from Mr. Tukani that the latter would not say anything.

[26] On these undisputed facts the case against Mr. Mshumpa, Accused no. 1, is damning, and the case against Mr. Best, Accused no. 2, pretty close to that. We will deal now with each one's response or defence to the case against them on these undisputed facts.

[27] Mr. Mshumpa's defence amounts to one of confession and avoidance. He does not dispute his involvement in a scheme, plotted with both Mr. Best and Mr. Tukani, to shoot Mr. Best and Ms. Shelver. Nor does he dispute that the primary purpose of shooting Ms. Shelver was to kill the baby, hence the shots through her stomach from right to left. The shooting of Mr. Best was to make the kidnapping and robbery look real. He received a weapon and ammunition from Mr. Tukani without the necessary licences. The avoidance consisted of an attempt at complete absolution, and, as an alternative, partial absolution.

The attempt at full absolution rested on the contention that he acted under compulsion from Mr. Tukani. Tukani had threatened his life and that of his close family if he did not execute the agreed plan. Mr. Tukani denied this in his testimony, but for the moment we are assessing the strength of the State case independently of Tukani's testimony.

In our view there is sufficient reason to reject Mr. Mshumpa's explanation of acting under compulsion even without bringing Mr. Tukani's denial of those threats into play. The defence of compulsion is an afterthought on Mr. Mshumpa's part. He first made mention of it in his letter to the prosecuting authorities in August 2005. His explanation for this delay was that he still felt under threat from Mr. Tukani until then. That however, did not prevent him from disclosing Mr. Tukani's part in the plot to the police almost immediately upon his arrest on 23 February 2006. It was his co-operation with the police which led to Mr. Tukani's arrest on the same day. There is no coherent explanation why he did not disclose the compulsion defence to the police at that stage. Later he wrote a letter to his family, apologizing for what he did. If compulsion was his excuse it was the ideal opportunity to state so in confidence to his family without fear of its disclosure to Mr. Tukani in any way. But he did not do so. His complaint in the letter was not that Mr. Tukani forced him to do the evil deeds, but that Mr. Tukani was walking away scot-free with the spoils of the scheme, namely the reward for what was done, which was rightfully his. Nor does he have any credible explanation why, when he had the gun in his possession and they, the three occupants in Mr. Best's vehicle, were out of sight from Mr. Tukani on 14 February 2006, he did not there and then go to the police to prevent what was happening, or why he did not ask his friend Sugar to report this to the police when he returned home after the incident.

We thus have little difficulty in rejecting his version as false and not reasonably possibly true, for the reasons already given.

What remains is the alternative, the attempt at partial absolution, namely that even on an acceptance of the State case against him he is not guilty of all the offences with which he was charged. I will leave consideration of those to the stage in this judgment when dealing with the legal arguments relating to what the accused may competently be found guilty of after the factual disputes have been resolved.

[28] In his evidence Mr. Best stated that he did not recognize Mr. Mshumpa when he got into the car on the morning of 14 February 2006, nor did he recognize him in the car or outside when he was shot. It is an incredible assertion for someone who on his own admission knew Mr. Mshumpa and admitted bringing him to town from Mdantsane that very morning. In the cross-examination of Mr. Mshumpa by Mr. Best's counsel it was never suggested to him that he somehow disguised his appearance after being dropped off earlier by Best that morning, an explanation belatedly given by Best himself when asked about the incongruity of not identifying Mshumpa that morning.

[29] Mr. Best's explanation for the contents of the conversation he had with Mr. Tukani on the morning of 23 February 2006 is similarly bold, but also totally implausible and improbable. He says that almost immediately upon meeting with Mr. Tukani he realized that Tukani had given effect to an earlier threat that he made to Best, namely that if he did not help Tukani in obtaining money Tukani would harm Mr. Best's brother's child. According to Mr. Best, Mr. Tukani alluded to this immediately upon meeting him that morning, but this part of the conversation was not transcribed. As a result of this he, Best, "played along" with Mr. Tukani by not protesting his own involvement in the scheme. Even if one accepts for the purposes of this argument that this improbable bit of the conversation indeed took place the explanation of 'playing along' can still not be true.

Mr. Best did not testify that part of the conversation included an explanation by Mr. Tukani of

the details of the plot and what Best's own involvement in it would have been. From the contents of the conversation already referred to earlier in our judgment it is quite apparent that Mr. Best volunteered, without prompting or coaching, many details of the scheme. How could he 'play along' with a plot of which he says he knew nothing? The true explanation, of course, is that his knowledge of the details of the plot as disclosed in the statements he made himself in the conversation shows that he not only knew what the plot entailed and that part of his obligation under it was to pay Mr. Mshumpa for the job he did for Mr. Best.

[30] We have no hesitation in rejecting Mr. Best's attempts to explain away his incriminating statements and behaviour in this manner as false and not reasonably possibly true. Our observations and assessment in this regard also have a bearing on the next part of the judgment which will deal with a reconsideration of the admissibility of the statements he made to Captain Dewing and Reverend Gernetzky, but for the moment we simply wish to record that in our assessment of the undisputed facts and Mr. Best's untruthful response thereto we have come to the conclusion that even on this narrow and circumscribed basis the State has proved beyond reasonable doubt that Mr. Best had prior knowledge of, and involvement in, a scheme with Mr. Mshumpa and Mr. Tukani, to shoot Best, Ms. Shelver and the unborn child in a manner which would make it look like a kidnapping and robbery.

[31] <u>Reconsideration of the admissibility of Mr. Best's statements</u>

Following the chronology of events on 14 February 2006 we will deal first with the statement made to Captain Dewing by Mr. Best. Earlier in this judgment we gave our reasons for admitting this statement after the trial within a trial. We there found Director McLaren and Captain Dewing to be credible witnesses and Mr. Best not. Mr. Price submitted that two further factors cast doubt on Director McLaren's assertion that he did not threaten Mr. Best in any way. The first was the alleged unlikelihood of Mr. Best changing his mind within fifteen minutes of his arrest, and the second the alleged similar modus operandi of McLaren in his dealing earlier with Mr. Tukani. Neither submission withstands scrutiny.

[32] The so-called change of mind rests on the assumption that up until his arrest Mr. Best asserted his innocence. That assumption is unfounded. Moments before his arrest by Middleton he indicated his complicity in the events in the taped conversation with Mr. Tukani. His subsequent conduct in admitting his involvement in the statement made to Captain Dewing is consistent with what he admitted to in his conversation with Mr. Tukani. We rejected his version that he only did so in order to 'play along' with Mr. Tukani. Further confirmation that his version of 'playing along' is false is to be found in his failure to immediately tell either Middleton or McLaren that he played along because of Tukani's earlier threats. It becomes almost tedious to mention even more reasons showing up the falsity of the 'playing along' story, but a further reason is that the alleged threat made earlier by Mr. Tukani was to harm Mr. Best's brother's child. For what reason would Mr. Tukani now change his mind and assist in getting the unborn child killed and risk killing the man he wanted money from? And why would Mr. Mshumpa get involved in such a scheme which would have no conceivable financial reward for him? Once again the answer is that these improbabilities disappear if the real plot was devised by and on the insistence of Mr. Best himself.

[33] The so-called similar method of inducing statements by McLaren is not similar at all. It is true that Andile said that McLaren told him not to mess around, but he did not say that McLaren threatened him in any way, nor did he say that he perceived McLaren's conduct as constituting any undue influence on him. Mr. Price candidly conceded that Mr. Best's evidence that Captain Dewing wrote down incriminating details which Best never told him was a lie, but argued that we should not because of that summarily dismiss his evidence of a threat made by McLaren. That is not what we have done. From what has been stated earlier we have concluded that Mr. Best's central assertions of innocence are demonstrably false. That inevitably has a bearing on further similar assertions by him. In summary no new evidence or new perspectives have come to light which convinces us that our earlier admission of Mr. Best's statement to Captain Dewing should be reversed. On his own version Mr. Best was warned of his right to silence. We accept that Director McLaren warned him of his constitutional rights, including that of the right to silence and to legal representation, as did Captain Dewing. Mr. Best is an intelligent, articulate person and he well knew what his rights were if he wanted to exercise them. The evidence of Mr. Webb takes the matter no further in his favour.

[34] It was next submitted by Mr. Price that the statement made to Captain Dewing was not reliable, because certain of the assertions made in the statement did not accord with, for example, the evidence of Ms. Shelver that there were no problems between them whilst Mr. Best mentioned such problems in the statement. Firstly it is debatable whether Ms. Shelver's evidence was so unambiguous. However, in view of his concession that Captain Dewing wrote down what Mr. Best told him this submission amounts to saying that Mr. Best lied in the statement too. We are not too sure what the real import of this submission was, but suffice it to say that it confirms the existence of a plan between Mr. Best, Mr. Tukani and Mr. Mshumpa to obtain a gun, to get rid of the baby, that the plan could not be executed in the Quigney or at Game, and that it was then decided to do it at the scan, after which the events on the road and at Fort Jackson took place. Whatever the difference in detail may be, the contents of the statement unambiguously implicate Mr. Best in these events.

[35] The statement to Reverend Gernezky was made after Mr. Best had already made his confession to Captain Dewing. Read in that context the statement is simply a continuation of Mr. Best's consistent behaviour on that day, namely an acknowledgement of his involvement in the events preceding, and those that took place on, 14 February 2006. Mr. Price's second bite at the cherry in regard to the admissibility of this statement rested on the alleged unfairness in Reverend Gernetsky asking Mr. Best to elaborate on what happened before he had, on his own, admitted complicity, and the further allegation that the Reverend went beyond his mandate in what he was allowed by Mr. Best to disclose to Ms. Shelver and the two affected families.

[36] The fundamental difficulty with these submissions lies in Mr. Best's response in evidence to these allegations. It is not his evidence that he would not have made the incriminating part of the statement to Reverend Gernetzky if the Reverend did not ask him to elaborate. He says that he never made the statement and that the good Reverend is lying. In evidence in the main trial Reverend Gernetzky testified that he was requested to convey what was said to him by Mr. Best to the people concerned. That is also what his statement, read in proper context, says. He was asked to convey Mr. Best's apology for his complicity in the crimes, as told to Reverend Gernetzky, to the families, and that he had been arrested. We commented earlier that Reverend Gernetzky did not always appear comfortable in the witness box, but compared to the quality of Mr. Best's evidence in this regard there is no reason to reject his version of what happened in that room. It fits in comfortably with what had happened before on that day and what state of mind Mr. Best was in at the end of a day where he had consistently admitted to his complicity in the shootings and what preceded it.

[37] I want to emphasize a last aspect again before ending the discussion on the admissibility of the statement to Reverend Gernetzky. We expressed no view on the question of whether a legally protected privilege exists between a spiritual advisor and a congregant, or in respect of private conversations generally. The Constitution may well allow the extention of privilege to those situations (compare *S v Bierman* 2002 (2) SACR 219 (CC)), but a decision on that issue need not be made in this case Our conclusion is based on the factual finding that Mr. Best authorized the disclosure of what he said to Reverend Gernetzky to other people and that it is that permission to disclose which destroys any legal privilege that may attach to such a conversation. We doubt that our factual finding will have the dire consequences predicted by Mr. Price in argument, namely that people will as a result of such a finding be reluctant to confide in their religious leaders.

[38] There is thus, again, no valid new reason for us to exclude the statement made by Mr. Best to Reverend Gernetzky.

[39] The incriminating statements made to Captain Dewing and Reverend Gernetzky in our judgment simply adds another nail to the coffin in the State's case against Mr. Best, still without any reliance on the evidence of Mr. Tukani. We repeat that in our judgment the factual involvement of Mr. Best in the conception of the plan to shoot himself, Ms. Shelver and the unborn child has been shown beyond reasonable doubt, without reliance on the evidence of either Mr. Tukani or Mr. Mshumpa. It is against this background or context that we now turn to the evidence of these accomplices.

[40] <u>Accomplice evidence</u>

It is trite law that the evidence of an accomplice should be approached with caution, for many and varied reasons. An accomplice is a self-confessed criminal; he may have many reasons to falsely implicate the accused: for example, in order to minimize his own culpability or that of another person; and by reason of his inside knowledge he may convincingly and deceptively turn the description of events that occurred to his own advantage (*S v Hlapezula* 1965(4) SA 439 (A) at 440D-E). We believe that the cautious approach that we have adopted, namely to initially assess the case against the accused by thinking away the accomplice evidence, goes a long way in addressing the concerns about relying on accomplice evidence.

[41] Further general considerations that militate against the false implication, by both Mr. Mshumpa and Mr. Tukani, of Mr. Best are the following. On Mr. Best's version they would have had to hatch the details of the plot to shoot him and Ms. Shelver on the night of 13 February 2006 because only then were they told of the impending visit to the doctor in Southernwood the next morning. It seems inconceivable, or at least incredibly stupid, to then risk detection by Mr. Best of Mr. Mshumpa's identity by the latter wearing nothing to disguise himself. Mention has already been made of the lack of financial incentive for such a plot of their own. Minor details also add convincingly to the veracity of the plot. Both mention an incident where an attempt to

execute the plan would be made whilst Mr. Best's mother would also be in the car and that they actually saw her, or at least another woman, in the car on that failed attempt. Mr. Best admits that he once took Ms. Shelver and his mother to a roadhouse in the vicinity. These kind of coincidences, in the end, simply becomes too much to explain away convincingly.

[42] Having said that, however, we accept that Mr. Tukani's evidence may validly be criticized on any number of grounds. To start off with he is an admitted accomplice, liar, fraudster, braggart and coward. He contradicted himself on many occasions in the witness-box, both in regard to earlier evidence as well as with regard to earlier extra-curial statements he made. But behind the bluster and unconvincing explanations of contradictions in detail, relating to times and places, there is in our judgment a credible consistency in the essentials of his story.

[43] Let us start with what I will call the 'Jacoby plot', which appears by general consensus to have originated before the 'baby plot'. It is undisputed that Mr. Best wrote handwritten notes providing false and almost bizarre information on Mrs. Jacoby and the boyfriend of her daughter, Tanya, a certain Mr. Richard Schultz, and that he handed these notes to Mr. Tukani. Mr. Tukani says Mr. Best gave him these notes as part of a plan to kill both Mrs. Jacoby and Mr. Schultz because Mr. Best was angry with Mrs. Jacoby for her disapproval of his relationship with Tanya, and resentful of Tanya's subsequent relationship with Mr. Shultz.

Earlier evidence by Mrs. Jacoby confirmed that she indeed disapproved of her daughter's relationship with Mr. Best. Ms. Tanya Jacoby also confirmed that she had a relationship with Mr. Best from a young age, but that she broke this off when she learned of Ms. Shelver's pregnancy and the fact that Mr. Best was the father, something which he denied to her. They remained in contact, even to the extent that Mr. Best phoned her from prison on two occasions after his arrest and detention.

It was put to Mr. Tukani by Mr. Price in cross-examination that these notes were the result of Tukani's desperate need for money (which he always sought from Mr. Best), and that he, Mr. Best, was afraid of Tukani. To alleviate matters Mr. Best then suggested extortion of Mrs. Jacoby and Mr. Tukani then asked for details from him, which he provided. In his evidence Mr. Best stated that he was coerced by Mr. Tukani to provide him with these notes. Mr. Tukani took out a gun and placed it on his lap whilst the conversation about this aspect was going on. Mr. Tukani then came up with the suggested extortion, not Mr. Best.

Despite the contradictions and almost surreal aspects of the plan deposed to in evidence by Mr. Tukani we have no doubt that his version of the origin of the plot is more credible than that of Mr. Best. It fits in with the other background evidence relating to Mr. Best's relationship with the Jacobys, both mother and daughter, and his probable antagonism to Mr. Schultz, whilst Mr. Best's version is not only fundamentally contradictory to what was put on his behalf, but also unduly contrived in trying to explain away collateral details.

[44] The same applies to the conflicting versions of Mr. Tukani and Mr. Best about the latter's involvement in the alleged plot relating to the shooting of Mr. Best, the baby and Ms. Shelver. The essentials of that plot as testified to by Mr. Tukani are corroborated by other evidence:(1) by many of the undisputed facts set out earlier in this judgment, such as Mr. Mshumpa's introduction to Mr. Best, the various trips in Mr. Best's car driving to various places in Mdantsane and the fact that Mr. Best picked both Mr. Mshumpa and Mr. Tukani on the morning of 14 February; (2) by the contents of what Mr. Best told Mr. Tukani when they met on 23 February 2006; (3) by the evidence of Mr. Mshumpa in court; (4) by the admissions of complicity in Mr. Best's own statements admitted in evidence, and (5) also by the record of continuous phone calls between Mr. Tukani and Mr. Best over a long period of time.

[45] We have already commented adversely on Mr. Best's credibility in this judgment. We do not think it is necessary to provide more detail in support of our adverse finding. He is an intelligent, articulate and on the face of it affable person. Having seen him in the witness box it becomes easier to understand why people would be convinced of even the most improbable things he might say. His outward appearance is that of an absolute conviction of the truth of his statements. The evidence in this case has sometimes been of an almost surreal quality, far removed from the realities of the world of most people. Mr. Price has argued that there is no apparent motive for Mr. Best to have been involved in the offences involving Ms. Shelver in view of the unchallenged evidence of his concern for Ms. Shelver and the baby during the pregnancy. The legal answer to that contention is that the State need not prove motive. The substantive answer is that, yes, Mr. Best did appear to treat Ms. Shelver and the baby with genuine concern and respect, but at the same time he remained in contact with his erstwhile girlfriend, Ms. Tanya Jacoby, not telling her of Ms. Shelver's pregnancy and denying fatherhood when that fact became known. We have no hesitation in finding that beneath the apparently open and genuine exterior exhibited by Mr. Best in giving evidence, he has been shown up as a scheming, dishonest and untruthful witness.

[46] In our view the evidence establishes overwhelmingly that Mr. Best, Mr. Tukani and Mr. Mshumpa arrived at a plan whereby both Mr. Best and Ms. Shelver would be shot - the former in the left shoulder (perhaps also in the left leg but there may well be some reasonable doubt on that score) and the latter from right to left in her stomach with the primary purpose of killing the unborn baby. This necessitated getting a fire-arm which was eventually procured in Mdantsane with the full knowledge of the three main protagonists. The plan would be executed in a manner that would make it look like a genuine kidnapping and robbery. There was at least one unsuccessful attempt in the Quigney area before the plan was executed in its final form on 14 February 2006.

On the basis of the reasons already given we also find that Mr. Best also involved Mr. Tukani in another, prior, scheme to kill Mrs. Jacoby and Mr. Richard Schultz.

[47] What remains is to determine what offences the two accused are guilty of on an acceptance of these facts. Our findings on the facts are unanimous and I wish to record the invaluable assistance I received from my assessors in the consideration of these factual issues. They also assisted me greatly in the research and discussion of the legal issues that follow, but in terms of the law I carry sole responsibility for deciding these issues of law.

<u>The killing of the unborn child</u>

[48] At the start of this judgment I referred to the uncontested evidence that both mother and baby were doing well before the shooting on 14 February 2006. The evidence of Dr. Kirsten, a neo-natal medical expert, established that the baby was viable, in the sense that it was almost absolutely certain that had she been delivered by ceasarean birth on the day of the incident, she would have been born alive and healthy. Generally speaking medical science now considers a foetus viable - in lay terms, considers it a baby - by the 25th week of pregnancy. Dr. Kirsten's

evidence graphically illustrated that the baby was 'alive' in the womb of her mother at the time of the shooting incident, in the sense that she would have experienced pain in the same manner as a normal living baby that had already been born and was alive in the world outside her mother's womb. Her reaction to the pain inflicted upon her by the two bullet wounds that entered her body caused a reaction that would normally manifest only itself in normal birth upon being expelled from the womb, by a baby inhaling air. When a living person is shot and experiences great blood loss one of the compensatory mechanisms of the body to cope with this crisis is accelerated breathing in an effort to obtain more oxygen. The same happened to the baby in Ms. Shelver's stomach. In reaction to the pain caused by the bullets she tried to breathe, but obviously she was unable to breath in oxygen. Instead, the evidence of her attempt at breathing was the fact that amniotic fluid and red blood cells were found in her lungs afterwards - it meant that in her distress caused by the pain of the bullet wounds she inhaled some of her own blood. In medical terms she was alive in the womb of her mother and died there as a result of the gunshot wounds to her body. Medically speaking her life and death inside the womb did not differ in nature from life and death of a normal person living in the outside world, but only in the location where that life and death occurred.

[49] Both Mr. Mshumpa and Mr. Best, when asked their views on what such a killing amounted to, replied that they considered it to be murder. I have no doubt that if I have to give expression to what is described in legal language as 'the legal convictions of the community' it might result in the view that the killing of an unborn child not by the mother, but by an outsider in the circumstances described in this case, amounts to murder. Whether the killing of an unborn child by the mother would also be regarded as murder too, is a much more contested issue, because here the rights of the mother to her physical and psychological integrity comes into countervailing play.

[50] In a passionate, eloquent, and temptingly persuasive argument, Mr. Marais urged that the time has come for the law to give proper reflection to medical reality and community conviction, and to declare that the killing of an unborn child in circumstances such as the present constituted the crime of murder in our law. He candidly conceded that there are formidable obstacles in the way of doing this, but nevertheless argued that these impediments could legitimately be overcome.

[51] Argument in this matter was heard on Wednesday (8 May 2007) and we indicated that we would hand down our judgment today, Friday (10 May 2007). Yesterday judgment was

delivered in the Constitutional Court in the matter of *Masiya v Director of Public Prosecutions and others*, Case CCT 54/06. Although it dealt with the definition of rape, it is a judgment that has a material bearing on the legal issue of whether it is competent and proper for me to develop the common law to include the killing of an unborn child under the definition of murder. In view of its outcome it is not necessary for me to deal in the same detail as I would otherwise have done with the difficulties standing in the way of the development of the common law in the manner advocated by Mr. Marais.

[52] In brief summary some of the most important impediments are the following.

[53] The present definition of the crime of murder is that it consists in the unlawful and intentional killing of another person (Burchell, *Principles of Criminal Law* 3rd ed., at 667; Snyman, *Strafreg*, 5th ed., at 423 ("die wederregtelike en opsetlike veroorsaking van die dood van 'n ander mens")). That has always been understood as requiring that the person killed had to be born alive. In terms of the present application of the definition of murder, the killing of an unborn child by a third party thus does not amount to murder.

[54] The extention of the definition of a crime, or the extention its application to new circumstances was frowned upon even in our pre-constitutional common law, primarily upon the basis that it offended against the principle of legality (*R v Sibiya* 1955 (4) SA 247 (AD) at 256H - 257A); *S v Von Molendorff and another* 1987 (1) SA 135 (T) at 169C - 170D). In textbooks it is stated that the courts do not have the power to create new crimes any more (Snyman, *Srafreg*, 5th ed., at 45; Burchell, *Principles of Criminal Law*, 3rd ed., at 96).

[55] Although the Constitution expressly expects the higher courts to develop the common law in order to bring it into line with the foundational values stated in the Constitution (for example in sections 8, 39 and 173 of the Constitution), the principle of legality is enshrined in section 35 (3)

(l) of the Constitution. This section provides for the inclusion, as part of the fair trial rights of an accused, the right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted". It is one thing to develop the common law in civil matters to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns offend against the foundational values of the Constitution, but it is quite another thing to bring about this development in the face of the legality principle explicitly recognized as a fundamental right itself in section 35 (3) (l) of the Constitution.

[55] The Constitution does not expressly confer any fundamental rights, most importantly the right to life, on an unborn child. As far as I am aware no South African court has ever held that an unborn child that was not born alive holds any right in its unborn state (an extensive discussion of, and reference to, the case law and literature on the subject both here and in other countries is contained in *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)).

[56] The 'born alive' principle has never been discarded or developed in the manner Mr. Marais suggests, in those countries where murder is a common law crime (compare *Attorney Generals's Reference (No. 3 of 1994)* [1997] 3 All ER 936 (HL)). Nor, as far as I am aware, have the courts developed or interpreted statutory homicide laws to do away with the 'born alive' principle where they did not contain express words to that effect (compare the Californian case of *Keeler v Superior Court* 2 Cal. 3d 619). The dominant trend where unborn baby killing has been criminalized has been to enact specific 'feticide laws' aimed at killing by third parties and not the mother, and not to change the definition of the crime of murder to accommodate such instances.

[57] Failure to develop the law in order to include the killing of an unborn child as murder will not leave such an act unpunished and thus bring the law into disrepute. The act may still be punished as part of the offence committed against the mother, whether that may be murder, attempted murder or any other kind of assault upon the mother. The aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage.

[58] There are practical difficulties in formulating a reasonably precise extended definition of murder to include the killing of an unborn child. These issues include whether the definition should require the viability of unborn babies as a prerequisite, whether it should be restricted to only third party killings and exclude the mother, and to what extent and how it fits in with the

criminal offence and sanction for illegal abortion under *The Choice on Termination of Pregnancy Act* 92 of 1996.

[59] The Constitutional Court judgment in *Masiya*, referred to above, has now fortunately made my task much easier by its clarification of the extent to which the Constitution allows our High Courts to develop the criminal law. As I understand the judgment it states, in a nutshell, that such a development of the common law of crimes must be done incrementally and cautiously in accordance with the dictates of the Constitution (paras. [30] to [33]); that the development should not have retrospective effect, dealing with the past, because that would offend the principle of legality, but that it is competent to effect the development prospectively, to operate only in future (paras. [47] to [51]).

[60] The application of these principles to the particular facts of the matter before it in the *Masiya* case is also instructive for present purposes. Although in issue there, was the extended meaning given to the definition of the crime of rape, the effect of the application of the extended definition to the accused there is similar to the position of the accused here. The act of the accused in *Masiya* constituted indecent assault under the old definition of rape, but fell within the new extended definition of rape, which now also includes anal penetration of a female without her consent. The Constitutional Court held that because of the principle of legality as set out in section 35 (3) (l) of the Constitution Mr. Masiya could only be found guilty of indecent assault and not of rape under the extended definition (para [71]). It also commented that the fact that he has been convicted of indecent assault did not "automatically mean that the sentence imposed upon him should be more lenient than if he had been convicted of rape" (para [72]).

[61] On an application of the *Masiya* judgment to the present case it seems clear that I cannot retrospectively declare the killing of an unborn child to constitute the crime of murder. Nor may I find the accused guilty of murder, for the simple reason that it would offend the principle of

legality enshrined in section 35 (3) (l) of the Constitution. When the unborn child was killed on 14 February last year the acts or omissions of the accused did not constitute the offence of murder at the time. The accused cannot therefore be guilty of murder on count 2.

[62] The only remaining issue on this aspect is whether I should make a prospective declaration that the definition of murder should be extended to include the killing of an unborn child. I think not. The first reason for declining to do so is substantive in nature, the others perhaps based more on pragmatic considerations.

[63] The prospective extension of the definition of rape in *Masiya* effectively extended the ambit of protection from the crime to an existing class of persons in society, namely women. rape is a crime which impinges upon the fundamental rights of dignity, privacy and physical integrity of woman in a brutal and degrading manner. There is no counterpart in the Constitution for the protection of the rights of an unborn child. What is protected in the Constitution, however, is everyone's right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, and to security and control over one's body (section 12 (2) (a) and (b)). The case of an assault, in whatever form, by a third party on a pregnant woman with a view to injuring the child in her womb, is an outrage even if viewed simply from the perspective of the injury to the mother. The wonder of pregnancy lies not in the separateness of the mother and the child in her womb, but in their unique togetherness during that period. An assault by an outsider on one is at the same time an assault on both, in their togetherness. Our existing common law of crimes of assault, in its various forms, already provides protection in this regard. And, as pointed out in *Masiya*, the extent and nature of the particular assault in any given case may have a more important role to play in determining an appropriate sentence, rather than the formal name given to the particular crime involving the assault. The appropriate development in respect of appropriately punishing third parties who intentionally harm or kill unborn babies may thus in my judgment be done within the ambit of existing crimes of assault against the pregnant mother. Such an approach would not only avoid the formal difficulties of formulating a precise definition for an extended crime of murder, but would also not make the punishment of an injury or killing

of an unborn child dependent on the stage the pregnancy has reached.

[64] The pragmatic considerations include the problem of precise definition that I have just referred to. Another is the possible uncertainty that a prospective declaration of a new or extended crime by a High Court of first instance will create. There is no provision in the Constitution for an automatic referral for confirmation by the Constitutional Court in such a case, as there is when national or provincial legislation or the conduct of the President is declared constitutionally invalid (section 172 of the Constitution). I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the Legislature is, as the major engine for law reform (*Masiya*, **para [33], referring to** *Carmichele v Minister of Safety and Security and another* **2001 (4) SA 938 (CC)), better suited to effect that radical kind of reform than the courts.**

The other offences

[65] On the basis of our factual findings it remains to determine which of the other offences the accused may be guilty of.

[66] Attempted murder of Ms Shelver (count 3)

In our judgment both accused are guilty on this count. Any person will know that there is a foreseeable risk of death by shooting anyone, including a pregnant woman, in the stomach. The medical evidence that Ms. Shelver would have died had there been no emergency treatment went unchallenged. The direct intent to kill the child does not exclude intention in the form of dolus eventualis in respect of the mother. The egregious killing of the unborn child is an aggravating feature of the assault and will receive proper consideration at the sentencing stage.

[67] Attempted murder of Mr. Best (count 4)

Suicide or attempted suicide is not a crime in our law (*Ex parte Die Minister van Justisie: In re S v Grotjohn* **1970 (2) SA 355 (AD)), so it appears that Mr. Best cannot be guilty on this count as a co-perpetrator. Mr. Mshumpa is, however, guilty, on the same basis as that in respect of the**

attempted murder of Ms. Shelver, namely that he must have subjectively foreseen the risk of death resulting from shooting Mr. Best in the shoulder, but that he nevertheless proceeded in acceptance of that possible consequence. Mr. Best's consent to the attempt on his life does not render his conduct lawful in our law (*S v Robinson* 1968 (1) SA 666 (AD).

[68] <u>Robbery with aggravating circumstances (count 5)</u>

On the basis of the facts accepted by us we have to accept that the accused never had the intention to steal the valuables handed over by Mr. Best to Mr. Mshumpa in the car on the way to Fort Jackson. Nothing was taken from Melissa. Mr. Mshumpa did however threaten her with rape, in execution of the instruction to act aggressively so as to convince her of the genuineness of the event. It is clear that Ms. Shelver was terrified: she believed that force was going to be applied to her in that respect. That is sufficient to constitute assault (Burchell, *Principles of Criminal Law,* 3rd ed., at 680). Both accused must have anticipated that result. We find both of them guilty of assault under this count.

[69] <u>Attempting to defeat or obstruct the course of justice (count 6)</u>

The whole purpose of faking a kidnapping and robbery was to mislead the police and prevent the detection of the true crimes. That constitutes the crime with which the accused are charged on this count (*S v Daniels* 1963 (4) SA 623 (E)). In addition Mr. Best gave a false statement about what had happened to the police (*S v Burger* 1975 (2) SA 601 (C)). They are both guilty on this count.

[70] <u>Unlawful possession of a firearm and ammunition (counts 7 and 8)</u>

Mr. Mshumpa admitted that he knew that one needed a licence to possess a firearm, but was unaware of the need for a licence for the possession of ammunition. This evidence is so unusual that, strangely, it carries the reasonable possibility of being true. Mr. Best has no such excuse. He is guilty of both counts, Mr. Mshumpa only of count 7.

[71] <u>Statutory conspiracy or incitement (counts 1 and 9)</u>

Under count 1 Mr. Best, Accused no. 2, is charged with statutory conspiracy with, or incitement of, Mr. Mshumpa and Mr. Tukani, to commit the offences set out in counts 2, 3, 4, 5, 6 , 7 and 8, in contravention of section 18 of Act 17 of 1956. It would amount to a duplication to convict Mr. Best of this offence in addition to his conviction of the actual offences under the other counts (Snyman, *Strafreg*, 5th ed., at 295). We have found him guilty under counts 3, 5, 6, 7 and 8, but not of count 2 (because I held that the crime of murder does not encompass the killing of an unborn child), nor of count 4. The latter finding in respect of count 4 was based on the fact that in our law suicide or attempted suicide is not a crime. However, it seems to me that nothing in principle prevents finding Mr. Best guilty under count 1 of statutory incitement of Mr. Mshumpa to commit attempted murder in respect of count 4.

We found earlier that Mr. Best did incite Mr. Tukani to kill Mrs. Jacoby and Mr. Schultz. The fact that Mr. Tukani did not actually agree to do it, or that the suggested ways to give effect

thereto were impractical, constitutes no defence to a charge of incitement (*S v Nkosiyane* 1966 (4) SA (AD)). He is thus guilty of count 9.

Summary

[72] In summary:

Mr. Mshumpa, Accused no 1, is found guilty as charged in respect of count 3 (attempted murder of Ms. Shelver), count 4 (attempted murder of Mr. Best),count 6 (attempted obstruction of justice) and count 7 (unlawful possession of a firearm), and of assault in respect of count 5.
Mr. Best, Accused no 2 is found guilty as charged on count 3 (attempted murder of Ms. Shelver), count 6 (obstruction of justice), counts7 and 8 (unlawful possession of a firearm and ammunition), count 9 (statutory incitement to murder Mrs. Jacby and Mr. Schultz), guilty of assault under count 5, and guilty of statutory conspiracy in respect of the completion of the offence set out in count 4, under count 1.
